

## Symposium

# Curricular Stress

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To begin on a personal note, I became dean at Vanderbilt with the declared purpose of working with the Law School faculty and campus administration to reform legal education. I was convinced, and remain convinced, that the traditional approach is seriously out of date and does a disservice to students who are preparing to practice law in the 21<sup>st</sup> century. When I found myself sitting in the dean's chair, however, I became aware of an entirely separate issue regarding the law students at my own institution. I realized that I was responsible for the welfare of some 600 young people. Quite apart from ensuring that they learned law, I needed to make sure that they negotiated the difficult transition from students to professionals with their physical and mental health intact, and to do what I could to preserve their idealism and enhance their sense of public responsibility, rather than encouraging them to become selfish, cynical owners of a monopolized occupational privilege.

This is, of course, precisely the issue to which the new AALS Section on Balance and this symposium are addressed. What I would like to explore here is the relationship between this issue, which I only confronted once I became a dean, and curricular reform, which is what motivated me to become a dean in the first place. It seems to me that the psychological damage that law school inflicts on some of its students, and the excessive stress that it imposes on nearly all of them, is partially the product of its outdated curriculum and pedagogic strategy. There are a number of other causes, to be sure, but some are entirely intractable, and others involve solutions that lie beyond the boundaries of our institutions. One reason to focus on the obsolescence of the curriculum as a source of stress is that we in the legal academy are responsible for generating this particular stress, and we can take action to change it if we have the will.

This essay identifies three types of stress that the curriculum imposes. The first is ideological stress, the stress that some students experience when exposed to a politically one-sided program that ignores or disparages their vision of law in favor of a rival vision. The second is the pedagogic stress all students experience in being subjected to a mode of instruction that is specifically designed to be stressful, and does so in violation of the 20<sup>th</sup> century discoveries about the way people learn. The third type of stress is ethical;

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while it results from the nature of the legal profession, not from law school, most law schools do nothing to confront or palliate it. Rather, they ignore it, and by doing so, make it more severe.

### **I. Ideological Stress**

The first form of stress to which the traditional curriculum subjects contemporary law students is ideological. Students begin law school with a wide variety of political views and personal predilections. Some are perfectly content with the social status quo, or primarily interested in finding a remunerative career, but others are idealistic, supportive of social change or committed to public service. The law can serve all these purposes and is, in fact, our primary means of mediating between them. It is a crucial mechanism for maintaining social order and facilitating commerce, and an equally crucial mechanism for effecting social change. When used to represent corporate clients or wealthy individuals, it is one of the most economically rewarding careers. But it is also a major modality of public service, qualifying students to be government officials, legislators, public defenders, community organizers, and public interest advocates.

Rather than including both these basic approaches to law, however, the traditional first-year curriculum chooses between them. Its overwhelming message is that real law and real lawyers maintain the status quo by resolving disputes between private parties. This message is built into the very fabric of the torts, contracts, property, and civil procedure courses, as they were designed by Langdell and his immediate successors, and as they continue to be taught at the present time.<sup>1</sup> Criminal law deviates only slightly from this pattern, focusing primarily on the way that private persons are prosecuted and defended for specific offenses. The only public law course typically taught in the first year is Constitutional Law, and many law schools attempt to assimilate this course to the private law model of the other first year courses by limiting it to structural issues—separation of powers, federalism, and the Commerce Clause—while deferring the allegedly less legal aspects of the subject, such as the Bill of Rights, equal protection, and due process, to the upper class curriculum.

This approach may be suitable for some law students, but it is bound to generate stress for many others who come to law school for different purposes and view law in a different light. For them, social justice legislation, human rights, the regulation and control of business corporations, and the protection of the ordinary citizens from private or government oppression are the essence of law. Their point of view is just as accurate and just as legitimate as the view that law is designed to maintain the status quo by resolving private disputes; one need only look at the work produced by legal scholars and other academics

1. Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Univ. of North Carolina Press 1983); Russell Weaver, *Langdell's Legacy: Living with the Case Method*, 36 *Vill. L. Rev.* 517 (1991); See William LaPiana, *Logic and Experience: The Origin of Modern Legal Education* (Oxford Univ. Press 1994).

