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A CRITIQUE OF BEST PRACTICES IN LEGAL EDUCATION: FIVE THINGS ALL LAW PROFESSORS SHOULD KNOW

Michael T. Gibson[*]

A. INTRODUCTION

Best Practices for Legal Education[1] bears a weighty name. Other efforts to improve legal education have been content with modest self-identification,[2] but *Best Practices* states its ambitious goal in the first word of its title. The first sentence of its text continues that theme: "This book provides a vision of what legal education might become if legal educators step back and consider how they can most effectively prepare students for practice."[3] To that end, *Best Practices* proclaims: "The principles of best practices described in this document are based on long-recognized principles of sound educational practices as well as recent research and scholarship about teaching and learning. Our conclusions are based on the most up-to-date information available."[4]

The book's authority is reinforced by Robert MacCrate himself, whose introduction describes *Best Practices* as part of a "historic opportunity to advance legal education."[5] The book also tells us it is the result of six years of effort, sponsored by the Clinical Legal Education Association, with the input of hundreds of people.[6] In short: a lofty title and a lofty goal, supported by extensive research. By the end of page 2, however, we are reading something different: "'Al Sacks once said to me: "Well, it seems to me that what you're saying is that law school is empirically irrelevant, theoretically flawed, pedagogically dysfunctional, and expensive." And I am, of course, saying just that.'"[7]

These opinion-based allegations are just the start. On page 3, we learn that one law professor believes legal education "is simply

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1.   ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007).
2.   *See, e.g.*, WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 19 (2007); THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM: CONFERENCE PROCEEDINGS 4 (Joan S. Howland & William H. Lindberg eds., 1994).
3.   STUCKEY ET AL., *supra* note 1, at 1.
4.   *Id.*
5.   Robert MacCrate, *Foreword* to STUCKEY ET AL., *supra* note 1, at vii–viii.
6.   STUCKEY ET AL., *supra* note 1, at ix. The lead author, Roy Stuckey of the University of South Carolina School of Law, recognizes contributing authors Sandy Ogilvy and Michael Hunter Schwartz as making "the most substantial contributions." *Id.* at xi. Stuckey says a large part of Chapter Six is an "adaptation" of Peggy Cooper Davis & Elizabeth Ehrenfest Steinglass, *A Dialogue About Socratic Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 249 (1997). *Id.* at 207.
7.   STUCKEY ET AL., *supra* note 1, at 2 (quoting Gary Bellow, *On Talking Tough to Each Other: Comments on Condlin*, 33 J. LEGAL EDUC. 619, 622 (1983)).

indefensible."[8]   Later pages assert that we law professors "undermine the [students'] sense of self-worth, security, authenticity, and compentenc[y]"[9] and create classrooms "where students feel isolated, embarrassed, and humiliated."[10] *Best Practices* claims we encourage students to "abandon[] their ideals, ethical values, and sense of self,"[11] and "arrest[] the moral development of many if not most students,"[12] even though one of the sources that *Best Practices* cites to reports:

> Research on the effects of law school on one's moral and ethical decision making is rather complex and often conflicting. Some *theorize* that "law school, especially during the stress of the first year, induces a regression in social and personal values[,] which might be reflected in a regression on moral development measures or at least [retarded] growth," as well as "a decline in ethics and emotional sensitivity." Only one study, however, supports the concept that law students regress morally during law school; other studies typically find that law students' moral reasoning advances, or does not change, as a result of law school. For example, a 1969 study found that law students' responses to professional ethical dilemmas were more often "ethical" by the end of law school. . . . [B]oth a 1974 and a 1981 study found no change in law students' moral reasoning during law school.[13]

As for our efforts to follow the lead of the great philosopher, *Best Practices* alleges that Socratic dialogue is merely our way to "control[] the dialogue, invite[] the student to 'guess what [we're] thinking,' and then inevitably find[] the response lacking. The result is a climate in which 'never is heard an encouraging word and . . .

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8.   *Id.* at 2–3 (quoting Bellow, *supra* note 7, at 622–23).

9.   *Id.* at 139.

10.   *Id.* at 30.

11.   *Id.* at 32 (quoting Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 78–79 (2002)).

12.   *Id.* at 34 (quoting Steven Hartwell, *Moral Growth or Moral Angst? A Clinical Approach*, 11 CLINICAL L. REV. 115, 118–19 (2004)).

13.   SUSAN SWAIM DAICOFF, LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES 74 (2004) (second alteration in original) (emphasis added) (footnotes omitted). This source is two pages from the language quoted in *Best Practices*. STUCKEY ET AL., *supra* note 1, at 31 (quoting DAICOFF, *supra*, at 76–77 (2004)).

thoughts remain cloudy all day.'"[14] If by now *we* are searching for an encouraging word, *Best Practices* declares that our ways of thinking are "fundamentally negative[,] ... critical, pessimistic, and depersonalizing."[15]

To be fair, *Best Practices* later recognizes that we do some things well,[16] and it has some excellent suggestions for improving our teaching.[17] To be candid, you will need considerable patience (or very thick skin) to reach those parts of the book. The authors of *Best Practices* sincerely want to improve legal education, but they sometimes seem more interested in venting their frustrations than in reaching their audience. I know talented, intelligent, conscientious litigators who have endured expensive and dysfunctional discovery procedures under the thumb of judges who humiliated them, encouraged them to abandon their ethics and values, undermined their self-worth, required them to guess what the judges were thinking, and created an atmosphere that was "fundamentally negative[,] ... critical, pessimistic, and depersonalizing."[18] But those attorneys did not voice their feelings in their trial briefs. Whatever the merits of *Best Practices'* allegations and opinions, neither their tone nor their conclusionary nature will encourage law faculty to keep reading.

That is a shame. Much of *Best Practices* is well worth reading. And while I disagree with some of it, it has caused me to think about what I do in (and out of) the classroom. *Best Practices* has helped me recognize sins I have long committed, and it has opened my eyes to a strange new world that I had barely glimpsed during twenty-eight years in the classroom. It has unintentionally challenged me to spend two years reading and thinking about an astounding amount of empirical research on higher education. Finally, just as I challenge my best students to confront some dark parts of the law, *Best*

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14.   STUCKEY ET AL., *supra* note 1, at 112 (quoting DEBORAH L. RHODE, IN THE INTEREST OF JUSTICE: REFORMING THE LEGAL PROFESSION 197 (2000)).

15.   *Id.* at 34 (quoting Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 117 (2002)).

16.   *See, e.g., id.* at 70 ("Law schools in the United States are particularly effective at teaching students how to engage in legal reasoning and helping them develop the skill that is described by many as 'thinking like a lawyer.'"); *id.* at 107 ("Most law professors sincerely want to be good teachers, and many are ....").

17.   *See id.* at 105–63 (regarding Chapter 4, there exists a wonderful introductory reading for new teachers and a good refresher for experienced faculty).

18.   *Id.* at 34 (quoting Krieger, *supra* note 15, at 117).

Practices has inspired me to confront some of the dark parts of legal education.

Part B of this article, "Raising Students to Higher Levels of Learning," reveals a treasure that *Best Practices* buries. While the book says it draws on "long-recognized principles of sound educational practices,"[19] it refers only once to a classic book on how people learn.[20] Even worse, it does not mention once that book's key concept of education: the idea that people learn in six stages or levels, which must be climbed in a specific order.[21] This article presents those six levels, shows where they appear in legal education, explains how we should use them to structure our Socratic dialogues with individual students and our class sessions, suggests how students can use them to assess their own learning, and suggests how we can use them to assess our teaching.

Part C, "Being Honest with Students: Disclosing What We Really Want Them to Learn," explains what *Best Practices* means when it insists that we tell our students what we want them to learn. Part C shows why this recommendation is neither trite nor a matter of spoon feeding students. It explains how even conscientious faculty—including myself—routinely and unintentionally deceive students, and suggests how we can correct this problem.[22]

Part D, "Resisting the Urge to Abandon the Socratic Dialogue," admits that, as *Best Practices* contends, some faculty abuse Socratic dialogue, but it shows that some exemplary teachers—both in law and out of law—endorse the technique, that many of the technique's supposed sins are the fault of others, and that *Best Practices*' goal of making education painless conflicts with the realities of human learning.

Part E, "Engaging Students: the Promises and Perils of Problems," corrects *Best Practices*' assumption that the problem method is devoid of flaws. Part E identifies several weaknesses of the problem method and shows how to avoid those weaknesses.

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19. *Id.* at 1.
20. *See* STUCKEY ET AL., *supra* note 1, at 144–45 (citing BENJAMIN BLOOM, TAXONOMY OF EDUCATIONAL OBJECTIVES: COGNITIVE AND AFFECTIVE DOMAINS 77–78 (1956)). However, the quoted material the authors attribute to this work actually appears in the second handbook, DAVID R. KRATHWOHL ET AL., TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS: HANDBOOK II: AFFECTIVE DOMAIN 77–78 (1964).
21. *See* BENJAMIN S. BLOOM ET AL., TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS: HANDBOOK I: COGNITIVE DOMAIN 18 (Benjamin S. Bloom ed., 1956).
22. *See infra* text accompanying notes 124–63.

Finally, Part F, "How the Best Teachers Treat Students," argues that *Best Practices* pays far too little attention to current empirical research, especially work done in the rest of higher education. In doing so, it fails to provide the types of evidence and arguments needed to persuade traditional law faculty, and it sometimes shortchanges the empirical research it does use. Accordingly, Part F introduces law faculty to one of the most important recent books about teaching in higher education and to the immense amount of current empirical research, in both law schools and higher education in general, which *Best Practices* overlooks. This empirical research will be the focus of the next article in this series: *A Critique of Best Practices in Legal Education, Part II: What Introverted Law Professors Need to Know About Empirical Research on Faculty–Student Interaction and About Group Work.*

B. RAISING STUDENTS TO HIGHER LEVELS OF LEARNING

1. The Six Levels of Learning: An Introduction to Bloom's Taxonomy

Unless you have the patience of Mother Teresa, the odds are high that you have been frustrated by students who asked you to just "tell me what the law is," who 'studied' by memorizing flash cards, or who rebelled at exploring the policy ramifications of a judicial opinion. These student attitudes sometimes indicate a closed mind, a resistance to learning, and a lawyer-as-plumber mentality. But sometimes these attitudes are *not* the student's fault. Instead, they indicate that the student has been "educated" by teachers who did not understand a basic principle: people learn in six levels or steps of increasing difficulty, each of which requires different thinking skills and must be mastered in a specific order.[23]

Best Practices gives us only a glimpse of this principle. Buried in the middle of the book are four sentences that contend we can best increase our students' critical thinking skills by focusing on problem-solving.[24] Unfortunately, these four sentences are all *Best Practices* gives us of the *Taxonomy of Educational Objectives: Cognitive and Affective Domains*, written by the University of Chicago's Benjamin Bloom.[25] Just as biologists use a taxonomy of species, families,

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23.   BLOOM ET AL., *supra* note 21, at 18.
24.   STUCKEY ET AL., *supra* note 1, at 144–45 (quoting KRATHWOHL ET AL., *supra* note 20, at 77–78).
25.   *See id.* The *Taxonomy* has earned an enormous number of accolades outside of legal education. *See, e.g.*, WILBERT J. MCKEACHIE & MARILLA SVINICKI, MCKEACHIE'S

phylla, etc. to structure their knowledge of the world's living creatures, the *Taxonomy of Educational Objectives* explains the structure of human learning.[26] It explains why many students believe learning is about memorizing and regurgitating "the law" and why they have difficulty tackling matters of policy.[27] It shows why problem-solving exercises are crucial, even for law faculty who want to teach policy or philosophy.[28] It also suggests why two common teaching methods (teaching by example and teaching by Socratic dialogue) are not as effective as we hope; provides a method for teaching issue spotting; and shows how we can assess our teaching and students can assess their own learning.[29]

The *Taxonomy*'s six levels of learning, from simplest to most complex, are:

> 1. Knowledge (*knowing and remembering* "ideas, material, or phenomena");[30]
> 2. Comprehension (*paraphrasing* that information into one's own words; *interpreting* it by making inferences, generalizations, or summaries; and *extrapolating* or predicting trends or tendencies by applying the information to a concrete situation);[31]

TEACHING TIPS: STRATEGIES, RESEARCH, AND THEORY FOR COLLEGE AND UNIVERSITY TEACHERS 12 (12th ed. 2006) (describing both Handbook I and Handbook II of the *Taxonomy* as "classics"); Mary Forehand, *Bloom's Taxonomy*, in EMERGING PERSPECTIVES ON LEARNING, TEACHING, AND TECHNOLOGY (Michael Orey ed., 2001–present) (living e-book), http://projects.coe.uga.edu/epltt/index.php?title= Bloom's_Taxonomy (last modified Oct. 30, 2012) ("[O]ne of the most widely applied and most often cited references in education.").

26. BLOOM ET AL., *supra* note 21, at 1, 18.
27. *Id.* at 28–30.
28. *Id.* at 38–39.
29. *See id.* at *passim*. Although the *Taxonomy* has been updated, expanded, and revised in many ways, *see* A TAXONOMY FOR LEARNING, TEACHING, AND ASSESSING: A REVISION OF BLOOM'S TAXONOMY OF EDUCATIONAL OBJECTIVES 259 (L.W. Anderson et al. eds., 2001) (describing many modern versions of the *Taxonomy*), I shall discuss only the original version. Its lessons are sufficiently powerful to stand on their own, and I do not want to dilute them with later refinements. For my colleagues who believe leftist ideological Bilgewater has rotted away any semblance of integrity and substance in modern education, I note that Bloom and his colleagues wrote long before "New Math," courses in self-esteem, post-modernism, etc.
30. BLOOM ET AL., *supra* note 21, at 62.
31. *Id.* at 89–90.

3. Application (*using* the information in a new situation, without being told the information is relevant, and without being shown how to use it);[32]
4. Analysis (*breaking down* information into parts, realizing how those parts relate to each other, and recognizing which parts are significant in a given situation);[33]
5. Synthesis (*putting together* elements and parts "in such a way as to constitute a pattern or structure not clearly there before," usually by combining the information with new material);[34] and
6. Evaluation (*making judgments* "about the value, for some purpose, of ideas, works, solutions, methods, material, etc.").[35]

The first three stages are obvious in some first-year students. Those who beg us to "just tell me the law," spend their time memorizing flash cards, obsess about remembering case names, or recite a *Restatement (Second)* section as if it were gospel are stuck at the first level. They regard learning as Knowing and Remembering.[36] We try to push them to the second level, Comprehension, by asking them to define the key words in a rule, put the rule in their own words, or use the rule they just learned to predict how a court would resolve a simple fact pattern.[37] Obviously, this step is more difficult than Knowing and Remembering.

The third level of learning, Application, seems to overlap substantially with Comprehension, the second level. Both require students to use information they have learned to resolve a new

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32. *Id.* at 120.
33. *Id.* at 144.
34. *Id.* at 162.
35. *Id.* at 185.
36. *Id.* at 62. In the fall of 1979, Yale's late Charles L. Black gave my Constitutional Law class a wonderful example of the limits of Knowing and Remembering. He claimed that long ago, when law schools were rare and bar exams were oral, a young man walked into a rural courthouse in Black's home state of Texas. When the presiding judge asked him how he had prepared for the exam, the young man proudly answered that he had spent three years memorizing the entire Texas Code (as Black pointed out, the Texas Code was much shorter then). The judge shook his head knowingly and asked the young man if he had ever been to Austin. "Sir! Yes, sir!" the young man eagerly answered. "That's the home of our great State's legislature." "It is," answered the judge. "And do you realize that those folks down in Austin could get together this afternoon and in ten minutes amend *everything* you know?"
37. *See id.* at 89–90.

situation.[38]   However,   the   *Taxonomy*   points   out   that   in Comprehension, we tell the student which information is relevant to a problem, usually by presenting the hypothetical immediately after discussing the relevant rule.[39] In Application, the student receives *no* clues as to which information is relevant.[40] Instead, she must look at everything she has learned so far and determine on her own what is relevant.[41]

Application is a huge step. People who comprehend information may not be able to decide when or how they should use it.[42] It is one thing for a medical student who has just memorized the symptoms of Disease X to answer correctly if her supervisor asks, "Does this patient have Disease X?"[43] It is another thing when the medical student has studied a hundred diseases and is able to answer correctly if her supervisor asks, "What disease does this patient have?"[44] Application is the skill of using information—whether from books, the classroom, or experience—in the real world. It shows we can make sense of and master situations we encounter for the first time.[45] Because one of the main purposes of education is to enable people to apply what they have learned to new situations, the *Taxonomy* warns that application-related objectives "are extremely important aspects of the curriculum."[46] *Best Practices* quotes one of the *Taxonomy*'s sister volumes to support its recommendation that we use the problem method of teaching.[47]

I think Application is important for another reason: it prevents us (students and teachers) from deluding ourselves. In my first decade of teaching, I sometimes found myself saying that I understood some material so well that I could skimp on class preparation; after three decades of teaching, a voice in my head sometimes says that I've taught a hypothetical so many times that I don't have to reread it before class. That voice is strong evidence that I do *not* understand

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38. *See id.* at 120.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 122 (discussing John E. Horrocks, *The Relationship Between Knowledge of Human Development and the Ability to Use Such Knowledge*, 30 J. APPLIED. PSYCHOL. 421, 501–08 (1946)).
43. *See id.* at 120.
44. *See id.*
45. *Id.* at 122.
46. *Id.* at 122–23.
47. STUCKEY ET AL., *supra* note 1, at 144–45 (quoting KRATHWOHL ET AL., *supra* note 20, at 77–78).

the material.[48] When I force myself to state aloud (or in writing) how I would answer that hypothetical, I quickly discover my subconscious mind was simply invoking Monty Python's solution for almost every Arthurian peril: "Run away! Run away!"[49] Application forces us to confront material we subconsciously are afraid to confront.[50] It shows which part of a rule or concept we do not understand.[51] Application is the key to many essay exam questions, and its value is why we encourage students to write out answers to old exams.[52]

The fourth level of learning, Analysis, overlaps with its predecessor, Application. Analysis requires a learner to divide new material into its important parts, to recognize the relationship between those parts, and to organize and structure that new information.[53] This also requires the learner:

(A) to identify the material's unstated assumptions;

(B) to distinguish the material's facts and its hypotheses;

(C) to distinguish the parts of the material that concern facts and the parts that reflect standards or norms;

(D) to identify which parts of the material are conclusions, and which parts support those conclusions;

(E) to recognize which parts of the information (such as which elements of a rule) are essential to a particular argument;

(F) to identify logical fallacies in an argument;

(G) to realize "causal relations and the important and unimportant details in [a] historical account"; and

(H) to recognize the motive or purpose or bias behind an author's writing.[54]

Asking students to engage in these practices, whether in classroom discussion or on exams, takes them far beyond our typical requests to

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48. See BLOOM ET AL., *supra* note 21, at 120, 122–23.
49. MONTY PYTHON AND THE HOLY GRAIL (National Film Trustee Company Limited, Python (Monty) Pictures, Ltd. 1975) (noting the reaction of King Arthur and his knights to a catapulted cow, catapulted wooden Trojan rabbit, subterranean dragon, and killer monster attack rabbit).
50. See BLOOM ET AL., *supra* note 21, at 19.
51. See *id.* at 120.
52. ANN M. BURKHART & ROBERT A. STEIN, HOW TO STUDY LAW AND TAKE LAW EXAMS: IN A NUTSHELL 162–67 (1996).
53. BLOOM ET AL., *supra* note 21, at 145.
54. *Id.* at 146–48.

have them state the facts of a case or state how the court resolved the first issue.[55]

Level five, Synthesis, requires a learner to:

> [D]raw upon elements from many sources and put these together into a structure or pattern not clearly there before. His efforts should yield a product–something that can be observed through one or more of the senses and which is clearly more than the materials he began to work with.[56]

This is why we encourage students to create their own outlines, instead of merely reading commercial outlines. Creating an outline is Synthesis (Level 5); reading one is Knowing and Remembering (Level 1).[57] A well-written Legal Research and Writing (LR&W) brief, upper class paper, or law review note involves Level 5; an LR&W brief that consists entirely of one-paragraph pro-plaintiff case summaries, a similar set of pro-defendant case summaries, and a concluding sentence urging the reader to find for the plaintiff is Level 1. In doctrinal courses, we can help students practice Synthesis by giving them a *series* of cases and statutes, and instead of discussing each case and statute *seriatim,* we can ask them to identify and *combine* those sources into a single rule that the class can use to resolve an in-class hypothetical.[58]

The sixth and final step, Evaluation, is the most difficult. Evaluation requires learners to make "judgments about the value, for some purpose, of ideas, works, solutions, methods, material, etc."[59] It expects learners to determine if information or other material is "accurate, effective, economical, or satisfying."[60] This is the place of traditional law school policy analysis, as well as entire schools of thought, such as Feminism or Law and Economics.[61] Evaluation's

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55.   *See* STUCKEY ET AL., *supra* note 1, at 21–22.

