

1-1-2009

UNDERSTANDING THE SOCRATIC METHOD IN LAW SCHOOL TEACHING AFTER THE CARNEGIE FOUNDATION'S EDUCATING LAWYERS

Joseph A. Dickinson

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Joseph A. Dickinson, *UNDERSTANDING THE SOCRATIC METHOD IN LAW SCHOOL TEACHING AFTER THE CARNEGIE FOUNDATION'S EDUCATING LAWYERS*, 31 W. New Eng. L. Rev. 97 (2009), <http://digitalcommons.law.wne.edu/lawreview/vol31/iss1/5>

This Article is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

UNDERSTANDING THE SOCRATIC METHOD IN LAW SCHOOL TEACHING AFTER THE CARNEGIE FOUNDATION'S *EDUCATING LAWYERS*

JOSEPH A. DICKINSON*

INTRODUCTION

In the spring of 2007, the Carnegie Foundation for the Advancement of Teaching released *Educating Lawyers: Preparation for the Profession of Law*.¹ This volume is part of a series of comparative studies of professional education in medicine, nursing, law, engineering, and preparation of the clergy that examines how the members of different professions are educated for their responsibilities in the communities they serve.² The dust jacket describes the book as one that “presents a richly detailed picture of how law school goes about its great work of transforming students into professionals and probes the gaps and the unintended consequences of key aspects of the law school experience.”³ In the introduction, the authors state that professional training “is a complex educational process,” and that “its value depends, in large part, on how well the several aspects of professional training are understood and woven into a whole.”⁴ They assert that “the challenge of professional preparation for the law” involves “linking the interests of educators with the needs of practitioners and the members of the public the profession is pledged to serve—in other words, participating in civic professionalism.”⁵ The authors write further that it is the aim of

* Professor of Law, Franklin Pierce Law Center. I am most grateful for the invaluable editorial assistance of Frederick Millett, FPLC class of 2008, and the support of my colleagues Jordan Budd and Mitchell Simon, as well as the support of Franklin Pierce Law Center.

1. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) [hereinafter *EDUCATING LAWYERS*].

2. *See, e.g.*, CHARLES R. FOSTER ET AL., *EDUCATING CLERGY: TEACHING PRACTICES AND PASTORAL IMAGINATION* (2006).

3. *EDUCATING LAWYERS*, *supra* note 1, at dust jacket.

4. *Id.* at 4.

5. *Id.*

their book to contribute to the understanding of civic professionalism.⁶

In pursuing this understanding, the authors of *Educating Lawyers* give serious effort to describing and comprehending the process of academic legal training. In this pursuit, it would seem that the authors could not avoid becoming enmeshed in the controversy within both the legal profession and legal academia between those who decry the perceived lack of skills-based training in legal education and those for whom the tradition of Socratic pedagogy in the classroom is compelling. Perhaps because the authors sought to bring another perspective to the controversy or because they did not wish to be identified as partisans of either view, the perspective of *Educating Lawyers* on this controversy is descriptive only and thus unilluminating.

Educating Lawyers writes to the fact of the controversy between the proponents of skills training and those who argue that traditional Socratic pedagogy is the irreducible core of legal education, but it does not directly express a position on the controversy. Yet, the authors describe all Socratic pedagogy in law school teaching in negative terms, leaving the rational implication that there is no value lost in giving up that pedagogy for skills training. Legal education would have been better served had *Educating Lawyers* taken a position and then supported it with evidence and argument rather than implication.

I read the Carnegie Foundation's *Educating Lawyers* with great disappointment. I am disappointed that its authors chose to support their call for reform simply by joining the common chorus of complaint about academic legal training—training that I characterize as facilitated classroom discourse. They unquestioningly take up a view of facilitated classroom discourse caricatured in John Osborn's *The Paper Chase* and pejoratively identified by contemporary culture as the "Socratic method."⁷ The discourse the authors describe and later label the "case dialogue method" may be simply

6. *Id.* ("How well the challenge of linking these interests and needs is met is, in large part, determined by how clearly civic professionalism is understood. The aim of this book is to contribute to that understanding." (citing WILLIAM M. SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* (2d ed. 2005))).

