

PROFESSOR KINGSFIELD: THE MOST MISUNDERSTOOD CHARACTER IN LITERATURE

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I. INTRODUCTION

Over thirty years have passed since Professor Kingsfield first appeared as a character in *The Paper Chase*.¹ He instantly became a powerful symbol of what many thought was wrong with legal education.² For many years, he remained synonymous with a particular form of the Socratic method, so demanding and unkind that it rendered students bitter, unhappy and cynical.³ Lest he fades from memory, both the novel and film have been reissued.⁴ As a result, Kingsfield is likely to continue to haunt prospective law students and to remain a foil for critics of traditional legal education.

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1. JOHN JAY OSBORN, JR., *THE PAPER CHASE* (Special Anniversary ed., 2003); *THE PAPER CHASE* (Twentieth Century Fox Film Corp. 1973).

2. See, e.g., Joyce Hughes, *Different Strokes: The Challenges Facing Black Women Law Professors in Selecting Teaching Methods*, 16 NAT'L BLACK L.J. 27, 28 (1998); see also discussion *infra* Part II.B.

3. See *infra* notes 289-92 and accompanying text.

4. OSBORN, *supra* note 1; *THE PAPER CHASE*, *supra* note 1.

Criticism of the Socratic method and legal education did not begin with the publication of *The Paper Chase*.⁵ But beginning in the 1970s, attacks on the Socratic method became more frequent,⁶ were often intemperate,⁷ and treated Kingsfield as synonymous with the Socratic method and its ills.⁸ Among the criticisms leveled at the Socratic method in the hands of professors like Kingsfield are that it results in poorly trained lawyers;⁹ it causes incivility between attorneys;¹⁰ it discriminates against women;¹¹ and it causes law students to lose their ideals.¹²

Partially in response to such attacks, law schools have become gentler places in a misguided attempt to become kinder to their students.¹³ In fact, critics have questioned whether the method ought to

5. Before the 1970s, arguments against the Socratic method generally were that it is too time consuming, that it is suited only to the small-class setting, and that it should be limited to the first-year curriculum. See, e.g., Harry E. Groves, *Toward a More Effective Program in the Small Law School*, 12 J. LEGAL EDUC. 52, 58-59 (1959) (stating that the method is ill-suited to large classes and that it is preferable in situations which allow for individualized attention). Even dating back to 1872, Boston University rejected Dean Langdell's use of the case method at Harvard. See Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 608 (1997). However, the literature included some notable exceptions to the criticism. See Ronald H. Silverman, *Weak Law Teaching, Adam Smith and a New Model of Merit Pay*, 9 CORNELL J.L. & PUB. POL'Y 267, 273 n.20 (2000) (quoting Robert M. Hutchins, *The Current of Legal Education*, 1929 KY. B. ASSOC. J. 258, 267); see also K.N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 666 (1935) (declaring that the pure case-method is "as fine a tool as teacher ever invented"); Roscoe Pound et al., *What Constitutes a Good Legal Education*, 7 AM. L. SCH. REV. 887, 898 (1933) (describing the Langdellian approach as conveying an "aphose" of the lawyer's life).

6. Silverman, *supra* note 5, at 295 (noting that while criticism of legal education may be long standing, the contention that the Socratic method is damaging to students is of recent origin).

7. See Paul T. Hayden, *Applying Client-Lawyer Models in Legal Education*, 21 LEGAL STUD. FORUM 301, 303 (1997) (claiming that students learn from a Socratic teacher that a "super-competent lawyer is brusque, dominating, and often condescending to those less competent (a category that certainly includes clients)"); Duncan Kennedy, Note, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71, 72-73 (1970) ("A great many students, of all levels of academic competence and of many varieties of personality, feel the socratic method . . . is an assault. . . . [S]tudents see professors as people who want to hurt them; professors' actions often do hurt them, deeply."); Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367, 381 (1997) (claiming that a Socratic teacher "communicates an unspoken but nonetheless powerful message that rude or mean-spirited wise cracks, and even temper tantrums, are entirely appropriate behavior").

8. See *infra* note 73 and accompanying text.

9. See *infra* notes 227-29, 256-58 and accompanying text.

10. See *infra* notes 268-69 and accompanying text.

11. See discussion *infra* Part III.A.

12. See discussion *infra* Part III.F.

13. As I argue below, law schools have almost certainly become gentler. But I contest whether we are kinder to our students by allowing them to graduate without exposing them to some of the realistic challenges that they will face inevitably in the practice of law.

be banned or discouraged as a teaching tool.¹⁴ As the cost of legal education has risen, and as law schools are increasingly dependent on alumni giving, institutional pressures have increased to make law schools more student-friendly.¹⁵ As a result, demanding professors like Kingsfield, where they remain in legal education, are on the defensive.¹⁶ While a majority of law professors continue to use some form of Socratic questioning,¹⁷ increasing numbers of professors engage in far less aggressive questioning of their students and adopt an array of techniques to lessen the stress, including allowing students to pass when they are called on¹⁸ or giving advance notice when they will be called on in class.¹⁹

Despite these changes in legal education, critics still target Kingsfield and the Socratic method as the cause of many of the problems in legal education.²⁰ If Kingsfield's brand of the Socratic method was the cause of the problems in legal education, those ills should have abated over time as professors have abandoned his demanding style. Few commentators have asked whether law students are as well prepared today as they were thirty years ago, now that they graduate from far more student-friendly law schools, or whether they are less cynical if

14. I witnessed one extreme example of criticism directed toward the Socratic method at an event sponsored by the California Judicial Council's Access and Fairness committee, held in October, 2003. During a breakout session, the facilitators posed questions for participants' consideration. One of those questions was whether the Bar should discourage the use of the Socratic method.

15. See Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1064 (1986) (noting that in response to "the growth of consumerism in higher education" law professors feel pressure to entertain and "lay [the material] out" for their students) (quoting Roger C. Cramton, *Report to the President of the University for the Year 1975-6*, 3 CORNELL L.F. 2, 5-6 (1976)); see also Silverman, *supra* note 5, at 332-411 (advocating a voucher and reward program for law professors based on a student-consumer model).

16. See, e.g., Phillip E. Areeda, *The Socratic Method (SM) (Lecture at Puget Sound, 1/31/90)*, 109 HARV. L. REV. 911 (1996) (defending the Socratic method).

17. See "ATTICUS FALCON," *ESQ.*, PLANET LAW SCHOOL 32-33 (1998); see also Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 28 (1996) (discussing the results of a survey in which ninety-seven percent of the professors who responded indicated that they "used the Socratic method at least some of the time in first year classes").

18. The Rodent, *The Lawyer's Motto: Be Unprepared*, 41 ORANGE COUNTY LAWYER 6, 6 (1999).

19. Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63, 82 (1995). In fact, John Jay Osborn, now a law professor at the University of San Francisco, admits that he does not call on any of his students unless they volunteer first. See *John Jay Osborn's "The Paper Chase" Being Reissued More than Thirty Years After Its Original Publication* (NPR radio broadcast, Mar. 4, 2003).

20. See *infra* Parts III.A-F.

they attend law schools where their professors solicit their personal views.²¹

The critics of Kingsfield's demanding form of the Socratic method often rely on empirical studies to support their claims.²² Armed with studies that "prove" that the demanding form of the Socratic method is ineffective or harmful to some group of students, critics have engaged in a frontal attack on the Kingsfields of the academy, whom they blame for their students' ills.²³ But many of the empirical charges against the Socratic method have become accepted as true without careful examination of the data.²⁴

As developed below, some of those studies have developed a life of their own even though they have been widely discredited.²⁵ In addition, some studies rely on surveys of students' feelings about the Socratic method or other aspects of law school life.²⁶ Concern about students' feelings of self-worth may lose sight of the primary goal of legal education. For example, in a humane article about principles of teaching, one prominent legal educator focuses exclusively on meeting students' emotional needs and fails to mention that law schools are training students for a highly demanding profession where competent representation of clients, not a lawyer's sense of self-worth, is the measure of success.²⁷

Increasing numbers of law schools advertise that they are "kinder and gentler" places than law schools of old.²⁸ From my observations,

21. See *infra* notes 123-25 and accompanying text.

22. See, e.g., Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994); Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75 (2002).

23. See *infra* notes 123-29 and accompanying text.

24. For example, one famous study by then University of Pennsylvania Professor Lani Guinier and her co-authors purported to show that the Socratic method caused women to underperform in their first year of law school. Guinier et al., *supra* note 22, at 3-5. Despite the fact that the study has been soundly discredited, as discussed in Part III.A, writers continue to cite the study as fact. See, e.g., LINDA HIRSHMAN, *A WOMAN'S GUIDE TO LAW SCHOOL 2* (1999) (discussing the Guinier study); Hess, *supra* note 22, at 81 (relying on the Guinier study); Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524, 531 & n.33 (1998) (relying on the Guinier study); Tanisha Makeba Bailey, Note, *The Master's Tools: Deconstructing the Socratic Method and Its Disparate Impact on Women Through the Prism of the Equal Protection Doctrine*, 3 MARGINS 125, 132-33 (2003) (relying on the Guinier study).

25. See discussion *infra* Part III.A.

26. See e.g., Hess, *supra* note 22, at 81-82.

27. See *id.* at 75-76; see also GERALD F. HESS & STEVEN FRIEDLAND, *TECHNIQUES FOR TEACHING LAW* (1999). While *Techniques for Teaching Law* is filled with numerous thoughtful essays about teaching, almost none of the essays mention the need to train students to meet the demands of practice, especially the need to protect the consumers of our students' legal services.

28. See discussion *infra* notes 119-22 and accompanying text.

many law schools are gentler today than in the past. But the trend has gone too far. Treating our students gently is not kind. Instead, by abandoning the demanding form of the Socratic method, we fail to prepare our students for the rigors of practice. Rather than marginalizing the Professor Kingsfields of the legal academy, we ought to embrace them and recommit ourselves to the high standards that they set.²⁹

After defining the Socratic method, Part II of this article reviews in more detail several attacks on the Socratic method, among them the claims that the method discriminates against women;³⁰ that it is an ineffective teaching method;³¹ that, even if it does teach analytical reasoning, it does not teach practical legal skills;³² that it leads to incompetence among attorneys;³³ that it leads to incivility between attorneys;³⁴ and that it is morally numbing,³⁵ thereby destroying students' idealism.³⁶ Further, critics claim that professors use the Socratic method to demean their students.³⁷ Finally, critics argue that even if the method is effective for some students, it fails to accommodate students with different kinds of learning styles.³⁸

Despite the widespread use of some form of the Socratic method,³⁹ the literature is almost all critical of both Kingsfield and the Socratic method.⁴⁰ A few writers advocate for the Socratic method, but distance

29. See *infra* notes 223-26 and accompanying text.

30. See *infra* Part III.A.

31. See *infra* Part III.B.

32. See *infra* Part III.C.

33. See B.A. Glesner, *Fear and Loathing in the Law Schools*, 23 CONN. L. REV. 627, 643-44 (1991) (discussing the tendency of law school to teach the lesson that "the appearance of competence is more important than actual competence"); 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, 461-62 (1996) (stating that the Langdellian method of instruction does not meet its "espoused goals"); Rodney J. Uphoff et al., *Preparing the New Law Graduate to Practice Law: A View from the Trenches*, 65 U. CIN. L. REV. 381, 381-82 (1997) (discussing criticisms that the rise of malpractice suits can be attributed to the failure of law schools to prepare their graduates for practice). For a more detailed discussion of the claim that the Socratic method produces incompetent lawyers, see *infra* Part III.D.

34. See discussion *infra* Part III.E.

35. See *infra* notes 91-94 and accompanying text; Part III.F.

36. See *id.*

37. See *infra* Part III.G.

38. See *infra* Part III.H.

39. See discussion *supra* note 7.

40. See Arthur Austin, *Orwellian LawSpeak Infiltrates Legal Education*, 19 VT. L. REV. 1, 2 (1994) (stating that "LawSpeak has blanketed the Socratic Method with [] whitemale imagery so that even former pop culture icon Professor Kingsfield is now a cross of Stalin, J. Edgar Hoover, and Hitler"); James R. Beattie, Jr., *Socratic Ignorance: Once More into the Cave*, 105 W. VA. L. REV. 471, 473, 484-89 (2003) (advocating an approach to teaching law closer to Socrates' actual methods than the more disreputable "Socratic method"; also discussing common criticisms of the method:

themselves from Kingsfield's version of the method.⁴¹ Given my view that legal education has been too quick to distance itself from an important and effective teaching tool, Part III rebuts the primary criticisms of Kingsfield's Socratic method and argues that law schools that are gentler are not kinder to their students.⁴² It argues that the Socratic method teaches highly relevant and practical skills.⁴³ The Socratic method forces students to engage in legal analysis and should effectively simulate the exchange between a judge and a lawyer or a senior partner and her junior associate. Further, it compels students to

that it humiliates students, that "hiding the ball" is frustrating to students, and that it creates combative and competitive students); J.T. Dillon, Paper Chase *and the Socratic Method of Teaching Law*, 30 J. LEGAL EDUC. 529, 533-35 (1980) (arguing that Kingsfield's method is ineffective for teaching law because a student gains very little out of answering professors' questions and because professors' questions neglect to train students to act like lawyers); Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 118-22 (1999) (describing three categories of criticisms toward the Socratic method: the harmful psychological effects the method imposes on students, the inability of the method to teach the students the wide range of skills they will need as practicing attorneys, and the political and ideological agendas that the method advances); Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91, 105-06 (2000) (stating that law students feel alienated by a process, which "blunt[s] moral and contextual judgment[s]" that they are forced to make); Schechter, *supra* note 7, at 381-82 (claiming that the Socratic method implicitly teaches students that they can be, and should be, uncivil in the professional world when they get out of school); Sheppard, *supra* note 5, at 619-20 (claiming that the Socratic method is really a quiz game in disguise); Silverman, *supra* note 5, at 287 (claiming that the Socratic method "often produce[s] a classroom experience that tends to submerge useful explanatory theory and explicit organizing principles, categories and suggestive intellectual structures"); Craig T. Smith, *Practice and Procedure: Synergy and Synthesis: Teaming "Socratic Method" with Computers and Data Projectors to Teach Synthesis to Beginning Law Students*, 7 J. LEGAL WRITING INST. 113, 114, 122 (2001) (claiming that the Socratic method bores "Internet-generation students" who are used to visual stimulation; it becomes ineffective when students are unprepared or unwilling to participate; it can be diverted into tangential discussions; it creates a power imbalance; and it "looks like an absurd, un-winnable guessing game" for the student); Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 415 (1971) ("[T]he professor's capacity to criticize within the Socratic method [often] exceeds his synthetic or constructive capacity," resulting in an "activist climate" in which students view analytical challenges as ideological assaults.); Douglas J. Whaley, *Teaching Law: Advice for the New Professor*, 43 OHIO ST. L.J. 125, 133 (1982) (claiming that grilling a new student who is not mentally ready for a rigorous cross-examination will only crush the student's self-esteem and potentially cause him or her to drop out of school).

41. See, e.g., Jennifer L. Rosato, *The Socratic Method and Women Law Students: Humanize, Don't Feminize*, 7 S. CAL. REV. L. & WOMEN'S STUD. 37, 59-62 (1997) (proposing three ways to "humanize" the Socratic method: "fostering an ethic of care," using it meaningfully, and "demystifying the learning process"); Beattie, *supra* note 40 at 493-94 (advocating an approach to teaching law closer to Socrates' actual methods than the more disreputable "Socratic method"); B. Glesner Fines, *The Impact of Expectations on Teaching and Learning*, 38 GONZ. L. REV. 89, 118 (2002) (claiming that the Socratic method can be a powerful teaching device when it is used with respect and consistency).

42. See *infra* notes 224-26 and Part III.C; see also *infra* notes 355-61 and accompanying text.

43. See *infra* Part III.C.

deal with the fear that they must overcome if they are to be able to practice law effectively.⁴⁴

II. THE SOCRATIC METHOD AND ITS CRITICS

A. Defining the Socratic Method

Articles critical of the Socratic method are easy to find; a readily accepted definition of the method is not. For some commentators, the Socratic method is a bit like obscenity, something hard to define but easy to know when we see it.⁴⁵ Others argue that the method used by Kingsfield and most law professors is not properly called Socratic.⁴⁶ That is so because the typical law school classroom dialogue relies on a professor's interrogation of his students, "a method Socrates scorned."⁴⁷

While the method developed by Harvard's Dean Christopher Columbus Langdell became known as the Socratic method,⁴⁸ it "coincides with the pedagogical technique of Protagoras, the leading Sophist and Socrates' rival."⁴⁹ Protagoras required students to explicate a text, not to gain self-knowledge, but to develop rhetorical skills.⁵⁰ Socrates apparently found Protagoras' method a form of manipulation, not education, because it did not lead to truth: "Protagoras taught students how to develop equally plausible arguments both for and against a given proposition by proving and then refuting each conceivable position, all in order to be able, as advocates, 'to make the weaker cause the . . . stronger.'"⁵¹

44. See *infra* Part III.C and notes 223-26 and accompanying text.

45. See, e.g., Areeda, *supra* note 16, at 911-14 (defending the Socratic method without specifically defining it).

46. See, e.g., Clark D. Cunningham, *Learning from Law Students: A Socratic Approach to Law and Literature?*, 63 U. CIN. L. REV. 195, 199-200 (1994) (calling the method the "Kingsfield method" and claiming that it only bears a "superficial resemblance" to Socrates' dialectic); Dillon, *supra* note 40, at 531-33 (describing the differences between Kingsfield's method and the "actual" Socratic method); FALCON, *supra* note 17, at 29 (claiming that the Socratic method label was chosen out of vanity); Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725, 728-29 (1989) (calling the method "Langdellian" or "Protagorean").

47. Neumann, *supra* note 46, at 729.

48. *Id.* at 728 & n.14. For an historical account of legal education in the United States, see generally Sheppard, *supra* note 5.

49. Neumann, *supra* note 46, at 729.

50. *Id.*

51. *Id.* (quoting William C. Hefferman, *Not Socrates, but Protagoras: The Sophistic Basis of Legal Education*, 29 BUFF. L. REV. 399, 415 (1980)). One ought to ask what is wrong with teaching an advocate to learn such rhetorical skills at least within the realm of legally defensible positions.

