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A Heretical View of Teaching: A Contrarian Looks at Teaching, the Carnegie Report, and Best Practices

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A HERETICAL VIEW OF TEACHING: A CONTRARIAN LOOKS AT TEACHING, THE CARNEGIE REPORT, AND BEST PRACTICES

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I. INTRODUCTION

Once again, law school pedagogy is the subject of close scrutiny and intense criticism.[1] In 2007, two reports, the Carnegie Foundation for the Advancement of Teaching Report, *Educating Lawyers*[2]

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[1] Criticism of law school pedagogy is hardly a recent phenomenon. *See, e.g.*, William V. Rowe, *Legal Clinics and Better Trained Lawyers - A Necessity*, 11 U. ILL. L. REV. 591 (1917); ALFRED Z. REED, THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (Charles Scribner's Sons) (1921); Oliver S. Rundell, *Problems of the Case Method*, 6 AM. L. SCH. REV. 699 (1926-1930); Jerome Frank, *A Disturbing Look at the Law Schools*, 2 J. Legal Educ. 189 (1949-1950); Charles A. Reich, *Toward the Humanistic Study of Law*, 74 YALE L. J. 1402 (1965); Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971); Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725 (1989); Lani Guinier, et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994); Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955 (2005); Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609 (2007); Harriet N. Katz, *Evaluating the Skills Curriculum: Challenges and Opportunities for Law Schools*, 59 MERCER L. REV. 909 (2008). In Vitiello's article, he notes that the type of criticism leveled at the Socratic method has changed in recent years, focusing on the premise "that the Socratic method disadvantages students who have different learning styles." Vitiello, *supra*, at 970.

[2] WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, & LEE S. SHULMAN, EDUCATING LAWYERS (2007) [hereinafter *Carnegie Report*]. *Educating Lawyers* is one of a series of reports issued by the Carnegie Foundation for the Advancement of Teaching, which includes reports on education in the professions of engineering, the clergy, nursing, and medicine as well as its report on education in the law. *Id.* at 3.

and *Best Practices For Legal Education*[3] were published. Both of these publications have triggered extensive re-evaluation of the pedagogy in law schools.[4] As Robert MacCrate[5] states in the Foreword to *Best Practices*, the *Carnegie Report* and *Best Practices* share a central message.[6] That message has three components. Law schools

[3] ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007) [hereinafter *Best Practices*]. *Best Practices* is the report of the Best Practices Project of the Clinical Legal Education Association.

[4] *See* Best Practices for Legal Education, BESTPRACTICESLEGALED, http://bestpracticeslegaled.albanylawblogs.org/ (last visited July 17, 2001). This blog site offers downloadable presentation materials and a listing of seminars on implementing the recommendations in the *Carnegie Report* and *Best Practices*. Programs included:

> Mar. 2010 – University of Miami School of Law, "Externships 5: Externships in Changing Times"
> Mar. 2009 – Maryland University School of Law, "Best Practices in Clinical Legal Education"
> Sept. 2008 – University of Washington School of Law, "Legal Education at the Crossroads: Ideas to Implementation"
> July 2008 – Michigan State University College of Law, "Great Lakes Symposium of Legal Scholarship & Best Practices"
> Mar. 2008 – Carnegie Foundation for the Advancement of Teaching, "Rethinking Legal Education"
> Mar. 2008 – American University Washington College of Law, "Innovations in First Year Curriculum"
> Feb. 2008 – Georgia State Law School, "International Conference on the Future of Legal Education"
> Dec. 2007 – Syracuse University College of Law, First Annual Upstate/Western New York and Beyond Regional Clinical Conference "Forming a Regional Community to Share and Define Best Practices"
> Nov. 2007 – University of South Carolina School of Law, "Legal Education at the Crossroads: Ideas to Action, Part I"
> Nov. 2007 – Mercer Law School, "The Opportunity for Legal Education".

[5] Robert MacCrate is senior counsel at the New York firm Sullivan & Cromwell LLP. He received his undergraduate degree from Havorford College, two doctor of law degrees from Havorford College and Union College, and his Juris Doctorate from Harvard Law School. Dr. MacCrate authored a July 1992 report to the American Bar Association (hereinafter MacCrate Report) which contained specific recommendations for changes to law school curriculums. However, though highly respected in the field of legal education, the recommendations in his report have not been widely adopted. *See* John O. Sonsteng, et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 332 (2007) (stating that although the report stirred discussions on implementation of change, "in the following years, schools reverted to the status quo with very little movement toward reform"); *see also* Russell G. Pearce, *MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values*, 23 PACE L. REV. 575, 585 (2003) (stating that "[m]ajor flaws in the MacCrate Report's treatment of [professional] values led to the Report's minimal impact in that area").

[6] Robert MacCrate, *Foreword* to STUCKEY ET AL., *supra* note 3, at viii.

should:

> 1. "broaden the range of lessons they teach, reducing doctrinal instruction that uses the Socratic dialogue and the case method;"[7]
> 2. "integrate the teaching of knowledge, skills and values, and not treat them as separate subjects addressed in separate courses;"[8] and
> 3. "give much greater attention to instruction in professionalism."[9]

Both reports recommend that these changes be implemented throughout the entire curriculum, with the result that if their recommendations were followed substantial changes in the first year curriculum would occur. Indeed, the *Carnegie Report* states that "[a]lthough our discussion ranges considerably beyond the first-year experience, because that experience is so significant in shaping the whole of legal education, it is our emphasis."[10] *Best Practices* concludes that in the first year, "[t]he Socratic dialogue and casebook method should be used sparingly. Context-based instruction, especially discussion of problems should be the prevalent method of instruction."[11]

The two reports differ to some extent in the deficiencies they find in the Socratic dialogue and their emphases on these deficiencies. The *Carnegie Report* states that the pedagogy absent in Socratic dialogue—what it terms the shadow pedagogy—has two compo-

[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] SULLIVAN ET AL., *supra* note 2, at 3. Interestingly however, in subsequent conferences Professor Wegner has focused her remarks more on the curricular changes beyond the first year, rather than in the first year. *See* Symposium, *The Opportunity for Legal Education* (pt. 1), 59 MERCER L. REV. 821, 836 (2008). For example, at a symposium held at Mercer University, Walter F. George School of Law, Professor Wegner discusses the use of Socratic dialogue (she refers to it as the "case-dialogue" method) in the first year and relates her observations. *Id.* at 830-36. She then goes on to state that law schools should think about other approaches to use after the first year that might free up resources. *Id.* at 836. She goes on to say that there is an opportunity to build more progression away from the case-dialogue method in the upper level curriculum. *Id.* at 838. On the contrary, Professor Stuckey, lead author of *Best Practices*, does concentrate on the topic of the need for reform in the first year. *See* Symposium, *The Opportunity for Legal Education* (pt. 2), 59 MERCER L. REV. 859, 861 (2008).
[11] STUCKEY ET AL., *supra* note 3, at 276.

nents: experience with clients and concern that the legal profession lacks ethical substance.[12] The Report also argues that law schools' overemphasis on legal analysis can color or even undermine their attempt to teach professionalism and ethics to such an extent that later attempts by law schools to inculcate these perspectives and skills may inevitably fail.[13]

Best Practices, on the other hand, not only shares the concerns of the *Carnegie Report* that Socratic dialogue has "significant defects as an instructional tool" and that it teaches "only a small part of the skills and knowledge needed to practice law effectively and responsibly," but goes on to state that the "most important reason" to limit the use of Socratic dialogue is because too many law school professors abuse the method with the result that students' sense of "self-worth, security, authenticity, and competence" are unnecessarily undermined.[14]

Although the reports have much to recommend them, I believe that their position with respect to the first year curriculum is in error, and perhaps into part of the second year as well.[15] In essence, their argument is two-fold. First, that Socratic dialogue intrinsically results in the problems mentioned and second, that experiential learning will teach analytical and synthesis skills, as well as fostering professionalism, better than Socratic dialogue. This article will address both these points. First, I argue that Socratic dialogue does not intrinsically cause the harms claimed above. This argument has two components. First, much of the harm attributed to Socratic dialogue is misguided and is in fact a critique of bad teaching technique rather than any flaw intrinsic in Socratic dialogue. Second, to the extent that some of the observations regarding the nature of Socratic dialogue are accurate, they should not be considered as flaws but rather as strengths with respect to the pedagogy that Socratic dialogue fosters.

My second point, that in the first year, experiential learning

[12] SULLIVAN ET AL., *supra* note 2, at 56-57.

[13] *Id.* at 141-42. The Report does make passing reference to language from *Best Practices* stating that the Socratic dialogue is used as a means of humiliating or embarrassing students, but that aspect of the Socratic dialogue is not the Report's main emphasis. *Id.* at 57.

[14] STUCKEY ET AL., *supra* note 3, at 134, 138-39. While the *Carnegie Report* is well-balanced in dealing with the pros and cons of the Socratic dialogue, virtually the entire tenor of *Best Practices* seems to be marked by a substantial antipathy towards the Socratic dialogue.

[15] See *infra* text accompanying notes 129-30.

does not teach analytical and synthesis skills better than Socratic dialogue, nor does it do a better job of fostering professionalism, also has two components. First, analysis and synthesis are foundational skills that are more effectively taught by focusing primarily on these skills by use of Socratic dialogue. Second, I argue that the inculcation of professionalism is not a function of method of instruction but rather a function of the entire culture created by the law school environment rather than the specific curriculum. Thus, within the first year curriculum, experiential learning is not intrinsically superior to Socratic dialogue for the purpose of inculcating professionalism. Rather, again, problems with respect to inculcating professionalism are a function of the quality of teaching rather than the curriculum.

Finally, I argue that the failure of the *Carnegie Report* and *Best Practices* to recognize that many of the problems they are trying to address are due to poor teaching rather than the Socratic dialogue means those reports' recommendations cannot achieve the results hoped for. Current law school hiring practices do not select for good teachers. Instead, they select for qualities that are not predictive of quality teaching. Until law schools start selecting for teaching skills, the quality of law school faculty teaching is not likely to improve. And if the true problem is the ability of law school faculty to teach, then changing the curriculum without improving the quality of the teachers is unlikely to improve the law school educational experience.

II. THE SOCRATIC DIALOGUE AND ITS CRITICS

At the heart of the curriculum for the first year to year and a half in most law schools is the Socratic dialogue. This is also called the case method or case-dialogue method. For purposes of simplicity, I will use the term Socratic dialogue to refer to this method. Although the use of the Socratic dialogue varies substantially from professor to professor, there are certain characteristics that are constant.[16] *Best Practices* describes the Socratic dialogue as having four compo-

[16] *See* Vitello, *supra* note 1, at 965. Professor Vitiello states that it is difficult to find a standard definition of the Socratic method. *Id.* at 961. He suggests that one of the reasons there are so many different criticisms of the method is that there are so many variations of it and thus critics vary in what is objectionable. *Id.* at 962.

nents.[17] First, the professor selects a student and asks the student to state the case.[18] This consists of asking the student to cull from the opinion the facts of the case and the rule of law the court has applied. The student is required to analyze the components of the rule of law, apply it to the facts, and then explain why the application of the rule to the facts results in the outcome.[19] The professor then uses closed hypothetical questions[20] that compare the instant case to the facts and rules of prior cases studied.[21] The professor then uses open hypothetical questions to demonstrate how the relatively simple determination of facts and the applicable rule conceal complexity and indeterminance.[22] This requires the student to engage in interpreting what he or she has read, rather than merely to recite it.[23] Finally, the professor draws lessons from the discussion about the processes involved in being a lawyer and the function of a judge.[24] This description is very similar to descriptions set forth by other scholars[25] and for purposes of this paper, I will use the description from *Best Practices* as the template from which I will work.[26]

Initially—perhaps even paradoxically given their criticism of Socratic dialogue—even the *Carnegie Report* and *Best Practices* rec-

[17] STUCKEY ET AL., *supra* note 3, at 213-16. *Best Practices* takes this description almost verbatim from Peggy Cooper Davis & Elizabeth Ehrenfest Steinglass, *A Dialogue About Socratic Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 249, 265-70 (1997).

[18] STUCKEY ET AL., *supra* note 3, at 213.

[19] *Id*. at 213-214.

[20] Closed hypothetical questions are those to which the professor knows the answer.

[21] STUCKEY ET AL., *supra* note 3, at 214.

[22] *Id.*

[23] *Id.* at 214-15.

[24] *Id.* at 216.

[25] *See, e.g.*, Vitello, *supra* note 1, at 961-65; Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1, 17 (1951); Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 114 n.3 (1999). Elizabeth Mertz would add to this description that often the professor will accomplish these tasks through extended questioning of a single student, frequently interrupting the student, providing few answers, and insisting that the student pay close attention to the text of the case, as well as a "challenging, if not hostile tone." ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL 44 (2007).

[26] This definition actually conflates two components. The first is the use of a Socratic teaching technique, which can be applied to other teaching methods besides using cases. Second is the use of case law to teach the curriculum. Case law can be taught by means other than a Socratic method. However, the predominant method of teaching in law schools is the application of Socratic technique to the teaching of case law in the method described above. Criticism of the Socratic dialogue deals with both aspects, and I will address each of these criticisms where appropriate.

ognize that, used correctly, Socratic dialogue has great merit. The *Carnegie Report* states that:

> The case-dialogue method is a potent form of learning-by-doing. . . . It encourages, at least for skillful teachers, the use of all the basic features of cognitive apprenticeship. It seems well suited to train students in the analytical thinking required for success in law school and legal practice. In legal education, analysis is often closely integrated with application to cases. The derivation of legal principles . . . generally occurs through a process of continuously testing, using hypothetical fact patterns or contrasting examples to clarify the scope of rules and reasoning being distilled. This central role of analysis and application, then is well served by the method.[27]

The *Carnegie Report* goes on to say that the Socratic dialogue is a powerful motivator and that the motivation does not come solely from the fear of being called on in class. Rather, the *Carnegie Report* states that, at least in the best taught classes the authors observed,

> [I]t was the narrative nature of legal argument itself, especially its dramatic character, that motivated students. . . . [L]egal proceedings, especially litigation . . . have an inescapable narrative dimension, with story and counter-story being constructed by the contending parties to the dispute. . . . As we saw, when 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 professionals.[28]

Best Practices also recognizes the strength of the Socratic dialogue,

[27] SULLIVAN ET AL., *supra* note 2, at 74-75.
[28] *Id.* at 75.

although its recognition of the Socratic dialogue's merits is much more muted.[29] *Best Practices* admits that the Socratic dialogue can be effective when used appropriately. It quotes Mark Aronson, who described some of the competencies the Socratic dialogue develops:

> [T]he case method provides students with simulated practice in how appellate courts formally reason, and predicting what courts will do is a core skill central to a lawyer's claim to professional expertise. . . . [F]eatures of the case method are also applicable when confronting problems in other contexts. These features include the grounding of analysis in facts, the comprehensive spotting of relevant issues and concerns, the search for governing rules, principles or standards by which to make decisions, the weighing of competing policy considerations in light of their consequences, the value placed on consistency and deference to past decisions, the utility of reasoning by analogy, the importance of reasoned justification, and the need to reach a conclusion and make a decision even if not perfect. Tailored and applied flexibly, the case method as a method of deliberation can provide a logical, overall methodology for approaching and thinking about all sorts of situations.[30]

Of course, recognition of the strengths of the Socratic dialogue is not limited to the *Carnegie Report* and *Best Practices*. Other scholars have recognized the value of the Socratic dialogue.[31] Given the recognition of the efficacy of Socratic dialogue the question must

[29] The entire tenor of *Best Practices* is marked by what seems to be a substantial antipathy towards the Socratic dialogue. This antipathy is ill-founded and leads to inapt conclusions about the role of Socratic dialogue in the curriculum.

[30] STUCKEY ET AL., *supra* note 3, at 212 (alteration in original) (quoting Mark Neal Aaronson, *Thinking Like a Fox: Four Overlapping Domains of Good Lawyering*, 9 CLINICAL L. REV. 1, 6 (2002)). Even this citation is evidence of the report's antipathy towards Socratic dialogue. The quote is taken from an article that is critical of over-reliance on the case method.