to be persuaded of this point. Yet this major aspect of law is not only excluded from the bulk of the first year curriculum, but systematically disparaged.<sup>2</sup>

For the most part, the exclusion, and certainly the disparagement, is implicit rather than explicit, but this only makes the problem more severe. If the faculty openly declared that public law was inferior to private law, that doctrinal coherence was more important than social justice, and that lawyers who didn't represent well-heeled private clients weren't real lawyers, students who disagreed would at least perceive that they were being fed a biased message, and would thus be partially empowered to fight back, or at least resist. Instead, the message is conveyed as objective reality, an aspect of conceptual rigor and the essence of what it means to "think like a lawyer." First-year law students naturally want to understand what law really is and how to think in its terms. For those students who come to law school with a different image of the law in mind, this message produces stress because their desire to master the subject matter and their desire to serve social purposes have been unnecessarily but decisively set in opposition to each other. This is certainly the opposite of balance, in several senses of that term.

To be sure, many law professors—probably a substantial majority—have liberal rather than conservative political views and some infuse these views into their first-year classes. They may talk about contracts of adhesion, civil-rights-based tort claims, landlord tenant law, and class action litigation. But these specific issues are set in a larger frame of private dispute resolution, with the principal, 20<sup>th</sup> century efforts to achieve social change and social justice through law consigned to a nether world beyond its boundaries. Moreover, most law professors, being fair-minded, are reluctant to proselytize to a captive audience, and quite properly limit the explicit political content of their courses. The problem is that this leaves the implicit message uncontested.

Moreover, the fact that many law professors are political liberals cannot address the underlying problem because the curricular bias toward private law doesn't fully align with one political position. Resolving private disputes is certainly not antithetical to liberal politics, and collective action can be used in the service of conservatism as well as liberalism. There is certainly no lack of conservative legislators, conservative political action groups, and pro-business legislation.<sup>3</sup> While the implicit message of law school is in part political, it is more basically old-fashioned, self-serving and constrained. It seeks to preserve the outmoded idea that law is coherent and autonomous by rigidly excluding the momentous developments that put the lie to this conception.<sup>4</sup> The first-

2. Elizabeth Mertz, *The Language of Law School: Learning to "Think Like a Lawyer"* (Oxford Univ. Press 2007); *see* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (NYU. Press 2004).
3. For the argument that Progressive Era regulation served conservative political purposes, see Gabriel Kolko, *The Triumph of Conservatism* (Free Press 1963).
4. This is the reason why Langdell and his acolytes were so anxious to purge political scientists from the law programs that they were asked to design or re-design. Lawrence Friedman, *A*

year curriculum probably aligns somewhat with political conservatism, but only as secondary effect of its principal commitment, which is hostility toward the transformation of the law that modern times and democratic governance has brought to pass.

The obvious way to resolve the ideological stress that the first-year curriculum imposes on law students is to expand that curriculum to take account of our modern legal system. This would seem to be a well-advised development in general, as I have argued elsewhere;<sup>5</sup> the point here is that it would also remove a primary source of stress for many law students and move toward the sense of balance that this Symposium addresses. First-year students should take a required course on legislation, regulation, and the structure of the administrative state. They should see the law achieving collective social purposes as well as resolving private disputes, as an instrument employed by public officials and public advocates as well as private lawyers. Students also should be offered a course on law and social justice, including issues of race, class and gender. In the remaining courses, collective social action should be given equal time with individual disputes. Civil procedure should feature law reform and public interest litigation as one part of a more general modernization that also would include the resolution of disputes in a globalized economy. Criminal law should have its obsessive focus on the elements of common law crime reduced, and discuss policing, plea bargaining, punishment, and other aspects of the criminal justice system. The first-year Constitutional Law course should give at least equal time to the Bill of Rights, equal protection, and due process as it does to federalism, the separation of powers, and the Commerce clause.