7. See JOHN JAY OSBORNE, *THE PAPER CHASE* (1971); *THE PAPER CHASE* (Twentieth Century Fox 1973). The "Socratic method" is "[a] technique of philosophical discussion . . . by which the questioner . . . questions one or more followers . . . building on each answer with another question . . ." BLACK'S LAW DICTIONARY 1425 (8th ed. 2004).

described as a process whereby a teacher guides a student to challenge imperfectly defined or justified beliefs and intuitions that must be eliminated on the way to the elucidation of a tested solution to a legal problem. The implicit acceptance of critiques of the inefficacy—if not destructiveness—of the method of training persons to be lawyers exclusively by the process of facilitated and professionally modeled legal discourse is troubling.⁸ It is especially troubling because the authors' critique, based, they write, on their observation and experience, posits that law school classroom teaching takes place in a lecture theater they describe as intensely competitive.⁹

Educating Lawyers identifies the creation of this environment and the pedagogical strategy supported by it as the “case dialogue method” and declares it legal education’s signature pedagogy.¹⁰ By this declaration the authors suggest a denigration of all dialogue-based pedagogy. Accepting the call for skills training as substitution for training via the “case dialogue method,” *Educating Lawyers* wrongly denies that dialogue-based pedagogy teaches skills that proficient members of the legal profession must be able to exploit.

Dialogue-based law school pedagogy is a sound strategy for training lawyers. By pursuing the dialectic exposition of the law through facilitated dialogue between teacher and student, and student and student, law professors prepare their students for the practice of law. This dialogue that students practice in class is the discourse of the law. To learn to be able to participate constructively in the conversation that is the law is essential to the practice of law.

Educating Lawyers proceeds to its critical description of dialogue-based pedagogy in American legal education by way of two overbroad mischaracterizations. First, *Educating Lawyers* treats all dialogue-based pedagogy employed by law teachers as a single strategy with universal attributes. It conglomerates all dialogue-based pedagogy employed by law teachers. Second, the authors

8. See, e.g., Bill Haltom, *Good-bye, Professor Kingsfield: Contracts and Socratic Method Should Make Way for Real-Life Issues*, TENN. B.J., Nov. 2006, at 42; Katherine S. Mangan, *Lani Guinier Starts Campaign to Curb Use of the Socratic Method*, CHRON. OF HIGHER EDUC., Apr. 11, 1997, at A12; Posting of Brian Leiter to Leiter Reports: A Philosophy Blog, *The “Socratic Method”: The Scandal of American Legal Education*, http://leiterreports.typepad.com/blog/2003/10/the_socratic_me.html (Oct. 20, 2003, 12:25 PM).

9. EDUCATING LAWYERS, *supra* note 1, at 2.

10. *Id.* at 50-54.

conflate the pedagogical strategy of dialogue with the environment in which they observe dialogue being facilitated.

By acquiescing to this undisciplined conglomeration of all dialogue-based law school classroom pedagogy, *Educating Lawyers*' critique of academic training for the legal profession sweeps too broadly. In joining the chorus of Socratic Method critics, *Educating Lawyers* has chosen to stand with those critics for whom the Socratic Method has become a shibboleth of all that is wrong with legal education. The gravamen of that dissatisfaction is that contemporary legal education does not prepare students to be client ready. By amassing all dialogue-based pedagogy into the negatively described "case dialogue method" and casting that conglomerated pedagogy as the "signature pedagogy" of American legal education, *Educating Lawyers* implicitly denies that dialogue-based pedagogy develops attributes necessary to the practice of law.¹¹ When exploited by a practicing lawyer, however, these are attributes that may properly be referred to as skills—skills necessary to client representation.

I. THE SOCRATIC METHOD

Although the dispute pertains more to the method's efficacy than to how it is labeled, it is helpful to look further at the label to understand the method. Perhaps an etymologist can explain how it is that the dialogue form of classroom legal education has come to be labeled the Socratic Method, and then how all law school classroom pedagogy except the occasional lecture has come to be so identified. But, regardless of how it came to be, the proper appellation for the dialogue-based pedagogical strategy identified by *Educating Lawyers* as the "case dialogue method"—then cast by them as legal education's signature pedagogy—is a matter of dispute.¹²

In his erudite analysis of the proper appellation for the standard law school classroom pedagogy observed and practiced by him, Professor Heffernan concludes that the dialogue process that law school teachers generally pursue in the lecture theater is not Socratic but rather Protagorian.¹³ He claims that it is a product of

11. *Id.* at 187-88.

12. *See id.* at 50-59.