56.   BLOOM ET AL., *supra* note 21, at 162.

57.   BURKHART & STEIN, *supra* note 52, at 136–37.

58.   However, we must remember that we are asking students to reach the fifth level of learning before they arrive in class. That may be safe with talented students and not-so-difficult material. For most students, especially with difficult material, we need to begin the classroom discussion by checking how well students have progressed through the prior learning stages. *See supra* note 30 and accompanying text (discussing that people learn in six different levels and that each level should be mastered before advancing to the next level).

59.   BLOOM ET AL., *supra* note 21, at 185.

60.   *Id.*

61.   *See* PHILIP C. KISSAM, THE DISCIPLINE OF LAW SCHOOLS: THE MAKING OF MODERN LAWYERS 160 (2003).

place at the top of the *Taxonomy* explains why so many law professors are attracted to policy questions and why so many students go blank when trying to answer them.[62] As I mentioned earlier, learners cannot tackle a higher level of learning until they have mastered all of the lower levels, while higher levels require different (and more difficult) mental skills than lower levels.[63] A student who can do solid Application (Level 3) and competent Synthesis (Level 5) still may have no idea how to tackle an Evaluation (Level 6) exam question.[64] This has important implications for legal education, as I will discuss next.

2. The Taxonomy's Implications for Common Law School Teaching Strategies

a. Teaching by Example

I firmly believe in teaching by example. If I do not practice what I preach, I destroy my credibility. To show how professionals act: I always arrive in class 15–20 minutes early; wear a coat and tie; start and end class precisely on time; and address students by title and last name. To show how lawyers think, I constantly give examples of the questions we ask when reading a case and of the steps we take when building a legal argument. I long have hoped that these examples would make my students better lawyers. The *Taxonomy* suggests that I have been wrong about many students, but it also suggests that *my* professors sometimes were wrong about *me*.[65]

For example, I learned Torts from Professor Guido Calabresi, who spent a lot of time showing us how courts had developed various common law tort doctrines. Two years later, I took another course from him—Common Law Courts in the Age of Statutes. Calabresi began the first class with a simple question: "How do courts develop the law?" Silence. He asked again. Again, silence from me and forty other Yale Law students. He repeated the question a third time, either from stubbornness or disbelief. Finally, he pounded the desk, shook his fist, and thundered, "By *analogy*! By *analogy*!" We supposedly were the best and the brightest. For two years we had watched him and other faculty use analogy; for two years we had used it ourselves on papers and exams. Still, none of us could articulate his elementary point.

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62. *See* STUCKEY ET AL., *supra* note 1, at 22.
63. BLOOM ET AL., *supra* note 21, at 18.
64. *See id.* at 18–19.
65. *See id.* at 1–2, 62.

Why not? Learning from example seems simple. The professor does; the students copy. The *Taxonomy* suggests why that process can be much more difficult than we think.[66] If we present one or two examples and expressly point out their significance, students need only record and remember what we say—Level 1.[67] But if we expect students to *decide* what they should copy, if we spread our examples over several classes, and if we do not expressly point them out and explain their significance, we are expecting students: (a) to recognize a pattern—"Here are the seven steps my professor always takes to determine the holding in a case" or "These are the ten things my professor always does whenever we read a statute"; (b) to decide that the pattern is important; and (c) to record and remember the pattern.[68] This is Synthesis, the fifth level of learning.[69]

Adding to the difficulty is that many students spend most of class at the lowest two levels of learning. When we discuss a case, they are trying to Know and Comprehend its facts, rules, arguments, and holding(s) (Levels 1 and 2).[70] Implicitly expecting them to recognize patterns in our questions about the case is expecting them to jump directly to Level 5 (Synthesis).[71] Even worse, students for whom education has been a matter of Knowing and Remembering (Level 1) probably have no clue that Level 5 exists.[72] They do not realize that real learning involves looking for and finding patterns.[73]

This especially is a problem for reading, reasoning, and thinking skills. Our syllabi and tables of contents identify the *doctrinal* patterns that students need to learn. A Contracts syllabus's list of defenses—duress, unconscionability, the Statute of Frauds, indefiniteness—tells students they need to identify and distinguish four patterns in the cases they read.[74] Students studying Article 2 of

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66. *See id.* at 28–29, 38.
67. *See id.* at 62.
68. *See id.* at 162.
69. *Id.* ("In synthesis . . . the student must draw upon elements from many sources and put these together into a structure or pattern not clearly there before. His efforts should yield a product . . . which is clearly more than the materials he began to work with."). I learned this while studying yoga. When the instructor demonstrated a new pose, I would stare intently at her, trying to do exactly what she was doing. After a while, she would patiently stand, walk behind me, and gently move my arm or leg an inch or two, whereupon I immediately felt a muscle whose existence and importance I had not previously suspected.
70. *See id.* at 62, 89.
71. *See id.* at 162.
72. *See id.* at 18–19, 62, 166–67.
73. *See id.* at *passim.*
74. *See id.* at 162–64.

the Uniform Commercial Code can pull its main patterns from its seven major headings, e.g., "General Construction and Subject Matter," "Form, Formation . . . ," "General Obligation and Construction of Contract," etc.[75] However, when it comes to skills, we rarely identify patterns explicitly. We may know intuitively how to read a statute, but as I discussed earlier, how often do we tell students that statute reading has its own set of patterns?

I still believe in teaching by example. Students need concrete examples, and they need to see those examples in use. Thanks to the *Taxonomy*, when I present an example, I try to point it out explicitly and give it a name—whether that be deductive reasoning, making a factual distinction, or determining the scope of a statute—to help students realize the example's importance and to remember it.[76] I even point out apparently obvious examples: always arriving for class in time to be ready to start at the designated time, addressing students by title and last name, and even staying in the room for the entire class time.[77]

b. The Socratic Method

The difficulty of Synthesis—of recognizing patterns—reveals a reason why even talented students struggle with the Socratic method. A lecture includes topic sentences, transitions, and changes in voice

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75.   U.C.C. Article 2 (2001); *see* BLOOM ET AL., *supra* note 21, at 162–64.

76.   *See* BLOOM ET AL., *supra* note 21, at 37–38.

77.   For reasons I do not understand, some students arrive in law school unaware of that last skill. My syllabi now include a list of "professional skills" I expect students to learn, one of which reads as follows: "Just as you would not want your attorney to leave the courtroom while you were being cross-examined, I expect all of us to stay in the room until class is over." This is standard procedure in courtrooms, such as those of the U.S. District Court for the Western District of Oklahoma. *See, e.g., Chambers Procedures for Stephen P. Friot, United States District Judge*, U.S. DISTRICT CT. W. DISTRICT OF OKLA., para. 16, http://www.okwd.uscourts.gov/files/jfriotrules.pdf (last visited Dec. 10, 2012) ("Do not leave the courtroom while trial is in progress without obtaining leave of court. This applies to all persons at the counsel table."); *General Rules for Trial of Cases Before Judge Timothy D. DeGiusti*, U.S. DISTRICT CT. W. DISTRICT OF OKLA., para. 4, http://www.okwd.uscourts.gov/files/jdegiustirules.pdf (last visited Dec. 10, 2012) ("While the Court is in session, do not leave counsel table to confer with anyone, including investigators or witnesses, in the back of the courtroom or outside the courtroom unless permission is granted in advance."); *General Rules for the Trial of Cases Before Judge Valerie K. Couch*, U.S. DISTRICT CT. W. DISTRICT OF OKLA., para. 16, http://www.okwd.uscourts.gov/files/jcouchrules.pdf (last visited Dec. 10, 2012) ("Do not leave the courtroom while trial is in progress without obtaining leave of court. This applies to all persons at the counsel table.").

tone or volume that help listeners identify the structure of the information being presented.[78] This clues learners to what pattern is under discussion.   In contrast, a Socratic dialogue's series of questions has no topic sentences, no conclusions, and no transitions to a new topic. It gives students few clues about the structure of the information they're trying to learn.   Their natural focus is on answering the question we have just asked (the tree), not on recognizing how that question fits into a larger pattern (the forest). Furthermore, the student being questioned may be confused or may take off on a tangent, disrupting the structure or pattern we are trying to create. This structure or pattern may concern doctrine, such as the factors or elements of a rule, or it may involve thinking, reading, and reasoning skills.   Worst of all, once a student gets lost, he or she tends to stay lost. It's hard to catch up when you don't know which road everyone else has taken.

In other words, the purer our Socratic dialogue, the more we unintentionally camouflage what we want our students to learn. That does not improve learning. There may be none so blind as she who will not see, but she who does not know that she is supposed to see ranks a close second.[79]

3. *Using the* Taxonomy *to Structure Our Teaching*

The *Taxonomy*'s six levels of learning can help us better structure in-class conversations with students, entire class sessions, and even year-long courses.   During a class discussion, we can use the *Taxonomy*'s six levels to tailor our Socratic dialogue to the needs of the student with whom we are talking.   In a typical first-year doctrinal class, we often begin the discussion of a case by asking a student to identify the parties and to describe the major events in the dispute. These are what *Best Practices* calls "inauthentic" questions,

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78. *See* KEN BAIN, WHAT THE BEST COLLEGE TEACHERS DO 26–27 (2004) (discussing how great teachers believe "everybody constructs knowledge," that we use existing "mental models" to understand new information, and that a teacher's job is to "stimulat[e]" construction, not "transmit[]" knowledge"); MCKEACHIE & SVINICKI, *supra* note 25, at 59–60 (discussing how educators in other disciplines recognize people learn by developing mental structures into which they fit new information).

79. In 2008, a survey of 30,000 law students from 85 law schools discovered that "students with lower LSAT scores tend to report that their courses place more emphasis on memorization." IND. UNIV. BLOOMINGTON CTR. FOR POSTSECONDARY RESEARCH, LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, STUDENT ENGAGEMENT IN LAW SCHOOL: PREPARING 21ST CENTURY LAWYERS 4, 5 (2008), *available at* http://www.lssse.iub.edu/2008_Annual_Report/pdf/j4u5h7e9/LSSSE_2008_Annual_Report.pdf.

since our students know that we already have the answers.[80] However, inauthentic is not always bad.[81] *Best Practices* wants us to ask "authentic" questions, such as which competing rule the court should use, which facts the court or the attorneys failed to develop, how the context of the situation "test[s] the contours and legitimacy of the rule," or what the rule's "functions, wisdom, and efficacy" might be.[82] But these authentic questions require a student to have reached Levels 4 (Analysis), 5 (Synthesis), or even 6 (Evaluation).[83] That is not easy for someone who is new to the subject, and who probably has had only two or three hours to read, think about, and understand the materials. Consequently, beginning a class with authentic questions is likely to embarrass students.[84] The normal method of questioning—asking the student to state facts, issues, and rules—is inauthentic, but it lets the student start at the easiest stage of learning: Knowing and Remembering.[85] After that, we will probably ask her to put the rule in her own words, to explain an argument the court makes, to define a key term in the rule, and to predict how the court would resolve an obviously related hypothetical, moving her to Comprehension (Level 2).[86] This approach lets a student recover from the surprise of being called on and, if she has prepared properly, should help her experience some success.[87]

The problem comes with our next questions. Asking the student to compare the case with earlier cases requires her to jump to Analysis and Synthesis (Levels 4 and 5).[88] Asking her to evaluate the strength of an argument or to identify the weaknesses in the court's final

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80. STUCKEY ET AL., *supra* note 1, at 214. *See also id.* at 208–09 (describing how Socrates used inauthentic questions to leave students "helpless," "silent," and "subordinate[]").
81. *Id.* at 214.
82. *Id.* at 215.
83. *Id.* at 123–24, 214–16.
84. *Id.* at 216–21; *see infra* notes 185–92 and accompanying text.
85. BLOOM ET AL., *supra* note 21, at 62–63. More precisely, it lets the student begin with the easiest aspect of the easiest stage of learning. The TAXONOMY says that dates, events, persons, etc., are the easiest details to know and remember, *id.* at 65, while identifying and recalling rules, principles, and generalizations is more difficult, *id.* at 68–69, 75. This last point may explain why students who are asked to articulate the basis for a court's decision often respond by identifying a fact instead of stating the rule the court uses.
86. *Id.* at 89–90, 92, 95.
87. STUCKEY ET AL., *supra* note 1, at 214.
88. *See* BLOOM ET AL., *supra* note 21, at 144–49, 162–64.

position pushes her to Evaluation (Stage 6).[89] Unless we are careful, we can move the student from the easiest level of learning to the most difficult in only a couple of questions.[90] That requires her to climb a steep hill in a very short time, so we should not be surprised when she stalls halfway to the top. Furthermore, the student and her classmates do not realize the steepness of the hill we have asked her to climb. Instead, they know only that she was able to answer a few questions before becoming stuck. That can be terribly discouraging to a conscientious student. Consequently, when my questions in class go beyond Level 3 (Application), I try to alert the class that we're tackling something difficult. Often, I tell the student with whom I'm talking that she has the first opportunity to answer the tough question, but that I'm then going to open it up to the entire class.

The *Taxonomy*'s levels of learning can also help allocate class time.[91] When the reading assignment includes straightforward rules, so that Knowledge and Comprehension are easy, I move quickly to Level 3's Application. When I teach difficult subjects, such as U.C.C. §2-207 or the parol evidence rule, I spend lots of time on finding and understanding the rules (Levels 1 and 2) before I move to Application. A similar problem arises when I try to use a long fact pattern in class. Classroom discussion usually is much better if we begin by focusing on the rule (Level 1), and how the courts have applied the rule in the cases we read (Level 2). Then and only then we move to Levels 3 and 4.

The *Taxonomy* also influences the structure of my two-semester Contracts course. For the first six weeks, I stick to Levels 1 and 2. Each assignment asks students to read one or two cases on a doctrine, quote the express rules, paraphrase those rules, and answer short hypotheticals that illustrate the meaning of those rules. By about week seven, my hypotheticals start requiring students to use rules from the entire reading assignment, rather than from just the past few minutes (introducing them to Level 3's Application).[92] In late October and November, we do a couple of page-long fact patterns that require students to use rules from a half-dozen cases (Level 3's

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89.   *Id.* at 185–86. *But see* BAIN, *supra* note 78, at 101–02 (discouraging faculty from asking questions that just require listening and remembering, while encouraging faculty to ask higher-order intellectual activities, such as comparing, applying, evaluating, analyzing, and synthesizing).

90.   *See* BLOOM ET AL., *supra* note 21, at 185–86.

91.   *Id.* at 21.

92.   *See id.* at 120.

Application).[93]   When we do this, I tell them, both in the reading assignment and in class, how we are moving to a new stage of learning, so that they realize what we are doing *and* what the final exam will require.   In upper class courses, the amount of time we spend identifying and explaining the rules from cases depends on the complexity of the relevant doctrines.