Traditionalists will complain that adding courses covering more controversial or unsettled topics, such as regulatory law or social justice, and expanding Civil Procedure, Criminal Law, and Constitutional Law to include so many additional topics, will reduce the rigor of the first-year program and diffuse the intensive focus on the methodology of legal thought. One answer is that this rigor, even assuming that it correctly describes common law subjects, no longer constitutes an accurate account of legal thinking. Students also must learn to understand the sprawling, chaotic landscape of regulatory law, the complexities of the criminal justice system, and the magnificent, albeit unstable realities of human rights protection to be effective lawyers in the modern world. Rigor purchased by resort to fiction is ultimately the most flaccid sort of thinking. The second answer is that this fiction, by concealing and disparaging the interests, commitments, and potential career choices of a large proportion of the students, subjects those students to unfair

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History of American Law 470-71 (3d ed., Touchstone 2005); Stevens, *supra* note 1, at 73-91; See William Chase, *The American Law School and the Rise of Administrative Government* 41-76 (Univ. of Wis. Press 1982).

5. Edward Rubin, *What's Wrong with Langdell's Method, and What To Do About It*, 60 *Vand. L. Rev.* 609 (2007).

and unnecessary stress, and fails to teach them the type of law that they will ultimately practice, at least if their commitment to law reform and collective action survives their educational experience.

## II. Pedagogic Stress

Identifying the second form of stress that the law school curriculum imposes as pedagogic in character—that is, generated by the style of teaching rather than its content—immediately brings the notorious Socratic Method to mind. The history of every law school more than thirty or forty years old includes at least one legendary practitioner of this dark art, one formidable figure whose name remains alive among its alumni and reverberates through its institutional memory. At Vanderbilt, it is Paul Hartman, “the Dutchman,” who taught first-year Contracts between 1949 and 1988.<sup>6</sup> Older alumni always have some story to tell about Hartman’s class, and generally recall it with both terror and affection. As the 1950s gave way to the 1970s and 1980s, however, the students who were subject to it at the time began to complain, and, ultimately, elicited a memo from the dean reminding faculty members not to “oppress” the students. As one alumnus recounted for me, Hartman conducted a particularly withering interrogation of one student the day after the memo was issued. He concluded this ordeal by saying to the student, “Now I’ve just received a memo from the administration telling me I shouldn’t oppress the students. So tell me, am I oppressing you?” “No sir” was the predictable response.

While the Socratic Method remains in use, particularly in first-year classes, the days of its maximum ferocity (“Here’s a dime, Mr. Smith; call your mother and tell her you’ll never be a lawyer.”) almost certainly lie in the past. But the Carnegie Report on legal education<sup>7</sup> and Elizabeth Mertz’s study of classroom dynamics<sup>8</sup> both observe that the basic method of teaching in first-year law classes continues to be something that can be described as the Socratic Method, that is, an intensive interrogation of professor-selected students into the doctrinal logic of a legal case. Although Carnegie is somewhat critical of this approach, and Mertz intensely so, neither reports it as being particularly cruel. There is some stress involved in being called on, to be sure, and more if the professor counts class participation as part of the grade. But most students seem to have acquired fairly steady nerves about talking in front of their peers by the time they get to law school. Many are more anxious to avoid being branded gunners by their peers than they are about giving the professor perfect answers. The more kindly and relaxed atmosphere of the modern legal classroom may be one reason why Carnegie describes the prevailing pedagogic approach as the “case-dialogue instruction,” rather than the Socratic Method.

6. D. Don Welch, *The Vanderbilt Law School: Aspirations and Realities* 148 (Vanderbilt Univ. Press 2008). Hartman was a specialist on state and local tax, which he taught as an upper class course, interestingly without use of the Socratic Method.

7. William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007).

8. Mertz, *supra* note 2.

In fact, the pedagogic approach used in law school, particularly during the first year, is a serious source of stress, but it inflicts its psychological depredations more subtly than Professor Kingsfield did.<sup>9</sup> When the 19<sup>th</sup> century lawyers who developed this approach referred to it as the Socratic Method, they may not have been thinking of the sort of sustained humiliation for which it subsequently became famous. Socrates, after all, is never in the sort of authority position that a law professor occupies and was more likely to annoy than excoriate his listeners. Rather, the reference to Socrates may have been primarily motivated by his theory of education, something that would have been well-known then, as it is now, since it is presented in one of the most famous passages in all philosophy, the parable of the cave in Book VII of Plato's *Republic*.<sup>10</sup>

