

A DIALOGUE ABOUT SOCRATIC TEACHING

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INTRODUCTION

In secondary or undergraduate years, most of us got to know Socrates, or to think that we knew him, by reading the Platonic dialogues in which he is cast as Master Teacher.¹ And most of us were charmed. This Socrates is undeniably compelling. He is delightfully fluent; Plato gave him a capacity for spontaneous eloquence, rather like the conversational agility Shakespeare gives to all but the most minor of his characters. Socrates also seems deliciously smart; he invariably bests his interlocutor (even though it

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1. As a rule, we eschew the word "master," except in its most direct and literal sense, as in "master and slave." We do this for two reasons. First, it is one of the features of our language that masculinizes the idea of competence. Second, it suggests an association between dominance and competence. In this instance, for reasons that will become apparent, the word is apt.

is not always clear that he has the better argument). He has an endearing wit. Take, for instance, the flirtatious flattery with which he responds to Meno's insistence that Socrates answer a question:

SOCRATES: Anyone talking to you could tell blindfold that you are a handsome man and still have your admirers.

MENO: Why so?

SOCRATES: Because you are for ever laying down the law as spoiled boys do, who act the tyrant as long as their youth lasts. No doubt you have discovered that I can never resist good looks. Well, I will give in and let you have your answer.²

Despite his persecuted end, Plato's Socrates enacts a life of the mind as a glamorous, satisfying quest for excellence. It is no surprise that this compelling figure caught the fancy of those who imagined, in the early days of formalized legal education in the United States, what it should be like to "read" the law.

But it is surprising — and perhaps unfortunate — that the Socratic method has so dominated thinking about legal education that other teaching methods have been marginalized or precluded. Except in clinical programs, the collaborative and experiential learning models that have become commonplace in other higher education contexts are rarely used in law school courses.³

We have been engaged for more than two years in a highly eclectic, critical evaluation of law school teaching methods and in the development of alternatives. We recognize that economies of scale make Socratic and lecture models attractive, especially in large undergraduate and professional schools that cannot afford the teacher student ratios graduate departments typically enjoy. Still, it is important to evaluate Socratic teaching against the goals of legal education. This essay is an effort to resist traditionalist inertia, to look behind Platonic images of grace, charm

2. PLATO, *Meno*, reprinted in PLATO: THE COLLECTED DIALOGUES 353, 359 (Edith Hamilton & Huntington Cairns eds. & W.K.C. Guthrie trans., 1987) [hereinafter *Meno*].

3. For discussion and examples of experiential learning, see DAVID H. LEMPert, *ESCAPE FROM THE IVORY TOWER: STUDENT ADVENTURES IN DEMOCRATIC EXPERIENTIAL EDUCATION* (1996) (arguing that educational goals of civic participation, consensus and community are furthered through a "democratic educational" model whereby students help to shape their education instead of conforming to an institution's ideals); IAN MCGILL & LIZ BEATY, *ACTION LEARNING: A GUIDE FOR PROFESSIONAL, MANAGEMENT, AND EDUCATIONAL DEVELOPMENT* (2d ed. 1995) (characterizing active learning as groups working together on real problems and then reflecting on their experiences, with group members challenging one another's preconceptions); *EXPERIENTIAL LEARNING: A NEW APPROACH*, (Lewis Jackson & Rosemary S. Caffarella eds., 1994) (referring to prior experience as a catalyst for new learning); *USING ACTIVE LEARNING IN COLLEGE CLASSES: A RANGE OF OPTIONS FOR FACULTY* (Tracey E. Sutherland & Charles Bonwell eds., 1996) (promoting a move away from traditional lecture-based courses to those that embrace student participation, activities, and/or group work as a goal for higher education).

and intellectual agility, and to examine the benefits and limitations of Socratic law school teaching. We will test Socratic teaching against a particular set of pedagogical goals.

Of course, law schools must serve the goal of teaching fundamental legal concepts, but this is only the beginning of a first-rate legal education. The MacCrate Commission and other critics argue that legal educators must avoid being too narrow, devoting too much time to honing the ability to analyze doctrine and too little to developing other abilities that are relevant to competent practice.⁴ We are sympathetic to this criticism. Unfortunately, however, the criticism has been misunderstood to set doctrinal analysis apart from all other kinds of lawyering work. This misunderstanding undermines reform efforts, for the doctrine-versus-other-skills dichotomy makes it difficult to appreciate the *integration* of capacities that occurs when one practices law successfully. We take a slightly different approach, arguing for development of an intellectual versatility that enriches doctrinal analysis as much as it expands the number of lawyering activities that students are led to consider. Legal education needs to be broad-ranging in its approaches to the analysis of doctrine as well as in its approaches to other tasks like counseling, negotiation, business planning, or advocacy. We therefore seek to develop a range of intellectual capacities and to teach students to integrate the use of those capacities across the various categories of lawyering work.

Practitioners readily affirm our conviction that high quality, responsible lawyering requires integrated development of a broad range of intellectual capacities. In our research, we break those capacities down into logical-mathematical, interpersonal, intrapersonal, narrative, categorizing and strategic intelligences, and we find that *each of them is important to doing every kind of lawyering work*. The analysis of doctrine is deeper if one has the intrapersonal intelligence to grasp multiple perspectives; the conduct of a mediation is more successful if one has the logical-mathematical intelligence to calculate prospective gains and losses; advocacy is more convincing if one has the strategic intelligence to assess both the efficacy of a move in the small world of litigation and the policy implications of a legal interpretation in the larger world.

High quality, responsible lawyering also requires critical thought about professional roles and consciousness of the many layers of choices for

4. Robert MacCrate, *Narrowing the Gap, Legal Education and Professional Development — An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR. See also Roger Cramton, *Lawyer Competence: The Role of the Law Schools*, 1979 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR (urging law schools to place additional emphasis on various skills important to being a professional lawyer, such as teamwork and oral communication); Jerome Frank, *Both Ends Against the Middle*, 100 U. PA. L. REV. 20 (1951) (criticizing traditional legal education for an excessive focus on case law and theory rather than on client interaction and the lower courts; arguing that legal curricula should focus also on the humanities).

which working professionals must accept responsibility. The shape of our laws, the workability of our legal system, and — to a great extent — the quality of our culture depend on the ways in which lawyers interpret rules and facts and interact, with other professionals and with lay-people, to give substance to ideas about justice, duty, entitlement, responsibility, and process.

Our goal for legal education is, then, to provide contexts in which students can learn fundamental legal concepts, develop intellectual versatility, learn to use the range of their intellectual capacities across the range of lawyering tasks, and develop a critical consciousness about their professional role. In what follows, we measure Socratic law teaching against that goal. In the process, we hope to demystify the Socratic method by making explicit the premises and choices that seem to drive its use. Our discussion should therefore be useful even to those who disagree with some or all of our statement of goals.

Parts I and II set the context for our analysis. In Part I we describe the dialogic method attributed to Socrates. In Part II we describe Christopher Columbus Langdell's introduction of Socratic techniques to law teaching. In Part III we describe various versions of the Socratic method as it is practiced in contemporary law school classrooms and consider its strengths and weaknesses in light of our pedagogic goals. We conclude with a dialogue about Socratic dialogue.

I.

SOCRATIC DIALECTIC

In the midst of his defense before the juror-citizens of Athens, Socrates avowed that he would rather lose his life at the hands of the state than give up questioning its citizens. Socrates' subsequent death only confirms the depth of his conviction that dialogic examination is crucial to a life worth living. He lived to engage in dialogues that challenged his interlocutors to seek wisdom and let it guide their lives.

As Socrates explains in the *Apology*, when he heard that the oracle at Delphi had proclaimed him the wisest of men, he began to test the oracle's proclamation by questioning his fellow Athenians, wisest first.⁵ On each occasion, he concluded that the oracle was correct, not because Socrates knew things that others did not know, but because only he was wise enough to recognize his own ignorance.⁶ While others would venture answers to

5. PLATO, *Socrates' Defense (Apology)*, reprinted in PLATO: THE COLLECTED DIALOGUES 3, 7-9 (Edith Hamilton & Huntington Cairns eds. & Hugh Tredennick trans., 1987) [hereinafter *Apology*].

6. Socrates' claims of ignorance are interpreted differently by different scholars. Brickhouse and Smith take Socrates at his word and argue that Socrates does not have "real" wisdom; he has only the greatest wisdom that man can have — knowing that he does not have true wisdom. THOMAS C. BRICKHOUSE & NICHOLAS D. SMITH, *PLATO'S SOCRATES* (1994). Gregory Vlastos differentiates certain and uncertain knowledge and argues that

fundamental questions, such as, "What is virtue?" Socrates knew that neither he nor his interlocutors had the answers. Nonetheless, at every opportunity, Socrates asked his questions, believing that dialectic was the best route to true understanding and that understanding was central to the good life.