4. Using the Taxonomy to Teach Issue Spotting

In some ways, issue spotting is a part of Application, Level 3 of the *Taxonomy*.[94]   This level requires the learner to use an abstract idea correctly in the proper situation, even though "no mode of solution is specified."[95]   However, the *Taxonomy* states that, "Research studies have shown that comprehending an abstraction [such as a rule] does not certify that the individual will be able to apply it correctly. Students apparently also need practice in restructuring and classifying situations so that the correct abstraction applies."[96]   In other words, before a student can determine that certain information will resolve a situation, she must decide what issues that situation presents.   This sounds like Synthesis (Level 5), a significantly more challenging level.[97]

Unfortunately, law students seeking to learn how to spot issues will find little help in the literature.   Some sources say merely that issue spotting depends on a student's understanding of—and thus her ability to apply—the material;[98] some sources provide only vague

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93.   *See id.*
94.   *See id.*
95.   *Id.*
96.   *Id.* at 122.
97.   *See id.* at 162.
98.   *See, e.g.*, CHARLES R. CALLEROS, LAW SCHOOL EXAMS: PREPARING AND WRITING TO WIN 105 (2007) (describing how students should apply the skills and knowledge acquired from briefing cases and outlining course materials); GARY A. MUNNEKE, HOW TO SUCCEED IN LAW SCHOOL 100 (3d ed. 2001) (spotting issues depends on "how well you know the material generally, and how adept you have become at spotting issues"); Paul L. Caron & Rafael Gely, *Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning*, 54 J. LEGAL EDUC. 551, 555 (2004); Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students?*, 45 S. TEX. L. REV. 753, 778–79 n.54 (2004); Peter T. Wendel, *Using Property to Teach Students How to "Think Like a Lawyer:" Whetting Their Appetites and Aptitudes*, 46 ST. LOUIS U. L.J. 733, 736–37 n.25 (2002). Twenty years ago, a computer expert claimed to have developed a program that would identify issues in typical first-year subjects. *See* Book Review, 101 HARV. L. REV. 1080, 1080 (1988) (reviewing ANNE VON DER LIETH GARDNER, AN ARTIFICIAL INTELLIGENCE

generalities.[99]   Others recommend a student begin the exam answer by quickly reviewing a mental checklist of topics studied,[100] i.e., by reviewing a mental list of patterns.

The best advice taps into the *Taxonomy*'s recognition of the importance of recognizing patterns.[101]   Michael Hunter Schwartz encourages students to look for connections among the topics they have learned and to recognize patterns.[102]   For the latter, he recommends using analogies, i.e., recognizing which facts stories have in common and which facts differ from story to story.[103]   Two others recommend that students develop key anchors or "trigger facts,"[104] e.g., a parol evidence issue arises when, despite the presence of a signed document, one party wants to introduce evidence about an oral or written agreement made before or at the same time as that document.[105]   Of course, the only way to decide which facts are trigger facts is to recognize patterns.

Some patterns are not hard to spot. Torts students should have no difficulty distinguishing between intentional and unintentional torts;[106] Contracts students should recognize that the lack of a signed writing is the key for a statute of frauds issue.[107]   But many patterns are not obvious. I cannot expect most of my students to recognize that an oral agreement made ten minutes before the parties signed a

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APPROACH TO LEGAL REASONING (1987)). Unfortunately, she wrote for a scientific audience, and a recent Westlaw search reveals no later writing about her project.

99.   *See, e.g.*, BURKHART & STEIN, *supra* note 52, at 181 (1996) ("When reading the problem, you will have identified issues that potentially are raised by it."); Thomas Disare, *A Lawyer's Education*, 7 MD. J. CONTEMP. LEGAL ISSUES 359, 370 (1996) (describing how issue spotting "begins with the knack for asking appropriate questions" and "listening carefully to the conversation").

100.   Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157 app. at 231 (1995); Paul T. Wangerin, *Learning Strategies for Law Students*, 52 ALB. L. REV. 471, 516 n.160 (1988).

101.   BLOOM ET AL., *supra* note 21, at 162.

102.   MICHAEL HUNTER SCHWARTZ, EXPERT LEARNING FOR LAW STUDENTS 209–10 (2d ed. 2008).

103.   *Id.*

104.   Steven Friedland, *Teaching Property Law: Some Lessons Learned*, 46 ST. LOUIS U. L.J. 581, 592 (2002) (describing, for example, how disputes between *neighbors* usually raise issues of nuisance, easements, and adverse possession); Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 440 (1989).

105.   11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33:1 (4th ed. 2012).

106.   *See* Joseph A. Page, *Torts Teaching: From Basic Training to Legal-Process Theory: Dominick Vetri, Tort Law and Practice*, 25 SEATTLE U. L. REV. 127, 129–30 (2001) (referring to this concept as a "teething ring" for first-year students).

107.   *See* 9 WILLISTON & LORD, *supra* note 105, § 21:5 (4th ed. 2011).

written document implicates the parol evidence rule, while the same oral agreement made ten minutes *after* the signing triggers the pre-existing contractual duty rule.[108]   The *Taxonomy*'s framework suggests that we need to determine which patterns and issues students should be able to recognize on their own and which ones we need to make explicit.[109]   In Contracts, I now devote most of my end-of-the-semester review sessions to showing how doctrines differ from each other and the types of situations in which each doctrine is likely to be at issue.

5. Using the Taxonomy *to Evaluate Teaching and Learning*

Finally, the *Taxonomy* gives us a tool by which to evaluate teaching: how far up the *Taxonomy*'s ladder does the teacher help her students to reach?[110]   When a class session merely requires students to remember facts or rules from a case, it is stuck at Knowing and Remembering (Level 1);[111] a class in which students sort through the entire reading assignment, identify which rules in the assignment address a fact pattern, and apply those rules to that fact pattern involves Level 3, a much better result.[112]   Classes in which students construct their own materials, such as by drafting a statute, agreement, or will, reach Level 6.[113]   Of course, it is one thing for the teacher to ask questions that are at a particular level; it is quite another thing for the students to actually reach that level in their answers.   A teacher who pushes students too far too fast will be as ineffective as a teacher who does not push at all.

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108.   *Compare* 11 WILLISTON & LORD, *supra* note 105, § 33:1 (parol evidence rule), *with* 3 WILLISTON & LORD, *supra* note 105, § 7:36 (4th ed. 2008) (preexisting contractual duty rule).

109.   *See* KRATHWOHL ET AL., *supra* note 20, at 4 ("If, however, educational objectives are to give direction to the learning process and to determine the nature of the evidence to be used in appraising the effects of learning experiences, the terminology must become clear and meaningful."); M.H. Sam Jacobson, *Learning Styles and Lawyering: Using Learning Theory to Organize Thinking and Writing*, 2 J. ASS'N LEGAL WRITING DIRECTORS 27, 29–30 (2004) (suggesting different teaching styles to achieve different goals within Bloom's *Taxonomy*).

110.   *See* KRATHWOHL ET AL., *supra* note 20, at 5 ("An even more important value we hoped to secure from the classification scheme was that of comparing and studying educational programs."); Penny L. Willrich, *The Path to Resilience: Integrating Critical Thinking Skills into the Family Law Curriculum*, 3 PHOENIX L. REV. 435, 444 (2010) (using the *Taxonomy* as a teaching and evaluative guide).

111.   Of course, this is perfectly appropriate in the opening weeks of a first-year course, when students struggle with almost everything.

112.   *See supra* notes 45–59 and accompanying text.

113.   *See supra* notes 66–71 and accompanying text.

The *Taxonomy* also may help students assess their own learning.[114] Students who come to law school after an undergraduate "education" involving large lecture halls and exams that stress remembering and regurgitating (Level 1), will be wrongly content to memorize case names and legal rules, only to be shocked by the typical Level 3 law school fact-pattern exam.[115]   Students whose wrestling with hypotheticals (Level 3) reveals the ambiguities, uncertainties, and inconsistencies inherent in legal rules wrongly may interpret their confusion and frustration as signs of incompetency, even though they are far ahead of classmates stuck at Level 1.[116] If they understood the *Taxonomy*'s six levels, they might be able to appreciate how far they have climbed the ladder of learning.

In short, Bloom's *Taxonomy* presents the map for how people learn. The better we understand the road it lays out, the better we can guide our students.

C. BEING HONEST WITH STUDENTS: DISCLOSING WHAT WE REALLY WANT THEM TO LEARN

1. What We Unintentionally Hide from Students

Although *Best Practices* tells us little about the *Taxonomy*'s important lessons, it did persuade me that I long have violated a basic rule of teaching. In my defense, I did not intend to sin, and I was aided, abetted, and encouraged by the well-meaning authors of well-respected textbooks. But sin I did for almost three decades. What follows is my confession and my efforts to atone.

Best Practices repeatedly says that a good teacher expressly tells her students what she wants them to learn.[117]   At first, this point seems trite. I cannot imagine omitting the parol evidence rule from my Contracts syllabi, reading assignments, and class discussions, and then testing my students on that doctrine. Instead, I list it in my syllabus and table of contents, make it a chapter heading in my book, and use it as the title of the agenda I distribute for several class

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114. *See* KRATHWOHL ET AL., *supra* note 20, at 5 n.1 ("We clearly recognize that students also have educational objectives which are most influential in shaping the instructor's choice of teaching methods."); Kimberlee A. Kovach, *The Lawyer as Teacher: The Role of Education in Lawyering*, 4 CLINICAL L. REV. 359, 383 n.160 (1998).

115. *See* Jessica Elliot, *Teaching Outlining for Exam Preparation as Part of the First-Year Legal Research and Writing Curriculum*, 11 PERSP.: TEACHING LEGAL RES. & WRITING 66, 67 (West 2003), *available at* http://store.westlaw.com/pdf/perspec/ Winter%202003/Wint032.pdf.

116. *See supra* Part B.1.

117. STUCKEY ET AL., *supra* note 1, at *passim*.

sessions.[118] So how did I fail to tell students what I expected them to learn?

Simple—I only disclosed doctrine. *Best Practices* points out that we expect students to learn many things beside doctrine: how to read like lawyers, think like lawyers, use precedent, synthesize cases, deal with conflicting case law, etc.[119] Yet, my syllabi, my tables of contents, and my class discussions did not say that. Even worse, my silence implied that these crucial concepts were *not* important.[120]

Let me give an example, with apologies to my unintended victim. I was teaching the Statute of Frauds in Contracts I. To help students understand the statute, the reading assignment asked them to apply it to several simple hypotheticals (the *Taxonomy*'s Level 2).[121] That should have given students ample time to prepare in advance, but the student on whom I called soon started to drown in the statute's language. I threw him several ropes; each one slipped through his hands. As he went down for the last time, I thought, "He doesn't have the slightest clue about how to read a statute." After class, I realized why. He was a first-semester law student, and his teacher (me) never had:

> (a) told him he needed to learn how to read a statute,
> (b) suggested that reading a statute was different than reading a case, or
> (c) explained how to read a statute.

No wonder he drowned in front of eighty classmates.

Back in my office, the solution was obvious. I prepared a list of the basic steps I used to read a statute. I distributed it to the class. The next year, I inserted the list in the regular reading assignment, immediately in front of the Statute of Frauds,[122] thereby telling my students what they needed to learn. Of course, I confess I did not take the obvious next step—preparing lists of how I do a number of *other* things I expect my students to learn to do.

Best Practices persuaded me that I needed to do the same thing for almost *every* non-doctrinal concept I expect my students to learn,

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118. *See supra* text accompanying notes 81–82.
119. STUCKEY ET AL., *supra* note 1, at 21–22.
120. *Cf.* Edwin Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 853–54 (1964) (*expressio unius exclusio alteris* as canon of construction).
121. BLOOM ET AL., *supra* note 21, at 89–90.
122. Actually, it now appears *three* times: when we encounter the U.C.C.'s formation rules in September, the Statute of Frauds in November, and U.C.C. § 2-207 in February. I do this because of the value of repetition.

despite the proliferation of academic success programs and how-to-survive-law-school books.[123]   Repetition and reinforcement are important learning strategies. Moreover, people who are new to a discipline often have difficulty transferring knowledge from one context (such as an academic success class) to another (such as a doctrinal course). Relying on academic success classes creates timing problems—the odds are high that the week the academic success classes teach students how to infer rules not expressly stated in a judicial opinion is not the same week you teach a case that turns on the presence of an implied rule. Finally, while wonderful books such as *Expert Learning for Law Students*[124] provide many strategies for reading cases, identifying rules, spotting issues, etc., they help only those students who take the time:

> (a) to find those books,
> (b) to find the particular pages that address their specific
> problem, and
> (c) to read those pages.

Expert Learning is 261 pages long, not including the appendices.[125] How many pressed-for-time, confused, struggling first-semester law students will voluntarily seek out and add 261 pages to their reading load?

In short, if good teachers tell their students what they expect those students to learn, our syllabi, tables of contents, and reading materials should include doctrinal *and* non-doctrinal material.[126]   If a case reaches a conclusion without expressly stating a rule, we need to make clear to students that we expect them to learn how lawyers recognize and identify implied rules.[127] When the reading assignment includes cases with conflicting rules, we should suggest what lawyers do when they face conflicting precedent. If a court decision does not protect the legitimate interests of one party,[128] we should discuss how

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123. STUCKEY ET AL., *supra* note 1, at 276–78.
124. *See* SCHWARTZ, *supra* note 102.
125. *Id.*
126. *See supra* text accompanying notes 125–29.
127. *See, e.g.*, Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33, 36–38 (8th Cir. 1975) (discussing how propane buyer's gas distribution system could be connected only to a seller's pipeline implicitly, which created the rule that requirement contracts are binding only if buyer agrees, implicitly or explicitly, to buy only from the seller).
128. *See, e.g.*, Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 111, 114 (Okla. 1962) (holding that a breach of a written promise to strip mine land and then restore it to its original condition justified an award of only $300, the difference in value

lawyers attack existing precedent. Doing this would tell students what they need to do and how they should do it, and it would do so when they most need that information and when they best can understand its significance.[129]

2. *Six Steps for Honest Disclosure*

I am taking six steps to atone for my sins.

First, I am compiling a list of the non-doctrinal concepts I want my first-year students to learn: reading skills, thinking skills, analytical skills, interpersonal skills, practical skills, and professional skills.[130] I am also preparing descriptions of each skill and inserting those descriptions in my reading materials right before the case or statute in which we will first use that skill. Textbook authors—especially of first-year books—could do the same.

The second step is to prioritize. A three-hour course gives exactly 2,100 classroom minutes, and students have a finite time outside of class to read, study, and prepare.[131] An often-overlooked part of our job is to decide what to save and what to cut. Law professors must be editors, constantly asking which topics are the most important and which topics need more time than they are worth. It is easy to pile on

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between the strip mined land and its projected value after restoration, instead of $29,000, the alleged cost of restoring mined land to its original condition).

129. *Best Practices* suggests a further step: law schools, as institutions, should "clearly articulate their educational goals and share them with their students." STUCKEY ET AL., *supra* note 1, at 8.

130. *See infra* Appendix A.

131. *Best Practices* seems unaware of this. After admonishing that student workloads should be "manageable and not overly stressful," STUCKEY ET AL., *supra* note 1, at 276–77, the book says that *in addition* to doctrinal instruction, the *first* year of law school should include:

-in and out of class simulations, with feedback for each student, in each course;

-in-class debriefings of all outside-of-class simulations;

-required participation in study groups;

-in- and out-of-class group projects,;

-training in collaboration;

-instruction in self-regulation (self-managing workload, self-monitoring learning, and reflecting on learning);

-writing reflective journals "in at least one course";

-meeting with practicing lawyers and judges;

-taking field trips and writing reflective journals about those experiences;

-receiving feedback on those journals;

-participating in formative assessments throughout each semester;

-taking multiple summative assessments; and

-compiling a portfolio.

Id. at 276–78.

the reading assignments, but I know of no evidence that increasing the length of an assignment increases student understanding of it.

Third, I am inserting those non-doctrinal lessons in my syllabi and tables of contents. The start of my Contracts I syllabus describes the Issue-Rule-Analysis-Conclusion structure of legal argumentation, provides an example, and explains how lawyers use this structure to build effective legal arguments.[132] My table of contents for Contracts I now has this memorial to the student I let drown so many years ago:[133]

> IV. VALIDATION
>   C. Defenses: What May Cause a Court to Invalidate an
>   Agreement?
>   3. The Statute of Frauds
>   a. Introduction
>   b. **Statutory interpretation**
>   i. **The differences between reading** *judicial*
>   **decisions and** *legislative* **statutes**
>   ii. **The ten rudimentary steps of statutory**
>   **interpretation**
>   c. The Statute of Frauds for land and service
>   contracts
>   d. The Statute of Frauds for UCC Article 2
>   e. Exceptions to the Statute of Frauds . . . .

If you use a commercial textbook, your administrative assistant can convert its table of contents into electronic form, allowing you to insert non-doctrinal skills as appropriate.[134]

Developing these materials takes time, but that proves my point. I needed several hours to put on paper the steps I subconsciously use when I read a statute,[135] even though I had been using statutes for a

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132. I devote the first page to the law school's mission statement, the four main skills we'll learn (deriving rules from cases, etc.), a short list of skills we won't have time to study, such as interpersonal skills, fact-finding skills, etc., along with an affirmation of their value, and a statement about the importance of ethics and values. The IRAC description gets pp. 2–4.

133. *See supra* text accompanying notes 128–29.

134. In addition, my first-year students say that my electronic version of the table of contents helps them realize that the table should be the starting point for their course outline.

135. Those efforts became *The Ten Rudimentary Steps of Statutory Interpretation*, which I include in my Contracts and Sales and Leases reading materials:

dozen years. How could I legitimately expect students in their second month of law school to discover and understand those steps on their own?

Be forewarned that what seems obvious to us can be eye-opening to students. *We* read a statute by looking at its title and then moving to the first word of its text, but many students merely skim the text until they find what seems to be an important word, a technique today reinforced by their experiences of doing a Google word search, getting 400,000 hits, and then ignoring all but the most interesting. Reading statutes requires them to do just the opposite—to read and understand *every* word, no matter how uninteresting it looks. If we don't show them how to read a statute, who will? E-mail is another good method. After each class, I e-mail the next assignment to my

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1. *"Read the statute."* I'm quoting U.S. Supreme Court Justice John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1374 (1992).

2. *"Read the entire statute."* Again, Justice Stevens. *Id.* at 1376.

3. *Start at the very beginning of the statute.* This comes from the Maria Von Trapp School of Statutory Interpretation. *Cf.* THE SOUND OF MUSIC (Robert Wise Productions 1965) ("Let's start at the very beginning: a very good place to start!"). The first part of a statute usually tells us what situations and cases the statute governs.

4. *Decide if the statute applies to your fact pattern.* If it doesn't, it's irrelevant.

5. *Determine what each word in the statute means.* Check the definitions in the statute itself, in related statutes, and in case law.

6. *Develop a list of every test that the statute imposes (and a list of the exceptions!).*

7. *Check the caselaw.* How have courts interpreted the statute?

8. *Determine what happens if your facts satisfy all the tests you found in steps 6 & 7.* You should also ask what happens if your facts satisfy some, but not all, of the tests.