By comparison to the Sophists' form of teaching, a true Socratic dialogue only initially shows the student "the nature and extent of his or her ignorance."⁵² Thereafter, unlike the Sophists' approach, a Socratic teacher questions the student to help her construct the knowledge that the teacher has just demonstrated that she lacked.⁵³ Socrates' goal was not merely to convince his students but to develop independent thinkers "to make every pupil realize that the truth was in the pupil's own power to find, if he searched long enough and hard enough."⁵⁴

One might think that Kingsfield, for example, is a true Socratic teacher. After all, he describes his method as follows:

We use the Socratic method here. I call on you, ask you a question, and you answer it . . . Through this method of questioning, answering, questioning, answering, we seek to develop in you the ability to analyze that vast complex of facts that constitute the relationships of members within a given society . . . You teach yourselves the law, but I train your mind. You come in here with a skull full of mush, and you leave thinking like a lawyer.⁵⁵

He emphasizes that the point of the Socratic method forces students to teach themselves the law, consistent with Socrates' notion that a pupil must realize that she has the power to find the answers.

Part of the problem in defining the Socratic method is that its critics vary in what they find objectionable, in part, because they seem to be describing something different from one another. They do agree, however, that Kingsfield's teaching style was inappropriate and that what passes as the Socratic method is inappropriate.⁵⁶

Critics describe the Socratic method as used in most law school classrooms in unflattering terms: "What is called the Socratic method in law school is more often a humiliation ritual of adversarial interchange . . ."⁵⁷ Another critic says that the "so-called" method is "a

One might ask whether that kind of advocacy is not what a zealous advocate ought to do. Insofar as that kind of argument may make students more cynical, see *infra* Part III.F.

52. Neumann, *supra* note 46, at 730.

53. *Id.* at 730-31.

54. *Id.* at 732 (quoting GILBERT HIGHET, *THE ART OF TEACHING* 121 (1950)).

55. *THE PAPER CHASE*, *supra* note 1.

56. Even authors who advocate use of the Socratic method urge professors to avoid Kingsfield's methods. See, e.g., Areeda, *supra* note 16, at 918 (claiming that "[t]here is no excuse for the insults hurled by fictional socratic instructors").

57. Catharine A. MacKinnon, *Mainstreaming Feminism in Legal Education*, 53 J. LEGAL EDUC. 199, 212 (2003).

hierarchical notion that the teacher knows all but refuses to share it.”⁵⁸ Yet another argues that the “so-called” method is not very Socratic because of the current emphasis on the ability to give quick answers. By comparison, a student who admits confusion, “a Socratic virtue,” will not do well in class.⁵⁹ Still another writer objects to the current form of Socratic method because “[t]he professor controls the dialogue, invites the inhabitants [of his classroom] to ‘guess what I’m thinking,’ and then finds the response inevitably lacking,” resulting in “a climate in which ‘never is heard an encouraging word and the thoughts remain cloudy all day.’”⁶⁰

The common thread in these descriptions of the Socratic method as employed in law schools today is that the method is objectionable. Presumably, fidelity to Socrates’ method would not be objectionable. Beyond that though, these descriptions of the bad and good methods of examining students are not consistent. For example, the true Socratic method does not simply destroy a student’s arguments, but also builds the student back up by showing the student that she has the power to find the correct answer.⁶¹ That assumes that there is such an answer, one that the more experienced professor usually knows.

One might expect that the professor does know the right answer to many of the questions that she asks her students. But according to some critics, the “so-called” Socratic method is objectionable because the professor has the right answer and is simply forcing students to guess at the answer.⁶² Presumably, some of the critics of the “so-called” Socratic method would not fully endorse Socrates’ methods, insofar as he must believe that there is a right answer.⁶³

Another inconsistency among critics of the “so-called” Socratic method is the belief that professors utilizing the method do not produce independent thinkers. One commentator argues that unlike Protagoras, Socrates wanted to produce independent thinkers. Similarly, some critics complain that professors who use the “so-called” Socratic method

58. Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School,”* 38 J. LEGAL EDUC. 61, 77 (1988).

59. Martha C. Nussbaum, *Cultivating Humanity in Legal Education*, 70 U. CHI. L. REV. 265, 272-73 (2003).

60. Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547, 1555 (1993) (quoting Grant Gilmore, *What Is a Law School?*, 15 CONN. L. REV. 1, 1 (1982)).

61. See Neumann, *supra* note 46, at 730-32.

62. See, e.g., Paul N. Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 457-58 (1970).

63. See, e.g., Neumann, *supra* note 46, at 737 & n.42.

control the dialogue and that their classrooms are hierarchical. But Socrates apparently had to lead his students to true insight. Even the examples that critics of Protagoras use to demonstrate Socrates at his best show that he is in control of the dialogue.⁶⁴

The absence of a fixed definition of the Socratic method allows critics to describe the method in unflattering ways and then to knock down the straw man that they have constructed. For example, critics who describe the method as simply a matter of a professor playing a guessing game with her students⁶⁵ may be describing bad teaching, rather than the effective Socratic method.

The lack of agreement on a basic definition of the Socratic method has led some commentators to throw in the towel. As one writer has stated, “[t]here appears to be no fixed definition of the Socratic Method. Each teacher conceptualizes it in her own way.”⁶⁶ Even some defenders of the Socratic method recognize the difficulty in gaining a uniform definition of the Socratic method and may not attempt to define the concept at all.⁶⁷

64. See, e.g., *id.* at 730-31 (providing a brief example of a paradigmatic Socratic dialogue from Plato’s *Meno*). In the dialogue, the boy would not be able to reach his erroneous conclusion and his subsequent knowledge of geometry without Socrates guiding him down both paths:

Meno challenges Socrates to prove that real knowledge is found in the self, rather than acquired from others. Socrates brings one of Meno’s servants, a boy, into the conversation and asks him a series of questions, at the end of which the boy takes the erroneous position that a square can be doubled in area by doubling the length of its sides. . . . Without telling the boy that he is wrong . . . [Socrates] draws lines that double the sides of the original square, which, according to the boy’s theory, should produce a square double the area of the original, and he gets the boy’s agreement that each line is drawn in conformity with the boy’s theory. Then Socrates asks a sequence of questions that causes the boy to realize that the enlarged figure is not twice, but four times as big as the original. . . . Socrates [then] asks another and much more sophisticated sequence of questions (accompanied by more line drawing) that cause the boy increasingly to doubt whether he can come up with any formula for doubling a square by increasing the size of its sides. Finally, Socrates asks the boy point-blank whether he can arrive at such a formula. . . . Socrates interrupts the dialogue to explain to Meno that the boy is more educated now than before, simply because he knows his own ignorance and has some motivation to remedy it. But the boy still has to discover how to double the area of a square. . . . Socrates draws a new square, subdivides it into quarters, and draws a diagonal across each quarter so that the diagonals together form a separate figure inside the square. Then he asks another sequence of questions that cause the boy to develop a mathematically accurate theory of square-doubling.

Id. (footnotes omitted).

65. E.g., Smith, *supra* note 40, at 121-22.

66. Rosato, *supra* note 41, at 40.

67. See, e.g., Areeda, *supra* note 16, at 911-14 (defending the Socratic method, while specifically choosing to not define it). Another source of disagreement among commentators is the distinction, or lack thereof, between the Socratic method and the case method. Commentators such as Areeda assert that they are distinct, yet complimentary, doctrines. See *id.* at 911. Other

Despite the lack of a precise definition of the Socratic method, a few generalizations are worth making. One author summarized many of the apt points as follows:

I consider the “traditional” Socratic method to be a teaching style in which the professor selects a single student without warning and questions the student about a particular judicial opinion that has been assigned for class. Often the professor begins by asking the student to state the facts of the case and then asks the student to explain how the court reasoned to an answer. The professor might then test the student’s understanding of the case by posing a series of hypotheticals and asking the student to apply the reasoning of the case to the new fact patterns. The purpose of this questioning is to explore the strengths and weaknesses of various legal arguments that might be marshaled to support or attack a given rule of decision. To that end, the professor’s inquiries are often designed to expose the weaknesses in the student’s responses.⁶⁸

This description works well. It identifies the goal of the Socratic discussion, suggesting that a good Socratic dialogue is not a broad ranging discussion of theories, but instead, forces students to prepare for class, increasing their ability to learn the material and to learn legal analysis by applying rules to new facts.⁶⁹ Extrapolating from the method’s critics, I would add one additional aspect to a definition of this traditional Socratic method. Professors who engage in probing questioning that exposes the weaknesses of their students’ responses inevitably bruise their students’ egos.⁷⁰ As developed more fully below,⁷¹ many critics object to the psychological harm that may result from the Socratic method as practiced by professors like Kingsfield.

commentators fail to make such a distinction. For example, in his historical account of legal education in the United States, Steve Sheppard uses the term “case method” exclusively while discussing Langdell and his legacy. As he describes the “case method,” it is obvious that he uses the term to mean a combination of the casebook method and a Socratic dialogue. He states that the method

had an essential and quickly famous foundation: knowledge of the law is best derived from its sources, the cases. A student would thus read and consider case opinions on a given topic, and then class discussion of that topic would develop the relationship of the principles of law reflected in the case to other points of law.

Sheppard, *supra* note 5, at 597-98 (footnote omitted). Similarly, some authorities cited in this article use the terms “Socratic method” and “case method” interchangeably, or they use one of the terms exclusively. When they do so, it is clear they are discussing, at the very least, a question-and-answer exchange similar to the one described by Kerr. *See infra* text accompanying note 68.

68. Kerr, *supra* note 40, at 114 n.3.

69. *See, e.g.,* Areeda, *supra* note 16, at 915.

70. *See, e.g., id.* at 917.

71. *See infra* Part III.F.

Indeed, a professor's willingness to accept the fact that some students' egos may be bruised may be the biggest dividing line between contemporary law professors, who may adhere to the Socratic method but who insist that it must be used in a way that avoids hurting their students' feelings, and the old line Socratic masters like Professor Kingsfield. Today, professors who use the Socratic method often attempt to avoid hurting the students' feelings. As developed below, law schools are gentler—with less chance for bruised feelings—than they were in Kingsfield's days.⁷²

B. *The Socratic Method's Failings*

During the past thirty years, Kingsfield has become the symbol of the evils of legal education and has largely been synonymous with the Socratic method.⁷³ One can find articles critical of the Socratic method prior to publication of *The Paper Chase*.⁷⁴ But Osborn's timing was nearly perfect. The baby boom generation was just arriving in law school, and, unlike prior generations, certainly unlike the depression and war era generations that preceded us, we believed that we were entitled and that our views mattered. Osborn captured that voice and gave my generation a foil for its criticism.

Articles criticizing legal education and the Socratic method have used colorful language to describe Kingsfield. He has been called "boorish and pompous,"⁷⁵ a "Socratic Monster, i.e., 'one of those professors who don't actually teach. They instill fear. Armed with students' names and seating charts, they have the class at their mercy, and they love it.'"⁷⁶ He is, according to one writer, "aloof, intellectually arrogant, and caustic,"⁷⁷ threatening and loathsome. He is sadistic and wields the Socratic method "like an intellectual sword, intimidating, if

72. See *infra* notes 113-22 and accompanying text.

73. See, e.g., Martin H. Belsky, *Law Schools as Legal Education Centers*, 34 U. TOL. L. REV. 1, 8 (2002); Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 UCLA WOMEN'S L.J. 81, 86-87 (1996).

74. See, e.g., Kennedy, *supra* note 7, at 72-73; Stone, *supra* note 40, at 407.

75. Catharine W. Hantzis, *Kingsfield and Kennedy: Reappraising the Male Models of Law School Teaching*, 38 J. LEGAL EDUC. 155, 156 (1988).

76. Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. WOMEN & L. 53, 159 (1999) (quoting Brett S. Martin, *A Field Guide to Professors*, NAT'L JURIST, Sept. 1997, at 28).

77. Douglas K. Newell, *Tributes: Robert L. Myers Professor Emeritus of Law*, 20 ENVTL. L. i, i (1990).

not terrorizing many of his students in the process.”⁷⁸ He and the Socratic method have been blamed for students’ tension, stress, substance abuse, anxiety, fear, and self-doubt.⁷⁹

While an occasional writer distinguishes Kingsfield from the Socratic method,⁸⁰ most critics conflate the two when they criticize legal education.⁸¹ Those criticisms are numerous, but the literature focuses on several major criticisms.

The first of these is that the Socratic method discriminates against women. Over the past thirty years, several studies purport to show that discrimination. As one writer stated, “[t]he results of these studies are overwhelmingly negative: they conclude that the Socratic Method alienates, oppresses, traumatizes and silences women.”⁸² Then University of Pennsylvania Law Professor Lani Guinier published the most famous of those studies.⁸³ As summarized by another author, Guinier’s study concluded that “women students perform less well in law school, in large measure because of the teaching methodology employed during their first year.”⁸⁴ If valid, her study raised troubling questions about the continued use of the Socratic method or, at least, its unmodified use.

A second criticism is that the Socratic method is ineffective. This is often combined with the fact that it is less effective than a specific alternative method, often one devised by the author of the article in question.⁸⁵ Another variant of this theme is that, even if effective for teaching analytical skills, it does not teach lawyering skills, or as two authors have argued, it “fails to prepare the student for work as an attorney.”⁸⁶ Instead, it teaches only abstract reasoning. As one writer has argued, “students only learn analysis in a vacuum; they are removed

78. M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 SEATTLE U. L. REV. 139, 139 (2001).

79. See, e.g., RICHARD D. KAHLENBERG, *BROKEN CONTRACT* 18 (1992); OSBORN, *supra* note 1, at 50; SCOTT TUROW, *ONE L* 118 (1977); *THE PAPER CHASE*, *supra* note 1; Hughes, *supra* note 2, at 28.

80. See, e.g., Beattie, *supra* note 40, at 473; Dillon, *supra* note 40, at 532; Rosato, *supra* note 41, at 40-41, 43-44.

81. See, e.g., Hughes, *supra* note 2, at 28.

82. Rosato, *supra* note 41, at 38.

83. See generally Guinier et al., *supra* note 22.

84. Rosato, *supra* note 41, at 38.

85. See, e.g., Silverman, *supra* note 5, at 287-88; Smith, *supra* note 40, at 115; Edith R. Warkentine, *Kingsfield Doesn't Teach My Contracts Class: Using Contracts to Teach Contracts*, 50 J. LEGAL EDUC. 112, 118 (2000).

86. Ronald Chester & Scott E. Alumbaugh, *Functionalizing First-Year Legal Education: Toward a New Pedagogical Jurisprudence*, 25 U.C. DAVIS L. REV. 21, 24 (1991).

from real world considerations and implications.”⁸⁷ Some critics suggest that the Socratic method is responsible for lawyers’ incompetence⁸⁸ and even more commentators contend that it is responsible for the increased incivility among practicing lawyers.⁸⁹ Critics sometimes base their conclusions on empirical research that purports to support their conclusions.⁹⁰

The third criticism is that law school and specifically the Socratic method make students more cynical. Cynicism results from the fact that Socratic professors require students to defend positions that they do not believe in. For example, as one writer has stated the problem:

Both men and women students report that, at least partially because of law school’s intellectual emphasis, they learn to suppress their feelings and come to care less about others. They learn that their value systems are irrelevant. “[T]he underlying highest value taught, even if implicitly, is the ability to come up with convincing reasons in support of any argument, whether one personally agrees with them or not, and to defend those reasons with cogent and convincing logic, on behalf of anybody”—a process that may lead to a moral neutering of the students.⁹¹

Another writer states the problem differently, but arrives at the same conclusion:

These traditional techniques [including the Socratic Method] desensitize students to the critical role of interpersonal skills in all aspects of a professionally proper attorney-client relationship and, for that matter, in all aspects of an ethical law practice. They also set students’ moral compasses adrift on a sea of relativism, in which all positions are viewed as “defensible” or “arguable” and none as “right” or “just,” and they train students who recognize and regret these developments in themselves to put those feelings aside as nothing more than counter-productive relics from their pre-law lives.⁹²

87. Stropus, *supra* note 33, at 461.

88. See discussion *infra* Part III.D.

89. See discussion *infra* Part III.E.

90. See *supra* note 24 and accompanying text.

91. Iijima, *supra* note 24, at 529 (quoting WALT BACHMAN, LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION 56 (1995)).

92. John Mixon & Robert P. Schuwerk, *The Personal Dimension of Professional Responsibility*, 58 LAW & CONTEMP. PROBS. 87, 102 (1995).

Critics suggest that students come to law school with ideals and a desire to do good and that law school drums it out of them.⁹³ According to this argument, blame lands at the feet of the Socratic method. Often the proposed antidote to moral numbing is for the professor to encourage students to articulate their own views.⁹⁴ That is, class should focus on students' own views, rather than forcing students to take positions adverse to their own positions.

Often part of the same critique is the concern that the Socratic method is ineffective because it produces so much stress and anxiety. One writer summarizes several of the criticisms of the Socratic method as follows:

[T]he modern Socratic dialogue resembles a game of "hide the ball" in which the professor asks questions that he knows the answers to while his students do not. The object of the game is to produce the answer that the professor thinks is correct. If the student fails to answer correctly, personal humiliation follows in various forms.

Scholars have extensively criticized this "mutant form" of the Socratic Method. It fosters competitiveness because students focus on gaining the professor's favor rather than communicating with one another. It mystifies the law because it fails to provide the students with answers even when the professor knows them. It dehumanizes the law and diminishes the students' creativity by rewarding neutral, logical responses rather than responses that allow the students to consider the problem from their personal perspectives (such as narrative) or from alternative perspectives (such as feminism). For these reasons, some critics have concluded that the classroom experience is traumatizing, painful and humiliating to *all* students.⁹⁵

93. See, e.g., KAHLBERG, *supra* note 79, at 5 (continuing with this theme throughout the book); Robert Solomon, *Teaching Morality*, 40 CLEV. ST. L. REV. 507, 508 (1992).

94. For example, Michael A. Mogill, encourages students to share personal stories in classroom discussions. Michael A. Mogill, *Our Students, Our Selves: The Mirror Reflects Back*, 32 CAP. U.L. REV. 317, 325-26 (2003). Ann L. Iijima recommends that law schools "encourage students to integrate their personal value systems into their legal education." Iijima, *supra* note 24, at 535. She offers as an example an assignment asking students to write about their personal values. *Id.* at 535 n.57. Similarly, Patrick Wiseman regrets that law schools "devalue the importance of moral considerations" and urges law professors to take seriously students' points of view. Patrick Wiseman, *Legal Education and Cynicism About the Law: Practicing Ethical Jurisprudence in the Classroom*, 25 CUMB. L. REV. 1, 20 (1994). Additionally, Lawrence S. Krieger favors "teaching methods calculated to provide for basic human needs" by integrating students' "personal values, beliefs, instincts, and conscience to the cases or principles being studied." Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 128 (2002).

