Actively Achieving Greater Racial Equity in Law School Classrooms

Catherine Bramble
J. Reuben Clark Law School, BYU

Rory Bahadur
Washburn University School of Law

ACTIVELY ACHIEVING GREATER RACIAL EQUITY IN LAW SCHOOL CLASSROOMS

CATHERINE BRAMBLE & RORY BAHADUR[*]

ABSTRACT

2020 illustrated the ongoing pervasiveness of implicit and explicit racism in our society. Less well-acknowledged and recognized is the extent to which Socratic pedagogy also reflects those pervasive racist realities while simultaneously resulting in inferior learning based on a teaching method invented 150+ years ago. Despite this racist and outdated reality, the legal academy has been reluctant to alter the traditional method of teaching. Tangible, empirical evidence obtained from data-driven cognitive learning science research demonstrates that active learning not only improves learning outcomes for all students, but also mitigates the structural effects of racism in the classroom thereby increasing racial equity. Most law professors do not fully understand what active learning entails and underestimate how different an active learning classroom looks from a traditional Socratic class. Once educators explore the evidence in this Article supporting active learning as a pedagogical method for increasing greater racial equity in the classroom, understand why most of the rationales frequently cited in support of Socratic teaching are unsupported, and implement the tangible and feasible techniques discussed to facilitate the transition away from Socratic towards active learning, the inertial resistance to the change will be overcome. In so doing, law professors can embrace best teaching practices, achieve maximum learning gains for their students, and create classrooms where every student is engaged, included, and supported in a truly equitable learning environment.

709

CONTENTS

<center>I. INTRODUCTION</center>

2020 was a year no one will soon forget. On March 11th, the World Health Organization classified COVID-19 as a global pandemic,[1] and it became the most serious pandemic in over one hundred years.[2] Countries issued nationwide lockdowns,[3] healthcare systems became overwhelmed,[4] and unemployment rates soared.[5]

On May 25, 2020, a 46-year-old black man named George Floyd was arrested by police in Minneapolis and died in police custody after a white officer knelt on his neck until paramedics arrived at the scene.[6] Three days later, a 911-call from Kenneth Walker was released to media outlets—a call he made after his girlfriend, a black woman named Breonna Taylor, was fatally shot on March 13, 2020 by police officers using a no-knock warrant to search for narcotics in her home.[7] The deaths of George Floyd and Breonna Taylor, as well as the deaths of other people of color killed by police in 2020, put a spotlight on racial injustice in the United States, igniting nationwide protests[8] and catapulting the Black Lives Matter movement to the international stage at a time when the entire world was home watching.[9]

Indeed, 2020 became a year that will not soon be forgotten not only because of a global pandemic, but also because of a worldwide reckoning calling on countries, communities, leaders, and individuals to confront and address irrefutable evidence that

---

[1] *Listings of WHO's Response to COVID-19*, WORLD HEALTH ORG. (June 29, 2020), https://www.who.int/news/item/29-06-2020-covidtimeline.

[2] OECD & EUR. UNION, HEALTH AT A GLANCE: EUROPE 2020 13 (2020).

[3] *Coronavirus: What are the Lockdown Measures Across Europe?*, DW (Apr. 14, 2020), https://www.dw.com/en/coronavirus-what-are-the-lockdown-measures-across-europe/a-52905137.

[4] Maia Dorsett, *Point of No Return: COVID-19 and the U.S. Healthcare System: An Emergency Physician's Perspective*, 6 SCI. ADVANCES 1, 1 (2020); OECD & EUR. UNION, *supra* note 2, at 15–16.

[5] *Unemployment Rate Rises to Record High 14.7 Percent in April 2020*, U.S. BUREAU OF LAB. STAT. (May 13, 2020), https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm?view_full.

[6] Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

[7] *A Timeline of Events Related to the Death of Breonna Taylor*, AP NEWS (Sept. 24, 2020), https://apnews.com/article/virus-outbreak-kentucky-racial-injustice-louisville-shootings-10a63f8d37bf23f219c371d4ec4f0ab8.

[8] Lisa Shumaker, *U.S. Saw Summer of Black Lives Matter Protests Demanding Change*, U.S. NEWS (Dec. 7, 2020, 8:04 AM), https://www.usnews.com/news/top-news/articles/2020-12-07/us-saw-summer-of-black-lives-matter-protests-demanding-change.

[9] Ashley Westerman, *In 2020, Protests Spread Across the Globe with a Similar Message: Black Lives Matter*, NPR (Dec. 30, 2020, 5:04 AM), https://www.npr.org/2020/12/30/950053607/in-2020-protests-spread-across-the-globe-with-a-similar-message-black-lives-matt.

racial inequities continue to exist systemically and pervasively in our modern world in everything from housing to employment to education.[10] In the United States, institutions of higher education responded by issuing calls to action to the members of their communities, forming committees, creating new positions, holding trainings and conferences, implementing new coursework, committing to diversity in hiring and admissions, holding vigils and townhalls, compiling resources, and recognizing "Juneteenth" as a university holiday for reflection.[11] These institutional efforts are commendable and hopefully will facilitate progress towards racial equity in higher education, but true educational equity requires even more than programs, reflection, education, and sensitivity. It requires proactively seeking out solutions to disrupt the norms that keep disadvantaged populations disadvantaged within our spheres of influence.

For legal educators, one of our greatest spheres of influence is within the four walls of our classrooms, where we are charged with training students to become proficient attorneys prepared to engage competently and ethically in our twenty-first century world. But, in attempting to achieve these goals, many law professors still employ a 150-year-old teaching method as their primary teaching technique. This form of teaching, popularized by Harvard professor and Dean Christopher Langdell in 1870,[12] combines a study of cases with the use of Socratic-method questioning. It is often referred to as the "case method" or "the Socratic method."[13] Though criticized and rejected by many legal educators at first,[14] it eventually gained traction and became the accepted method of teaching at Harvard Law School and then the majority of other law schools in the United States by the early 1900s.[15]

In the 100+ years since the widespread adoption of the Langdellian case method in legal education, the world has significantly changed as science, technology, and human evolution have shifted how people understand and interact with the world. Indeed, at the time Langdell introduced his method, the Wright brothers' first successful airplane flight would not occur for another 33 years, women would not have the Constitutional right to vote in the United States for 50 years, the United States Supreme Court would not find segregation of schools on the basis of race unconstitutional for another 84 years, and mankind was 100 years away from Neil

---

[10] *Id.*; *see also* Daniel Mateo, *The George Floyd Case and Racism in Higher Education Systems and Institutions*, UNESCO-IESALC (June 29, 2020), https://www.iesalc.unesco.org/en/2020/06/29/the-george-floyd-case-and-racism-in-higher-education-systems-and-institutions/#.

[11] Joey Hadden, *How the Top 25 Colleges and Universities in the U.S. Are Responding to the Black Lives Matter Protests*, BUS. INSIDER (June 25, 2020, 12:56 PM), https://www.businessinsider.com/college-top-us-universities-respond-black-lives-matter-protests-2020-6#duke-university-13.

[12] Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 518 (1991).

[13] *Id.*

[14] *Id.* at 518–19.

[15] *Id.* at 540–43.

Armstrong's first step on the moon. Moreover, Langdell and his colleagues likely could not even have imagined advances that would occur in the next 150 years in neuroscience and our ability to understand how the human brain acquires, understands, and retains new knowledge.

Despite massive advances in cognitive learning science, especially in recent decades, many legal educators continue to employ a teaching practice that contradicts scientific discoveries and instead choose to rely on a century-old teaching technique as their primary method for teaching.[16] Professor Deborah Jones Merritt explains:

> Legal scholars and lawyers know surprisingly little about the cognitive science research that has unveiled new methods of harnessing the brain to work harder and smarter. We are a profession that depends upon rigorous thinking, creative problem solving, and persuasive advocacy. Yet we have remained strangely oblivious to research about how the brain works.[17]

To overcome systemic racism, each individual must inspect his or her personal sphere of influence not just to ferret out blatant racism, but to proactively counter systemic racism by looking for insidious threads of oppression. If legal educators do so, they will discover that the findings of cognitive learning science can no longer be ignored.

Simply put, the cognitive learning science of the last decade has demonstrated through countless empirical studies that best teaching practices, including the use of active learning, do not just increase the learning outcomes for all students; such practices *increase learning outcomes for students from disadvantaged backgrounds, including students of color, disproportionately to the point where achievement gaps completely disappear.*[18] Additionally, the best teaching practice of active learning has many other positive effects on diverse populations, including increasing feelings of belonging, increasing self-efficacy, increasing course pass rates, and providing an environment of real educational equity where historically underrepresented populations speak and contribute at equal rates to their classmates.[19] Finally, there is a plethora of scholarly research demonstrating that not only does the still widely-used Socratic method *not* rise to the level of active learning, but its continued use also hinders efforts within legal education to prepare students for legal practice and to create environments of educational equity where all students feel included, valued, and heard.[20]

---

[16] Deborah Jones Merritt, *Legal Education in the Age of Cognitive Science and Advanced Classroom Technology*, 14 B.U. J. SCI. & TECH. L. 39, 40 (2007) ("Cognitive scientists have made major advances in mapping the process of learning, but legal educators know little about this work.").

[17] *Id.* at 41.

[18] *See, e.g.*, Elli J. Theobald et al., *Active Learning Narrows Achievement Gaps for Underrepresented Students in Undergraduate Science, Technology, Engineering, and Math*, 117 Proceedings Nat'l Acad. of Scis. 6476, 6476 (2020).

[19] *Id.* at 6480.

[20] *See* Rory Bahadur & Liyun Zhang, *Socratic Teaching and Learning Styles: Exposing the Pervasiveness of Implicit Bias and White Privilege in Legal Pedagogy*, 18 HASTINGS RACE & POVERTY L.J. 114, 115, 134 (2021). S*ee generally* Kris Franklin & Rory Bahadur, *Directed*

This Article asserts that one of the most critical steps to achieving educational equity in law school classrooms is replacing the Socratic method with active learning. Part II introduces and defines active learning, provides a brief history of its origin, gives several specific examples of it in practice, and explains why it is superior to passive learning. Part III explains why active learning results in greater equity in the classroom for underrepresented populations. Part IV responds to the first of two common misunderstandings about the use of active learning in law school classrooms—that the Socratic method already is a form of active learning. Part V explains why the Socratic method hinders efforts within legal education to improve student preparation for legal practice and to provide educational equity within the classroom. Part VI responds to the second common misunderstanding about active learning—that it cannot be used to teach students higher forms of thinking, such as how to "think like a lawyer." Part VII issues a call to action for law professors who are convinced by the arguments made in this Article.

Changing 150 years of the tradition and history of legal education, as well as individual professors' decades of teaching experience and teaching investment from carefully crafted lectures to entertaining unrealistic hypotheticals, will admittedly be an uphill battle for every brave educator who leaves behind comfortable pastures of familiarity and confidence to venture out into a 21st century world of learning, but never has it been so important. Superior learning gains for students is a worthy goal that will presumably incentivize many professors to seriously consider moving to an active learning teaching style, but working to create real equity in law school classrooms for all students should be a non-negotiable outcome for which every legal educator should strive.

II. ACTIVE LEARNING

A.   *Defining Active Learning*

The term "active learning" has been used with increasing frequency in pedagogical discussions in recent years and, unsurprisingly, this has resulted in the term being used both too broadly and too narrowly. In fact, much of the confusion and misunderstanding about active learning could be attributed to the imprecise definitions applied to it. For example, one professor may believe she is already engaging in active learning by calling on a student to take part in a Socratic dialogue. Another professor may believe that active learning is most applicable to lower-level learning, such as memorizing the elements of voluntary manslaughter, and is therefore irrelevant to his teaching, which seeks to focus on higher levels of learning such as legal analysis or the skill of "thinking like a lawyer."

At its core, active learning is what it sounds like—the learner is the active party, not the professor.[21] The focus of the learning experience is on the individual learner. The learner is the one interacting with the thing to be learned. The learner is the one creating new pathways in her brain and understanding things in ways she did not

---

Questions: A Non-Socratic Dialogue about Non-Socratic Teaching, 99 U. OF DET. MERCY L. REV. 1 (2021).

[21] *See Active Learning Challenges Old Education Models*, HARV. EXTENSION SCH. (Oct. 1, 2019), https://extension.harvard.edu/blog/active-learning-challenges-old-education-models/#content.

before. The learner is the one exercising higher-order thinking as she organizes new information to fit into her existing cognitive structures.[22] In simple terms, active learning means that learners "do meaningful activities and think about what they are doing."[23]

Active learning is the opposite of passive learning, which focuses on the professor as the main participant—the person in the spotlight and the expert sharing knowledge to be passively absorbed as students "take on the role of 'receptacles of knowledge.'"[24] In higher education, the lecture-based passive learning model remains "the single most prevalent teaching tool, although its dominance has declined in recent years owing to the increased discussion of, and research on, active learning methods."[25]

B.   *The Origins of Active Learning*

There are many in academia who are reluctant to experiment with what they view as a new and "modern" method of teaching, fearing they will be embracing a fad based on trendy science that may soon be discarded with the next discovery. In reality, nothing could be further from the truth when it comes to active learning. Though the term "active learning" is more modern terminology, the practice of active learning can be traced to our earliest ancestors and actually *pre-dates* the practice of using lecture to transmit skills and knowledge, which was an advent of medieval universities used "for duplicating textbooks (before printing presses) and later adapted for other purposes."[26]

Long before the arrival of teaching by lecture in medieval times, the roots of active learning can be found "as far as anthropology and archaeology allow. With the learning of hunting, farming, crafting, building. Of medicine, theology, law. Of child-raising, leading, orating. With parents teaching children. Shamans, initiates. Craftspersons, apprentices. *All of this takes place actively*."[27] Indeed, active learning is an "innate process through which humans come to know things, whether how to use fire, care for children, bake brea[d], do algebra, scan for iambic pentameter, or list the principal events of the French Revolution."[28] Looking at the full scope of human

---

[22] CHARLES C. BONWELL & JAMES A. EISON, ACTIVE LEARNING: CREATING EXCITEMENT IN THE CLASSROOM 5 (Jonathan D. Fife et al. eds., 1991).

[23] Michael Prince, *Does Active Learning Work? A Review of the Research*, 93 J. ENG'G EDUC. 223, 223 (2004).