13. *See* William C. Heffernan, *Not Socrates, But Protagoras: The Sophistic Basis of Legal Education*, 29 BUFF. L. REV. 399, 399 & n.1 (1980). Heffernan argues that the law school teacher's practice of teaching through question and answer rather than lecture to reach valid textual interpretations of the legal rules of a case is "a form of *eristical criticism of texts*." *Id.* at 401 (meaning that textual interpretation is character-

law professor conceit that the process is labeled Socratic.¹⁴ Heffernan's disciplined analysis demonstrates that the best descriptor of traditional law school teaching is that the "process of teachers' questions and students' answers" is "properly . . . called dialectical as well as eristical," though the term dialectic was later refined from its "looser meaning in the time of Protagoras and Socrates" and, as a technical matter, may no longer be a proper descriptor.¹⁵

There is a large body of formal comment on the singular use and efficacy of the "case method" and Socratic Method in American legal education dating from a Carnegie Foundation report published in 1914.¹⁶ More contemporary comment appears in the context of the post-*Paper Chase* dispute about the Socratic Method's place in legal education.¹⁷ Professor Guinier's judgment that the Socratic Method is used in law schools to perpetuate hierarchy by intimidation is elaborated further in *Becoming Gentlemen: Women, Law School, and Institutional Change*.¹⁸ One practitioner opines that nothing conveyed by the method he experienced in law school has proved useful.¹⁹ However, not all commentary pursues

ized by debate). He then seeks to prove that the purpose of Socrates in pursuing dialogue was to find ethical truth and, in that way, achieve moral reform. *Id.* at 407-12. This contrasts with the purpose of Protagorean question and answer whose purpose was the practice of forensic technique "to make the weaker cause . . . the stronger [cause]." *Id.* at 414-15 (internal quotation marks omitted). Victory in debate, beyond learning to see both sides of an issue, was an important goal in its own right. *Id.*

14. With less charity in his observations, Professor Leiter, who refers to himself as a fully recovered Socratic Method teacher, perceives not only conceit but presumptuousness in legal education's choice to label its pedagogy Socratic. Leiter, *supra* note 8. Leiter observes that professors of philosophy do not employ Socratic dialogue in their teaching of philosophy. *Id.* For this reason he declaims that the use of dialogue, purportedly Socratic or otherwise, is a scandal both for its presumptuousness and its manifest inefficacy. *Id.*

15. Heffernan, *supra* note 13, at 405-06.

16. See generally JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING (1914); Heffernan, *supra* note 14, at 399 n.1 (providing an extensive sample of comment on the Socratic Method published between 1914 and 1975).

17. See, e.g., Mangan, *supra* note 8 (describing the conflicting views within the University of Pennsylvania's law school faculty by juxtaposing the assertion that the Socratic teaching style is intimidating against the traditional claim that this form of pedagogy is best for leading students to think like lawyers).

18. LANI GUINIER, MICHELLE FINE, & JANE BALIN, BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 58-62 (1997). Professor Guinier and her coauthors accept the stereotypical harsh and demeaning Socratic Method process practiced around them as the norm and call for its elimination from law school pedagogy as a first step to reform. *Id.* at 72.

19. Haltom, *supra* note 8, at 44.

the current negative vogue. There is positive regard expressed by many. For example, third-year law student Ann Marie Pedersen lauds her Socratic training and its “good grillin”:

[W]hen it’s done well, the Socratic experience can be challenging, motivating and even fun. And no, I’m not a masochist.

So far I have had a few doctrinal professors who have made law school worth every penny. They employ this method of pedagogy and do it well. These professors motivated me to work hard and to get it right. As a result, I’ve developed the confidence and analytical abilities to rise beyond my first-semester grades.

I came to law school to become a lawyer, not just to learn the law. To do that, one must think like a lawyer. Thinking like a lawyer means having a strong grasp of analytical reasoning and the ability to make and defend an argument aloud and in public. To learn to think like a lawyer I need the Socratic method.²⁰

I did not discover any report of empirical research as to the efficacy or inefficacy of law school Socratic pedagogy. However, Roger G. Tweed and Darrin R. Lehman employed a Confucian-Socratic framework to analyze the cultural influence on academic learning in general.²¹ Following a critical analysis of the teaching process described as Socratic, Tweed and Lehman argue that “some of what passes for instruction in critical thinking is not in fact modeling a superior or even Socratic approach to thinking. Rather, it is modeling an extreme Western and somewhat distorted Socratic value system in which criticism receives more emphasis than thinking”²²

Two thoughtful practitioners of the art make the case that principled pursuit of genuine dialogue—where the teacher and student are simultaneously teachers and students—is a sound, if not essential, pedagogical means to the professional development of law students. First, Professor Elizabeth Garrett makes a cogent case for the efficacy of the Socratic Method for the development of skills essential to being prepared to meet the varying roles lawyers are

20. Ann Marie Pedersen, *In Defense of the Oft-Maligned Socratic Method: Sure It’s Scary, But the Approach Instills Skills That Every Lawyer Needs*, NAT’L L.J., Sept. 11, 2006, at S6.