9. *Apply your facts to the tests you developed.*

10. *Use steps 7, 8, and 9, to decide what result the court should reach.*

Don't let the simplicity of these steps fool you. I've seen lawyers lose cases because they didn't know these basic rules. I remember one attorney who ignored steps 2, 3, and 4 and tried to apply the Federal Bituminous Coal Conservation Act of 1937 to a 1980 farm foreclosure case in Nebraska, 400 miles from the nearest coal mine. The results weren't pretty. So memorize these ten steps and use them whenever you encounter a statute.

students.[136] It's easy to include an extra line that recounts the skill(s) we learned that day or to alert students to upcoming skills.[137]

The fifth major step is to expressly identify and discuss non-doctrinal learning goals in class. About thirty minutes before class, I e-mail an agenda in Word and WordPerfect to my students.[138] About fifteen minutes before class, I display this agenda in the classroom, and I begin class by quickly walking through the major headings.[139] It is an *agenda*, not an outline; the headings and subheadings (doctrinal and non-doctrinal) provide a structure for class discussion without providing the answers.[140] The agenda alerts students to both the doctrinal and non-doctrinal lessons I expect them to learn. In addition, at the end of the class, when I try to summarize the day's major points, I try to point out particular non-doctrinal skills that we've used that day. The agenda has the added benefit of providing structure to the Socratic dialogue that I use.[141] Since I have begun surveying my students about this technique, the results have been strongly positive.[142]

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136. This tactic saves me from scrambling frantically at the end of class to quickly calculate how far we can get in the next class session and from scrambling frantically two hours before class to remember that day's assignment.

137. For example, "[t]he next assignment requires you to identify some rules that the judge did not make explicit. Carefully read page IV–84, which lists some ways to do this."

138. Professor Judith Maute suggested this to me back when "technology" was chalk on a blackboard. Today, it's easy to prepare such an agenda as a WordPerfect or Word document.

139. Many students are "global" learners, who learn best when they get the "big picture" before they get specific details. *See* Richard M. Felder & Barbara A. Solomon, *Learning Styles and Strategies*, N.C. STATE UNIV., http://www4.ncsu.edu/unity/lockers/users/f/felder/public/ILSdir/styles.htm (last visited Dec. 10, 2012).

140. *See infra* Appendix B. This is a vital difference from the traditional Power Point slide. Empirical research shows that a "skeletal outline" helps students, while "detailed notes" make them passive. MCKEACHIE & SVINICKI, *supra* note 25, at 71 (citing James Hartley & Alan Cameron, *Some Observations on the Efficiency of Lecturing*, 20 EDUC. REV. 30 (1967); L.F. Annis, *Effect of Preference for Assigned Lecture Notes on Student Achievement*, 74 J. EDUC. RESEARCH 179 (1981); K.A. Kiewra, *A Review of Note-Taking: The Encoding-Storage Paradigm and Beyond*, 1 EDUC. PSYCHOL. REV. 147 (1989)). I also use the agenda to summarize the hypotheticals in the reading assignment.

141. *See* BAIN, *supra* note 78, at 26–27; MCKEACHIE & SVINICKI, *supra* note 25, at 59–60. I think, though I cannot prove, that the agenda also helps students who become lost to rescue themselves. When I move to a new topic, I try to physically point at the appropriate heading in the agenda to show where we are.

142. During the 2008–2012 school years, I included with my school's student evaluations an extra set of questions, one of which asked students to what extent "[t]he daily agenda e-mailed to the class and posted in class was helpful." Of the 431 responses

This explicit attention to non-doctrinal matters is not cheap. It takes time to figure out which skills we should teach students and when; it takes time to identify and write down the specific steps we use to compose a holding or reconcile apparently conflicting cases; it takes class time to discuss skills and practice using them. Moreover, expressly addressing non-doctrinal skills messes with the minds of students who come to law school expecting us to just "tell them what the law is."[143] On the other hand, "messing with" a student's mind may be one of our greatest duties,[144] and the thinking, reading, and reasoning skills that I have discussed are crucial to any student who intends to do anything more with his or her law degree than recite the five elements of promissory estoppel while standing on a downtown street corner, hat in hand.

I am still implementing the sixth step: repetition. Learning requires repetition and practice, as any talented musician or athlete will tell you.[145] However, when learners confront new material, they often have trouble recognizing patterns or tying together different parts of that material.[146] They also may not remember that a skill even exists. As I go through Contracts I and II, I am making lists of the reading, thinking, and other skills addressed in each assignment. I'm also writing a short discussion of each skill and inserting that discussion

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received, 52% said "Strongly Agree"; 34% said "Agree"; 9% had "No Opinion"; 2% said "Disagree"; and 3% said "Strongly Disagree."

143. *See* Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 903 n.68 (1985) ("Students typically plead to be told what the law is, to clarify the vagueness produced by reading and discussing cases.").

144. In a national search for "the best" college teachers, Ken Bain and his team of researchers regarded student comments that a teacher had "messed with their heads" as evidence of "deep learning [that] was likely to last." BAIN, *supra* note 78, at 9–10.

145. An example is Hall of Famer Tony Gwynn, who won three consecutive National League batting titles. He usually took 200 practice swings *before* his team's regular batting practice and another 200 *after* the game. GEORGE F. WILL, MEN AT WORK: THE CRAFT OF BASEBALL 164, 168 (1990). John McPhee recounts how teenager Bill Bradley spent his high school years dribbling a basketball *wherever* he went and shot so many practice free throws that he could identify when the rim of a basket was less than an inch too low. JOHN MCPHEE, A SENSE OF WHERE YOU ARE: A PROFILE OF BILL BRADLEY AT PRINCETON 27–28, 74 (1999). Bradley went on to lead Princeton University to the NCAA basketball tournament, was named the NCAA's player of the year in 1965, studied at Oxford as a Rhodes scholar, was a key member of the NBA champion N.Y. Knicks, and served three terms in the U.S. Senate. *Id.* at 141, 143, add. 1978, add. 1999.

146. *See* BLOOM ET AL., *supra* note 21, at 162 (explaining that Level 5 of the *Taxonomy* is Synthesis, which involves putting together different parts and sources in such a way as to discover a pattern not previously there).

in the assignment itself. In other words, students learn about a skill just before I expect them to use it.

3. Closing Thoughts

Telling students what skills we expect them to learn does *not* mean spoonfeeding them. When my syllabus tells my students we will study the doctrine of good-faith interpretation and the parol evidence rule, no one accuses me of spoonfeeding. Why should telling students we will study the skill of statutory interpretation be any different?

It is true that when I discuss a skill with my students, I give them step-by-step guidance. This does mean that I am giving them information and knowledge (Level 1 of learning), rather than asking them to recognize the patterns (Level 5) that I've used to produce the step-by-step guidance.[147] I do this for two reasons. First, we may use a particular skill only once or twice every few weeks, and I cannot expect students to pick up a pattern they do not constantly see.[148] Second, few judicial opinions or statutes expressly discuss the reading and thinking skills that students need to know. Lest my students misinterpret my step-by-step guidance as implicit permission to memorize and regurgitate (Level 1), I insist that they apply their new knowledge, pushing them up to (Level 3).[149]

Furthermore, many of the skills I teach require students to think more and to read more carefully, because they require students to engage in higher levels of learning. For example, asking students to state the elements of a rule usually is a matter of knowing and remembering information (Level 1).[150] But when I have them turn those elements, and their legal terms, into questions to ask their client during an interview, or instructions to give a jury, students discover they have to translate those legal terms into language a client can understand. That requires comprehension and understanding (Level 2).[151] Similarly, when we learn how to attack precedent that hurts a client's legitimate interests, students have to determine what values that precedent protects, identify its consequences, and critique its weaknesses (Level 6).[152]

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147. *See id.* at 62, 162.
148. *See id.* at 162 (explaining that recognizing patterns is part of Synthesis, which is Level 5); *supra* notes 76–80 and accompanying text.
149. *See* BLOOM ET AL., *supra* note 21, at 62, 120.
150. *See id.* at 62–63.
151. *Id.* at 89–90.
152. *Id.* at 185–87.

Finally, when we expressly identify the skills we want our students to learn, we are practicing an important value: transparency. We expect legislatures and administrative agencies to be transparent when adopting statutes and regulations; we expect public institutions to be transparent in how they do business.[153] Our commitment to transparency should include our own classrooms and textbooks. Even as we have a duty to teach students doctrine, we have a duty, individually and collectively, to tell students what skills we expect them to learn and to use.[154]

D. RESISTING THE URGE TO ABANDON THE SOCRATIC DIALOGUE

1. *Two Conflicting Views of Socratic Dialogue*

Best Practices does not mince words about what it calls "the Socratic dialogue and case method."[155] The book says that "[t]he main impediment to improving law school teaching is the enduring over reliance on the Socratic dialogue and case method,"[156] and that "too many law teachers abuse it," thereby inflicting serious, lasting harm and pain on students.[157] No fewer than ten pages describe the approach's many sins,[158] and several chapters later, *Best Practices* resumes the attack, as if it feared Socrates himself might rise from the grave. We are told that he left his students "perplexed," "helpless and silent," in a "subordinated position," and focused only on "Socrates' approach to virtue," rather than on true virtue.[159] If *Best Practices* condemns even the great philosopher, who among we lesser mortals should be able to escape punishment?

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153. *See, e.g.*, Phyllis E. Bernard, *From "Good Ol' Boys" to "Good Young Law": The Significance of the Oklahoma Administrative Code*, 18 OKLA. CITY U. L. REV. 267, 287–89 (1993) (describing Oklahoma's difficulty in developing a "non-secret, modern system of administrative law"); Jonathan C. Lipson & Christopher M. DiVirgilio, *Controlling the Market for Information in Reorganization*, 18 AM. BANKR. INST. L. REV. 647, 651–52 (2010) (complaining that SEC's role in bankruptcy reorganization "is unlikely to accomplish even the crudest version of transparency"); David Woltz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1077–78 (2010) (urging greater transparency in North Carolina Innocence Inquiry Commission).

154. *See* STUCKEY ET AL., *supra* note 1, at 42–45; *supra* Part B.2.a.

155. STUCKEY ET AL., *supra* note 1, at 134–41.

156. *Id.* at 133.

157. *Id.* at 139 (quoting Krieger, *supra* note 15, at 125).

158. *Id.* at 132–41.

159. *Id.* at 209 (citing Davis & Steinglass, *supra* note 6, at 259).

Yet Socratic dialogue has been endorsed by a book that *Best Practices* cites at least fifteen times—*What the Best College Teachers Do.*[160] Author Ken Bain and a team of researchers searched around the country, seeking faculty for whom there was "strong evidence of helping and encouraging their students to learn in ways that would usually win praise and respect from both disciplinary colleagues and the broader academic community," and whose students spoke of how their teacher had "'transformed their lives,' 'changed everything,' and even 'messed with their heads.'"[161] Bain and his team identified sixty-three great teachers in a variety of institutions, from a community college in the Rio Grande Valley to Harvard University,[162] then spent several years interviewing those teachers and their students, videotaping their classes, and examining their syllabi, reading materials, and lesson plans.[163] Bain's book was published by Harvard University Press, and it won that institution's Virginia and Warren Stone Prize for outstanding contributions to education and society.[164] One of the findings? Many of the great teachers in the study used Socratic dialogue.[165] Bain writes:

> To gain students' attention and hold it for some higher purpose, the best teachers start with something that, as [Harvard political theorist Michael] Sandel put it, "students care about, know, or think they know, rather than just lay out a blueprint or an outline or tale or theory or account of our own." . . . For Sandel and many others, the method is grounded in Socratic dialogues. "Socrates began," Sandel explains, "by attending to what people thought they knew, and then he tried gradually and systematically to wrench them from their familiar place." Such an approach often means asking students to begin struggling with an issue from their own perspective even before they know much about it, getting them to articulate a position. [University of California mathematician] Donald Saari does some of that when he gets students to break a calculus problem into smaller pieces. Using Socratic questioning, he begins with

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160. *See id.* at *passim* (citing BAIN, *supra* note 78, at *passim*).

161. BAIN, *supra* note 78, at 9–10.

162. *Id.* at 5–9, 60, 109, 182–90.

163. *See id.* at 5–10, 182–90.

164. BAIN, *supra* note 78; *What the Best College Teachers Do*, HARVARD UNIV. PRESS, http://www.hup.harvard.edu/catalog.php?isbn=9780674013254&content=bios (last visited Dec. 10, 2012).

165. *See* BAIN, *supra* note 78, at 110.

what "common sense" might suggest to the students; then, through additional probing, he helps them add the "muscle" that disciplinary discoveries can give them. Sandel compares this method of teaching to ways that he might teach one of his children to play baseball: "I could give them detailed instructions on how to hold the bat, where to stand, how to look for the ball from the pitcher, and how to swing, never letting them hold a bat until they had heard several lectures on the subject. Or, I could give them a bat and allow them to take a few swings, after which I might find one thing that the kid is doing, which if adjusted, would make him a better hitter." The second approach seems eminently more sensible than the first for teaching someone baseball, and it is the method Sandel and others used to teach students to think.

Every year more than seven hundred students crowd into Sandel's classroom at Harvard to take his course on justice.[166]

Bain, Sandel, and Saari are not law professors; they have no vested interest in preserving Socratic dialogue.[167] Nor are they the only academics who appreciate the technique.[168] Here are the views of some *legal* educators:

(a) "Law schools in the United States are particularly effective at teaching students how to engage in legal

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166. *Id.*
167. *See id.* at 94, 109; *Faculty for Institute*, BEST TEACHERS SUMMER INSTITUTE, http://www.bestteachersinstitute.org/id1.html (last visited Dec. 10, 2012).
168. James L. Junker, George A. W. Waterhouse & Robert L. Garrett, *Improved Student Performance Following the Introduction of Socratic Teaching Methods for Basic Science Courses in Pharmacy School*, 701 ANNALS OF THE N.Y. ACADEMY OF SCIENCES 120, 121 (1993) (illustrating that a pharmacy school's introduction of Socratic method in three required classes increased exam scores). "[T]he Socratic method encourages students to be more responsible for their own learning, to learn from reading, and to explain orally to others what they have learned. Thus, students are better equipped to become independent learners and scientific communicators, skills which have lifelong value." *Id.* Dr. David Stern describes how medical students often work with a "healthcare team" consisting of multiple doctors who collectively treats patients, and how members of the team "often quiz students in Socratic fashion about the rationale for their ideas, their understanding of the underlying disease, and their choices for treatment." David Stern, *Outside the Classroom: Teaching and Evaluating Future Physicians*, 20 GA. ST. U. L. REV. 877, 895 (2004) ("When many students are present, any student in the group is 'fair game' to these questions . . . about a specific medical condition.").

reasoning and helping them develop the skill described by many as 'thinking like a lawyer'";[169]

(b) When the Socratic dialogue and case method is "properly used, it is a good tool for developing some skills and understanding in law students";[170]

(c) "[C]oupled with the issue-spotting style of examination, this method of active learning turned out to be a superb way of inculcating the analytic skills and the skepticism about easy answers that are requisite to competence in any career in the law";[171] and

(d) "Interaction with a Socratic teacher help[s] to sharpen students' minds. They learn to think on their feet, to express themselves, and to read cases—skills that a practicing lawyer needs . . ." and it gives them "a deeper understanding of the rules."[172]

Where will you find these endorsements? In *Best Practices*.[173]

So what is going on? In part, as the book grudgingly admits, the value of Socratic dialogue depends greatly on the professor using it.[174] In part, many of the sins described by the book are really the fault of the case method or of class size.[175] And in part, the book sometimes seems to envision learning as a painless process, in which we must protect students from the challenges that real learning requires.[176]

2. The Allegation of Abuse

Let me begin with one of *Best Practices'* most serious allegations: "The main reason [to reconsider use of Socratic dialogue and case method] is that too many teachers abuse it and contribute to the

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169. STUCKEY ET AL., *supra* note 1, at 70.

170. *Id.* at 112.

171. *Id.* at 211 (quoting with alteration Paul Brest, *The Responsibility of Law Schools: Education Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5, 7 (1995)).

172. *Id.* (quoting Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 244 (1992)).

173. *See supra* notes 178–81 and accompanying text.

174. STUCKEY ET AL., *supra* note 1, at 112 ("That is not to suggest that Socratic techniques are entirely without educational value. In the hands of an adept professor, they cultivate useful professional skills . . . ." (quoting RHODE, *supra* note 14, at 197)).

175. *See infra* Part D.3–4.

176. *See infra* Part D.5.

damage that the law school experience unnecessarily inflicts on many students."[177]

The book tells us that "complaints about classroom abuse of students primarily involve misuse of the Socratic dialogue and case method,"[178] that it "contributes to a hostile, competitive classroom environment that is psychologically harmful to a significant percentage of students,"[179] and that faculty use it to "undermine [students'] sense of self-worth, security, authenticity, and compentenc[y]."[180]

"[T]he professor controls the dialogue, invites the student to 'guess what I'm thinking,' and then inevitably finds the response lacking. The result is a climate in which 'never is heard an encouraging word and . . . thoughts remain cloudy all day.'"[181]

It is wrong to abuse students. Period. Yelling at them, attacking them personally, or calling their comments "dumb" or "stupid" is neither professional nor ethical. Almost as bad is the tactic of setting students up to fail, as when we, in the name of "rigor," expect them to recite (sometimes without consulting the book) trivial facts in a case or to answer in a few seconds questions that we have contemplated for years. We also set students up to fail when we ask broad questions that require them to mentally sift through thirty or forty pages of reading material to reach one, single, very specific answer.[182] *Best Practices* correctly condemns these "guess what I'm thinking" questions.

Yelling at students or setting them up to fail also can be counterproductive, since it encourages some students to retreat into passivity. For example, Bronwyn T. Williams explains what happened when his teachers "dismissed or disdained" his ideas:

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177. STUCKEY ET AL., *supra* note 1, at 139.
178. *Id.* at 112.
179. *Id.* (citing RHODE, *supra* note 14, at 197).
180. *Id.* at 139.
181. *Id.* at 112 (quoting RHODE, *supra* note 14, at 197).
182. For example, when I teach the RESTATEMENT (SECOND) OF CONTRACTS' parol evidence rule (§§ 209, 210, 213, 214, 215, and 216), I don't ask, "What is the biggest distinction between the rules of the RESTATEMENT OF CONTRACTS (1932) and those of the RESTATEMENT (SECOND) OF CONTRACTS (1982)?" That broad question would require students to review and evaluate a large amount of material in seconds, without any guidance from me, even as it implicitly would warn them that there is only one correct answer—mine. Instead, I ask, "How is Restatement § x different than Restatement (Second) § y, and how important is that distinction?" Now the student can focus her attention on something manageable, and even if she has seen a different distinction than I, she still can be correct.