95. Rosato, *supra* note 41, at 41-42 (footnotes omitted).

Critics argue that the fear and anxiety caused by the Socratic method results in “an unusually high incidence of alcoholism and various emotional disabilities.”⁹⁶ Some critics go further and contend that part of the problem with the Socratic method is that it is hierarchical, with the focus on the professor.⁹⁷

A fourth criticism has emerged in recent years. Critics contend that the Socratic method disadvantages students who have different learning styles.⁹⁸ For example, some learners may be unable to learn well from a Socratic law professor, a mere “talking head.”⁹⁹ Studies have used the Myers-Briggs test to measure law students’ orientation on a scale that measures thinking, judging, feeling, and perceiving. Not surprisingly, those who measure high on the thinking-judging scales do better than do feeling-perceiving students.¹⁰⁰ Critics argue that the emphasis on the Socratic method and the failure of professors to recognize their students’ different learning styles is responsible for this disparity between introverted law students and extroverted law students.¹⁰¹

The literature critical of Kingsfield and the Socratic method is voluminous.¹⁰² By comparison, the defense of the Socratic method is tepid at best. A number of articles review the literature and then argue for a kinder version of the Socratic method.¹⁰³ But few authors offer a vigorous defense. One reason may be that the Socratic method is indefensible. My own experience tells me otherwise.

96. See Iijima, *supra* note 24, at 524-25. For more claims that the Socratic method contributes to alcoholism, see Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1 (1995); Mixon & Schuwerk, *supra* note 92, at 96.

97. See, e.g., Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 593 (1982); Stone, *supra* note 40, at 411-12.

98. See Smith, *supra* note 40, at 114; Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL’Y 119, 132 (1997).

99. See, e.g., Harry J. Haynsworth, *Post-Graduate Legal Education in The United States*, 43 S. TEX. L. REV. 403, 407 (2002); David Simon Sokolow, *From Kurosawa to (Duncan) Kennedy: The Lessons of Rashomon for Contemporary Legal Education*, 1991 WIS. L. REV. 969, 973 (1991); Dan Subotnik, *The Cult of Hostile Gender Climate: A Male Voice Preaches Diversity to the Choir*, 8 U. CHI. L. SCH. ROUNDTABLE 37, 77 (2001).

100. See generally, Paul VanR. Miller, *Personality Differences and Student Survival in Law School*, 19 J. LEGAL EDUC. 460, 466 (1967) (claiming that people with “Thinking” personalities on the Myers-Briggs Type Indicator tend to be overrepresented in law schools, while “Feeling” types are underrepresented in law schools).

101. Randall, *supra* note 19, at 101-02.

102. A quick Google search of “Professor Kingsfield” returned 646 hits, and a search of “Socratic method” returned 28,400.

103. See, e.g., Smith, *supra* note 40, at 113-15; Rosato, *supra* note 41, at 59-62.

III. IN DEFENSE OF THE SOCRATIC METHOD

As a law student, I certainly shared much of the distaste for the Socratic method.¹⁰⁴ I began to rethink my position on my first day as a lawyer. I now believe that the Socratic method needs a vigorous defense. The urgency of that need was brought home to me last fall when I participated in an event sponsored by the California Judicial Council. During a small group discussion, one of the group leaders asked whether the Bar should discourage the use of the Socratic method.¹⁰⁵ The frequently voiced concern that the demanding Socratic method is the cause of students' ills must be examined closely. In this section, I address the main criticisms leveled against the Socratic method.

Before I address the specific criticisms leveled against the Socratic method, two general observations are in order. First, while criticism of the Socratic method is long-standing,¹⁰⁶ the criticism has intensified in the past thirty years, with Professor Kingsfield as the perfect symbol for

104. I memorialized my views of law school in a letter that I wrote to Professor Roland Pennock at Swarthmore College. Professor Pennock was organizing a panel discussion on law school and he solicited views from those of us currently in law school. On February 20, 1973, I wrote in part:

The transition from [high school] teaching to being a student was not very easy: teaching provided me with frequent and positive feedback; the result of my energy was measurable in human growth; being a first year law student is a hazing Because you want to counsel undergraduates and do not anticipate changing the law school atmosphere, you might make students aware of the intensity of the competitive environment and of the limited success that is built into the system (few exams; the majority of grades deferred until June; training in the Socratic method which is aimed at [stripping] down inefficient thinking and rebuilding minds in the new shape—a device frequently used to embarrass, if not humiliate, first year students; the ten percent cut off point for Law Review which leaves many striving and ambitio[us] and bright students feeling like failures).

Letter from Professor Michael Vitiello to Professor Roland Pennock (on file with author) [hereinafter *Pennock Letter*].

105. The event, sponsored by the California Judicial Council, was held at Hastings College of Law on October 16, 2003.

106. *See supra* note 5. The debate concerning the Socratic method may overstate the dichotomy between the Socratic method and other teaching methods. Critics of the Socratic method assume that the lecture method, for example, is less demanding and challenging than the Socratic method. But lectures can challenge a student's sense of well-being by attacking their core beliefs and a professor's lecture may be intellectually challenging, difficult for her students to comprehend. A difficult lecture may challenge a student, causing the student anxiety. By contrast, a professor may use the Socratic method in a manner that amounts to spoon-feeding. Most students who prefer lecture to the Socratic method no doubt do so because they can remain passive and do not have to defend their views. While a claim that the lecture method is always less demanding than the Socratic method is naïve, some truth inheres in the view that, at least when done in a demanding manner, the Socratic method is more challenging than most lecture based classes.

all that is wrong with the Socratic method.¹⁰⁷ Assessing whether the Socratic method as practiced by the Kingsfields of the legal world is the cause of distress and other problems experienced by law students is difficult.

In the new edition of *The Paper Chase*, John Osborn observes that the book is coming out in the same year that his daughter is entering Harvard Law School. "Will she meet a Professor Kingsfield?" he asks and concludes, "I think that she can count on it."¹⁰⁸ I am not so sure.

No careful study has determined whether law schools have become gentler places over the past thirty years. One study, acknowledging that it was not statistically valid, concluded that the overwhelming majority of law professors still use the Socratic method.¹⁰⁹ The study did not attempt to define the Socratic method.¹¹⁰ Beyond that, though, the study made no effort to determine whether law professors use the method in ways that are likely to increase stress.¹¹¹ For example, the questionnaire sent to law professors did not ask what sanctions are imposed if students are unprepared or whether they allow students to pass if they do not want to be called on or whether the professor simply accepts volunteers.¹¹²

Anecdotal evidence seems to cut both ways. Many articles criticizing the Socratic method assert that the method in all of its glory is still in place.¹¹³ But other writers have observed that the atmosphere in law schools has become gentler in recent years.¹¹⁴ Often, in comments about a retiring colleague, professors state that the honoree is no Kingsfield but instead was a master of a kinder form of the Socratic method.¹¹⁵ My own observations at four different law schools where I have taught support the latter conclusion.

107. See *supra* notes 40, 73 and accompanying text.

108. OSBORN, *supra* note 1, at xi.

109. See Friedland, *supra* note 17, at 3, 28.

110. *Id.* at 15.

111. See *id.* at 15-16.

112. *Id.*

113. See, e.g., David D. Garner, *Socratic Misogyny?—Analyzing Feminist Criticisms of Socratic Teaching in Legal Education*, 2000 BYU L. REV. 1597, 1597 (2000); Geoffrey C. Hazard, Jr., *Commentary: Policy Implications*, 10 J.L. & HEALTH 79, 83 (1995).

114. See, e.g., Carl T. Bogus, *The Death of An Honorable Profession*, 71 IND. L.J. 911, 942 (1996); Amy M. Colton, *Eyes to the Future, Yet Remembering the Past: Reconciling Tradition with the Future of Legal Education*, 27 U. MICH. J.L. REFORM. 963, 963 (1994); Schechter, *supra* note 7, at 382.

115. See, e.g., John H. Jackson, *Remarks on the Occasion of the Memorial Service for William Warner Bishop, Jr. Held at the Lawyers Club on January 22, 1998*, 86 MICH. L. REV. 1558, 1559 (1988); Harvey J. Goldschmid, *In Remembrance of Curt Berger*, 99 COLUM. L. REV. 276, 276 (1999).

Institutional pressures dampen enthusiasm for the highly demanding use of the Socratic method. As law schools become more expensive to run¹¹⁶ and more dependent on alumni giving, deans and others responsible for fundraising may have little enthusiasm for professors who are seen as “infantilizing, demeaning, dehumanizing, sadistic,” and “destructive of positive ideological values.”¹¹⁷ Combine institutional pressure with student evaluations that became routine around the time of *The Paper Chase*: in light of the importance that some schools place on student opinion, one doubts that an untenured professor is going to emulate Kingsfield.¹¹⁸ A quick survey of ads for law schools supports the conclusion that some law schools are no longer hospitable to Kingsfield-style professors. Southern Methodist University, for example, advertises that it has adopted a “kinder, gentler” approach to the first year of law school.¹¹⁹ Within the recent past, Vermont Law School advertised that “[t]he days of Professor Kingsfield . . . infamy are over.”¹²⁰ Other schools make similar claims. Concord, the online law school, made much of the fact that it has no “looming” law professors or “quaking” students,¹²¹ and while another states that it espouses a culture of civility and respect, “avoiding ‘paper chase’ or ‘cutthroat’ law school stereotypes.”¹²²

At a minimum, the probable decline in the use of the highly demanding Socratic method over the past thirty years in favor of a gentler form of the method should raise doubts about empirical claims that it is a major cause of students’ ills.¹²³ Law schools should hesitate to make sweeping changes in legal instruction without better evidence that

116. See Dale Whitman, *Some Challenges Before Us*, NEWSLETTER (Ass’n of Am. L. Schools, AALS), Nov. 2002, at 2, available at <http://www.aals.org/pmnov2.html>.

117. Stone, *supra* note 40, at 407.

118. See, e.g., Byse, *supra* note 15, at 1064.

119. Linda K. Wertheimer, *A Kinder, Gentler Law School: SMU, UT Take Sharing Approach to Making 1st Year Less Daunting*, DALLAS MORNING NEWS, Sept. 13, 2001, at 39A.

120. Vermont Law School, Orientation 2000, available at <http://www.orientation.vermontlaw.edu/asp/director.htm>.

121. Tony Mauro, *All-Online Law School Challenges Precedents*, USA TODAY, Oct. 12, 1999, at 6A; see also Adam Liptak, *Forget Socrates*, N.Y. TIMES, Apr. 25, 2004, at 34.

122. Louis D. Brandeis School of Law, About the Brandeis School of Law, University of Louisville, at <http://www.louisville.edu/brandeislaw/welcome/about.htm> (last visited April 18, 2005).

123. Some of the popularly cited studies linking stress and the Socratic method were conducted in the 1970s and 1980s. See, e.g., Ronald M. Pipkin, *Legal Education: The Consumers’ Perspective*, 1976 AM B. FOUND. RES. J. 1161 (1976); Stephen B. Shanfield & G. Andrew H. Benjamin, *Psychiatric Distress in Law Students*, 35 J. LEGAL EDUC. 65 (1985); Lawrence Silver, *Anxiety and the First Semester of Law School*, 1968 WIS. L. REV. 1201 (1968); James B. Taylor, *Law School Stress and the “Déformation Professionnelle,”* 27 J. LEGAL EDUC. 251 (1975).

the Socratic method is the cause of students' woes. If the Socratic method is a major cause of students' problems, their problems should have diminished over time as the method is employed less vigorously.¹²⁴ But the literature lacks careful longitudinal studies of students' problems.¹²⁵

That raises the second general point about the criticisms of the Socratic method. Often, critics rely on empirical studies that they claim support a host of problems with the Socratic method.¹²⁶ As discussed in more detail below in connection with the Guinier study,¹²⁷ empirical studies often develop a life of their own; article after article cites a past study as part of the attack on the Socratic method.¹²⁸ But closer examination shows that many of those studies were methodologically flawed and, worse, that they have been soundly rebutted by subsequent studies or analysis of their methodologies.¹²⁹ Nowhere is this more evident than with the claim that the Socratic method discriminates against women.

A. *Does the Socratic Method Discriminate Against Women?*

In 1994, Lani Guinier and her co-authors published the most famous study dealing with gender and the Socratic method.¹³⁰ The study concluded that the Socratic method resulted in a performance gap between men and women in their first year at Penn Law School.¹³¹ Subsequent examination of the report's methods and conclusions has discredited it.¹³² Despite that, it remains widely cited as evidence of one evil of the Socratic method.¹³³

124. Instead, some research suggests law school remains a stressful place. *See, e.g.*, Kerr, *supra* note 40, at 132-33; Suzanne C. Segerstrom, *Perceptions of Stress and Control In the First Semester of Law School*, 32 WILLAMETTE L. REV. 593, 594 (1996).

125. *See generally* James R.P. Ogloff et al., *More than "Learning to Think Like a Lawyer": The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73 (2000) (reviewing empirical research on legal education).

126. *See, e.g.*, Guinier et al., *supra* note 22.

127. *Id.*; *see infra* Part III.A.

128. *See supra* note 24.

129. *See discussion infra* notes 148-59, 172, 205-06 and accompanying text. As developed below, in some instances, I cannot point to good empirical data to prove my points. Especially in those instances where good empirical data is lacking, I fall back on logically sound arguments about how we ought to teach.

130. Guinier et al., *supra* note 22.

131. *See id.* at 62.

132. *See, e.g.*, Monroe Freedman, *Stereotyping Women Law Students*, LEGAL TIMES, March 20, 1995, at 26 (criticizing the study for only proving that women's grades were lower); Elizabeth Garrett, *Becoming Lawyers: The Role of the Socratic Method in Modern Law Schools*, 1 GREEN BAG 2d 199 (1998) (discussing the contrast between Guinier's study and student reactions); Kerr,

The Guinier study used three methods to generate data. First, the authors created a database from the 366 responses received from a 1990 survey given to Penn Law School's population of 712 students.¹³⁴ For a second database, the authors collected academic performance data for a total of 981 students, 712 of whom were enrolled at the time of the 1990 survey.¹³⁵ The authors formed a third database, using the 104 student responses from the 1990 survey's open-ended questions regarding students' views of gender and their law school experiences.¹³⁶ This third database also included data collected from a focus group of twenty-seven students, the authors' classroom observations of two seminars, a meeting with a women's student group, and meetings with law faculty.¹³⁷

Probably the most damning evidence was the finding that women, entering Penn with credentials equal to those of their male classmates, underperformed the male students.¹³⁸ Beyond GPA and class standing, women also were underrepresented on law review, graduation awards, and the moot court competition and board.¹³⁹

Consistent with other gender surveys,¹⁴⁰ the study found that men participate more frequently in class than do women,¹⁴¹ specifically that men participated twice as frequently as did the women in class.¹⁴² Not surprisingly, women were far less comfortable with their level of participation in class. Only 28% of the first year women, while 68% of the men, responded "yes," to the question, "Are you comfortable with

supra note 40, at 132-33 (questioning whether the study's results are caused by the Socratic method); Subotnik, *supra* note 99, at 39 (concluding that the evidence does not support a charge of "hostile learning environment[s]" at law schools).

133. See HIRSHMAN, *supra* note 24, at 192; Hess, *supra* note 22, at 81; Bailey, *supra* note 24, at 133, 138.

134. Guinier et al., *supra* note 22, at 6-7.

135. *Id.* at 8.

136. *Id.* at 9.

137. *Id.* at 9-10.

138. *Id.* at 23-24, 26.

139. *Id.* at 27.

140. Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 139 (1988); Taunya Lovell Banks, *Gender Bias in the Classroom*, 14 S. ILL. U. L.J. 527, 530 (1990); Suzanne Homer & Lois Schwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L. J. 1, 13 (1989); Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 314 (1994); Janet Taber et al., *Gender, Legal Education and the Legal Profession*, 40 STAN. L. REV. 1209, 1242 (1988); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1310 (1988).

141. Guinier et al., *supra* note 22, at 32-33.

142. *Id.* at 33 n.86.

your level of voluntary participation in class?”¹⁴³ The gender gap decreased over time, however, with only an 8% difference by the third year of law school.¹⁴⁴

Most of the women described their first year experience as “radical, painful, or repressive . . . one that they will never forget.”¹⁴⁵ The study contended that this type of experience is a matter of “institutional design,” not the result of personal qualities of the women in the first year class.¹⁴⁶ While the study found additional causes of women’s painful experiences, it singled out the Socratic method as a major cause: women report that “when speaking feels like a ‘performance,’ they respond with silence rather than participation, especially when the Socratic method is employed to intimidate or to establish a hierarchy within large classes.”¹⁴⁷

Even the study’s authors acknowledged that the sample was not properly drawn.¹⁴⁸ The study relied on a limited sample that was not randomly selected. As a result of relying on volunteers, the students responding to the open-ended question “may not have been typical of the entire student body.”¹⁴⁹ One cannot seriously argue that the women who responded are typical of women in the first year.¹⁵⁰ Self-selected volunteers may have an axe to grind and were not, therefore, typical of female law students generally.

The study suffered from additional problems, including whether the results were capable of replication in subsequent years and at other law schools.¹⁵¹ More fundamental though was whether the Socratic method

143. *Id.* at 36.

144. *Id.* at 36; *cf. id.* at 37 nn.97-98 (showing further evidence of the decreasing trend of the gender gap in later years).

145. *Id.* at 42.

146. *Id.* at 45.

147. *Id.* at 46.

148. *Id.* at 42.

149. *Id.*

150. *See id.* at 7 n.21. (noting a “selectiv[e] bias” by gender because many more women, and far fewer men, than expected responded to the survey); *id.* at 42 (adding that they were “unusually motivated to tell their stories,” and “arguably among the more alienated members of the school population”); *see also* Garrett, *supra* note 132, at 204 (“My experiences are different from Professor Guinier’s and from those of many of the women that she quotes, but I am willing to assume that her description is accurate with respect to *some* women . . .”) (emphasis added); *id.* at 199 (stating that Guinier’s conclusions “not only contrast sharply with my own perceptions of the legal academy, but they also differ from the reactions of my students—male and female—who have participated with me in Socratic dialogues”); Rosato, *supra* note 41, at 48 (“Without extensive follow-up studies, it is unclear whether these results are representative of other law schools or unique to the University of Pennsylvania.”); Subotnik, *supra* note 99, at 48, nn.84-85; Catherine Pieronek, *Review of Lani Guinier et al.’s Becoming Gentlemen*, 25 J.C. & U.L. 627, 635 (1999).

