Law Quadrangle (formerly Law Quad Notes)

Volume 45 | Number 2 Article 11

Summer 2002

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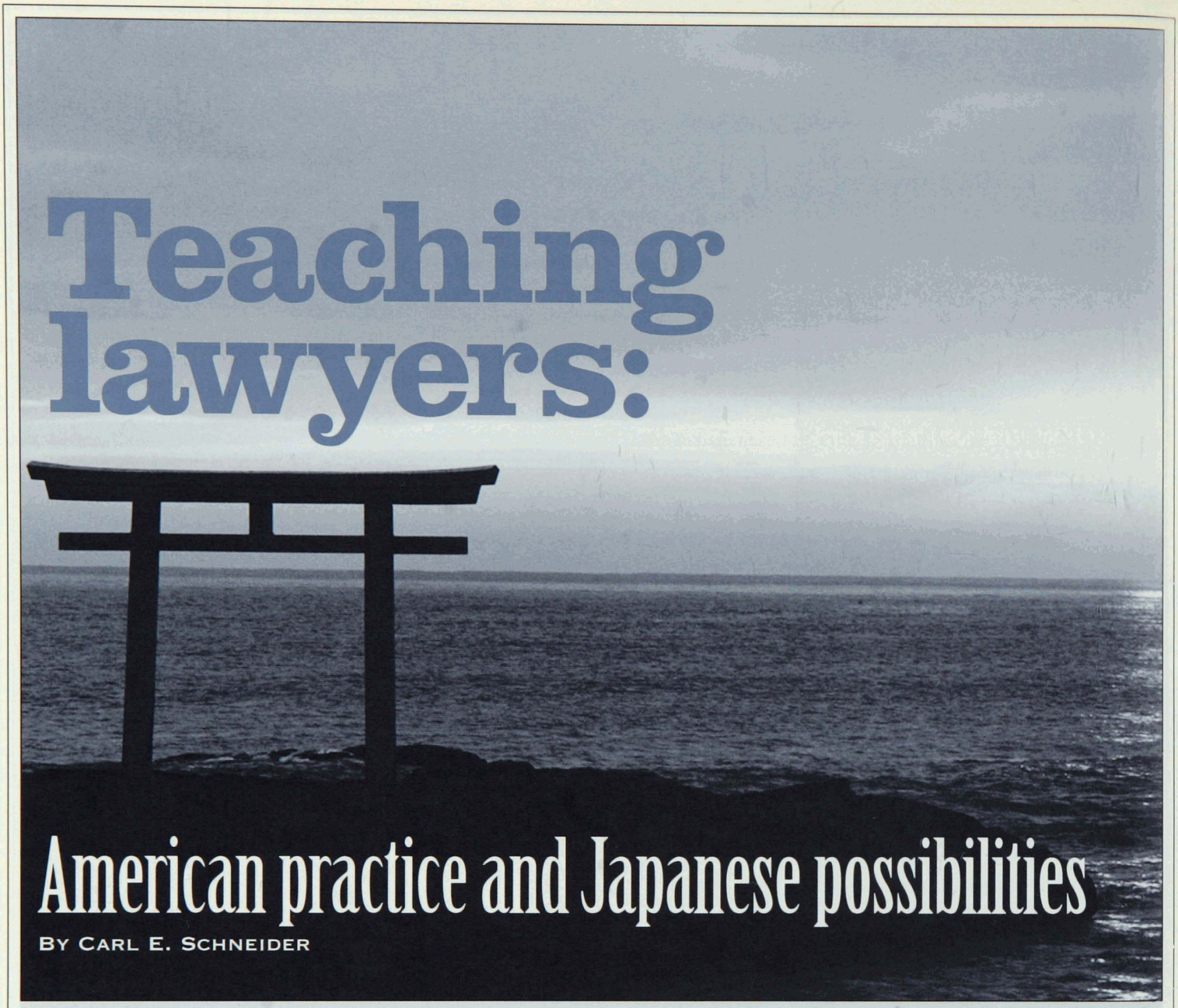