I was determined not to be made a fool. If I offered nothing—no comments, no ideas, and the bare minimum of writing—then I could only be judged on nothing. I knew I had more to say than I was divulging to the teacher, but I was prepared to seem average if it meant keeping my dignity intact. Each day of sitting quietly felt like a small victory.[183]

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183. Bronwyn T. Williams, *Metamorphosis Hurts: Resistant Students and Myths of Transformation*, 60 J. ADOLESCENT & ADULT LITERACY 148, 150 (2006); *see also* E. Holly Buttner, *How Do We "Dis" Students?: A Model of (Dis)Respectful Business Instructor Behavior*, 28 J. MANAGEMENT EDUC. 319, 327 (2004) (explaining how business school students report on how faculty rudeness, sarcasm, and insults "had a chilling effect" on their motivation). Psychologist Edgar H. Schein, Sloan Fellows Professor of Management Emeritus at MIT's Sloan School of Management, expands Williams' example. Schein says that when business organizations demand their employees learn to do something differently:

> [Many employees] become afraid to make the wrong move . . . .
> In the prison camps [of American soldiers captured by the Chinese during the Korean War] 80% of the people survived the ordeal by being passive. That's generally the way it is in organizations: People hang on through the coercive pressures that once came from the outside–a CEO's directives, for instance . . . .
> As we learned from the prisoners of war in Korea, resilience is often the ability to make yourself invisible. In organizations, individual learners lie, cheat, go underground—they do whatever they have to do to remain invisible.

Diane L. Coutu, *Edgar H. Schein: The Anxiety of Learning*, HARV. BUS. REV., Mar. 2002 at 103, 105 (quoting Schein).

I do not know of any empirical studies that try to link the in-class conduct of law professors with the extent of student resistance in their classes. A 2007 study of 564 undergraduates at a Mid–Atlantic university did find a correlation. Nancy F. Burroughs, *A Reinvestigation of the Relationship of Teacher Nonverbal Immediacy and Student Compliance-Resistance with Learning*, 56 COM. EDUC. 453, 459 (2007). Burroughs asked students to determine the extent to which the teacher whose class they had just finished was "relaxed . . . smiles frequently, engages in a lot of eye contact and is generally perceived as friendly and approachable." *Id.* at 456. She also asked how much the class had increased their interest in the subject (affective learning), how much they had learned in the class (cognitive learning), and whether they had complied with the last request the professor had made. *Id.* at 458–59.

"[S]tudents who passively rejected ($M = 33.13$) a request made by a teacher reported significantly lower levels of teachers' nonverbal immediacy [smiling, being friendly, etc.] than complete compliers ($M = 38.05$), partial compliers ($M = 37.42$), and those who had no recall [did not remember a request] ($M = 37.46$)." *Id.* at 463.

The study determined that 21% of differences in how much students thought they had learned could be attributed to students' willingness to comply with faculty requests and teachers' nonverbal immediacies. *Id.* at 465; *see also id.* at 471 ("[S]tudents who [p]assively [r]ejected teachers' requests had significantly lower cognitive and affective learning. . . . An approximately linear relationship existed among the compliance-resistance technique (levels of compliance): complete compliers ($M =$

In short, *Best Practices* correctly condemns such faculty conduct, and I join that condemnation.[184]

At the same time, I must say that *Best Practices* makes no effort to quantify its allegations, nor does it ask how much of the abuse that does occur is caused by Socratic dialogue and how much is caused by the personalities we sometimes allow to stand behind the podium.[185]

First, the matter of quantity. Professor Kingsfield walked Harvard's halls in the 1970s and 1980s,[186] but how many of his ilk haunt classrooms today? I have no more empirical evidence than does *Best Practices*,[187] but others believe this aspect of legal education has changed significantly since *The Paper Chase* appeared.[188] In 2003, Kingsfield's creator described Harvard Law

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129.28) reported the most perceived affective learning, followed by partial compliers (*M* = 114.83), and passive rejectors (*M* = *103.04*).".) Further, Burroughs warned that teachers who are not friendly or approachable are the *least* likely to notice their students' passive resistance. *Id.* at 470. However, the study also found that only 19% of the students sampled reported completely rejecting their teachers' requests. *Id.* at 468.

184. STUCKEY ET AL., *supra* note 1, at 111–12.

185. *See id.* at 138–39 (explaining, but not quantifying, how "the Socratic dialogue and case method is not a particularly effective tool for preparing lawyers for practice" because many law professors abuse it).

186. *See* JOHN JAY OSBORN, JR., THE PAPER CHASE 5 (2003); THE PAPER CHASE (Twentieth Century–Fox 1973); *The Paper Chase* (CBS television broadcast 1978–1979); *The Paper Chase* (Showtime television broadcast 1983–1986).

187. Somewhat to my surprise, the eight LAW SCHOOL SURVEYS OF STUDENT ENGAGEMENTS published so far do not discuss the issue of faculty abuse of students in the classroom. These are national surveys that regularly receive responses from more than 20,000 students each year. *See* LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2004 ANNUAL SURVEY RESULTS, STUDENT ENGAGEMENT IN LAW SCHOOLS: A FIRST LOOK 5 (2004); LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2005 ANNUAL SURVEY RESULTS, THE LAW SCHOOL YEARS: PROBING QUESTIONS, ACTIONABLE DATA 5–6 (2005); LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2006 ANNUAL SURVEY RESULTS, ENGAGING LEGAL EDUCATION: MOVING BEYOND THE STATUS QUO 7 (2006); LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2007 ANNUAL SURVEY RESULTS, STUDENT ENGAGEMENT IN LAW SCHOOL: KNOWING OUR STUDENTS 7 (2007); LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2008 ANNUAL SURVEY RESULTS, STUDENT ENGAGEMENT IN LAW SCHOOL: PREPARING 21ST CENTURY LAWYERS 6 (2008); LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2009 ANNUAL SURVEY RESULTS, STUDENT ENGAGEMENT IN LAW SCHOOL: ENHANCING STUDENT LEARNING 6 (2009); LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2010 ANNUAL SURVEY RESULTS, STUDENT ENGAGEMENT IN LAW SCHOOL: IN CLASS AND BEYOND 6 (2010); LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2011 ANNUAL SURVEY RESULTS, NAVIGATING LAW SCHOOL: PATHS IN LEGAL EDUCATION 3 (2011).

188. *See* John Jay Osburn, Jr., *A Change in Professor Kingsfiled—and His Creator*, HARV. L. BULL. (2003), http://www.law.harvard.edu/news/bulletin/2003/spring/classnotes_

School as "a caring, loving place that consider[s] the feelings of its old graduates, the kind of place that wants to relieve the tension of its old alums, the kind of place any father would be happy to have his daughter attend."[189]   In 2005, Robert M. Lloyd lamented that the "traditional Socratic method . . . has vanished from American law schools," that "[f]ew professors question students rigorously anymore," that "[i]n many courses, even . . . minimal preparation is no longer required on a daily basis," and that "many professors" tell their students in advance who they will call on.[190] Indeed, even *Best Practices* admits, "[M]ost contemporary law teachers think . . . hazing [to be] rude and pointless."[191]

Second, does Socratic dialogue increase faculty abuse of students, or is abuse a product of the technique's users?   *Best Practices* sometimes argues the former: "[T]he professor controls the dialogue, invites the student to 'guess what I'm thinking,' and then inevitably finds the response lacking."[192] It also makes the powerful point that the very process of asking a series of questions, however well meaning, reinforces the power status of the questioner at the expense of the questionee.[193] This use of Socratic dialogue creates an example within legal education of how power corrupts.[194]   We should remember that one of Socrates' goals was to show his audience that they were wrong, and such a goal easily can translate into an atmosphere of hostility and conflict.[195]

At the same time, *Best Practices* sometimes implies that abuse is a matter of a professor's personality. The book *twice* admits that a

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testimony.html (last visited Dec. 10, 2012) (noting how his feelings about Harvard Law School changed over the years, partly because the school became more responsible to its students).

189. *Id.* (celebrating admission of his daughter to Harvard Law School).

190. Robert M. Lloyd, *Hard Law Firms and Soft Law Schools*, 83 N.C. L. REV. 667, 681–83 (2005).   Unfortunately, Lloyd provides neither more documentation nor quantification than does *Best Practices*.

191. STUCKEY ET AL., *supra* note 1, at 219 (quoting Davis & Steinglass, *supra* note 6, at 266).

192. *Id.* at 112 (quoting RHODE, *supra* note 14, at 197).

193. *Id.* at 219–20 (citing Davis & Steinglass, *supra* note 6, at 266). Indeed, *Best Practices* points out that professional interviewers, such as pyschotherapists, tend to avoid questions and instead make statements on which the interviewee can comment. *Id.* at 220.

194. *See* JOHN BARTLETT, FAMILIAR QUOTATIONS 749–50 (Emily Morison Beck ed., 14th ed. 1968) (quoting John Emerich Edward Dalberg-Acton, who said, "Absolute power corrupts absolutely").

195. Long ago, a former colleague, Michael Allan Wolf, pointed out to me that the people of Athens rewarded Socrates with a bowl of hemlock.

professor can abuse students using any method of instruction,[196] and faculty abuse occurs in disciplines that do not use Socratic dialogue.[197] And while the book condemns Socratic dialogue, it also urges us to call on "women . . . [and members] of any other group that tends to be less impetuous in conversation."[198] Most powerfully, *Best Practices* does *not* urge us to bury forever Socrates and his method.[199]

Instead, the book merely asks us to "reduce" our use of Socratic dialogue[200] and to increase our use of the problem method, problem solving, group work, context-based instruction, and experiential learning.[201] However, any class—whether it uses the case method, the problem method, problem solving, or context-based instruction— offers opportunities for someone bent on publicly humiliating a student,[202] and an abuser can inflict just as much harm in the small confines of group work or experiential learning.[203]

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196. *See* STUCKEY ET AL., *supra* note 1, at 112, 216 n.630.
197. Nursing even has a formal "Incivility in Nursing Education" survey instrument. Cynthia M. Clark, *Faculty and Student Assessment of and Experience with Incivility in Nursing Education*, 47 J. NURSING EDUC. 458, 460 (2008). A composite of seven studies in that area found that 30% of 306 surveyed nursing students reported experiencing faculty who "exert[ed] rank or superiority over others" and 24% had teachers who made "condescending remarks or put-downs." *Id.* at 464, tbl.4. In a survey of seven business management courses at a large southeastern university, 228 students reported 107 instances of faculty rudeness, ridicule, sarcasm, and insults. Buttner, *supra* note 183, at 322, 327. A study of engineering students who had taken an introductory math or engineering course produced comments like "I was very put down from the first day and was told by my advisor that I should be a teacher, not an engineer." Barbara S.S. Hong & Peter J. Shull, *A Retrospective Study of the Impact Faculty Dispositions Have on Undergraduate Engineering Students*, 44 C. STUDENT J. 266, 271 (2010).
198. STUCKEY ET AL., *supra* note 1, at 217 (quoting Davis & Steinglass, *supra* note 6, at 278).
199. *See id.* at 211.
200. *Id.* at 132.
201. *Id.* at *passim.*
202. As mentioned earlier, *Best Practices* twice admits abuse can happen in any format. *Id.* at 112, 216 n.630.
203. Cynthia M. Clark quotes one nursing student as saying, "I hated clinical after that. I cried all the way home. If I had to sum up that year into one word—it would be fear," while another, speaking more generally of nursing faculty, said, "Those old power-hungry women have been demeaning students for too long . . . . They put so much pressure on you and you're constantly under their thumb—being tested and forced to jump through hoops." Cynthia M. Clark, *Student Voices on Faculty Incivility in Nursing Education: A Conceptual Model*, 29 NURSING EDUC. PERSP. 284, 286–87 (2008).

Best Practices also asks us to change the tone of Socratic dialogues, urging us to "create and maintain student-friendly climates .... [Because] [s]tudents need to feel safe and free from fear of in-class humiliation."[204] To do this, the book suggests that we must take the following steps:

> (1) Develop a classroom "atmosphere ... of mutual respect and collaborative learning";[205]
> (2) Create a "supportive teaching and learning environment";[206]
> (3) "[M]ake students feel welcome and included";[207]
> (4) "[S]olicit[] alternative viewpoints and opinions from students; prais[e] student work; call[] on students by name; pos[e] questions and encourag[e] students to talk; us[e] humor; hav[e] discussions outside of class; and ask[] students how they feel about assignments";[208]
> (5) "[T]ake delight in teaching," as shown by our "attitude, enthusiasm, and passion";[209]
> (6) "Reassure flustered students and move to another student if a student is unprepared";[210]
> (7) "Do not use successive questions and answers that leave students feeling passive, powerless, and unknowing";[211]
> (8) "Use Socratic dialogue to illuminate lessons, not to expose students' lack of understanding";[212] and
> (9) Do "not intentionally use Socratic dialogue as a tool for humiliating or embarrassing students."[213]

I agree. Earlier, I encouraged both new and experienced faculty to read these parts of the book.[214] I long have tried to teach as *Best Practices* suggests, and I have spent considerable time reading empirical studies that show these suggestions improve undergraduate

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204. STUCKEY ET AL., *supra* note 1, at 112.
205. *Id.*
206. *Id.* at 118 (quoting Hess, *supra* note 11, at 92).
207. *Id.* at 121.
208. *Id.* at 123 (quoting Hess, *supra* note 11, at 101). These are known as "immediacy techniques."
209. *Id.* at 124–25 (quoting Hess, *supra* note 11, at 104).
210. *Id.* at 219.
211. *Id.*
212. *Id.* at 220.
213. *Id.* at 216.
214. *See supra* text accompanying note 17.

learning.[215] My point simply is that *Best Practices'* denunciations are less about Socratic dialogue and more about the people who use it, and the attitude they—I mean "we"—bring to the classroom.[216] This brings me back to Bain's intensive study of great college teachers, the study that found that many used Socratic dialogue:

> I cannot stress enough the simple yet powerful notion that the key to understanding the best teaching can be found not in particular practices or rules but in the *attitudes* of the teachers, in their *faith* in their students' abilities to achieve, in their *willingness* to take their students seriously and to let them assume control of their own education, and in their *commitment* to let all policies and practices flow from central learning objectives and from a mutual respect and agreement between students and teachers.[217]

Bain reinforces his point by describing a number of teachers who were well-regarded by some students, but who left many others angered and frustrated.[218] Students focused on the attitudes of these faculty: they did not care about students, they were rude and obsessed with control, they used a combative tone when they spoke, and they wanted to make students look bad.[219] *Best Practices* would have been a better book had it spent more time discussing how we can get such faculty out of the classroom altogether and less time denouncing Socratic dialogue.[220]

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215. I shall discuss those studies extensively in the next article in this series.
216. *See* STUCKEY ET AL., *supra* note 1, at 216, 218–20.
217. BAIN, *supra* note 78, at 78–79. For a summary of Bain's methodology, *see supra* text accompanying notes 169–72.
218. BAIN, *supra* note 78, at 79.
219. *Id.* at 137–38.
220. For example, there is an easy (and relatively cheap) way to discourage classroom abuse by bad teachers *and to protect good teachers* from false or spurious claims of abuse and discrimination. Police departments put cameras in squad cars and interrogation rooms, while railroads install cameras on the front of diesel locomotives. Few things more discourage frivolous allegations of police brutality than a video of an obviously intoxicated client swinging at an officer; a video of a driver driving around the crossing gates just in front of a train is an excellent defense against tort claims. There is considerable literature on how to evaluate teaching. *See, e.g.*, NANCY VAN NOTE CHISM, PEER REVIEW OF TEACHING: A SOURCEBOOK 2–3 (2d ed. 2007).

3. Separating Socratic Dialogue from the Case Method

Many of *Best Practices'* impassioned attacks on Socratic dialogue actually concern "the Socratic dialogue and case method."[221]   The book describes this as a series of "one-on-one dialogues with individual students in which the instructor questions students about the facts and legal principles involved in appellate court decisions,"[222] and in which students summarize the facts of the case, "comment on the issues, arguments and *ratio decidendi,*" and "discuss the case critically" at times.[223]

Best Practices' definition limits Socratic dialogue to the discussion of cases—or more accurately, of appellate judicial opinions—thereby excluding the very things it complains that *we* exclude, such as "the ethical–social issues embedded in the cases under discussion"[224] and "the underlying social forces that are interacting to determine the outcome of events in a field of law."[225]   I regularly use Socratic dialogue to explore the ethics of invoking the Statute of Frauds when a client admits making a contract, the role that race plays in setting interest rates for new car loans,[226] or how a lawyer's duty of confidentiality may extend even to someone the attorney did not take as a client.[227]

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221. STUCKEY ET AL., *supra* note 1, at 132.
222. *Id.* at 133.
223. *Id.* at 135 (quoting Andrew Petter, *A Closet Within the House: Learning Objectives and the Law School Curriculum, in* ESSAYS ON LEGAL EDUCATION 76, 86 (Neil Gold ed., 1982)).
224. *Id.* at 140 (quoting SULLIVAN, *supra* note 2, at 140). The irony is that the original Socratic dialogues were all about ethics and morality.
225. *Id.* at 136 (quoting John S. Elson, *The Regulation of Legal Education: The Potential for Implementing the MacCrate Report's Recommendation for Curriculum Reform,* 1 CLINICAL L. REV. 363, 384 (1994)).
226. *See* CONSUMER FED'N OF AM., THE HIDDEN MARKUP OF AUTO LOANS: CONSUMER COSTS OF DEALER KICKBACKS AND INFLATED FINANCE CHARGES *passim* (2004), *available at* http://www.consumerfed.org/pdfs/autofi-report%20.pdf (describing how new car dealers systematically charge higher interest rates to black and Hispanic buyers, regardless of creditworthiness); *see also* Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations,* 104 HARV. L. REV. 817 *passim* (1991); Mark A. Cohen, *Imperfect Competition in Auto Lending: Subjective Markup, Racial Disparity, and Class Action Litigation* (Vanderbilt Univ. Law Sch. Law and Econ., Working Paper No. 07-01, 2006), *available at* http://ssrn.com/abstract=951827.
227. *See* MODEL RULES OF PROF'L CONDUCT R. 1.18(b) ("Even when no client–lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation . . . ."); *id.* R. 1.18(c) (indicating that a lawyer who has had discussions with prospective client shall not

Similarly, *Best Practices* criticizes the Socratic dialogue and case method for failing to address how the facts and context of a case test the meaning and legitimacy of the rule,[228] and for failing to teach legal rules in context.[229] Again, this is because *Best Practices'* definition would let us address only the contents of the judicial opinion.[230] Long ago, a devout user of Socratic dialogue disagreed with that approach, telling me that the secret to good teaching was to do something that's *not* in the book.[231] I do. My reading assignments begin by telling students how lawyers use the doctrine we're about to study, how the doctrine may affect their clients, and if relevant, how the situation in which the case in our book arose.[232] I use Socratic dialogue to work through page-long hypotheticals in class and to talk about legal rules in context.[233] In twenty-eight years of teaching, I have yet to be arrested by the Socratic-dialogue police for violating *Best Practices'* narrow definition. And some of *Best Practices'* suggestions for improving the Socratic dialogue and case method are the very techniques excluded by the book's definition, such as using "open hypotheticals to demonstrate complexity and indeterminacy of legal analysis," using "closed hypotheticals" to link a case's rules with those studied earlier, exploring the meaning of terms within a statute used in the case, discussing other rules that the court might

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represent a client "with interests materially adverse to those of [the] prospective client").