[24] BONWELL & EISON, *supra* note 22, at 18 (quoting MICHAEL P. RYAN & GRETCHEN G. MARTENS, PLANNING A COLLEGE COURSE: A GUIDEBOOK FOR THE GRADUATE TEACHING ASSISTANT 20 (1989)).

[25] David R. Stead, *A Review of the One-Minute Paper*, 6 ACTIVE LEARNING IN HIGHER EDUC.118, 127 (2005).

[26] Paul Corrigan, *Active Learning Has an Ancient History*, TEACHING & LEARNING IN HIGHER EDUC. (Nov. 30, 2013), https://teachingandlearninginhighered.org/2013/11/30/active-learning-has-an-ancient-history (citation omitted).

[27] *Id.* (emphasis added).

[28] *Id.*

experience, "it turns out that active learning has an ancient history, *while lecturing is the fad*, a blip in the history of learning"[29] that has been the prevalent form of teaching only for a few hundred years.

The fad of passive learning that began in the medieval era did not persuade everyone, however. Indeed, in 1762, French philosopher Jean-Jacques Rousseau published *Émile, ou De l'éducation*, which is recognized by many as the first formalized argument criticizing professor-focused lecture-style education and advocating instead for student-based instructor-guided learning (what would later be called passive learning and active learning, respectively).[30] In *Émile*, Rousseau counsels the fictional teacher of the fictional student Émile as follows:

> No doubt he will require some guidance . . . but very little, and that little without his knowing it. If he goes wrong let him alone, do not correct his mistakes; hold your tongue till he finds them out for himself and corrects them, or at most arrange something, as opportunity offers, which may show him his mistakes. If he never makes mistakes he will never learn anything thoroughly. Moreover, what he needs is not an exact knowledge of local topography, but how to find out for himself. No matter whether he carries maps in his head provided he understands what they mean and has a clear idea of the art of making them. See what a difference there is already between the knowledge of your scholars and the ignorance of mine. *They learn maps, he makes them*.[31]

Rousseau's eloquent arguments fell largely on deaf ears, however, as they were made alongside controversial arguments about morality and religion that resulted in copies of *Émile* being burned in Rousseau's native Switzerland, while the French Parliament banned the book and ordered that Rousseau be arrested for authoring it.[32] Over 150 years passed before another influential philosopher reignited interest in educational reform from professor-focused lecture-style passive learning to student-focused active learning.

Dr. John Dewey was an American philosopher and psychologist who is recognized as one of the most influential educational thinkers of the 20th century.[33] In his 1916

---

[29] *Id.* (emphasis added).

[30] *See generally* JEAN-JACQUES ROSSEAU, ÉMILE, OU DE L'ÉDUCATION (1762).

[31] *Id.* at 164 (emphasis added).

[32] William Frank, *Hyacinth Gerdil's* Anti-Emile*: A Prophetic Moment in the Philosophy of Education*, 61 THE REV. OF METAPHYSICS 237, 237 (2007).

[33] *Schoolhouse Pioneers*, PBS, pbs.org/onlyateacher/john.html (last visited June 30, 2021).

> John Dewey was the most significant educational thinker of his era and, many would argue, of the 20th century. As a philosopher, social reformer and educator, he changed fundamental approaches to teaching and learning. His ideas about education sprang from a philosophy of pragmatism and were central to the Progressive Movement in schooling. In light of his importance, it is ironic that many of his theories have been relatively poorly understood and haphazardly applied over the past hundred years.

Id.

work *Democracy and Education*, Dewey claims, "learning means something which the individual *does* when he studies. It is an active, personally conducted affair."[34] He further explains:

> [T]here is no such thing as genuine knowledge and fruitful understanding except as the offspring of doing. The analysis and rearrangement of facts which is indispensable to the growth of knowledge and power of explanation and right classification cannot be attained purely mentally—just inside the head. Men have to do something to the things when they wish to find out something; they have to alter conditions. This is the lesson of the laboratory method, and the lesson which all education has to learn. The laboratory is a discovery of the condition under which labor may become intellectually fruitful and not merely externally productive.[35]

Though Dewey's work resulted in significantly more educational reform than Rousseau's two centuries earlier (Dewey is credited as being a founder of the Progressive Education Movement of the late 1800s and early 1900s, which resulted in the creation of experimental schools for mostly elementary-aged children),[36] ultimately Dewey's efforts did not result in an overhaul of the "traditional" lecture-based teaching model in the United States as he had hoped.[37] Rather, Dewey and his colleagues "encountered a highly bureaucratic system of school administration in general that was not respective to new methods."[38]

Fifty years and two World Wars later, the 1950s and 1960s saw a massive increase in college enrollment nationwide (49% in the 1950s; 120% in the 1960s) followed by a resurgence of interest from educators in higher education in the 1970s and 1980s. Specifically, educators began to examine which methods of teaching actually result in the highest levels of learning.[39] Educators began to focus significant attention on

---

[34] JOHN DEWEY, DEMOCRACY AND EDUCATION 378 (1916) (emphasis added).

[35] *Id.* at 310.

[36] *See Progressive Era*, K12 ACADS., https://www.k12academics.com/history-education-united-states/progressive-era (last visited June 30, 2021).

[37] *Id.*

[38] *Id.*; s*ee also Progressive Education*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/education/Social-reconstructionist-education (last visited June 30, 2021).

[39] U.S. DEP'T OF EDUC. OFF. OF EDUC. RSCH. AND IMPROVEMENT, 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 66 (Thomas D. Snyder ed., 1993).

> The 1950s and 1960s marked two major developments. First, large numbers of young people entered college and second, public colleges expanded dramatically to meet the demand. College enrollment rose by 49 percent in the 1950s, partly because of the rise in the enrollment/population ratio from 15 percent to 24 percent. During the 1960s, enrollment rose by 120 percent. By 1969, college enrollment was as large as 35 percent of the 18- to 24-year-old population. About 41 percent of the college students were women. Public institutions accounted for 74 percent of enrollment, and about one-fourth of all students were enrolled at 2- year colleges.

considering how to improve teaching methods, and "active learning" became the term most widely used for student-focused learning.[40]

In 1987, after several years of collaborative research, funded in part by the American Association for Higher Education, Professors Arthur Chickering and Zelda Gamson published an article in the American Association for Higher Education Bulletin.[41] The six-page article, titled "Seven Principles of Good Practice," was brief in its message, but its impact was far-reaching as evidenced by the number of institutions that, thirty-five years later, *still* use the article as a primary source on university teaching webpages to explain their respective university's commitment to high-quality instruction.[42] The article begins:

> Apathetic students, illiterate graduates, incompetent teaching, impersonal campuses—so rolls the drumfire of criticism of higher education. More than two years of reports have spelled out the problems. States have been quick to respond by holding out carrots and beating with sticks. There are neither enough carrots nor enough sticks to improve undergraduate education without the commitment and action of students and faculty members.[43]

The 1970s were a period of slower growth in college enrollment despite record numbers of young people of college age and increasing participation of older adults in college. During the 1970s, enrollment rose by 45 percent, somewhat slower than the 1960s, but about the same as the 1950s. The proportion of part-time students also increased, from 31 percent in 1969 to 41 percent in 1979. This rise was partly due to increased participation rates of older students and the expansion of 2-year college systems, whose enrollment more than doubled. By 1979, women constituted the majority on college campuses. Enrollment growth slowed substantially during the 1980s, with only a 17 percent increase between 1979 and 1989. Incremental increases have continued during the early 1990s. The proportion of part-time students has increased only slightly during the 1980s as participation rates for older age groups have remained stable. In contrast, enrollment rates for younger, traditional college-age people rose significantly, and college enrollment showed increases during the 1980s, despite drops in the college-age population.

Id.

[40] L & S LEARNING SUPPORT SERVS., TEACHING WITH TECHNOLOGY 98 (Steel Wagstaff, 2015).

[41] Arthur W. Chickering & Zelda F. Gamson, *Seven Principles for Good Practice in Undergraduate Education*, AM. ASS'N FOR HIGHER EDUC. BULL. 1 (1987).

[42] *See, e.g.*, *Seven Principles for Good Teaching*, THE UNIV. OF TENN. CHATTANOOGA, https://www.utc.edu/academic-affairs/walker-center-for-teaching-and-learning/faculty-support-and-resources/pedagogical-strategies-and-techniques/seven-principles-for-good-teaching (last visited Feb. 22, 2022); *Seven Principles for Good Practice in Undergraduate Education*, UNIV. OF S.C., https://sc.edu/about/offices_and_divisions/cte/teaching_resources/course_design_development_delivery/principles_good_practice/index.php (last visited Feb. 22, 2022); Jennifer Panther Bishoff, Utilization of the Seven Principles for Good Practice in Undergraduate Education in General Chemistry by Community College Instructors (2010) (Ph.D dissertation, West Virginia University) (on file with Graduate Theses, Dissertations, and Problem Reports, University of West Virginia).

[43] *Id.*

The article then goes on to list seven principles of good practice in higher education, including principles such as encouraging communication between students and faculty, developing cooperation between students, and providing prompt feedback.[44] On the topic of pedagogy, Chickering and Gamson argue in Principle Three, the lengthiest principle of discussion in the article, that active learning results in far greater levels of student learning than lecture-based passive learning.[45]

> Learning is not a spectator sport. Students do not learn much just by sitting in classes listening to teachers, memorizing pre-packaged assignments, and spitting out answers. They must talk about what they are learning, write about it, relate it to past experiences, apply it to their daily lives. They must make what they learn part of themselves.[46]

Four years after the publication of Chickering and Gamson's article, Professors Charles Bonwell and James Eison published another seminal work on best teaching practices in higher education, titled, "Active Learning: Creating Excitement in the Classroom."[47] In their article, Bonwell and Eison refute a common faculty objection to the recommendations of Chickering and Gamson: that mature, engaged college-aged students should have the responsibility of engaging their own minds as active learners in lecture-style classrooms rather than the responsibility resting on the professor to create an active learning environment.[48]

As Bonwell and Eison explain, "many faculty assert that all learning is inherently active and that students are therefore actively involved while listening to formal presentations in the classroom.[49] Analysis of the research literature . . . however, suggests that students must do more than just listen: They must read, write, discuss, or be engaged in solving problems."[50] Bonwell and Eison further state, "[m]ost important, to be actively involved, students must engage in such higher-order thinking tasks as analysis, synthesis, and evaluation."[51]

Turning to legal education, many law professors similarly believe that Langdell's Socratic method *is* a form of active learning so long as each student chooses to actively engage his mind in closely listening to a Socratic method lecture whether or not he is called on to converse with the professor in a dialogue.[52] This argument fails for the reason Bonwell and Eison identified—if the student himself is not actively involved in tasks of analysis, synthesis, and evaluation—not the observation of other people

---

[44] *Id.* at 3–5.

[45] *Id.* at 4.

[46] *Id.*

[47] BONWELL & EISON, *supra* note 22.

[48] *Id.* at xvii.

[49] *Id.* at iii.

[50] *Id.*

[51] *Id.*

[52] *Id.* at xvii.

doing these things, but the actual acts of doing them himself—the student is not engaged in active learning.[53] Additionally, even for the student engaging in the dialogue with his professor, the case method may be *interactive*, but it does not rise to the level of active learning even for that one student.[54] As this argument is one of the most commonly recited by law professors reluctant to abandon the traditional methods of pedagogy, it will be addressed at length in Part Three of this Article.

Another common concern Bonwell and Eison address in their 1991 article is that active learning may be ideal for small courses with limited class sizes, but could not possibly be done effectively in larger courses, such as the introductory classes found at universities or, for the law school counterpart, a second- or third-year large-enrollment doctrinal course such as Criminal Procedure or Evidence.[55] Bonwell and Eison respond, "a faculty member in a class of any size can instruct students to write a brief response to a question, to pair with a partner seated on the left or right, and then to compare and contrast both responses."[56]

C.   *Specific Examples of Active Learning*

Chickering and Gamson provide several examples of active learning in their 1987 article, including "structured exercises, challenging discussions, team projects, and peer critiques."[57] Chickering and Gamson further suggest that students can engage in active learning by "help[ing] design and teach courses or parts of courses,"[58] and they provide concrete examples from some of the programs they observed during their study:

> At Brown University, faculty members and students have designed new courses on contemporary issues and universal themes; the students then help the professors as teaching assistants. At the State University of New York at Cortland, beginning students in a general chemistry lab have worked in small groups to design lab procedures rather than repeat pre-structured exercises. At the University of Michigan's Residential College, teams of students periodically work with faculty members on a long-term original research project in the social science.[59]

Bonwell and Eison add several more examples of active learning to the list:

> 1) Pausing two or three times during a lecture for a few minutes to give students time to consolidate their own notes;

---

[53] *Id.* at 1–2.

[54] *Id.* at 24–25.

[55] *Id.* at 14–15.

[56] *Id.* at iv.

[57] Chickering & Gamson, *supra* note 41, at 4.

[58] *Id.*

[59] *Id.*

2) Brief demonstrations;

3) Assigning short, ungraded writing exercises followed by class discussion;

4) A feedback lecture, which consists of two mini-lectures separated by a small-group study session built around a study guide;

5) A guided lecture, in which students listen to a twenty-to-thirty-minute presentation without taking notes, followed by writing for five minutes about what they remember and spending the remainder of the class period in small groups clarifying and elaborating the material;

6) Cooperative learning;

7) Debates;

8) Drama;

9) Role playing;

10) Simulation.[60]

The list is far from exhaustive, and, in the thirty years that followed these two seminal publications, they have resulted in an entire field of scholarship that explores active learning techniques and their effectiveness in improving student learning outcomes.[61] Once a professor, department, or university embraces the importance of active learning and works to understand its underlying principles, the possibilities are fairly limitless. By way of just one example, in 2005, a university professor from the United Kingdom wrote an article based on his research of the prevalence and effectiveness of the active learning technique of the "one-minute paper"—a paper assigned at the end of class that requires students to engage in reflection on the learning experience that occurred during the class period by writing a response to a simple question such as, "what is one thing you learned today?" for, literally, just one minute.[62] This one-minute exercise allows the student to engage in meta-cognition about his or her own learning while also consolidating into memory a piece of his or her learning experience as the student scans the events of the class period to identify that piece.[63]

D.   *Active Learning is Superior to Passive Learning*

Turning to the question of whether student-focused active learning is actually the superior method of learning, in 1762, Rousseau theorized it was so,[64] and in 1916, Dr.

---

[60] *See* BONWELL & EISON, *supra* note 22, at 69.

[61] Stead, *supra* note 25.