[31] *See* Vitiello, *supra* note 1; *see also* Jennifer L. Rosato, *The Socratic Method and Women Law Students: Humanize, Don't Feminize*, 7 S. CAL. REV. L. & WOMEN'S STUD. 37 (1997); *see also* James R. Beattie, Jr., *Socratic Ignorance: Once More into the Cave*, 105 W. VA. L. REV. 471 (2003); *see also* David D. Garner, Comment, *The Continuing Vitality of the Case Method in the Twenty-First Century*, 2000 BYU EDUC. & L.J. 307 (2000).

arise, why is there such dissatisfaction with the Socratic dialogue that the *Carnegie Report* and *Best Practices* recommend radical changes to the curriculum involving substantial de-emphasis of the Socratic dialogue?[32]

Certainly, to the extent that the two reports are concerned about the overemphasis of the Socratic dialogue throughout the entire law school curriculum, such criticism may well be justified. There is much more to being an effective lawyer than the ability to analyze and synthesize the holdings in cases. Lawyers must be problem solvers. This means that, among other things, they must be able to listen effectively to clients, be able to diagnose and analyze issues, negotiate, perhaps mediate, and, perhaps most important, devise the best solution for their clients, taking into account the economic and emotional effects the legal problem being dealt with may have on the client.[33] In addition, potential lawyers need the opportunity to obtain research, drafting, litigating, negotiating, writing and trial skills. There are better alternatives to Socratic dialogue for teaching many of these skills, and any law school that focused solely on Socratic dialogue would ill prepare its students. However, this is a comparatively unwarranted concern. Schools are well aware of the need for diversity in their curricula so as to provide students with training in areas other than Socratic dialogue.

The American Bar Association Standards for Approval of Law Schools require that students must receive "substantial instruction" in "writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigor-

[32] Although I intend this as a rhetorical question, Professor Amy Mashburn speculates that several changes in law schools, starting in the 1970s, most especially changes in law professors, have resulted in continuing, increasingly intense criticism of Socratic dialogue. Amy R. Mashburn, *Can Xenophon Save the Socratic Method?*, 30 T. JEFFERSON L. REV. 597, 624-32 (2008). Mashburn argues that, among other factors, law professors tenured in the 1980s and more recently have an "anti-authoritarian attitude that equates rules and institutional restraints with conservatism, totalitarianism, and formalism. Such a mind-set bridles at enforcing imposed structures, restrictions, and rules because it sees them as dictatorial and unnecessariy rigid. To the intellectually free-spirited, treating students like adults means not imposing constraints on them or requiring teachers to be enforcers." *Id.* at 624.

[33] STUCKEY ET AL., *supra* note 3, at 21 (quoting Carrie Menkel-Meadow, *Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney General*, 49 J. LEGAL EDUC. 14, 14 (1999)).

ous writing experience after the first year,"[34] "other professional skills generally regarded as necessary for effective and responsible participation in the legal profession,"[35] and "the history, goals, structure, values, rules and responsibilities of the legal profession and its members."[36]

However, the gist of the *Carnegie Report* and *Best Practices* is not that there is overemphasis on the Socratic dialogue throughout the entire curriculum (although, to be sure, both reports do address that concern in some detail). Rather, both reports state that they recommend substantial reform of the first year curriculum, with de-emphasis on Socratic dialogue.[37] So the question must be, why do they recommend this? The answer in both reports is two-fold. First, Socratic dialogue has many harmful effects on students.[38] Second, it fails to achieve the pedagogical objectives of the reports.[39]

These are two different, serious criticisms that any advocate of Socratic dialogue must address. However, the question arises as to whether these reputed shortcomings of Socratic dialogue are intrinsic in the method itself or whether there is some other reason why Socratic dialogue falls short. Legal scholarship is rife with articles critical of Socratic dialogue suggesting that these shortcomings are intrin-

[34] Standard 302 (a)(3), 2007-2008 Standards for Approval of Law Schools, ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR (2007-2008).

[35] *Id.* at (a)(4).

[36] *Id.* at (a)(5).

[37] SULLIVAN ET AL., *supra* note 2, at 3 ("Although our discussion ranges considerably beyond the first-year experience, because that experience is so significant in shaping the whole of legal education, it is our emphasis."); STUCKEY ET AL., *supra* note 3, at 22 ("The first year curriculum gives students a skewed and inaccurate vision of the legal profession and their roles in it.").

[38] STUCKEY ET AL., *supra* note 3, at 73 ("[Socratic dialogue and the case method] and beliefs that underlie them undermine 'the sense of self-worth, security, authenticity, and competence among students.' " (quoting Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 125 (2002))); *see also* SULLIVAN ET AL., *supra* note 2, at 57-58 (citing criticisms of Socratic Dialogue mentioned in *Best Practices* and saying that if these criticisms are correct, then other means of teaching besides Socratic dialogue are needed).

[39] *See* STUCKEY ET AL., *supra* note 3, at 138 ("The skills and knowledge that can be acquired through the Socratic dialogue and case method are only a small part of the skills and knowledge needed to practice law effectively and responsibly."); *see also* SULLIVAN ET AL., *supra* note 2, at 57 (suggesting that the Socratic dialogue fails to teach students the "significance—and . . . the techniques—of interpretative, interactive, narrative, and problem-solving work").

sic in the method itself. However, I believe such criticisms are misguided. I suggest that the criticisms and recommendations of the *Carnegie Report* and *Best Practices* are systemic responses to individual problems of poor teaching. As such, they are likely to be inefficient at improving pedagogy at best and ineffective at worst.

III. THE CRITIQUE OF THE SOCRATIC DIALOGUE AS BAD PEDAGOGY IS ERRONEOUS

There is a substantial body of work arguing that the Socratic dialogue is intrinsically flawed.[40] The criticisms of the Socratic di-

[40] *See, e.g.*, Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?*, 43 CAL. W. L. REV. 267, 284 (2007) ("The main charge that has been leveled against the Socratic method's use is that the method humiliates and terrorizes students."); Beattie, *supra* note 31, at 472 ("Most critics of Socratic teaching [assert] that the method, as currently practiced, inevitably humiliates, intimidates, and silences students."); David D. Garner, Comment, *Socratic Misogyny? – Analyzing Feminist Criticisms of Socratic Teaching in Legal Education*, 2000 BYU L. REV. 1597, 1601 (2000).

> [T]he Socratic method has often been described in terms of "Socratic kung fu." Advocates of the method (yes, these are the advocates!) tout the Socratic method as a form of "ritualized combat," a "civilized battle," a "boot camp" of sorts, in which professors utterly "destroy" students by making "friendly assaults" on their answers. Such advocates imbue the Socratic method with an uncanny sado-masochistic quality . . . .

Id. (citations omitted); Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 119-20 (1999).

> The most common complaint against the Socratic method is that it is cruel and psychologically abusive. Socratic professors are quick to criticize imperfect student answers, subjecting students to public degradation, humiliation, ridicule, and dehumanization. This torture often scars students for life. Even among students who do not speak in class, the possibility that they will be called on can be incapacitating. Non-traditional students such as women and minorities are particularly vulnerable, both because they are likely to be used as 'spokespersons' for their race or gender, and because many have already internalized stereotypes of inadequacy in the combative and mostly white and male atmosphere of traditional law schools.

Id. (citations omitted); Tanisha Makeba Bailey, *The Master's Tools: Deconstructing the Socratic Method and Its Disparate Impact on Women Through the Prism of the Equal Protection Doctrine*, 3 Margins: MD. L.J. RACE, RELIGION, GENDER & CLASS 125, 127 (2003).

> While its promoters contend the [Socratic] Method is intended to empower all law students with the knowledge of the law, I argue that this teaching strategy is built upon fear, humiliation, and intimidation. It hinders the academic development of women by maintaining a denigrat-

alogue in the literature claiming it is harmful to students fall into two categories. In the first category, I contend that the criticisms are not really attributable to the Socratic dialogue but to ineffective use of the Socratic dialogue. In other words, the true problem is bad teaching or some other problem endemic to the system of legal teaching. The most prevalent criticism in this category is the claim that Socratic dialogue is humiliating or degrading. This criticism focuses primarily on the use of Socratic dialogue rather than on the use of cases as primary teaching material. However, there is also criticism of the use of cases as the primary teaching method. This criticism is equally misguided; looked at carefully, one sees that it is also actually criticism of how professors teach, in this instance how they utilize the cases.

In the second category are observations of characteristics regarding Socratic dialogue that are accurate, but about which there is disagreement as to whether or not those characteristics are desirable.[41] The most common of these is that it forces students to divorce themselves from their feelings, which can be characterized as depersonalization by critics or as a skill necessary to the effective practice of law by advocates.

A. Many Criticisms of the Socratic Dialogue Are Really Criticisms of the Professors Who Teach by This Method

1. Attribution of Humiliation as Intrinsic to the Socratic Dialogue Is Erroneous

Perhaps the best place to start an analysis of which alleged

ing psychological atmosphere of silence, and adversarial competition.

Id.; Jeremy M. Miller, *Legal Ethics and Classroom Teaching: The Apology*, 14 WIDENER L.J. 365, 428 (2005) (concluding that "although Socratic/Case Method dialogue is intellectually stimulating, it is often intimidating to many students (to the point of felt humiliation) and confusing to most students—since conclusions are typically not furnished by the professor").

[41] There is some overlap between these first two categories. For example, teaching students about the need to dissociate themselves from their feelings for the purposes of analyzing a client's case may very well be depersonalizing if it is done badly. But it need not inevitably have that effect.

flaws in the Socratic dialogue are really attributable to bad teaching is the frequent allegation that the Socratic dialogue exposes the student to humiliation and embarrassment. I suspect almost everyone can agree that a professor who uses the Socratic dialogue for the specific purpose of humiliating and embarrassing students is abusing the teaching method. The more difficult issue is the essential claim that use of the Socratic dialogue undermines students' sense of self-worth, security, authenticity, and competence; in other words, that it intrinsically humiliates and embarrasses students.[42]

Best Practices states that misuse or abuse of the Socratic dialogue is what creates the problem of humiliation,[43] stating what it says is the "most important" reason that law schools should rethink their use of the Socratic dialogue:

> The main reason is that too many law school teachers abuse [the Socratic dialogue] and contribute to the damage that the law school experience unnecessarily inflicts on many students. Traditional teaching methods and beliefs that underlie them undermine the sense of self-worth, security, authenticity, and competence among students.[44]

Initially, it is important to recognize that humiliation is not the same as discomfort or embarrassment. Proper use of the Socratic dialogue may well cause discomfort or even embarrassment in some students. However, that is a far cry from humiliation. While students' discomfort and embarrassment should be mitigated to the extent possible, these emotions will be an inevitable byproduct of the students' being challenged in the classroom in a new discipline.

While there are numerous aspects that go into good teach-

[42] Beattie, *supra* note 31, at 472 ("Most critics of Socratic teaching answer that the method, as currently practiced, inevitably humiliates, intimidates, and silences students."); Andrew S. Watson, *Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 109 (1968); Lisa G. Lerman, *First Do No Harm: Law Professor Misconduct Toward Law Students*, 56 J. LEGAL ED. 86, 91(2006); THOMAS L. SHAFFER & ROBERT SAMUEL REDMOUNT, LAWYERS, LAW STUDENTS, AND PEOPLE 158 (1977).

[43] STUCKEY ET AL., *supra* note 3, at 139.

[44] *Id.*

ing,[45] one aspect that virtually everyone, both critics of and adherents to the Socratic dialogue, agrees on is that professors must have high expectations of their students.[46] But it is not enough to simply have high expectations of students. It is more important to make high demands of students.

This is especially true in a law school classroom, where there are limited opportunities for direct feedback and assessment. While you can tell students that you have high expectations for them and even take actions that demonstrate your high expectations, the reality is that it will not impact them unless they are required to live up to those high expectations. As Ken Bain points out, this does not mean assigning excessive amounts of work.[47] Rather, it means assigning material that gives students an opportunity to perform at a high intellectual level and then requiring them to perform at that high level both in class and out of class.

However, simply telling the students this is required is not sufficient. When they are called on to recite, their answers must be relentlessly dissected to explore the students' analyses. Absent that in-class experience, many students will not do the work necessary to master the material. If they believe that they can slide through the course without being held to high standards, many students will try to do as little as necessary to slide by. Thus, each student must know that he or she will be held to high standards in class.

Such a demand for excellence will undoubtedly make a significant number of students, if not all, uncomfortable. This is because they are novices to the discourse. Ann Iijima describes this feeling as "being embarrassed for not being good at a new area of study. It happens when people are really competent in their previous dealings and then face something new and confusing."[48]

As Anthony D'Amato points out, "Teaching is an attempt to

[45] While it is probably impossible to make a comprehensive list of such aspects, most faculty would agree that the following aspects are important to effective teaching: 1. high expectations; 2. making students understand that learning for its own reward (as opposed to good grades) is crucial to the best learning; 3. gearing learning towards metacognition and making students think for themselves; 4. providing assessment as frequently as is practicable; 5. good relations with students.

[46] Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL ED. 75, 85 (2002).

[47] KEN BAIN, WHAT THE BEST COLLEGE TEACHERS DO 71 (2004).

[48] ANN L. IIJIMA, THE LAW STUDENT'S POCKET MENTOR 85 (2007).

change the student's mind" physically, not just metaphorically.[49] When learning takes place, new neural pathways are formed. This is accomplished only by getting past the mind's "censors," which people use as shortcuts to dealing with and analyzing every day scenarios and questions faced. While these censors are useful for dealing with every day scenarios—such as recognizing situations and instinctively dealing with them, rather than having to reason out a proper response from scratch—they inhibit the kind of learning that needs to take place in mastering a new skill, such as learning how to learn the law. Getting past these censors and creating new neural pathways, causing learning to take place, "requires sharp challenges to the conclusions that existing pathways compel."[50] This requires mental struggle, something that students not used to this kind of learning,[51] will find uncomfortable. Indeed, D'Amato, recalling his law school experience, describes it as "alienating and refreshing, frustrating and challenging, upsetting and liberating."[52]

In other words, feeling embarrassed is not a function of the professor intending to make the student feel that way; it is the normal course of events for students to feel uncomfortable, even embarrassed, in their performance at first. Nor is there anything wrong with their being stressed.

As Barbara Glesner Fines, a critic of Socratic dialogue, points out, stress, so long as it is not excessive, can be useful. As she states,

> A certain amount of tension and anxiety can be useful in motivating students to do their best. The stress of law school can lead students to forge strong alliances among their colleagues. The tension of a well-directed Socratic dialogue can motivate students to learn subject matter and develop independent learning skills. Successfully meeting and overcoming a frightening challenge makes courage easier the next time

[49] Anthony D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461, 462 (1987).
[50] *Id.* at 466.
[51] *See infra* text accompanying footnotes 88-90.
[52] D'Amato, *supra* note 49, at 465.

around.[53]

It is crucial to recognize that students experience being novices to the discourse. For if this is true, then the students' intimidation and discomfort is not a function of the Socratic dialogue. Further, not only is it not something to avoid, it is a signal that the students are making an effort to stretch and learn new knowledge and skills.

This does not mean that the professor should not be sensitive to students' stress. To keep the stress from being excessive and therefore counterproductive, it is well worthwhile to attempt to mitigate it to the extent possible. However, some degree of discomfort should be inevitable, and it must be recognized that this discomfort can be productive, not counterproductive.