While it is difficult to generalize about Socrates' methods, the literature on the early and middle Platonic dialogues⁷ does refer with consistency to a few basic elements. In general, the dialogues are said to begin with *elenchus*⁸ — a process through which Socrates' interlocutor is made to realize that he does not know what he thought he knew. After eliciting his interlocutor's position, Socrates asks a series of leading questions designed to elicit agreement with a series of related propositions. Socrates then reveals what he knew all along — that the statements to which his interlocutor has agreed contradict the interlocutor's original position. One scholar has described the process in this way:

His tactics seem unfriendly from the start. Instead of trying to pilot you around the rocks, he picks one underwater a long way ahead where you would never suspect it and then makes sure you

Socrates' knowledge of the philosophical questions which the dialogues address is only uncertain. Thus, Socrates' claims of ignorance refer to his uncertainty. GREGORY VLASTOS, *SOCRATIC STUDIES* 28-58 (1994). We follow Richard Robinson, who differentiates the general philosophical questions which are central to the dialogues from the questions that Socrates asks during *elenchus*. RICHARD ROBINSON, *PLATO'S EARLIER DIALECTIC* (2d ed., Oxford, Clarendon Press 1953) (1941). As Robinson explains:

These secondary questions differ from the primary one in that, whereas that was a matter of real doubt and difficulty, the answers to all these seem obvious and inescapable. Socrates usually phrases them so that the natural answer is yes. When we examine one of the arguments in detail, and see just what its logical structure is, we become convinced that from the very first of the secondary questions Socrates saw and intended the refutation of the primary answer.

Id. at 7, 8-9. Regarding the secondary questions, Robinson believes that Socrates' claims of ignorance are insincere. Socrates' insincerity or "irony" is thought to be a necessary part of getting his interlocutors to state honestly their beliefs, a precondition for a successful refutation. *Id.* at 8, 15.

7. Our information about Socrates comes primarily from Plato. Xenophon and Aristotle also make reference to Socrates, but for reasons beyond the scope of this paper, scholars take Plato to be the more reliable source. See Gregory Vlastos, *Introduction: The Paradox of Socrates*, in *THE PHILOSOPHY OF SOCRATES: A COLLECTION OF CRITICAL ESSAYS* 1 (Gregory Vlastos ed., Anchor Books 1971) (1971); see also A.R. Lacey, *Our Knowledge of Socrates*, in *THE PHILOSOPHY OF SOCRATES: A COLLECTION OF CRITICAL ESSAYS* 22 (Gregory Vlastos ed., Anchor Books 1971).

Though Plato is considered the most reliable source, scholars generally believe that over time Plato increasingly used Socrates as a mouthpiece for his own philosophy. Thus, the early Platonic dialogues are thought to depict Socratic philosophy; the middle dialogues, while considered Socratic, also reflect Platonic revision.

8. For discussion of *elenchus*, see ROBINSON, *supra* note 6, at 7-19. See also VLASTOS, *supra* note 6; Richard K. Neumann, *A Preliminary Inquiry into the Art of Critique*, 40 *HASTINGS L.J.* 725, 730, 732-34 (1989); Thomas D. Eisele, *The Poverty of Socratic Questioning*, 63 *U. CIN. L. REV.* 221, 233, 237 (1994).

get all the wind you need to run full-sail into it and smash your keel upon it.⁹

This process engaged Socrates' audiences, if not his interlocutors. As Socrates tells us in the *Apology*, people enjoyed spending time in his company because they enjoyed hearing him "examine those who think that they are wise when they are not — an experience which has its amusing side."¹⁰ But Socrates had a purpose beyond entertainment. He believed that learning could begin only with the acknowledgment of ignorance and the experience of perplexity, or *aporia*. *Elenchus* generated *aporia* and thus motivated genuine interest in learning.

The *elenchus* created the necessary conditions for what some analysts describe as the next stage of the dialogue — the *psychagogia*. This stage is not always identifiable in Socratic dialogues. The early dialogues — those thought to depict Socrates most accurately — consist primarily of *elenchus*, while the more Platonic versions of the dialogic method, as illustrated by the middle and later dialogues, place less emphasis on the *elenchus* and greater emphasis on construction of knowledge.¹¹ In those dialogues in which the *psychagogia* does occur, it takes the form of a series of questions by which Socrates supports the construction of new understanding from what has already been agreed upon.

The course of both the *elenchus* and the *psychagogia* is fixed by a series of inauthentic questions — questions for which Socrates knows the answers.¹² The inauthentic question has a special discursive impact that

9. VLASTOS, *supra* note 6, at 7-8.

10. PLATO, *The Apology*, reprinted in PLATO: THE COLLECTED DIALOGUES 3, 19 (Edith Hamilton & Huntington Cairns eds. & W.K.C. Guthrie trans., 1987).

11. As Richard Robinson writes:

Three things happen to the *elenchus* in the middle and later dialogues. First, . . . it loses its irony. Second, it is incorporated into the larger whole of dialectic, which somewhat changes its character. Though still negative and destructive in essence, it is harnessed to the car of construction. Third, while often referred to and recommended, it gradually ceases to be actually depicted in the dialogues. Refutations take less of the total space. Those that do occur are less obvious in form. They are less purely negative.

ROBINSON, *supra* note 6, at 19.

For further discussion of the *psychagogia*, see HENRY TELOH, SOCRATIC EDUCATION IN PLATO'S EARLY DIALOGUES 1-23 (1986); Neumann, *supra* note 8, at 730-33; THOMAS D. EISELE, *Bitter Knowledge: Socrates and Teaching by Disillusionment*, 45 MERCER L. REV. 587, 602, 614-15 (1994).

12. Charles Kahn characterizes Socrates' known-answer questions as "proleptic" in that they anticipate material that Socrates (or in this case, Plato) has already thought through (and will communicate more completely in subsequent dialogues). Charles H. Kahn, *Did Plato Write Socratic Dialogues*, 31 CLASSICAL Q. 305 (1981); CHARLES H. KAHN, PLATO AND THE SOCRATIC DIALOGUE (1997).

We recognize that "proleptic" is less negative than the term "inauthentic"; nonetheless, we choose to use the term "inauthentic" because the issues of authenticity and the possibility of offense are pertinent to our critique. We believe this term fairly describes this type of questioning, albeit more fairly in some contexts than in others.

often causes offense. According to linguists,¹³ a question, or a request for information, is authentic when it fulfills three preconditions (each relating to the state of mind of the person being questioned whom we will call the respondent): the respondent must believe that the questioner believes (1) that the questioner does not already have the information; (2) that the respondent does have the information; and (3) that the respondent will not provide the information without being asked. Situations in which the respondent believes that the questioner already knows the answer constitute other types of speech acts, such as a request for display. Linguists also note that requests presume an obligation of deference on the part of the respondent. Because they carry this presumption, requests can easily cause offense. This potential for offense accounts for the fact that requests are usually softened by mitigating language, such as expressions of politeness.¹⁴ The risk of offense is greatest — and the expectation of mitigation is highest — when requester and respondent are peers or the respondent is superordinate. An adult may not mitigate a request made to a child, but it is likely that s/he will mitigate a request made to a supervisor. Genuine questions are mitigated by the questioner's neediness. Requests for display lack this mitigating element. They therefore seem to presume an even greater discrepancy in power and, as a result, are more likely to cause offense.¹⁵

Throughout the dialogues, Socrates asks questions to which he appears to know the answers. In dialogue with his equals, these questions sometimes seem offensively arch;¹⁶ in dialogues with subordinates, they seem more routine, but more conspicuously hierarchical. The *Meno* provides an example.

The *Meno* is often cited as an exemplification of Socratic dialectic. In dialogue with Meno, Socrates uses only *elenchus* to facilitate Meno's understanding of the nature of virtue. Challenged to defend the value of the examination, Socrates interrupts his dialogue with Meno to have a second demonstration dialogue with Meno's slave. Socrates uses both *elenchus* and *psychagogia* to facilitate the slave's understanding of the area of squares. To demonstrate the value of the examination, Socrates asks Meno's slave how to make a square which has twice the area of another. Meno's slave believes he knows the answer and says that one doubles the length of the sides. Socrates initiates an *elenchus*; he knows, and proceeds through a series of questions to prove, that the slave is wrong.

13. For further discussion of speech acts and questions, see WILLIAM LABOV & DAVID FANSHIEL, THERAPEUTIC DISCOURSE: PSYCHOTHERAPY AS CONVERSATION 77-86 (1977); JOHN R. SEARLE, SPEECH ACTS (1969).

14. LABOV & FANSHIEL, *supra* note 13, at 79.

15. *Id.* at 84-86.

16. In the *Apology*, Socrates acknowledges that his dialogues have caused offense and connects his interlocutors' enmity to the fact that he has shown that they are ignorant. *Apology*, *supra* note 5.

SOCRATES: You say that the side of double length produces the double-sized figure? Like this I mean, not long this way and short that. It must be equal on all sides like the first figure, only twice its size, that is eight feet. Think a moment whether you still expect to get it from doubling the side.