228.   *See* STUCKEY ET AL., *supra* note 1, at 214–15.

229.   *See id.* at 137 (quoting RHODE, *supra* note 14, at 197–98).

230.   *See supra* note 222 and accompanying text.

231.   I am ever-grateful to Professor Art LeFrancois for that insight.

232.   For example, when teaching the landmark standing case of *Allen v. Wright*, 468 U.S. 737 (1984), which found black parents in Virginia lacked standing to sue the Internal Revenue Service for treating as deductible donations to all-white private schools created to avoid integrating local public schools, I show students Lawrence Schiller's immortal photo of teenage Hazel Bryan venting hatred at Elizabeth Eckford as the latter walks toward Little Rock High School. *See* DAVID MARGOLICK, ELIZABETH AND HAZEL: TWO WOMEN OF LITTLE ROCK 60–61 (2011). I also describe how some areas of Virginia shut down the public school system entirely rather than obey *Brown v. Board of Education*, 347 U.S. 483 (1954). *See* CHRISTOPHER BONASTIA, SOUTHERN STALEMATE: FIVE YEARS WITHOUT PUBLIC EDUCATION IN PRINCE EDWARD COUNTY, VIRGINIA 2 (2012).

233.   For example, to explore the difference between having a legal right and actually using it, I ask students what would happen if a small-town grain elevator company invoked the Statute of Frauds as a defense against a farmer suing it for breach of contract. To show students that we sometimes have a duty to persuade courts to adopt new rules, I ask how a lawyer might persuade a court to recognize promissory estoppel as an exception to the same Statute of Frauds.

have used, and using the case's facts and context to "test the contours and legitimacy of the rule."[234]

Similarly, *Best Practices'* complaint that the Socratic dialogue and case method overemphasizes litigation[235] should be directed at the case method, which by definition, concerns litigation,[236] and faculty hiring committees who treat federal clerkships as the only acceptable seals of approval.[237] *Best Practices* also forgets that while appellate judicial opinions deprive students of seeing the "real world of factual complexity and indeterminacy,"[238] they do show students what a rule "in the wild" can look like.[239] Finally, the case method is largely to blame for part of *Best Practices'* unfavorable comparison of doctrinal classes to LR&W classes.[240] The book praises LR&W classes for requiring students to "*construct* written products through an ongoing process."[241] Of course, doctrinal courses also expect students to build a written product through the course of the semester—the classic outline. Unfortunately, the case method encourages students to see

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234. STUCKEY ET AL., *supra* note 1, at 214–15.

235. *Id.* at 137 (citing Elson, *supra* note 225, at 385).

236. Actually, our use of the case method *underemphasizes* litigation in a curious but important way. We spend considerable time helping students identify and understand the elements of the rule in a case, but we do not help students connect those elements and sub-elements to how litigators use them. Once a student has recited the elements of a doctrine discussed in a judicial opinion, it's usually easy to ask the student to use those elements to create lists of the facts that the litigator needs to find, the factual allegations required in the complaint, the witnesses we need to call at trial, the questions we need to ask those witnesses, and the documents we need to introduce. Those elements and sub-elements also will indicate what our jury instructions need to say. For an excellent, short description of how a lawyer investigates and develops a case see Don G. Holloday & Timothy D. DeGuisti, *Working the Case*, 82 OKLA. B.J. 2903, 2903–07 (2011) (providing an excellent short description of how a lawyer investigates and develops a case).

237. Clerkships are valuable, but they are about litigation. Unfortunately, there is no equivalent merit badge for transactional experience.

238. STUCKEY ET AL., *supra* note 1, at 136 (quoting Elson, *supra* note 225, at 384–85). This discussion does attribute this problem to current textbooks' fixation with appellate cases, but *Best Practices* does not explain why it consistently links the focus of textbooks on appellate judicial decisions with Socratic dialogue. *See id.* at 136–37.

239. *See id.* at 137 (citing RHODE, *supra* note 14, at 197–98) (stating that Socratic dialogue and case method "present[s] disputes in highly selective and neatly digest formats" that deprive students of "encounter[ing] a 'fact in the wild,' buried in documents or obscured by conflicting recollections").

240. *See id.* at 130–32 (discussing the limitations of the case method for instruction as opposed to legal writing courses).

241. *Id.* at 131 (quoting Judith Wegner, Theory, Practice, and Course of Study–The Problem of the Elephant 31 (2003) (unpublished manuscript) (on file with author)).

judicial opinions as the basic building blocks of that outline, and we need to work hard to overcome that obstacle.[242]

4. Blaming Socratic Dialogue for the Sin of Class Size

About ten years ago, I left a seventy-five minute Contracts class feeling proud of myself. I had called on four students; another seven or eight had volunteered comments or asked questions; three or four more had stayed after class to talk with me. In other words, I knew I had connected with about fifteen students. Just as I was patting myself on the back, I had a terrible thought: What about the other sixty? Had I engaged them in any meaningful way?

Consequently, I understand why *Best Practices* tells us that most learning in a typical law school class is "vicarious."[243] Socratic dialogue directly affects only one student at a time,[244] and students know the odds of having to speak in class are slim. Instead, we expect them to learn by listening to and thinking about what others are saying, by trying to answer the questions we are asking the student in the hot seat, and by comparing their mental answers with the answers the student on call generates.[245] *Best Practices* contrasts this approach with LR&W classes, in which faculty "attend very closely to the *individual* student in a sustained fashion" and require students "to take responsibility" instead of remaining "*passive observers*."[246] These are valid criticisms—of the number of students we put in a classroom.[247] Every additional student in class is one

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242. I often see first-year outlines, which are merely one-paragraph summaries of each case, with little effort to synthesize those cases (and statutes) into a coherent doctrine. The problem method is an excellent way to do this, and *Best Practices* correctly endorses it. *See id.* at 143. Another approach is to distribute/display for each class session an agenda that uses concepts or rules (rather than cases) as its organizing themes.

243. *Id.* at 135 (citing Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 351–53 (2001)); *see also id.* at 223 (praising faculty for avoiding Socratic dialogue and case method and instead "endeavoring to draw a substantial portion of the class into active participation" (quoting Wegner, *supra* note 241, at 34)).

244. *Id.* at 134–35 (citing Petter, *supra* note 223, at 86).

245. In one way, this makes perfect sense. Much of what lawyers do is listening closely to other people and thinking about the significance of what those people are saying. Unfortunately, this takes tremendous energy and focus. In real life, the client's needs provide the motivation, but in law school, there is little short-term downside to students who let their minds wander.

246. STUCKEY ET AL., *supra* note 1, at 131 (quoting Wegner, *supra* note 241, at 31).

247. *See supra* p. 43; *infra* note 249.

more student who must listen when another student speaks, whether as part of a Socratic dialogue or the methods that *Best Practices* encourages us to use, such as "brain-storming," "demonstrations," or "free group discussions."[248] Even worse, the size of a typical law school class (especially in required courses) prevents us from providing feedback and requiring accountability. *Best Practices* is correct to praise LR&W classes for giving students one-on-one feedback.[249] But what is difficult and exhausting for an LR&W professor with two sections of twenty students each is impossible for a doctrinal professor with more than one hundred.

Best Practices says little about class size. Its opening pages assure us that:

> Many of our recommendations do not have any cost or time implications, and others have none beyond the initial effort involved in making the transition from current practices. Certainly, schools that decide to offer the best possible learning experiences for their students may want to have smaller student–faculty ratios than today's typical law school.[250]

The book also tell us that "law schools have not had the teaching resources of our other graduate programs,"[251] that "large classes *tend* to ignore" the LR&W practice of "attend[ing] very closely to the individual student in a sustained fashion,"[252] and that large classes diminish "the potential value of the Socratic dialogue and case

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248. *See* STUCKEY ET AL., *supra* note 1, at 132.

249. My very dedicated LR&W colleagues are thoroughly drained at the end of a week of conferences, and they average about forty students each. I do not know how I would do the same for the seventy-four Contracts students and forty-three Sales and Leases students I taught last semester. At fifteen minutes a conference, I would need twenty-nine hours and fifteen minutes each week, and that would not include the time spent preparing for each conference.

Years ago, my law school experimented with a Legal Analysis class that would include student papers. One semester I did assign three five to seven page papers and an essay exam (all with written comments) with forty-five students; the next year it was two papers and an essay exam with fifty-five students. Each time I also had a 75-student Contracts class. I managed to write comments on every paper; I was not able to meet with students. Mercifully, time has deleted most memories of that semester.

250. STUCKEY ET AL., *supra* note 1, at 4. The book also tells us the most student-centered American law schools have relatively modest budgets. *Id.* at 4 n.12.

251. *Id.* at 4 (quoting Talbot D'Alemberte, *Talbot D'Alemberte on Legal Education*, 76 A.B.A. J. 52, 52 (1990)).

252. *Id.* at 131 (emphasis added) (quoting Wegner, *supra* note 241, at 31–32).

method."[253]   The modesty of these criticisms is striking.   To *Best Practices*, packing eighty or more students in a classroom only tends to detract from the attention we can give each student and merely "diminish[es]" "the potential value of the Socratic dialogue."[254]   As for teaching resources, *Best Practices* says only that we "have not had the teaching resources" of other programs, ignoring the fact that graduate medical schools receive more than $3 billion a year from the federal government to cover teaching costs.[255]   *Best Practices* pulls few punches when it discusses Socratic dialogue, but it treats the problem of class size with velvet gloves.[256]

Moreover, the book completely sidesteps the problem of class size just when size becomes most crucial: Chapter 5's discussion of experiential courses.[257]   Early on, Chapter 5 describes experiential learning in an Evidence class, although this exercise turns out to be nothing more than having one student state the arguments a prosecutor would make, another state the defense's arguments, and a third decide who should win.[258]   Presumably, the other students are learning vicariously by listening to this exchange, but *Best Practices* only complains about that in regard to Socratic dialogue.[259]   Later, the book promises explanations of how to do experiential learning in Criminal Law and Civil Procedure (both traditional, large classes) and traditional courses "regardless of class size."[260]   The two cited sources have some excellent ideas, but they do not even purport to attempt the kind of learning in which faculty teaching a large class

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253.   *Id.* at 134; *see also id.* at 182 (quoting Jay M. Feinman, *Simulations: An Introduction*, 45 J. LEGAL EDUC. 469, 472 (1995)) ("[L]arge basic course[s] . . . [can] make students aware of the importance of skills in the lawyering process and of the possibility of treating skills learning as a subject requiring the same kind of conceptual generalization that helps one understand other subjects in law school.").

254.   *Id.* at 131, 134 (emphasis added).

255.   Yes, that's $3 *billion* a year.   Richard M. Knapp, *Complexity and Uncertainty in Financing Graduate Medical Education*, 77 ACADEMY MED. 1076, 1077 tbl.1 (2002); *see supra* text accompanying notes 251–62.

256.   *Compare* STUCKEY ET AL., *supra* note 1, at 133–41 (detailing the shortfalls of the Socratic method), *with id.* at 131, 146 n.476, 166 n.541 (suggesting that alternative teaching methods should be implemented, regardless of class size).

257.   *See id.* at 165–205.

258.   *Id.* at 166 (citing Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51, 63 (2001)).

259.   *Id.* at 135 (citing Schwartz, *supra* note 243, at 353).

260.   *Id.* at 166 n.541.

"attend[] very closely to the *individual* student in a sustained fashion"[261] and provide teaching "devoted to a single student."[262]

Eventually, *Best Practices* admits, "The truth of the matter is that few, if any law schools, have programs or resources to develop the full range of the skills needed for law practice to the degree of proficiency expected of practicing lawyers."[263]   The truth of the matter is that this statement hides an even more serious problem. The truth of the matter is that one semester of experience in a clinic, externship, or simulation course[264] only begins to "develop the full

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261. *Id.* at 131 (quoting Wegner, *supra* note 241, at 31).
262. *Id.* at 132. *Best Practices* cites two sources for these examples. *Id.* at 166 n.541. The "examples from courses in Criminal Law and Civil Procedure" are said to come from Deborah Maranville, *supra* note 258, at 63. Professor Maranville has wonderful ideas about what we *should* do in first year classes. *Id.* at 64 (explaining how beneficial it would be if each first-year law student "negotiated a personal injury claim in Torts class," "interviewed a client about a contract for a business transaction in Contracts class," "and spent four hours helping interview unrepresented litigants in connection with . . . landlord–tenant cases . . . in Property [class]"). But that is not what she actually does. She quite rightly encourages first-year students to participate in law school clinics that train them for simple client contact. *See id.* at 63–64. That's an excellent idea, but (a) the clinics are taught by other faculty, and (b) she does not suggest that they can handle even a majority of the students in her first-year class. She also suggests using simulation exercises in *upper* class courses, whose size she does not mention, and "service-learning field placements," which presumably would require other faculty to supervise. *Id.* at 65 tbl.1.

   The ideas that she and colleague Jacqueline McMurtrie *have* implemented have value, but they are far from *Best Practices*' calls for one-on-one instruction and "extensive feedback." McMurtrie has each student portray a prosecutor, a defense counsel, and an observer in an out-of-class exercise, with students turning in "a worksheet" and "a journal entry." *Id.* at 63. There is no mention of professorial feedback. *Id.* Maranville has students argue or act as judge in a hypothetical case and draft a simple complaint and answer, for which feedback is "a short checklist and class discussion." *Id.* Her goal for that latter exercise is merely to help students understand the concept of "stating a claim." *Id.* Neither professor purports to show how simulation-based courses or in-house clinics can be taught as part of a seventy-person class.

   Best Practices tells us that the other source, William Shepard McAninch, *Experiential Learning in a Traditional Classroom*, 36 J. LEGAL EDUC. 420, 421–22 (1986), explains how we can use experiential education "regardless of class size." That is true, and Professor McAninch has some great ideas. But they are designed only to "let the students witness and *vicariously* experience the factual predicate of the issues" in some of the cases they study," *id.* at 425 (emphasis added), and the author frankly states that even when divided into groups, some classes are too large to critique papers and oral presentations. *Id.* at 421.
263. STUCKEY ET AL., *supra* note 1, at 171.
264. *Best Practices* describes these as simulation-based courses, in-house clinics, and externships. *Id.* at 166.

range of the skills needed . . . to the degree of proficiency expected of practicing lawyers."[265]   And how many law schools have the resources to provide even *two* such experiences for each student? Put another way: The offensive line coach at the University of Nebraska–Lincoln (one of my *alma maters*) is responsible for teaching ten students how to entertain people for about three hours on a dozen Saturday afternoons a year.   In Contracts, I am responsible for teaching seventy-five students how to structure relationships that involve their clients' families, homes, businesses, investments, and freedom.[266]   Telling   me   that   "many"   of   *Best   Practices'* recommendations "do not have any cost or time implications" and that others merely require the energy needed for change does not help. [267]

I would be more patient with *Best Practices* on this point if the book did not chide us for not following the path of "medical schools," which use "problem-based education" to present students "with the very situations they will face in their elected professional field."[268]   That's not quite right. According to George Washington University's Dr. Michael E. Whitcomb, "Medical schools are not responsible for preparing doctors for practice and have not been for decades."[269] What prepares doctors for practice is graduate medical education,[270] and while law students pay most of the cost of legal instruction (thus limiting the size of a school's faculty), the majority of funding for training residents in graduate medical programs comes from the federal government.[271] In 2002, Medicare alone paid $2.6 *billion* for "direct" graduate medical education,[272] while the Veterans Health Administration paid for 9% of all residency positions.[273] Back in 1999, Medicare was paying teaching hospitals about *$70,000 per year per trainee,* which would have produced a $35 million annual

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265.   *Id.* at 171.
266.   Plea bargains in criminal law are a form of contract. Cuffley v. State, 7 A.3d 557, 563 (Md. 2010).
267.   STUCKEY ET AL., *supra* note 1, at 4. The book also tells us the most student-centered American law schools have relatively modest budgets. *Id.* at 4 n.12.
268.   *Id.* at 145.
269.   Michael E. Whitcomb, Commentary, *Flexner Redux 2010: Graduate Medical Education in the United States,* 84 ACADEMIC MED. 1476, 1477 (2009).
270.   *Id.* at 1476–77.
271.   *Id.* at 1478.
272.   Knapp, *supra* note 255, at 1077 tbl.1.
273.   *Id.* at 1083 n.2.

budget for a law school of 500 students,[274] even if its students did not pay a dime in tuition or fees (and that was twelve years ago!). Such a budget would let me convert my seventy-five-person Contracts class into a seven- or eight-student course teaching doctrine through drafting exercises and giving plenty of individualized attention.[275] My failure to do so is not the fault of the Socratic approach.[276]

Best Practices does give a list of techniques (each with a one or two sentence description) we can use to reduce our reliance on the Socratic dialogue and case method: "brain-storming," "buzz groups," "demonstrations," "free group discussion," "group tutorial[s]," "individual tutorial or 'tutorial,'" "problem-centered groups," "programmed learning," the "syndicate method," "synectics," and the "T-group method."[277] Some of them are subject to the same listen-to-other-people, "vicarious learning" criticism for which *Best Practices* condemns Socratic dialogue.[278] Most of them involve students working in groups of up to fourteen.[279] That has advantages: students often are more willing to talk in small groups than in front of the entire class, there is some peer pressure for everyone to contribute to the discussion, and there is time for each student to say something. However, *Best Practices* does not point out that group work has its own problems. Some groups will discuss the latest sporting event; some unintentionally will go astray; some will be dominated by an over-talkative student; some will break down because of interpersonal dynamics.[280] *Best Practices* hints at these problems

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274. Stephan Ariyan, *The Rising Level of Medical Student Debt: Potential Risk for a National Default*, 105 PLASTIC & RECONSTRUCTIVE SURGERY 1457, 1459 (2000) (citing Arnold M. Epstein, *U.S. Teaching Hospitals in the Evolving Health Care System*, 273 J. AM. MED. ASS'N 1203, 1206 (1995)).