[62] *Id.*

[63] *Id.*

[64] ROSSEAU, *supra* note 30.

Dewey argued the same.[65] Over half a century later, the work of researchers Chickering, Gamson, Bonwell, and Eison relied on what limited evidence was available at the time, which validated the claim that active learning is superior to passive learning, while calling for additional research to be done.[66] Finally, in the early 2000s, following the passage of the No Child Left Behind Act, which resulted in a corollary effect occurring in higher education as entire academic institutions focused on learning outcomes, significant resources were turned to answering the question of which teaching method is best for maximizing student learning.[67] When the spotlight focused on learning outcomes and researchers from various disciplines conducted empirical studies, the initially limited evidence relied on by early scholars snowballed into a mountain of results that repeatedly offered the same conclusion: Active learning results in significantly greater student learning than passive learning.[68]

---

[65] *See* JOHN DEWEY, DEMOCRACY AND EDUCATION 400 (1916).

> Without the particulars as they are discriminated by the active responses of sense organs, there is no material for knowing and no intellectual growth. Without placing these particulars in the context of the meanings wrought out in the larger experience of the past—without the use of reason or thought—particulars are mere excitations or irritations. The mistake alike of the sensational and the rationalistic schools is that each fails to see that the function of sensory stimulation and thought is relative to reorganizing experience in applying the old to the new, thereby maintaining the continuity or consistency of life.

Id.

[66] Chickering & Gamson, *supra* note 41, at ¶ 3.

> Currently, most published articles on active learning have been descriptive accounts rather than empirical investigations, many are out of date, either chronologically or methodologically, and a large number of important conceptual issues have never been explored. New qualitative and quantitative research should: Examine strategies that enhance students' learning from presentations; Explore the impact of previously overlooked, yet educationally significant, characteristics of students, such as gender, different learning styles, or stage of intellectual development; Be disseminated in journals widely read by faculty. In retrospect, it appears that previous classroom initiatives and written materials about active learning have all too often been isolated and fragmented. The resulting pedagogical efforts have therefore lacked coherence, and the goal of interactive classrooms has remained unfulfilled. Through the coordinated efforts of individual faculty, faculty developers, academic administrators, and educational researchers, however, higher education in the coming decade can make real the promise of active learning!

BONWELL & EISON, *supra* note 22.

[67] *See* Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WEEK (Apr. 10, 2015), https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04 ("The No Child Left Behind law . . . effectively scaled up the federal role in holding schools accountable for student outcomes.").

[68] *See* Youki Terada, *Students Think Lectures Are Best, But Research Suggests They're Wrong*, EDUTOPIA (Oct. 16, 2019), https://www.edutopia.org/article/students-think-lectures-are-best-research-suggests-theyre-wrong.

To highlight one of the largest studies, a 2014 article published in the Proceedings of the National Academy of Sciences of the United States of America entitled, "Active Learning Increases Student Performance in Science, Engineering, and Mathematics," presented the results of a meta-analysis of *225 different studies*—the largest meta-analysis done in undergraduate STEM education as of the date of its publication.[69] The meta-analysis compared student performance on exams in courses where the professors had taught their classes using passive learning against student performance on exams where the professors had taught their classes using active learning.[70] The courses included in the meta-analysis spanned many disciplines, including courses in "astronomy, biology, chemistry, computer science, engineering, geology, mathematics, natural resources or environmental science, nutrition or food science, physics, psychology, and statistics."[71]

The results of the meta-analysis were consistent across disciplines: students' exam scores improved by approximately 6% in active learning courses.[72] Furthermore, students in passive learning courses experienced increased failure rates—55% higher than those of students enrolled in active learning courses.[73] The findings of the meta-analysis of the 225 studies were further supported by the results of two earlier studies in undergraduate STEM disciplines conducted in 1999 and 2011, which reached the same conclusions: Active learning courses are superior to passive learning courses for student learning outcomes, and student failure rates are higher in passive learning courses as compared to active learning courses.[74] The 2014 study's authors concluded, "[t]he results raise questions about the continued use of traditional lecturing as a control in research studies and support active learning as the preferred empirically validated teaching practice in regular conclusions."[75]

Focusing on an individual study (separate from the studies referenced above) to demonstrate to the reader the types of techniques used to conduct this kind of research, in 2019, Harvard conducted a study in its introductory physics course to determine if professors who employed active learning techniques experienced superior student

---

[69] Scott Freeman et al., *Active Learning Increases Student Performance in Science, Engineering, and Mathematics*, 111 PNAS 8410, 8410 (2014).

[70] *Id.*

[71] *Id.* at 8414.

[72] *Id.* at 8410.

[73] *Id.*

[74] *Id.*

> Although this is the largest and most comprehensive meta-analysis of the undergraduate STEM education literature to date, the weighted, grand mean effect size of 0.47 reported here is almost identical to the weighted, grand-mean effect sizes of 0.50 and 0.51 published in earlier meta-analyses of how alternatives to traditional lecturing impact undergraduate course performance in subsets of STEM disciplines. Thus, our results are consistent with previous work by other investigators.

Id. at 8412.

[75] *Id.* at 8410.

learning gains to those professors who employed passive learning techniques.[76] Through random selection, the researchers enrolled half of the introductory physics students in passive learning classrooms and the other half in active learning classrooms with a number of controls in place to ensure consistency and limit bias, including controlling for the professors' teaching experience, the materials provided to the students (e.g., lecture slides), and student composition.[77] The experiment was administered as follows:

> Students in both groups received identical paper handouts with key concepts and equations along with example problems targeting specific learning objectives. The handouts had blank space for students to take notes and fill in answers to these sample problems. . . .

> In the control group, the instructor presented slides based on the handouts, gave explanations and demonstrations, and solved the example problems while students listened and filled in the answers along with the instructor. Emphasis was placed on maximizing the fluency with which the information was delivered. The use of handouts and focus on problem solving was different from the usual lectures in these courses. Using the taxonomy of Stains, these classes in the control group were strictly didactic in approach, with none of the supplemental group activities found in the usual class meetings.

> In the experimental group, the instructor actively engaged the students using the principles of deliberate practice . . . students were instructed to solve the sample problems by working together in small groups while the instructor roamed the room asking questions and offering assistance. After the students had attempted each problem, the instructor provided a full solution that was identical to the solution given to the control group. Students were actively engaged throughout the class period, making the experimental group fully student-centered.

> *The crucial difference between the 2 groups was whether students were told directly how to solve each problem or were asked to try to solve the problems themselves in small groups before being given the solution.* In other words, students in both groups received the exact same information from the handouts and the instructor, and only active engagement with the material was toggled on and off.[78]

The students were then tested at various points throughout the semester on topics that both types of classrooms had covered.[79] The result was the same each time: Scores

---

[76] Louisa Deslauriers et al., *Measuring Actual Learning Versus Feeling of Learning in Response to Being Actively Engaged in the Classroom*, 116 PNAS 1, 2 (2019).

[77] *Id.* at 1.

[78] *Id.* at 2 (emphasis added).

[79] *Id.* at 3.

were "significantly higher in the active classroom."[80] The researchers concluded, "[s]tudents learn more when they are actively engaged in the classroom than they do in a passive lecture environment. Extensive research supports this observation."[81] The Harvard research team further identified additional benefits of active learning: "Research also shows that active teaching strategies increase lecture attendance, engagement, and students' acquisition of expert attitudes toward the discipline."[82]

Finally, the researchers posed the same question that the authors of this Article seek to pose to its readers:

> Despite this overwhelming evidence, most instructors still use traditional methods . . . . Why do these inferior methods of instruction persist? Instructors cite many obstacles preventing them from adopting active teaching strategies, such as insufficient time, limited resources, a lack of departmental support, concerns about content coverage, and concerns about evaluations of their teaching.[83]

The authors of this Article readily admit that making the transition to an active learning teaching style will require time, resources, and support, in addition to a willingness to confront concerns about issues such as student ratings (which the Harvard study found were lower in the active learning classes because of the additional workload and cognitive strain caused by the student-centered learning environment even as the students learned significantly more). However, as Part III will explain, active learning not only results in *all* students learning more, which normatively should, on its own, motivate professors to confront these obstacles, but it also results in students from underrepresented and disadvantaged populations experiencing even greater learning gains than the general student population.[84] If this is the case, then in a 21st century law school classroom, one would hope that no professor would shirk the opportunity to provide greater educational equity for students from diverse populations in her classroom, even if it requires finding time, resources, and effort to do so.

III. Diversity and Equity

Active learning achieves greater equity in the classroom for diverse student populations because it begins to build bridges where there are currently gaps that keep these students from experiencing the same positive outcomes as their peers.[85] Because this is a finding that has emerged in recent years as the focus has turned from the general question of *whether* active learning increases learning outcomes for all students to the more discrete questions of *who it benefits* and *how exactly it benefits them*, there are still likely many more benefits to be identified. This Article will discuss

---

[80] *Id.*

[81] *Id.* at 1.

[82] *Id.*

[83] *Id.*

[84] *See* Theobald et al., *supra* note 18, at 6476.

[85] *Id.* at 6476.

an additional advantage that active learning creates for all students (other than superior learning outcomes), followed by discussing four specific advantages it creates for diverse student populations.

A.   Increased Interaction with Diverse Students

In 1999, Dr. Patricia Gurin submitted an Expert Report in the cases of *Gratz v. Bollinger* and *Grutter v. Bollinger* titled, "The Compelling Need for Diversity in Higher Education."[86] In her report, Dr. Gurin argues that a diverse environment in the university setting results in positive effects for all students including benefits such as increased cognitive abilities and the likelihood of creating a more diverse circle of friends and more diverse experiences later in life.[87]

> Students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.[88]

Interestingly, Dr. Gurin's report repeatedly relies on the assumption that students will have frequent opportunities to engage with each other outside *and inside* the classroom.[89] Indeed, Dr. Gurin claims:

> The impact of structural diversity depends greatly on classroom and informal interactional diversity. Structural diversity is essential but, by itself, usually not sufficient to produce substantial benefits; in addition to being together on the same campus, *students from diverse backgrounds must also learn about each other in the courses that they take . . . .*[90]

Dr. Gurin further explains, "Much to our chagrin as educators, we are compelled to understand that students' hearts and minds may be impacted most by what they learn from peers."[91]

In passive learning classrooms where the focus is primarily on lecture-based learning or limited interaction with one or two students engaging with the professor while the others passively observe the exchange, *structural diversity* may be present in the classroom, but the greatest benefits of diversity are missed. Those benefits are missed because those with diverse perspectives, experiences, and opinions are not provided regular, structured opportunities to contribute to the learning experience.[92] In contrast, in active learning classrooms, students are required to regularly engage with each other and with the professor. Indeed, ideally, each student contributes

---

[86] Patricia Gurin, *Expert Report of Patricia Gurin*, 5 MICH. J. RACE & L. 363, 363 (1999).

[87] *Id.* at 370, 385.

[88] *Id.* at 365.

[89] *Id.* at 420–21.

[90] *Id.* at 377.

[91] *Id.* at 422.

[92] *See id.* at 385.

multiple times to the learning experience each class period thereby enabling all students to experience the benefits cited by Dr. Gurin—benefits such as increased engagement, increased motivation, and increased intellectual skills.[93]

Dr. Gurin's focus twenty years ago as a social psychologist was on the importance and benefits of a diverse student body to the entire student population in institutions of higher education when regular engagement and interaction occur.[94] In the decades since Dr. Gurin's report, researchers have designed studies to consider the narrower question of whether active learning has positive effects specifically for underrepresented and disadvantaged student populations.[95] What these researchers found were several specific positive results that greatly improve the learning experience for diverse students.[96]

B.   *Increased Engagement, Self-Efficacy and a Sense of Belonging*

Professors who effectively use active learning techniques should see increased academic performance in all students, but the increase in academic performance disproportionately increases the performance of diverse students, which, in turn, increases student engagement, self-efficacy, feelings of belonging, and retention of diverse students.[97] These positive effects then become amplified as, year-over-year, these diverse students progress through a course of study with a better foundation to work from as they move to more difficult coursework and continue to build on their skills and confidence as they repeatedly find academic success in their courses.[98]

In the 2014 meta-analysis of 225 studies comparing student learning in active learning courses to passive learning courses, the team of biology professors who conducted the study explained:

> The data suggest that STEM instructors may begin to question the continued use of traditional lecturing in everyday practice, especially in light of recent work indicating that *active learning confers disproportionate benefits for STEM students from disadvantaged backgrounds and for female students in male-dominated fields*. Although traditional lecturing has dominated

---

[93] *Id.* at 365.

[94] *Id.* at 365–66.

[95] *See Inclusive Teaching Through Active Learning*, Brown, https://www.brown.edu/sheridan/inclusive-teaching-through-active-learning (last visited Oct. 27, 2021).

[96] *Id.*

[97] *See* Sarah Eddy & Kelly Hogan, *Getting Under the Hood: How and for Whom Does Increasing Course Structure Work?*, CBE Life Sci. Educ. (2014) 453, 453–68; *see also* Mariah Bohanon, *Advocating for Active Learning*, Insight Into Diversity (Aug. 22, 2018), https://www.insightintodiversity.com/advocating-for-active-learning (emphasis added); Theobald et al., *supra* note 18, at 6480.

[98] *See* James Urton, *Underrepresented College Students Benefit More From 'Active Learning' Techniques in STEM Courses*, UW News (Mar. 9, 2020), https://www.washington.edu/news/2020/03/09/underrepresented-students-stem-active-learning.

undergraduate instruction for most of a millennium and continues to have strong advocates, current evidence suggests that a constructivist "ask, don't tell" approach may lead to strong increases in student performance— amplifying recent calls from policy makers and researchers to support faculty who are transforming their undergraduate STEM courses.[99]

To be more specific about how these disproportionately greater academic gains occur, a few members of that same research team researched the effect of active learning in an introductory biology course on specific racial groups.[100] One professor taught six terms of the course including three terms with low structure and three terms with moderate structure.[101] The low structure course included a traditional passive learning lecture format with little student participation, three homework assignments, and four high-stakes exams.[102] The moderate structure increased the use of active learning techniques, including using in- and out-of-class activities, and involved the students speaking an average of 35% of the time during activities that reinforced concepts learned from the homework, including higher-order thinking skills.[103]

The results of that study were that while the increased course structure increased the course performance of all student populations, it "worked disproportionately well for black students—halving the black-white achievement gap—and first-generation students—closing the achievement gap with continuing generation students."[104]

In addition, the researchers asked the student participants to respond to a series of questions about the class and found that one behavior changed disproportionately for black students enrolled in the low structure course from those enrolled in the moderate structure: speaking in class.[105] In the low structure classes, black students "were 2.3 times more likely to report a lower level of in-class participation than students of other ethnicities."[106] In contrast, with the skills and confidence diverse students gained in the moderate structure classroom, the disparity of black students not speaking up in class at the same rate as their peers "*completely disappeared*" in the moderate structured classrooms.[107]

Indeed, STEM professors Stains and Smith from the University of Nebraska and Cornell (respectively) who studied the effect of classroom structure in 2,000 classes with 500 professors at 11 colleges and universities, explained in a 2018 report on their

---

[99] *See* Freeman et al., *supra* note 69 (emphasis added) (citations omitted).