Teaching lawyers:

American practice and Japanese possibilities

BY CARL E. SCHNEIDER

Prospective lawyers, I suppose, need to learn three things: First, legal doctrine, or what the law says; second, legal analysis, or how to reason about a legal issue; and third, legal practice, or how to apply legal doctrine and legal reasoning to the lawyers' tasks of advising clients, drafting legal documents, representing clients before tribunals and governmental agencies, negotiating for clients, and so on. In no country I am familiar with do law schools genuinely attempt to teach the last of these — the practice of law. Rather, that task is primarily left — expressly or tacitly — to some other institution: In England, to apprenticeship combined with instruction from the two parts of the profession (barristers and solicitors). In Germany, to the *Referendariat,* a series of apprenticeships in different practice settings. In Japan, to classes at the Legal Training and Research Institute and to the apprenticeships that follow.

The American system is perhaps the least formalized. American schools do generally have "clinical" courses in which students under supervision represent clients (usually people who cannot afford a lawyer). Essentially, however, American law schools expect preparation for legal practice to come from *de facto* apprenticeships in law firms. In fact, I would argue that, no matter what system of schools and apprenticeships a country has, the *real* work of teaching young lawyers how to practice law is most crucially done in their first job, when particular employers teach them how to practice particular kinds of law in particular jurisdictions in particular ways.

The training of sophisticated lawyers today is increasingly on the medical model: you go to law or medical school for the intellectual equipment you need, then you go for three or six years to a law firm or hospital for a "residency" in which you learn the specifics of your specific craft.

Legal education around the world agrees, then, in leaving practical training to practical people in practical settings. This worldwide division of labor seems to me entirely sensible. Much about the practice of law is best learned while working with experienced lawyers and is only inefficiently taught in classes. Thus no law school should hope to turn out finished lawyers.

But recall our second requirement of legal education: Shouldn't law schools at least hope to turn out lawyers who know the law? My answer, which may surprise you, is: up to a point. Of course there are legal doctrines every lawyer should know, that are building blocks of law of all kinds. But certainly in America and, I would argue, even in a code country, it is both (1) increasingly impossible to learn all the law you will need and (2) increasingly unnecessary to learn all the law you can. In America, of course, we have so many jurisdictions that no human being could read, much less learn, all the law that floods our country. But even in Japan, your Diet, your courts, and your very imposing bureaucracy churn out new law at accelerating rates. And the practice of law in Japan is ever more international, so that knowledge of foreign legal systems, which is already impressive, must become even more thorough.

At the same time, as I just suggested, lawyers find themselves using an increasingly narrow range of law as practice inexorably becomes more specialized. Specialization is already far advanced in the United States and is proceeding with laser-like speed in Europe. As Japan expands its bar, that process must seize Japan. Not only is law specializing rapidly and relentlessly, it will change in ways we cannot imagine during the 40 years of a lawyer's professional life.

But of course the fact that it is increasingly impossible and increasingly unnecessary to teach students every legal doctrine does not mean we should teach them no doctrine at all. The question is, how to teach doctrine effectively. Here I must be frank about two things. First, at base, professors don't teach law — students learn it. They learn it by sitting alone in a room struggling to make sense of involuted and exfoliating doctrines, by rereading primary materials, by scrutinizing secondary sources, by searching for explanatory principles, by outlining sprawling topics, by memorizing crucial ideas. No amount of professorial explanation can make this labor unnecessary; no professorial instruction can prove more rewarding than this lonely labor. I am even perverse enough to believe that students often understand more deeply and permanently law they have puzzled out than law professors have lucidly explained. In sum, professors can be helpful, but they cannot learn things for other people.