21. See generally Roger G. Tweed & Darrin R. Lehman, *Learning Considered Within a Cultural Context: Confucian and Socratic Approaches*, 57 AM. PSYCHOLOGIST 89 (2002).

22. *Id.* at 97.

called upon to fulfill in their professional lives.²³ Professor Garrett's case against elimination is coupled with recognition that some of the criticism of the law school Socratic Method is due to its use in the hands of bad teachers.²⁴ In reaction to this, Professor Garrett calls for faculty evaluations by both peers and students, followed by discussion of legal pedagogy within the faculty directed to how professors might refine their skills.²⁵

Second, Emeritus Professor Donald Marshall, in his inaugural lecture on taking the position of Law Alumni Distinguished Teacher at the University of Minnesota Law School, posited that "the quintessential evocative mode [of teaching], properly used, is the dialogue,"²⁶ and that the phrase "Socratic Method" used in describing law school teaching is a synonym for dialogue.²⁷ His position is that principled exploitation of the pedagogy of dialogue is "the irreducible core of legal education."²⁸

These established law professors do not describe the dialogue they facilitate as combat or verbal duels where students engage in intense competition with the teacher or each other. Rather, Professor Marshall declares that his teaching through dialogue is disciplined by the principle that "genuine dialog . . . is a dialog based on respect for the promise of the students' minds and a determination to help them realize that promise by providing intellectual challenge."²⁹ To this end, Professor Marshall asserts that the teacher must manifest the professional and personal characteristics that follow from the ultimate purpose of the dialogue.³⁰ That purpose, he declares, is "to maximize learning by encouraging participation in the process of discovery, including, most significantly, discovery of the dialogue as a means of autonomous learning."³¹ For this purpose to have effect, "the teacher must have [an attitude of] genuine

23. Elizabeth Garrett, *Becoming Lawyers: The Role of the Socratic Method in Modern Law Schools*, 1 GREEN BAG 2D 199 (1998) (reviewing GUINIER, FINE & BALIN, *supra* note 18).

24. *Id.* at 203.

25. *Id.* For a structured inter-faculty peer review observation and evaluation program directed to improving law school teaching, see Mitchell M. Simon, M.E. Occhialino & Robert L. Fried, *Herding Cats: Improving Law School Teaching*, 49 J. LEGAL EDUC. 256 (1999).

26. Donald G. Marshall, Lecture, *Socratic Method and the Irreducible Core of Legal Education*, 90 MINN. L. REV. 1, 17 (2005).

27. *Id.* at 8.

28. *Id.* at 7-8.

29. *Id.* at 2.

30. *Id.* at 13-14.

31. *Id.* at 13.

respect for classroom space and time, for the dialog process, and for all potential participants,” and this respect must be “evident by her preparation.”³² It is further evidenced by a sense of compassion manifest in recognition “that although dialog imaginatively used is the most effective pedagogical vehicle for learning the irreducible core of legal education, it can be, when misused, destructive.”³³

The teacher must be aware that while lawyers may often be required to speak their views in public, knowing those views will be subject to critique and criticism, new students are likely not practiced in that skill. They are in a law school class to acquire and practice that skill. Public denigration of a student’s proposition the first time that student responds cannot be sound. Compassion requires coaching, not denigration.

Coaching and practice are the means to prepare students for entry into the legal profession. Dialogue pursued as Professor Marshall counsels is how the lawyering skills and attributes are acquired through the process of active learning at the direction of active coaching. This preparation for entry into the legal profession must be adequate for any of the roles lawyers may be asked or choose to assume. Both Professors Garrett and Marshall posit that the irreducible attribute of lawyers that law professors seek to instill is that they will be problem solvers. While some of our students may “never enter a courtroom as advocates, . . . they will counsel clients, devise strategies for legal challenges [both] to [and facing] social institutions like schools or prisons, draft legislation and advise state and federal lawmakers, or run businesses.”³⁴

Through dialogue, Professor Garrett seeks to teach her “students the habit of rigorous and critical analysis of the arguments they hear,”³⁵ “to learn to reason by analogy,”³⁶ and further to know “the practice of assessing and revising their own ideas and approaches in light of new information or different reasoning” revealed through the discourse, as well as demanding that students think and listen critically.³⁷ Through dialogue, a student who is appropriately challenged by the professor learns that unexamined be-

32. *Id.*

33. *Id.* at 14-15.

34. Garrett, *supra* note 23, at 207.

35. *Id.* at 202.

36. *Id.* at 201.