BOY: Yes, I do.

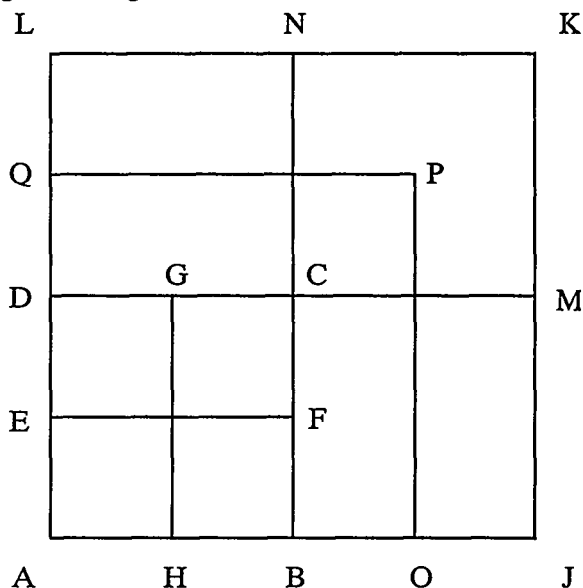
SOCRATES: Well now, shall we have a line double the length of this (AB) if we add another the same length at this end (BJ)?

BOY: Yes.

SOCRATES: It is on this line then, according to you, that we shall make the eight-feet square, by taking four of the same length?

BOY: Yes.

SOCRATES: Let us draw in four equal lines (*i.e. counting AJ, and adding JK, KL, and LA made complete by drawing in its second half LD*), using the first as a base. Does this not give us what you call the eight-feet figure?



BOY: Certainly.

SOCRATES: But does it contain these four squares, each equal to the original four foot one? (*Socrates has drawn in the lines CM, CN to complete the squares that he wishes to point out.*)

BOY: Yes.

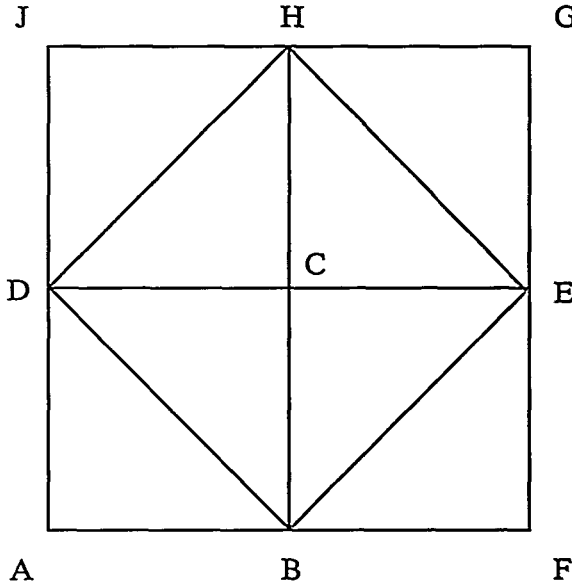
SOCRATES: How big is it then? Won't it be four times as big?

BOY: Of course.¹⁷

Once Meno's slave is aware of his ignorance, the dialogue shifts to *psychagogia* — the construction of new understanding from what has been

17. *Meno*, *supra* note 2, at 366-67.

agreed upon. But the questions remain inauthentic. Socrates clearly knows how to double the area of the square. He begins the *psychagogia* by drawing a new figure — a sixteen square-foot square circumscribing a second square rotated so that its corners bisect the edges of the first, larger square.



Socrates then asks Meno's slave a structured sequence of questions:

SOCRATES: Here are four squares. Has not each line cut off the inner half of each of them?

BOY: Yes.

SOCRATES: And how many such halves are there in this figure? (BEHD.)

BOY: Four.

SOCRATES: And how many in this one? (ABCD.)

BOY: Two.

SOCRATES: And what is the relation of two to four?

BOY: Double.

SOCRATES: How big is this figure then?

BOY: Eight feet.

SOCRATES: On what base?

BOY: This one.

SOCRATES: The line which goes from corner to corner of the square of four feet?

BOY: Yes.

SOCRATES: The technical name for it is 'diagonal'; so if we use that name, it is your personal opinion that the square on the diagonal of the original square is double its area.

Boy: That is so, Socrates.¹⁸

What has Meno's slave learned from the dialogue? Socrates has clearly illustrated why it is that drawing a square on the diagonal will produce a second square with twice the area of the first. Certainly, the slave has gained a deeper understanding for having observed the process rather than being told the answer. It is also possible that he has understood more deeply for having participated in a dialogue rather than listening to a lecture.¹⁹ Through diagrams and questions,²⁰ Socrates included Meno's slave in the process of deriving the solution and made sure that he was following along. As with a lecture, however, Socrates has structured and controlled the process. Socrates draws the illuminating diagram and, by asking only inauthentic questions, he walks the slave through it. Also, in the end it is Socrates, not Meno's slave, who states the solution. Meno's slave has followed along and answered the discrete questions put to him, but has he also constructed an understanding of the process as a whole?²¹ In some ways, the dialogue seems to have encouraged Meno's slave to be a relatively active learner; yet, in others, the dialogue has only reinforced the slave's subordinated and passive position.

Socrates points out that the slave's "opinions, being newly aroused, have a dream-like quality."²² He also suggests, however, that by answering sequences of questions again and again, the slave will develop a less ethereal understanding: "[I]f the same questions are put to him on many occasions and in different ways, you can see that in the end he will have a knowledge on the subject as accurate as anybody's."²³ Modern educators would put it only slightly differently: through repetition and variation, a student can construct, or internalize, an independent understanding of a problem and its solution, developing a sure and waking knowledge of, in the slave's case, the area of squares.²⁴

18. *Id.* at 369-70.

19. About Meno's slave, Jerome Bruner asks, "would his insights have been possible without the queries of Socrates?" JEROME BRUNER, *THE CULTURE OF EDUCATION* 17 (1996).

20. Notably, Socrates does not, in this case, ask leading questions to which the slave would have to answer only yes or no.

21. "Socrates' students are often depicted as being confused by and annoyed at him; rarely if ever can they be said to have really *learned* anything." BRICKHOUSE & SMITH, *supra* note 6, at 4.

22. *Meno*, *supra* note 2, at 370.

23. *Id.*

24. For discussion of the construction of knowledge see generally JEAN PIAGET, *SIX PSYCHOLOGICAL STUDIES* (Anita Tenzer trans., Random House 1967). Eleanor Duckworth writes: "In Piaget's terms, you must reach out to the world with your own intellectual tools and grasp it, assimilate it yourself." ELEANOR R. DUCKWORTH, "THE HAVING OF WONDERFUL IDEAS" & OTHER ESSAYS ON TEACHING & LEARNING 7 (2d ed. 1996). For discussion of the internalization of knowledge see generally LEV VYGOTSKY, *MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES* (1978); BARBARA ROGOFF, *APPRENTICESHIP IN THINKING* (1990).

Socrates' dialogue with Meno is about far less concrete questions: "What is virtue? And is it teachable?" Nonetheless, Socrates still seems to ask inauthentic questions and to have an answer, or at least a way of answering and some wrong answers, in mind. Here we see Socrates coming to the end of one piece of the *elenchus*, and charging, in a tone of heavy irony, that Meno is making him seem foolish.

SOCRATES: . . .[I]t seems you are making a fool of me.

MENO: How so, Socrates?

SOCRATES: I have just asked you not to break virtue up into fragments, and given you models of the type of answer I wanted, but taking no notice of this you tell me that virtue consists in the acquisition of good things with justice; and justice, you agree, is part of virtue.

MENO: True.

SOCRATES: So it follows from your own statements that to act with a part of virtue is virtue, if you call justice and all the rest parts of virtue. The point I want to make is that whereas I asked you to give me an account of virtue as a whole, far from telling me what it is itself you say that every action is virtue which exhibits a part of virtue as if you had already told me what the whole is, so that I should recognize it even if you chop it up into bits. It seems to me that we must put the same old question to you, my dear Meno — the question: What is virtue? — if every act becomes virtue when combined with a part of virtue. That is, after all, what it means to say that every act performed with justice is virtue. Don't you agree that the same question needs to be put? Does anyone know what a part of virtue is, without knowing the whole?

MENO: I suppose not.²⁵

In response to Socrates' questions, Meno generally says little more than "I suppose not," "true," or "so it appears." The dialogic process seems to make him passive and relatively silent.²⁶ At the end Meno claims,

Socrates, even before I met you they told me that in plain truth you are a perplexed man yourself and reduce others to perplexity. At this moment I feel you are exercising magic and witchcraft upon me and positively laying me under your spell until I am just a mass of helplessness. My mind and my lips are literally numb, and I have nothing to reply to you.²⁷

25. *Meno*, *supra* note 2, at 362.