Second, I must be frank about lectures. Normally, they are useless. They are a poor way to help people learn doctrine. At least where a field is not changing rapidly, lectures are open to one crushing question — if you have something to tell us, why not write it down and let us study it efficiently, carefully, and conveniently? True, a brilliant lecture is a thing of beauty and a joy forever. But the brutal truth is that few people can write brilliant lectures even occasionally, much less three times a week for 15 weeks. I attended a distinguished university where professors in large courses lectured. I remember clearly only two courses, and in most courses I discovered a dreadful truth we all know but are too polite to speak — lectures are often boring, and the student who listens is constantly tempted to slip into sleep. Worse, the professor who lectures is constantly tempted to slip into indolence. Once you write lecture notes, it's easy to re-use them eternally. Whatever vitality your lectures may have had, they lose, and whatever interest in teaching you may have had, you lose.

Let me say a final frank word about teaching substance. If that's all you want to do, you don't need a law school. In every system I know well, a commercial enterprise has arisen for teaching students enough substance to allow them to pass a bar exam. American students grind through a few weeks after law school at a commercial school that crams enough information into them that they can pass their state's bar exam. German students skip professors' lectures and pay someone they literally call a "repeater" to stuff enough law into them to get them through the *Staatsexamen*. And as you know better than I, Japanese students also seek commercial help in learning the law. Indeed, some of your *bengoshi* never even studied law in the university.

Well, where does this leave us? To answer that question, let me remind you of the third thing students need to learn if they are to become lawyers — legal analysis, or how to read a legal document, to reason about a legal issue, and to formulate a legal argument. I said the substance of law cannot be taught efficiently through lectures. But these skills cannot be taught at all by lecturing. To understand why, we must begin with the fascinating studies of how professionals reason that suggest that we do not do our work in the purely logical way one might expect.

Professionals apply abstract learning to novel problems not governed by straightforward rules. But they do not start at first principles and work their way logically through to a solution. Rather, they use something like intuition. They look at a novel problem, and typically a solution comes into their minds. It appears because professionals, having seen thousands of problems, have developed a file cabinet of typical patterns associated with typical solutions. They scan these patterns so fast that they do not know what they are doing. The best example comes from studies of chess masters. They look at a board and a plausible move presents itself in their minds. They then examine logically what their file of patterns suggests are likely to be weak aspects of the move. But 85 percent of the time, the first move that occurs to the expert is the move the expert makes.

So our problem is to teach students how to reason in a way that relies crucially on a kind of intuition. Lectures won't work. First, professionals do not know how they reason, so they cannot describe the process well enough to allow the novice to learn it. Second, the only way to build up a file of patterns is through experience. This means that the only way to learn to think like a lawyer is to practice.

The old way to get practice was to apprentice yourself and grasp whatever experience your master would permit you. This, however, is clumsy and expensive, and today American law

schools give students practice in understanding, criticizing, and formulating legal arguments and documents through what we modestly call the Socratic method. In the classic version of the form, the Socratic professor assigns students a text — a statute, a case, a contract, or what have you. The professor asks students a series of questions. These are the questions an experienced lawyer implicitly asks in formally analyzing the problem. Through these questions, students gradually acquire a sense of the kinds of questions they should learn to ask (at first deliberately, eventually by second nature). The professor asks students another kind of question as well. These are questions about students' responses to the first set of questions. These latter questions are designed to help students criticize their initial responses, to teach them the difference between a good and a bad argument, to help them probe ever deeper into an issue. Each class thus becomes an hour of practice in analyzing legal problems. By the time students graduate, they have practiced legal analysis under expert guidance so often that they should be able to do it adroitly on their own.