According to the parable, the inhabitants of the cave live in semi-darkness, bound by the neck and legs so that they can only see the back wall of the cave. Above and behind them, that is, between them and the entrance, is an artificial light source that projects shadow images on the wall to which their gaze is necessarily directed. Education, according to Plato, releases the prisoners from their bonds, turns them around, and sets them on a journey out of the cave. On this journey, they first come across the artificial light and realize that they have been seeing only the shadows of real objects; next they emerge from the cave and see the sun. A striking aspect of this image, as it is first presented, is that Socrates describes the process as an extremely painful one. The prisoner "released and suddenly compelled to stand up, to turn his neck around, to walk and look up toward the light...in doing all this is in pain and, because he is dazzled, is unable to make out those things whose shadows he saw before." Compelled to look at the artificial light, "his eyes [would] hurt and...he [would] flee." Suppose, Socrates continues, "someone dragged him away from there by force along the rough, steep upward way and didn't let him go before he had dragged him out into the light of the sun, wouldn't he be distressed and annoyed at being so dragged? And when he came to the light, wouldn't he have his eyes full of its beam and be unable to see even one of the things now said to be true?"<sup>11</sup>

This is certainly one version of education and it has its appeal. The student, imprisoned by the bonds of ignorance, and capable of seeing only vague shadows of the truth, is released and forced, against her inclinations and despite her discomfort, to confront increasingly greater levels of illumination. It hurts at first, but, ultimately, as Plato says, she becomes accustomed to it, and wouldn't dream of returning to her previous condition. In fact, she does return to the cave, but now as a teacher to release her quondam compatriots from bondage.<sup>12</sup> Socratic teachers are thus supposed to inflict pain on their

9. John Jay Osborn, Jr., *The Paper Chase* (Whitston Publishing Co. 2003).

10. *The Republic of Plato* 193-98 (Allan Bloom trans., Basic Books 1968) (514a-519e).

11. *Id.* at 194 (515c-516a).

12. *Id.* at 198-99 (519c-521b).



students, not because pain itself is good, but because it is inevitable when one moves from benighted ignorance to dazzling enlightenment. The pain involved is not really the pain of being hectored or insulted in class, although that is certainly one way to get the ossified, vision-impaired prisoner moving toward the light. Rather it is the pain of new ideas, of having one's preconceptions shattered and one's easy assumptions stripped away. Regardless of whether the professor is cruel or kind, the premise of the Langdellian method is that learning to think like a lawyer involves the painful reorientation that Socrates regarded as the essence of education. In other words, pain is good for people because it teaches them—the invariable excuse of petty tyrants.

The first-year curriculum makes good on this premise by plunging the student into a dense thicket of common law doctrine with little or no explanation of its context. Langdell's legendary way of starting his first class ("Turn to the case of *Smith v. Jones* in your casebooks. Mr. Abbott, state the facts.") is designed to disorient students, to put them on notice that they have entered a different world from the one that they have inhabited before. What exactly is a case? What is the concept of facts that the professor is using?<sup>13</sup> Why are we analyzing the reasoning of a judge to learn the law? On what basis should I perform this analysis? These questions will create stress for the student, whether the professor nicely says "Ms. Abbott, please state the facts" or scornfully says "Ms. Abbott, do you think there's any possibility that you can state the facts?" The underlying reason is that law school is designed to be what Victor Turner calls a "liminal experience"<sup>14</sup>—an initiation ritual that signals to the students that they have crossed a boundary from their former to their current lives. Stress is intrinsic to experiences of this sort, in part because it serves to break down previously maintained mental constructs, in part because it bonds the subject to the experience, creating a retrospective sense of achievement for having survived something that was painful at the time.