[100] Scott Freeman et al., *Increased Course Structure Improves Performance in Introductory Biology*, 10 CBE–LIFE SCI. EDUC. 175, 175 (2011).

[101] Eddy & Hogan, *supra* note 97, at 456–57.

[102] *Id.* at 456.

[103] *Id.* at 457.

[104] *Id.* at 453.

[105] *Id.* at 462–63.

[106] *Id.*

[107] *Id.* at 463 (emphasis added).

work that "[u]nderrepresented, female, and first-generation students have *the most to gain* from a more interactive class structure. . . . There have been various studies at Minority-Serving Institutions showing that these shifts lead to higher academic performance and higher retention rates among underrepresented students."[108]

The results of Stains' and Smith's research were so compelling that the Association of American Universities launched a project to improve undergraduate learning and teaching in the STEM fields by working with member universities to develop and implement best practices in teaching, including at large universities where lecture-focused classrooms with hundreds of students had been the norm for decades.[109] Fifty-five member institutions worked on initiatives such as curriculum redesign, faculty training workshops, redesign of classroom spaces, and training of teaching assistants to support faculty members in creating an active learning environment.[110] The result? STEM students at these institutions that have embraced active learning not only perform better in introductory courses; these students "are persisting and performing highly in *subsequent courses*"[111] and equally importantly, "*achievement gaps for underrepresented students have greatly decreased.*"[112]

> We have seen learning gains for all students, but we also see that for those from diverse backgrounds, these gains are particularly great. . . . A lot of [these techniques], when done well, are creating inclusive classroom environments. We have very strong examples on our campuses of how disparities can really be addressed by improving the effectiveness of instruction within the classroom.[113]

In 2020, a group of professors in Washington conducted a similar study to test their hypothesis that active learning could narrow achievement gaps in STEM courses.[114] The research included a comprehensive search of published and unpublished studies, yielding a data set that included the exam scores of over 9,000 students.[115] The study concluded that active learning "reduced achievement gaps in examination scores by 33%."[116]

In addition to increasing academic gains at disproportionately higher rates, studies have shown that for diverse students, active learning environments increase self-

---

[108] Mariah Bohanon, *supra* note 97 (emphasis added).

[109] *Id.*

[110] *Id.*

[111] *Id.* (emphasis added).

[112] *Id.* (emphasis added).

[113] *Id.*

[114] Theobald et al., *supra* note 18, at 6476.

[115] *Id.*

[116] *Id.*

efficacy and feelings of inclusion.[117] In the 2018 article, "Enhancing Diversity in Undergraduate Science: Self-Efficacy Drives Performance Gains with Active Learning," STEM professors and researchers explained the results of a study designed to quantify the effects of "traditional versus active learning" on diverse students enrolled in large introductory STEM courses (defined as 250+ students) in three areas: academic performance, self-efficacy, and a sense of belonging.[118]

As with previous research, the study concluded that active learning classrooms improved student performance for all students, including diverse students.[119] However, the study also found that active learning classrooms produced feelings of greater belonging in the classroom, which especially benefitted diverse students.[120] The researchers explained:

> One obstacle that underrepresented minority students (URM) face is overcoming a 'chilly' classroom climate, characterized by little student participation and faculty-driven transmission of information in large introductory undergraduate classes. This environment can significantly undermine students' academic abilities and disproportionately affects historically URM students, who face unique challenges resulting from feelings of social isolation, low confidence, and stereotype threat.[121]

The researchers further explained that the increased sense of belonging created in an active learning classroom not only benefited underrepresented minority students, but also two other categories of students.[122] "More structured classrooms, in which the learner is asked to read before coming to class, has activities in class, and practices outside of class, preferentially benefit women and first-generation university students."[123] This result is not surprising given the findings of another study conducted in 2018, which considered the question of why women and people of color have been historically underrepresented in the STEM fields.[124] The researchers found that a lower sense of belonging significantly increased the likelihood that students would leave STEM programs prior to completion and also found that students from

---

[117] Cissy J. Ballen et al., *Enhancing Diversity in Undergraduate Science: Self-Efficacy Drives Performance Gains with Active Learning*, 16 CBE–LIFE SCI. EDUC. 1, 1 (2017).

[118] *Id.*

[119] *Id.* at 5.

[120] *Id.*

[121] *See* Ballen et al., *supra* note 117, at 1.

[122] *Id.*

[123] Barbara E. Goodman et al., *Best Practices in Active and Student-Centered Learning in Physiology Classes*, 42 ADVANCES IN PHYSIOLOGY EDUC. 417, 417 (2018).

[124] Katherine Rainey et al., *Race and Gender Differences in How Sense of Belonging Influences Decisions to Major in STEM*, 5 INT'L J. OF STEM EDUC. 1, 1 (2018).

underrepresented groups were the least likely to feel that they belonged in the STEM fields.[125]

The reason active learning classrooms have such an impact on diverse student populations in increasing a feeling of belonging was explained by a study conducted in introductory biology courses that compared feelings of student belonging in what the study called "low structure" and "high structure" courses with the "structure" referring to the amount of student engagement during the class period.[126]

> Under low structure, students did not seem to get to know the other students in the class and did not positively view the class as a community. . . . With increased structure, students were two times more likely to view the class as a community and 2.4 times more likely to say students in the class knew each other. . . .[127]

Another STEM study published in 2020 concluded that where active learning courses were designed to reduce or even eliminate achievement gaps through the resulting increased academic gains of diverse students, those students also reported "an increased sense of community and self-efficacy compared to their peers in the lecture-intensive version of the same course."[128]

Finally, active learning classrooms result in higher course pass rates for those students with less preparation than their peers, such as those from disadvantaged backgrounds.[129] A 2011 study conducted at the University of Washington considered the question of whether the failure rate of students taking introductory biology could be decreased by including active learning activities and regular assessments in place of low-structure courses based on lecture and a few high-stakes exams (a format often found in law school classrooms where lecture dominates, and a single summative exam is the only assessment tool).[130] The researchers briefly discussed effects of the democratization of education in the United States, which eventually resulted in historically excluded groups, specifically women and people of color, gaining access to higher education.[131]

> For faculty, the democratization of higher education means that an increasingly smaller percentage of students come from privileged social and economic backgrounds. Although faculty should celebrate this fact, it is

---

[125] *Id.* at 13.

[126] *See* Eddy & Hogan, *supra* note 97, at 455–56.

[127] *Id.* at 464.

[128] Theobald et al., *supra* note 18, at 6480.

[129] Freeman et al., *supra* note 100, at 184.

[130] *Id.* at 176.

[131] *Id.* at 175.

common to hear instructors express concern about the downside of democratization: high variation in student ability and preparedness.[132]

The researchers claimed, "[r]ecent research suggests that changes in course-design—specifically, the introduction of active-learning strategies—can help"[133] and used that claim to form a hypothesis: "[I]ntensive active learning, combined with frequent formative assessment, can lower failure rates in an introductory biology course."[134]

The results of the study after controlling for variables such as student ability and instructor effects were the following: "[F]ailure rates were lower in a moderately structured course design and *were dramatically lower in a highly structured course design*."[135] Specifically, the failure rates were reduced by a factor of three, from 18.2% to 6.3%.[136] The study further concluded that active learning "can make students more skilled learners *and help bridge the gap between poorly prepared students and their better-prepared peers*."[137]

Researchers from the previously discussed STEM study conducted in 2020 came to the same conclusion when considering the effect of active learning on failure rates.[138] The 2020 study considered data from 26 different studies and a total of 44,606 students for the analysis of failure rates.[139] After applying Bayesian regression analysis, the researchers concluded, "[O]n average, active learning . . . *narrowed gaps in passing rates by 45%*."[140]

As a result of their findings, the 2020 study's authors challenged professors "to replace traditional lecturing with evidence-based, active-learning course designs across the STEM disciplines" and claimed that the outcome of the study "suggest[s] that innovations in instructional strategies *can increase equity in higher education*."[141]

In conclusion, the benefits of active learning for all students are undeniable; they are especially compelling when considering the effects active learning has on diverse students. For those who are persuaded by this Article that active learning is the superior teaching method, the next question becomes how active learning can become a reality in legal education. In order for that reality to exist, however, the authors must first address two of the greatest stumbling blocks keeping legal education from progressing: first, the idea that the Socratic method *is* active learning (it is not) and

---

[132] *Id.*

[133] *Id.* at 176.

[134] *Id.*

[135] *Id.* at 175 (emphasis added).

[136] *Id.* at 183.

[137] *Id.* at 175 (emphasis added).

[138] Theobald et al., *supra* note 18.

[139] *Id.*

[140] *Id.* (emphasis added).

[141] *Id.* (emphasis added).

why the Socratic method actually hinders progress in legal education; and second, the idea that active learning may be appropriate for professors in other fields of study, such as the STEM fields, but does not and cannot apply to teaching "higher levels of learning" such as "thinking like a lawyer."

IV. THE SOCRATIC METHOD IS NOT ACTIVE LEARNING

First, before explaining why the Socratic method is not active learning, it is important to define what the authors mean when referring to the term "Socratic method." The Socratic method in legal education began as Langdell's chosen method to teach law using cases.[142] The Socratic method as practiced by Langdell involved asking students a series of questions about cases they had read to help them understand the legal principles underlying the case.[143]

Despite the common nomenclature between the two, Langdell's question-based method for teaching the law is actually very different from the question-based approach generally associated with Socrates because the law school version does not facilitate knowledge production by students, but rather involves the professor asking a series of questions, usually to a single student, in an attempt to lead the student "down a chain of reasoning either forward, to its conclusions or backward to its assumptions."[144]

---

[142] 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, 269–71 (2007).

> The use of the Socratic method as the predominant law school teaching tool came into vogue at the same time as the system with which it is most often linked, the case method. In 1870, Christopher Columbus Langdell became dean of Harvard Law School. Langdell believed that law should be taught, not as a skilled trade, but rather as a science. In furtherance of this belief, he introduced the case method of law study, in which students learned the law by reading and discussing cases to extract the scientific legal principles.

Id. at 269–70.

[143] *Id.* at 270.

> In utilizing the case method of study, Langdell relied primarily on what was termed the "Socratic method." As practiced by Langdell, the Socratic method consisted of having a student analyze each of the cases and then asking a series of questions designed to draw out the legal content of the case.

Id.

[144] *See* Bahadur & Zhang, *supra* note 20, at 122, n.29 (quoting Sheila I. Vélez Martínez, *Towards an Outcrit Pedagogy of Anti-Subordination in the Classroom*, 90 CHI.-KENT L. REV. 585, 591 (2015) (explaining that *Something Borrowed* is not the first article to erroneously conflate the Socratic method with the Langdellian Case Study Method)).

> Some scholars have often erroneously referred to this method as the Socratic method. The designation of the Langdellian method of instruction as the Socratic method has been criticized as a mischaracterization of the true nature of Socratic dialogue. The case method as conceived by Langdell involves a teacher asking a series of questions, usually to a single student, in an attempt to lead the student "down a chain of reasoning either forward, to its conclusions or backward to its assumptions." Professor Neumann, in his thought-provoking article, "A Preliminary Inquiry into the Art of

Other authors have also noted the dissonance between the Socratic method as applied in the law school classroom and the method actually used by Socrates in *Maieutic* and *The Apology*.[145] Professor Jeffrey D. Jackson, for example, points out that it is a mistake to link the question-based pedagogy observed in the law school classroom with Socrates' method of questioning because they are fundamentally different.[146] Most notably, they are different because true Socratic questioning, unlike

---

Critique," masterfully deconstructs the way the Langdellian method as it is currently used in law school is in fact Protagorean as it coincides with the techniques of Protagoras, Socrates' rival. In particular, Neumann highlights that it was Protagoras who taught students how to develop equally plausible arguments for and against a given proposition. For Neumann the wide use of the Langdellian Method has had the "unfortunate effect of inhibiting law school teachers from developing a more truly Socratic method of critique, one that can better teach analytical art to individual students while avoiding the hazards of the Langdellian technique." Neumann explains that the most important element of a true Socratic method is left out of the Langdellian method: where students have the opportunity to engage in knowledge production.

Id.

[145] *See* Joshua Krook, *The Real Socratic Method: Law Schools Fail to Understand Why Socrates Asked So Many Questions*, NEW INTRIGUE (Sept. 24, 2017), https://newintrigue.com/2017/09/24/the-real-socratic-method-law-schools-fail-to-understand-why-socrates-asked-so-many-questions/#_ftnref.

Instead of using the Socratic method on inexperienced students, the *Apology* seems to suggest that the Socratic method should be used on figures of authority. In the middle of the trial, Socrates' recounts the story of the Oracle of Delphi declaring him the wisest of all men. To disprove this absolutist claim, Socrates seeks out figures of authority and wisdom whom he suspects are wiser than he. He begins to interrogate them using his Socratic method, and this is what gets him in trouble. Here the Socratic method is revealed as a tool to interrogate those who hold themselves out to be wise, to test whether they are in fact wise at all.

To undergo such a test, the figure must have authority – which is why it is strange to use the technique on a student. Socrates himself suggests that he primarily used the method on three individuals. A politician who claimed himself wise, an artist, who did the same, and a poet, whose wisdom was self-evident in his poetry. In each case Socrates questioned a figure of authority on the subject matter. In the case of the politician, Socrates was literally 'looking' to the state in the manner expressed above.

The above examinations of the Socratic method as used in the *Apology* reveal three distinct claims. One, the method should be used to question the interests of the state. Two, the method should be used to question those in authority. Three, the method should be used to question those who hold themselves out to be wise. A modern version of the Socratic method would therefore encompass all three.

Id. (citation omitted).

[146] Jackson, *supra* note 142, at 271–72.