37. *Id.* at 202. “The goal is to learn how to analyze legal problems,” to learn by real experience, where the edges of ideas are located, and to know the task of finding words with which to successfully communicate an idea for replicable application. *Id.* at 201-02.

liefs, assumptions, glib response, or clever retort alone are poor ground to stand on and cannot be the basis for understanding the effect of the law on those subject to it, or be the source of sound solutions to the varying problems that the student will be asked to resolve as a lawyer. Challenging the student to these realizations through dialogue, the professor will facilitate the development of thinking skills and habits appropriate to whatever job the student takes on or any problem the student will confront.

Professor Marshall describes his understanding of the dialogue method as “teacher and student, by studying together, develop that constellation of cognitive and moral capacities necessary to understand the nature of law.”³⁸ He invokes President Garfield’s “definition of the ideal university” as a professor “at one end of a log and a student at the other.”³⁹

The method of genuine dialogue is straightforward. Whether the method is properly labeled Socratic, Protagorian, dialectic, or simply dialogue, what the law teacher does first is formulate a question that requires a response from the student. That first question is calculated to direct the discourse toward a tested solution to the legal problem under investigation and the rational elimination of imperfectly defined and unjustified intuitions. This direction is achieved by the teacher responding to the student’s answer (often predictable in the teacher’s experience) directly, when direction is required, or with a question that tests the foundation of the student response when the basis of that response is unsound or requires illumination. The method is a means of participatory learning that coaches students to develop the abilities to think critically and to present ideas effectively. The method is successful because it requires student participants, whether actively or vicariously by listening, to articulate, develop, and defend positions that illuminate the law under investigation. Where the subject matter of the discourse is the analysis of judicial opinions, “students have to learn what counts, in light of a received rhetorical tradition, as persuasive justifications for judicial answers to particular legal problems. Concomitantly, they develop a sense of which arguments of counsel are likely to be regarded as convincing, which provocative, and which acceptable.”⁴⁰

38. Marshall, *supra* note 26, at 5 (internal quotation marks omitted).

39. *Id.* at 8.

40. *Id.* at 6.

Dialogue pedagogy delivers more than thinking skills. Professor Garrett takes the position that speaking in public—whether to client groups, a meeting of lawmakers, corporate boards, or in courtrooms or administrative proceedings—is integral to becoming a lawyer.⁴¹ The demand of dialogue pedagogy teaches students, “[i]n an atmosphere of relatively low stakes,” to “present ideas to groups, defend those ideas, and propose solutions to legal problems.”⁴²

Phillip E. Areeda made the same point.⁴³ In dialogue based on eristic analysis of judicial opinions, students learn what is material and relevant to understanding a legal problem or its solution.⁴⁴ Students also develop through the dialogue process the keen regard for the facts essential to sound lawyering. All of this is accomplished through the teacher’s challenge to unjustified assumptions, untested beliefs, and unquestioned habits, followed by direction toward sound solutions. The process of the dialogue conversation also teaches the vocabulary of the studied law through its use. The form of professional legal discourse is practiced as the teacher models it. One need only negotiate the resolution of a controversy over the telephone or before a planning board or a board of directors to know the centrality of the skills practiced and acquired through participation in the dialogue process.

Educating Lawyers acknowledges, albeit only once and with a telling lack of emphasis, the development of skills resulting from dialogue pedagogy: “the surface structure of the pedagogy—question and answer—relates to its deep structure, the teaching of legal reasoning. Gradually, case by case, students discover that reading with understanding means being able to talk about human conflicts in a distinctively legal voice.”⁴⁵ The authors note that thinking “like a lawyer emerges as the ability to translate messy situations into the clarity and precision of legal procedure” and then to find solutions and advocate for a client.⁴⁶ Dialogue pedagogy promotes learning this “translation of human conflicts into legal language” by repetition much as weightlifters build through exercise.⁴⁷ Similar to

41. Garrett, *supra* note 23, at 207.

42. *Id.* at 204.

43. Phillip E. Areeda, *The Socratic Method (SM) (Lecture at Puget Sound, 1/31/90)*, 109 HARV. L. REV. 911, 922 (1996).

44. *Id.*

45. EDUCATING LAWYERS, *supra* note 1, at 53.

46. *Id.* at 54.

47. *Id.*

Marshall and Garrett, the authors of *Educating Lawyers* believe that “[t]he case-dialogue method is a potent form of learning-by-doing. As such, it necessarily shapes the minds and dispositions of those who apprentice through it.”⁴⁸

II. THE ATTACK ON THE SOCRATIC METHOD

Educating Lawyers may be read to support the stance of Areeda, Garrett, and Marshall that important professional skills are taught by means of dialogue pedagogy; however, it may also be read to have accepted the lament of the critics that the pedagogy does not produce client-ready graduates. The work does not directly express an opinion on the question of whether traditional Socratic pedagogy should be abjured in favor of skills training, yet the description of the authors’ observations of law school Socratic pedagogy creates an impression that they think that this practice should be left in the past. Direct critique with supporting argument would have better served legal education.