Traditionalists will argue that this process is an educative one, that—in effect—Plato was right about the inherent painfulness of real education. Occasionally, when I speak with alumni about the innovations in legal education, someone will say, "Well, I hope you're still scaring the students the way our professors scared us." But modern educators are almost unanimous in their view that the traditionalists—and Plato—are wrong. In their view, determining the best way to educate students is an empirical question, not a philosophic one. It only can be answered by gathering information about the particular group of students that one wants to teach, and testing the effect of alternative approaches on those students. This approach, described as progressive or learner-centered

13. See Mertz, *supra* note 2, at 43-83; Sullivan et al., *supra* note 7, at 52-53.

14. Victor Turner, *Dramas, Fields and Metaphors: Symbolic Action in Human Society* 231-71 (Cornell Univ. Press 1974). Traditional legal education resembles Turner's description of a Ndembu circumcision ritual, *id.* at 200-01.

education, has revealed a vast field of systematic inquiry in place of the tendentious speculations that previously passed as educational theory.<sup>15</sup>

It turns out—not surprisingly perhaps—that effective education resembles nurture, rather than punishment. One of the most important discoveries of modern pedagogic theory—fully explored and documented by Piaget—is that learning is a developmental process, closely linked to the growth of the individual’s capacities.<sup>16</sup> As John Dewey wrote, the mind is not something “complete in itself, ready to be directed to present material,”<sup>17</sup> but a set of capacities that develop as a result of the educational process. These ideas, and the research that supports them, transformed elementary, secondary, and undergraduate education during the 20<sup>th</sup> century.<sup>18</sup> Law students are not developing physically or even conceptually the way younger students are, but they are developing as lawyers and professionals. Thus, the same basic pedagogic principles apply. An educational program should be designed to foster the student’s gradual mastery or intellectual control. It should begin at the students’ level of comprehension and facilitate their gradual acquisition of knowledge and skill in comprehensively planned and successively more sophisticated stages. This idea of developmental education is closely related to the Carnegie Report’s idea that legal education is a process of apprenticeship.<sup>19</sup> By apprenticeship, the report does not mean the subordinated servitude of the medieval artisan or the 18<sup>th</sup> century law clerk, but a gradual process of introducing students to the norms and patterns of the profession.

Translated into practice, modern learning theory suggests that the educational program should be different during the three years of law school. To teach at the same level of detail and intensity for all three years contradicts what we now know about the learning process. A course that is appropriate for second-year students, for example, is likely to be boring for third-year students; more importantly, it will be confusing and stressful for students at the beginning of their legal education. First-year courses should provide a foundation and a context for further education, rather than being structured as a stressful initiation ritual, a sudden immersion into an unfamiliar and confusing realm.

15. Modern philosophers generally provide theoretical justifications for this empirical finding. In addition to Dewey, see generally Alfred North Whitehead, *The Aims of Education* (Macmillan 1929).
16. See generally Jean Piaget, *The Construction of Reality in the Child* (Margaret Cook trans., Routledge & Kegan Paul 1954); Jean Piaget, *The Child’s Conception of the World* (Joan & Andrew Tomlinson trans., Routledge & Kegan Paul 1929). See also Maria Montessori, *The Absorbent Mind* (Laurel Press 1984).
17. John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* 156 (Macmillan 1916).
18. See Lawrence Cremin, *The Transformation of the School: Progressivism in American Education, 1876–1957* (Knopf Doubleday 1961).
19. Sullivan, et al., *supra* note 7, at 95–108, 145–61.



Learner-centered approaches of this sort should not be mistaken for intellectual laxity. One of the most important lessons of modern pedagogic theory is that a demanding and challenging educational program is not the same thing as an unpleasant, stressful one, and indeed, is very often the opposite. Just as prior generations of children were fed castor oil because pre-modern doctors incorrectly assumed that something that tasted so bad must be beneficial, so prior generations of children were subjected to oppressive discipline, struck with rulers, and forced to memorize dull material because pre-modern educators incorrectly assumed that these afflictions were essential attributes of learning. What the preceding century of pedagogic theory has determined is that learning is more likely to occur when the student is engaged and interested, and this crucially depends on presenting material that is appropriate to the student's level of understanding and mastery.<sup>20</sup> The reader can determine, by introspection, whether anxiety is conducive to clear thinking, whether information is best absorbed, and skills are best acquired, during times of stress. The adrenaline surge we associate with stress may be useful for dealing with physical emergencies, but it is simply the wrong internal chemical for successful learning.