While part of the discomfort that students feel is the result of the fact that they are learning a new skill that they are not very good at initially, consider also that proper preparation for the Socratic dialogue requires substantial preparatory work before the classroom discussion starts and that the result of the Socratic dialogue is often a non-definitive resolution, while many students crave definitive responses.[54] When these two characteristics are combined, it is not a surprise that students will feel uncomfortable. However, neither the need for extensive preparation pre-class nor a lack of definitive resolution is unique to the Socratic dialogue. It is possible for both of these characteristics to exist in other methods of teaching. In fact, I will suggest that regardless of the method of teaching, if the professor is intent on pushing students to do their best work then both these characteristics will exist. Regardless of whether the professor is using the Socratic dialogue or a version of the problem method or the student is participating in a clinic, substantial preparatory work is necessary to be able to answer the professor's questions, and it is quite

[53] B.A. Glesner, *Fear and Loathing in the Law Schools*, 23 CONN. L. REV. 627, 644-45 (1991). Glesner then states, accurately, that although stress can be productive to a student's learning, too much stress can be counterproductive. *Id.* at 645. She then goes on to criticize the Socratic dialogue as being a cause of undue stress. *Id.* at 651. I would agree that poor use of Socratic dialogue can increase stress, but I think that a professor who uses it properly and is sensitive to student concerns need not create undue stress. Professor Glesner seems to agree that certain palliatives might relieve strain. *See id*. at 647. However, she and I part company at the point where she describes Socratic dialogue as using "the 'muffled use of threat and stress' to provoke learning." *Id.* at 651 (quoting SHAFFER & REDMOUNT, *supra* note 42, at 214).

[54] MADELEINE SCHACHTER, THE LAW PROFESSOR'S HANDBOOK 156 (2004).

likely that there will be no definitive answer to the questions the professor raises or that students ask.

To the extent that law school should be preparing students for the practice of law, both of these characteristics are appropriate. Lawyers need to prepare extensively for their cases. They also have to know that there may be more than one outcome to the issues raised in their clients' cases, and they must be ready to assess the likelihood of an unfavorable outcome. While uncertainty in dealing with an area that they are unfamiliar with may very well be disconcerting to novices to the discourse of law, this is a skill that they need exposure to as part of their education. To reiterate, however, neither intense preparation nor lack of a definitive resolution is unique to the Socratic dialogue; they will be present anytime the professor is pushing the students to their limits. Nor should it be a matter of concern that the students sometimes feel extensive discomfort. In my experience at least, the students' discomfort eases substantially as they master the skills the professor is teaching.[55]

[55] I am not saying that faculty can afford to be oblivious to students' discomfort. While a certain level of discomfort is unavoidable and the resulting tension can be productive, it is also indisputable that excessive levels of discomfort can become counterproductive. Faculty need to be sensitive to that danger. However, there are means of alleviating students' discomfort outside the classroom without becoming less demanding in the classroom. This means being available to the students and convincing them that you care about them and that you will work with them when they have concerns.

Last year, I had a student who approached me after about the third week of class. He told me that my style of teaching made him nervous and asked if I could either go easier on him or not call on him at all. He said he was so nervous that he did not think he would be able to learn in class. I talked with him at length and explained to him that I could not single him out for special consideration. I also told him that anytime he felt overwhelmed or had questions he was free to come to my office and talk with me. He never came to my office to talk to me during the course of the year, although he was always friendly when we would pass in the hall. At the end of the year, he approached me in the hall and asked if he could talk to me. We chatted and he said with a sheepish grin, "You were right, Professor. I learned a great deal in your class and it was due to what you demanded of us in class." In fact, that had been clear to me before we ever had the discussion. I had noticed that he voluntarily participated increasingly during the course of the year. Although he certainly could not be categorized as a frequent contributor, he clearly was participating at an increased level.

This one example does not mean that every student will have the same experience with me or any other demanding professor. However, it does exemplify two points. First, students often underestimate their own capability and when they are pushed, they respond successfully. Second, when the professor demonstrates adequate concern about the student, the student can be sufficiently put at ease to be able to respond effectively in a demanding classroom.

My own experience in the classroom has led me to believe that the concept of students as novices to the discourse almost exactly explains the dynamic, at least in my classroom. What I am about to describe is a phenomenon that takes place not only in courses in which I use the Socratic dialogue, but also in my Evidence class, in which I use a problem method.[56] The fact that the same phenomenon occurs in both scenarios makes it clear that what is causing the discomfort is the demand for excellence rather than the use of Socratic dialogue.

I tell my students that they are likely to feel uncomfortable and intimidated at first when they start answering questions because they are novices to the discourse. I explain what that means and why they are likely to feel intimidated. Despite my attempts at reassurance, students remain uncomfortable and intimidated until they come to believe that they have indeed begun to master the material to the level that I expect of them. I only push students as hard as I think they can withstand it. I want to challenge them to explore their limits. One result is that a significant number of students are not comfortable, not only because they are novices to the discourse, but because they have rarely been challenged in this manner.

I think it is fair to say that a substantial number of them are substantially discomfited in a number of different ways. Certainly, my student evaluations report large numbers of students saying that they are substantially intimidated in class.[57] Invariably I have the exact same discussion with students who tell me they are intimidated in my class. I ask them if I am disrespectful to them personally. They always reply that I do not demean them or attack them on a personal level. Rather, they respond that what I want from them in terms of answering questions is "scary." I tell them that I am not asking anything of them that will not be asked of lawyers, and they respond that

The above anecdote does not mean that faculty will always be successful in alleviating stress. Every student is different, and faculty need to be sensitive to this issue. However, it does demonstrate that one can push a student beyond the student's normal comfort zone with highly successful results.

[56] In Evidence, I use A MODERN APPROACH TO EVIDENCE (3d ed.), by Lempert, Gross and Liebman, which uses explanatory text and then a series of problems requiring the students to apply the relevant rule of evidence to a fact pattern.

[57] While it is worth discussing what the students say about intimidation in the student evaluations, student evaluations contain extremely limited value for assessing the efficacy of a teacher.

they know this is so but that it is intimidating nonetheless.

This dichotomy between being personally attacked and having their analyses criticized is an important one. Telling a student that he or she is incapable or that an answer is stupid will undoubtedly be counterproductive. However, that is a far different response than exploring with the student why the student's answer was deficient and working with the student to explore the deficiencies and remedy them. Certainly students may misinterpret being shown how their answers are deficient as personal attacks. Alternatively, they may simply be embarrassed (perhaps even see themselves as having been humiliated) at having the class see the deficiencies in their answers. If that is the dynamic at work, however, the proper response is to work with the students to encourage them to explore their answers and not feel embarrassment.

One can start by making a point of telling the students that they have no reason to feel embarrassed. Assure the students that none of their classmates are laughing at them and that their classmates are silently saying, "There, but for the grace of god, go I." In other words, let the students know the reason for dissecting the students' answers in such detail—that it is likely that their classmates share the same mistakes and that by working with one student the professor can help to correct the entire class' misunderstandings or misanalysis. Encourage the students to participate by pointing out to them that when they participate they are in essence getting an individualized tutorial. Reassure them that you do not think any less of them because they are not flawless in their analyses and that so long as they make an effort, you can work with them and help them improve.

To be sure, while many students will be reassured by this lecture, many students will still feel uncomfortable and will prefer not to participate if they can avoid it. Yet, over the course of the semester students who participate become much more comfortable. Even though each new section of a course introduces them to an area of law they are unfamiliar with, they are no longer intimidated by the exchange between professor and student. They gain confidence in their ability to meet the demands made of them. Even students who have not voluntarily participated become more willing to speak up

and are less nervous as they see that they are on the right track.[58]

The above analysis is not just rationalization. One often sees that by the time the students have completed a challenging course, they have gained substantial confidence. One sees it in the halls or at student functions. The students know they have been held to high standards and, even more, they have met those high standards. The change in demeanor for many of these students is palpable.[59]

Of course, not every student will respond the same way. No one teaching style will satisfy every student in every class. In any given class, there will be students who resist the entire semester. However, and this is crucial, in any given class there will be a substantial number of students who respond to being pushed this way, including many who initially resisted. Given this dynamic, it is important to gear the class towards making the students work harder, even at the cost of discomfort, than to gear the class towards the students' comfort. This is not just a value judgment as to which students to cater to. By addressing your teaching to the better students, you will force the weaker students to increase their efforts as well, thus improving their performance.[60]

[58] This effect by which students who have made the effort outside of the classroom gain confidence by comparing their answers to the answers given by their classmates is substantial. Further, the existence of this effect is an important rebuttal to the claim that the Socratic method is an inefficient and ineffective method of teaching. Of course, it must be recognized that some students may remain diffident throughout the course of the semester. Just as importantly, by having their analyses relentlessly challenged the students are getting training for the day in practice when they will receive such challenges. This will occur during their careers, either from a partner who is questioning a memo the attorney has written or a presentation that has been made, or a judge, or opposing counsel. Students must learn how to cope with such attacks and the best way to learn is to experience such confrontations in class. The advantage, of course, is that the professor can gauge how the student is responding and guide the discussion in a productive direction, for example by suggesting other approaches to the problem being analyzed, rather than by simply destroying the student, as might happen in practice. The experience of having every detail of an analysis challenged is good preparation for practice.

[59] This phenomenon is certainly not unique to the classroom. It applies in all walks of life. For example, Geoff Colvin reports that in the business world, "[e]xecutives consistently report that their hardest experiences, the stretches that most challenged them, were the most helpful." GEOFF COLVIN, TALENT IS OVERRATED 129 (2008).

[60] Of course, while theory is fine, the key is execution and successful execution requires judgment. Simply deciding to teach to the better students does not determine every decision to be made. If a substantial portion of the class is weaker than normal, it may be necessary for the teacher to reformulate the way he teaches his doctrines and the questions he raises. One cannot simply decide to write off a substantial portion of the class. Alternatively, if the

To conclude, discomfort and embarrassment are not the same as humiliation. The fact that students are novices to the discourse is what makes them uncomfortable, not the use of the Socratic dialogue. Discomfort will exist, or should exist, regardless of the teaching method used. Blaming student discomfort on the Socratic dialogue is misguided. To be sure, a faculty member can misuse the Socratic dialogue to a substantial negative effect. Certainly, a professor who intends to embarrass a student for embarrassment's sake should not be classified as a good teacher. However, the negative results occurring as a result of these sorts of teaching practices are not a reflection of the inappropriateness of Socratic dialogue; rather they are examples of bad teaching. Throwing out the Socratic dialogue because there are professors who use it poorly throws the baby out with the bath water.

2. Arguments that the Socratic Dialogue Leads to a Skewed, Oversimplified Vision of Lawyers' Roles are Inaccurate

The second basis of criticism of the Socratic dialogue centers on the fact that the first year curriculum relies primarily on appellate and trial court opinions as source material. The essence of the criticism focuses on the fact that opinions by their very nature are artificially simple, and the edited versions found in casebooks are even simpler. It is argued that these opinions give students an inaccurate and oversimplified view of the world of law practice, focus the students inappropriately on litigation and common law, and are an inefficient means of transmitting information.

I argue that such criticism is not an innate function of applying Socratic dialogue to appellate and trial opinions. To the contrary, the fact that appellate and trial court opinions are simplified is a virtue rather than a vice. The ability to read, analyze, and synthesize cases is a foundational skill for the other skills that law students ultimately need to master. By using materials that place concerns such as fact-finding, negotiating, and counseling as secondary, it allows

class is better than average, one may find himself asking even more difficult questions than he normally would. As always, good teaching requires judgment in applying a rule.

students to focus on the foundational skills that are necessary for them to master the higher level skills that are necessary to be effective lawyers. Further, nothing in the use of court opinions precludes faculty from emphasizing the breadth of law practice. To the extent that using case law as the subject of Socratic dialogue may result in the students receiving a skewed, oversimplified vision of the lawyers' functions, this is again the result of ineffective teaching rather than an innate flaw in the Socratic dialogue.

Best Practices provides an effective summary of the alleged deficiencies of the Socratic dialogue as used with case law, quoting Professor John Elson.[61] It then supplements this summary with critiques from other law review articles that coincide with Professor Elson's assessment of the Socratic dialogue. Professor Elson views each of his criticisms as an intrinsic shortcoming of the Socratic dialogue; I view each of the criticisms as being a function of a professor who utilizes the Socratic dialogue inartfully at best and badly at worst. If a professor truly taught the way that Professor Elson describes, the Socratic dialogue could lead to some of the shortcomings Elson and others describe. However, such a teaching method would be the hallmark of a poor, or perhaps inexperienced, professor. There is nothing intrinsic to the Socratic dialogue that requires a professor to teach in the manner that Professor Elson describes.

Elson's first criticism of the Socratic dialogue is that

> Appellate opinions' reduction of the real world of factual complexity and indeterminacy into a set of seemingly clear-cut, independent variables which appear to foreordain the outcome of cases conveys an inaccurate sense of the indeterminacy and manipulability of the factual reality that lawyers must organize and create. The case method's formal criteria for analyzing and distinguishing cases are necessary elements of

[61] STUCKEY ET AL., *supra* note 3, at 136-37. The critique comes from Elson's article, in which he evaluates the likelihood that the recommendations of the MacCrate Report would be implemented. Elson concluded that it was unlikely that the recommendations would be effectuated and that other reforms would be necessary in order to improve the quality of legal education. John Elson, *The Regulation of Legal Education: The Potential for Implementing the MacCrate Report's Recommendation for Curricular Reform*, 1 CLINICAL L. REV. 363, 384 (1994). Among these reforms was movement away from Socratic dialogue for the reasons which *Best Practices* cites. *Id.*

> lawyering that students must master to become effective practitioners. Nevertheless, when that methodology is applied outside the context of a problem situation, it distorts students' understanding of how lawyers actually analyze cases in order to achieve their goals. . . . By repeatedly leading students through a highly routinized set of analytical rules and distinctions, the traditional case method tends to dampen creative problem-solving by instilling an essentially passive thought process, one that is inflexible and ill-suited to the inchoate factual world lawyers must actively try to manipulate.[62]

Although Professor Elson is accurate in some aspects of his discussion of the use of appellate opinions as a teaching tool, he makes two major errors. First, he seriously mischaracterizes how good teachers use appellate opinions to teach students. Second, he implies that teachers using Socratic dialogue never venture beyond the four corners of the cases they teach.

Appellate opinions (and trial court opinions) are an excellent tool for teaching law students the fundamental skills they will need to build upon, and good teachers use appellate opinions for a variety of purposes. First, appellate opinions take a complex area that needs to be mastered and break that complexity down to manageable pieces that can be mastered by a student. As the *Carnegie Report* and *Best Practices* properly point out, becoming a good lawyer requires mastering a large number of complex skills. While one approach to teaching students mastery of these skills is to simply expose them to all the issues involved and let them try to master each skill simultaneously (the sink or swim method), the use of Socratic dialogue allows the professor to introduce skills serially instead, allowing students to become familiar with each skill and at least start down the road to mastery before starting on the next skill.

Appellate opinions allow the professor to start with the skill that underlies everything a lawyer hopes to accomplish for his or her clients—the ability to master legal analysis. At a minimum, students

[62] Elson, *supra* note 61, at 384.

need to be able to analyze cases and be able to synthesize the rule of law from a series of cases, which includes the ability to understand what the rule of law has been, how it has changed, and in what direction the law may be heading in the future. While mastering common law analysis is hardly the be-all and end-all of legal analysis, common law analysis provides an intellectual underpinning for students to move on to other skills. It is crucial for students to be able to determine what the relevant rule of law is, what the relevant facts are, and how the rule should apply to the facts. The criticism that use of appellate opinions does not teach the students anything about the factual complexity and indeterminacy of the cases they will handle as lawyers is inappropriate when applied to new students. Appellate opinions are a way to start students on the road to mastering the relationship of facts and law. They can concentrate on that first skill before moving on to another skill—how to handle factual complexity and indeterminacy. As students master the initial skill of relating facts and law, the faculty member then has the opportunity to introduce the student to the many-faceted issues involved in fact discovery in actual cases.

What is crucial to realize is that as students master the skills, good faculty continue to push them to new limits. The depth to which one explores a case with first week law students, as well as the emphasis the professor puts on various aspects of the case, must inevitably differ from the depth and emphasis that the professor concentrates on later in the semester, as well as the progression through the entire first year. As students' mastery of legal analysis improves, faculty start reaching for more complex analyses of the law as well as introducing new skill sets. To characterize the Socratic dialogue as "repeatedly leading students through a highly routinized set of analytical rules and distinctions" either describes a poor teacher or misdescribes the process of learning that takes place under Socratic dialogue.[63] Not only is there nothing in the Socratic dialogue that requires routinization, the need for thoughtful faculty to monitor and recognize their students' progress precludes such a routinization.