While the "classical" example of Socratic questioning to which the Socratic method is most often linked is Plato's dialogue the Meno, the questioning used in that dialogue bears little if any resemblance to the Socratic method as used in law schools. As in the Meno, Socrates's dialogues are dialectic--that is, the truth is not known to either of the participants, and the questioning is pursued in an attempt to figure out

the questioning used by professors in law school classrooms, is dialectic—the truth to be discovered is equally unknown to both teacher and student and becomes apparent as they engage in a Socratic-style discussion together.[147]

In contrast, when law professors and law students use the term "Socratic method" they are generally referring to the "the incessant questioning that [] professors use to prod and test the rules they cover."[148] One essential aspect of Socratic pedagogy as used in law school is that it is instructor-driven or instructor-led.[149] Professor Kris Franklin explains, "[t]he nature of Socratic dialogue as it usually functions in the casebook law classroom tends to involve a solitary interlocutor conversing with one or only a very few students at a time."[150]

For the purposes of this Article, the "Socratic method" will be defined as professor-led or professor-centered questioning-based pedagogy, even though the authors acknowledge that this is not "Socratic teaching" as taught and exemplified by Socrates, but rather an adaptation of Socratic teaching used in law schools to teach case law.[151] This broad definition should be understood to include all variants of the Socratic method found in law schools today; it neither requires nor ascribes to professors using the method that the professor pursue student questioning in a harsh manner or employ the kinds of degrading techniques highlighted by movies such as *The Paper Chase*.[152] Having defined the term "Socratic method" as it will be used for

---

   the truth. The questioning used in the Socratic method is not dialectic because one of
   the participants (the professor) knows the answer. The purpose of the Socratic method
   is for the professor to guide the student in discovering that answer for himself or
   herself.

  Id. (footnotes omitted).

[147] *Id.*

[148] Don Macaulay, *The Socratic Method, The Case Method and How They Differ*, BARBRI L. PREVIEW (Oct. 17, 2019), https://lawpreview.barbri.com/socratic-method-case-method-differ.

[149] *See* Bahadur & Zhang, *supra* note 20, at 124 ("Harvard University, where the methodology was born, states in describing the LCSM method that it '[e]mploys a hub-and-spoke discussion between professor and student.' The 'hub-and-spoke' means that the students' answers are followed up by a professor question.").

[150] Kris Franklin, *Method Lawyering: Immersion Teaching Illustrated*, 69 J. LEGAL EDUC. 1, 13, n.50 (2020) [hereinafter Franklin] (citing Jeremiah A. Ho, *Function, Form, and Strawberries: Subverting Langdell*, 64 J. LEGAL EDUC. 656, 658–70 (2015)).

[151] *See* Weaver, *supra* note 12, at 545.

[152] *See, e.g.*, Elizabeth Garrett, *Becoming Lawyers: The Role of the Socratic Method in Modern Law Schools*, 1 GREEN BAG 2D 199, 200 (1998). Explaining that the typical critique of the Socratic method assumes:

   the harshest and most adversarial version of the Socratic method as the benchmark
   for success and relates that one commentator has described "the stereotypical Socratic
   approach at its worst as learning how to ask rude questions." Her phrasing in this
   passage suggests that there is a kind of Socratic method other than the harsh
   stereotype, but much of her discussion centers around this caricature.

  Id.

the remainder of this Article, the authors will now explain why the Socratic method used in law schools does not rise to the level of active learning.

As explained in Part One of this Article, active learning requires the student to be the active party in the learning experience: The student is the one engaging with the thing to be learned and the student is the one leading the learning.[153] In Rousseau's words, though students will undoubtedly require some guidance it will be "but very little, and that little without his knowing it," allowing students to make mistakes and figure out for themselves how to solve the problems with which they are presented.[154]

Because the Socratic method used in law school follows a question-and-answer procedure and involves interaction between professor and student, the Socratic method is absolutely *interactive*, but it is a fundamental error to equate interactive learning with active learning. Unfortunately, this erroneous misunderstanding—that interaction is the same as active learning—widely persists in legal education. For example, Professor Jeffrey Jackson states, "[o]ne of the principal benefits that the Socratic method confers is to allow large bodies of students to engage in 'active learning.'"[155] The source of his error is Professor Elizabeth Garrett's article, which erroneously concludes that the Socratic method is active learning because the professor is not lecturing while using Socratic questioning.[156] Professor Garrett argues:

> No student is certain before class whether she will be called on to discuss difficult issues or to respond to answers provided by one of her colleagues. She must therefore pay close attention to the discussion between the professor and other students so she will be ready to play a meaningful role. Moreover, the Socratic method places some responsibility on students to think about the questions silently and participate *actively* on their own; the element of surprise provides a powerful incentive for them to meet that responsibility.[157]

Despite Professor Garrett's claims that all students will be "actively" participating on their own, nothing in her statement has anything to do with active learning except the fact that she chooses to use the word "actively."[158] Interactivity is not synonymous with active learning. Interactive learning is learning where the professor and one or more students interact using some form of communication; the simplest example of

[153] *See* BONWELL & EISON, *supra* note 22, at 19.

[154] ROSSEAU, *supra* note 30, at 164.

[155] Jackson, *supra* note 142, at 274.

[156] *See* Garrett, *supra* note 152, at 200–01 (reviewing LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE (1997)); *Id.* ("Professors could lecture students about legal reasoning, but those who use the Socratic method prefer to rely as much as possible on active learning.").

[157] Garrett, *supra* note 152, at 202 (emphasis added).

[158] *Id.*

interactive learning is when a professor asks a student a question and the student answers.[159]

In contrast, active learning is a distinct and deliberate pedagogical method.[160] The essence of active learning is a shift from focusing on how well the instructor can present the new material to be mastered by the student to how cognitively active each student is in the classroom and how much responsibility they take for their own learning in the classroom.[161] It requires the students' brains to engage with the material and the students' brains to guide the learning experience.[162] As explained by Dr. Dewey, "[m]en have to do something to the things when they wish to find out something; they have to alter conditions. This is the lesson of the laboratory method, and the lesson which all education has to learn."[163]

In order to accomplish such a learning experience, active learning focuses on activities that allow students to construct knowledge and understanding using the framework of their own current cognitive structures.[164] These activities can vary, but the focus is on students doing the higher-order thinking—requiring students to "do something" to the things they wish to better understand. And, although not always explicitly noted in the research, metacognition—students thinking about and reflecting on their own learning—is another important element of the active learning process as it allows the students to create links between the activity being done and the learning that is occurring.[165] Consequently, a necessary hallmark of active learning is the instructor moving away from a teacher-centered and content-based approach to a learner-centered approach.[166]

To be clear, a skilled advocate could shoehorn the Socratic method as currently used in legal education to fit within the broadest definitions of active learning.[167] But the authors of this Article argue that this act of shoehorning would be the result of an inertial response made to justify the status quo and avoid the uncomfortable but

---

[159] *See* Paola Arlotta, *Asking Questions That Push Students to Discover Information for Themselves*, Harv. Graduate Sch. of Educ., https://instructionalmoves.gse.harvard.edu/asking-questions-push-students-discover-information-themselves (last visited Oct. 22, 2021).

[160] Michael Christie & Erik de Graaff, *The Philosophical and Pedagogical Underpinnings of Active Learning in Engineering Educatio*n, 42 Eur. J. of Eng'g Educ. 5, 5 (2017).

[161] Michael Wiederman, Active Learning & Learner-Centered Instruction (2015), https://www.sc.edu/study/colleges_schools/medicine_greenville/internal/documents/learner_centered_strategies.pdf.

[162] *Id.*

[163] John Dewey, Democracy and Education 342 (1916).

[164] *See* Cynthia J. Brame, Active Learning 1 (2016).

[165] *Id.*

[166] Goodman et al., *supra* note 123, at 420.

[167] *See* Wiederman, *supra* note 161 (defining active learning broadly as "[a]ny method that facilitates active (cognitive) engagement of students with the material to be learned").

absolutely necessary process of questioning current pedagogical techniques based on a 150-year-old teaching method while ignoring the massive amounts of research coming from other disciplines, namely the STEM fields, that claim such outdated methods are inferior. In criminal law parlance, it would be akin to getting off on a technicality.

Indeed, despite suggestions to the contrary, the vast majority of learning in a Socratic method classroom is passive learning. It involves a room full of students passively observing a professor interacting with one student at a time as the professor leads the student through a series of questions selected by the professor, which results in even the student who is involved interacting with the professor but not engaging in active learning.[168]

To contrast this picture found in many law school classrooms today and to further highlight the differences between the Socratic method and actual active learning, below are ten active learning techniques with explanations that can easily be adopted for use in any law school classroom. Several have been used by the authors of this Article in first-year doctrinal courses, first-year legal writing courses, and upper-division courses; comments on those experiences are included.

Some of these active learning activities are from the original lists of activities generated by researchers Chickering, Gamson, Bonwell, and Eison in the late 1980s and early 1990s, while others are newer additions discovered in more recent years as professors across disciplines have sought to create opportunities for more active learning in their classrooms.

---

[168] *See What is Active Learning*, SMART SPARROW, https://www.smartsparrow.com/what-is-active-learning (last visited Nov. 4, 2021) (defining active learning as "any learning activity in which the student participates or interacts with the learning process, as opposed to passively taking in the information").

> The nature of Socratic dialogue as it usually functions in the casebook law classroom tends to involve a solitary interlocutor conversing with one or only a very few students at a time. In theory all other students/observers are thoroughly engaged in critically considering both sides of this discourse, but it seems doubtful that those who are not part of the exchange remain attentively and fully engrossed at every moment.

Bahadur & Zhang, *supra* note 20 (citing to Franklin, *supra* note 150); *see also* Sheila I. Vélez Martínez, *Towards an Outcrit Pedagogy of Anti-Subordination in the Classroom*, 90 CHI.-KENT L. REV. 585, 595 (2015).

> As A. Benjamin Spencer has recently argued, the ability of the case-dialogue method to transmit analytical skills effectively has never been demonstrated. Elizabeth Mertz advanced this argument in her article, "The Language of Law School." There, she describes studies of teaching methods that fail to show any connection between the method used and the ability of students to engage in effective legal analysis. Additionally, Spencer asserts that "the type of thinking promoted by the method is limited to certain kinds of legal analysis, neglecting some of the basic problem-solving skills that today's practitioners need to develop solutions to their clients' problem." In anticipation of students' interactions with their clients' problems, law students should be taught to be active problem solvers and not vicarious learners.

Id.

A.   *The Pause Procedure*

This method involves the professor simply pausing at periodic intervals (e.g., every 12–18 minutes) during class time to give the students a few minutes to work collaboratively with each other to discuss and work to understand what is being learned.[169] This peer-to-peer collaboration is an essential element of the constructivist learning theory upon which active learning is based.[170] It immediately involves every student in the classroom and requires students to explain in their own words the learning that has occurred thereby consolidating the new information in their minds.[171] The result is significant improvement in retention and understanding as well as class-wide engagement, both of which earlier sections of this Article argue are critical for working towards greater equity in law school classrooms.

B.   *Reflective Free Write*

The professor pauses after he or she finishes teaching a new concept and asks the students to individually complete the sentence in writing, "[s]o far today, I have learned that . . ." before moving on to new material. This technique aides in the formation of cognitive schema creation from old knowledge to new knowledge or, in other words, allows students to "translate information to new domains."[172] Professor Laurie Zimet of Hastings shared this technique with one of the authors, and both have had great success with it improving students' retention and understanding.

C.   *Think-Pair-Share*

The professor asks the class a question that requires higher-order thinking exactly like one would in a Socratic method classroom, but instead of putting one student on the spot and engaging only with that student while the other students passively listen, students are required to work with a peer to draft a written response to the question and to discuss and explain their answers with other peer groups. Pedagogically this allows students to "critically consider their neighbor's responses" and to "articulate newly formed mental connections."[173] As with other active learning techniques, this provides an opportunity for class-wide immediate engagement with every student being required to interact with other students. One of the authors uses this technique regularly and has also used oral versions with equal success where the students think of a response, then share it with each verbally rather than in writing. One additional suggestion for this technique is that if professors observe students pairing up in the same groups repeatedly, which limits the diversity of interactions, the professor can simply instruct students to work with someone they have not yet worked with in the class that week or that month or that semester or post assignment pairings and randomize them each class.

---

[169] *See* BRAME, *supra* note 164.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

D.   One-Minute Papers

The students write a written response for one minute to a question that requires them to reflect on their own learning or engage in critical thinking for one minute. The professor can then ask students to share responses to stimulate class discussion or collect all responses to provide the professor with feedback and inform future class sessions (e.g., by asking the question, "What is one question you have about today's class?" at the end of a class). As with the think-pair-share approach, this approach encourages students to articulate and examine newly formed connections and is also an excellent opportunity for meta-cognition.[174] One of the authors uses one-minute papers to take attendance in the course, providing students with a piece of paper titled, "Attendance Questions" that they pick up as the enter the room, then requiring students to start each class by responding to a one-minute question she posts before class begins. The professor then ends each class by requiring students to respond to a one-minute question. This simple technique takes very little time yet engages every student and provides a plethora of teaching benefits from opportunities for class discussion to regular feedback.

E.   Strip-Sequence

The professor gives the students "the steps in a process on strips of paper that are jumbled; ask them to work together to reconstruct the proper sequence."[175] This approach "strengthen[s] students' logical thinking processes and test[s] their mental model of a process."[176]

In one of the authors' Torts classes, students are given a series of jumbled sentences and the students work in groups to reassemble the sentences in the correct order to form a perfect IRAC essay answer to a hypothetical that they do not have a copy of. By the end of 15 minutes, the students understand on their own that issues are questions and rules are the principles that answer the issue questions. Additionally, after the students have assembled their answers, the professor asks them to highlight everything in the answer that they think is a fact and then recreate the hypothetical they think the assembled document was the answer to.[177] The students are surprised by how much they can learn by working backwards and how close they can come to recreating the hypothetical to which their assembled document was the answer. When they are given the actual hypothetical, the students discover that some of the facts in the hypothetical were not in the answer they were originally provided. The students then understand on their own that these facts are legally irrelevant facts that do not need to be in the analysis. They further understand that good legal analysis contains enough facts that the reader of an IRAC essay answer is able to derive the question that was asked minus the legally irrelevant facts. During this 15-minute exercise, the professor remains silent, circulating around the classroom and observing the students work as the students make the discoveries and form new connections in their minds in

---

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] This again is a variation of an active learning technique Laurie Zimet of Hastings introduced to one of the authors.

ways that are far more memorable and tangible to the students than if the professor had lectured about the same concepts for the entire class period with a few students responding to professor-selected questions.