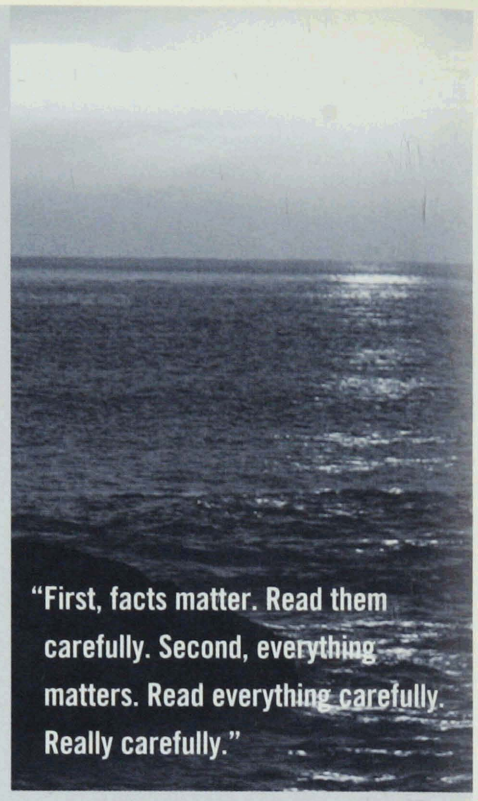
To make this generalization more concrete, let me briefly describe my first encounter with the Socratic method — an encounter still lively in my mind after a quarter century. At 9 a.m. on an early day of September 1975, I took a seat in Hutchins Hall Room 150 for my first law school class — Professor Francis Allen's course in criminal law. At 9:05, Professor Allen marched to the podium, arranged his notes, looked gravely out at the class, and asked, "Mr. Smith, what are the facts in *Regina v. Dudley & Stephens?*" Mr. Smith seemed to have only a pretty superficial sense of those facts. I discovered (as I tried to answer silently while poor Mr. Smith struggled aloud), that I had hardly a better one. The night before, the facts had seemed quite simple and wholly unforgettable. Dudley and Stephens had been crewmen on a yacht which had sunk. With another crewman and the cabin boy, they had escaped in a small boat. They soon ran out of things to eat. Eventually, they began lunching on the cabin boy. Soon afterward, they were rescued, brought home, and (to their surprise) charged with murder.

It seemed, however, that there was more to the facts than this and that something more was, somehow, important. Professor Allen seemed unsurprised we had not grasped this, but he was remorseless. He eventually wrenched every significant fact out of the class. Even on that first day, then, he taught by example two momentous lessons. First, facts matter. Read them carefully. Second, everything matters. Read everything carefully. Really carefully.

After Professor Allen had finally gotten us to tell him just how many cans of turnips had been on board the lifeboat (two), he plowed on with question after question about the procedural history of the case. It had not occurred to us to care about the legal procedures that had brought the case into the court, but we began to see that they might matter. And we were reminded by these questions that everything matters and that everything must be read carefully.

Professor Allen then asked someone to describe the issue the court sought to resolve in its opinion. In panic, I scrabbled through the opinion for a sentence beginning, "The issue before us is whether . . . ." There wasn't one. I'd have to figure it out by myself. The student called on flailed away. His answer sounded OK to me, but a battery of questions soon convinced me otherwise. But if that was wrong, what was right? As I wrestled limply with that question, another student tried another answer, and so on until Professor Allen had refined the class's answer into something which did not dissatisfy him too painfully.

Having defined the issue, Professor Allen asked us what the court's answer was. That we figured out without too much difficulty. He then asked whether the answer was right. Well, I supposed that if this court had said it was right, and if the case was assigned to read, its answer certainly ought to be correct. Somebody tried to say as much. Bad mistake. What made us think courts never erred? But Professor Allen proffered help. What



authority, he inquired, had the court consulted? We scoured the opinion for statutes and precedents, but Professor Allen wearied not until we had uncovered every one. Then, well, then he wanted to know whether the court had used its authorities persuasively. Did they really say what the court said they said? Was the court's rebuttal of contrary authority really convincing?

Then Professor Allen asked whether the court's reasoning was sound. We scrutinized every step of the court's reasoning, searching, under the prod of remorseless questions, for ways to pry apart each link in the chain and for ways to reinforce each link. And as if this were not enough, we then had to construct a dissent in the case. By this point — a number of days into the semester — I thought we'd pretty much established the answer to Professor Allen's question about whether the court's resolution of the issue in the case was correct. But no, for then he asked whether the result was consonant with justice.