There is a profound difference between repetition for the sake of learning and routinization. Repetition of a skill is crucial to learning that skill. Indeed, at some point one hopes that the student be-

[63] *Id.*

comes so proficient in exercising that skill that the exercise becomes routine; that is to say engaging in such analysis becomes second nature. Once it has become second nature, the student can focus on mastering other skills. So while engaging in legal analysis of the sort engendered by Socratic dialogue may become routine for the student, that does not mean that the professor should let it be routine as far as what he or she teaches.

Elson is even further in error when he characterizes the traditional case method as "instilling an essentially passive thought process, one that is inflexible and ill-suited to the inchoate factual world lawyers must actively try to manipulate."[64] It is certainly possible for a teacher to use the Socratic dialogue in such a manner that students will start to think mechanically. If a professor assigns the students the mere task of reading and briefing a case in sufficient detail that they can identify the relevant facts, procedure, issue, holding, and reasoning to the professor's satisfaction, then students may well start to think passively. However, the Socratic dialogue does not require that the analysis of the case stop at the four corners of the case. The four corners of the case are merely a starting point for deeper analysis of the law—a task that, if done correctly, requires active thought from the students.[65]

In essence, the entirety of Elson's criticism so far is based on a supposition of ineffective teaching by a professor using the method.[66] Nothing in Socratic dialogue intrinsically forces a professor

[64] *Id.*

[65] There are undoubtedly many ways by which a professor can achieve this goal. One method that works extremely well is to ask one question repeatedly: "Why?" When the student answers a question with a conclusion as part of the response, ask the student why he or she reached the conclusion. It does not have to literally be the word "why." One can ask the student what led him or her to reach that conclusion. The response will almost always have an aspect that contains a conclusion. Point out that conclusory aspect and again ask the student what led him or her to reach that conclusion. Keep working backward in that respect. At some point you will reach the beginning of the student's argument. Then the professor can explore the flaws in the reasoning as well as why they lead to the results reached. The technique is not only useful for pointing out flaws in a student's analysis but also allows the professor to show the student the assumptions that may underlie his or her conclusions. The professor can then ask what happens if the assumptions are changed. Further, this can lead into a discussion of which assumption(s) are appropriate and why.

[66] There is accuracy to Elson's claim that Socratic dialogue is not an ideal method of preparing students for the "inchoate factual world" that lawyers need to deal with. However, mastery of legal analysis is a foundational skill, without which students cannot make determinations about which facts are important. In other words, in trying to discover those

to teach it in the style described by Elson, and skillful teachers do not teach it in such a manner. The *Carnegie Report* notes that in the hands of skillful teachers, Socratic dialogue is very effective, not only in teaching legal analysis but also in "gradually reshaping students into legal professionals."[67]

> Elson's second criticism of Socratic dialogue is that:
> The case method is an inefficient and, often haphazard, way to convey to students the doctrinal knowledge that is necessary for effective problem-solving and the ways lawyers must identify and acquire the doctrinal knowledge they will need to solve problems in unfamiliar areas.[68]

Elson is not the only one to make that charge. *Best Practices* also cites Michael Schwartz among others as arguing that " 'law teaching is neither effective, efficient, nor appealing . . . .' "[69] Of course, the ubiquity of such a charge does not make it true.

The accuracy of the charge will depend on what the professor is trying to achieve. If the primary purpose of the professor is the transmission of information, then the charge certainly rings true; there are more effective modes for transmitting information. However, the purpose of using Socratic dialogue is far broader than the transmission of information. The primary purpose must be teaching students how to teach themselves the law.[70] Once they have mastered that skill, their ability to teach themselves the law will enable them to learn what they need to know in order to help their clients. In other words, the ability to teach themselves the law is foundational. It must be mastered before it is possible for students to start mastering other skills. I have no dispute with advocates of clinical education who ar-

inchoate facts, they will have no idea what it is they need to look for. So while it is true that additional teaching methods are necessary to foster some skills that lawyers will need in practice, this criticism fails to establish the inappropriateness of the Socratic method for the purpose of establishing the necessary foundation for students to efficiently and effectively search for inchoate facts.

67 SULLIVAN ET AL., *supra* note 2, at 75.

68 Elson, *supra* note 61, at 384.

69 STUCKEY ET AL., *supra* note 3, at 136 (quoting Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 358 (2001)).

70 *See* D'Amato, *supra* note 49, at 465 (describing how a hypothetical professor, "Professor Smith," can "teach his students to teach themselves the law").

gue that exposure to clients should be part of a law student's education. However, that experience cannot be truly fruitful without mastery of the foundational skill of learning how to learn the law.

Crucially, students cannot master how to learn the law without an exploration of how they think; in other words, they must master metacognition. Metacognition is one's knowledge regarding how his or her own cognitive processes work with respect to learning from information or data.[71] Socratic dialogue is well-suited to this purpose.

The purpose of Socratic dialogue is to teach students to "think like a lawyer." Leaving aside the ambiguities inherent in what it means to "think like a lawyer,"[72] a critical component of mastering this skill is understanding how one thinks.[73] While it is undoubtedly true that individuals reach conclusions differently, it is also true that there are similarities in the way that people think.[74] Socratic dialogue can be tremendously effective in teaching students how to think about problems. The key here is to understand that the scope of Socratic dialogue not only applies inside the classroom but that it also extends beyond the classroom. Used effectively, Socratic dialogue allows the professor to use one student as a surrogate to explore many students' thought processes. This works on two different levels. First, with respect to the student called on to recite, the professor gets insights into that student's thought processes. By focusing on the student's analysis, the professor is capable of exploring how the student thinks and where the flaws lie, not only in the student's analysis as he or she presented it to the class but also in the student's thought processes. Working with the student, the professor then can correct the flaws and perhaps even model a scheme that will allow the student to improve his or her approach to the material.

[71] Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 1, 7 (2003).

[72] The *Carnegie Report* sets forth a good exposition of what this entails. SULLIVAN ET AL., *supra* note 2, at 51-54.

[73] I am not talking about the differences in learning styles. Students learn in a variety of ways. Regardless of their learning styles, students must come to understand how they think—what presumptions they start with and how they proceed from those assumptions through application of the law to the facts and ultimately reach a conclusion. Once students understand their own thought processes, they can assess the validity of their analyses at each step.

[74] *See* DANIEL T. WILLINGHAM, WHY DON'T STUDENTS LIKE SCHOOL 113 (2009).

While the professor is working with an individual student, the teaching will extend to many more students. This can happen in a variety of ways. First, if the student is thoughtful in his or her responses, the odds are that many students reached similar or different conclusions using similar reasoning. Thus, by exploring one student's thought processes, the professor reaches many students. In addition, the professor can ask other students to join in the analysis. Comparing and contrasting the thought processes of one student with another is likely to reach many more students and give them insight into their own thought processes. Used in this manner, Socratic dialogue is a time-tested method of exploring students' reasoning in a way that helps to illuminate the thought processes of other students as well as the students called upon. It must again be emphasized that the reason for exploring students' thought processes is to help them learn how to learn the law, the primary foundational skill without which the other skills students will learn are meaningless.

Of course, the key to the efficacy of this approach is thoughtful questioning on the part of the professor. If the professor is merely asking questions for the purpose of hectoring the student or showing the student that no matter what he or she answers, the professor is capable of finding flaws in the answer, then the students called upon will legitimately become resentful, and the other students in the class are likely to learn little about either the called-upon student's thought processes or their own.

Asking students questions for the purpose of hectoring them or showing the professor's superior skills is simply bad teaching. The teacher's inefficacy in such a situation is not the result of some inherent flaw in Socratic dialogue; it is a function of the teacher's misuse of the method or the professor's general ineptitude or thoughtlessness. Ineptitude will render any approach to teaching inefficient. It is inappropriate to disparage Socratic dialogue based on a presumption that its practitioners will not use it properly.

In addition to using Socratic dialogue in the classroom to reach the entire class, it can be used outside the classroom to the same effect. The teacher need only give thoughtful assignments for the students to work on between classes. One can assign cases for his or her students to read and tell them that class will start with particular questions designed to ensure that they have thought about a particular point. One can direct the students by telling them that they

need to approach the question from a particular perspective. One can also encourage them to discuss the questions together either online or physically together. When students take these assignments seriously (and unfortunately they do not all do so), it allows them to engage in their own methods of analysis, whether it is Socratic dialogue or otherwise. This interaction, of course, is the best means of teaching them metacognition—by getting each of them individually to explore how they think.[75] For this to work, the professor must give thoughtful assignments, not just assign reading for the next class. None of this is inconsistent with the use of Socratic dialogue.

In conclusion, Elson's second criticism deals with a flaw resulting from bad teaching, not any flaw intrinsic in Socratic dialogue. A professor whose primary goal is transmission of information and decides to use Socratic dialogue is probably using a less effective method than might otherwise be available. When Socratic dialogue is used for the proper purpose—teaching students how to learn the law—and utilized thoughtfully, it is an effective, efficient means of teaching students in a classroom.[76]

Elson's third criticism of Socratic dialogue is that:

> The case method is also an ineffective, and likely misleading, approach toward helping students understand the underlying social forces that are interacting

[75] The reader may have already noticed that this is just another example of the fact that work outside of the classroom is what is truly useful in students mastering the appropriate material. In this instance, the professor is telling the students they must master the material so as to be able to respond to a particular line of questioning they are likely to see as lawyers. However, because the professor has guided the students as to what the professor wants them to master, the students are able to use whatever methods work best for them in preparing for the assignment. Again, the key is that the professor requires the students to master a particular skill, but by giving guided assignments the students may use whatever works best for them individually to master that skill.

[76] There is one last aspect to the criticism of Socratic dialogue as inefficient. There is undoubtedly a class size at which Socratic dialogue fails to work effectively. I am fortunate to work at a school where the largest class I have had to deal with is probably seventy-five people. I think that is stretching the limits at which Socratic dialogue can be usefully employed. However, above that limit I am not convinced that any method of teaching is particularly effective, especially if the purpose of the class is to teach students how to think, rather than transmission of information. Further, none of the suggestions made in the *Carnegie Report* or *Best Practices* is conducive to large classes. Therefore, class size is not really relevant to a discussion of the efficiency of Socratic dialogue. If the classes are too large, no method of teaching students how to think will be efficient. If the classes are small, then Socratic dialogue is an efficient method.

> to determine the outcome of events in a field of law. This misplaced focus on caselaw as the primary medium for understanding the dynamic of an area of practice retards students' ability to develop an effective approach toward practice.[77]

This description of Socratic dialogue is extremely myopic. There is nothing about Socratic dialogue that requires such an approach to teaching this material. Such an approach would be more indicative of the deficiencies of the professor rather than the material. It is possible to teach using Socratic dialogue without going beyond the four corners of the case but there is nothing intrinsic to Socratic dialogue that restricts professors to the four corners of the case. In fact, in many cases, the decisions themselves contain discussion of the social forces that have led the court to reach the decision that it has reached. Not only does the case itself discuss the social forces leading it to its decision, it creates a wonderful starting point for a more detailed discussion of relevant social developments and how they interact with the law.

It is true that many cases do not have a discussion of social forces as part of the analysis. However, in those cases in which the professor thinks that such a discussion is necessary, there is nothing that precludes the professor from introducing additional material into the discussion. This can be done by assigning additional material for the students to read, providing such information during the discussion of the case, or through the students' introduction of material during the discussion. This last method, student introduction of material, is likely to occur regardless of whether the professor intended it to occur or not if the professor has created an atmosphere where student participation is encouraged.[78]

It is true that the casebook or cases that a professor chooses to use may require the professor to do independent research to augment the cases. However, this can hardly be an unexpected or onerous burden on the professor. Certainly it is appropriate to expect that a

[77] Elson, *supra* note 61, at 384.

[78] I want to emphasize there is nothing intrinsic in Socratic dialogue that precludes creation of an atmosphere where student participation is encouraged. Creation of such an atmosphere is a function of the professor's relationship with the students in and out of the classroom.

professor dedicated to being a good teacher will seek out materials beyond what is in the casebook. I would go further. I would say that a professor who does not seek out materials beyond what is in the casebook is shortchanging the students and is not to be described as a professor whose teaching style should be endorsed or emulated. I will suggest, however, that such faculty are rare.[79]

As with Elson's prior criticisms, his concern is a function of poor teaching, not anything intrinsic in Socratic dialogue. This discussion of myopic professors leads directly into Elson's fourth criticism, that:

> The teachers who rely principally on case books to develop an understanding of, and a pedagogical approach to, a field of law are being distracted from engaging in readings and experiences that will give them a more coherent and penetrating vision of the social and legal processes that are governing the field.[80]

This criticism is purely a strawman and truly does not merit extended discussion. Teachers who would rely on such a limited universe to gain expertise in the fields of law that they teach lack the kind of intellectual curiosity that would make them good teachers. Their lack of intellectual curiosity will make them poor teachers regardless of what method they choose to use. In other words, whatever ineffectiveness a teacher displays using Socratic dialogue will be a function of the professor's skill or attitude towards teaching, not a function of the fact that the professor uses Socratic dialogue.[81]

[79] There is one potential exception that I would make to this rule. If a professor is asked at a late time to teach a course outside his or her area of interest or expertise, time constraints may result in the professor simply using the casebook without going beyond. I have no doubt that this will lead to a less educational experience for a class than if the professor had expertise in the area. Even this is mitigated by the presence of teacher's manuals for many casebooks. Many teacher's manuals suggest areas for discussion beyond what the cases provide. In any event, the lesser educational experience is a function of the professor's lack of expertise, not his or her choice of Socratic dialogue as the means of teaching. Regardless of what materials the professor chose, he or she would be limited to the perspective provided by the materials he or she chose. While a professor might choose materials with a broader perspective than that provided by a casebook, there is likely to be trade-off in the depth of the material covered.

[80] Elson, *supra* note 61, at 384.

[81] The one scenario in which a professor might not show great intellectual curiosity in the course he or she is teaching is a situation where, because of curricular needs, the school requires the professor to teach a course in an area he or she has no interest in. In such a

Elson's final criticism is that:

> The case method's exclusive focus on the outcomes of litigation diverts students' attention from the many other arenas of lawyering with which competent practitioners should be familiar, such as alternative dispute resolution, administrative practice, legislative advocacy and client counseling.[82]

If law schools taught solely through Socratic dialogue, this criticism might have merit. However, as discussed earlier, this simply is not the case.[83]

In conclusion, none of the perceived flaws in the use of the Socratic dialogue as it is applied to case law is intrinsic to the Socratic dialogue. Rather to the extent that these problems exist, they arise from ineffective teaching.

B. The Socratic Dialogue's Emphasis on Rationality over Emotion is Not a Drawback but Rather a Strength of the Method

While the criticisms in the previous section should have been recognized as being inappropriately attributed to the use of Socratic dialogue, the criticism in this section is not so easily pigeonholed. *Best Practices*, as part of its criticism, states that:

> Law students get the message, early and often, that what they believe, or believed, at their core is unimportant—in fact "irrelevant" and inappropriate in the context of legal discourse—and their traditional ways of thinking and feeling are wholly unequal to the task before them.[84]

The *Carnegie Report* also shows concern that, in the interests of enhancing students' adeptness at legal reasoning, Socratic dialogue "of-

situation, a professor might be loath to invest a great deal of effort in an area he or she hopes to eventually stop teaching. In such a scenario, the comparatively ineffectual teaching that will result is a function of a less than optimal logistical situation rather than a result of the system the professor chooses to use in the course that he or she really does not want to teach.

[82] Elson, *supra* note 61, at 384.

[83] *See supra* notes 31-33 and accompanying text.

[84] STUCKEY ET AL., *supra* note 3, at 139.

ten forces students to separate their sense of justice and fairness from their understanding of the requirements of legal procedure and doctrine."[85] Stated another way, Socratic dialogue is criticized as emphasizing rationality "at the expense of students' emotions, feelings, and values," with the result that "students' moral compasses [are set] adrift on a sea of [moral] relativism, in which all positions are viewed as 'defensible' or 'arguable' and none as 'right' or 'just,' and they train students who recognize and regret these developments in themselves to put those feelings aside as nothing more than counterproductive relics from their pre-law lives."[86]

Part of this criticism—that students may be led to believe that the law is just about taking positions and that lawyers are essentially just "hired guns"—is, as the previous criticisms were, inaccurate in that it attributes consequences of bad teaching to Socratic dialogue. The other part of this criticism—that Socratic dialogue emphasizes rationality over emotion—is an accurate observation but is wrong in the conclusions it draws about the wisdom of this characteristic of Socratic dialogue.