F.   Concept Maps

Concept maps are visual representations of the relationships between concepts. Concepts are placed in nodes (often circles), and the relationships between the nodes or circles are indicated by labeled arrows that connect the concepts. The professor assigns students to create a concept map by identifying the key concepts to be mapped in small groups or as a whole class. The professor then asks students to determine the general relationship between the concepts and to arrange them two at a time, drawing arrows between related concepts and labeling the concepts with a short phrase to describe the relationship. By the professor asking students to build an external representation of their own mental model of a process, the students examine and strengthen the organization in their own minds, making corrections and adjustments as warranted following group discussion.[178]

In one of the authors' Civil Procedure classes, just after the class has completed a lesson on "judgment as a matter of law," students are assigned to spend 15–20 minutes creating a flowchart that explains that in a civil action, there is one way to begin a case and three ways to end it. Working in groups, the students figure out that when a complaint is filed and served, there must be a response. The students then work through mapping out the concepts that the first way a lawsuit can end is by a Rule 12 motion; if it does not end there, there is typically a responsive pleading and discovery regarding the allegations denied in the pleading, then the possibility of summary judgment; if summary judgment does not occur, then the case proceeds to trial where there is the possibility of a Rule 50 motion being granted. Once the students do this basic mapping, the professor asks them to fit Rules 8, 10, 11, 13, 15, 16, 26–37, 41, 45, and 55 into their concept map on their own outside of class.

G.   Mini Maps[179]

A mini map is essentially a smaller version of a concept map to focus on a smaller piece of law.

In one of the author's Torts classes, students are provided with a copy of the general rule for battery and all of the other sub-rules the class has been extracting from the cases. The professor then asks the students to individually or in small groups work to "elementize" battery, juxtapose each sub-rule with the element it is relevant to, and then create a one-sentence fictional fact pattern that will help them remember the rule. Requiring the students to organize the law allows students to create their own cognitive schema and also "hook" the new information learned to something already familiar to them (the fictional fact pattern they create from their own life experience), which results in better understanding and higher retention than borrowing from someone else's schema as occurs when a professor leads students through the lecture or discussion.

---

[178] *See* BRAME, *supra* note 164.

[179] *Id.*

H.   Categorizing Grids

The professor presents the students with a grid made up of several important categories and a list of scrambled terms, images, equations, or other items. Students are asked to quickly sort the terms into the correct categories in the grid. The professor then asks volunteers to share their grids and answer questions that arise from other classmates. This approach allows students to express and thus interrogate the distinctions they see within a field of related items. It can be particularly effective at helping professors identify misconceptions.[180]

In one of the authors' Civil Procedure classes, students are given a detailed plain English summary of Rule 26 with copious "fill in the blank spaces." Each of these spaces can be filled in by one of a series of statements in a separate table that he provides the students. Each statement contains some of the language of Rule 26. Students read the rule carefully in small groups, working to solve and understand which of the statements is appropriate to fill in the blank space. It is a challenging exercise for students that requires careful reading and contextualizing of the rule, but it provides students the opportunity to create their own understanding of the importance of the careful reading skills required for rules and statutes in a way that is instantly tangible for them and is far more effective than any version of instructor-led teaching on the same topic.[181]

I.   Student-Generated Test Questions[182]

After the class completes a topic, the professor assigns the students to work in groups to design a one-paragraph hypothetical they think tests a concept from the topic just taught. The groups then exchange questions and try to answer the question drafted by another group. After the "test," students discuss the results. The majority of the time, the drafting student group ends up testing issues they did not think they were testing and/or realizes that they included facts that either did or did not invoke a certain rule as intended because of gaps in their understanding of the law. This exercise teaches students the importance of understanding the complexity and nuance of law while also helping them better understand the law from a "backwards" approach as they work to create a hypothetical that interacts with the law they have been learning.

This technique was introduced to one of the authors by Professor Laurie Zimet and has been one of the most powerful teaching active learning techniques the author has ever used in the classroom.

J.   Case-Based Learning[183]

The immediate reaction of law professors to this technique's name may be that the Socratic method is a perfect example of "case-based learning" because it uses cases. Indeed, case-based learning can be an incredibly effective active learning technique *if the technique is deployed properly* (similar to parachutes being an incredibly effective

---

[180] *Id.*

[181] RORY D. BAHADUR, *CIVIL PROCEDURE: AN ACTIVE LEARNING APPROACH* 83–87 *(Revised ed.* 2021).

[182] *See* BRAME, *supra* note 164.

[183] *Id.*

safety device for skydivers when deployed properly, but incredibly ineffective if deployed in the wrong manner).[184] "Proper deployment" of cases as an active learning technique is explained by Professor Cynthia Brame as follows:

> [C]ase-based learning presents students with situations from the larger world that require students to apply their knowledge to reach a conclusion about an open-ended situation. Provide students with a case, asking them to decide what they know that is relevant to the case, what other information they may need, and what impact their decisions may have, considering the broader implications of their decisions. Give small groups (3-5) of students time to consider responses, circulating to ask questions and provide help as needed. Provide opportunities for groups to share responses.[185]

Most critical here is that the "proper deployment" of case-based learning as described by Professor Brame involves *the entire class's participation*, small group work where each individual engages in discussion and contributes, and student-centered learning. The professor is *not* leading the discussion or asking the questions. Instead, the students are the ones scrutinizing the case and choosing what is relevant, the students are the ones deciding what information they still need, the students are the ones discussing what impact their decisions have, and the students are the ones who work as a group to understand what the broader implications of their decisions are.

By way of one final and quite memorable example of active learning, the authors turn to the "Sick Pig Scenario," where Professor Laurie Zimet illustrated what active learning in a law school classroom looks like by describing her work with veterinary professors.[186] During the Section on Teaching Methods Presentation of the American Association of Law Schools ("AALS") annual meeting in 2019, Professor Zimet recalled her work at the National Institute on Issues in Teaching at the University of Chicago.[187] She explained that the conference focused on teaching across academia and that there were professors from liberal arts colleges and universities representing every kind of graduate and professional school—engineering, the military, veterinary schools.[188] There were professors who were sociologists, musicians, biologists, computer scientists, sculptors and artists, poets, historians, and economists.[189] These academics had come from across disciplines and geography to explore commonalities

---

[184] *Id.*

[185] *Id.*

[186] *See* AALS, *Section on Teaching Methods – Bringing Modern Pedagogy to the Traditional Doctrinal Classroom*, SOUNDCLOUD, at 1:41:30, https://soundcloud.com/aals-2/section-on-teaching-methods-bringing-modern-pedagogy-to-the-traditional-doctrinal-classroom/s-kDHcu.

[187] *Id.*

[188] *Id.* at 01:43:00.

[189] *Id.* at 01:42:04.

and differences in pedagogy.[190] One of the sessions at that conference was a plenary session on active learning during which participants were divided into small groups composed of five to six people each and asked to think about how they could implement active learning in their teaching.[191] Zimet recalls that one of the people in her group was the Dean of a veterinary school who raised an objection to active learning similar to one typically heard in the legal academy.[192] The Dean said:

> All of this active learning sounds fine, it is a fine idea, but if you have students like mine, it is not practical. My students are training to be veterinarians— they have to make rapid decisions. This is real. They go out and, on the spot, in minutes, have to diagnose what is wrong with the animal. It sounds great but not for us.[193]

After hearing the Dean's sentiments, Zimet felt obligated to prove that the position that his students could not learn the things they needed to master through active learning was incorrect.[194] Zimet explained ways that the active learning strategy of role playing could be incorporated into veterinary classes.[195] For example, students could be paired together with one playing the role of the veterinarian and the other playing the role of a sick pig.[196] The student pretending to be the sick pig would pick a disease and act the way a sick pig with the disease would act while the other student played the role of the vet and tried to diagnose the disease based on the symptoms.[197] Zimet then explained that the student who was the sick pig would know the disease even better than the student diagnosing since the pig would have to envision and articulate every facet of how the disease manifested.[198] And both students would learn and internalize the information much more powerfully than if their professor had simply lectured them or created a problem for them to work through.[199]

The sick pig experiment demonstrated how a passive learning classroom could be transformed into an active learning classroom with all its associated benefits. The transformation would entail ensuring that the learning was student-centered and student-generated rather than professor-focused and professor-led.

---

[190] *Id.* at 01:43:17.

[191] *Id.*

[192] *Id.*

[193] *See id.* at 1:44:10.

[194] *Id.*

[195] *Id.* at 01:45:08.

[196] *Id.*

[197] *Id.*

[198] *See id.* at 1:45:37.

[199] *Id.*

A common question used in pedagogy discussions is whether the teacher is acting as the "sage on the stage" or the "guide on the side."[200] The concrete examples given above demonstrate what active learning looks like when the professor acts as a "guide on the side" and allows the students to lead the learning rather than the professor acting as the "sage on the stage." Furthermore, these examples have hopefully provided sufficient contrast to make abundantly clear why the Socratic method, while *interactive*, does not rise to the level of active learning.

V. THE SOCRATIC METHOD HINDERS PROGRESS

In addition to failing to maximize learning gains, given that it is largely a form of passive learning, the Socratic method also hinders legal education's progress towards effectively preparing law students to be competent legal professionals and towards equity in the classroom. Many scholars have previously written extensive, well-researched articles about the deficits of the Socratic method; what follows is a brief summary of those academic critiques.[201]

A.   The Socratic Method is Outdated

Professor Edward Rubin, who specializes in administrative law, notes that Langdell's method was built on an emphasis on the common law, which, Rubin claims, is an outdated approach.[202] To continue to promote and utilize a method that primarily focuses on common law is to fail to recognize the impact of the administrative state in much of the modern legal world.[203] Indeed, Rubin posits that if Langdell's original teaching ideology of focusing almost exclusively on primary sources were strictly followed today, there would actually be much more reading of *statutes and regulations* over cases.[204] As Rubin puts it, "the institutional features of legislatures and agencies, not the institutional features of courts, have become crucial to understanding the modern legal system."[205] Instead, the first year classroom, Rubin continues, is "captive to the refuted glorification of the common law."[206]

B.   Practical Lawyering Skills Are Not Emphasized

Langdell approached the study of law essentially as a form of natural science; however, Rubin explains that modern law is more like a social science in its

---

[200] *Id.*; *see also* Peter Santon, *"Sage on the Stage" vs. "Guide on the Side" Education Philosophy*, MEDIUM (Aug. 17, 2019), https://peterwstanton.medium.com/sage-on-the-stage-vs-guide-on-the-side-education-philosophy-f065bebf36cf.

[201] See *infra* Part V.B–D.

[202] Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 616–17 (2007).

[203] *Id.* at 622.

[204] *Id.* at 620.

[205] *Id.*

[206] *Id.* at 631.

methodology.[207] The strict adherence to the Langdellian method has resulted in under-coverage of practical skills similar to the under-coverage of statutory study.[208] Criticism of the Socratic method in law school pedagogy often includes assertions that the method fails to explicitly teach the analytical processes that it seeks to hone.[209] The failure to incorporate explicit instruction of analytical skills results in inadvertently training students to prioritize the kind of rule memorization that would be expected in substantive courses.[210]

The central conclusion of the Carnegie Foundation's 2007 book-length report *Educating Lawyers: Preparation for the Profession of Law* ("the Carnegie Report"), as expressed by Mark Yates, is that traditional legal pedagogy "overemphasizes legal theory and underemphasizes practical skills and professional development."[211] According to American legal philosopher Jerome Frank, the "true work of a lawyer consists of solving the real problems of real clients. It does not pivot around the abstract legal rules, principles, and theories explored in Socratic dialogue."[212] Skills such as cooperation and client representation are not expressly taught early and concretely enough (hence Frank's recommendation to create clinical schools to teach those practical skills that are lacking in law students).[213]

C. The Method Lacks Explicit Foundational Instruction

Professor Larry O. Natt Gantt II claims that students are not taught often enough what critical and analytical thinking actually entails, even though they are expected to learn this way of thinking.[214] Returning to the classic Socratic discourses, the interlocutors interacting with Socrates were generally led to aporia rather than any new positive knowledge.[215] Rubin bemoans the belief that today law schools essentially teach three years of second-level courses:

> Each course begins with a definition of its subject matter–whether torts, civil procedure, corporations, or bankruptcy–then proceeds down to a fairly

---

[207] *Id.* at 642.

[208] *Id.*

[209] Larry O. Natt Gantt II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413, 419 (2007).

[210] *Id.* at 419–20.

[211] Mark Yates, *The Carnegie Effect: Elevating Practical Training over Liberal Education in Curricular Reform*, 17 J. LEGAL WRITING INST. 233, 234 (2011).

[212] Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 119 (1999) (citing to Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 907–08, 913 (1933)).

[213] *Id.*

[214] Gantt II, *supra* note 209, at 423.

[215] Christopher Meckstroth, *Socratic Method and Political Science*, 106 AM. POL. SCI. REV. 644, 649 (2012). Socrates himself often disclaims having any positive knowledge of his own. *Id.*

refined level of doctrinal detail, and finally stops short of intensive inquiry into any specific topic that would bring students to the advancing edge of scholarship or practice.[216]

This plays into the common law school trope of students being "terrified in the first year, interested in the second year, and bored by the third year."[217] Furthermore, this contributes to a difficulty in motivating students by failing to engage them intellectually.[218]

Beth A. Brennan notes that sometimes there are elements contributing to this lack of explicit instruction that are unintentional on the part of professors.[219] This lack of explicit instruction can be partially attributed to the "curse of knowledge," where experts forget what it is like to be a novice and inadvertently expect students to operate on the same mental schema that the professor has developed over years of study and experience.[220] Additionally, Brennan notes that sometimes expertise is conflated with pedagogy.[221] As a result, professors may refrain from explicit instruction to avoid "spoon feeding," equating the two. Brennan explains:

> [T]he academy uniformly recoils at the notion of "spoon-feeding" students. While effective teaching can manifest in numerous ways, referring to a teaching technique as "spoon-feeding" is to dismiss it out of hand. According to the academy's prevailing mythology, the ultimate reward of being able to think like a lawyer is obtained only via a painful pedagogical route. A student's journey begins with fog, is attended by constant confusion, and ends with eventual understanding. Rather than explicitly teach students foundational rules and concepts, professors use indirect methods to guide students toward moments when the student suddenly sees the underlying structure of the law and everything begins to make sense. The assumption is that to do otherwise will confound students' learning by instilling passivity. They will learn to think like lawyers only if they grapple with unfamiliar concepts and vocabulary until they eventually–somehow—reach illumination.[222]

---

[216] Rubin, *supra* note 202, at 648.