Regrettably, *Educating Lawyers* conflates the process of dialogue with the environment its authors observed surrounding it. The work describes that environment as “a situation of intense and public competition with fellow students” and a place where “students are expected to engage in intense verbal duels and competitions with the teacher as they struggle to discern facts and principles of interpretation within a case.”⁴⁹ This picture is hardly consistent with that drawn by Professor Marshall of the teacher on one end of a log in conversation with the student on the other before an engaged class of eighty, teacher and student together seeking in dialogue to find principle and to abandon misconception.⁵⁰ Nor is it consistent with his principles of genuine dialogue—respect, sound preparation, and compassion.⁵¹ It is belied by the observation of both Professors Areeda and Garrett that “the modern Socratic Method differs dramatically from the stereotype.”⁵² They claim, in fact, that “[t]he relentless questioner who never utters a declarative sentence is extinct.”⁵³ A teacher can hardly coach or mentor a stu-

48. *Id.* at 74.

49. *Id.* at 2, 24.

50. Marshall, *supra* note 26, at 5-6.

51. *Id.* at 13-16.

52. Garrett, *supra* note 23, at 201.

53. *Id.* (internal quotation marks omitted) (quoting Areeda, *supra* note 43, at 919).

dent towards the acquisition of a professional skill while engaged in intense competition with that student for some kind of ascendancy.

Educating Lawyers describes this competition as ubiquitous (thus vindicating Professor Guinier's perception of the prevalence and destructiveness of the harsh stereotypical Socratic Method).⁵⁴ It explains the presence of this competitive, unsupportive classroom environment by describing two related phenomena. First, it notes that at the standard model law schools faculty are selected from the graduates of leading law schools. Accordingly, "[t]he contest for distinction and influence is relentless and consuming," in part because faculty are themselves products of the case dialogue pedagogical system and seek in teaching to replicate the contest at which they excelled.⁵⁵ And second, it observes that at elite law schools the "case dialogue method," together with the practice of grading on the curve and sorting by class rank, is used for the purpose of sorting out (from those already sorted by admissions) those students qualified for distinction with careers as scholars, professors, jurists, and associates at paradigm law firms with the rewards of the "power track."⁵⁶ The implication is that having survived the competitive sorting process, law teachers will necessarily utilize the same teaching methods they experienced—and likely thrived under—in law school.

The competitive atmosphere they observed led the Carnegie authors to express some concern as they lamented that this "atmosphere militates against a cooperative learning environment."⁵⁷ Furthermore:

[t]here is evidence that law school typically blares a set of salient, if unintentional, messages that undercut the likely success of efforts to make students more attentive to ethical matters. The competitive atmosphere of most law schools generates a widespread perception that students have entered a high-stakes, zero-sum game. The competitive classroom climate is reinforced by the peculiarities of assessment in first-year courses. The ubiquitous practice of grading on the curve ensures that, no matter how talented or hard-working the students are, only a predetermined number will receive A's. Such a context is unlikely to suggest

54. See EDUCATING LAWYERS, *supra* note 1, at 2, 24. See generally GUINIER, FINE & BALIN, *supra* note 18.

55. EDUCATING LAWYERS, *supra* note 1, at 90.

56. *Id.* at 137.

57. *Id.* at 166.

solidarity with one's fellow students or much straying from a single-minded focus on competitive achievement.⁵⁸

Perhaps the Carnegie authors meant to advance their agenda of reform in legal education by casting the Socratic Method of case dialogue as they did. But the position that all dialogue-based legal education, or even discourse, must take place in an environment of combat between teacher and student, a "situation of intense competition" engendered by the teacher who must pursue victory, is not sound. By his principles of genuine dialogue, it is clear that Professor Marshall does not seek to create that type of environment and that he believes it is not necessary to do so.⁵⁹ By her description, Professor Garrett's teaching goals are not her competitive ascendancy.⁶⁰

III. MY EXPERIENCES WITH THE SOCRATIC METHOD

I came to law school teaching convinced by my high school and collegiate educational experience that the negative educational experience I had in law school in the unsupportive, competitive environment observed by *Educating Lawyers* did not have to be replicated for the successful professional training of aspiring lawyers. My goal when entering a classroom—where my task is to facilitate the discourse—is that my students and I learn something together, not that my students fall at my feet. I can honor the teachers in my past in no better way.