Initially, there is some validity to the criticism that Socratic dialogue may lead new law students to the conclusion that the function of the lawyer is to be able to create arguments for any client who hires the lawyer, and therefore the lawyer is a hired gun who should not take into account other interests in counseling a client. If a professor is not sensitive to this issue, the emphasis on creating arguments without an equal emphasis on the reason for this skill might easily mislead a novice to the discourse of the law to misinterpret the role of a lawyer as being a hired gun. However, this problem is easily remedied. The professor need only explain the reasons for emphasizing the students' ability to create an argument on either side. These reasons are the bases underlying my claim that the Socratic dialogue's emphasis on rationality is a strength of the method.

First, students need to understand that different people may have differing ideas of what is "right" or "just." Therefore, where there is a dispute, the other side will be able to formulate an argument to support that other side's position. Second, in order to rebut the other side's argument, lawyers must understand the other side's ar-

[85] SULLIVAN ET AL., *supra* note 2, at 57.
[86] STUCKEY ET AL., *supra* note 3, at 139-40 (quoting Krieger, *supra* note 38, at 125).

gument at least as well as they understand their own arguments. In other words, professors need to make students aware of a tenet that lawyers take for granted—that one needs to know the other side's argument at least as well as one knows his or her own argument.

Professors must do more than make students aware of this tenet; professors must ensure that students make this tenet part of their mental machinery.[87] That means that professors must emphasize both elements set forth above—that reasonable people can differ on what is right and just and no one has a monopoly on this and that the ability to understand the other side's argument—no, formulate the other side's argument—is crucial to being an effective advocate for your client.[88]

The observation that Socratic dialogue emphasizes rational thought and deemphasizes emotion is accurate. However, far from this being an undesirable trait, as critics claim, it is this emphasis on rationality that makes it so effective and valuable. As stated earlier,

[87] *See infra* note 118 and accompanying text.

[88] Fortunately, it is not difficult to set the right tone. All the professor needs to do is explain to the students why he or she is emphasizing the need to explore all sides of the argument and be able to formulate arguments for a side the student may disagree with. Let me give an example. Recently in my Constitutional Law class, we were dealing with the doctrine of state action, more specifically when private actors' actions are attributable to the State. After analyzing three cases, I asked the students to synthesize the cases and give me the answer to a hypothetical I posed. I started by asking what argument the students would make for a finding that the private actor's action would be attributable to the State. One student took the lead, and I worked with him for about fifteen minutes. After he had formulated the argument, I asked him what argument he should make to convince the court that the action should not be attributable to the State. The student (and the class) looked surprised that such an argument could be made. Ultimately, the class formulated the necessary argument. Immediately, the inevitable question arose—what was the correct answer?

It was at that point that I stated that the key to the exercise was not to demonstrate that there was no definitive answer nor was it to point out that arguments could be made on both sides. Rather, the point was that the students needed to be able to see both arguments so as to be able to decide for themselves which was the better argument and most importantly, to be able to defend their conclusion against attack from the other side. This answer was intentionally designed to dispel the "hired gun" syndrome and to fit the entire exercise within a context that would emphasize what attorneys do. As I glanced around, the students seemed to have gotten the message; after all, it is a message I repeat consistently throughout the year with them.

Earlier on in my career, I did not emphasize this point. Indeed, I did not even think of the concern that I might be inculcating "hired gun" syndrome. It was only with the passage of time and research into teaching methods that I became aware. The point to be made is that the criticisms attributed to Socratic dialogue are not intrinsic to Socratic dialogue; rather they are a function of a teacher's skill.

lawyers take it as a given that they need to understand the opposing arguments at least as well as they understand their own. Students, however, need to embrace this concept.

Mastering the ability to understand that reasonable people can differ on what is right and just as well as the ability to understand the other side's argument requires the student to move beyond himself or herself to a broader world. It is not sufficient for the student to have a passionate sense of right and wrong. It is not sufficient for a student to have a passionate sense of justice. The students must understand that there are other justifiable positions than the students' own positions, regardless of how passionately the students are committed to those positions. This requires the students to move beyond themselves. This task may be difficult for many of them, especially if it challenges beliefs they are passionately committed to.

The ability to understand the counterarguments to one's position requires one to dissociate himself or herself from an emotional attachment to that original position. It requires the student to be able to dispassionately look at his or her argument and see the potential flaws and weaknesses in it. It requires the student to be able to determine what presumptions underlie the argument and determine how and why those presumptions might be subject to challenge. In other words, it requires a student to be able to ruthlessly explore the validity of his or her reasoning and honestly and accurately assess that reasoning, including facing the potential consequence that his or her reasoning was wrong. It requires the student to acquire metacognitive skills—the ability to understand his or her thought processes—so that the student may trace them and explore their truth or falsity.

I am not saying that students should not have opinions about the law or that their opinions should not have an emotional component. However, it is critical for students to be taught that just because they "feel" a certain way does not shelter that feeling or opinion from being analyzed as to whether it is defensible from an analytical standpoint. In fact, it is absolutely critical that students be weaned away from feeling that because they feel a certain way that makes their position impregnable to argument. As Madeleine Schachter recognizes, when an opinion is rooted in emotion, counterarguments will have no effect on such an opinion. When an opinion "rests solely on feeling, the worse it fares in argumentative contest, the more persuaded its adherents are that their feelings must have some deeper

ground, which the arguments do not reach."[89] In other words, the students' emphasis on emotion and feelings is entirely counterproductive to his or her mastery of analytic thinking, a key skill necessary to being an effective lawyer.

Most importantly, mastery of the ability to dispassionately assess one's case rationally allows the student to more effectively plead the case with passion. Only after the case has been analyzed thoroughly from a dispassionate perspective can a lawyer determine what points to emphasize and how strongly to emphasize those particular points. In other words, an emphasis on dispassionate analysis, which forces a student to question what he or she has taken for granted, is not incompatible with teaching students the need for passion in their practice of law. In fact, it enhances it. However, this enhancement cannot take place without mastery of the ability to step back and look at a case rationally. If students are weak with respect to this skill, then students must practice it until it is mastered. That requires emphasis on this particular skill.

C. The Argument that Rationality Should be De-emphasized in the First Year is Wrong and Such De-emphasis Would be Counterproductive

The question then becomes, "What should schools emphasize early in the curriculum?" Should there be heavy emphasis on the analytic mode of thinking or should there be more of a sharing of the emphasis on narrative modes as well as the analytic mode? For me, the answer is clear; there must initially be heavy emphasis on the analytic mode. Only after the students have begun to master the analytic mode can the narrative mode be meaningfully introduced.

The ability to think analytically—to conceptualize, establish cause and effect, rank, order, and find logical relationships of inclusion and exclusion—is a necessary, although not sufficient component of being a good lawyer. Unfortunately, many students now enter law school sadly deficient in these skills.[90] The students are not to

[89] MADELEINE SCHACHTER, THE LAW PROFESSOR'S HANDBOOK 157 (2004) (quoting JOHN STUART MILL, THE SUBJECTION OF WOMEN (1869)).

[90] Philip C. Kissam, *Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education*, 60 OHIO ST. L.J. 1965, 1972

blame. This is a function of the education that they have received. Numerous books describe the shift in American educational emphasis from rigorous academic standards to a predominant focus on their feelings.[91]

The result is that many, if not most, students entering law school today are ready to focus on what they feel or believe the answers should be, rather than being ready to explore the material with an eye towards the analytic thinking of conceptualization and logic. One readily sees this in the criticism of Socratic dialogue by Krieger referenced to earlier in which he states that students "regret these developments in themselves to put those feelings aside as nothing more than counter-productive relics from their pre-law lives."[92]

Students come to law school well versed in the skill of stating their opinions. They come to school far less capable of analytic skills.[93] Thus, far more emphasis must be placed on developing their analytic skills. While students' emotions or intuitions may lead them in the correct direction, without analytic skills students will never be able to explain the propriety of those feelings persuasively. The

(1999).

> [M]any law students may begin their legal education with rather limited motivations, aptitudes, or experiences in several intellectual activities that are preconditions for successful learning in the case method/final examination system. These activities include: the careful, critical, imaginative reading of complicated texts, the contemplation of ethical questions—as presented by literature, philosophy, or the social sciences—and the writing coherent texts on complex subjects in ways that depend on a process of rereading both the text one is writing and one's subject texts; obtaining feedback from these rereadings; and relentlessly rethinking, revising, and rewriting texts.

Id. Professor Kissam and I come to different conclusions on what consequences flow from this diminution in entering students' skills. He believes that this requires restructuring the curriculum while I believe it increases the need for effective teaching with respect to these skills, which is done effectively through the use of Socratic dialogue.

[91] Two excellent books that not only describe the shift in focus in schools but also set forth the negative effects resulting from this shift are MAUREEN STOUT, THE FEEL-GOOD CURRICULUM: THE DUMBING DOWN OF AMERICA'S KIDS IN THE NAME OF SELF-ESTEEM (2000) and JEAN M. TWENGE, GENERATION ME (2006).

[92] Krieger, *supra* note 38, at 117.

[93] *See* Michael Jordan, *Law Teachers and the Educational Continuum*, 5 S. CAL. INTERDISC. L.J. 41, 67 (1996) (arguing that pre-law school education trains students to be passive consumers of education, "predisposed to accept, in fact, demand the type of education that nurtures [passivity]"). Jordan goes on to state that "[w]hat is not demanded, and may even be met with hostility, is the effort to develop analytical skills." *Id.*

ability to persuade, of course, is an essential part of being a lawyer.

Mastering analytic skills requires a student to be dispassionate in analyzing cases. If the professor knows that students are weak in a particular skill, it is the professor's duty to work with the students to increase their mastery of that skill. If large numbers of entering students are weak at analytic skills, then professors must emphasize analytic skills so that students' mastery increases, even if it means de-emphasizing the students' feelings for a substantial period of time. Students simply must master the ability to approach a problem dispassionately. If they are allowed to simply follow their feelings, they will not reach the same level of depth of analysis. They will just assume they are right without adequately questioning why they felt the way they did in the first place. To ask a student to support the position he or she feels is right requires a great deal of introspection and self-knowledge on the part of the student, which he or she often lacks. A good professor will force the student into that introspection.

Of course, questioning which forces a student to explore beliefs that may be deeply held often makes the student uncomfortable and may indeed lead the student to believe that the professor is disagreeing with the student's basic beliefs.[94] Nonetheless, the professor must force the student to confront the issues.

It is crucial that we challenge our students' beliefs, even their most cherished ones, not for the purpose of destroying them or showing them they are worthless but rather so that they can learn how to defend them if they are worth defending. That requires sensitivity on our part as teachers. We must let them know that these challenges (which they may well view as attacks) are for the purpose of education and that these challenges are for the purpose of improving their ability to explicate their reasons for their beliefs. While it will make the students feel uncomfortable (because they are novices to this discourse), it must be done. It is not permissible for students to defend themselves with "that's the way I feel." While feelings may be valuable as guideposts to what is correct, they are not infallible. Students

[94] It is up to the professor to be sufficiently aware of this problem and to address it with any particular student or the entire class. It is the reason I often require my students to take a side on an exam that I know they will disagree with. It is actually a favor to them because it forces them to think the material through instead of just being conclusory in their answers because they assume (subconsciously) that the answer is obvious instead of working through all the necessary steps.

cannot be allowed to cut off speech by simply using feelings as some sort of trump card. To students who are used to just being able to give a justification of "that's how I feel," this may feel harsh. However, the professor is not there to be liked—the professor is there to educate the students.[95]

Critics believe that this commitment to rationality over emotion has the effect of telling the students that what they believe is unimportant and that it is pessimistic and depersonalizing.[96] I find this critique wholly misguided. Gerald Hess speaks of the sense of excitement that law students have upon entering law school, how that sense of excitement disappears during students' law school careers, and states that law school should not have that effect on students.[97] One way of keeping students engaged is teaching them new skills and letting them get a sense of the mastery they are gaining.

Students' mastery of the ability to move beyond themselves can be immensely liberating and exhilarating for them. The important thing is to make sure that students keep their eye on that particular ball. They need to understand that the emphasis on analytical skill and rational thought is not inconsistent with passion for a cause; professors need to create a context in which students understand that they are being taught these skills because these skills are integral to being an effective lawyer and that theses skills will help them to be effective lawyers so that they can pursue their passions with excellence.

At the same time, it is important that professors remind students of how far they have come in mastering the skills needed to be a lawyer since they entered law school. It is all too easy for students to get bogged down in the difficulty of a given assignment or series of assignments and lose perspective about how far they have come.[98]

[95] STOUT, *supra* note 91, at 232 ("But as a friend of mine—an experienced teacher—told me before I started teaching at university, 'It doesn't matter if they like you; they only have to learn something from you.' ").

[96] Krieger, *supra* note 38, at 125 ("Law students get the message, early and often, that what they believe, or believed, at their core, is unimportant—in fact 'irrelevant' and inappropriate in the context of legal discourse . . . .").

[97] *See* Hess, *supra* note 46, at 75.

[98] I was very lucky to have a professor who understood this point when I was in law school. My Torts professor was a marvelous teacher named George Trubow. He was a classic Socratic dialogue professor with all that it entails. There was no doubt that he was intimidating. However, the intimidation occurred not because he intended to intimidate us,

When students understand that the skills they are being asked to master will further their goals, it creates a context that encourages them to work hard at these skills. When they realize that they are indeed mastering these skills, they try even harder. This is as true when the skill being mastered is rational analysis as other skills.

IV. WITHIN THE FIRST YEAR CURRICULUM, THE SOCRATIC DIALOGUE IS BETTER SUITED TO MEET STUDENTS' PEDAGOGICAL NEEDS THAN EXPERIENTIAL LEARNING BECAUSE SOCRATIC DIALOGUE IS BETTER SUITED TO TEACHING FOUNDATIONAL SKILLS

Advocates of experiential learning contend that it is a more effective method of teaching because it places learning the skills or information in a specific context and provides experience. They argue that when students are trying to learn a skill or information, they will learn the skill or information better if it is to be used in a specific context.[99] Thus, they argue, a student is more likely to learn analysis

but rather because he was holding us to his very high standards. Yet, for all that were intimidated, we loved having him as a teacher because he made it clear that he cared for his students and wanted us to learn and become fine lawyers. One day we were covering defamation and just having a horrible time with one of the concepts. After a few minutes, it was clear how badly the class was struggling and that we were becoming dispirited. Professor Trubow closed the book and looked at us. He told us that he knew we were struggling. He told us that the concept we were struggling with was difficult and not to get discouraged. Instead, he told us to look back at how far we had come in the last ten weeks. He reminded us of a case we had struggled with early in the semester dealing with intent. Then he looked at us and asked us, "Don't you wish you were dealing with an issue that simple now?" With that question, he showed us how far we had come. The concept we were having trouble with is long since lost to posterity; the lesson he taught us has endured to this day and I make sure to remind my students of how far they have come each semester.

[99] STUCKEY ET AL., *supra* note 3, at 22 ("Students who receive instruction that is contextualized by reference to problems or professional settings seem to believe that more is expected of them, and treat associated intellectual tasks with a greater seriousness of purpose and a higher level of engagement.").

On one level, this is not a surprise. Dealing with reallife cases is exciting. However, good teachers make the material they cover exciting to their students, regardless of how they teach, nor is there any reason that a teacher using Socratic dialogue cannot demand the same level of seriousness of purpose and engagement. This is a function of good teaching.

There is another aspect to this, however. Much of law practice is not exciting, but rather consists of drudgery. Students need to deal with drudgery. On one level, preparing for a class using Socratic dialogue will not be as exciting as preparing to interview a client or represent that client in court. Students may well have a difficult time mustering the self-

and synthesis skills when there is a specific problem that these skills are necessary to solve. For example, students are more likely to learn about trespass to land if they are given a problem in which a client has asked for advice involving a neighbor who has cut down a tree on the client's property rather than if they are merely given an assignment to learn about trespass to land.