[217] *Id.*

[218] *Id.* at 650.

[219] Beth A. Brennan, *Explicit Instruction in Legal Education: Boon or Spoon?*, 52 U. Mem. L. Rev. 1, 23–27 (forthcoming 2022).

[220] *Id.* at 23–24.

[221] *Id.* at 25.

[222] *Id.* at 2.

Some professors believe explicit instruction robs students of the opportunity to think independently[223] while others resist explicit instruction under the belief that the law is "inherently unknowable."[224]

D.   *Emphasis on Process Over Doctrine*

Closely related to a lack of explicit foundational instruction is the critique that in law school pedagogy, process is stressed over doctrine.[225] Critics claim that as a result of this over-emphasis on process, some students even come to "conclude that practical skills are of little value and consequence," and leave law school "unsure of how to ask questions," only knowing how to respond to them.[226] The Socratic method often leaves students lacking in doctrinal understanding, having a mere superficial sense of legal problem solving, while severely lacking practical training.[227]

This, perhaps, is one way in which the Langdellian method is similar to pure Socratic methodology. A good argument in Socratic refutation is one that is good "relative to a given position one is trying to refute," rather than one that must be absolutely good or true in any ultimate sense.[228] "Because [Socrates' refutations] always begin from the contingent constellation of views that an interlocutor happens to hold, the conclusion of any single refutation must always remain *relative* to that particular position."[229] Professor Chris Meckstroth claims that "Socratic elenchus, unlike an analytic *reductio*, the logical status of a single refutation is inferior to that of the ongoing and systematic refutation of all competing views."[230] This process of perceived "dancing around an answer" can be sensed often in the law classroom and leads one to ask questions about whether the apparent quality of information taught using the Langdellian method is worth the sacrifice of the quantity of information that could be instilled through explicit instruction.

E.   *Psychological Harm*

The Socratic method has the potential to create any number of psychological problems for students. Aside from the terror experienced because of cold calling, students may be led to believe they have failed if they give the wrong answer in class.[231] Additionally, they may become anxious and confused when more questions

---

[223] *Id.* at 9.

[224] *Id.*

[225] Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 Loy. U. Chi. L. J. 449, 461 (1996).

[226] *Id.*

[227] *Id.* at 462.

[228] Meckstroth, *supra* note 215, at 648.

[229] *Id.* at 648–49.

[230] *Id.* at 649.

[231] *See* Stropus, *supra* note 225, at 457.

are created in their minds than answers.[232] Students may also struggle as they are forced to cope with relativism.[233] These pressures can lead students to engage in several coping mechanisms, whether it be an obsession with rank and academic success, withdrawal from the learning process, or even an antagonistic posture toward instructors and peers.[234]

F.   *Dehumanization of Human Matters*

Mark Yates suggests the Carnegie Report argues that constant study in the abstract context of the classroom fails to prepare students for actual practice, especially when it comes to having well-developed ethical foundations.[235] The second chapter of the Carnegie Report acknowledges that the Socratic method trains students to focus on legal principles while distancing themselves from the human element of the stories.[236] Real stories of tragedy, loss, and need are callously labeled "fact patterns."[237] People are viewed merely as a labeled party in court—plaintiff or defendant.[238] Students are trained in legal reasoning that focuses exclusively on cases without the "ethical substance" that accompanies exposure to actual clients.[239]

G.   *Rewarding and Promoting Privilege and Discrimination*

Several classes of individuals can either be unjustly privileged or discriminated against by the nature of Socratic discourse. Legal education already privileges those who are fast readers or who have good memories, but students who struggle in those areas often fail to develop legal reasoning skills.[240] Beth Brennan argues, "to the extent law schools expect students' background knowledge and skills to buoy them through their first year of law school, they are allowing students' privilege to leverage them into higher grades and more prestigious jobs."[241] While it can be effective to avoid using explicit instruction in the teaching of higher-order thinking skills, it is unfair to use implicit instruction to give students foundational knowledge of the law.[242]

---

[232] *Id.*

[233] *Id.* at 457–58.

[234] *Id.* at 458–59.

[235] Yates, *supra* note 211, at 234.

[236] *Id.* at 237.

[237] *See id.*

[238] *Id.*

[239] *Id.*

[240] *See* Brennan, *supra* note 219, at 1–2.

[241] *Id.* at 5.

[242] *Id.*

Ruta Stropus argues that the Socratic method also can have the effect of disadvantaging nontraditional students. It instills an added sense of alienation,[243] possibly because the Langdellian method reflects white male values in an environment that is "assertive, argumentative, confrontational, controlling, impersonal, logical and abstract."[244]

Some, however, believe the method actually has merits in this regard. One Harvard professor responded to the critique that the Socratic method is oppressive by positing that it can actually have an empowering effect.[245] Another said that it levels the playing field (for women specifically, but certainly for minorities as well) in that it keeps some students from dominating the discussion, it purposefully engages others, and it enforces a "you can do this" mentality by not letting someone off the hook when they scramble for answers.[246] Meckstroth, in response to a critique of the Socratic method on behalf of minorities and women, argues that when done well, the method exposes rather than occludes any remainder perspectives outside of whatever terms or perspectives are presently dominant.[247]

H.   Advancement of a Specific Political and Ideological Agenda

Finally, according to Professor Duncan Kennedy, the Socratic classroom is a training ground for hierarchy.[248] An atmosphere may be created in which the professor is an omnipotent entity who can invade a student's personal space on a whim, and students may, in turn, adopt a posture of deference to professors despite occasions of *ad hominem* attacks in the classroom.[249] Additionally, there can be a perceived "stacked deck" against women, who some scholars claim generally tend to prefer a more cooperative and communal style of learning.[250] As a result, female law students may feel they do not have anything to contribute and may feel excluded from discourse.[251]

Having addressed the Socratic method in Parts IV and V, including why it is not active learning and how it hinders progress in legal education, the authors will now address the other most common misunderstanding that keeps active learning from becoming a reality in law school classrooms—the false belief that active learning may be useful in other disciplines but cannot be used to effectively teach students higher-level skills such as how to "think like a lawyer."

---

[243] *See* Stropus, *supra* note 225, at 462.

[244] *Id.* at 463.

[245] Kerr, *supra* note 212, at 128.

[246] *Id.*

[247] Meckstroth, *supra* note 215, at 653.

[248] *See* Kerr, *supra* note 212, at 121 (citing DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 3 (1983)).

[249] *Id.*

[250] *Id.*

[251] *Id.*

VI. ACTIVE LEARNING AND "THINKING LIKE A LAWYER"

"You come in here with a skull full of mush, and you leave thinking like a lawyer."[252] This iconic line from legal zeitgeist *The Paper Chase* is much more than a caricature of legal education; it is often held to be the genuine goal and purpose of a legal education.[253] And yet, for how often the phrase is hailed as being the definitive goal, the phrase is ambiguous and vague.[254] It is precisely this ambiguity that makes it nearly impossible to argue with a professor who claims his or her goal as a law professor is not to teach "the law" but rather "how to think like a lawyer," and then further uses this claim to support his or her argument that the only way to achieve that aim is by using the Socratic method.

The reality is that there is no universal agreement about or understanding of exactly what the phrase "thinking like a lawyer" means. The result of this reality is that so long as a nebulous ill-defined outcome is the alleged "goal" of a legal education, it is impossible to assess whether the goal is actually being achieved. This is an excellent way to avoid scrutiny of one's effectiveness as a teacher, but a poor way for an entire field of professional study to conduct itself in a twenty-first century educational environment where clear outcomes and assessment are the expectation of students and accrediting bodies alike, in the United States and internationally.[255]

Dean Erwin Chemerinsky comically captured the limited utility and absurdity of clinging to one such lone, hazy pedagogical goal when he said:

> Imagine you are about to undergo brain surgery and just as the anesthesia is taking effect, the neurosurgeon walks in. How would you feel if the surgeon said, "Relax, you are in good hands. I haven't even actually done surgery before, but I graduated top of my class in medical school and they taught us how to think like a surgeon."[256]

The origin of the idea of "thinking like a lawyer" has been attributed to Christopher Langdell.[257] As previously explained, Langdell believed that the scientific method

---

[252] THE PAPER CHASE (20th Century Studios 1973).

[253] Kris Franklin, *Sim City: Teaching "Thinking Like a Lawyer" in Simulation-Based Clinical Courses*, 53 N.Y.L. SCH. L. REV. 861, 863 n.11 (2008) [hereinafter Franklin, *Sim-City*].

[254] *Id.* at 866.

> "Thinking like a lawyer" is a phrase so routinely used and so often self-referential that its meaning is generally left unexplained, or at least ill-articulated. Given the variability and subjectivity of potential meanings of the phrase, our use of it skates uncomfortably close to something that "we know when we see it."

Id.

[255] Mrunal Mahajan & Manvender Kaur Sarjit Singh, *Importance and Benefits of Learning Outcomes*, 22 IOSR J. HUMANITIES & SOC. SCI. 65, 65 (2017).

[256] Erwin Chemerinsky, Address at the Thomas Jefferson School of Law Bricks & Bytes Conference (Mar. 11, 2012).

[257] Gantt II, *supra* note 209, at 419.

was an appropriate approach to the law, which he considered to be a science itself.[258] However, in the 150 years since then, though the term has remained prevalent in legal education, a clear consensus of what exactly that phrase means and how an institution can measure if the goal of teaching students how to do it has been met has, thus far, failed to matriculate.[259]

Rather, the opposite has occurred. One does not have to look far to see many varied interpretations of what "thinking like a lawyer" means as modern day educators have sought to crystallize a definition to justify its continued existence as the oft-recited ultimate goal of legal education.

Former Dean Scott Bice claims the term includes:

> [T]he interpretation and use of legal materials (cases, statutes, administrative orders, private contracts, etc.) to serve clients' interests. Sometimes serving those interests involves using legal knowledge for counseling, sometimes for negotiation, sometimes for lobbying for a change in a relevant statute, sometimes for litigation. Moreover, in certain fora (an appellate court or a legislative body), "thinking like a lawyer" requires normative arguments, which involve considerations of such values as efficiency, corrective justice, and wealth distribution.[260]

Conversely, Professor Kenney Hegland claims that the term refers to three major components: "1. To spot legal issues (problems) lurking in any fact pattern; 2. To know the general solutions the law has adopted to solve these problems; and 3. To apply these solutions to case at hand."[261] He adds that "[t]his, and nothing more fancy, is what it is 'to think like a lawyer.'"[262]

Larry Gantt, in his work *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, claims that many definitions of "thinking like a lawyer" are circular in that they imply that thinking like a lawyer is a cognitive state of mind that happens when one undertakes cognitive processes that accompany the tasks of the profession of law.[263] Indeed, cognitive psychology tends to portray any kind of critical thinking as "domain-specific," suggesting that expertise in a field is produced by the combination of domain-specific (in this case, legal) knowledge and skill to utilize such knowledge.[264] However, it is overly simplistic to suggest that "thinking like a lawyer" amounts to mere intense problem-solving. Problem-solving as a process, such as ends-means analysis, is innate to human nature

---

[258] *Id.*

[259] *Id.* at 413.

[260] *Id.* at 415 (quoting Scott H. Bice, *Good Vision, Overstated Criticism*, 1 J. Ass'n Legal Writing Dirs. 109, 109–10 (2002)).

[261] Kenny F. Hegland, Introduction to the Study and Practice of Law 87–88 (2003).

[262] *Id.* at 88.

[263] Gantt II, *supra* note 209, at 415.

[264] Brennan, *supra* note 219, at 5.

and does not require explicit instruction.[265] Domain-specific problem-solving techniques, such as those employed and cultured in the law classroom, requires conscious effort.[266]

Gantt suggests that there is merit in distinguishing between practical skills and analytical processes, as often the practical skills employed by lawyers are based upon some foundational analytical skills.[267] He gives the example of legal research (practical) as being fueled by statutory analysis and case synthesis (analytical).[268]

Gantt's article is renowned for breaking down the cognitive processes involved in "thinking like a lawyer."[269] He separates the overall structure of legal thinking into seven categories that overlap and build on one another.[270] The seven categories include: (1) overall structure for legal thinking; (2) identifying legal issues; (3) logical reasoning; (4) "arguing from the rules;" (5) seeing all sides in a matter; (6) attending to detail; and (7) recognizing the "big" issues.[271]

Approaching the idea of "thinking like a lawyer" from another angle, Professor Kris Franklin uses Bloom's Taxonomy to frame the cognitive processes employed by those in the legal community.[272] Bloom's Taxonomy breaks cognitive operations into a hierarchy of six levels that increase in complexity.[273] It can be applied to a lawyer's cognitive skills as such: the lower-level skills of remembering and understanding a client's situation and goals, as well as applicable laws; the mid-level skills of applying the law to the facts at hand as well as analyzing facts and laws; and the higher-level processes of evaluating (judging, prioritizing, comparing validity of arguments) and creating (predicting various outcomes, adapting and adjusting arguments in response to input from others).[274]

Turning to the American Bar Association for guidance on what it means to "think like a lawyer" (assuming this is, in fact, the ultimate goal of legal education), in 1992, the American Bar Association Task Force on Legal Education and the Profession released the MacCrate Report.[275] The Report was meant to be a vision of legal

---

[265] *Id.* at 7.

[266] *Id.* at 7–8.

[267] Gantt II, *supra* note 209, at 422.

[268] *Id.*

[269] *See* Franklin, *Sim-City*, *supra* note 253, at 866–67.

[270] Gantt II, *supra* note 209, at 436–78.

[271] *Id.*

[272] Franklin, *Sim-City*, *supra* note 253, at 867–69.

[273] *Id.* at 867–68.

[274] *Id.* at 871–72.