I had a number of very good teacher mentors before law school. These teachers used dialogue. They sat at either end of a Harkness table with a circle of students around the table.⁶¹ These

58. *Id.* at 31.

59. Marshall, *supra* note 26, at 13-16.

60. Garrett, *supra* note 23, at 200-02.

61. A Harkness Table is an oval table at which twelve students with their teacher sit for class discussion. Phillips Exeter Academy, The Amazing Harkness Philosophy, http://www.exeter.edu/admissions/147_harkness.aspx (last visited Mar. 15, 2009). It takes its name from a graduate and benefactor of Phillips Exeter Academy in Exeter, New Hampshire, who designed and donated a number of these tables to the school. His hope was that the tables would encourage classes to be conducted in a discursive manner with each participant able to have eye contact with all other participants in the conversation. Phillips Exeter Academy, The History of Harkness Teaching, http://www.exeter.edu/admissions/147_5238.aspx (last visited Mar. 15, 2009). For this reason the phrase "Harkness Table" is sometimes used to refer to that style of teaching, particularly in American boarding schools and small private colleges. See Tyler C. Tingley, *Educating with the Harkness Table*, Scholar Search Associates, http://www.scholarsearchassoc.com/articles-schools/NHPHE/NHPHE_020604.htm (last visited Mar. 15, 2009).

teachers propounded carefully considered questions to the group. Following up these questions, the teachers constructed conversations inclusive of all. All students contributed to the conversation. These conversations were energized not by competitive zeal. They were energized by our excitement at following the path to understanding the subject at hand. I have tried to teach as the good teachers I experienced in my life taught, through disciplined question and answer, pursued not as verbal tag but as a test of assumption, intuition, reason, and belief that honors student participants for their courage in speaking their ideas before a group, knowing those ideas are to be tested.

I think good dialogue teaching is a product more of attitude than of technique. That attitude must be informed by Professor Marshall's principles of genuine dialogue.⁶² It must be an attitude that aims at creating an environment where teacher and student are both simultaneously teachers and students. This means that when a law teacher recognizes the palpably reticent student (who saw *The Paper Chase* before starting law school)⁶³ trembling in anticipation of the possible demand of being called to respond without prior notice—the “cold call”⁶⁴—and then calls on that student for a response before his or her classmates, the teacher must respond to that student's response with gentleness, finding in it a thing of value to the discussion. This situation does not call for the teacher to use the response to prove how smart she is relative to the student. If the valuable response is not the student's first response, coaching a valuable response from the first response with follow-up questions honors the student's achievement in overcoming reticence and confirms his capacity to contribute. At a minimum, that student and all the others in the room who empathize, as most do, with their classmate will have learned that they can respond and no untoward thing necessarily results. If a teacher gives pre-class notice to a student who will be called upon, that student will prepare, respond, and maybe even respond with excellence. Thus, that student and the empathetic class have had a compelling lesson in the lawyering skill of sound preparation and the satisfaction in its exercise. I have been advantaged in my pursuit of genuine dialogue pedagogy not only by having had great mentor teachers but also because I have

62. Marshall, *supra* note 26, at 2.

63. THE PAPER CHASE, *supra* note 7.

64. EDUCATING LAWYERS, *supra* note 1, at 75.

been free of the competitive pressure and its ideology found by *Educating Lawyers* to be ubiquitous at the standard law school.

The law school where I teach, Franklin Pierce Law Center, was founded with the specific intent of not replicating the standard law school characterized by *Educating Lawyers*.⁶⁵ I have not been required to confront or exploit the effects of the stimuli to competition there noted. Franklin Pierce successfully resisted employers' demands for class rank until 1993 and the mandatory curve until 2001 when we sectioned our first-year required courses.

My experience as a teacher has convinced me that Professor Marshall's thesis that the dialogue process is the process of the law is sound and important.⁶⁶ A teacher cannot expect his students to accept the gifts he is offering them unless he will appreciate and accept the gifts those students offer in return. Participation in dialogue pedagogy teaches more than the thinking and problem-solving skills noted by Professor Garrett.⁶⁷ Dialogue is at least the process of the common law by which judges (or legislatures in reaction) in the United States' legal system apply, create, and implement law. Through dialogue, judges and legislators test a proposed principle of decision for a challenging legal question by argument and counterargument. In the face of changing facts over time and experience, testing in this crucible of argument and counterargument is the law's path to coherent and replicable solutions. This mode of testing is mirrored by the dialogue process.