Then Professor Allen suddenly shifted ground and asked a series of questions about hypothetical cases in which the facts of *Dudley & Stephens* were altered in cruelly imaginative and cleverly revealing ways. Each time, he asked whether the principle of *Dudley & Stephens* led to a tolerable result.

Where, you ask, was Schneider during all this? I sometimes summoned up the nerve to raise my hand, and I occasionally produced an apparently not intolerable answer to a question, but there was always another and yet another. I began to try to anticipate what questions Professor Allen would ask. I kept re-reading *Dudley & Stephens,* scouring it for the unexpected things he kept seeing in it. Each evening as I prepared for class, each night in my tormented dreams, and each morning as I walked to school, I rehearsed my answers to the questions I expected. In short, without realizing it, I had been seduced into beginning to think like a lawyer. I had begun to read more carefully and critically. I had begun to ask the questions lawyers ask. I had begun to suppress some kinds of answers and pursue others.

As I think you can see from this account, the Socratic method does what lectures cannot — it demands that students do what they most need to do — practice some aspects of the lawyer's craft. This alone justifies the Socratic method, particularly when the only practical alternative is the lecture. But that method has other, agreeably practical, advantages. Let me again be frank. Learning is hard. It hurts. People postpone it as long as they dare. They skim reading, they skip class. But students who know they might be asked questions in class have an incentive to prepare regularly. Even off its peak, then, the Socratic method stimulates students in the way Dr. Samuel Johnson wryly described: "Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." Catholic doctrine speaks of occasions for sin; the Socratic method imposes regular occasions for learning.

The Socratic method not only gives students regular incentives to work, it rewards them for it. Because the method asks students to learn by doing, because it corrects errors and rewards insights, because it challenges students to react and reflect, because it more deeply engages students' minds, and because it draws them into the work of learning and thus induces them to learn more richly and deeply, it commonly repays — and thus invites — the labor of learning better than lectures.

This leads me to a question I am often and urgently asked when I discuss the Socratic method with Japanese audiences — doesn't it scant the teaching of doctrine? No. In fact it induces students to learn substance exactly because it gives them an incentive for learning it — the desire to use it in preparing for and participating in classes. And it gives the professor a sense of how well the class is progressing.

Another question I am frequently asked always puzzles me — how can the Socratic method be used to teach students who do not know the law? This is not a problem, and, to be honest, I am not sure why it should be. You don't have to know everything to discuss something. Most legal issues require knowing a set of texts, and these texts can be presented for the student's reading before the discussion. The Socratic method helps students ask the right questions about what they are reading. The less experienced and learned students are, the less sophisticated the discussion. But students must start somewhere whatever method professors use, and their understanding is always superficial at first. The Socratic method moves novices toward expertise faster than any alternative, yet it can challenge even the most advanced students to confront the most advanced problems.

Japanese audiences also suggest to me that Socratic teaching is so difficult that professors will resist using it and use it badly. Good Socratic teaching is arduous. Every moment poses fresh pedagogical problems, problems that vary from student to student and day to day and year to year. The professor is like a sheepdog: He must walk into class the master of all the relevant material, knowing his goal and his road to it, flexible enough to snap up any pedagogical opportunities that present themselves. He must pose searching questions that nudge students toward productive responses, listen aggressively to students' answers, quickly sense when the class has succumbed to some misapprehension, inject the class with energy and — please — humor, and, snipping and snapping at its heels, herd it toward enlightenment.

I admit it: to do all this superbly requires rare gifts. But to lecture superbly requires gifts at least as rare. *The real question is which method, as used by the average professor, is likeliest to help students learn.* Anyone bright enough to be a professor is bright enough to ask questions students will benefit by pondering. Simply by asking enough rigorous questions, the professor goes far toward teaching students to think, and to think like a lawyer. Yet perhaps I should make one more admission: Socratic teaching demands harder work than lecturing: You can't just rely on last year's lecture notes. On the other hand, Socratic teaching repays the investment. It presents rich and rewarding pedagogical opportunities. It invites professors to engage profitably with the class on issues of moment. Of course the professor can anticipate the available analytic approaches. But I have not infrequently been surprised by which of the possible avenues the students prefer and by their arguments for them. In fact, students' reactions to the ideas in my courses have so much interested me that many of the articles I have written grew out of my attempts to explain those reactions to my students and myself.