275. *See* discussion *supra* Part D.4.

276. To be fair, *Best Practices* was written before the dean of the University of Texas School of Law gave thirteen faculty (including himself) "loans" totaling about $4.5 million. Tierney Plum, *A Talent Race Turned Ugly*, NAT'L JURIST, Feb. 2012, at 16. The loans were to be forgiven to faculty who stayed at Texas for five years. *Id.* at 17; *cf.* STUCKEY ET AL., *supra* note 1, at 4 (explaining how law schools that want to provide the best learning experiences for students "might expect their faculties to devote more time to educating students").

277. *See* STUCKEY ET AL., *supra* note 1, at 132–33.

278. *Id.* at 135. For example, brainstorming is "[a]n intensive discussion situation in which spontaneous suggestions as solutions to a problem are received uncritically[,]" *id.* at 132, i.e., in which a series of students each talk briefly while others listen. In demonstrations, "The teacher performs some operation . . . while the students watch." *Id.*

279. *Id.* at 132–33.

280. I will explore the challenges of effective group work in the next article in this series.

when it speaks of "highly structured cooperative learning experiences,"[281] but it does not explain how dividing my seventy-five Contracts students into *sixteen* groups of four will let me "attend[] very closely to the *individual* student in a sustained fashion" and require students to "take responsibility" instead of remaining "passive observers."[282]

5. Socratic Dialogue, the Hippocratic Oath, and Best Practices' Goal of Painless Learning

Best Practices criticizes Socratic dialogue because it prevents us from creating "effective and healthy teaching and learning environments."[283] This concern about healthy environments makes sense. People learn best when they can concentrate on learning; unhealthy environments create fear and anxiety that distract or even disable.[284]

However, *Best Practices* seems to regard a "healthy" learning environment as a painless one. The book tells us (in full italics) that "*[t]he first rule of ethical teaching is to do no harm to students*,"[285] an admonition supposedly drawn from the Hippocratic oath.[286] The book further says that "[t]raditional teaching methods and [the] beliefs that underlie them undermine the sense of self-worth, security, authenticity, and competence among students."[287] In particular, "Law students get the message, early and often, that what they believe, or believed, at their core, is unimportant—in fact 'irrelevant' and inappropriate in the context of legal discourse—and their traditional ways of thinking and feeling are wholly unequal to the task before them."[288]

The book urges us to make clear that "all questions are legitimate";[289] when students are unprepared, we simply should

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281. STUCKEY ET AL., *supra* note 1, at 120 (discussing Caroline J. Buckner, *Realizing Grutter v. Bollinger's "Compelling Educational Benefits of Diversity"-Transforming Aspirational Rhetoric into Experience*, 72 UMKC L. REV. 877, 924–25 (2004)).

282. *See id.* at 135 (quoting Wegner, *supra* note 241, at 31).

283. *Id.* at 110 (citing Hess, *supra* note 11, at 87).

284. *See generally* Hess, *supra* note 11 (discussing the effects of stressful law school learning environments and ways that teachers can minimize that stress).

285. STUCKEY ET AL., *supra* note 1, at 111 (citing JAMES M. BANNER, JR. & HAROLD C. CANNON, THE ELEMENTS OF TEACHING 37 (1997)).

286. *See id.* at 111.

287. *Id.* at 139.

288. *Id.* (quoting Krieger, *supra* note 15, at 125).

289. *Id.* at 30 (quoting BANNER & CANNON, *supra* note 285, at 37).

"move on to another student."[290]   *Best Practices* sums up its philosophy in one phrase: we are to keep students "free of *all* threats to their well-being."[291]

I recognize that law professors inflict unnecessary pain on students. I agree we should reduce that as much as possible.[292]   I have no conscious desire to hurt students. But *Best Practices'* rhetoric goes too far. Except for those who believe education is "memorize-it-and-regurgitate-it-on-the-exam," learning is not a process that can be devoid "of all threats to [one's] well-being," any more than medicine can always be free of pain.[293]   Real learning requires people to question what they already believe and to recognize when what they already know will not help them solve a problem.   Real learning often requires people to change, to face failure, and sometimes to experience failure. And unfortunately, really learning *law* involves its own stresses and strains.

Let me begin with the book's claim that the Hippocratic oath says, "[F]irst, . . . do no harm."[294]   One easily might interpret that to mean nothing we do should cause our students any pain, stress, or discomfort. But the original oath used very different language. It required a doctor to make the following promise: "I will apply dietetic measures for the benefit of the sick according to my ability and judgment; I will keep them from harm and injustice."[295]   The "no harm" clause meant the doctor was to guard against evils that patients might inflict on *themselves*, i.e., eating the wrong foods or the wrong

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290. *Id.* at 219 (citing Davis & Steinglass, *supra* note 6, at 266).

291. *Id.* at 30 (emphasis added) (quoting BANNER & CANNON, *supra* note 285, at 37).

292. *See, e.g., id.* at 112 (quoting RHODE, *supra* note 14, at 197) (discouraging faculty from "invit[ing] the student to 'guess what I'm thinking,' and then inevitably find[ing]" fault with the student's answer); *id.* at 216 (discouraging faculty from "intentionally us[ing] Socratic dialogue as a tool for humiliating or embarrassing students"); *id.* at 219 (encouraging faculty to avoid "successive questions and answers that leave students feeling passive, powerless, and unknowing"); *id.* at 220 (encouraging faculty to "[u]se Socratic dialogue to illuminate lessons, not to expose students' lack of understanding").

293. *Id.* at 30 (quoting BANNER & CANNON, *supra* note 285, at 37).

294. *Id.* at 111 (citing BANNER & CANNON, *supra* note 285, at 37).

295. LUDWIG EDELSTEIN, THE HIPPOCRATIC OATH: TEXT, TRANSLATION, AND INTERPRETATION, *reprinted in* ANCIENT MEDICINE: SELECTED PAPERS OF LUDWIG EDELSTEIN 6 (Owsei Temkin & C. Lilian Temkin eds., C. Lilian Temkin trans., 1967); *Greek Medicine*, U.S. NAT'L LIBRARY OF MED., U.S. NAT'L INST. OF HEALTH, http://www.nlm.nih.gov/hmd/greek/greek_oath.html (2002) (last updated Feb. 7, 2012). Another part of the oath banned the use of deadly drugs.

amount of food.[296] Controlling diet (and administering non-deadly drugs) was about all a physician could do under the oath.[297] The Hippocratic doctor did not even have to decide if he should inflict the short-term pain of surgery so he could ease long-term pain. The oath commanded him to pass the patient to a surgeon.[298]

Modern versions of the Hippocratic oath do not talk of avoiding harm.[299] If the oath barred any infliction of pain, doctors would have to abandon chemotherapy, knee replacement surgery, and even efforts to persuade patients to stop smoking.[300] Those treatments involve considerable pain in the short term, but in the long run, they heal. The Hippocratic oath is not about protecting patients from *all* pain, stress, or discomfort.[301]

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296. EDELSTEIN, *supra* note 295, at 23. Edelstein argues that physicians who took the oath believed most illnesses were caused by "opulent living" and "extravagant" diet, so that their duty was to prevent patients from harming themselves through poor eating habits. *Id.* at 23–25. The parallel for law faculty would be mandatory training in recognizing addiction to and abuse of alcohol and other drugs, potential for suicide, and mental illness among our students–and among each other.

297. The oath required its takers to swear they would not practice surgery, even when a patient was suffering from kidney stones. *Id.* at 6 ("I will not use the knife, not even on sufferers from stone . . . ."); *id.* at 98 (A physician "can do nothing but give drugs"); *id.* at 30 (explaining that the Hippocratic oath created dichotomy between medicine and surgery).

298. *See id.* at 6 ("I will not use the knife, not even on sufferers from stone, but will withdraw in favor of such men as are engaged in this work.").

299. One version includes promises to "apply, for the benefit of the sick, all measures [that] are required. . . . , to remember that . . . warmth, sympathy, and understanding may outweigh the surgeon's knife or the chemist's drug, [and to] not be ashamed to say 'I know not'." Shawna S. Baker, *Where Conscience Meets Desire: Refusal of Health Care Providers to Honor Health Care Proxies for Sexual Minorities*, 31 WOMEN'S RTS. L. REP. 1, 13 (2009) (quoting Louis Lasagna, Dean of the School of Medicine at Tufts University (1964)). The Declaration of Geneva includes promises to "practise [sic] my profession with conscience and dignity, [to make] the health of my patient . . . my first consideration, [to] maintain the utmost respect for human life[,]" and to refrain from violating "human rights and civil liberties," but it does not include any reference to harm. *WMA Declaration of Geneva*, WORLD MEDICAL ASSOCIATION, http://www.wma.net/ en/30publications/10policies/g1/index.html (last visited Dec. 10, 2012).

300. *See* STEVEN H. MILES, HIPPOCRATIC OATH AND THE ETHICS OF MEDICINE 144 (2004) ("A Physician could not perform any surgery or administer any drug (even one dose of penicillin that could cause a lethal allergic reaction) if he or she was obliged to avoid the chance of harm. The pursuit of therapy—any therapy—represents a decision that the probability and magnitude of benefits outweigh the chance and severity of harms.").

301. *Id.*

Of course, the oath is an important reminder that just as doctors are to use their knowledge and training "for the benefit of the sick,"[302] we have a duty to put our students' training ahead of our own egos.[303] I have no respect for faculty who try to make themselves look big by using Socratic dialogue to make their students look small, or who teach largely so that they can hear the sound of their own voices.[304] The oath also requires doctors to avoid inflicting unnecessary pain on patients, a sin we often commit unintentionally,[305] and *Best Practices* correctly criticizes us for that.[306] But *real* learning often involves pain and stress from which we are unable to shield our students. As T.H. White's version of King Arthur confides to his best friend near the end of a life-long struggle to bring peace and justice to Olde Englande: "Don't ever let anybody teach you how to think, Lance: it is the curse of the world."[307]

Why is learning sometimes painful? First, real learning requires us to change what's in our heads. Ken Bain writes that all of us have built mental structures that explain (at least for us) how the world works; when we encounter something new, we interpret it so that it

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302. The original oath uses this phrase twice. EDELSTEIN, *supra* note 295, at 6.
303. *See* Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 128 (1994) ("The process of teaching law involves more than the study of cases, statutes, rules and regulations. . . . [m]ore important, it also involves qualities of humaneness, civility, and respect for others.").
304. A former colleague, Steven Fishman, once suggested that a good way to judge a faculty's collective teaching ability would be to walk past each classroom and determine the percentage from which you heard a professor speaking and the percentage from which you heard a student's voice.
305. For example, the best way to reduce anxiety is to prepare. *See, e.g., Reducing Test Taking Anxiety*, TEST TAKING TIPS.COM, www.testtakingtips.com/anxiety/index.htm; *Test Anxiety*, UNIV. OF S. FLA. COLL. OF EDUC., www.coedu.usf.edu/ zalaquett/Help_Screens/TestAnxiety.html (last visited Dec. 10, 2012); *Reducing Test Taking Anxiety*, UNIV. OF MONT., life.umt.edu/testing/Preparation/testanxiety.php (last visited, Dec. 10, 2012); *Anxiety: How to Cope with It*, UNIV. OF FLA. COUNSELING & WELLNESS CTR., www.counseling.ufl.edu/cwc/Anxiety-How-to-Cope-with-It.aspx (last visited Dec. 10, 2012) ("PREPARE! PREPARE! PREPARE! The more preparation you have done, the less anxious you will be."). But it took me a decade of teaching to realize that I could reduce the classroom anxiety of at least some students simply by providing them, in advance, the main questions and hypotheticals that we would discuss. We also know that even students who properly prepare still get so anxious in class because we might call on them that they have trouble focusing on the material. I try to reduce that needless anxiety by announcing, at the start of class, the three or four students I will try to call on that day.
306. STUCKEY ET AL., *supra* note 1, at 111–12.
307. T.H. WHITE, THE ONCE AND FUTURE KING 455 (1958).

fits within our existing mental structure.[308] Bain says we really learn only when:

(a) we encounter "a situation in which [our] mental model will not work (that is, will not help [us] explain or do something)"; and

(b) we care enough about the failure of our model that we "stop and grapple with the issue at hand."[309]

As an example, Bain invokes the Arizona State University physics experiment.[310] Professors gave students in the department's introductory course the same test before the first class and after the final exam, then compared the results.[311] They found that most students entered the course with woefully outdated views of physics, and that after the course was over, even the "A" students still held the same beliefs.[312] Disturbed, the faculty interviewed students and performed experiments in front of them to show how those old beliefs were wrong.[313] That didn't help.[314] "As a rule, students held firm to mistaken beliefs even when confronted with phenomena that contradicted those beliefs."[315] They "performed all kinds of mental gymnastics to avoid confronting and revising the fundamental underlying principles that guided their understanding of the physical universe."[316] In other words, learning involves at least a subconscious admission that we did not know something, that what we knew was not enough to solve a problem, or that what we knew

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308. BAIN, *supra* note 78, at 26.
309. *Id.* at 27–28; *see also* Sandra I. Musanti & Lucretia (Penny) Pence, *Collaboration and Teacher Development: Unpacking Resistance, Constructing Knowledge, and Navigating Identities*, TCHR. EDUC. Q. 73, 86 (2010) ("Learning and change involves some degree of disruption to what [learners] know . . . ."); Jessica Berit Kindred, *'8/18/97 Bite Me': Resistance in Learning and Work*, 6 MIND, CULTURE, AND ACTIVITY 196, 200 (1999) ("In confronting the new, learners apply their prior schemas, which can result in cognitive friction or lack of fit. The frustrated application of accomplished expertise to new conditions that change its relevance or bearing provides ample motivation and substance for the generation of resistance, as for disequilibrium.").
310. BAIN, *supra* note 78, at 22.
311. *Id.*
312. *Id.*
313. *Id.* at 23.
314. *Id.*
315. *Id.* (quoting Ibrahim Abou Halloun & David Hestenes, *Common Sense Concepts About Motion*, 53 AM. J. PHYSICS 1056, 1059 (1985)). Overall, the semester-long course increased students' "basic knowledge" of physics by only 14%. Ibrahim Abou Halloun & David Hestenes, *The Initial Knowledge State of College Physics Students*, 53 AM. J. PHYSICS 1043, 1047 (1985).
316. BAIN, *supra* note 78, at 23.

was wrong.[317] That is why Bain includes a third requirement for real learning: the learner must be "able to handle the emotional trauma that sometimes accompanies challenges to longstanding beliefs."[318] Some educators go a step further and argue that people do not deeply learn something unless they first *resist* learning it; resistance shows the learner is experiencing the pain that Bain describes.[319]

Another reason that real learning—as opposed to the "memorize, regurgitate on the exam, and then forget" variety—can be painful is that as we change our views of how the world works, we may change (or fear that we are changing) our identity.[320] This change may separate the learner from his or her family, friends, and support groups.[321] These fears can be so powerful that they cause people to

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317. *Id.* at 26–28.

318. *Id.* at 28; *see also id.* at 45 ("[E]motional transitions people undergo when they encounter new ideas and material."); Musanti & Pence, *supra* note 309, at 86 ("Learning and change involves some degree of disruption to what [learners] know . . . ."); Kindred, *supra* note 309, at 200 (describing how learners' efforts to fit new information to their existing structure of knowledge can produce frustration, resistance, and disequilibrium).

319. *See* Kindred, *supra* note 309, at 198 ("[D]eep cognitive shifts that reflect knowledge integration" require learners to resist learning and their teachers to engage that resistance); Helen A. Moore, *Student Resistance in Sociology Classrooms: Tools for Learning and Teaching*, 23 SOC. VIEWPOINTS 29, 32, 38 (2007) (citing Tara Yasso, *Whose Culture Has Capital?*, 8 RACE, ETHNICITY, & EDUC. 69–91 (2005), *available at* http://www.pasocsociety.org/pss-viewpoints-2007.htm) ("[R]esistance and learning may be inextricably linked . . . . [and] student resistance is a necessary educational dimension."); Musanti & Pence, *supra* note 309, at 86 (learning that "[m]oments of conflict, tension, and resistance should be expected and also welcomed").

320. *See* Williams, *supra* note 183, at 151 ("A significant change in thinking about who you are, as a student, teacher, or person, is often scary and hard and implies a critique of the former identity and cultural position that may also be uncomfortable. What has to get left behind when you transform? What's more, once the process has begun do you lose the possibility of going back?"); Kindred, *supra* note 309, at 200 ("[T]he contradictions that may arise between one's sense of oneself and 'the one you will become if you internalize that knowledge . . . . Out of such struggles in identification is resistance born.'" (quoting Bonnie E. Litowitz, *Deconstruction in the Zone of Proximal Development*, *in* CONTEXTS FOR LEARNING: SOCIOCULTURAL DYNAMICS IN CHILDREN'S DEVELOPMENT 184, 190 (Ellice A. Forman, Norris Minick & C. Addison Stone eds. 1993))); Coutu, *supra* note 183, at 103 ("Once you've established your attitudes towards work and life, you don't particularly want to change them. It's just not a joyful process to give up your values and beliefs. If somebody comes along and tries to change how you think, you're likely to walk away unless that person can somehow hold you back.").