151. Rosato, *supra* note 41, at 48.

was the cause of the perceived poorer performance of women. The study blamed law school pedagogy for women's alienation and underperformance,¹⁵² but upon closer examination, what Guinier described may have been poor teaching, not the Socratic method.¹⁵³ As one commentator concluded, the remedy for bad teaching is "not to eliminate a challenging teaching strategy."¹⁵⁴

The study also failed to determine whether the Socratic method was the primary cause of women's poorer performance. For example, almost certainly, first year professors did not all use the same teaching style.¹⁵⁵ Even if most of them used some version of the Socratic method, almost certainly some were gentler than others in their approach.¹⁵⁶ The study made no effort to determine whether women achieved higher grades in classes in which the professor used a gentle approach than in classes in which the professor used a more Kingsfield-like approach.

Another finding that the study simply did not test was the relationship between participation and performance. The study concluded that because women were more uncomfortable with the Socratic method than were men, they participated less in class and that led to their lower performance.¹⁵⁷ But that conclusion was not tested.¹⁵⁸ Nowhere did the study correlate how a woman performed with whether she participated in class. That fact was assumed.¹⁵⁹

One study, published a year after the Guinier study, found a much smaller gap than did the Guinier study.¹⁶⁰ Using a much broader sample than did Guinier, the Wightman study found an overall gender gap favoring men but only by about 7% of a standard deviation.¹⁶¹ In direct

152. Guinier et al., *supra* note 22, at 3-4.

153. Garrett, *supra* note 132, at 201.

154. *Id.* at 203.

155. Friedland, *supra* note 17, at 29-31 (describing some of the teaching styles that surveyed professors purported to use at least some of the time: lecture, small groups, role playing, and other techniques such as audio-visual presentations).

156. Garrett, *supra* note 132, at 200 (suggesting that Guinier seemed to acknowledge a kinder version of the Socratic method than the "harsh stereotype" she criticized).

157. *See* Guinier et al., *supra* note 22, at 3-5, 61-62.

158. *See* Subotnik, *supra* note 99, at 39, 49.

159. Guinier et al., *supra* note 22, at 61-62 (the authors "suspect" a "psychological link" between performance and participation in class); *see also* Pieronek, *supra* note 150, at 639; Freedman, *supra* note 132, at 28 (noting that Guinier's statistics regarding male and female academic performance "prove only that women's grades at Penn are lower than men's grades at Penn. And they don't prove much more.").

160. LINDA F. WIGHTMAN, WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN 12 (1996).

161. *Id.* at 11-12.

conflict with Guinier's findings, Wightman found virtually no disparity at the higher grade ranges.¹⁶²

The most compelling evidence that the Socratic method does not impair women is found in a yet to be published study.¹⁶³ Like the Wightman study, the interim report found a small gender gap, one that varied among the twenty schools that participated, with women outperforming men in some of the schools.¹⁶⁴ That study found that the disparity in grades between men and women vanishes if students' grades are compared with their LSAT scores.¹⁶⁵

While grades in combination with LSAT scores are considered the most accurate predictor of success in the first year of law school, the study explains why reliance on the combined index in studies like the Guinier study skews the results. Women enter law school with higher college GPAs but lower LSAT scores than do men.¹⁶⁶ But college grades are less useful as predictors of success in law school if they are used as a "raw" score. Unlike the LSAT, which allows objective comparisons without regard to where the student took the LSAT, GPAs vary widely based on several factors, including the student's major area of study.¹⁶⁷ GPA is also dependent on the extent to which the undergraduate institution has inflated grades and upon the student's selection of courses.¹⁶⁸ Thus, a student who has gone to a school with high grade inflation, who selects courses to improve her GPA and who takes an undemanding major will have a GPA that will not be a reliable predictor of success in law school. The study acknowledged that its findings do not eliminate the possibility of a gender gap in performance, but it did conclude that its findings should "eliminate the presumption that a gender gap exists that is not explained by the entering credentials of students."¹⁶⁹

Finally, one other aspect of the Guinier study demonstrated more prejudice against the Socratic method than it did a reasoned conclusion. The study concluded that women participated less frequently than did men and that lower academic performance resulted from less

162. *Id.* at 12.

163. Richard Sander et al., Interim Report: National Study of Student Performance in the First Year of Law School (Mar. 10, 1998) (unpublished report, on file with the author).

164. *Id.* at 2.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

participation.¹⁷⁰ If that were true, one wonders why the study attacked the Socratic method. If participation improves performance, one committed to eliminating the gender disparity should argue that professors should abandon the now common practice of accepting volunteers¹⁷¹ and encourage professors to go back to requiring students to be prepared for all classes and to calling on them randomly.

Despite a number of articles questioning its findings,¹⁷² the Guinier study has staying power. Writers continue to cite it as authoritative.¹⁷³ I have no doubt that many law professors labor under the same misconception. Because few, if any, law professors would consciously discriminate against women, many have probably adopted Guinier's suggestions and modified their use of the Socratic method to avoid disadvantaging their women students. That is unfortunate.

B. *Is the Socratic Method an Effective Teaching Technique?*

As with claims about gender discrimination, critics have argued that the Socratic method is an ineffective teaching method.¹⁷⁴ But before law professors abandon the Socratic method, they need to examine the data more closely.

When I began working on this article, I doubted that I would find methodologically sound studies showing that the Socratic method was ineffective. My doubts were based on two considerations: one was whether the studies would ask the right question. For example, I questioned whether the studies would focus on how students felt about the Socratic method¹⁷⁵ or on something far more difficult to measure, whether the Socratic method taught important lessons about lawyering. Feelings about one's self and developing important lawyering skills are distinct and may even be conflicting goals.¹⁷⁶

The second reason that I doubted that I would find sound studies that showed that the Socratic method was ineffective (or effective, for that matter), was the enormous commitment that such studies would take. A researcher would face too many practical difficulties in setting up a sound study. For example, one might set up a study in which a law

170. Guinier et al., *supra* note 22, at 61-62.

171. See Garrett, *supra* note 132, at 204-05.

172. See *supra* note 132.

173. See, e.g., Hess, *supra* note 22, at 81; Rosato, *supra* note 41, at 38 & n.5; Bailey, *supra* note 24, at 133, 138.

174. See, e.g., Hess, *supra* note 22, at 81; Rosato, *supra* note 41, at 42.

175. See, e.g., Hess, *supra* note 22, at 76, 81-82.

176. See discussion *infra* notes 207-11; Part III.C; Part III.F.

school divided its 1Ls into three sections, one taught entirely by Socratic teachers, a second by professors who lectured, and a third taught by teachers using both methods. The students might be distributed randomly, as long as the entering credentials of students in each section were the same. The professors in each section would have to agree to use the same exams and then to have the exams distributed randomly, not necessarily graded by the students' own professors.¹⁷⁷

I doubted that any law school would allow such a study. Setting up such an elaborate experiment would face too many practical problems. First, law students would not allow themselves to be treated as guinea pigs.¹⁷⁸ A second problem is that, like efforts to herd cats, the effort to get the entire first year faculty to agree to such restrictions is improbable at best. Third, even if a law school agreed to such a study, the study's conclusions would be of limited value unless other studies replicated its results.¹⁷⁹

The few studies in the literature are not ambitious and are largely inconclusive. A number of professors have divided their classes into sections and taught each section using different methodologies.¹⁸⁰ The students took the same exam and the researchers measured differences in the test scores.¹⁸¹ The studies have found no statistically significant difference in the students' performances.¹⁸²

Such studies have obvious methodological flaws. The most obvious is that a professor may not be an especially good lecturer or Socratic teacher. Assume that a professor is an inspired lecturer but mediocre Socratic teacher. Students in the lecture section may do well because of her superior lecturing skills while her students taught through the Socratic method may under-perform because she simply cannot teach

177. In *Broken Contract*, Richard Kahlenberg discussed "the Experiment" at Harvard, calling it "a new interdisciplinary way of teaching law students in a more humane manner." KAHLBERG, *supra* note 79, at 11. At least some of the professors in his section used a gentler method of instruction. He does not indicate whether the law school attempted to measure different levels of performance between the sections. But his brief description of "the Experiment" suggests that it was not a valid empirical study, if that was the intent of the program. *See id.* at 11-14.

178. *Cf. id.* at 11-14. (complaining about "the Experiment" at Harvard).

179. Ogloff et al., *supra* note 125, at 98, 107.

180. *See, e.g.*, Charles D. Kelso, *Programming Shows Promise for Training Lawyers: A Report on an Experiment*, 14 J. LEGAL EDUC. 243, 244 (1961); Edward L. Kimball & Larry C. Farmer, *Comparative Results of Teaching Evidence Three Ways*, 30 J. LEGAL EDUC. 196, 196 (1979); Williard D. Lorenson, *Concentrating on a Single Jurisdiction to Teach Criminal Law—An Experiment*, 20 J. LEGAL EDUC. 361, 362-64 (1968).

181. Kelso, *supra* note 180, at 245; Kimball & Farmer, *supra* note 180; Lorenson, *supra* note 180, at 364.

182. Kelso, *supra* note 180, at 245-46; Kimball & Farmer, *supra* note 180, at 199-200; Lorenson, *supra* note 180, at 364-65.

effectively with that method.¹⁸³ As developed in more detail below, such studies are also limited because law school exams do not test all of the skills that one may be learning in the classroom.¹⁸⁴ The Socratic method teaches important oral advocacy skills. Traditional law school exams do not determine whether a student has improved her ability to answer probing questions, a skill that she will need in many areas of practice.¹⁸⁵

Several arguments suggest that the Socratic method should be an effective teaching tool, obviously on the assumption that the professor uses the method well. We know that active learners do better than passive learners.¹⁸⁶ Studies do support the view that a method like the Socratic method that relies on questioning of students enhances learning.¹⁸⁷ One article reviewed various studies and reported that higher-level questioning led to higher levels of critical thinking among students and that questioning improved their retention levels.¹⁸⁸ Numerous educational studies replicated the finding that subjects who were questioned in class outperformed those who were not.¹⁸⁹ Students who learn in a classroom where the professor engages in high-level questioning retain as much as eighty percent of what they learn.¹⁹⁰

Another series of studies compared the development of reasoning skills in law, medicine, psychology, and chemistry graduate programs.¹⁹¹ Apparently, the studies were well designed.¹⁹² Students in different disciplines differed in their improvement in the various reasoning

183. Kelso, *supra* note 180, at 246 (acknowledging that the slightly better grades in an experimental section may have resulted from the author's skill using the experimental methods).

184. *See* discussion *infra* notes 403-08 and accompanying text.

185. *See* discussion *infra* notes 243-49 and accompanying text.

186. *See, e.g.*, Alan M. Lerner, *Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107, 116 (1999).

187. Kenneth B. Williamson et al., *The Art of Asking: Teaching Through Questioning*, 9 ACAD. RADIOL. 1419, 1420 (2002).

188. *Id.*

189. *Id.* at 1420-21.

190. *Id.* at 1421. Professors who have large classes face a special challenge in assuring that the Socratic method is, in fact, interactive. If they call on only one or two students during the course of an hour, the learning experience for the silent majority becomes almost as passive as the experience in a lecture course. Professors can increase the experience for a greater percentage of the class by calling on numerous students to react to what their peers have said. By comparison, many of the modern gentler law professors select students in advance to give them warning in order to reduce their stress. The effect of such a technique is to make the learning experience even more passive for those who can count on not being called on randomly.

191. Darrin R. Lehman et al., *The Effects of Graduate Training on Reasoning: Formal Discipline and Thinking About Everyday-Life Events*, 43 AM. PSYCHOLOGIST 431, 434, 436 (1988) (both studies conducted by the authors involved students from these four different disciplines).

192. Ogloff et al., *supra* note 125, at 110.

skills.¹⁹³ Not surprisingly, law students improved their ability to reason through problems using conditional logic.¹⁹⁴ The results of the studies suggest that legal education helped students develop their verbal and conditional reasoning abilities.¹⁹⁵

Obviously, one can ask students questions without using the Socratic method. But questioning, often vigorous questioning, is the hallmark of the Socratic method.¹⁹⁶

One can also use the Socratic method without the aggressive questioning that is supposed to typify Kingsfield and other demanding law professors.¹⁹⁷ For example, probably Kingsfield's real life opposite is Professor Gerald Hess, who heads Gonzaga's Institute for Law School Teaching, created to improve law school teaching.¹⁹⁸

Hess has identified eight elements for effective teaching and learning environments. Those elements are mutual respect, expectation, support, collaboration, inclusion, engagement, delight, and feedback.¹⁹⁹ That Hess intends to create a classroom environment quite distinct from Kingsfield's is obvious. For example, "Intimidation, humiliation, and denigration of others' contributions are disrespectful, cause many students to withdraw from participation, and hinder their learning."²⁰⁰ He also states that educational literature supports the view that a teacher's high expectations increases students' achievement.

He emphasizes the need for teachers who are concerned, helpful and caring, with frequent student-faculty contact.²⁰¹ He also advocates cooperative learning, for example, by dividing students into small

193. Lehman et al., *supra* note 191, at 437-38.

194. *Id.*

195. Ogloff et al., *supra* note 125, at 111.

196. *Supra* Part II.A.

197. *See supra* text accompanying notes 71-72.

198. Hess offers the following description of his relationship with one of his classes, demonstrating how different his teaching philosophy is from Kingsfield's: "About two-thirds of the way through one of my courses, I began class one day by telling the students: 'Every single day of our course, I am happy to walk into this classroom. Thank you for the gift you have given me—an exciting, insightful, challenging, caring classroom environment.' The students deserved to know how I felt. Their reactions ranged from big smiles to tears." Hess, *supra* note 22, at 105. For more articles by Hess urging a kinder, gentler law school experience for students, see Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401 (1999); Gerald F. Hess, *Student Involvement in Improving Law Teaching and Learning*, 67 U.M.K.C. L. REV. 345 (1998) [hereinafter Hess, *Student Involvement*]; Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F.L. REV. 941, 962 (1997).

199. Hess, *supra* note 22, at 87, 87-110.

200. *Id.* at 87.

201. *Id.* at 92.

groups to work together to solve problems.²⁰² He goes further than most commentators by urging that students and faculty collaborate on the coverage in the course.²⁰³

Even this quick summary of Hess's views shows how far he is from Kingsfield. Hess's recommendations pose some practical problems for law professors. For example, in many schools, they may have difficulty finding time to meet with large numbers of students or to give meaningful feedback in addition to the single final exam at the end of the semester.²⁰⁴ But apart from practical problems with Hess's suggestions, his arguments raise theoretical and empirical questions.

Hess, like others, relies on the now-discredited Guinier study in asserting that the Socratic method unfairly disadvantages women.²⁰⁵ Some of his own empirical data are of limited reliability because, instead of measuring performance objectively, he relies on students' attitudes as a measure of success.²⁰⁶ One ought to question whether students' attitudes are equivalent to student achievement. One can readily envision students who are more satisfied with a less demanding professor, one who allows them to come to class unprepared or to demur if called upon, than they are with a demanding professor. But those attitudes do not necessarily translate into greater comprehension. Whether some of Hess's recommendations make sense also depends on one's goals in teaching students.

Law professors have various legitimate goals in their teaching. One goal may be to have satisfied students who feel validated by their experience in law school.²⁰⁷ But that goal may conflict with other, more important goals. Students' learning improves when they experience some stress.²⁰⁸ Even Hess's description of appropriate goals suggests

202. *Id.* at 94-96.

203. Hess, *Student Involvement*, *supra* note 198, at 345.

204. A Harvard law professor teaching a One L section has about 140-150 students in class. *See, e.g.*, KAHLBERG, *supra* note 93, at 12-13; OSBORN, JR., *supra* note 1, at 5; TUROW, *supra* note 79, at 16.

205. Hess, *supra* note 22, at 81.

206. Hess, *Student Involvement*, *supra* note 198, at 355-61. Professor Hess relies on anecdotal evidence, citing his students' evaluations of his courses. Apart from the question whether students' sense of satisfaction is the same as whether they have learned the material (I believe that those are quite distinct questions), citing student evaluations proves little. For example, Kingsfield, the nemesis of professors like Hess, received a standing ovation from his students at the end of the year, some measure of their respect for him. I have no doubt that some students give positive evaluations to professors like Kingsfield. So even if one agrees that student evaluations are a meaningful measure, Hess's anecdotal recitation of his own evaluations does not prove much.

207. *See, e.g.*, Hess, *supra* note 22, at 88.

208. Glesner, *supra* note 33, at 644-45.

this tension between competing goals. While he acknowledges the importance of a professor's high expectations,²⁰⁹ he does not recognize the conflict that may arise with other goals. High expectations may cause some students to feel embarrassed because their answers fail to satisfy such expectations.²¹⁰ Students who choose to do little work may feel less included than their harder working peers; a professor must choose whether to assure high standards or inclusiveness.

The answer cannot be that by being supportive and open, all of the members of the class will work hard. Even critics of Kingsfield and the demanding Socratic method admit that students are better prepared in a demanding environment.²¹¹

Hess's position is not unusual in the current literature.²¹² Often ignored by critics of Kingsfield and the Socratic method is that the gentle professor, sensitized not to hurt students' feelings, may create an atmosphere that is not conducive to learning. A student who is poorly prepared will not learn as well as one for whom expectations are high.²¹³ By comparison, demanding professors set the standard high, forcing students to aim high to meet the professor's expectations.²¹⁴

If this is a problem, it is because such high expectations create a fearful environment that impairs students' learning.²¹⁵ Whether Kingsfield-style professors still roam the halls of American law schools is difficult to determine empirically.²¹⁶ Above, I argued that is unlikely.²¹⁷ And while professors should aim for a classroom in which students experience enough stress to be motivated to do well, but not too much to paralyze students,²¹⁸ the literature today suggests that many law professors are more worried about setting the bar too high, rather than too low.²¹⁹ Many well-meaning professors, writing about their teaching,

209. Hess, *supra* note 22, at 91.

210. Beattie, *supra* note 40, at 485.

211. See, e.g., Glesner, *supra* note 33, at 644-45; Smith, *supra* note 40, at 113-14. As devoted as Hart was to impressing Professor Kingsfield, even he was willing to test the limits by announcing that he had nothing to add to class discussion. OSBORN, *supra* note 1, at 210-11; THE PAPER CHASE, *supra* note 1.

212. See, e.g., Iijima, *supra* note 24, at 533-35; Krieger, *supra* note 94, at 113-26.

213. Hess, *supra* note 22, at 91.

214. *Id.*

215. Glesner, *supra* note 33, at 630, 645. Hart obviously did well in that environment. The movie makes clear that he received an "A" in his Contracts class, THE PAPER CHASE, *supra* note 1, and according to Osborn, Hart was one of Kingsfield's best students. OSBORN, *supra* note 1, at ix-x.