[275] *See generally* AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (Robert MacCrate et al., eds., 1992) [hereinafter MacCrate Report].

education as an institution.[276] Specifically, the ABA Task Force explained that the purposes of enumerating specific goals included:

> (1) aiding students and practitioners in their self-assessment and self-development decisions; (2) creating discussion and debate among the members of the legal profession concerning the SSV's contents, thereby leading to a refined knowledge and understanding of shared fundamental skills and professional values; and (3) assisting law schools and other educational providers in the continuum in the design and delivery of improved programs for educating students and practitioners in fundamental skills and values.[277]

The MacCrate Report enumerates the following skills that it claims law school graduates should have: "(1) problem solving; (2) legal analysis and reasoning; (3) legal research; (4) factual investigation; (5) communication; (6) counseling; (7) negotiation; (8) litigation and alternative dispute resolution procedures; (9) organization of legal work; and (10) recognizing and resolving ethical dilemmas."[278]

Turning to the attorney-licensure process, the Uniform Bar Exam should presumably be an exam focused on the ability to "think like a lawyer" given the claim that this is the most critical skill taught in law school to prepare students to be future lawyers and given that the Bar Exam acts as the final gatekeeper for entry into the legal profession. According to the National Conference of Bar Examiners, the UBE "tests knowledge of general principles of law, legal analysis and reasoning, factual analysis, and communication skills to determine readiness to enter legal practice in any jurisdiction."[279]

Finally, on October 28, 2020, the Institute for the Advancement of the American Legal System (IAALS) published one of the largest empirical studies ever done to develop "an evidence-based definition of minimum competence" that involved over 50 focus groups including junior lawyers and supervising lawyers.[280] Though the study did not purport to investigate the definition of what it means to "think like a lawyer," if the study sought to identify the most critical skills attorneys need to be

---

[276] J. Michael Norwood, *Scenes from the Continuum: Sustaining the MacCrate Report's Vision of Legal Education into the Twenty-First Century*, 30 WAKE FOREST L. REV. 293, 293 (1995).

[277] *Id.* at 295–96; *see* MacCrate Report, *supra* note 275, at 123–34.

[278] Gantt II, *supra* note 209, at 421; *see* MacCrate Report, *supra* note 275, at 138–40. These skills are further elaborated on in Chapter Five of the MacCrate Report, entitled "The Statement of Fundamental Lawyering Skills and Professional Values" (SSV). *Id.* at 135–41.

[279] *Understanding the Uniform Bar Exam*, NAT'L CONF. OF BAR EXAM'RS (July 2017), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/August2017OpenSessionMaterials/17_august_ncbe_ube_overview.pdf.

[280] DEBORAH JONES MERRITT & LOGAN CORNETT, BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 3 (Inst. for the Advancement of the Am. Legal Sys.,   2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar_pre_print.pdf.

minimally competent in practice and if law schools are the program of study that claims to prepare students for the practice of law, it would seem reasonable that these skills of minimum competence should be included in the ultimate goal of a legal education in order to actually teach students to "think like a lawyer."[281]

The IAALS study found that minimum competence to practice law requires that the practitioner possess twelve different skills or interlocking components in their skillset referred to as "building blocks," which are as follows:

- The ability to act professionally and in accordance with the rules of professional conduct

- An understanding of legal processes and sources of law

- An understanding of threshold concepts in many subjects

- The ability to interpret legal materials

- The ability to interact effectively with clients

- The ability to identify legal issues

- The ability to conduct research

- The ability to communicate as a lawyer

- The ability to see the "big picture" of client matters

- The ability to manage a law-related workload responsibly

- The ability to cope with the stresses of legal practice

- The ability to pursue self-directed learning.[282]

Considering all of these different definitions and interpretations, categories and lists, overlaps and non-overlaps, only one thing is clear: What it means to "think like a lawyer" is anything *but* clear. As with the Socratic method, the phrase is 150 years outdated, and it is outdated at a time when learning outcomes should be clearly stated, clearly defined, and clearly achievable.[283]

---

[281] *Id.*

[282] *Id.*

[283] *See, e.g.*, Kris Franklin & Rory D. Bahadur, *Directed Questions a Non-Socratic Dialogue about Non-Socratic Teaching*, 99 U. DET. MERCY L. REV. 1, 50 (2021).

> Before faculty can assess how well their students are learning, they must identify and clarify what they are trying to teach. If the objective for each class session is unarticulated, or is only loosely formulated in broad strokes like "understand this case" or "learn how to think like a lawyer," pretesting and assessment are almost impossible to implement. Some studies suggest that "the most serious impediment to improving education was not the quality of either instruction or assessment, but rather the failure of instructors to identify clearly what were the most important objectives for learning," so finding ways to influence the setting of concrete and achievable learning goals can only improve legal education.

Id. at 29 (internal citations omitted).

After those outcomes have been clearly expressed, we can then turn to the question of whether active learning can effectively teach higher-level skills such as those found at the top of Bloom's Taxonomy—analysis, evaluation, and creation. Can active learning teach these kinds of skills or is it only effective for the lower levels of learning such as memorization and basic understanding? Is active learning limited to certain spheres of the learning experience or could it be applied to teach even the most complex and sophisticated types of cognitive learning?

The short answer? Absolutely, yes. In fact, *active learning is at its best when applied to the highest levels of learning* because these levels of learning require that the learner, not the professor, be the individual engaging with the thing to be learned.[284] Conversely, passive learning is wholly ineffectual in teaching students the highest levels of learning.[285] Passive learning cannot teach a student to analyze through passively observing the analysis of a professor.[286] Passive learning cannot teach a student to evaluate through passively observing evaluation done by a professor.[287] And passive learning certainly cannot teach a student how to create through passively observing a professor in the act of creation.[288] In more eloquent terms, Rosseau explains:

> [W]hat he needs is not an exact knowledge of local topography, but how to find out for himself. No matter whether he carries maps in his head provided he understands what they mean, and has a clear idea of the art of making them. See what a difference there is already between the knowledge of your scholars and the ignorance of mine. *They learn maps, he makes them*.[289]

The longer answer is to direct the reader back to the massive amounts of research done on the superiority of active learning over passive learning, in which no study limited professors to focusing their teaching on the bottom levels of Bloom's Taxonomy. On the contrary, researchers repeatedly discovered that the increase in learning that happened in active learning classrooms allowed the students to experience higher levels of mastery.[290] Returning to Bonwell and Eison's explanations of what active learning is, they claim that in order for students to engage in active learning, "students must do more than just listen: They must read, write, discuss, or be engaged in solving problems. *Most important, to be actively involved,*

---

[284] Kate E. Bloch, *Cognition and Star Trek(R): Learning and Legal Education*, 42 J. MARSHALL L. REV. 959, 968–69 (2009).

[285] *Id.* at 980.

[286] Michael L. Richmond, *Teaching Law to Passive Learners: The Contemporary Dilemma of Legal Education*, 26 CUMB. L. REV. 943, 953 (1996).

[287] Bloch, *supra* note 284, at 992–93.

[288] Franklin & Bahadur, *supra* note 283, at 8–9.

[289] ROSSEAU, *supra* note 30, at 199. (emphasis added).

[290] *See* Freeman et al., *supra* note 69, at 8411.

students must engage in such higher-order thinking tasks as analysis, synthesis, and evaluation."[291]

Bonwell and Eison further explain, "research studies evaluating students' achievement have demonstrated that many strategies promoting active learning are comparable to lectures in promoting the mastery of content but superior to lectures in promoting the development of students' skills in thinking and writing."[292] *Indeed, active learning is not only effective for teaching the highest levels of learning; it is actually the far superior method for doing so.*[293]

In conclusion, this second misunderstanding results from two inaccurate beliefs: first, that the vague term "thinking like a lawyer" should be the ultimate goal of a legal education; and second, that higher-level learning cannot be taught through active learning methods. Neither belief should continue to persist given their falsity and the negative ramifications they have in law school classrooms. Instead, law professors should embrace the opportunity to think critically about specific, well-defined objectives for their courses and use their well-developed analytical and writing skills to clearly define and express those desired outcomes and the assessments that will be used to measure those outcomes. Furthermore, law professors should commit to using the most superior teaching methods for guiding students as they work to acquire the high-level skills required in today's legal market—skills of analysis, evaluation, and creation.

VII. A CALL TO ACTION

In 2020, the ABA's Commission on the Future of Legal Education published a report on legal education stating:

> Our established system of legal education and licensure is preparing the next generation of legal professionals for yesterday rather than tomorrow. It is preparing them for a world that will not exist sooner than we might like to imagine. There are important and meaningful exceptions to this assessment. Those exceptions typically come from the hard work of institutional and individual innovators. They are not a result of systemic change or of how our system of education and licensure is designed.[294]

The report then issues a call for reform in accreditation standards, arguing that the standards should "encourage pedagogical initiative and discourage entrenchment . . . and reward transparent innovation and experimentation."[295] The report concludes, "[t]here is positive change already underway; passionate innovators in every sector of

---

[291] BONWELL & EISON, *supra* note 22, at 22 (emphasis added) (emphasizing the importance of active learning in the classroom).

[292] *Id.*

[293] *Id.* at 5–6; *Understanding the Uniform Bar Exam*, *supra* note 279.

[294] AM. BAR. ASS'N COMM'N ON THE FUTURE OF LEGAL EDUC., *Principles for Legal Education & Licensure in the 21st Century* (2021), https://www.americanbar.org/content/dam/aba/administrative/future-of-legal-education/cflle-principles-and-commentary-feb-2020-final.pdf.

[295] *Id.*

legal education and licensure strive for progress every day. To build on that work, we need systemic change—and we need it now."[296]

The authors of this Article agree that systemic change is needed; however, we caution against drastic change overnight that may result in poor implementation or frustration for professors and students. Indeed, STEM professors seeking to use more active learning in their classrooms cautioned:

> [F]aculty who are new to active learning may need to start their efforts to redesign courses with low-intensity interventions that are less likely to improve student outcomes. If so, the goal should be to persist, making incremental changes until all instructors are teaching in a high-intensity, evidence-based framework tailored to their courses and student populations.[297]

This advice echoes the advice given by Bonwell and Eison, who counseled those professors who are committed to creating an active learning environment to proceed as follows:

> An excellent first step is to select strategies promoting active learning that one can feel comfortable with. Such low-risk strategies are typically of short duration, structured and planned, focused on subject matter that is neither too abstract nor too controversial, and familiar to both the faculty member and the students. Conversely, greater levels of risk occur when one or more of these dimensions is altered. Faculty can successfully overcome each of the major obstacles or barriers to the use of active learning by gradually incorporating teaching strategies requiring more activity from students and/or greater risk into their regular style of instruction.[298]

The authors of this Article concur with the counsel of Bonwell and Eison—begin today, but begin with manageable steps. Start by incorporating two or three active learning exercises into each class. Begin class with a brief active learning exercise (e.g., a short-answer question that requires written analysis by individuals or groups of a new fact pattern using a piece of law from the previous class), insert an active learning exercise mid-way through class (e.g., a 2–3 minute Pair and Share to respond to a question you have traditionally posed to only one student), and finish with an active learning exercise (e.g., a One-Minute Paper asking students to write one thing they learned and one thing they still have a question about). Then, as students become more engaged, learning gains increase, and the professor becomes more comfortable with shifting the focus of class from professor to student, more and more active learning elements can be introduced into each class period.

This Article includes several lists of active learning activities in Part II (any of which could be adapted to a law school setting) and ten specific active learning activities with explanations in Part IV.

The authors of this Article further recognize that it is difficult to make significant changes to pedagogical techniques in isolation without support and resources. Law

---

[296] *Id.*

[297] Theobald et al., *supra* note 18, at 6497.

[298] Bonwell & Eison, *supra* note 22, at 8.

school administrations need to become informed about the importance of creating an active learning environment, the additional workload it imposes on faculty, and the need for support for those faculty members willing to make such changes. Bonwell and Eison advise:

> Faculty developers can help stimulate and support faculty members' efforts to change by highlighting the instructional importance of active learning in the newsletters and publications they distribute. Further, the use of active learning should become both the subject matter of faculty development workshops and the instructional method used to facilitate such programs. And it is important that faculty developers recognize the need to provide follow-up to, and support for, faculty members' efforts to change. Academic administrators can help these initiatives by recognizing and rewarding excellent teaching in general and the adoption of instructional innovations in particular.[299]

ABA standard 401, Qualifications of the Faculty, *requires* law school to have faculty who "possess a high degree of competence," which includes "teaching effectiveness."[300] Section 403, Instructional Role of Faculty, includes the comment that efforts to ensure effectiveness in teaching include, among other things, "a faculty committee on effective teaching; . . . colloquia on effective teaching; and recognition and use of creative scholarship in law school teaching methodology."[301] As effective teaching is a requirement for ABA Accreditation, law school administrators should take seriously the arguments of this Article that active learning is the far more effective teaching method and proceed accordingly in educating, supporting, and providing resources to its faculty to begin shifting towards research-based best practices to maximize student learning in the law school classroom.

To accelerate that process, share this Article with your administrators and share it with colleagues; schedule a teaching discussion with other faculty where you can discuss this Article and then schedule another such discussion next month or next semester to discuss other articles focused on best teaching practices, including any of the many papers cited herein. Begin what will hopefully become an ongoing discussion at your law school about what specific efforts you can make as a faculty to improve your own teaching, and ask your administration to support these efforts.

With the commitment of law professors and the support of law school administrators, we can work towards a far superior learning model than the one created 150 years ago, which persists due to a strangely deep-rooted need in legal education to cling to tradition, familiarity, and comfort while ignoring scientific advancements, research, and innovation.

---

[299] *Id.*

[300] *ABA Standards and Rules of Procedure for Approval of Law Schools*, AM. BAR ASS'N (2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf.

[301] *Id.*

It is time for us to stop doing what has always been done and instead start doing the harder, far better thing.

VIII. Conclusion

Jean Jacques Rousseau said, "[T]rue education consists less in precept than in practice. We begin to learn when we begin to live; our education begins with ourselves . . . ."[302]

We must, as educators, begin with ourselves. We must become invested, passionate, and committed to understanding and then applying best teaching practices as supported by cognitive learning science and the explosion of research from the past few decades in order to model and create an environment in which our students begin to learn by beginning to live themselves both in the classroom and out of the classroom as brilliant, capable, and engaged individuals who lead the learning as we guide them through the process. We can no longer be passive professors. The time has come for active learning to take center stage to improve the learning outcomes of all of our students and to build a bridge to greater educational equity for our underrepresented students.

Rosa Parks said, "To bring about change, you must not be afraid to take the first step. We will fail when we fail to try."[303] It is time for legal educators to take the first step.

---

[302] ROSSEAU, *supra* note 30.

[303] ROSA PARKS & GREGORY J. REED, DEAR MRS. PARKS: A DIALOGUE WITH TODAY'S YOUTH 87 (1996).