In fact, it is the Socratic Method, and traditional legal education generally, that suffers from intellectual slovenliness. The Platonic theory of education that inspired it assumes the fire behind the shadow-casting figures and the sun outside the cave. That is, it depends on Plato's theory of ideas, his assertion that underlying the observed phenomena of the natural world lie absolute, unchanging forms that represent the real truth. His theory of education, and its subsequent variations, makes little sense without this notion that students must be released from bondage, "turned away" from their former beliefs, to perceive the true nature of reality. While Plato's theory has certainly not been universally rejected, the bulk of modern thinking runs in favor of the opposite approach, which can be roughly described as the social construction of reality.<sup>21</sup> The idea that there exists an objective reality that humans can perceive, a truth to which we can have unmediated access, is now regarded as a reassuring myth that has been upended by the insights of modernity. In any case, whatever modern thinkers' views of Plato's approach as a matter of ontology and epistemology, no one really thinks that this approach applies to the legal system. Even to a Platonist, law is a social artifact, a set of rules specific to a given society. There indeed may be a Platonic notion of law, but that is a matter for a specialized course in jurisprudence. The essence of law school is professional training, however sophisticated, for the practice of law

20. See Jerome Bruner, *The Process of Education* (Harvard Univ. Press 1960).

21. See, e.g., Peter Berger & Thomas Luckmann, *The Social Construction of Reality* (Anchor Books 1967); Hans-Georg Gadamer, *Truth and Method* (Crossroad 1989); Nelson Goodman, *Ways of Worldmaking* (Hacking 1978); Thomas Kuhn, *The Structure of Scientific Revolutions* (Univ. of Chi. Press, 2d ed. 1970); William Quine, *Word and Object* (Tech. Press of MIT 1960); Peter Winch, *The Idea of a Social Science and its Relation to Philosophy* (Routledge & Kegan Paul 1958); Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe, trans., 3d ed., Prentice Hall 1958).

in our society. That demands the development approach of the progressive education movement and the apprenticeship of the Carnegie Report.

### III. Ethical Stress

A third source of stress in legal education is ethical in nature. The fact is the law is a morally ambiguous profession. Compared with medicine or engineering, for example, the law suffers from at least two moral problems. The first is that lawyers are required to be insincere, to speak words they themselves do not necessarily believe. In the pre-modern world, stage actors generally were condemned because their profession required such behavior;<sup>22</sup> Plato was vehemently—and influentially—opposed to all forms of mimetic art for this reason.<sup>23</sup> With our more sophisticated notions of morality, we have progressed beyond this rather shallow, pseudo-righteous notion, recognizing that the actor, like the musician or indeed the teacher, is entirely sincere in bringing something valuable to life and transmitting it to its intended audience.

The insincerity of the legal advocate, and of the legal negotiator, is not so readily resolved, however. It is true that society has judged this particular form of insincerity desirable. The standard explanation, and the one that is occasionally offered to first-year law students, is that the lawyer speaks for the client, who is entitled to a voice but cannot speak for himself in the highly specialized, technical context of the legal system. But the connection between the client and the lawyer is much more problematical than the connection between the playwright and the actor. Once one accepts the value of theatrical productions, as almost everyone does these days, there is no moral difficulty with any particular performance. The most kindly person can play a vicious murderer, unabashedly slaughtering her victims on the stage, with the same justification as she can play a saint. Barring bizarre circumstances, the play is a self-contained event, and all the actors contribute equally to its realization.

Legal advocates, in contrast, can find themselves representing someone whose actions they find morally reprehensible, and often do so, since it is people of this sort who frequently get sued or indicted. Speaking for these people in the constrained setting of the court or the conference room typically has important effects beyond that setting; indeed, that is the entire point. The further justification is that the representation of unsavory individuals, however unpalatable on its own, contributes to the general administration of justice and the facilitation of business. But the connection here is remote and dependent on a series of intermediate assumptions. One need only contrast it to the justification for the actor to recognize that the legal representation

22. See Jonas Barish, *The Antitheatrical Prejudice* (Univ. of Cal. Press 1985); Thomas Postlewait & Tracy Davis, *Theatricality: An Introduction*, in *Theatricality: Theater and Performance Theory* 1, 4-7 (Tracy Davis & Thomas Postlewait eds., Cambridge Univ. Press 2004).