216. See *supra* notes 109-15 and accompanying text.

217. See *supra* notes 115-23 and accompanying text.

218. See Glesner, *supra* note 33, at 644-45.

219. See Krieger, *supra* note 94, at 124.

emphasize the need to reach Generation X students, students who have been raised on the media, with shorter attention spans, with less motivation than earlier generations.²²⁰ Those professors often write about making the classroom exchange fun, rather than challenging.²²¹ The high visibility that Hess has achieved demonstrates that this trend is likely to continue.²²²

Another question that needs to be explored is whether the goals advanced by advocates of a gentler law school environment necessarily ready students for the practice of law. I have no doubt that Hess's goals, like inclusiveness, are well suited to undergraduate education.²²³ Below, I develop in more depth my concern with the goals of those who advance the gentler law school: are we giving our students adequate training to deal with the stress that they will face in practice?²²⁴ In a gentler law school, students who bruise easily will not have training in how to deal with the inevitable frustrations of practice, including the reality that they will face judges and opponents who care little about their feelings and whose conduct will be confrontational.²²⁵

220. See, e.g., Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 3 (2002); Michael L. Richmond, *Teaching Law to Passive Learners: The Contemporary Dilemma of Legal Education*, 26 CUMB. L. REV. 943, 956 (1995); Smith, *supra* note 40, at 114.

221. See Byse, *supra* note 15, at 1064.

222. Hess is the founder and director of the Gonzaga Institute for Law School Teaching. See Institute for Law School Teaching, at <http://www.law.gonzaga.edu/Programs/Institute+for+Law+School+Teaching/Contact+Us/Co-Directors.htm> (last visited Mar. 30, 2005). Hess was a presenter at the AALS 2003 Workshop for New Law Teachers, discussing his eight elements of an effective teaching and learning environment. See Association of American Law Schools, "Teaching Nuts and Bolts" AALS Workshop for New Law Teachers 2003, at <http://www.aals.org/profdev/nlt2003/hess.pdf> (last visited Mar. 31, 2005).

223. In fact, Hess has developed some of his ideas for creating an effective teaching and learning environment from principles developed for undergraduate education. See, e.g., Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51, 71-72 (2001) (discussing Hess's proposal).

224. See discussion *infra* Parts III.C-D. I discussed the critique of the classic Socratic method and the trend toward a gentler law school. See *supra* notes 109-25 and accompanying text. There, I focused on the fact that critics contend that the Socratic method undermines students' moral values and adds to their stress—particularly when professors force them to articulate arguments with which they might not agree. See *id.* I characterized the contrary position, one that is more concerned about students' sense of well-being, as the "gentle" approach to legal education. See *id.* That is how I use the term "gentle" in this discussion. A professor who is quiet in her questioning may not be "gentle" in that sense. Instead, a professor, no matter the volume of her voice, is not gentle as I use that term if she probes her students' arguments, making them feel uncomfortable when their answers are superficial or when they are unprepared. At the root of my disagreement with critics of Kingsfield's Socratic method is that they are too critical of professors who are willing to challenge students even if it means that some of their students will feel insecure and uncomfortable, even morally numb.

225. Other problems exist with gentler law school classrooms. For example, not all students may learn well in groups. Often, lawyers must work alone on projects or with little supervision from

My point is simply that law schools today run a far greater risk of creating too gentle an environment rather than creating too rigorous an environment. For those legal educators who doubt this assertion, I pose this question: in most American law schools today, are deans more likely to be concerned about professors considered too demanding or not demanding enough? Again, I have no empirical proof. But, based on my own experiences at various law schools, deans give far more attention to trying to soften professors considered demanding than they do trying to get undemanding teachers to increase intensity in the classroom. Indeed, were a not especially demanding teacher confronted by a dean today, the professor might simply rely on the numerous articles attacking the demanding Socratic method as proof that the professor's gentler methods are more effective.²²⁶

C. *Does the Socratic Method Teach Practical Skills?*

Even some commentators who recognize that the Socratic method has some value argue that its value is limited. They argue that it is effective for teaching analytical skills, but does not teach lawyering skills. As two authors have argued, it "fails to prepare the student for work as an attorney."²²⁷ Instead, it teaches only abstract reasoning.²²⁸ Some critics suggest that the Socratic method is responsible for lawyers' incompetence.²²⁹

The frequently repeated claims that Kingsfield's demanding form of the Socratic method is ineffective simply lack definitive empirical support.²³⁰ Even advocates of the gentler classroom recognize that

their superiors. In fact, over the past twenty years, large firms have been able to provide less training and have a more difficult time justifying the use of junior associates on projects because clients scrutinize bills more carefully and demand increased attention from senior lawyers, rather than junior associates. A professor might wisely reject group projects in light of the realities of law practice.

226. For example, were a professor criticized for being too gentle, he might cite the fact that the law school sent him to one of the workshops sponsored by the AALS for new law teachers. There, speakers often represent the "kinder, gentler" philosophy adopted by professors like Gerald Hess. Indeed, he was one of the speakers at the 2003 Workshop for New Law Professors sponsored by the AALS. *See supra* note 222.

227. Chester & Alumbaugh, *supra* note 86, at 24.

228. *See id.*; *see also* Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 229 (1991).

229. *See* discussion *infra* Part III.D.

230. *See, e.g.*, Beattie, *supra* note 40, at 473; Chester & Alumbaugh, *supra* note 86, at 24; Warkentine, *supra* note 85, at 112. None of these critics of the Socratic method provide empirical support for their assertions that the method is ineffective.

professors' high demands lead to greater learning.²³¹ Further, empirical support does suggest that the probing questioning method, even with some attendant anxiety among students, is a highly effective teaching method and that the absence of anxiety in the classroom reduces learning.²³² Finally, professors who make the classroom too gentle miss an important teaching opportunity: the very real opportunity to teach students how to engage in vigorous exchange with a judge or opponent in litigation.²³³

Part of the problem with this argument is sorting out what skills lawyers must have.²³⁴ That in turn requires an examination of what lawyers do in their practice. Were the Socratic method's value as limited as argued, it nonetheless should be celebrated for that value. But the Socratic method does teach highly relevant and practical skills.

The obvious benefit of the Socratic method is that it forces students to state issues and rules with precision and then to test their understanding of those rules in new factual settings.²³⁵ Unlike undergraduate education, where memorization and regurgitation may be all that is necessary for academic success,²³⁶ the Socratic method tests whether students can apply what they have memorized.²³⁷ Further, in many areas of the law, beyond the ability to extract and apply a rule of law, students must also learn to synthesize rules of law.²³⁸ In learning to apply rules or to synthesize those rules, students must also learn the relationship of rules to their underlying justifications or policies that support those rules.²³⁹ No one can question that those are critical legal skills and almost no one questions that those are the most important legal skills. Those skills are surely part of "thinking like a lawyer."²⁴⁰

We should not be apologetic if those were the only skills taught in the classroom. But the Socratic method teaches additional skills as well. It forces students to learn to deal with the pressure that they will inevitably face in the practice of law.²⁴¹ They learn the need for mental

231. See *supra* note 211 and accompanying text.

232. See Glesner, *supra* note 33, at 644-45.

233. See discussion *infra* notes 243-49 and accompanying text.

234. See Nancy B. Rapoport, *Is "Thinking Like a Lawyer" Really What We Want to Teach?*, 1 J. ASS'N LEGAL WRITING DIRS. 91, 103 (2002).

235. See Stropus, *supra* note 33, at 467.

236. See Glesner, *supra* note 33, at 647-48; Stropus, *supra* note 33, at 474-75.

237. See Stropus, *supra* note 33, at 468.

238. See *id.* at 467.

239. See *id.* at 466.

240. See *id.* at 467, 471-72.

241. See John W. Teeter, Jr., *The Daishonin's Path: Applying Nichiren's Buddhist Principles to American Legal Education*, 30 MCGEORGE L. REV. 271, 290 (1999) (claiming that the Socratic

agility in handling rapid fire questioning.²⁴² These skills have more to do with day-to-day lawyering than critics acknowledge.

Above, I mentioned that I began to rethink my view of the Socratic method on my first day as a lawyer. I served as a law clerk to an appellate court judge.²⁴³ When I arrived in chambers, the senior clerk handed me a group of draft opinions circulated by other judges on the court. He explained that by lunchtime, I needed to be prepared to discuss those cases with the judge and the other clerks and to recommend whether the judge should join those opinions. Over lunch and for much of the rest of my first afternoon, we discussed cases in depth, with the judge questioning us in what amounted to a Socratic dialogue.

When I first handled litigation thereafter and had to argue a series of motions before a federal district court judge, I was again reminded of the close analog between the Socratic method and the practice of law. Any litigator should recognize the relationship between the Socratic method and the motions practice. With the decline in the number of trials,²⁴⁴ litigation practice today is primarily the motions practice where oral argument involves give-and-take between the lawyer and the judge, reminiscent of the Socratic dialogue.²⁴⁵ Judges' questions are often similar to those that a professor may ask in a Socratic classroom.²⁴⁶

method prepares students for "the 'exploding telephone' where at any hour a client, colleague, or adversary may call demanding one's best intellectual efforts").

242. Anyone who has listened to an appellate argument or an argument on a trial motion recognizes the need for a litigator to be able to answer questions under fire. For anyone unfamiliar with appellate arguments, arguments from some high profile Supreme Court cases are now available online. See Oyez, *Popular Audio*, at <http://www.oyez.org/oyez/portlet/popularAudio/> (last visited Apr. 3, 2005); Oyez, *The Oyez Project Releases Inaugural Supreme Court MP3 Files*, at <http://www.oyez.org/oyez/resource/nitf/273/> (last visited Apr. 3, 2005). Arguments from select high-profile Supreme Court cases examining civil procedure issues are also available online. See Civil Procedure Stories, *Digital Supplement*, at <http://legal1.cit.cornell.edu/kevin/civprostories/> (last visited Apr. 3, 2005).

243. I served as a law clerk to the Honorable J. Sydney Hoffman, of the Pennsylvania Superior Court, Pennsylvania's intermediate appellate court, from 1974 through 1977.

244. See Patricia Lee Refo, *The Vanishing Trial*, 30 A.B.A. LITIG. 1, 2 (2004).

245. See MICHAEL R. FONTHAM, MICHAEL VITIELLO & DAVID W. MILLER, PERSUASIVE WRITTEN AND ORAL ADVOCACY IN TRIAL AND APPELLATE COURTS 194 (2002).

246. Anyone who is unconvinced that attorneys often face tough, unsympathetic judges ought to read an article about John Doar, the head of the Civil Rights Division of the Justice Department during the early 1960's, upon whom Gene Hackman's character in *Mississippi Burning* is based. See generally Douglas O. Linder, *Bending Toward Justice: John Doar and the "Mississippi Burning" Trial*, 72 MISS. L.J. 731 (2002). No doubt, Doar's experience is an extreme example of the kind of emotional toughness that some lawyers have shown. Most lawyers have not had to worry about their personal safety, as did Doar and other members of the Civil Rights division and other civil rights lawyers. See *id.* at 734. But what struck me about the article was its description of Doar's courtroom appearances before United States District Court Judge William Harold Cox. Here is a description of Doar's relationship with Judge Cox, a notorious segregationist:

Litigators routinely face demanding judges who are impatient with attorneys who are not well prepared or who do not answer their questions directly.²⁴⁷ Ask anyone who has spent time in a trial or appellate courtroom about instances in which judges lose their patience with lawyers, perhaps justifiably. Judges expect lawyers to help them decide cases before them by answering their questions thoughtfully.²⁴⁸ Every time a student is called on in class, she is learning an invaluable litigation skill if the professor demands responsive and thoughtful answers and probes deeply to test the student's understanding of the material. Professionalism demands as much.²⁴⁹ A professor torn between nurturing a student or making sure that students have fun in class and

William Harold Cox and John Michael Doar had met numerous times in the judge's courtroom. It would be fair to describe them as being old adversaries. A 1963 letter from Cox to Doar, written in response to Doar's request to give the voting rights case of *United States v. Mississippi* immediate attention, is revealing of their relationship:

Dear Mr. Doar,

I have a copy of your letter of October 12 . . . [I] thought I had made it clear to you . . . that I was not in the least impressed with *your imprudence* in reciting the chronology of the case before me with which I am completely familiar. If you need to build such transcripts for your boss man, you had better do that by interoffice memoranda because I am not favorably impressed with you or your tactics in undertaking to push one of your cases before me. I spend most of my time in fooling with lousy cases brought before me by your department in the civil rights field, and I do not intend to turn my docket over to your department for your political advancement You are completely stupid if you do not fully realize that each of the judges in this court understands the importance of this case to all the litigants. I do not intend to be hurried or harassed by you or any of your underlings in this or any court where I sit and the sooner you get that through your head the better you will get along with me, if that is of any interest to you

Id. at 755-56. No doubt, Judge Cox's behavior was extreme. But instances of judges who are hostile to a lawyer, the lawyer's client, or the lawyer's cause are hardly unique.

247. See FONTHAM, VITIELLO & MILLER, *supra* note 245, at 196-97.

248. See *id.* at 194.

249. In an exercise sponsored by the ABA, Justice Stephen Breyer, then a judge for the United States Court of Appeals for the First Circuit, discussed his expectations of lawyers during oral argument. Videotape: Effective Arguments to the Court: Arguments to the U.S. Supreme Court, Tape 3 (American Bar Association Consortium for Professional Education and the Section of Litigation 1999). He emphasized the importance of questioning and the lawyer's role in that process. See *id.* Justice Breyer explained that he relies on oral argument to discover "the lawyer's characterization of the issue from their point of view." *Id.* He then noted that, despite what some lawyers may think, judges do not ask questions during oral argument in order to hear themselves talk. See *id.* "We've read the brief, we're trying to think about the issues in the case. We believe that the lawyers are there to help us. Our job is to decide this case correctly. And the lawyers, although they want to win for their clients, we feel they are there to help us, and therefore by trying to get these questions out, there is something either that is really bothering me or I want to use the best argument of the other side to elicit the response." *Id.*

preparing students for a demanding career disservices her students by erring on the side of gentleness.²⁵⁰

Not only do we disserve our students when we fail to challenge them intellectually, we also fail their future clients. The literature that criticizes Kingsfield's brand of the Socratic method seldom mentions what we are training students to do.²⁵¹ True, not all law students intend to practice law. But most will.²⁵² We do not serve them well by treating superficial answers as acceptable or by allowing them to believe casual preparation is professionally acceptable. As a matter of a professor's professional obligation, she ought to demand high professional standards of herself and her students. That should include the requirements of preparation and thoughtful responses to her questioning.

One might object that, even if most students will practice law, not all of them will be litigators. Again, that is certainly true. But lawyers in many different settings face demanding questioning as part of their work. An associate may have to explain a legal conclusion to her boss, and a lawyer may have to explain a proposed business plan to his client or argue her case to a mediator or arbitrator.²⁵³ Often, the lawyer must answer specific questions and offer thoughtful responses, beyond her planned presentation.

Numerous writers have advocated alternatives to the contentious confrontational litigation model. Often, they suggest that both parties may win in a successful negotiation or settlement.²⁵⁴ That is undoubtedly true. But even in win-win situations, successful lawyers must be zealous

250. This is not an invitation to cruelty, but instead an argument in favor of high demands. Students may experience the professor's probing questioning as demeaning or as cruel, but developed below, that often relates more to the student's psyche than to the professor's purposes. Students unable to withstand probing, difficult questioning ought to be aware that the practice of law often requires dealing with similar kinds of pressure. The student who is truly paralyzed by such questioning may need to reexamine his career goals.

251. See, e.g., Austin, *supra* note 40, at 2; Hughes, *supra* note 2, at 28; Ellen K. Solender, *The Story of a Self-Effacing Feminist Law Professor*, 4 AM. U. J. GENDER & L. 249, 256 (1995).

252. A 1998 study found that 81 percent of all admitted members to the California Bar are active. The projected active rate is 84 percent in 2015. TORA KAY BIKSON ET AL., *THE LABOR MARKET FOR ATTORNEYS IN THE STATE OF CALIFORNIA: PAST, PRESENT, AND FUTURE* 43-45 (2003).

253. Four of the ten competencies identified by the American Bar Association as essential for practicing attorneys are communication, counseling, negotiation, and litigation and alternate dispute resolution procedures. See AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* 172-199 (1992).

254. See, e.g., Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982).

in representing their clients.²⁵⁵ They must be prepared to deal with opponents who want to take advantage of perceived weaknesses or who will advance their own client's strongest position. Again, the skill set even in that setting includes the ability to think on one's feet, to answer counterarguments agilely and to have among one's tools intellectual toughness.

D. *Does the Socratic Method Lead to Incompetence?*

Despite what would appear to be unquestionable advantages to the Socratic method, some critics have argued that the Socratic method contributes to incompetence among lawyers.²⁵⁶ Such charges are hard to assess. Many judges have complained that the lawyers appearing before them are incompetent.²⁵⁷ Whether the Socratic method causes incompetence is far from clear.

One popular book, now in its second edition, asserts that the method is ineffective because professors "hide the ball," leaving students mystified about how to find the rules of law.²⁵⁸ The author complains that students must find the law on their own.²⁵⁹ A Socratic teacher might respond that this is a virtue of the Socratic method. Lawyers are constantly faced with situations in which the law is not settled and part of the skill of a lawyer is to synthesize existing precedent in a manner that favors her client's position.²⁶⁰ Thus, one might argue that a professor should "hide the ball." Again, the student is learning to deal with the uncertainty of the law, an important skill, no matter how uncomfortable for the student. In addition, the assertion by critics that the Socratic method thus leads to incompetence is not supported by the empirical literature.²⁶¹ As indicated below, studies suggest that

255. Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 274 (1999).

256. See, e.g., Glesner, *supra* note 33, at 643-44; Stropus, *supra* note 33, at 462; Uphoff, *supra* note 33, at 391.

257. See ROBERT J. MARTINEAU, *CASES AND MATERIALS ON APPELLATE PRACTICE AND PROCEDURE* 368 (1987); Albert Tate, Jr., *The Art of Brief Writing: What a Judge Wants to Read*, 4 A.B.A. LITIG. 11, 13 (1978).