26. See Clark D. Cunningham, *Learning from Law Students: A Socratic Approach to Law and Literature?* 63 U. CIN. L. REV. 195, 199-200 (1994) (positing that Socratic dialogue has the same effect on Crito).

27. *Meno*, *supra* note 2, at 363.

Socrates' questions have left Meno perplexed and willing to acknowledge his ignorance, but they have also left him helpless and silent. They have reinforced Meno's subordinated position, shifted his attention from virtue to Socrates' approach to virtue, and, implicitly, suggested that there is only one way to approach such problems.

The plight of Socrates' interlocutors, during both the *elenchus* and the *psychagogia*, is often fixed as a result of their implicit acceptance of a consistent, but sometimes hidden, premise: that the concepts under discussion are definable in universal terms. According to the epistemology suggested by the early and middle Platonic dialogues, one cannot know what virtue is by citing virtuous acts or listing properties associated with virtue; only the identification of all its necessary and sufficient properties would suffice. Throughout the dialogues, Socrates insists that philosophical concepts be defined only in this way. He is credited, as a result, with introducing the practice of "definition" to the field of philosophy — a practice understood to entail identifying the universal features that distinguish philosophical concepts.²⁸

Some philosophers have recognized the limits of this approach and have begun to explore alternatives. Wittgenstein, for example, argued that searching for Socratic definitions is often futile because members of many concept-categories are linked not by universal features but by networks of overlapping and discontinuous features, the same way that members of a family may have any of a number of common family characteristics.²⁹ Psychological research reveals that, in fact, the categories we use are based less on abstract definitions than on family resemblances.³⁰ For the most part, we organize categories around prototypes and include members when they are "similar enough" to the prototype.³¹ In contrast with Socrates' basic supposition, Jerome Bruner points out that humans typically and effectively use categories without articulating essential features, defining them, or even thinking about them.³² If we accept this view, then we have to conclude that Socrates' interlocutors were often less misguided than Socrates' dialogic demonstrations suggested.

28. Vlastos notes that according to Aristotle, Socrates "occupied himself with the moral virtues, having been the first to search for universal definitions." Vlastos also differentiates Socrates' efforts to derive universal definitions of moral virtues from Plato's systematic theory of "forms." GREGORY VLASTOS, *SOCRATES: IRONIST AND MORAL PHILOSOPHER*, 91-98 (1991).

29. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe Trans., 1953).

30. See Eleanor Rosch, *Natural Categories*, 4 *COGNITIVE PSYCHOL.* 328 (1973); Eleanor Rosch, *Principles of Categorization*, in *COGNITION AND CATEGORIZATION* 28 (Eleanor Rosch & B.B. Lloyd eds., 1978); Eleanor Rosch & Carolyn Mervis, *Family Resemblances: Studies in the Internal Structure of Categories*, 7 *COGNITIVE PSYCHOL.* 573 (1975).

31. For a development of this insight in the context of legal thought, see Jerome Bruner, Lecture 1: Categories, Lawyering Theory Colloquium at New York University School of Law (Spring 1996) (on file with author).

32. *Id.*

II.

LANGDELLIAN DIALOGUE

Christopher Columbus Langdell brought a version of the Socratic method to law school classrooms when he became Dean of Harvard Law School in 1870.³³ Langdell's appointment was a great surprise to many who had never heard of the young, bookish New York lawyer. But Charles Eliot, the new President of the University, was impressed by Langdell's theories of legal education, and Eliot was well aware that the law school needed reform.

In the years preceding Langdell's appointment, there had been growing concern about the ease with which one could earn a law degree from Harvard.³⁴ There were no academic prerequisites for admission, no required courses, and no examinations.³⁵ Arriving throughout the year, students read in the library and attended lectures as they chose.³⁶ Two years later, on the basis of self-reported accomplishment, they were granted diplomas.³⁷

Langdell immediately implemented a variety of reforms.³⁸ Diplomas were granted only after examinations were passed.³⁹ Students were expected to begin their studies at the beginning of the academic calendar, and they were obligated to complete seven required courses and seven electives over two years.⁴⁰ But the reform for which Langdell is best known took place in his classroom. Everyone knew that Langdell was up to something when he began compiling cases and distributed them before classes began.⁴¹ A large crowd came on the first day to see what he would do.⁴² The Centennial History of the Harvard Law School⁴³ describes the first few minutes of Langdell's class in this way:

Langdell: "Mr. Fox, will you state the facts in the case of *Payne v. Cave*?"

Mr. Fox did his best with the facts of the case.

Langdell: "Mr. Rawle, will you give the plaintiff's argument?"

Mr. Rawle gave what he could of the plaintiff's argument.

33. For information about the history of Harvard Law School, see Charles Eliot, *Langdell and the Law School*, 33 HARV. L. REV. 518 (1920); Franklin G. Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493 (1920); JOEL SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 33-35* (1978).

34. Fessenden, *supra* note 33, at 494.

35. *Id.* at 494, 497.

36. *Id.* at 496.

37. SELIGMAN, *supra* note 33, at 33.

38. *Id.*

39. Fessenden, *supra* note 33, at 497.

40. SELIGMAN, *supra* note 33, at 33.

41. Fessenden, *supra* note 33, at 498.

42. *Id.*

43. HARVARD LAW SCHOOL ASSOCIATION, *THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 34-35* (1917).

Langdell: "Mr. Adams do you agree with that?"

Though we are cautious about characterizing Langdell's method from the scant descriptions that we have, it seems certain that Langdell's approach was radically different than that of other professors. While his colleagues read to their students from textbooks outlining the rules of law and made occasional comments on their reading,⁴⁴ Langdell questioned his students about cases they were expected to read and study in advance. In other classrooms, students passively received the thinking of others, but in Langdell's classes students were expected to think through the cases for themselves. Describing Langdell's method nearly fifty years later, Eliot took pride in the introduction of active learning techniques at the law school:

Professor Langdell had, I think, no acquaintance with the educational theories or practices of Froebel, Pestalozzi, Seguin, and Montessori; yet his method of teaching was a direct application to intelligent and well-trained adults of some of their methods for children and defectives. He tried to make his students use their own minds logically on given facts, and then to state their reasoning and conclusions directly in the classroom. He led them to exact reasoning and exposition by first setting an example himself, and then giving them abundant opportunities for putting their own minds into vigorous action, in order, first, that they might gain mental power, and secondly, that they might hold firmly the information or knowledge they had acquired. It was a strong case of education by drawing out from each individual student mental activity of a very strenuous and informing kind. The elementary and secondary schools of the United States are only just beginning to adopt on a large scale this method of education, — a method which is not passive but intensely active, not mainly an absorption from either book or teacher but primarily a constant giving-forth.⁴⁵

Like Socrates, Langdell used questions to provoke critical thinking.⁴⁶ But unlike Socrates, Langdell seemed to believe that he knew, and his students could be expected to discover, the truth of the matters being considered.⁴⁷ Langdell held that law was a "science" and that doctrine could be

44. Fessenden, *supra* note 33, at 498.

45. Eliot, *supra* note 33, at 523-24.

46. In some regards, their questions seem quite different. Socrates often formed questions that made statements and asked his interlocutors to agree or disagree. Here we see Langdell form questions which require his students to make statements. However, it may be that these questions of Langdell's parallel the questions that Socrates asks at the beginning of his dialogues through which he tries to get his interlocutors to state their opening positions. Like Socrates, Langdell may have then used leading questions to illuminate the limitations of his students' thinking.

47. There are other significant differences as well. Socrates refused the title of teacher and was not paid to engage in dialogues, while Langdell accepted the titles of professor and

applied to facts consistently and certainly.⁴⁸ In the introduction to his casebook on the law of contracts, he wrote:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.⁴⁹

Believing the law to be a science, Langdell concluded that it should be studied as a science. Just as students of natural science derive the laws of nature from real-world phenomena, so should students of law derive legal doctrine from cases.⁵⁰ From his theories of law and legal education, we infer that when Langdell posed questions about cases, he expected students' answers to reference the "correct" underlying doctrine. We also infer that Langdell's questions, like those of Socrates, were inauthentic in that they sought an answer that the questioner knew in advance. Based on these scant descriptions, we believe that Langdell's method was similar to that of Socrates in terms of both its strengths and limitations. While Langdell required his students to construct doctrinal knowledge for themselves, he also constrained the process and the outcome of their learning.

Initial public response to Langdell's method was critical. Unfamiliar with the method and wary of articulating novice opinions, students complained that they weren't learning anything — not nearly what they would from lectures — and even suggested that Langdell didn't lecture because he didn't know anything.⁵¹ Soon only seven or eight students were attending the class.⁵² Langdell persisted despite criticism and declining enrollments for three consecutive years.⁵³ Soon enrollment picked up again.⁵⁴ Graduates of Langdell's program were apparently well-prepared for employment and were getting good jobs.⁵⁵

dean and was compensated for his work. Textual analysis was disparaged by Socrates but was the central activity in Langdell's classes.