There is little dispute that providing a context for learning can help students, including law students, learn better.[100] Every good teacher understands that implicitly. However, recognizing the truth of this statement does not help resolve the issue of what kind of context will best help the students learn. Determining the proper context requires inquiry into what skills the professor is seeking to teach and what foundation students must already have in order for those skills to be successfully taught. Many, if not most or all, first semester law students need to learn all the skills necessary to be a successful lawyer. These include textual exegesis, rule choice, fact development, contextual analysis, narrative development, and policy analysis,[101] as

discipline necessary to adequately prepare. However, they need to learn to master that skill at least as much as other professional skills if they are to be successful.

[100] There is a reason that students learn abstract concepts better when those concepts are placed in context. That is because students understand new concepts in the context of what they already are familiar with. Most of what they are familiar with is concrete in nature rather than abstract. Thus, giving the students a concrete example helps them because it allows them to relate the new, abstract idea to something they are already familiar with. For a more detailed discussion, see WILLINGHAM, *supra* note 74, at 67-80.

However, giving concrete examples so as to provide context for learning abstract concepts is not the same thing as experiential learning. David Kolb describes experiential learning as follows: "Immediate or *concrete experiences* are the basis for observations and *reflections*. These reflections are assimilated and distilled into *abstract concepts* from which new implications for action can be drawn. These implications can be *actively tested* and serve as guides in creating new experiences." Alice Y. Kolb and David A. Kolb, *Learning Styles and Learning Spaces: Enhancing Experiential Learning in Higher Education*, 4 ACAD. OF MGMT. LEARNING & EDUC. 193, 194 (2005) (emphasis in original).

While many educators take the superiority of experiential learning as a given, there is far from unanimity on this issue. For a list of critiques of experiential learning, see *Experiential Learning Articles and Critiques of David Kolb's Theory*, http://reviewing.co.uk/research/experiential.learning.htm (last visited June 30, 2011). A discussion of experiential learning would be far too complex for this paper. For purposes of this discussion, I am willing to assume arguendo that experiential learning is valid. I contend, however, that even if it is, Socratic learning will be more effective at this stage of a law student's career.

[101] STUCKEY ET AL., *supra* note 3, at 215 (discussing Peggy Cooper Davis & Elizabeth Ehrenfest Steinglass, *A Dialogue About Socratic Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 249 (1997) and stating that all these skills are necessary to be a sophisticated law-

well as the ability to listen effectively to clients, diagnose and analyze issues, negotiate, perhaps mediate, and perhaps most important, devise the best solution for their clients, taking into account the economic and emotional effects the legal problem being dealt with may have on the client.

While all these skills are necessary to be an effective, sophisticated lawyer, they cannot all be taught at once. It is at this point that I part ways with the *Carnegie Report*. The *Carnegie Report* relies primarily on a study by Hubert Dreyfus and Stuart Dreyfus which argues that "[f]ormal knowledge is not the source of expert practice. The reverse is true: expert practice is the source of formal knowledge about practice."[102] The *Report* goes on to conclude that "the progression from competence to expertise cannot be described as simply a step-by-step build-up of the lower functions. In the world of practice, holism is real and prior to analysis."[103]

I believe the *Carnegie Report* misses a crucial point. I have no dispute with the idea that ultimately the process of becoming an expert requires the novice to be immersed in the milieu in which he or she hopes to become an expert, nor do I have any disagreement with the idea that immersion plays a part in a person's gaining insight into the profession and how to manipulate knowledge. Rather, my disagreement lies in the stage at which such immersion should take place. There are prerequisites that must be mastered before the novice is ready to benefit from immersion. After all, one does not train a mathematician by starting him or her with calculus. The novice must learn algebra first. Similarly, a pianist must practice and master G major scales before being able to play Beethoven's 4th Concerto in G Major, which contains many G major scale passages.[104] One does not achieve mastery of the concerto by simply sitting down at the piano and trying to play the entire piece.

A. There is a Difference Between Novice Learning and Expert Learning

The reason that there are starting points is that when one

yer).

[102] SULLIVAN ET AL., *supra* note 2, at 118.

[103] *Id.*

[104] Thank you to my colleague, Professor Bruce Morton, for this example.

learns, one thinks differently early in his or her training than later in one's training, or as Daniel Willingham states concisely, "Cognition early in training is fundamentally different from cognition late in training."[105] That means that activities that are appropriate for experts will not do much for students cognitively; in other words, it is unrealistic to expect novices to learn by doing the same activities as experts.[106]

Novices become expert through practice. Practice entails more than simply engaging in the activity one wishes to master. It requires feedback from a knowledgeable teacher. Just as important, it means "investing time in activities that are not the target task itself but done for the sake of improving that task."[107] However, mere practice by itself does not create expertise. It is deliberate practice that results in expertise.

Deliberate practice is different from practice. "[It] is a highly structured activity, the explicit goal of which is to improve performance. Specific tasks are invented to overcome weaknesses, and performance is monitored to provide cues for ways to improve it further."[108] In other words, there are three critical aspects to mastering a skill—assessment of the students' skills and weaknesses, repetition and feedback.

B. The Socratic Dialogue is Ideally Suited to Allow Students to Engage in Deliberate Practice and Master the Foundational Skills that Will Allow Expert Learning

At some point in the curriculum, the students should be immersed in the field of law. Simulations, internships and externships,

[105] WILLINGHAM, *supra* note 74, at 98.
[106] *Id.* at 109.
[107] *Id.* at 151.
[108] K. Anders Ericsson, Ralf Th. Krampe, & Clemens Tesch-Romer, *The Role of Deliberate Practice in the Acquisition of Expert Performance*, 100 PSYCHOL. REV. 363, 368 (1993). Ericsson et al. set forth the theory that there are several factors that are necessary to become an expert. *Id.* at 363. One of those factors is the willingness to exert sufficient effort to become expert. *Id.* at 367. More effort equals higher degree of expertise. However, simple effort is not enough. *Id.* at 363. Rather, mastery is achieved through recognition of one's weaknesses and specifically creating exercises that strengthen those weaknesses. *Id.* at 368.

and live client clinics are all excellent means of immersion that will help students become better lawyers. The proper question is where in the curriculum this immersion will be most effective.

Some skills serve as foundations for others. From my perspective, textual exegesis is the first skill that needs to be mastered. Next comes the ability to analyze and synthesize cases, which skills include rule choice, fact development, contextual analysis, narrative development and policy analysis. If students are to be able to competently determine which facets of the law are favorable to their client and which are detrimental to their clients' interests, they must be able to read and interpret the law the accurately. A major part of this competence is the ability to read cases accurately.

It is crucial to recognize that "writing contains gaps—lots of gaps—from which the writer omits information that is necessary to understand the logical flow of ideas. Writers assume that the reader has knowledge to fill the gaps."[109] Judges write for lawyers, not law students. They assume the intended readers, the lawyers, have the requisite knowledge to understand the opinions. Law students, at least beginning law students, do not have that knowledge. They must acquire that knowledge to be able to read the potentially relevant opinions competently. Socratic dialogue is an ideal way to impart that knowledge so that students can read the cases knowledgeably in order to analyze and synthesize them, with all that that implies.

It is only after these skills are adequately developed that a sufficient foundation has been laid for the student to be a sophisticated problem solver for the client. In other words, it is only after the set of specific skills has been developed that giving the students the opportunity to apply those skills in an experiential setting will be most effective. In order for students to become effective lawyers, they must practice activities that do not constitute lawyering itself, but will facilitate their ability as lawyers when that activity is applied. Looked at from this perspective, the question becomes which method is most effective at teaching those foundation skills—Socratic dialogue or experiential learning.[110]

[109] WILLINGHAM, *supra* note 74, at 23.

[110] If one concludes, as I do, that Socratic dialogue is more effective, then a second question arises—how far into the curriculum can Socratic dialogue continue to be effective? *See infra* text accompanying notes 131-36.

What critics favoring experiential learning fail to credit is that Socratic dialogue does create a context that enhances learning. Each case studied has a fact pattern against which the discussion of law takes place. Traditional law school learning does not consist of professors assigning the Restatements of Contracts or Torts and then asking students to memorize the rules contained therein and master what they mean. To the contrary, the students are given a fact pattern in each case they study and then they are shown what the law is (and often how it developed) and how it applies to the facts of the case.[111] In other words, students can proceed one step at a time, at a pace that does not overwhelm them. While not every case creates a scenario in which every skill a lawyer needs to possess may be addressed, the totality of cases in each course will provide numerous opportunities for a professor concerned about these skills to address them with the class.

Briefing the cases is the most effective way of teaching these skills. It not only allows the students to break the skills being mastered into small enough building blocks to be mastered, it also allows for deliberate practice. Within the context of learning foundational skills, that means that students can attempt a brief, see what they did wrong, and try to correct for this in the next set of briefs. By using Socratic dialogue to focus on analysis and synthesis, which even critics such as the *Carnegie Report* and *Best Practices* admits are effective for this purpose, students have an opportunity to repeat this exercise. Further, with feedback from the professor, the students can discover the weaknesses in their briefing skills and focus on those in the next set of briefs.[112] It is important to focus on these particular

[111] I recognize that the facts that the court sets forth in the opinion are a distilled version of what lawyers will face in practice and that if a professor goes no further than those facts students will not learn about the indeterminacy of facts in real life. There are two factors to consider in dealing with this criticism. First, it is incumbent on faculty to point out to students how the facts are determined in a case, whether it is a trial court opinion or an appellate opinion. This gives the professor an opportunity to discuss the indeterminacy of facts and introduce students to the concept. Second, there is a foundation issue. Mastering the ability to apply the law to the facts of a case is separate from the issues involved in discovering facts. Without the ability to apply the law to the facts, the students will not know what facts they need to look for.

[112] I do not want to overstate my argument. Ericsson et al. state that it takes 10,000 hours of practice over ten years to reach true expertise and that individualized feedback is necessary. Ericsson et al., *supra* note 108, at 368. No matter how intense law school may be, students are not going to engage in 10,000 hours of deliberate practice, and law school is

skills, rather than diluting them, so that they can be improved upon through deliberate practice.

Then, as students gain sufficient mastery of a skill, the next set of skills can be introduced. The students' mastery of the skill need not be complete before the next set of skills is introduced. In fact, ideally the next set of skills can be used to reinforce the previous set of skills. For example, in dealing with issues involved in the indeterminacy of facts, professors should explore how each possible set of facts will impact the case, requiring the students to set forth their analyses precisely.

There is another factor—one that proponents of contextual or experiential learning have missed—that substantially favors the effectiveness of Socratic dialogue over experiential learning in teaching students the foundation skills I have listed above. That factor is the crucial need for students to master metacognition as an integral part of being a good lawyer. Metacognition requires introspection. Students must explore the way they think.[113] Socratic dialogue, if done skillfully, has at its core the students' thought processes and forces them to figure out why they came to the conclusions they reached. It is ideally suited to foster mastery of metacognition.

Without mastery of the foundational skills, students cannot make effective decisions on behalf of their clients. It is only after students have mastered the basic skills that they can meaningfully start to make decisions on behalf of their clients.[114] Given the impor-

not going to extend for ten years. Nonetheless, simple awareness of these principles means that they can be incorporated into teaching and mentoring to create a more effective teaching style.

[113] *See supra* text accompanying notes 69-72.

[114] The reason this is so is based on how learning takes place and how novices become experts. Students learn by combining information from the environment, such as what they are being taught or what they are experiencing, with information from long-term memory. This takes place in that portion of the mind known as working memory. *See* WILLINGHAM, *supra* note 74, at 10-14. However, working memory serves as a bottleneck in the process. People can only maintain so much information in their working memory at one time. Experts have better analytical skills than novices because they have a greater degree of knowledge in their long-term memories, but even more importantly, they have knowledge of structures and processes in their long-term knowledge. Because this knowledge resides in long-term memory, it does not create a bottleneck in working memory. Experts can call on these processes to interpret data they receive from the environment. *See* WILLINGHAM, *supra* note 74, at 97-111.

Within the law school context, I am suggesting that students will be able to better concentrate on determining what decisions they make that will best serve their clients if they

tance of metacognition in mastering the foundational skills, it is crucial that pedagogical techniques be used that foster the introspection necessary for mastery of metacognition.[115] For the reasons I have just stated, I contend that Socratic dialogue is best suited to this task.

In conclusion, the criticism that Socratic dialogue is not as effective a teaching method as experiential learning is erroneous. It fails to recognize adequately that some skills are foundations for other skills, and that certain teaching techniques may work better for foundational skills than others. I do not want to overstate my argument with regard to this last statement. Every professor has different strengths and weaknesses for teaching different materials. It may well be that for any given professor experiential learning works best, while for other professors Socratic dialogue is best suited to their teaching strengths. The critical point is that there is nothing intrinsic to Socratic dialogue that makes it inferior to experiential learning with respect to teaching foundational skills. It is the individual professor's style and abilities that will determine the efficacy of any particular teaching technique rather than the intrinsic superiority of the technique.

V. A LAW SCHOOL'S CULTURE FOSTERS PROFESSIONALISM, NOT ITS CHOICE BETWEEN THE SOCRATIC DIALOGUE OR EXPERIENTIAL LEARNING AS ITS CURRICULUM

All of the above is not to say that a proper environment—emphasizing that a lawyer is a problem solver who must be ethical and committed to justice—should not be created from the start. However, nothing in the use of Socratic dialogue prevents the professor, or the curriculum, from creating such an environment. Law

have achieved some level of mastery of the foundational skills of textual exegesis and the ability to analyze and synthesize cases, which skills include rule choice, fact development, contextual analysis, narrative development, and policy analysis. If they have achieved this level of mastery, they can then focus on how to learn how to make decisions on behalf of their clients. If, in contrast, they do not have this level of mastery, then they will be much less efficient and effective in making these decisions because they will have to continually derive this information in working memory.

[115] It may seem odd for me, in a paper where I talk about narcissistic students, to say that the students need to be introspective in their first year and perhaps second year but self-absorption is not synonymous with introspection.

schools should emphasize the primacy of the client, as well as other professional obligations, early in the students' academic careers, preferably starting at orientation. However, there are ways to do that without distracting from a pedagogical technique so well suited to fostering metacognition. In fact, I would go further than this statement. The key to fostering the professionalism that should indisputably be the goal of legal education is to foster a culture that pervades the entire law school environment. Most important, fostering a culture of professionalism is not a function of the curriculum; it is a function of the faculty inside and outside of the classroom. If the faculty does not have such a commitment then no curricular structure will compensate for the lack of such a commitment; if the faculty at a law school is committed to establishing these precepts, then it is likely that students will learn these lessons regardless of the curricular structure.

There are several aspects to professionalism, but I would like to focus on one in particular, which is a focus of the *Carnegie Report*—whether law schools place sufficient emphasis on achieving justice.[116] The *Carnegie Report* states that it is concerned not only that law schools do not place sufficient emphasis on creating a culture of justice, but also that Socratic dialogue contributes to the deficiency.[117]

In addressing this issue, I want to make two things clear. First, I concur wholeheartedly that a key portion of being a professional lawyer is a commitment to justice and the public good. Second, I also agree that law schools have cultures and that a particular school's culture can have a major influence on how its students view the profession. The scholarship is rife with stories of how a law school's culture can change students' perspectives of the law and what kind of careers they may seek. The usual story is about how students come in idealistically and that the law school's culture pushed them in the direction of corporate law.

[116] The *Carnegie Report* cites with approval the 1996 report of the Professionalism Committee of the American Bar Association's Section of Legal Education and Admission to the Bar, which characterizes professional lawyers as being dedicated to "justice and the public good." SULLIVAN ET AL., *supra* note 2, at 126.

[117] In discussing law school pedagogy, the Report states that Socratic dialogue sends the "tacit message . . . that for legal professionals, matters of justice are secondary to formal correctness." SULLIVAN ET AL., *supra* note 2, at 58.