258. FALCON, *supra* note 17, at 43, 234.

259. See *id.*

260. See FONTHAM, VITIELLO & MILLER, *supra* note 245, at 52-55.

261. Compare Chester & Alumbaugh, *supra* note 86, at 24 (claiming that law school fails to prepare students and leads to incompetence); Silverman, *supra* note 5, at 287 (claiming that the Socratic method produces "a classroom experience that tends to submerge useful explanatory theory"); Warkentine, *supra* note 85, at 115 (claiming that law schools employing the Socratic method historically "ignored the fact that their graduates were really not prepared to practice law"),

alternative methods do not produce measurable differences in learning.²⁶²

A second problem with claims that the Socratic method leads to incompetence is the difficulty with designing a study that addresses any number of other probable causes of inadequate performance, from poor writing skills inherited from grade school, high school, and undergraduate education,²⁶³ to the lack of training once associates are hired in large law firms.²⁶⁴ Even if a researcher can define and measure incompetence, correlating lack of competence with a particular teaching method is probably too daunting. Finding a control group of graduates who were taught without resort to the Socratic method is unlikely. Most graduates have been exposed to a number of different teaching techniques.²⁶⁵ Showing that one method was the cause of their competence or incompetence seems impossible.

One fact that critics conveniently ignore is that claims of incompetence seem to have increased in recent years. The claims of increased incompetence have arisen when the use of the Socratic method (or at least Kingsfield's version of the method) appears to be on the wane.²⁶⁶ That alone does not prove the opposite, i.e., that abandoning the high demands of the Socratic method has lowered graduates' competence. But that conclusion surely has intuitive appeal, especially in light of the admission even of some of the critics of the Socratic method that students are more likely to be prepared for classes run by the demanding Socratic teachers like Professor Kingsfield than they are for those run by their gentler colleagues.²⁶⁷

E. Does the Socratic Method Lead to Incivility Between Attorneys?

Even if one recognizes the benefits from the demanding intellectual exchange, critics argue that the Socratic method results in incivility

with Beattie, *supra* note 40, at 486-88 (writing to dispell the myth that the Socratic method hides the ball and leads to incompetence).

262. See *infra* notes 383-408 and accompanying text. See generally Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 1 (2003); Robin A. Boyle et al., *Presenting a New Instructional Tool for Teaching Law-Related Courses: A Contract Activity Package for Motivated and Independent Learners*, 38 GONZ. L. REV. 1 (2003).

263. See TOM GOLDSTEIN & JETHRO K. LIEBERMAN, *THE LAWYER'S GUIDE TO WRITING WELL* 28-31 (1989).

264. See KAHLENBERG, *supra* note 79, at 34; Stropus, *supra* note 33, at 470.

265. See Friedland, *supra* note 17, at 29-31.

266. See *supra* notes 123-25 and accompanying text.

267. See *supra* note 211.

among lawyers.²⁶⁸ Critics argue that students watch their professors bully their classmates and emulate that behavior.²⁶⁹ Again, efforts to show a causal link may be impractical or impossible. But we ought to question that link for a number of reasons. First, lawyers are reportedly less civil today than in the past.²⁷⁰ Incivility has increased as the widespread use of the Kingsfield-style Socratic method has been on the decline.²⁷¹ Law students are exposed to a variety of teaching styles, increasingly so in recent years.²⁷² Why should students take on the traits of the Kingsfield-type professors, rather than the gentler role models?

Second, developmental psychology suggests that the assertion that the Socratic method causes incivility is far more complicated than critics assume. That is, can the exposure to an occasional demanding Kingsfield cause an adult to change her personality and suddenly become uncivil, hostile, and unacceptably aggressive? Surely, personality is formed far earlier in our lives than in our early and mid-twenties.²⁷³ If that is so, the effect of exposure to a Kingsfield-type professor should have little effect on the aggressiveness of law students. Or, if exposure to such a professor can have a profound effect on her students, one might ask why the effect is to increase students' level of aggression. Why wouldn't some students be so repulsed by the aggressive style that they would become less aggressive?

Developmental psychology does suggest that infants interact with their parents' (especially their primary caregivers') parenting style.²⁷⁴ But the effect on the child depends on two variables, the parents' and the child's attachment style.²⁷⁵ Thus, an aggressive child, nurtured by an avoidant caregiver, may become extremely aggressive because his needs are only met when he is aggressive enough to get the attention of his avoidant caregiver.²⁷⁶ This may explain how children of the same parents may develop such different personalities.²⁷⁷ It also suggests that

268. See, e.g., Hayden, *supra* note 7, at 303; Schechter, *supra* note 7, at 381.

269. See Schechter, *supra* note 7, at 381.

270. See *id.* at 378-82.

271. See *id.* at 382.

272. See Friedland, *supra* note 17, at 29-31; Kerr, *supra* note 40, at 114.

273. Developmental psychologists claim that genes and early, interpersonal experiences shape the development of the human mind. DANIEL J. SIEGEL, M.D., *THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE* 4 (1999) ("Interpersonal experiences directly influence how we mentally construct reality. This shaping process occurs throughout life, but is most crucial during the early years of childhood.").

274. See *id.* at 20-21.

275. See *id.* at 276-84.

276. See *id.* at 277.

277. See *id.* at 277, 282-84.

even during periods of greatest development, children react quite differently to different kinds of parenting attachment styles.²⁷⁸

The fact that students may have different attachment styles may explain a phenomenon that many of us observed as students. I remember my seventh grade classmates reducing my English teacher to tears. Mostly male students showed open contempt toward her. That is, her avoidant style as a teacher evoked their aggression. Similar behavior may take place in law school. For example, students may more openly challenge a passive professor than they would an aggressive professor. While criticizing the Socratic method, author Richard D. Kahlenberg shows his contempt for one of his professors who was one of the chief proponents of a gentler form of instruction.²⁷⁹ For example, at one point he characterizes his professor's course as "a vast wasteland."²⁸⁰ One suspects that at least some of his classmates treated the gentle professor more aggressively than they would have treated a more aggressive professor.

No one blames the gentle professor for her students' aggressive behavior. Their bad behavior would be dismissed as chauvinistic or as a matter of their personality. I question then why Kingsfield's critics blame him for the increased aggression of his students. How can he cause his students to become aggressive if a gentle professor is not to blame for the aggression of her students?²⁸¹

As indicated, one might doubt that an aggressive teacher may have a significant impact on her students. But even if she did, psychological theory suggests that the effect will be dependent on her students' psychological make-up, with at least some of her students becoming less aggressive with an aggressive teacher.²⁸²

This discussion also begs other questions: what is so wrong with aggression? And even if the Socratic method leads to more aggressive attorneys, is that the same as a lack of civility? Analytically, the concepts are distinct: a person may be uncivil by being passively aggressive, i.e., simply ignoring her opponent. One can also be aggressive without being uncivil. Indeed, aggressive trial attorneys know that their lack of civility will backfire, at least when they appear in front

278. *See id.*

279. *See* KAHLBERG, *supra* note 79, at 11-14.

280. *Id.* at 52.

281. Criminal law scholars have struggled with the idea that one individual can cause another's conduct, at least where the actor has a free will. They typically reject that idea. *See, e.g.*, SANFORD H. KADISH, BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 158-65 (1987).

282. *See* discussion *supra* notes 274-80.

of a jury.²⁸³ Successful trial attorneys learn to control their aggression when necessary. Any good appellate lawyer knows both the virtue of enthusiastic, aggressive presentation of his case and the need for deference.²⁸⁴ Properly trained lawyers learn how to achieve balance.

Arguably, a link may exist between the lack of civility and the Socratic method. As captured in the idea of “fight or flight,” we react differently to fear.²⁸⁵ Some of us will fight when confronted with a threatening situation.²⁸⁶ If the Socratic method is in fact an ineffective teaching technique that leaves us insecure and, therefore, fearful, perhaps young lawyers are uncivil as a defense mechanism. But the Socratic method may have taught students to negotiate their fear without becoming uncivil. Some critics complain that the Socratic method is hierarchical.²⁸⁷ That is, students suffer because of the disparity of power between them and their professors.²⁸⁸ But one effect of such a disparity in power may be to teach the student how to negotiate with someone with more power. Surely, a student must learn self-control in a classroom setting where his lack of power militates against the student attempting to bully his professor.

Some of these concerns resurface in the next subsection in which I discuss an additional set of criticisms leveled against the Socratic method. For now at least, one can see that claims that the method does not work lack both empirical support and intuitive appeal.

F. *Is the Socratic Method Nonetheless Objectionable?*

Closely related to the claim that the Socratic method is ineffective are the criticisms that focus on the negative effects that the Socratic method purportedly has on students. These criticisms are logically separate from the claim of ineffectiveness because one might recognize the method as effective, but contend that the cost of the Socratic method is too great to justify its use.

Critics have made much of the fact that students become increasingly cynical through law school,²⁸⁹ and not only are they more

283. MICHAEL R. FONTHAM, TRIAL TECHNIQUE AND EVIDENCE 26-27, 104, 475 (2d ed. 2002).

284. See FONTHAM, VITIELLO & MILLER, *supra* note 245, at 98.

285. See Glesner, *supra* note 33, at 627.

286. See *id.*

287. See *supra* note 97 and accompanying text.

288. See *id.*

289. See, e.g., Glesner, *supra* note 33, at 628; Robert Granfield, *Constructing Professional Boundaries in Law School: Reactions of Students and Implications for Teachers*, 4 S. CAL. REV. L. & WOMEN'S STUD. 53, 69 (1994); Kennedy, *supra* note 7, at 77; Jon Richardson, *Does Anyone*

cynical, but they are also more anxious.²⁹⁰ According to the critics, students become cynical because they are forced to defend positions contrary to their beliefs. For example, one writer argues:

[Students] learn to suppress their feelings and come to care less about others. They learn that their value systems are irrelevant. “[T]he underlying highest value taught, even if implicitly, is the ability to come up with convincing reasons in support of any argument, whether one personally agrees with them or not, and to defend those reasons with cogent and convincing logic, on behalf of anybody”—a process that may lead to a moral neutering of the students.²⁹¹

Critics suggest that students come into law school with ideals and a desire to do good and that law school drums it out of them.²⁹²

The moral numbing argument is misguided for a number of reasons.²⁹³ First, a natural part of psychological development involves the abandonment of a simplistic view of the world.²⁹⁴ A natural consequence of that change from our teens to our twenties is that we become more critical and more cynical.²⁹⁵ Therefore, cynicism may be a product of healthy psychological development rather than the unwanted cost of a legal education.

Care for More Hemlock?, 25 J. LEGAL EDUC. 427, 440-41 (1972); Taylor, *supra* note 123, at 258-59.

290. See, e.g., G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 246; Mixon & Schuwerk, *supra* note 92, at 94; Pipkin, *supra* note 123, at 1163; Shanfield & Benjamin, *supra* note 123, at 67, 69; Silver, *supra* note 123, at 1201; Silverman, *supra* note 6, at 301; Taylor, *supra* note 123, at 261; Andrew S. Watson, M.D., *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 121-22, 131 (1968); Andrew S. Watson, M.D., *A Psychiatrist on the Law School Faculty: Influences on Professional Careers*, 16 LAW MED. & HEALTH CARE 240, 242 (1988).

291. Iijima, *supra* note 24, at 529 (quoting in part BACHMAN, *supra* note 91, at 56). See also Mixon & Schuwerk, *supra* note 92, at 102; Richardson, *supra* note 289, at 441; Taylor, *supra* note 123, at 258-59.

292. KAHLBERG, *supra* note 79, at 5; TUROW, *supra* note 79, at 90; Granfield, *supra* note 289, at 69; Mixon & Schuwerk, *supra* note 92, at 100; David W. Raack, *Essay Review: Law School and the Erosion of Student Idealism*, 41 J. LEGAL EDUC. 121, 132 (1991).

293. The existing studies do not prove that the Socratic method is responsible for students' loss of their ideals in law school. Many other factors may cause the changes in their attitudes about doing public interest work, for example, the lures of money, power, prestige, and convention. See KAHLBERG, *supra* note 79, at 6-7. But even if the Socratic method is responsible for increasing cynicism, this change may be essential to training students to become lawyers.

294. See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1414 (1997); Silver, *supra* note 123, at 1208.

295. See Raack, *supra* note 292, at 124.

Second, advocates of this position suggest that a law professor should allow students to voice their own views without seriously challenging those views.²⁹⁶ She should also avoid forcing her students to argue positions that they do not believe in. Otherwise, she risks causing her students to lose their moral bearings in a “sea of relativism.”²⁹⁷ The failure to challenge students would be educational malpractice.

The most important feature of a legal education is that it challenges our views and forces us to examine them with care.²⁹⁸ Some of the discussions about allowing students to voice their personal views imply that it is necessary to protect certain groups, like women, who may not otherwise have their voices heard.²⁹⁹ Insofar as this is an antidote to concerns about women underperforming in law school, the disparity in performance disappears when one examines LSATs rather than combined LSAT-GPA figures.³⁰⁰ As a result, special treatment for one group of students seems unwarranted.

In addition, I doubt that advocates of this position would have professors apply it consistently. Welcoming students’ expression of their personal views can lead to the expression of ugly views. Those of us who teach rape in Criminal Law walk a fine line in efforts to encourage a full and open debate and shutting down some insensitive boorish views.³⁰¹ But where students’ views are relevant, surely our obligation is not to pick sides in a sensitive policy debate. It is to press students to see what the implications of their views are.

For example, in a Criminal Law class, a student might argue in favor of a strict liability standard on the question of mistake relating to consent.³⁰² But the professor almost certainly must explore whether the

296. See *supra* note 94 and accompanying text. Additionally, a suggested model for a course in professional responsibility required that the classroom environment “be far, far safer than is typical in law school . . . , [one] in which students felt free to discuss issues having strong emotional content without fear.” *Mixon & Schuwerk, supra* note 92, at 90.

297. *Mixon & Schuwerk, supra* note 92, at 102.

298. See *Garret, supra* note 132, at 202; see also *Areeda, supra* note 16, at 917-18; Patricia Mell, *Taking Socrates’ Pulse: Does the Socratic Method Have Continuing Vitality in 2002?*, 81 MICH. B.J. 46, 46 (2002).

299. See Tanya Greene, *Shut Up and Sit Down, Young Lady—The Gendered Law School Experience*, Contemporary Women’s Issues Database, at <http://www.highbeam.com/library/doc0.asp?DOCID=1P1:29128607&num=1&ctrlInfo=Round9k%3AProdCtrl%3ASR%3AResult&ao> (last visited April 21, 2005); Paul T. Wangerin, *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, 62 TUL. L. REV. 1237, 1296-97 (1988).

300. See *supra* note 165 and accompanying text.

301. See, e.g., Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509, 509 (1992); James J. Tomkovicz, *On Teaching Rape: Reasons, Risks and Rewards*, 102 YALE L.J. 481, 481 (1992).

302. That issue was before the Supreme Judicial Court of Massachusetts on several occasions. See *Commonwealth v. Ascolillo*, 541 N.E.2d 570, 575 (Mass. 1989) (upholding the trial court’s

statutory language supports such an interpretation, whether the grading of rape as a crime of violence makes strict liability an appropriate standard on the question of mistake, or whether mistake in rape should be treated the same as mistake in other areas of the criminal law.³⁰³

Failing to expose students to competing arguments fails to alert them to an essential role of the lawyer. Even if one successfully shapes her career to represent only clients who share the attorney's political views and values, she must know how to prepare her case by anticipating the other side. Hence, even in a Catholic law school that may discourage a professor from advocating the appropriateness of *Roe v. Wade*,³⁰⁴ a professor would not serve his students by simply reiterating the arguments of the dissenting justices³⁰⁵ or of other critics of the Court's decision.

Closely related to the previous point, we disserve our students by affirming poorly argued positions. In one of the classroom scenes in *The Paper Chase*, one of the protagonist's study group members, Mr. Bell, provokes Professor Kingsfield's rebuke when Bell argues that the application of a Dead Man statute³⁰⁶ that prevents the plaintiff's recovery is simply unfair.³⁰⁷ By contrast, I wonder how a professor intent on affirming his students' views would treat Mr. Bell. Should he say, "Mr. Bell, I value your sense that the Dead Man statute is unfair"? Should he leave the discussion there or should he probe further to show how superficial the answer is? If the former, the message that he gives the hapless Mr. Bell is simply wrong. If the latter, I wonder what is gained by affirming his student's poorly reasoned argument. Students almost certainly can see through faint praise; the additional probing

refusal to instruct the jury that an honest and reasonable mistake as to consent was a defense to rape); *Commonwealth v. Sherry*, 437 N.E.2d 224, 233 (Mass. 1982) (rejecting a claim that an honest but unreasonable mistake that the victim consented negated the mens rea of rape); cf. *Regina v. Morgan*, A.C. 182 (H.L. 1976), (holding that a good faith mistake negates the mens rea of knowledge).

303. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 155-56 (3d ed. 2001).

304. 410 U.S. 113 (1973). This example may seem far-fetched, but during the early 1980s, some of the Jesuit priests at Loyola New Orleans Law School argued that law professors should not be allowed to teach that *Roe* was morally or legally appropriate. As a member of the faculty at Loyola, I was more than mildly concerned about their position.

305. See *id.* at 171 (Rehnquist, J., dissenting).

306. Dead Man statutes

are intended to protect the estates of deceased or incompetent persons against fraudulent claims. While this is a noble aim, it is how these statutes accomplish this goal that is so troublesome. Typically, they disqualify a surviving party from testifying if the other party dies. Death need not be caused by the incident subject to the litigation.

PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE 223 (2003).

307. See OSBORN, *supra* note 1, at 127-28.

ought to reveal the superficiality of Bell's answer. That then gives him the message that his point was ineffective.³⁰⁸

Affirming Mr. Bell's personal views ignores that he made an ineffective legal argument. If Kingsfield worries about Mr. Bell's feelings and spends his energy and the class's time affirming Mr. Bell's views, Mr. Bell comes away feeling good about himself, but not learning that his argument is superficial.

Leaving Mr. Bell uninformed does not serve him well. Imagine Bell as an associate in a law firm or as an advocate before a court. If he makes a similar argument in a memo to a senior partner or to a judge, he will learn a hard lesson that he should have learned in law school where his unprofessional argument would not hurt his client.

Once professors recognize the need to expose their students to competing arguments, I wonder how a professor harms her students by asking them to argue the other side. For example, as asserted above, a professor must expose students to competing arguments for or against a particular result in a case. Hence, a professor who calls upon a student who opposes abortion is obligated to ask that student what arguments support the Court's holding. I wonder how much harm a professor really does by framing the question, "If you represent Ms. Roe, what argument do you make on her behalf?" Concluding that students' psyches are harmed by that additional leap seems far-fetched, absent some compelling empirical data. In addition, if a student's psyche is so frail that arguing a position adverse to his personal beliefs leaves him morally numb, we may want to ask whether he is well suited for the practice of law.