48. See G. Edward White, *The American Law Institute and the Triumph of Modern Jurisprudence*, 15 *LAW & HIST. REV.* 1, 4-7, 8, 11, 14 (1997) (discussing Langdell's use of the term "scientific" and his belief that doctrine could be applied with certainty).

49. CHRISTOPHER C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* at viii (2d ed. 1879).

50. White, *supra* note 48, at 4-6, 11-12.

51. SELIGMAN, *supra* note 33, at 35.

52. *Id.*

53. Fessenden, *supra* note 33, at 509-10.

54. *Id.* at 510.

55. Eliot, *supra* note 33, at 522-23.

Within thirty or forty years, schools all over the country were using Langdell's method. In 1914, the Carnegie Foundation commissioned a report on legal education in the United States.⁵⁶ The author, Josef Redlich, concluded that the Socratic method was quite effective, but he added that the context in which the method was used was central to its success. Redlich praised the professors he studied for using, in addition to the Socratic teaching method, textbooks, dictionaries and encyclopedias, being available to answer questions during office hours, and providing introductory lectures (although Redlich thought that they did not do so to the extent that they might have).⁵⁷ Redlich wrote:

Of still greater significance, and in my opinion of really decisive consequence in this connection, is a general factor that I might briefly term the general "atmosphere" of the American university law schools This specific "atmosphere," without which so successful an application of case method would be difficult or even impossible, consists above all in the extraordinary strong spirit of fellowship, in the spirit of professional comradeship, that pervades the young people in all these important law schools in varying degree, but nowhere in so peculiarly powerful a way as in Harvard. From the first day each new class forms a unified whole from which only a very few hold themselves aloof, usually those very ones who later drop out of the course altogether.⁵⁸

III.

CONTEMPORARY SOCRATIC DISCOURSE

Over the years, law school classes became larger and more intensely competitive, and Socratic teaching seemed to take on an edge. The camaraderie described by Redlich seemed to dissipate, and student bodies became less homogenous. In addition, legal realism and subsequent schools of legal thought challenged Langdell's presumption of determinacy. By and large, law professors have responded to the changes in law school climate by softening the Socratic method; what was taken as good sport at the Harvard Law School of the late nineteenth and early twentieth centuries became unseemly in classes of one hundred or more strangers. Law professors have responded variously to critiques of determinacy. Some reject the critique; others have adapted Socratic methods to take account of it. To get an idea of how the method is used today, let's walk through a bit of classroom dialogue.

56. 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* 23-25 (1914).

57. *Id.* at 30.

58. *Id.* at 31.

Suppose that a contemporary Socrates — let's call her Professor Classic — wants her students to understand the presumption of legitimacy. She has asked them to read the opinions of the California Court of Appeals and United States Supreme Court in *Michael H. v. Gerald D.*⁵⁹ Both cases addressed the claims of Michael, a man who was, according to the results of sophisticated blood grouping tests, almost certainly Victoria's biological father, and Victoria herself. Victoria had lived sometimes with her mother, Carole, and Michael, and sometimes with Carole and Carole's husband, Gerald.⁶⁰ When the courts entered her life, she was living with Carole and Gerald.⁶¹ Although all parties agreed that Victoria should remain with Carole and Gerald, there was dispute about whether she should continue to visit with Michael.⁶² In order to secure visitation rights, Michael went to court to establish his paternity.⁶³ Victoria, by means of a guardian ad litem, joined in his request for visitation.⁶⁴ We will, for purposes of this discussion, ignore the procedural history of the case before it reached the California Supreme Court. That court held that Michael could be denied legal recognition of his paternity and associated visitation rights because, under California law, a child born to a woman married to and living with a man who is not sterile is, except under certain rather limited circumstances, conclusively presumed to be the child of the woman's spouse.⁶⁵ The United States Supreme Court agreed with the California court that this ruling did not violate Michael's or Victoria's federally protected rights of family affiliation and autonomy.⁶⁶

A. Professor Classic's Approach

1. Step One: FARFing the Case

Professor Classic might begin the discussion by selecting a student and asking that she "state the case" as it was decided by the California court. Let's call the selected student Mr. Right. He will be expected to perform what Anthony Amsterdam, a leading innovator in legal pedagogy, calls a FARF analysis.⁶⁷ FARF stands for fact-and-rule-fit. The first step in a FARF analysis is to cull from an appellate opinion (1) the facts of the matter before the court, and (2) the rule of law that has been applied. The rule is parsed into a definitional component (prescribing the circumstances under which the rule attaches) and an outcome component (prescribing the

59. 236 Cal. Rptr. 810 (Ct. App. 2d Dist. 1987) and 491 U.S. 110 (1989) respectively.

60. 236 Cal. Rptr. at 813.

61. 491 U.S. at 114.

62. 236 Cal. Rptr. at 813.

63. 491 U.S. at 114.

64. *Id.*

65. *Id.* at 114-16.

66. *Id.* at 129-31.

67. Anthony G. Amsterdam & Nancy Morawetz, *Cognitive Components in Argument Planning* (1996) (unpublished manuscript, on file with authors).

result once the rule attaches). FARFing consists of establishing the fit between the facts of the matter and the definitional component of the rule, so as to justify the result prescribed by the rule's outcome component. It is understood as a deductive process: The rule says that if X happens, Y will be the consequence. X has happened; therefore, Y.

Applying the FARF model, Mr. Right might say the following: Michael H. sought to establish that he was the father of a child born to a married woman and her husband. He also sought visitation rights. The presumption of legitimacy holds that a child born to a married woman living with her husband is conclusively presumed to be the child of the marriage. The child in question was born to Carole while she was married to and living with Gerald. Therefore, the petitioner cannot be the legal father, and the court held as much.

This is an exercise in reading and recitation. Professor Classic and her students will learn whether Mr. Right has read the case with enough care (or found some other means) to be able to identify and recite its facts, the governing law, and its central holding. They will also learn whether Mr. Right is flustered or able to recite with poise. If the case is complex, the identification of dispositive facts and law and the court's central holding may require sorting through tangential or subsidiary facts, rules and conclusions, but Mr. Right's initial task has not been daunting. If he has prepared for class and he is calm, he should find it easy to live up to his name.

If Mr. Right is unable to FARF the case, he may be in for the kind of hazing that the general public has come to associate with law school applications of the Socratic method. Professor Classic may respond to a wrong answer with a Kingsfieldian comment like, "Well, Mr. Right, there's always medical school." But most contemporary law teachers think this sort of hazing rude and pointless. A wrong answer is likely to lead Professor Classic to reassure Right if he is flustered or move on to another student if he is unprepared.

2. *Step Two: The Closed Hypothetical*

Once the case has been FARFed, it is likely that Classic will move on to the more difficult terrain of the closed hypothetical. Let's suppose that the class had earlier discussed cases holding that under California law non-custodial parents are, in certain circumstances, entitled to visitation with their children. Classic might ask what the result would be if Carole's former husband, Harry N., the father of Victoria's older sibling, Victor, had sought visitation with Victor. If Right recalls the earlier case, he should be able to FARF the hypothetical: California law provides that if conditions A, B, and C are met, a non-custodial parent is entitled to visitation; Harry N. is a non-custodial parent. Therefore, if conditions A, B, and C are met, he is entitled to visitation, and a court should hold as much.

Answering the closed hypothetical is a step — albeit a rather close step — from reading and recitation. It requires Mr. Right to recall and consult more material, and it requires him to replicate the deductive process that governed an earlier case by applying the process to a new set of facts. But these processes are not daunting. If Right is able to remember (or quickly find) the earlier case and to think calmly, the question should pose few difficulties. Classic will quickly get a correct answer, either from Right or from some better prepared or more composed student, at which point she will undoubtedly turn to something more challenging.

3. *Step Three: The Open Hypothetical*

Until now, Professor Classic's questions have not been authentic; she has been asking questions for which she already had an answer. Right's recitations have served, perhaps, to give him practice at public speaking under some stress, but their more important function has been to set before the class a set of principles that will be the subject of discussion for a while. At this point, Classic, who understands that doctrinal analysis involves a great deal more than recall and recitation, is likely to shift from requests for recitation and simple deduction and demand that Right engage in interpretive work. And at this point the development and integration of Right's lawyering capacities begins in earnest. Classic has carefully chosen her FARF and closed hypothetical inquiries so as to juxtapose legal rules that she thinks are mutually illuminating. Her choices have facilitated some lines of inquiry and made others less likely; juxtaposing the presumption of legitimacy and the visitation rule for non-custodial parents calls attention to some features and consequences of the presumption and fails to call attention to others. Still, the discussion might take a variety of directions from this point, and its direction will be guided, at least to some extent, by additional choices that Classic must now implement.