Richard Kahlenberg, in *Broken Contract*, summarizes the process as follows.[118] He starts by asking how it was that so many students could start law school highly idealistic and end up working for corporate law firms. He states that a transformation takes place during law school that results in students who were initially interested in effectuating social change deciding to work for corporate law firms.[119] He ultimately concludes that the belief that it was important for the fortunate to give back to society was one that "most of my colleagues at H[arvard] L[aw] S[school] had ceased to find credible" and that such cynicism had been taught, at least in part, by the faculty.[120] Kahlenberg writes that he and the other members of his class did not believe the "graduation rhetoric" about the need to solve the world's problems "because we were taught, directly and indirectly, not to believe it."[121]

The culture at Harvard Law School, a function of the faculty's attitudes both inside and outside the classroom, led students not to believe in justice as part of the law's calling. Kahlenberg's lament is hardly alone,[122] nor can there seriously be any doubt that the culture

[118] RICHARD D. KAHLENBERG, BROKEN CONTRACT (1999). Kahlenburg would not agree with the central thesis of my argument, that Socratic dialogue is an essential part of the law school curriculum. He is critical of the Socratic dialogue throughout his entire discussion of his law school career. Nonetheless, that does not undermine my reliance on the central thesis of his book, that the culture of the law school has a profound influence on its studentsand that the faculty plays the central role in communicating that culture to the students.

[119] *Id.* at 5.

[120] *Id.* at 231.

[121] KAHLENBURG, *supra* note 118, at 234.

[122] *See, e.g.*, Brett Deforest Maxfield, *Ethics, Politics and Securities Law: How Unethical People are Using Politics to Undermine the Integrity of Our Courts and Financial Markets*, 35 OHIO N.U. L. REV. 243, 244 (2009) ("Law school seemed to kill the idealism of most of my fellow students who had come to law school to change the world for the better and now just wanted to make money."); Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1202 (2008) (asserting that "[t]he most highly-ranked law schools are research institutions that adhere to a curriculum that has historically been designed to prepare students for work in a large law firm setting"); Jenée Desmond-Harris, *"Public Interest Drift" Revisited: Tracing the Sources of Social Change Commitment Among Black Harvard Law Students*, 4 HASTINGS RACE & POVERTY L.J. 335, 387-88 (2007) (noting that "assimilation to norms of H[arvard] L[aw] S[chool]" is accompanied by the "tendency to lose interest in social change careers"); Robert Granfield, *Constructing Professional Boundaries in Law School: Reactions of Students and Implications for Teachers*, 4 S. CAL. REV. L. & WOMEN'S STUD. 53, 70 (1994) ("For most students, the completion of first year studies signal[ed] a removal of any involvement in the law as a search for justice [and] . . . cynicism was pervasive among stu-

of a law school can affect its students' beliefs.

What can be doubted, however, is whether it is the school's curriculum or its faculty that set the culture. I will suggest that it is the school's faculty that sets the culture. It does not matter how the curriculum is structured if the faculty continue to tell the students that justice is unimportant. The same lesson can be learned in a Socratic dialogue setting as in an experiential learning setting.

A school might attempt to demonstrate its commitment to justice in many ways. One method might be to introduce a mandatory course dedicated to exploring issues of justice in the legal profession. This, of course, creates several different questions that must be answered. When is the course to be offered? If it is in the first year, will there be any follow-up? If it is offered in the second or third year, will that be too late to offset whatever corrosive effects the first year of law school may have had on the students' sense of justice? Should there be a mandatory Justice course and a mandatory Justice component in each required course, as well as large enrollment electives?

The truth is that none of these answers will matter to the students if the faculty does not make a concerted effort to make justice an integral theme throughout the entire law school experience. If a mandatory Justice course is offered, unless the faculty reinforces this theme throughout the law school experience there is a danger that the students will come to view justice as a compartmentalized component of the curriculum—just another course in which to strive for an A—and fail to realize its importance to professionalism. So assume that in order to resolve that concern, a Justice component is mandated in every required course, as well as selected non-required "core" courses. If the faculty do not take this mandate seriously, the mandate will be meaningless. If the faculty member is teaching this material solely because of a mandate, he or she is unlikely to spend much time on it. Even worse, the faculty member may very well, through body language or attitude towards teaching the material, send the message that this material is not very important, thus undercutting the very purpose of the mandated material.

In all these scenarios, it is not the curriculum that will determine the success or failure of impressing the student with the importance of justice as a component of professionalism. Rather, it will be

dents.").

the faculty's attitude towards sending this message. Within virtually every course there is an opportunity to include a justice component if the professor feels that it is important. Torts, Contracts, Criminal Law, Civil Procedure, and Constitutional Law, just to name a few, all require discussion of policy questions in which a discussion of what the appropriate policy should be can include issues of justice.

Not only is that discussion not intrinsically inhibited by Socratic dialogue, Socratic dialogue provides a unique opportunity to discuss such issues. This is because within Socratic dialogue the students are being encouraged to explore issues from all sides rationally. Placing a discussion of justice in this context precludes a student from cutting short the dialogue by simply stating that the student believes that a particular position is the just one. Rather, placing the discussion in the context of a Socratic dialogue requires the students to explore why they believe the way they do. In other words, there is nothing in Socratic dialogue that precludes a discussion of justice or other aspects of professionalism. Rather, the extent to which these aspects of professionalism will be emphasized is dependent on the attitudes of the faculty teaching them and the quality of the teaching.

One can see the accuracy of this observation by looking at the implementation of ethics courses in law schools and their failure to achieve the goal of substantially raising the level of ethics in the legal profession. The extensive involvement of lawyers in the Watergate scandal in the early 1970s was the impetus for the American Bar Association regulation that Professional Responsibility be taught in law schools,[123] which led, for the first time, to all law schools offering a course in Professional Responsibility by the late 1970s.[124] That this failed to adequately elevate the ethics of the legal profession can hardly be disputed. Indeed, one of the major concerns of the *Carnegie Report* is fostering a higher degree of legal ethics.[125] The *Carnegie Report* recognizes that one of the problems with creating a discrete Professional Responsibility course was that it cabined the issue of legal ethics away from the rest of the curriculum, with the result that ethical issues ended up being segregated from the rest of the cur-

[123] The current rule so requiring is Standard 302(a)(5).

[124] Laurel S. Terry, *U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOB. STUD. L. REV. 463, 474 (2005); Arnold Rochvarg, *Enron, Watergate and the Regulation of the Legal Profession*, 43 WASHBURN L.J. 61, 68 (2003).

[125] SULLIVAN ET AL., *supra* note 2, at 148-51.

riculum. In other words, the failure of the culture of the law schools to emphasize ethics in the entirety of the curriculum contributed to ineffectiveness in trying to inculcate a culture of ethicality.[126]

Just as important, there is nothing in the type of curriculum, practical or otherwise, that guarantees that the professor will be ethical. The creation of a culture of ethics depends on the entire faculty creating such a culture, not on the types of courses the faculty teaches. Consider, for example, the following plaint made by a law student. She was speaking of her Contracts professor. " 'You have to be sneaky,' said the Professor today. Translation: You have to lie." It would make no difference whether the professor who communicated such a lesson were teaching in a classic Socratic dialogue or in a clinical setting. In either setting, it would be the lesson the professor was teaching that had the greatest effect, not the type of course that was being taught.

Finally, the misadventures of graduate business schools demonstrate that it is not Socratic dialogue that creates problems in ethics. Some of the finest graduate business schools utilize the case study method as the primary curriculum. Harvard Business School describes the case method as follows:

> When students are presented with a case, they place themselves in the role of the decision maker as they read through the situation and identify the problem they are faced with. The next step is to perform the necessary analysis—examining the causes and considering alternative courses of actions to come to a set of recommendations.[127]

[126] To be sure, there were undoubtedly other factors at work in this failure as well. As the *Carnegie Report* points out, other factors in law school culture, such as the competitiveness created by a grade curve may contribute to a failure of ethics. *Id.* at 31. Certainly, societal norms play a role as well. With numerous reports of widespread cheating in academia prior to law school, it cannot be a surprise that law students may already be ethically challenged by the time they get to law school. *See* DAVID CALLAHAN, THE CHEATING CULTURE 196-219 (2004). It may well be that by the time that students get to law shool, their characters are sufficiently formed that emphasis on ethics cannot be terribly effective. Unless the entire faculty places an emphasis on ethics, merely creating a course on Professional Responsibility will not inculcate an ethical character in the student body by itself.

[127] *How the HBS Case Method Works*, HBS, http://www.hbs.edu/mba/academics/howthecasemethodworks.html (last visited June 30, 2011). A similar description can be found at other business schools. *See, e.g.*, *Case Method: Academics: MBA: Darden*

This is similar to the simulations that the *Carnegie Report* suggests will improve law school education.[128] There is no evidence that this difference in curriculum has led to more ethical behavior in business people with MBAs than in lawyers. One need only look at the business scandals in the last ten years, such as Enron or the numerous scandals on Wall Street to refute the idea that a difference in the curriculum will make the difference in ethical behavior. Indeed, business schools are sufficiently concerned about their students' ethics that they are altering their curricula to include more emphasis on ethics.[129] In other words, the mere use of the case study, or in law school, the case conference model, is no guarantee of improved ethical behavior among graduates. Rather, it is the message sent by faculty and administration—the culture of the law school—that has the potential for the greatest effect on law students.

VI. THE ROLE OF THE SOCRATIC DIALOGUE BEYOND THE FIRST YEAR CURRICULUM

Given that Socratic dialogue is an effective technique for teaching foundational skills, the other question that arises is for how much of the curriculum is the use of Socratic dialogue appropriate. Certainly its use in the first year, in which students are striving to master foundational skills, is appropriate. The question is more one of to what extent its use is appropriate in the second and third years. LSSSE[130] data indicate growing student dissatisfaction with law schools as they progress through the curriculum. Much of that dissatisfaction arises from the continued use of Socratic dialogue throughout their entire law school careers. Students report that by their third year they have mastered the skills necessary for case analysis and

School of Business, DARDEN.VIRGINIA, http://www.darden.virginia.edu/html/standard.aspx?menu_id=72&styleid=2&id=812 (last visited June 30, 2011).

[128] The *Carnegie Report* suggests the increased use of lawyering courses in the first year curriculum. SULLIVAN ET AL., *supra* note 2, at 194-200. Note, however, that the use of the case study method has been criticized. *See* ROBERT K. YIN, CASE STUDY RESEARCH: DESIGN AND METHODS 14-19 (4th ed. 2009).

[129] David A. Kaplan, *MBAs Get Schooled in Ethics*, FORTUNESMALLBUSINESS (Oct. 19, 2009, 9:01 AM), http://www.fortunesmallbusiness.com/2009/10/16/news/economy/mbas_ethics_classes.fortune/index.htm.

[130] The Law School Survey of Student Engagement. These surveys can be found at http://lssse.iub.edu.

synthesis and are bored.[131]

This indicates two potential, yet different problems. Does the boredom result from true mastery of the foundational skills so that continued use of Socratic dialogue is truly counterproductive? Or does it result from the ineffective use of Socratic dialogue, either because the teacher cannot use it effectively or because it is being used for purposes it is not well-designed to teach? The answer is probably a combination of both. Certainly, one can reasonably expect that law students will gain a reasonable mastery of these skills at some point after the first year. At that point, continued use of Socratic dialogue when the primary purpose of the professor is dissemination of information is counterproductive. There are more efficient ways to disseminate information than Socratic dialogue. Similarly, if the purpose of the course is to teach practical skills, there are better techniques than Socratic dialogue. The conclusion thus becomes inescapable that as students advance through the law school curriculum, other teaching techniques should be utilized.

That conclusion, however, leaves open a question: how quickly should the Socratic dialogue be phased out? Reasonable people may differ on this point; however, I believe there is a need for Socratic dialogue to have a significant, although not necessarily dominant, position in the second year curriculum. I believe it even has a place in the third year curriculum, although it should probably be much diminished. How much presence it should have in the second and third year curricula is not susceptible to a definitive answer. The answer will, of necessity, differ from school to school, depending on the mission of each school as well as the quality of its students. However, in all schools, even in the schools with the best students, it is unlikely that students will have completely mastered the foundational skills by the end of the first year. The majority of students may well have mastered the basic skills of textual exegesis and the ability to analyze and synthesize cases. However, the degree of mastery at the end of the first year hardly represents the pinnacle of achievement in this area. There is much subtlety and nuance left to master.

This need for greater mastery was demonstrated in the remarks of Professor Suzanna Sherry at the 2009 Association of American Law Schools Annual Meeting. Speaking on a panel entitled, "Is

[131] SULLIVAN ET AL., *supra* note 2, at 75-77.

American Constitutional Law in Crisis?," Professor Sherry discussed the effect of placing Constitutional Law in the first year curriculum rather than the second year.[132] She stated that first year students are "intellectually immature in the discipline of law" and that "they are likely to see in black and white instead of shades of gray."[133] She stated that it takes them a while to become sufficiently sophisticated to see the shades of gray and that they were insufficiently sophisticated to achieve that level in their first year of law school.[134] She argued that this intellectual immaturity precludes them from an appropriate understanding of Constitutional Law and that they need to master legal doctrine in other courses before they can properly proceed to the proper understanding of Constitutional Law.[135] She concluded her remarks by recommending that Constitutional Law be taken out of the first year curriculum.[136]

In other words, there is only a certain degree of mastery that can be achieved by students in their first year of law school. Most students enter as novices to the discourse, and there is a limit to how much progress can be made during the first year. After they have mastered the basics of the foundational skills, there is still room for further development and refinement of these skills. Socratic dialogue can play a major role in this refinement for all the reasons that it is effective in teaching these skills to the students when they are novices. Thus, it plays an appropriate role in the curriculum beyond the first year for faculty who choose to use it for those purposes. While its role should be diminished and there should be increasing emphasis on other teaching techniques of the sort contemplated by the *Carnegie Report* and *Best Practices* in the upper level curriculum, there is still room in the second and third years for courses utilizing Socratic dialogue that will continue to refine students' skills.[137]

[132] Remarks of Professor Suzanna Sherry, "Is American Constitutional Law in Crisis?," Association of American Law Schools Annual Meeting, January 8, 2009.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] As an example, courses in Computer Law readily serve such a function. The issues that arise with the context of the rise of the digital age and the internet create cutting edge issues. These issues take established policy and apply it to circumstances not originally envisioned. This requires students to be able to read precedents and statutes in a sophisticated manner beyond what they are likely to master in the first year. As a result,

VII. THE POTENTIAL DAMAGE TO BE DONE BY THE *CARNEGIE REPORT* AND *BEST PRACTICES*: THEIR ERRONEOUS FOCUS ON THE SOCRATIC DIALOGUE MISLEADS LAW SCHOOLS AWAY FROM THEIR TRUE PROBLEM—THE NEED TO PLACE PRIMACY ON ATTRACTING GOOD TEACHERS

There is no doubt that the critique of law school instruction by the *Carnegie Report* and *Best Practices* is thoughtful and well intentioned. Further, to the extent that such thoughtful critiques are a spur to law schools not to let inertia guide their curricula and to look for means by which to improve their curricula, they should be applauded. Nonetheless, the desirability of thoughtful critiques does not mean their conclusions should be unthinkingly adopted. Rather, they should also be painstakingly vetted to determine their validity.

I believe that the *Carnegie Report* and *Best Practices* miss the mark with their recommendations for two major reasons. First, as explained above, many of the failures in instruction that they are concerned about are the failure not of the teaching techniques used in the curriculum—primarily Socratic dialogue—but rather the failures in the faculty utilizing this technique. Second, law schools do not select for good teachers; law schools essentially select for excellent students who are capable of becoming excellent scholars. I will address each of these points seriatim.

Now it is possible that, as *Best Practices* alleges, the majority of law school faculty are not skilled in using Socratic dialogue. However, there is no reason to believe that faculty who are ineffective at using Socratic dialogue would be any more capable under some other method of teaching. In fact, there is reason to think they might very well be worse. Law schools do not dedicate a great deal of resources to training professors how to be effective teachers. At least the Socratic dialogue has been modeled for law faculty. If they cannot teach well using an approach that has been modeled, there is no reason to think they are likely to be effective teachers using some

Computer Law and related courses are wonderful instruments for measuring students' ability to analyze and synthesize cases as they relate to law and social policy and increase students' mastery. Socratic dialogue is especially well-suited to this task, even in the third year. Nor is Computer Law unique in this regard.

other method for which there has been no training.[138] In other words, the attempt at curricular reform is a systemic solution for an individual problem. In such instances, systemic solutions are inefficient at best and ineffective at worst.