Forcing a student to take a particular position that may be contrary to that student's personal views underscores another essential point that students should understand. Most lawyers face the problem that they may not agree with a particular position that their clients want them to take or with the values that their client represents. Apart from lawyers who get to pick their causes and to work for ideological organizations,³⁰⁹

308. I am not feigning ignorance and certainly am not trying to set up a straw person when I pose what appears to be an irreconcilable conflict: how can a professor affirm a student's views when those views are superficial and poorly reasoned? The choice seems to be between affirmation and risking harm to the student's self esteem. Critics of Kingsfield and the Socratic method contend his methods were wrong because they harmed students' self esteem. See Lila A. Coleburn & Julia C. Spring, *Socrates Unbound: Developmental Perspectives on the Law School Experience*, 24 *LAW & PSYCHOL. REV.* 5, 19 (2000).

309. Even those lawyers may not always be able to pick and choose their clients. Even a lawyer working for an organization like the A.C.L.U. or the Pacific Legal Foundation or the Public Defenders Office or the District Attorney may have limited ability to avoid clients whom they do

employers often expect lawyers to represent clients without regard to personal preferences. Pretending that students can argue only positions that they believe in distorts the kind of realistic dilemma that they will face within a short period of time as they enter practice. Sheltering them from realities of practice seems singularly undesirable.

Third, those critics of Kingsfield and the Socratic method who argue that we should let students fully air their own views are confused about the proper use of the Socratic method. In context, those who advocate greater attention to students' views seem to view the classroom dialogue as more akin to an undergraduate or graduate open-ended discussion than a Socratic dialogue.³¹⁰ As developed in more detail below,³¹¹ a student's opinions about the law are only marginally related to most of what takes place in a carefully focused Socratic dialogue. If we are serious about training our students to be lawyers, not op-ed writers, a classroom discussion should resemble the interchange between a judge and a lawyer, not a professor and her graduate students.

The argument that students should be able to voice their personal views in a Socratic dialogue is premised on a very different view of the Socratic method from that held by many of its most effective proponents. Envision a discussion of *Erie Railroad Co. v. Tompkins*,³¹² in a Civil Procedure class and ask at what point a student's personal views about the appropriateness of that decision become relevant. I suspect that an effective Socratic dialogue would begin with a detailed discussion of the case, including the facts and competing arguments that the parties made in the lower courts. Time should be spent clarifying the precise holding. For example, many students believe that it states a rule that, in diversity cases, state substantive and federal procedural law applies. Yet, nowhere does the opinion state that as its holding.³¹³

not fully believe in. A lawyer at the A.C.L.U. might prefer not to work on a case defending the Ku Klux Klan's right to march in an African American neighborhood. A member of the PLF may be libertarian on some issues but prefer not to represent some private property owners who are challenging important environmental regulations. A public defender may prefer not to represent child molesters. A district attorney may prefer not to prosecute petty drug offenders or police charged with corruption.

310. See, e.g., Lawrence S. Krieger, *What We're Not Telling Law Students—and Lawyers—That They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from Its Roots*, 13 J.L. & HEALTH 1, 42-43 (1998).

311. See *infra* notes 312-36 and accompanying text.

312. 304 U.S. 64 (1938).

313. *Erie* holds that there is no federal general common law, and unless the United States Constitution or acts of Congress govern the matter, federal courts sitting in diversity must apply state law, which includes both statutes and common law. *Id.* at 78. The closest that the majority comes to making the substantive/procedural distinction is its statement that “[t]here is no federal

The explication of the Court's opinion can profitably focus on forum shopping. No matter what else one might think of *Erie*, one might find the forum shopping in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*³¹⁴ entirely objectionable. Focusing on that kind of forum shopping sets up a more in-depth discussion of *Erie*'s policy argument and a treatment of inter-jurisdictional forum shopping, very much alive after *Erie*.³¹⁵

Thereafter, the discussion would focus on the Supreme Court's theory. For example, as legal scholars recognize and continue to debate, the Court's theory is difficult to divine.³¹⁶ Decided just as the Supreme Court began to expand the Commerce Clause to affirm New Deal legislation,³¹⁷ *Erie*'s constitutional grounding in the Tenth Amendment has been subject to great debate.³¹⁸ Even more suspect is its discussion of equal protection.³¹⁹ Justice Reed's concurring opinion, arguing that the decision is simply a matter of interpretation of the Rules of Decision Act,³²⁰ offers a perfect opportunity to ask students why Justice Brandeis

general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts." *Id.*

314. 276 U.S. 518 (1928).

315. See, e.g., *Ferens v. John Deere Co.*, 494 U.S. 516, 520, 524 (1990).

316. Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in KEVIN M. CLERMONT, *CIVIL PROCEDURE STORIES* 65 (2004). For a debate regarding the meaning of the *Erie* opinion, see generally Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977); Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311 (1981); Martin H. Redish, *Continuing the Erie Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959 (1982); Peter Westen, *After "Life for Erie"—A Reply*, 78 MICH. L. REV. 971 (1982).

317. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30, 33 (1937) (finding the National Labor Relations Act a permissible exercise of Congressional power over interstate commerce; the Act established the right of employees to organize and bargain collectively); see also BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 202 (1942) (suggesting that there was "the switch in time which saved nine"; that is, because Justice Roberts began to vote to uphold New Deal legislation, the Court was saved from President Roosevelt's court packing plan).

318. See generally John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 702-04 (1974) (arguing that *Erie* was implicitly grounded in the Tenth Amendment). But see generally Philip B. Kurland, *Mr. Justice Frankfurter, The Supreme Court and The Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 191 (1957) (arguing that *Erie* has no constitutional basis because the Court's decisions after *Erie* have resolved the issues before them without embarking on an analysis that examines the relationship between *Erie* and the Constitution).

319. Georgene M. Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 FORDHAM L. REV. 167, 178, 182-84 (1985).

320. 28 U.S.C. § 1652 (2000); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 90-91 (1938) (Reed, J., concurring).

avoids basing his decision on statutory grounds.³²¹ Further discussion might develop why Justice Reed was hesitant to ground the decision in the Constitution³²² and why he instead argued that the Court was merely avoiding the unconstitutional course that *Swift v. Tyson*³²³ took.

A professor might probe the constitutional questions further, including a discussion about precisely what would be beyond Congress's power to enact. For example, one might ask whether Congress could have drafted legislation based on the Commerce Clause that would have regulated conduct on an interstate rail bed.³²⁴ One might ask whether legislation regulating products liability would interfere with state power over local tort law.³²⁵

Other questions might focus on questions that surfaced later in the *Erie* line of cases. For example, the *Erie* Court seems to have assumed that Pennsylvania law or federal common law would apply to the dispute, despite the fact that the action was filed in a federal court located in New York.³²⁶ A professor can probe why that might be the case, introducing students to conflicts of law rules and the possibility for inter-jurisdictional forum shopping made easier as a result of *Erie* and *Klaxon*.³²⁷

The foregoing is an incomplete list of questions that a professor might ask her students.³²⁸ My discussion of *Erie* is lengthy on purpose: it shows the rich questions that a professor can explore using the Socratic method. Conspicuously absent is a question directed to elicit a student's personal feelings about the *Erie* doctrine.³²⁹

With so many fascinating legal and theoretical problems posed by the case, I wonder how a professor would have time to explore students'

321. *Erie R.R. Co.*, 304 U.S. at 77-78.

322. *See id.* at 90-92; *see also id.* at 88 (Butler, J., dissenting) (acknowledging a statute that would have required certification to the Attorney General if the constitutionality of an act of Congress is at issue).

323. *Swift v. Tyson*, 26 U.S. (16 Pet.) 1 (1842).

324. *Vairo*, *supra* note 319, at 175.

325. *Id.* at 176.

326. *Erie R.R. Co.*, 304 U.S. at 69.

327. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941) (stating that the federal courts will respect state law provisions concerning whether their law will be applied in a diversity suit).

328. For an in-depth discussion of additional facets of *Erie*, see Purcell, *supra* note 316, at 21-74.

329. One might respond that *Erie*, unlike cases like *Roe*, does not evoke students' emotions. That is not necessarily so. During the spring of 2004 when I taught *Erie*, one of my libertarian students demonstrated almost religious fervor in defending *Erie* as a Tenth Amendment case, first in class and then in numerous TWEN postings. To my student's credit, most of his arguments were not simply about his personal feelings about the case, but instead about the doctrine itself.

feelings about it. One might ask for their personal views about the doctrine, but at most, that might be about the role of Congress as opposed to the federal courts in creating law, or the role of the states as opposed to the federal government. I am not sure how much the students' personal views add to the discussion. Far more important than their feelings is that they understand the doctrines at play in the case.

To underscore that point, I envision Mr. Bell arguing before a judge in a case in which he contends that the plaintiff should be able to testify despite the existence of a controlling Dead Man statute. The court has little interest in his personal views about the statute and even less in how he feels about the statute.³³⁰

Concern about validating students' views skews what should be the priorities of legal educators: law students should be learning legal arguments first and foremost. Too much, not too little, time is spent asking students about their views, rather than honing in on the legal arguments and policies that drive the courts. Much of the literature arguing against the Socratic method and in favor of more student-oriented, student-friendly classrooms is premised on the view that time spent on students' views is a primary goal.³³¹ I suspect that many law professors have heeded the exhortation to nurture students' personal views. But we ought to question whether that is helpful to their students.

Apart from whether courts care about lawyers' personal views, students quickly discover that their employers care little about their personal views. Many junior associates have difficulty adjusting to the large firm practice.³³² The adjustment is probably more difficult for the highest achieving students.³³³ One ought to question whether part of that difficulty is that students at the top of their class did get to share their views; professors took seriously their discussion of high theory.³³⁴ Suddenly, faced with a mound of mundane discovery documents, the new associate may experience frustration because no one cares about her

330. Of course, advocates must care about the issues in their case or project that concern as a matter of effective advocacy. FONTHAM, VITIELLO & MILLER, *supra* note 245, at 19. But that must be distinguished from an open appeal to one's personal feelings about a legal matter. That is simply irrelevant.

331. See Iijima, *supra* note 24, at 535 n.57; Krieger, *supra* note 94, at 128; Mogill, *supra* note 94, at 325-26; Wiseman, *supra* note 94, at 20.

332. See Steven C. Bahls, *Generational Change and the Problem of Associate Retention: An Introduction to the Associate Retention Symposium*, 29 CAP. U. L. REV. 887, 887 (2002).

333. See *id.* at 890 (noting that good grades do not predict success in practice).

334. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 38 (1992).

personal views.³³⁵ That is, her law school misled her to believe that her views mattered.³³⁶

G. *Does the Socratic Method Demean Students?*

Besides the corrosive relativism caused by the Socratic method, its critics object that Socratic professors often demean, embarrass or dehumanize their students.³³⁷ I certainly shared that view of the Socratic method.³³⁸ Having made the general criticism over thirty years ago, I imagine that many students share my misperception about their professors' intent. I thought that my Contracts professor, who was my personal Kingsfield, was demeaning students. He was not; he was challenging us.³³⁹ I began rethinking my views of my Contracts professor on the first day that I began practicing law. He had no ill will toward us.³⁴⁰ He was trying to get us ready for the rigorous practice of law where our views would be challenged on a regular basis.³⁴¹

If professors are not routinely trying to demean their students, we ought to ask why students' experiences are so at odds with their professors' intentions. A few commentators have correctly suggested that some students, especially those who excelled prior to law school, have difficulty adjusting to the Socratic method because they have

335. Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1252 (1991).

336. See generally Edwards, *supra* note 334, at 38, 40; Johnson, *supra* note 335, at 1252.

337. See, e.g., Beattie, *supra* note 40, at 484.

338. See *Pennock Letter*, *supra* note 104.

339. I had come from an elite undergraduate college and thought that I had been challenged there. But like many college classrooms, we were nurtured in a way that none of my legal employers would have done. One commentator points to the differences between undergraduate and legal education. She claims that

law school education is different than undergraduate education for most students. Legal education requires that students work hard, master complex ideas quickly, solve tough problems, and create complex frameworks for a diverse range of human and institutional interactions. They must also learn to bargain or argue confidently and effectively in the face of equally effective opposition.

Glesner, *supra* note 33, at 646-47 (footnote omitted).

340. Professor Curtis R. Reitz was a classic Socratic teacher, seldom if ever making a declaratory statement. He never made demeaning comments; instead, he simply bore in on our arguments with difficult questions in an effort to get us to develop and defend our positions. He did not favor one position or another but challenged every student until that student could no longer respond and then he moved on to other students. As his student, I blamed him for my discomfort. Shortly thereafter, I began to understand that the problem was mine, not his, and that I misconstrued his motives when he challenged us. As his student, I should have revered him for the intellectually rigorous class that he conducted, instead of complaining about the challenges that he provided us.

341. Rosato, *supra* note 41, at 51-52. I concede that some professors may intentionally demean their students. But I suspect far fewer professors do so than their critics suggest.

difficulty dealing with the change in the methodology.³⁴² As one writer has stated, students “no longer deal with absolute truths as they did in college; instead, they must learn to cope with relativism.”³⁴³ Those students who experience extreme anxiety because they are unable to make the transition may see themselves locked in a competition with their professors.³⁴⁴ They may be antagonistic and may “take pride in beating the professor at his own game.”³⁴⁵

What commentators do not focus on is whether those students who have difficulty adjusting to the relativism of the law may have personality disorders. Students so unable to have their views challenged may have narcissistic personalities.³⁴⁶ Critics suggest that law professors ought to change our teaching methodology, in part, to accommodate these students, even though many other students do not share their experience. But if a student who has difficulty adjusting to the demands

342. Stropus, *supra* note 33, at 450.

343. *Id.* at 457-58.

344. *Id.* at 458-59; Glesner, *supra* note 33, at 627.

345. Stropus, *supra* note 33, at 459.

346. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 301.81, at 717 (4th ed. 2000).

Diagnostic criteria for 301.81 Narcissistic Personality Disorder

A pervasive pattern of grandiosity (in fantasy or behavior), need for admiration, and lack of empathy, beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following:

- (1) has a grandiose sense of self-importance (e.g., exaggerates achievements and talents, expects to be recognized as superior without commensurate achievements)
- (2) is preoccupied with fantasies of unlimited success, power, brilliance, beauty, or ideal love
- (3) believes that he or she is “special” and unique and can only be understood by, or should associate with, other special or high-status people (or institutions)
- (4) requires excessive admiration
- (5) has a sense of entitlement, i.e., unreasonable expectations of especially favorable treatment or automatic compliance with his or her expectations
- (6) is interpersonally exploitative, i.e., takes advantage of others to achieve his or her own ends
- (7) lacks empathy: is unwilling to recognize or identify with the feelings and needs of others
- (8) is often envious of others or believes that others are envious of him or her
- (9) shows arrogant, haughty behaviors or attitudes

Id.

Often, successful people suffer from this particular disorder. It is prevalent among professionals, including attorneys, who may have a vast sense of their own self-importance and consider themselves smarter and better than others.

of the Socratic classroom suffers from a personality disorder, one might ask why an otherwise effective teaching tool is inappropriate.³⁴⁷

On occasion, a professor may intend to embarrass one of her students. In the most famous scene in *The Paper Chase*, Kingsfield calls on Hart, who announces defiantly that he would prefer to pass since he has nothing important to add to the discussion.³⁴⁸ Hart's response is in retaliation to an earlier conflict between them. Kingsfield asked Hart to prepare a paper related to one of the professor's books. Hart was unable to produce the paper. Instead of contacting Kingsfield, Hart continued to work on the project well past its deadline.³⁴⁹ Hart does not bother to ask Kingsfield for an extension or to tell him of his difficulties in organizing the material.³⁵⁰ When he finally goes to Kingsfield's office, Hart is annoyed with Kingsfield because Kingsfield has had someone else complete the project when Hart missed the original deadline. Hart's behavior in class is in retaliation to Kingsfield's decision to have someone else complete the project.

In the book, Kingsfield tolerates Hart's insolence.³⁵¹ In the movie, when Hart announces that he is unprepared, Kingsfield tells him to come to the podium where he hands Hart a dime, with instructions to call his mother to tell her that he will not be a lawyer. As Hart is about to exit, he turns back and shouts that Kingsfield is a son of a bitch. Kingsfield

347. The literature critical of legal education and the Socratic method points to various studies suggesting that law school causes a variety of psychological problems, including stress-related illnesses and substance abuse. See, e.g., Benjamin et al., *supra* note 290, at 246; Pipkin, *supra* note 123, at 1163; Shanfield & Benjamin, *supra* note 123, at 65, 69; Silver, *supra* note 123, at 1201; Taylor, *supra* note 123, at 261. Practicing lawyers suffers similar problems. Critics have argued that legal education should change to avoid creating these problems. See, e.g., Iijima, *supra* note 24, at 532-38; Nancy J. Soonpaa, *Stress in Law Students: A Comparative Study of First-Year, Second-Year, and Third-Year Students*, 36 CONN. L. REV. 353, 371-74 (2004). Some of the proposed changes, like helping students with stress management, seem quite sound. But revising legal education to eliminate the highly demanding use of the Socratic method is short sighted. Failing to expose students to the demands similar to those of practice simply delays the day when students will suffer stress-related problems. In the past, I was tempted to urge that law schools use a psychological test as part of the admissions process in order to weed out those most likely to suffer from stress-related illnesses. My fear is that aspiring organizations like LSAT prep groups will spring up to teach applicants how to answer psychological tests to assure their admission to law school. Another remedy might be to encourage applicants to undergo career counseling before matriculating to law school and making such a substantial financial investment. While such a remedy may be sound, I doubt that law schools competing for applicants are likely to exercise such self-restraint.

348. THE PAPER CHASE, *supra* note 1; OSBORN, *supra* note 1, at 210.

349. THE PAPER CHASE, *supra* note 1; OSBORN, *supra* note 1, at 131-36.

350. OSBORN, *supra* note 1, at 131-36.

351. *Id.* at 211.

relents and tells Hart to take his seat with the comment that Hart's comment is the most intelligent thing he has said all day.³⁵²

No doubt, Kingsfield wanted to embarrass Hart. But surely Hart earned a sanction of some kind. He was unprofessional in failing to complete the project as agreed upon or, at a minimum, in notifying Kingsfield in a timely manner. He was immature in blaming Kingsfield for his own failure; yet the movie invites us to condemn Kingsfield for not being more solicitous of Hart.