There are many aspects of the presumption that Classic may now choose to highlight, each of which complicates the FARF analysis and helps her students to appreciate that the case outcome was not rigidly determinate. Classic may, for example, direct the discussion toward the meaning of the statutory terms that embody the rule or the terms of prior opinions that clarify its meaning. If she does this, she is likely to want the discussion to reveal ways in which the rule is ductile.

Classic may direct discussion to whether the presumption of legitimacy was the correct or only rule to apply in Michael H.'s situation. If she does this, she is likely to want the discussion to reveal a range of choice in fitting complex life situations into legal categories.

She may direct her students' attention to facts in the record that were neglected in the majority opinions, to the way in which those opinions interpret the facts, or to how the facts might have been developed before and

during trial. If she does this, she is likely to want the discussion to reveal ways in which the facts were ductile.

The professor may want to focus on how the facts and context of Michael H's situation test the contours and legitimacy of the rule. If she does this, she is likely to want the discussion to reveal relationships between the identified function of a rule and its interpretation; she is also likely to want to discuss ways in which case facts suggest a rule's functions and test its efficacy. Of course, she may also want to have a broader discussion of the functions, wisdom and efficacy of the rule, in which case the discussion will turn to policy analysis.

Classic may also focus discussion on cultural and narrative patterns that the rule — or the courts' interpretation of it — seems to follow. If she does this, she may want her students to consider the difference between imagining the case as Michael's case, or as Victoria's case, or as Carole's case, or as Gerald's case. She might ask them what associations they have with the idea of illegitimacy, marriage, adultery, or divorce. She will want them to see that proverbial stories and cultural expectations can shape the interpretation of a rule.

A well-rounded legal education requires exploration of all of these domains, for textual exegesis, rule choice, fact development, contextual analysis, narrative development and policy analysis are all integral to sophisticated lawyering. Any of these domains can be explored in the format that is described by the term Socratic teaching, as that term is used in law schools. For purposes of this discussion, we will assume that Professor Classic wishes to position herself to explore each domain, with a special focus on the rule choices made by the lawyers and justices whose interactions produced the Michael H. opinions.

Because Classic's approach to case analysis acknowledges indeterminacy, her questions will soon become genuine. She will move from establishing the shared premises for discussion to exploring matters as to which reasonable minds in her classroom might well differ. The structure of the exchange between Classic and Right may convey the impression that there are right and wrong answers to all of Classic's questions, but in truth the demand on Mr. Right at this stage of the class moves from recitation to analysis. Let us look in on a bit of the dialogue:

CLASSIC: Mr. Right, you have said that the California court was correct when it denied a paternity adjudication and visitation rights to Victoria's father.

RIGHT: Yes.

CLASSIC: And you have said that the California court would also be correct if it granted visitation rights to Victor's father.

RIGHT: Yes.

CLASSIC: Now, Mr. Right, I must ask you to choose. Are non-custodial fathers in California entitled or not entitled to visitation?

RIGHT: Only with their sons?

[Laughter.]

CLASSIC: Try again.

RIGHT: Well, it seems that Michael H. is not Victoria's legal father, so he can't take advantage of the visitation rule.

CLASSIC: When the case went to the Supreme Court, Justice Stevens thought he could.

RIGHT: Well, yes. There's language in the statute giving judges discretion to grant visitation to other persons having an interest in the child's welfare, and Justice Stevens thought that could apply to a biological father even if he was barred by the presumption of legitimacy from being declared the legal father.

CLASSIC: Suppose there had been no paternity proceeding, Mr. Right. Why couldn't Michael H. have simply applied for visitation rights under the California visitation statute?

RIGHT: Well, some of the California opinions suggest that having visitation would be confusing to the child since she is living with another person she regards as a father.

CLASSIC: But Victor has a step-father, does he not?

RIGHT: Yes.

CLASSIC: Will Victor be less confused than Victoria?

RIGHT: Well, step-families are pretty common, and it's a legally recognized arrangement. It could be harder for a child to have to deal with a legally illegitimate father.

CLASSIC: So it's the law that's creating the problem for Victoria.

RIGHT: No. Well, it depends how you look at it.

CLASSIC: Suppose I told you that Victoria was bonded to both Michael and Gerald, that they were both psychological fathers to her, and expert witnesses thought it was in her best interests to maintain her relationship with both of them.

RIGHT: California law says it would be confusing for her.

CLASSIC: What does the statute say?

RIGHT: It seems to say visitation is possible; I don't know.

The recitations at the beginning of the exchange serve to remind (or tell) Right's classmates about some of the more subtle points of the Michael H. opinions. The rest of the exchange demonstrates, to Right and to the rest of the class, that the FARF analysis conceals a great deal of complexity and indeterminacy.

4. *Step Four: Meta-Analysis*

When Professor Classic has explored as many aspects of the presumption of legitimacy as pedagogic judgment counsels her to explore, she may draw from the discussion lessons about the processes of lawyering and judging. With respect to the exchange reproduced above, for example, she might say: "So it seems, Mr. Right, that the interpretation of the visitation statute has depended on a particular understanding of Victoria's needs and circumstances;" or, "So it seems, Mr. Right, that the outcome of the litigation may have depended on whether it was conceived as a constitutional challenge of the presumption of legitimacy or as a constitutional challenge of the visitation rule as interpreted by the California courts;" or, "So it seems, Mr. Right, that the rule responds to different sets of cultural assumptions about married and unmarried fathers." However, recognizing the value of active learning, Professor Classic might also, over time, shift responsibility for drawing such conclusions to her students, by asking authentic questions, such as, "Mr. Right, how might you explain the different outcomes in the cases of Victor and Victoria?"

B. *Critiques of Classic's Approach*

1. *Problems with Questions*

Steps three and four in Professor Classic's dialogue allow her to avoid many of the risks associated with the Socratic method. By asking authentic questions about the law, Professor Classic suggests that there are multiple ways of thinking about legal problems and that her students are capable of such analyses. However, each step in the dialogue, including steps three and four, presumes that "question and answer" is a valuable method of teaching. This presumption becomes problematic in light of literature that suggests that successive questions can leave a respondent feeling passive, powerless, and unknowing.⁶⁸

As the linguist's distinction between genuine and inauthentic questions suggests, question and answer interactions presume or attempt to enact a power differential. Only if a questioner has higher status will the respondent tolerate successive questions and not attempt either to resist answering or to turn the tables by asking a question in return. The questioner enacts his or her higher status by presuming authority to command information or display and by determining the topic and direction of the conversation. The respondent enacts his or her lower status by submitting

68. J.T. Dillon, *To Question and Not to Question During Discussion: Questioning and Discussion*, J. TEACHER EDUC., Sept.-Oct. 1981, at 51. See also A. BENJAMIN, *THE HELPING INTERVIEW* (2d ed. 1974) (referring to how bombarding an interviewee with successive questions undermines trust and rapport); Edwin Susskind, *Encouraging Teachers to Encourage Children's Curiosity: A Pivotal Competence*, 8 J. CLINICAL CHILD PSYCHOL. 101, 106 (1979) (finding that "the rates of student questions . . . correlate significantly with the pattern of teacher questioning").

to the question and by allowing the questioner to ask the next question and to determine the direction of the conversation. With successive questions the respondent takes less and less responsibility for the conversation and grows increasingly passive. Some research suggests that with each successive question a respondent's answers will grow shorter and shorter.⁶⁹ A sequence of similar questions, which implicitly suggests that the answers given have been inadequate, may have the additional effect of making the respondent defensive about his or her previous answers and/or hopeless about providing the right answer.⁷⁰

In his interdisciplinary review of the literature on questioning, Dillon shows that teachers' presumptions about the value of questioning are the opposite of those of scholars and practitioners in other disciplines.⁷¹ Whereas teachers ask questions to elicit critical thinking, survey researchers and litigating attorneys typically use questions to curtail respondents' answers. Personnel interviewers and psychotherapists avoid questions because they can be silencing; instead, they make statements and remain silent to promote thoughtful discussion. By asking students questions, Professor Classic may in fact make it more difficult for them to answer and to do the critical thinking she wants them to do.

2. Contextual Issues

Each step in the dialogue is also colored by the social context in which it takes place. Students' experiences of their professors' questions are inevitably influenced by the classroom setting.

As he explains in the *Apology*, Socrates used the dialogues to test the wisdom of his interlocutors.⁷² Often Socrates engaged Sophists who were certain about the answers to his questions and sometimes even said that his questions were too easy. Believing that intellectual humility was a necessary first step to serious philosophical inquiry, Socrates considered it a duty to demonstrate the limitations of his interlocutors' understanding. Before Professor Classic applies Socrates' method, she might ask herself to what extent her context is similar or different. Are law students so confident of their answers or their knowledge that their lack of understanding must be demonstrated? Depending upon their previous experience and learning, some students may come to law school believing that they understand some areas of the law. However, given the age and limited professional experience of many students, it seems likely that many arrive aware of their ignorance and anxious about their capacity to learn what is expected. Already

69. Dillon, *supra* note 68, at 53.

70. Irving Sigel & Todd D. Kelley, *A Cognitive Developmental Approach to Questioning*, in QUESTIONING AND DISCUSSION: A MULTIDISCIPLINARY STUDY 105, 114 (J.T. Dillon ed., 1988).