23. Plato, *supra* note 10, at 277-91 (595a-608a). More generally, he asserts that artistic representations are not true, and argues, rather unconvincingly, that truth is an absolute value.

of people whose actions one condemns, and the insincerity inherent in that representation, is likely to raise serious moral concerns for anyone who has not been completely indoctrinated into legal practice.

The second source of the law's moral ambiguity is that its social purpose and the social value of the vast resources we devote to it—the resources that incidentally support the law school and attract the law students—are open to serious question. Virtually no one questions the purpose of the medical profession, which is to provide health for the human body. Many ethical issues cluster around this basic purpose, and the cost of health care is of course a concern, but the social value of medicine is uncontroversial. Law is a different matter; many people feel that private law firms, which absorb the majority of law school graduates, do more harm than good, and others feel that the social resources that these firms absorb are wildly excessive. More generally, negative attitudes towards lawyers are rampant in society.<sup>24</sup> First-year students arrive at law school fully aware of these attitudes and unprotected by the self-justifications that older lawyers rely upon to avoid the ethical stress that they would otherwise experience.

Unlike the ideological and pedagogic stress described above, the stress generated by the role-playing aspect of legal practice and the societal doubts about its underlying value are not caused by law school. But they are not addressed by law school either. First-year students are generally presented with a curriculum that treats the role of the lawyer as unproblematic and the legal profession as an unquestioned social good. There is no course or other setting where the ethical issues that are likely to trouble a significant proportion of the students can be discussed. Students who raised such issues in the past would be met with scorn. Now they are more likely to indulged, but the message that these issues are irrelevant to the subject matter is essentially unchanged. While some first-year students have wanted to be lawyers since elementary school and are untroubled by the ethical status of the profession, others have come to law school with uncertainty, grave doubts or positive reluctance. For these students, at least, the lack of attention to the ethical concerns that are so well-known and so wide-spread will be a significant source of stress.

There should be some space in the first year for students to discuss their concerns about the role of the lawyer and the legal profession. Far from being the sort of T-group or touchy-feely experience which is anathema to many traditional law teachers, this could be a valuable part of the curriculum. It could be one organizing theme of a social justice course that was required for all first-year students and that also addressed issues of racial, gender, and class equality. It could be a one-hour, stand-alone discussion class that focused specifically on legal ethics, in the broad sense of that term.<sup>25</sup> In either format, it would combine the opportunity for students to express their own

24. *See generally* Marc Galanter, *Lowering the Bar: Lawyer Jokes and Legal Culture* (Univ. of Wis. Press 2005).

25. For further discussion of this option, see Edward Rubin, *The Citizen Lawyer and the Modern State*, 50 *Wm. & Mary L. Rev.* 1335 (2009).

ethical concerns with substantive material about the role law plays in modern American society. The argument that material of this sort is out of place in the first year of a three-year legal education would be difficult to make to anyone except a legal educator.

### **Conclusion**

What passes for rigor in legal education is often little more than rigor mortis. It is the fossilized remains of an approach to law and education that is so far out of date that we no longer recognize its obsolescence. An IBM Selectric typewriter looks old-fashioned; a fountain pen looks charming. There is a certain charm to legal education, but it is experienced primarily by those who have completed it. For the students who are currently enrolled, particularly in their first year, its antediluvian design is a source of ideological, pedagogic, and ethical stress.

Very little of this stress is productive and just as little of it is necessary. Modern learning theory not only provides no support for the Socratic Method as it is practiced in law schools, but also fails to support the idea, championed by the real Socrates, that education must be painful. When subjected to stress, people tend to become defensive, constricted, and instrumental; the personal development and intellectual creativity of genuine learning requires a supportive, engaging environment. Law schools could create environments of this sort. To do so, they would need to eliminate the ideological bias of the first year, and validate all forms of legal practice, public as well as private. They would also need to seek help from experts in education about the way to design the curriculum that encourages real learning. Finally, they would need to create opportunities for law students to discuss the ethical issues that afflict lawyers and the legal profession, and to begin crafting careers that enable them to see themselves as moral persons. That is at least one meaning of balance in legal education.