Whether the particular sanction Kingsfield chose was appropriate is debatable. But Kingsfield's critics seem to argue that we should not embarrass our students at all.³⁵³ Failing to sanction Hart's insolence would be a grave mistake. Despite the criticism that law school is hierarchical,³⁵⁴ so too is the practice of law. Kingsfield should not allow Hart to believe that his behavior in failing to perform work in a professionally responsible manner is acceptable or that a senior partner or judge would tolerate Hart's immature outburst.³⁵⁵

Apart from the history between Kingsfield and Hart, Kingsfield should not tolerate Hart's lack of preparation for class. Not only are students going to learn less in a classroom where class preparation is not required, but also, professors who do not require preparation ignore the needs of their students' prospective clients. As discussed above, even law professors who have largely student-centered goals face competing goals.³⁵⁶ Not requiring preparation may set the bar too low: I question whether students will interpret the absence of a preparation requirement as a lowering of expectations. Further, unprepared students cannot take as much out of class as those who have struggled with the material and are more likely ready to do higher-level thinking about issues than their classmates.³⁵⁷ Finally, the discussion of student-centered learning seldom mentions their students' clients.³⁵⁸

Surely, professors who require class preparation and sanction the lack of preparation are making a statement about professional standards: preparation matters. Tolerating poor preparation in the name of

352. THE PAPER CHASE, *supra* note 1.

353. See Hess, *supra* note 22, at 87.

354. See, e.g., Stone, *supra* note 40, at 411-12; Kennedy, *supra* note 7, at 593.

355. See FONTHAM, VITIELLO & MILLER, *supra* note 245, at 201-04 (discussing appropriate techniques for showing deference to the court).

356. See discussion *supra* notes 207-11.

357. See, e.g., Areeda, *supra* note 16, at 915; Glesner, *supra* note 33, at 644-45; Smith, *supra* note 40, at 113-14.

358. See generally HESS & FRIEDLAND, *supra* note 27 (omitting a discussion of the impact that student-centered learning will have on the students' future clients); Hess, *supra* note 22 (same).

inclusion³⁵⁹ or in order to avoid putting students on the spot³⁶⁰ sends a bad message about one's professional obligation. A gentler education may feel better than the more traditional, demanding model,³⁶¹ but we are not serving our students—or ultimately our students' clients—by allowing students to develop poor work habits and careless thinking.

H. Does the Socratic Method Violate What Learning Theory Teaches Us?

A number of prominent legal educators have based their critique of the Socratic method on learning theory.³⁶² Some learning theorists recognize that the Socratic method may be effective for many students and may not argue that it should be abandoned.³⁶³ Instead, they contend that law professors should be aware of students' different learning styles and use different methods to reach those students.³⁶⁴ Their insights are important and influential.³⁶⁵

One cannot lightly dismiss their message. Surely, a professor ought to attempt to reach all of her students. In this section, after reviewing the arguments of the learning theorists, I do raise questions about learning theorists' arguments. My concern focuses on a practical question: how will students need to ingest material and to communicate material when they practice law? That is, learning theorists must show that lawyers who lack the ability to learn through reading, listening, and debating their points can be fully effective as practicing lawyers. Learning theorists have not effectively addressed that question.³⁶⁶

359. See Hess, *supra* note 22, at 99-101 (proposing that making students feel more included will increase their motivation to prepare for class).

360. *Id.* at 87.

361. See discussion *supra* notes 199-226.

362. See, e.g., Boyle, *supra* note 262, at 1; Friedland, *supra* note 39, at 4; Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 125 (1994); Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 350 (2001); Paul T. Wangerin, *Learning Strategies for Law Students*, 52 ALB. L. REV. 471, 472 (1987).

363. See, e.g., Friedland, *supra* note 39, at 28.

364. See, e.g., HESS & FRIEDLAND, *supra* note 27, at 3; Jacobson, *supra* note 78, at 142; William Wesley Patton, *Opening Students' Eyes: Visual Learning Theory in the Socratic Classroom*, 15 LAW & PSYCHOL. REV. 1, 2 (1991).

365. See, e.g., Hess, *Student Involvement*, *supra* note 198, at 343 (advocating the use of Student Advisory Teams (SATs) to give feedback to the professor throughout the year about the effectiveness of the professor's teaching).

366. See *infra* text accompanying notes 386-87.

Educators have argued that students absorb material differently from one another. They identify five kinds of learners.³⁶⁷ First, verbal learners absorb information through written texts.³⁶⁸ Second, visual learners absorb information in its entirety. Visual learners may be able to memorize well, but not solve problems well.³⁶⁹ Third, oral learners absorb information by speaking. Such students need to speak in class to maximize their learning.³⁷⁰ Fourth, aural learners absorb information by listening. Presumably, like verbal learners, they are well suited for law school because many of the traditional teaching techniques play to their strength. Hence, they benefit from class lectures and discussions.³⁷¹ Finally, tactile or kinesthetic learners learn best by doing, e.g., by role-playing or simulation.³⁷²

Learning theorists have argued that law professors spend too much time using only one or two teaching methods.³⁷³ For example, because so much time in law school is devoted to learning through written materials, verbal learners are more successful than their peers. By comparison, visual learners tend to end up at the bottom of their class.³⁷⁴ Some critics of current teaching strategies argue that professors can enhance learning of visual learners by using charts and diagrams.³⁷⁵ Other scholars have suggested a host of strategies to engage more of their students than are able to learn effectively through the use of the Socratic method.³⁷⁶

Not all writers agree on the role of the Socratic method in an ideal teaching environment. Some writers have argued that law professors can maintain the academic rigor of the Socratic method and nonetheless help students who are in the bottom half of the class (or who will end up there

367. See Jacobson, *supra* note 78, at 151-56.

368. See *id.* at 151.

369. See *id.* at 152.

370. See *id.* at 154.

371. See *id.* at 155.

372. See *id.*

373. See, e.g., Friedland, *supra* note 17, at 13.

374. See Jacobson, *supra* note 78, at 151-52.

375. See, e.g., Lasso, *supra* note 220, at 44; Patton, *supra* note 364, at 18; Wangerin, *supra* note 362, at 479.

376. For example, one of my colleagues has advocated the use of sophisticated visual display technology. He argues that we have experienced a shift towards visually based communications. As a result, our students have been trained visually and typically have spent more hours in front of a television than in school. He has developed high quality teaching materials and presents questions and hypotheticals visually.

at the end of the first year).³⁷⁷ Others have argued explicitly or implicitly that the Socratic method is not a good educational tool.³⁷⁸ For example, in arguing that their method is superior to the Socratic method, three authors developed an exercise called a Contract Activity Package (“CAP”)³⁷⁹ that allows students to work at their own pace. It also permits learning through different learning styles, unlike the Socratic method.³⁸⁰

One can only sound callous if he questions whether we ought to be addressing the learning needs of all of our students. But we must ask whether students need to have a particular learning style in order to succeed in the practice of law. I offer a simple analogy: in my sophomore year in college, I took a basic Art History course. I ended up doing well in the course because I was able to read enough about art to know what I ought to be able to see in the work. Although I did not identify the problem in these terms in 1965, my problem was that I am not a visual learner.³⁸¹ I adapted.

Imagine that instead of taking an art course, I was deciding whether to become an art historian or art appraiser. Surely, I chose wisely when I decided not to concentrate in Art History. Had I chosen Art History and sought employment in the field, I would not have been able to compensate for my lack of visual, spatial intelligence. What, for example, if I had been employed as an art critic, to write about modern art? I lacked a skill necessary to work in that field.³⁸²

377. See Patton, *supra* note 364, at 4-18 (advocating that law professors can easily include the use of games, simulations, graphs, charts, and T-lines as additional instructional tools in the Socratic classroom to benefit non-auditory learners and improve the effectiveness of class for all students).

378. See Saunders & Levine, *supra* note 362, at 129-30.

379. See Boyle et al., *supra* note 262, at 8-14 (describing the “Contract Activity Package” or “CAP” as consisting of five components: three to five “simply stated objectives,” *id.* at 9; and alternatives for a particular lesson plan, allowing a student to perform the activity in a manner that conforms to his or her preferred learning modality; “[r]eporting [a]lternatives,” *id.* at 10; that require a student to share his work with others, helping the student to reinforce the material; “small-group techniques,” *id.* at 11; designed to further reinforce the material; a list of “multisensory resources that students may use to accomplish its objectives,” *id.* at 14; and a “post-test to assess the students’ mastery of the subject matter.” *Id.* CAP allows students to work at “their own speed,” *id.* at 9, and adjust their surroundings to “match their learning style characteristics.” *Id.*) (internal quotation marks omitted).

380. See *id.* at 9 n.46.

381. See Jacobson, *supra* note 78, at 157-60 (discussing how information processing can be described as either a left-brain or right-brain function, with most learners having a dominant hemisphere) “[T]he left-brain primarily governs language and writing, and the right-brain governs spatial construction.” *Id.* at 157. Apparently I am left-brain dominant.

382. An art critic would likely be a right-brain thinker, who absorbs information visually and processes information creatively. See *id.* at 158 (stating that “the left-brain processes information analytically and linearly, and the right-brain processes information synthetically and creatively”).

Similar examples abound. Social scientists now identify several different kinds of intelligence.³⁸³ But most commentators do not argue that teachers in a given field should compensate for their students' lack of a particularly relevant kind of intelligence by use of different learning styles.³⁸⁴ Instead, they recognize that individuals should make career choices that call up that individual's strengths.³⁸⁵

That point is missed in much of the discussion of learning theory in the law school context. Although learning theorists contend that law students must develop both practical and analytical skills in order to learn how to think like a lawyer, learning theorists do not focus on the particular skills that lawyers need to have.³⁸⁶ Given the wide variety of kinds of law practice, one might argue that people with different learning styles should find a niche in practice. But the practice of law does have some common denominators.

No doubt, some lawyers are rainmakers, whose interpersonal skills are more important than their analytical skills.³⁸⁷ Some lawyers have strong oral advocacy skills and weak writing skills.³⁸⁸ But the overwhelming majority of lawyers must be able to read and analyze statutes, rules, and cases.³⁸⁹ They must be able to take complex facts and figure out how the various rules and cases apply to those facts.³⁹⁰ They must be able to draft coherent legal documents whether they are litigators, transactional lawyers, or administrative advocates.³⁹¹ They must be able to digest and synthesize large amounts of material.³⁹²

The literature advocating better accommodation of students with different learning styles misses the latter point. Learning theorists writing about law school fail to ask whether students who are not verbal learners may have difficulty practicing law.³⁹³ Instead, they advocate

383. *See id.* at 146-47 (identifying eight different types of intelligence).

384. *See, e.g.*, James M. Hedegard, *The Impact of Legal Education: An In-Depth Examination of Career-Relevant Interests, Attitudes, and Personality Traits Among First-Year Law Students*, 1979 AM. B. FOUND. RES. J. 793, 865-68 (1979) (suggesting that the type of student admitted into law school is the problem and not the teaching methods used to train them).

385. *See id.*

386. *See, e.g.*, Saunders & Levine, *supra* note 362, at 125; Wangerin, *supra* note 362, at 518.

387. *See, e.g.*, LISA L. ABRAMS, *THE OFFICIAL GUIDE TO LEGAL SPECIALTIES* 469-71 (2000).

388. *See, e.g.*, FONTHAM, VITIELLO & MILLER, *supra* note 245, at xxiv.

389. *See, e.g.*, ABRAMS, *supra* note 387, at 238.

390. *See id.* at 420.

391. *See id.* at 83, 104, 222.

392. *See id.* at 25.

393. *Cf.* Schwartz, *supra* note 362, at 383; Jacobson, *supra* note 78, at 142.

more diverse teaching techniques to reach those students.³⁹⁴ Whether that is a sound strategy is debatable.

Not surprisingly, students who lack certain kinds of learning ability end up in the bottom half of the class.³⁹⁵ Implicit in the literature is that teaching and testing should change to give students without, say, *verbal* intelligence a better chance of academic success.³⁹⁶ That makes sense only if I am wrong in my description of what it takes to excel in the practice of law: visual learners may be better architects than lawyers but almost certainly verbal learners are better suited to practicing law than are visual learners.³⁹⁷

Given that law schools admit students who may be visual or tactile or aural learners, one might argue that law professors must accommodate them. A similar argument has surfaced in literature that emphasizes the generational gap between law professors, sometimes derisively called “talking heads,”³⁹⁸ and their students, raised on visual stimuli.³⁹⁹ That is, some commentators argue that law professors must use display technology to accommodate students raised on television.⁴⁰⁰

Here, again, the discussion should begin with the essential skills needed to practice law and the way in which information will be available to practicing lawyers. Yes, lawyers can attend lectures and get some material on tape or CD. But the primary medium of communication remains the printed word.⁴⁰¹ The flood of written material has increased as legislatures pile on new laws, courts publish hundreds of new opinions, and agencies promulgate new regulations.⁴⁰² Training law students to read and analyze complex material must remain the primary focus of law school, even though some learners may have more difficulty than their peers.

Some critics have suggested that law schools should test differently from the way in which we currently do, with so much riding on a single

394. See, e.g., Boyle et al., *supra* note 262, at 9 (suggesting more widespread use of “CAP” programs); Jacobson, *supra* note 78, at 140; Lasso, *supra* note 220, at 44 (encouraging increased use of visual aids such as transparencies and powerpoint presentations in the classroom to reach visual learners); Patton, *supra* note 364 (supporting the use of “geometric organizers” to visualize legal concepts and theories).

395. See, e.g., Jacobson, *supra* note 78, at 151-52.

396. See *id.* at 142; cf. Rapoport, *supra* note 234, at 98-99.

397. See discussion *supra* notes 389-92.

398. See, e.g., Haynsworth, *supra* note 99, at 407; Sokolow, *supra* note 99, at 973; Subotnik, *supra* note 99, at 77.

399. See Jacobson, *supra* note 78, at 140; Lasso, *supra* note 220, at 3.

400. See Lasso, *supra* note 220, at 23.

401. Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 509-10 (1992).

402. See *id.* at 533-34.

exam,⁴⁰³ where speed seems to be the most important skill.⁴⁰⁴ While learning theorists recognize that verbal learners outperform other kinds of learners on these exams,⁴⁰⁵ they contend that we ought to be testing additional skills, ones that non-verbal learners may demonstrate to a greater degree than verbal learners.⁴⁰⁶

The argument has a superficial appeal to one's notion of fairness. If exams really test a limited and questionably relevant skill, why do we rely on them so heavily? But we are back to the question that I posed earlier: the ability to process large quantities of complex written material is essential to success in practicing law,⁴⁰⁷ and those who have the verbal learning style do well under the current law school examination system,⁴⁰⁸ therefore, our heavy reliance on written exams does make sense.⁴⁰⁹

IV. CONCLUSION

Law schools today are gentler places than they were when John Osborn went to Harvard. Unlike Osborn, I am not confident that his daughter will encounter any, or at least many, Professor Kingsfields at Harvard or anywhere else in the legal academy today.⁴¹⁰ Where they still teach, I suspect they are on the defensive, subject to hostile student evaluations, pressure from their deans to lighten up on their students, and criticism from their younger colleagues, who are armed with "evidence" that the Socratic method, at least the Kingsfield variety, is disabling and discriminatory.⁴¹¹

403. See, e.g., Rapoport, *supra* note 234, at 99.

404. See, e.g., William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 982 (2004) (recognizing that faster test-takers do better on in-class exams).

405. See, e.g., Jacobson, *supra* note 78, at 151 (concluding that verbal learners, who learn best through written materials, do well because of law school's reliance on written materials).

406. See *id.* (advocating, for example, the use of take-home exams and writing assignments).

407. See *supra* note 392 and accompanying text.

408. See *supra* note 405 and accompanying text.

409. The typical law school curriculum includes a wide array of less traditional courses, for example, simulation courses and clinics, where students who are not verbal learners may do well. Given that different styles of learners will excel in different kinds of courses, an astute employer may make an informed decision on the kind of lawyer she is hiring. A student who does poorly in courses relying heavily on written exams but who excels in simulation courses may be a tactile learner, not a verbal learner. Hiring that student for a litigation practice where he will frequently write legal memoranda may be a poor decision.

410. See *supra* notes 108-22 and accompanying text.

411. See *supra* notes 116-29 and accompanying text.

If we listen to the current mythology, the Kingsfields of the academy are responsible for their students' incompetence,⁴¹² incivility,⁴¹³ anxiety,⁴¹⁴ alcohol abuse,⁴¹⁵ and cynicism.⁴¹⁶ In addition, Kingsfield's brand of verbal questioning is outmoded in light of a new generation of visual learners raised on television and videogames.⁴¹⁷

Law schools are heading in the wrong direction. Convinced that Kingsfield's methods lead to unfairness and incompetence, numerous law professors have urged a gentler law school environment.⁴¹⁸ Often a gentler atmosphere de-emphasizes the need for thorough class preparation and places students' personal views ahead of understanding the analysis that has moved the courts.⁴¹⁹ Students often mistake the nature of the enterprise: they believe that their views matter, when as practicing lawyers, their views have little relevance to the resolution of legal issues.⁴²⁰

Empirically, "gentler" is not necessarily kinder than the methods of Professor Kingsfield. Despite widespread reliance on empirical research, many of the empirical claims do not withstand critical scrutiny.⁴²¹ Intuitively, "gentler" may not be kinder. If the goal is comfortable classroom experience, no doubt "gentler" teaching makes sense. But if the goal of a professor is to teach students the skills that they will need to practice law, "gentler" makes little sense. Instead, law professors owe their students a tough intellectual experience; they need to expose them to the pressure of answering hard questions that force them to examine and defend their premises.⁴²²

Before law schools abandon universally, or water down, the demanding form of the Socratic method, we ought to determine whether the Socratic method is responsible for the parade of ills that its critics claim. We ought to demand far more compelling empirical evidence before we abandon a teaching method that has so many virtues.⁴²³

412. For a more detailed discussion of the claim that the Socratic method produces incompetent lawyers, see *supra* Part III.D.

413. For a more detailed discussion of the claim that the Socratic method causes incivility among lawyers, see *supra* Part III.E.

414. See *supra* note 290.

415. See *supra* note 96.

416. See *supra* note 289.

417. See *supra* note 220.

418. See *supra* notes 223-26 and accompanying text.

419. See *supra* notes 312-31 and accompanying text.

420. See *supra* notes 331-36 and accompanying text.

421. See *supra* notes 24, 123-25, 148-59, 172, 205-06 and accompanying text.

422. See *supra* Parts III.C and III.F.

423. See *supra* notes 24, 123-25, 148-59, 172, 205-06 and accompanying text.

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Further, we ought to explore alternative ways to deal with any negative effects that it may produce. For example, we ought to ask whether more careful psychological screening prior to law school or counseling in law school might help students to adjust. If, instead, we allow students to complete law school without exposure to the demanding form of the Socratic method, we are simply shifting the time when our students come face to face with those demands, in the form of a judge or senior partner or opposing attorney. Surely, our unwillingness to use the demanding Socratic method shifts to others the responsibility of teaching our students.