71. J.T. Dillon, *The Effect of Questions in Education and Other Enterprises*, 14 J. CURRICULUM STUD. 127, 130, 146 (1982).

72. *Apology*, *supra* note 5.

uncertain, students may experience sequences of Socratic questions as an indication that they have not answered adequately and do not have the necessary capacities.

The one-shot system of evaluation used in many law school classes may make students especially likely to react badly to Socratic testing. Because most law students are formally evaluated only at the end of each semester, students are prone to seek out other opportunities to assess their learning. In effect, every classroom exchange becomes an opportunity for self-assessment. Aware, or simply imagining, that she is being evaluated (by the professor, her classmates, and herself), the student naturally wants to use each interchange to demonstrate knowledge and understanding. For a student working in a self-evaluative mode, it may be particularly difficult to tolerate sequences of questions designed to move past what the student has already thought through. Moreover, in a public forum, before professor and peers, it is easy to imagine that the experience of not knowing would be humiliating. Yet, because Socratic teaching depends heavily on public questioning that displays the limits of students' understanding, teachers like Classic tend to challenge students no matter what they say, and to extend their very public questioning beyond issues the responding student has considered in advance. While some students might respond to this experience determined to return to fight another day, others will be equally determined to avoid a repetition by avoiding class participation. All of this may make it very difficult for students to focus on learning rather than performing.

It is also difficult for students to learn from questioning when professors don't talk about why they do it.⁷³ In the absence of explanations, students imagine for themselves. Not knowing, in combination with being anxious about performance, makes it easy for students to accept the worst that they have heard or to conclude that their professors' motives are self-aggrandizing or malevolent. As Redlich pointed out eighty years ago, the success of the Socratic method depends on the social context in which it is used.⁷⁴ In a community of homogenous fellowship and privilege, a sequence of questions that moves past one's understanding may be experienced as a playful rite of passage. But in a large, relatively competitive and impersonal class, students may feel (and be) more vulnerable. Moreover, in a heterogeneous context in which race, gender, ethnicity, social class, sexual preference and other categories of difference play a role in shaping interpersonal dynamics and the realities of people's lives, Socratic testing will carry different, and sometimes unfortunate, meanings for different students. For example, a student socialized to expect and prefer what

73. Plato may have come to the same conclusion. According to Robinson, "[t]he *elenchus* which Plato came to approve was a contest in which both parties openly admitted that the questioner was trying to refute and the answerer was trying not to be refuted." ROBINSON, *supra* note 6, at 19.

74. REDLICH, *supra* note 56, at 31.

Deborah Tannen refers to as “report talk,”⁷⁵ may delight in inauthentic questions, seeing them as an opportunity to display knowledge, but a student socialized to expect and prefer “rapport talk” may think inauthentic questions rude.

3. Control

Developmental psychologists have, of course, explored the ways in which learners construct knowledge.⁷⁶ According to Piaget and his followers, children construct knowledge independently from their experience in the world. Typically, children make sense of their experience from the perspective of their current understanding. However, faced with phenomena that call their understanding into question, children accommodate and develop new perspectives. Alternatively, Vygotsky and his followers posit that children construct knowledge intersubjectively, through interactions with teachers who perform such functions as “shielding the learner from distraction, . . . forefronting crucial features of a problem, . . . sequencing the steps to understanding, . . . or some other form of ‘scaffolding.’”⁷⁷ Though significantly divergent, both theoretical perspectives suggest that if it is to be remembered and understood, new knowledge must be connected, in an active, thoughtful process, to old knowledge.⁷⁸

Educational research supports these theories. Whether engaged in independent exploration or in social interactions, learners benefit from active learning experiences in which they maintain a measure of control over their work.⁷⁹ For example, third and fourth grade writers learned more from

75. Tannen distinguishes “report talk,” which serves the function of asserting independence and achieving status by displaying knowledge, and “rapport talk,” which serves the function of establishing connections and negotiating relationships. She observes that in many settings men are more prone to engage in report talk, women to engage in rapport talk. DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND* 76-77 (1990)

76. See generally JEROME BRUNER, *THE CULTURE OF EDUCATION* (1996).

77. Jerome Bruner, *Celebrating Divergence: Piaget and Vygotsky* 10-11 (1996) (unpublished manuscript, on file with authors). See also, L.S. VYGOTSKY, *MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES* (1978); BARBARA ROGOFF, *APRENTICESHIP IN THINKING: COGNITIVE DEVELOPMENT IN SOCIAL CONTEXT* 137 (1990) (comparing Piaget and Vygotsky with particular reference to “speculation . . . and research on the role of social interaction in the cognitive development of individual children”).

78. PIAGET, *supra* note 24. See also DUCKWORTH, *supra* note 24, at 6 (claiming that “ideas do not spring out of nothing. They build on a foundation of other ideas.”); J. Bransford, N. Vye, L. Adams & G. Perfetto, *Learning Skills and the Acquisition of Knowledge, in FOUNDATIONS FOR A PSYCHOLOGY OF EDUCATION* 199, 201-202 (Alan Lesgold & Robert Glaser eds., 1989) (contending that “the ability to make . . . inferences does not only depend on general ‘inference skills’; it also depends on the activation of appropriate knowledge If people lack relevant background knowledge . . . they are unable to make the assumptions necessary to understand in ways that speakers and writers intend.”).

79. See Colette Daiute, Carolyn H. Campbell, Terri M. Griffin, Maureen Reddy, Terrence Tivnan, *Young Authors' Interactions with Peers and a Teacher: Toward a Developmentally Sensitive Sociocultural Literacy Theory, in THE DEVELOPMENT OF LITERACY THROUGH SOCIAL INTERACTION* 41 (Colette Daiute ed., 1993).

collaborative interactions when they were able to exercise control and ensure that the interactions addressed their concerns.⁸⁰ Similarly, research on high school classrooms associated high quality instruction with teachers' use of authentic questions.⁸¹ In response to their teachers' authentic questions and responses, students were able to discuss and build on their previous conceptions.⁸²

This literature suggests that Socratic dialogues which are tightly controlled by the professor may be less effective than authentic discussions. As demonstrated by Socrates' dialogue with Meno's slave, dialogues which are tightly controlled by the questioner tend to track the questioner's thinking, not the respondent's. Such dialogues do not necessarily facilitate the respondent's efforts to link the new material to his or her previous conception.

A more effective dialogue would enable the respondent to build on his or her current understanding while also taking advantage of the teacher's greater expertise. Such a dialogue might begin where Professor Classic leaves off. By asking Mr. Right how he would explain the different outcomes in the cases of Victor and Victoria, Professor Classic invites Mr. Right to begin with his current understanding. By responding authentically to his statement, Professor Classic might provide Right with expert knowledge that requires him to revise his understanding.

4. Coverage

Professor Classic has demonstrated that the Socratic method can be used to explore multiple dimensions of lawyering and to develop a broad range of capacities. Nonetheless, the method may be less effective than others with regard to some of our goals.

For example, we have found it difficult to compose Socratic questions that will lead students to adopt critical meta-analytic perspectives on the application of doctrine. Moreover, Socratic discussion of appellate cases clearly is not the best context for learning about crucial aspects of lawyering, such as fact development and problem analysis. Using appellate opinions to organize discussions narrows the focus of the conversation. Appellate opinions follow, and therefore do not readily expose, the significant decisions that lawyers and judges make as a matter moves from problem to resolution.

We have found it easier to foster meta-analysis and to develop capacities for interpretive and problem-solving work in simulation and clinical contexts. In these contexts, students can have the experience of managing

80. *Id.*

81. Martin Nystrand & Adam Gamoran, *Student Engagement: When Recitation Becomes Conversation*, in *EFFECTIVE TEACHING: CURRENT RESEARCH* 257, 268 (Herholt C. Waxman & Herbert J. Walberg eds., 1991).

82. *Id.*

a matter from the articulation of a problem in the world to its legal resolution. As a result, they are positioned to see how interpretations of fact and law evolve as lawyers and other relevant parties interact. Moreover, they are able to appreciate the significance of lawyers' choices. For example, if students, in-role, are privy to multiple responses to the same simulated problem, they naturally compare responses. Additionally, a negotiating team involved in multiple negotiations can analyze the implications of key decisions and contextual factors.

C. Alternatives to Professor Classic's Approach

By the end of her dialogue, Professor Classic has used a variety of techniques with the potential to engage many students at many levels. But inevitably, many of Professor Classic's students have not participated in the dialogue; some, overwhelmed by the relief that they were not the one called on, have not even listened attentively. To ensure that her observers are learning, Professor Classic may want to incorporate other methods into her repertoire. By asking students to jot down their thoughts (and not just take notes), she may ensure that every student is actively participating and thinking. These jottings might then provide a basis for discussion, perhaps encouraging those who rarely speak to do so. Students might also bring written responses to class where they could share them in pairs or small groups. Professor Classic might also use what are called "break-out groups," organizing her classes to include small group discussions in which students can speak more comfortably and develop ideas that can then be discussed in the larger group.