Finally, I often hear that while Socratic teaching may work in America, it must fail in Japan. This argument partly rests on the belief that Socratic teaching is easiest in a system prolific of cases and hardest in a code system. There is something in this. Cases can be wonderful vehicles for discussion, and students find cases more agreeable to analyze than statutes, which can be repellently complex and impersonal. But any legal document can successfully be taught Socratically. What is more, judicial opinions are increasingly prominent in Japanese law, and stimulating hypothetical cases can readily be devised as a basis for analyzing

code provisions. Much will depend on professors' willingness to write casebooks. But I can testify from having worked on two casebooks that writing them is stimulating and satisfying.

A practical barrier to teaching Socratically in Japan is that classes can be large (although not as large as many German classes). However, you can teach Socratically in classes of even 200 students in a room with good acoustics. It is, of course, preferable to have classes small enough that each student speaks frequently. But even a student who is not speaking can learn much from a Socratic dialog by listening attentively and answering each question silently. And large classes have the advantage of offering many well-prepared students with differing opinions.

Another reason people suspect Socratic teaching is less suited to Japan than America is cultural. That teaching requires students to participate vigorously in discussion. American students are notoriously disputatious; Japanese students are not. I acknowledge the difficulty but am optimistic about its solution. I have taught Socratically for many years not only in Japan, but also in Germany, another country commonly thought to present cultural barriers to Socratic teaching. True, my students volunteered for the experiment, but the results were uniformly uplifting. Students consistently reported themselves thrilled at the experience, which they thought educationally transformative in a way nothing they had ever encountered had been. "You really made me think" is perhaps the comment I hear most often. Students even perceived that being called on in class was a sign of the professor's concern for their ideas and their progress, a truth American students do not always cherish.

To be sure, Japanese and German students defer to age and rank in a way American students could hardly imagine or abide. But this can be put to good use, if the faculty exercises its authority to establish from the students' arrival that they are expected to speak vigorously in class. This works especially well if the students are encouraged to dispute with each other rather than with the professor. I am confirmed in all these happy thoughts by the fact that when I visited classes at Japan's Legal Training and Research Institute, they were conducted in a lively Socratic style that both professor and students seemed to relish.

Indeed, this is the moment Japan can structure its legal education to make Socratic teaching succeed in a way that is barred in Germany. First, you may choose your students. There are people of real intelligence who will never learn to think like a lawyer. A graduate program in law can exclude such people and give professors a class composed of people with an aptitude for the kind of reasoning the Socratic method teaches. This makes life delightfully easier for both students and professors. Second — and here again I speak with immoderate frankness — students prepare for class diligently and participate actively in it not just because it is stimulating, but also because they fear the career consequences of indolence. If an American student wants a good job, he needs good grades. This gives American students an essential incentive to take class seriously, an incentive German and Japanese students lack.

I have essayed a case for the Socratic method of teaching law. Part of that case has been that the Socratic method is preferable because it so far surpasses the alternatives. But I have also tried to convince you that that method abounds in virtues. Let me be frank with you one last time. I do not promise you a rose garden. There are days when my students want the cup of my questions to pass from their lips. There are days I am discouraged by my failure to inspire my students with my love for my subject and to bring them to the level of craftsmanship lawyers owe their clients. Teaching is frustrating because it is not easy for an expert to know what it is fair to demand of novices. It is hard to find the just balance between sympathy and standards. Nevertheless, ultimately, I am sustained by my conviction that Socratic discourse can be a superb way of teaching and learning. The Socratic method brings to the classroom something that can be had in few other ways; for in it the teacher engages the student in a disciplined, rigorous, and rewarding encounter with the logic and the life of the law.

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