Although earlier I criticized *Best Practices* for starting from the presumption that the majority of faculty are poor teachers, it is necessary to realize that this might indeed be so. Law schools do not select for good teachers. Law schools essentially select for excellent students who are capable of becoming excellent scholars. Neither the ability to be an excellent student nor the ability to be an excellent scholar implies the ability to be a good teacher. Further, there is no reason to think that faculty who are poor instructors using their preferred choice of teaching techniques will be any more effective using a different technique urged upon them by administrators or other faculty in a rush to adopt the latest, greatest trend.

It is the quality of the teacher that will determine how much students learn, not the techniques that they use. That is not to say that technique is unimportant; however, a poor teacher will not effectively educate students regardless of the technique he or she uses. Until law schools truly make selecting for excellent teachers the linchpin of their hiring philosophies instead of merely paying it lip service, changes in curriculum will merely result in improvement at the edges, if at all, rather than making substantial improvements.

The law school hiring process is dominated by a search for credentials. The vast majority of law professors hired matriculated at elite law schools.[139] Of those who matriculated at elite law schools, the most sought after are those who receive prestigious clerkships or have worked for prestigious firms. Such applicants are the students who did well in their first year of law school and made law review. None of these credentials are an accurate proxy for the successful ability to teach, nor should they be expected to be. The ability to

[138] It is possible that some faculty might improve if they were to change their teaching techniques. However, there is no reason to think that this would be universally true or that it would even be substantially true.

[139] Professor Randolph Jonakait cites a study by Brian Leiter showing that from 1996-2001, three quarters of law faculty starting tenure track jobs came from 19 schools, with a third of them coming from three schools, Harvard, Yale, and Stanford. Randolph N. Jonakait, *The Two Hemispheres of Legal Education and The Rise and Fall of Local Law Schools*, 51 N.Y.L. SCH. L. REV. 863, 901-902 (2006-2007).

score highly on a final exam or a paper indicates the ability to understand material at a certain level and communicate that mastery to a sophisticated reader. Similarly, law clerks and practitioners are writing for a more sophisticated audience than first year law students. Their ability to write for those audiences does not necessarily translate to an ability to communicate effectively with novices to the discourse.

At the same time, once faculty are hired, law schools put a strong emphasis on scholarship. Good teaching is not enough to qualify a professor for tenure. There must be a strong record of scholarship. The emphasis on scholarship is so overwhelming that applicants for faculty positions make a point of asking what accommodations will be made to facilitate their scholarship. I have served on the faculty appointments committee for my school for several years and attended the AALS recruiting conference held each November. Every faculty candidate we have interviewed in recent years has asked what accommodations will be made to facilitate their scholarship. The anticipated accommodation is that they will receive a light teaching load so that they can engage in the scholarship necessary to achieve tenure. I will suggest that when law schools tell young faculty that they will lessen their teaching load so that the young faculty can write, law schools make it clear that teaching is of secondary importance.

That is not to say that scholarship is unimportant. The kind of mind that engages in inquiry and a desire to solve problems is likely to show the same kind of inquisitiveness necessary to good teaching. Additionally, law faculty serve many different functions. They serve as valuable consultants both to private parties and government. Their research and scholarship can make valuable contributions to the legal profession. Also, a law school faculty's scholarship can contribute to the prestige and influence of the law school itself. Therefore, one can readily understand the intrinsic and extrinsic value of scholarship to law faculty and law schools.

Nonetheless, the ability to produce quality scholarship is not an accurate proxy for the ability to teach effectively. Similar to the skills necessary to excel in law school, clerkships, and practice, effectiveness at scholarship involves the ability to communicate effectively with an audience that is sophisticated and experienced in the issues being addressed. This does not automatically translate to the ability

to communicate effectively with tyros.

The ability to effectively teach law students is, at its core, the ability to communicate with newcomers to the discipline. This involves two different facets. First, one must teach novices the ability to think within certain disciplines.[140] Second, one must effectively transmit information. Moreover, both of these facets must often be taught simultaneously.

The ability to do this effectively initially requires the ability to take sophisticated, complex materials and break them down into component parts that students can master a part at a time. Then the teacher must be able to recombine these basic building blocks. The recombination of basic building blocks into a more complex structure serves two purposes. First, it teaches the newcomer how the various components fit together. Second, by recombining the components into a more complex scheme, the teacher helps the students understand the nuances involved in the doctrine or skill being learned. Ideally, the teacher not only demonstrates how the components fit together, but also provides guidance to students as to how they might restructure the components so that students can fashion new insights as a result of understanding the individual components and then discovering how they fit together.[141] The ability to do this requires the teacher to not only understand the subject matter deeply, something most faculty have mastered, but more importantly, to have a deep understanding of his or her own metacognition. The teacher needs to be able to understand just how it is that he or she mastered the subject matter so

[140] I am not speaking solely of the ability to "think like a lawyer" in the traditional sense. I am referring to the practice skills necessary to be an effective lawyer. *See supra* text accompanying footnote 33.

[141] For example, towards the end of my Constitutional Law course, the class addresses the issue of Congressional power to provide remedies pursuant to Section 5 of the 14th Amendment. Specifically, we compare and contrast three cases, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003); and *Tennessee v. Lane*, 541 U.S. 509 (2004). Each of these cases explores the constitutionality of a Congressional statute enacted under Section 5 and arguably the results of these cases are, at best, inconsistent. By the time students study these cases, they can integrate analysis of Congressional powers, federalism, separation of powers, judicial deference, and different levels of equal protection into their discussions. It is not just a matter of these cases being an excellent opportunity to review a year's worth of work. What is crucial is that the students can discuss these cases in much greater depth and with greater insights for having mastered the earlier doctrines in depth and then understanding how they fit together in this specific context.

deeply. Then the teacher must be able to lead the students on a similar journey, not just within the context of showing the students the route that the teacher traveled but, much more importantly, teaching the students how to discover their own routes.

Depth of mastery of a subject area does not necessarily correlate with the ability to teach the subject matter. Within the sports world, it is understood that very often the best athletes do not make good coaches or managers. There may be a variety of reasons for this, but two stand out as reasonable hypotheses. First, for some athletes the particular skill that they display comes so naturally that the athlete does not have to question what it is that allows them master the skill.[142] Second, because they have achieved such high levels of mastery, they may be impatient with those who do not display those levels of mastery. In other words, mastering a skill does not necessarily impart the ability to teach others how to master that skill.

It is true that in the classroom we are talking about the ability to learn rather than mastering a physical skill. Yet there can be no doubt that for some people the ability to master learning the law comes more easily than to others. For a student for whom mastery comes quickly, there may not be the need for the kind of introspection and emphasis on metacognition that the student having more trouble might need. Further, one to whom such mastery came "naturally" might be impatient with those for whom it does not come as quickly. For students to whom this description applies there is no reason to think that they would be good teachers. They are likely to be unsympathetic to students having trouble understanding new material. Worse, they may well be unable to effectively communicate to the students how to master the material, leaving it to the students to somehow master the material. In fact, I will suggest that much of the scholarship criticizing law school education is really criticism of faculty who cannot communicate to the students how to master the material or are impatient and do not want to take the time to communicate to the students how to master the material.

This is not to say that brilliant law practitioners or theoreticians cannot be effective, even superlative, teachers. Undoubtedly everyone can think of more than one example of a brilliant practi-

[142] That is not to say that star athletes do not work hard to master those skills. The greatest athletes are renowned for their work ethic.

tioner or theoretician who is also a superb teacher. But it does make clear that the two sets are not identical or even that there is or should be significant overlap. Since there is no reason to think that brilliance as a student or lawyer is a proxy for effectiveness as a teacher, law schools' failure to place emphasis on teaching skills as the primary (or at least an equally important) requirement in hiring means that there are indeed likely to be many faculty who are not effective teachers. Teachers lacking the ability to effectively communicate the skills that are necessary for students to master the material will be ineffective regardless of technique. There is no reason to think that they will be more effective if only they change their teaching technique.[143] Nor is there reason to think that schools will change their emphasis to good teaching, no matter how much lip service they may pay to this suggestion. The *Carnegie Report* itself makes this clear. The *Report* states that the uniformity of background for the vast majority of law faculty results in replication of the desire for prestige within the academy and that this leads to emphasis on scholarship, rather than teaching.[144]

[143] One need not merely posit this on a theoretical basis. Evidence of this can be found in the fact that in recent years, there has been movement away from Socratic dialogue and increased emphasis on practical skills, including the huge growth of clinical programs. Yet, as there has been increased emphasis on practical skills, student mastery of lawyering skills apparently has not increased to a satisfactory level. In fact, if anything, criticism of law school pedagogy has increased. Note the recent publication of the *Carnegie Report* and *Best Practices*, both of which are highly critical of existent law school pedagogy.

One is almost tempted to argue that the proponents of more practical skills' claims that they will improve law school education have it exactly backwards. After all, there has been a substantial increase in provision of practical skills in law schools and yet law school pedagogy has gotten worse, if the amount of criticism is any measure. What is the cure? More of what has not, to this point, solved the problem—emphasis on practical skills because what has not worked so far will surely work better if only it is applied in greater doses.

Of course, this argument is not really fair. In the last twenty years, there have been substantial changes in the legal profession that have reduced mentoring and required greater emphasis on law students' graduating with a greater ability to hit the ground running with respect to practice skills. In addition, students have changed. Substantial numbers of them come in seriously lacking skills in critical thinking, as well as the ability to read and write effectively. *See supra* text accompanying note 45. Given these changes in the environment, it is inappropriate to blame the increase on emphasis for practical skills for the continued dissatisfaction with legal education. In fact, I believe that the increase in emphasis has been productive. Nonetheless, I believe that it needs to take place after other foundational skills have been mastered.

[144] SULLIVAN ET AL., *supra* note 2, at 89-90. There is likely one further impediment to law schools quickly changing. Faculty are notorious for believing they are above average. Try

Finally, it must be remembered that law schools are more than simply vocational schools. They play a part in helping to shape the contours of law and society. Given that situation, it is appropriate for law schools to hire faculty who are eminently qualified to fill that role. There is no reason to think that faculty with those interests will be capable of carrying out the suggested mandates of the *Carnegie Report* and *Best Practices*. In fact, given the current problems allegedly created by undue emphasis on scholarship, it is likely that they will not. Thus, the legitimate values of the law school also act to make it more difficult to enact the changes called for by the *Carnegie Report* and *Best Practices*.

VIII. CONCLUSION

Law schools should not stand still with respect to improving the quality of their teaching. Even without the external impetus of such stimuli as the *Carnegie Report* and *Best Practices*, they should strive to improve the quality of instruction for their students. The *Carnegie Report* and *Best Practices* are thoughtful analyses and well worth reading, but they should not be taken as gospel. They should be explored, not venerated. These two works are substantially flawed with respect to their suggestion that the first year curriculum should substantially deemphasize the use of Socratic dialogue. This suggestion is based on a misguided criticism of Socratic dialogue as well as an inaccurate assumption about the efficacy of experiential learning vis-à-vis Socratic dialogue for first year students.

This is not to say that every teacher in the first year curriculum should be forced to use Socratic dialogue. Although I have spent a substantial amount of time on this paper defending the Socratic dialogue and the need to focus on analysis and synthesis skills, I recognize that not everybody teaches the same way. If faculty believe they are more effective teaching using a different style, there is no reason they should not use that different style. If the *Carnegie Report* and

this experiment. Gather all your faculty in one room. Then ask them to rank themselves as either being above average or below average as a classroom teacher. The odds are good that at least 90% of them will state that they are above average in the classroom. That means at least 40% of them are wrong. How likely is it that a faculty member who believes he or she is above average will be ready to engage in radical change that requires extensive labor at the expense of scholarship?

Best Practices cause a professor to think about what style is best suited to him or her, then they will have performed a very valuable function.

However, to the extent that they are read as suggesting that Socratic dialogue is somehow an inappropriate or inadequate teaching technique or that a curriculum that focuses on analysis and synthesis in the first year is somehow deficient and that both the technique and curriculum *must* be changed, they are misguided at best and likely to be counterproductive at worst. They set up strawmen of bad teaching and then talk about the need for new teaching styles.

I hope I have made two points clear: 1) Socratic dialogue is an effective means of teaching the skills that first year students need to learn; and 2) it is likely to be more effective in teaching first year students those skills than experiential learning. It must also be noted that students have changed over the years, and Socratic dialogue has been effective throughout all these changes. There is no reason to think this generation is so different that teaching must change to be effective. In fact, given the problems these students have, teaching by Socratic dialogue may be absolutely necessary.

As Lynne Truss puts it so succinctly in Eats, Shoots and Leaves,

> The printed word is presented to us in a linear way, with syntax supreme in conveying the sense of the words in their order. . . . All those conditions for reading are overturned by the new technologies. Information is presented to us in a non-linear way, through an exponential series of lateral associations.[145]

Given that this is how our students are now experiencing reading and writing and the importance of the written word to lawyers, we will need to redouble our efforts. The emphasis on reading is well-suited to Socratic dialogue.

Maybe *Best Practices* is right; maybe there are a large number of poor teachers who misuse Socratic dialogue. In that case, there is no reason to believe that such teachers will become any more effective using experiential learning techniques than Socratic dialogue. Transforming them into better teachers by changing the curriculum is

[145] LYNNE TRUSS, EATS, SHOOTS AND LEAVES 180-81 (2004).

a pipe dream. It is a systemic response to problems caused not by a flawed system but by individuals. Now, a systemic response that takes into account individual foibles can work. In fact, good systems must take into account individual foibles. There is no evidence that the new system will be better adapted to faculty members' foibles than the existent one.[146]

In 2007, the New York Times printed an article about curricular change at a number of law schools.[147] In his blog, Professor Brian Leiter posted a response to that article by Professor Pierce that was scathing in its criticism of the curricular reform described in the article.[148] It in essence stated there was nothing new under the sun; that the reforms were nothing new—they had been tried before and found wanting.[149] Professor Leiter then followed the statement with his own commentary. While I think that further experimentation with the curriculum to improve the law school educational experience is warranted, Professor Leiter's comments seem entirely appropriate to the first year curriculum. He states:

> The fact is that (1) being "trained to think like a lawyer"—which really means (a) honing analytical and argumentative skills of general applicability (legal reasoning is distinguished only by the fact that arguments from authority are not fallacious) in the context of (b) law-specific institutions, rhetoric, and categories—and (2) learning substantive rules and principles in different areas of the law, are tasks that law schools can actually discharge, and that good law schools do discharge. Certainly there should be substantial clinical opportunities (and a variety of them) and the like, but the perennial idea that law schools need curricular

[146] The solution to that problem is to either improve their teaching or get rid of them. As a practical matter, that is not likely to happen. A solution to that problem will likely need to be long-term. Law schools must put greater emphasis on teaching and selecting for good teachers rather than merely looking at credentials that provide no guarantee that an applicant will be a good teacher.

[147] Jonathan D. Glater, *Training Law Students for Real-Life Careers*, NY TIMES (Oct. 31, 2007) http://www.nytimes.com/2007/10/31/education/31lawschool.html?_r=1.

[148] Brian Leiter, *Brian Leiter's Law School Reports*, LEITERLAWSCHOOL, http://leiterlawschool.typepad.com/ (last visited July 25, 2011).

[149] *Id.*

> reform strikes me as being ill-motivated by any actual evidence.[150]

This strikes me as an accurate observation. The reason it is accurate can be found in, of all places, *Best Practices*, which states:

> A well-rounded legal education requires exploration of all of these domains, for textual exegesis, rule choice, fact development, contextual analysis, narrative development and policy analysis are all integral to sophisticated lawyering. Any of these domains can be explored in the format that is described by the term Socratic teaching, as that term is used in law schools.[151]

I could not have said it better myself.

[150] *Id.*
[151] STUCKEY ET AL., *supra* note 3, at 215.