Professor Classic might also experiment with the use of on-line discussions. At NYU, we have found that on-line formats elicit different kinds of discussions than classroom contexts. On-line discussions appeal to a broader group of students: students who are wary of speaking in public or of speaking extemporaneously are often more comfortable sharing ideas that they have composed in private and at their leisure. We have also found that on-line discussions allow us to address a broader range of subject matter than can be addressed in time-limited classes.

Professor Classic might also foster a wider-ranging class discussion, and the development of a greater range of capacities, by asking students to analyze cases in role. By looking at cases from the perspectives of the parties, of their lawyers, of other individuals who might be involved or might be in similar situations in the future, *and* of the appellate court, students are more likely to grasp the significance — and learn the techniques — of interpretive, interactive, narrative, and problem-solving work. Professor Classic might also choose to develop these capacities by assigning problems, such as those commonly used in evidence courses.

Outside of the constraints of a large, lecture class, Professor Classic might, of course, choose to teach through experiential learning methods, adding simulation and clinical teaching to her repertoire.

CONCLUSION

PEGGY: So, Liz, what do you think of the Socratic method?

LIZ: Peggy, you must think I am singularly fortunate, to know whether the Socratic method is good. The fact is that I have no idea what a good method might be. And how can I know, if I have no idea where or when or to what end such a method is to be used? Alas, my friend, not only am I entirely at a loss to say whether Socratic method is good, but, to the best of my belief, I have never known anyone to know. But perhaps I am mistaken. Perhaps, Peggy, you know. What do you say it would mean for the method to be good?

PEGGY: There is no difficulty about it. The method would be good if it helps students learn fundamental legal concepts, develop intellectual versatility, and begin to have a critical consciousness about their professional role.

LIZ: I seem to be in luck. I wanted one virtue and I find that you have a whole swarm of virtues to offer. To carry on this metaphor of the swarm, suppose I asked you what a bee is and you replied that bees were of many different kinds, what would you say if I went on to ask: "What is that character in respect of which they don't differ at all, but are all the same?" But I see that your brow has begun to furrow. Perhaps I should give this particular Socratic obsession a rest. I take it, Peggy, that in your view good teaching is teaching that helps students learn fundamental legal concepts, develop intellectual versatility, and have a critical consciousness about their professional role. Is that not right?

PEGGY: Most emphatically, yes.

LIZ: Now, is each of these qualities essential to good law school teaching, or do you think one or more of them superfluous?

PEGGY: I would have to say, Liz, that each of them is essential.

LIZ: And if we were forced to conclude that Socratic teaching did all these things, we would have to agree that Socratic teaching is good, would we not? Answer my question, like a good woman; there is nothing difficult about it.

PEGGY: Quite clearly, we would.

LIZ: But if we were forced to conclude that Socratic teaching failed to do any of these things, then we could not count it as good, could we Peggy?

PEGGY: No, we could not.

LIZ: The next point then, I suppose, is to find out whether Socratic teaching succeeds or fails to meet the objectives you have identified as essential.

PEGGY: Agreed.

LIZ: Let us begin with the first and inquire whether the Socratic method succeeds at teaching students fundamental legal concepts. Tell me, Peggy, would you count the rule announced by an important appellate opinion as a fundamental legal concept?

PEGGY: I would have to say, Liz, that often the rule relied on in an important appellate opinion is a fundamental legal concept.

LIZ: And I would suppose — please correct me, Peggy, if I am wrong — that teachers using the Socratic method are likely to select for classroom analysis cases that fit this description.

PEGGY: But for some qualifications that are unimportant to our discussion, I would say, Liz, that your statement needs no correction.

LIZ: Tell me this, Peggy, is it better to be humiliated in the presence of one's peers or to perform well?

PEGGY: To perform well, of course.

LIZ: Is there anyone who prefers to be humiliated rather than admired by associates? Answer me, my friend. Is there anyone who prefers to be humiliated?

PEGGY: Of course not.

LIZ: Now reason with me one step further, Peggy. If a student had a choice to make between a course of action that was likely to bring humiliation and a course of action that held the promise of bringing admiration, which would the student choose?

PEGGY: Why, the course that held the promise of bringing admiration.

LIZ: Now it is my understanding that in the earliest years of legal education, students were given access to books and left to determine for themselves what to read and what to make of it.

PEGGY: I believe that is correct.

LIZ: In such an environment, what a student learned of fundamental legal concepts would depend entirely, would it not, on the initiative and dedication of the student.

PEGGY: Yes, I suppose it would.

LIZ: But suppose, Peggy, that every student was required to read a prescribed sequence of cases and to attend large classes in which at any moment s/he might be interrogated about the lessons to be found in those cases. Don't we have to assume, Peggy, that it would be humiliating to be called upon in such a class and shown to be unprepared or uncomprehending?

PEGGY: Yes.

LIZ: And since you have already told me, my friend, that every person prefers admiration to humiliation, we are left with no alternative but to conclude that under this method students will learn the lessons of their assigned cases. For it is only by doing so that they can avoid humiliation and hold some hope of earning admiration.

PEGGY: It seems that you are right, Liz.

LIZ: I shouldn't like to take my oath on the whole story, but let us be agreeable and mark it proved that Socratic teaching serves the goal of leading students to learn fundamental legal concepts. With that our inquiry is just beginning. Are you ready to face with me the question whether Socratic teaching serves the goal of developing intellectual versatility? What say you, Peggy?

PEGGY: Uncle.

LIZ: I beg your pardon?

PEGGY: Uncle. The referee counted three. You win. Let's stop these deduction games and talk.

LIZ: Have I persuaded you that Socratic teaching is good, then?

PEGGY: You have persuaded me, Liz, that Socratic discourse has its limitations, and I suspect that was your purpose all along.

LIZ: So what do you want to talk about?

PEGGY: Well, there are lots of things that I like about Socratic method. But it's a mixed bag. Students tell me that if I call on them without warning and rough them up a bit when they are unprepared, they read more and are more alert in class. But others tell me that constant fear of humiliation interferes with their ability to concentrate.

LIZ: I see what you mean about a mixed bag. Every study I've seen shows that calling on people is better than taking volunteers from the standpoint of ensuring the participation of women, or of any other group that tends to be less impetuous in conversation. On the other hand, if you call on people only to rough them up, they may feel inclined to retreat. Still, if uninterrupted lecture is the only alternative, then maybe it does make sense to use questioning to force students to be more active. But break out groups would make more students active, and simulations can make them all active.

PEGGY: I confess that sometimes I enjoy testing students by coming up with a counter argument for their every argument. But those are cheap shots; I've been thinking about my fields for nearly thirty years.

LIZ: Maybe students would feel better if they knew the rules of the game — knew that you refute their arguments not because they are wrong, but to push them to develop their skills in the

realm beyond recitation where *open* and *genuine* questions are debated.

PEGGY: Could be. I do agree that Socratic teaching can be broad ranging enough to address a variety of lawyering contexts and to develop intellectual versatility. Open questions about a case can lead students to reconstruct and critique the processes of fact development and counseling, for example. Or to explore an advocate's or a judge's narrative choices.

LIZ: I suppose, but there must be better contexts for getting students to appreciate the complexities of fact development. I would think that always working from appellate opinions down would be limiting; why not do some bottom up work?

PEGGY: This may sound stuffy, but tradition is important. Students expect a little *One L* action.

LIZ: I think it was Socrates who said that ideas are apt to run from the mind unless you tether them by working out the reason. I don't feel that I'm working out reasons when I'm being marched through deduction games. You didn't either.

PEGGY: I understand. But sometimes Socratic discussion nicely explores the reasons for a result or a rule. It can also foster the development of professional consciousness by modeling a process of thinking through the multiple dimensions of a problem and the consequences of alternative decisions.

LIZ: I think students might find it hard to think things through for themselves in a discourse structure designed to demolish rather than weigh their arguments. And in a structure that is so controlled and dominated by the teacher.

PEGGY: But you had a good idea for addressing those problems: I think it makes sense to demystify the process for students by making it clear that questions are open and genuine and that it's in the nature of the game that even the best argument will be refuted. You know, there's truth to the notion that Socratic teaching models a style of argumentation that is often used in practice.

LIZ: My guess is that it's used because you law professors keep modeling it.

PEGGY: Not because it's good?

LIZ: In this I really am with Socrates: I do not know what goodness is.

PEGGY: Maybe you resemble Socrates in another sense, my anti-Socratic friend. Perhaps the gods have appointed you to this law school, as though it were a large thoroughbred horse which because of its great size is inclined to be lazy and needs the stimulation of some stinging fly.