Participation in the process of dialogue by question and answer teaches a student how to function in the legal process that dialogue mirrors. Students learn the lawyer's role by doing it. In this way, students exercise the skills necessary to perform that role and build an understanding of the law.⁶⁸

The power of this process of inclusive dialogue on the law has been demonstrated to me in law school classrooms where the students' prior experience of teaching was neither interactive nor participatory. Students in classes in Russia, Bulgaria, and the People's Republic of China, where I have facilitated classes in law, have a common educational experience. The teacher-scholar has had access to the library where the stacks are closed to students and has read all there is on the subject of his study. By informed intuition,

65. See *EDUCATING LAWYERS*, *supra* note 1, at 2 (characterizing the standard law school).

66. See Marshall, *supra* note 26, at 5-6.

67. Garrett, *supra* note 23, at 201.

68. Marshall, *supra* note 26, at 5-6.

that teacher has conceived an efficient organization of the subject that can be articulated to his students. This teacher's purpose in going to the classroom is to download that knowledge to his students. Students are presumed to come to the classroom as empty vessels. The role of these vessels in the educational process is to open themselves up to receiving the words of the teacher as he pours them into the students' passively receiving minds.

In all three countries, when given the privilege of a classroom filled with students with this experience of university education, I resisted following the form of downloading acquired knowledge in favor of pursuing the process of dialogue I know. Shock is not the right word to describe the students' collective response the moment I left the podium to ask the class: "What do you think?" In each instance the students were not shocked—they were nonplussed. Nonplussed, I think, because the idea that a person with the role and status of a teacher could be interested in what they thought or act as if it mattered was beyond their classroom experiences.

My favorite such moment was in a Russian classroom where I was presenting through a contemporaneous translator who was so good that the conversation went on seamlessly, as if the translator were in my frontal lobe. It was seamless until I turned to the class and for the first time asked: "What do you think?" The translator choked. In her surprise and distaste she could not bring herself to find the Russian words until a student with some English skill prompted her past the impasse. The translator was unable to achieve seamlessness again until I had conducted two more classes. The students got it long before the translator. Our conversation moved on past the translator's hesitation until a student stood and demanded that the male students, as well as the professor of criminal law then sitting in, stop interrupting her comments and cutting off her contribution. Her fellow students felt the rebuke as I honored her request by continuing the conversation of her idea with her. Thereafter they responded with courtesy. These students left behind the experience of being nonplussed as they found in our conversation their power to identify and know the beginning of the truth. As they accepted, through practice, the process of guided inquiry, they came to understand that the law is both central authority and a subject that becomes more discernable through their own reasoning together. They knew they had a role in the process of the conversation of the law.

CONCLUSION

My experience as a law professor has brought me to the conclusion that Professors Areeda, Garrett, and Marshall are right. They are correct that Socratic dialogue pursued as they describe, and not the “case dialogue method” described by *Educating Lawyers*,⁶⁹ is a compelling method of pedagogy necessary for the sound preparation of students in the practice of law. The dialogue process effectively teaches the method of the law as well as the skills and attitudes essential to the sound implementation and exploitation of that method. By conglomerating all dialogue-based law school pedagogy in its critique, then conflating the dialogue process with the intense competitive environment the authors observed, *Educating Lawyers* has done a disservice to those committed practitioners of the art of genuine dialogue.

The hallmark of genuine dialogue is “respect for the promise of the students’ minds and a determination to help them realize that promise by providing intellectual challenge.”⁷⁰ The hallmark is not intense verbal dueling and competition with the teacher. A teacher motivated to “prevail” in the classroom cannot illicit student understanding that genuine dialogue is a means of autonomous learning. *Educating Lawyers’* call for reform should not be advanced at the sacrifice of genuine dialogue pedagogy, a pedagogy that in my experience, as well as in the experience of noted law professors, instills essential professional qualities and skills in those law students who participate in its process.⁷¹

69. EDUCATING LAWYERS, *supra* note 1, at 75.

70. *Id.* at 2.

71. The call for reform asks specifically that law schools focus on teaching “MacCrate skills.” *See id.* at 73-76. MacCrate skills, named for a report commonly called the “MacCrate Report” are professional skills required in the practice of law. *See* TASK FORCE ON LAW SCHOOLS & THE PROFESSION: NARROWING THE GAP, AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992). The MacCrate Report advanced the position that law schools were not giving adequate attention to teaching students professionalism and the skills necessary to the practice of law. *See id.* at 4. The Report admonished law schools that more instruction in the skills necessary to the day-to-day practice of law should be emphasized in instruction. It also specified a list of fundamental lawyering skills (interviewing, researching, fact gathering, etc.) that should be the focus of law school training. *See id.* at 138-41.