321. Coutu, *supra* note 183, at 104 ("Learning something new can cast us as the deviant in the groups we belong to. It can threaten our self-esteem and, in extreme cases, even our identity.").

resist learning things that almost all of us would consider valuable, such as how to succeed in college or even how to read.[322]

A third source of pain is the possibility of failure.[323] We may fail an exam; we may incorrectly answer a teacher's question in class; we may even "fail" by doing something that others would consider a huge success.[324] Because learning involves advancing through six increasingly difficult steps,[325] some learners will eventually encounter a level they cannot reach.[326] Others believe that they will fail even before they start.[327] There also is the simple fact that human beings are not perfect, so we may need more than one attempt to learn something new.[328] Psychologist Edgar H. Schein, Sloan Fellows Professor of Management Emeritus at MIT's Sloan School of

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322. *E.g.*, Williams, *supra* note 183, at 152 (student in adult literacy class regarded discussion of the value of literacy as criticizing the intelligence of her working class family). Justin White, Stefinee Pinnegar & Pat Esplin, *When Learning and Change Collide: Examining Student Claims to Have 'Learned Nothing,'* 59 J. GEN. EDUC. 124, 125 (2010) (noting that active learning courses designed to help students transition into college "can make students uncomfortable because they challenge students in new ways"). These fears even affect teachers. *See* Musanti & Pence, *supra* note 309, at 78–83, 85–87 (describing teachers' resistance to professional development programs).

323. Coutu, *supra* note 183, at 104 ("Learning anxiety comes from being afraid to try something new for fear that it will be too difficult, that we will look stupid in the attempt, or that we will have to part from old habits . . . .").

324. When I entered Yale Law School in the fall of 1979, one apocryphal legend was that newly-retired Prof. Grant Gilmore had enjoyed walking into the first day of Contracts, scanning the class, saying "All of you always have been in the top ten percent of your class. That no longer is true for ninety per cent of you," and then smiling at the shock on his students' faces as they realized the truth of his statement.

325. *See supra* text accompanying notes 31–48.

326. *Best Practices* recognizes that many undergraduate programs focus on "receiving" information, while law schools expect students to *build* their own knowledge (which involves several higher levels of learning), and this causes "most law students [to] experience a wrenching and largely unrecognized shift" in epistemology. STUCKEY ET AL., *supra* note 1, at 141 (citing Wegner, *supra* note 241, at 6–7). Receiving and remembering information is the *Taxonomy's* lowest level of learning, while constructing knowledge is the fourth. *See supra* text accompanying notes 37–42.

327. Some people believe they are born with a certain level of intelligence that cannot be changed. White, Pinnegar & Esplin, *supra* note 322, at 138 (citing CAROL S. DWECK, MINDSET 6–7 (2006)) ("[Students] with the fixed mind-set believe that people are born with innate and unchangeable capacities . . . . [And] tend to avoid challenging situations in which they might fail because they reveal inadequacies that cannot be overcome.").

328. Bain suggests that failure is an essential part of learning when he repeatedly describes learning as "try[ing]," "fail[ing]," and "try[ing] again." *See* BAIN, *supra* note 78, at *passim*.

Management, goes even further.[329] He says these "learning anxieties" are so intense that we learn only when it is necessary to survive,[330] and he compares learning to brainwashing.[331]

On top of all this, we are teaching law. Law often concerns the pain that human beings inflict on other human beings. Our courses introduce previously sheltered students to rape, defective products that kill or maim, child abuse, bankruptcy, discrimination, environmental injustice, broken contracts, deceptive business practices, and more.[332] Meanwhile, as students near graduation, they begin to realize the awesome responsibility that they soon must shoulder:

> You're not a lawyer when you graduate from law school.
> You're not even a lawyer after you pass the bar exam and
> are admitted to the bar. When you can face a client or an
> opponent—or a judge—without an overwhelming urge to
> throw up . . . *then* you're a lawyer.[333]

Law is also a discipline in which much of the information to learn and to apply (what we call the rules) are not immutable facts, like the speed of light, or techniques developed by experiment and widely recognized in the discipline as valid.[334] Legal rules are values, and while some are based on widely shared values, many are values that were held by whoever had sufficient votes in the relevant constitutional convention, legislature, or appellate court.[335] To protect our client's legitimate interests, we sometimes must know (and use) rules with which we do not necessarily agree. I silently cringe when I teach consideration, the common law's failure to recognize an admissions exception to the Statute of Frauds and the parol evidence rule. For me, a person's word should be his or her

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329. *See* Coutu, *supra* note 183, at 102–03, 105–06.

330. *Id.* at 103–05.

331. *Id.* at 102.

332. *See, e.g.*, *First Year Curriculum*, DUKE UNIV. SCH. OF LAW, http://law.duke.edu/curriculum/firstyr/ (last visited Dec. 10, 2012).

333. John W. Teeter, Jr., *Eastern Visions, Western Voices: A Sermon on Love in the Valley of Law*, 53 CLEV. ST. L. REV. 429, 430 n.5 (2005–06) (quoting THANE JOSEF MESSINGER, THE YOUNG LAWYER'S JUNGLE BOOK: A SURVIVAL GUIDE vvi (2d ed. 2000)).

334. *Cf.* Hans Zeisel, *Reflections on Experimental Techniques in the Law*, 2 J. LEGAL STUD. 107, 107 (1973) (noting effects of rules are rarely proven).

335. *Cf.* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 72 (1982).

bond. But I continue to teach those rules; my students are going to practice in the world that is, not in the world that I think should be.[336]

And law is a profession that draws students from a wide variety of experiences, beliefs, training, and values. *Best Practices* correctly complains that our focus on legal doctrine means that students who come with a passion for justice (whatever they may believe justice to be), for deciding by consensus, rather than by rule, for caring about people regardless of their legal rights, and for immersing themselves in the emotions and beliefs of their clients "get the message, early and often, that what they believe, or believed, at their core is unimportant—in fact 'irrelevant' and inappropriate in the context of legal discourse—and their traditional ways of thinking and feeling are wholly unequal to the task before them."[337]

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336. This does not stop me from asking students about the ethics of invoking the Statute of Frauds after their client privately has admitted made the contract.

337. STUCKEY ET AL., *supra* note 1, at 139 (quoting Krieger, *supra* note 15, at 125); *see also id.* at 32 (quoting Hess, *supra* note 11, at 78–79) (explaining that law school teaches that "tough-minded analysis, hard facts, and cold logic are the tools of a good lawyer, and it has little room for emotion, imagination, and morality").
The traditionalist in me argues that my students rarely will find their values and feelings at the top of the agenda the next time they represent a client at a creditor's meeting in bankruptcy court. On the other hand, no less an authority than the Chief Reporter of the Uniform Commercial Code warned law schools back in 1930 of the dangers of focusing only on doctrine and logic. As *Best Practices* reminds us, "The first year experience as a whole, without conscious and systematic efforts at counterbalance, tips the scales, as [Karl] Llewellyn put it, away from cultivating the humanity of the student and toward the student's re-engineering into a 'legal machine.'" *Id.* at 23 (quoting SULLIVAN ET AL., *supra* note 2, at 91 (2007)).
In *The Bramble Bush*, Llewellyn argued that while we must teach students to "think precisely, to analyze coldly, to work within a body of materials that is given, to see, and see only, and manipulate, the machinery of the law", in doing so, we undermine some attributes that lawyers must have:
> It is not easy thus to turn human beings into lawyers. Neither is it safe. For a mere legal machine is a social danger. Indeed, a mere legal machine is not even a good lawyer. It lacks insight and judgment. It lacks the power to draw into hunching that body of intangibles that lie in social experience. None the less, it is an almost impossible process to achieve the technique without sacrificing some humanity first.

K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 116 (1960).
I also note that Ken Bain's qualitative research found that the best college teachers were careful to address issues of values and student feelings in their classes. *See* BAIN, *supra* note 78, at 90–92. In particular, he discusses Jeannett Norden, of Vanderbilt University's Medical School, who received Vanderbilt's first endowed chair of teaching excellence *and* the 2000 American Association of Medical College's Robert Glaser award for teaching excellence. *Id.* at 5–6. To help her medical students better understand the strong emotions of their patients and families, she has each

That charge has considerable truth.[338] I spend little time in my courses addressing the needs and concerns of such students. However, *Best Practices* commits the same sin.

Many other types of students come to us with values and perspectives to which we—and *Best Practices*—give little attention. Students trained in math, engineering, and the hard sciences come to us thinking in terms of numbers and universal formulas that produce hard, definite answers. We expect them to think in words, to tolerate conflicting rules, and to work with answers in shades of grey. Students with weak educational backgrounds believe that learning is merely remembering and regurgitating information. We bewilder them when we expect them to use their knowledge to resolve a situation they've never encountered before.[339] In fact, the problem-method of teaching, which *Best Practices* advocates,[340] may frustrate and stress students who have not developed the ability to regulate and adjust their learning.[341] Other students have religious values that cause them to view the world in terms of absolute rights and wrongs and to use only the literal text of a constitution, statute, or agreement. Like mathematicians and engineers, we expect them to work with conflicting rules that produce inconsistent results. We also expect them to look far beyond a text, such as to the provision's purpose, to

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student write on one card an aspiration, on another the name of a loved one, and on a third a talent the student values. She has the students lay the cards on their desks, face down, and then she walks through the classroom, grabbing cards at random and throwing them into the trash. *Id.* at 90–91.

In a later article, I will address the extent to which, and the manner in which, we should incorporate values, feelings, and emotions into the classroom.

338. As the basic canon of statutory and contract interpretation states, *expressio unius exclusio alterius* (the expression of one excludes the others). Edwin Patterson, *The Interpretation and Construction of Contracts,* 64 COLUM. L. REV. 833, 853–54 (1964).

339. *See, e.g.,* STUCKEY ET AL., *supra* note 1, at 191.

340. *Id.* at 142–45.

341. *See* Peggy A. Ertmer, Timothy J. Newby & Maureen MacDougall, *Students' Responses and Approaches to Case-Based Instruction: The Role of Reflective Self-Regulation,* 33 AM. EDUC. RES. J. 719, 735, 744 (1996) ("[A]ll four students classified as low self-regulators expressed frustration due to a lack of knowledge, the specific case, or tediousness of the work[;]" quoting low self-regulator as saying, "I don't think that you can learn just from [problems]. Pure lecture is important in clarifying concepts," and noting earlier authors who predicted students would resist or be stressed by problem-based learning.). The Ertmer study involved first-year veterinary students and found that "high self-regulat[ors]" valued and appreciated problem-based learning, while low self-regulators "appeared to fluctuate in their perceptions of the value" of the method. *Id.* at 745. The study did find that the problem method did help even the low self-regulators in some ways.

usage of trade, to courses of prior dealing, etc.[342] when deciding its meaning. Students who value efficiency, freedom of contract, and the free market shudder when I teach unconscionability and good faith. Students with serious business experience recoil when I expect them to write out a lengthy explanation of legal doctrine. *Best Practices* does not mention these types of students or how we shock *their* values and beliefs.[343] Does the book mean to say that what these other students "believe, or believed, at their core is unimportant—in fact 'irrelevant' and inappropriate in the context of legal discourse— and their traditional ways of thinking and feeling are wholly unequal to the task before them"?[344]

Nor can I agree with *Best Practices'* insistence that "*all* questions are legitimate."[345] The obvious counterexamples are questions based on racist, sexist, or otherwise discriminatory assumptions. Less obvious—but still important—are questions that could have been answered by reading the syllabus or the assignment. I recognize that the first few weeks of law school are a hurricane of information

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342. *See* U.C.C. § 1-103(a) (2005) ("[U.C.C.] must be liberally construed and applied to promote its underlying purposes . . . .").

343. In addition, some of *Best Practices'* commendable recommendations will inflict at least short-term pain on some students. For example, *Best Practices* correctly recommends we provide more experiential learning, with its many challenges. *See* STUCKEY ET AL., *supra* note 1, at 165–96. But that would terrify students who fear and resist learning situations that challenge them, either because they believe that they were born with a fixed amount of ability and talent, *see* White, Pinnegar & Esplin, *supra* note 322, at 138 (citing DWECK, *supra* note 327, at 5–6), or because they believe education is about memorizing information.

Best Practices urges us to teach students "the ethical and social dimensions of the profession," STUCKEY ET AL., *supra* note 1, at 20, even though that will frustrate and anger students who are especially anxious about the bar exam and want to learn the law that will be tested in their jurisdiction. And to the extent those social dimensions include multicultural education, such teaching can inflict "grief and feelings of loss" on some white students because "their increased awareness of different statuses may threaten deeply held ideas of self and identity, status, idealization of parents, and other significant people in their lives, and systems of social support." Jane Mildred & Ximena Zúñiga, *Working With Resistance to Diversity Issues in the Classroom: Lessons from Teacher Training and Multicultural Education*, 74 SMITH COLL. STUD. SOC. WORK 359, 364 (2004) (citing Dorothy Van Soest, *Social Work Education for Multicultural Practice and Social Justice Advocacy: A Field Study of How Students Experience the Learning Process*, 3 J. MULTICULTURAL SOC. WORK 17, 24–25 (1994)).

My point here is only that *Best Practices'* admonition to do "no harm," STUCKEY ET AL., *supra* note 1, at 111, is not consistent with its other recommendations.

344. STUCKEY ET AL., *supra* note 1, at 73 (quoting Kreiger, *supra* note 15, at 125).

345. *Id.* at 30 (emphasis added) (quoting BANNER & CANNON, *supra* note 285, at 37).

dumped on students by deans, registrars, librarians, counselors, and faculty, and even hard-working students will forget what they've been told. But I also realize that in three or four short years, judges will expect them to look at the court's local rules *before* asking how long a brief may be, and senior partners will expect them to read an assignment more than once *before* asking: "So what do you want me to do?" One of our duties as teachers is to judge when a question is *not* legitimate, at least in the sense that the student should know where easily to find the answer, and then to politely and gently encourage them to do so.

In short, I think it is impossible to eliminate all of the dangers, threats, and sources of stress that *Best Practices* identifies, just as I think that we should continue to use Socratic dialogue as a major part of our classroom instruction.[346]

E. ENGAGING STUDENTS: THE PROMISES AND PERILS OF PROBLEMS

1. Best Practices' Recommendation

Best Practices encourages:

> [L]aw schools to follow the lead of other professional schools and transform their programs of instruction so that the entire educational experience is focused on providing opportunities to practice solving problems under supervision in an academic environment .... [which] is the most effective and efficient way to develop professional competence.[347]

This context-based, problem-solving curriculum would include the problem method,[348] problem-solving courses, "comprehensive programs for teaching students" to produce law-related documents,[349] simulation courses,[350] externships,[351] and in-house clinics.[352]

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346. *Id.* at 211–13.
347. *Id.* at 144.
348. *Id.* at 143, 145–48.
349. *Id.* at 148.
350. *Id.* at 151.
351. *Id.* at 153.
352. *Id.* at 153–57.

The problem method is the easiest approach, and as *Best Practices* argues, it has several advantages. [353]   Students must actively engage with the material[354] instead of merely taking notes, thereby improving their understanding and retention of doctrine.[355]   The problem method also helps accomplish some non-doctrinal goals.   It addresses "broader values of fairness and the collective good,"[356] helps students "engage issues of professional identity," shows students the value of "a range of insights," and requires students to collaborate.[357]

Another claimed advantage is that problems increase students' motivation to learn.   They raise questions students find intriguing or important,[358] and they help students realize that "their 'thinking' could benefit people who might actually exist."[359]

A traditionalist like me is tempted to ignore that last claim.   To me, the importance of the subjects I teach is obvious.   Every case I teach involves real people, and it's easy for me to see how a real, live client with a similar problem someday will appear in a former student's office.

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353. *Best Practices* is not completely clear as to what this means. Sometimes it clearly distinguishes between "hypotheticals" (including "closed" and "open" hypotheticals), *see id.* at 134, 160, 213–14, 236, and the elaborate problems used in medical and business schools. *Id.* at 145. At other points, it seems to blend the two, speaking of "hypothetical problems," *id.* at 146–47, and it calls typical law school questions, which usually are only a page or two in length, "problem-based essays." *Id.* at 254.
Myron Moskovitz distinguishes between hypotheticals and problems. Moskovitz, *supra* note 172, at 246. A hypothetical is short, involves only one or two issues, and tends to be presented for the first time in class. *Id.* A problem, on the other hand, is longer, deals with several issues, and tends to be distributed in advance of the class discussion for which it is the focus. *Id.* at 250.

354. STUCKEY ET AL., *supra* note 1, at 143. Problem-solving shows students that a client's problem may not have a single, all-correct answer, and that legal education and the practice of law involve much more than memorizing rules. *See* Steven J. Shapiro, *Teaching First-Year Civil Procedure and Other Introductory Courses by the Problem Method*, 34 CREIGHTON L. REV. 245, 267–68 (2000).

355. STUCKEY ET AL., *supra* note 1, at 145 (quoting Moskovitz, *supra* note 172, at 247–48).

356. *Id.* at 148 (citing Wegner, *supra* note 241, at 40).

357. *Id.* at 147 (citing Wegner, *supra* note 241, at 41).

358. *Id.* at 143 (citing BAIN, supra note 78, at 18); *see also* Cynthia G. Hawkins-Leon, *The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Method Continues*, 1998 BYU EDUC. & L.J. 1, 13 (1998); Moskovitz, *supra* note 172, at 262 ("[M]ost first-year students love the problem method."); Shapiro, *supra* note 354, at 260 (Students almost never pass when called on to discuss a problem); *id.* at 263 (Students spend more time preparing for class). *But see id.* at 265–66 (Problem method has not seemed to improve performance on tests).

359. STUCKEY ET AL., *supra* note 1, at 147 (citing Wegner, *supra* note 241, at 39–40).

But I'm not a student. Students enter law school after two decades of sitting in classrooms listening to teachers talk, ask questions, and give reading assignments. Law school seems like more of the same. *We* know that we're teaching students how to read and to think like lawyers, but even to conscientious students, what we do looks, sounds, and feels like what they have endured for years: school.[360] They want to be *lawyers,* and lawyers *do* things. *Students* merely sit in classrooms, take notes, read textbooks, and answer essay questions. *Lawyers* file complaints, examine witnesses, and draft contracts. Consequently, I suspect my classroom is often a much more passive place than I want it to be.

The empirical evidence paints a dismal picture, especially in upper-class courses. A 1998 study done at eleven law schools showed that 66.9% of third-year students spent less than twenty hours a week studying,[361] only 44.1% reported completing "all," "nearly all," or "most" of their reading assignments,[362] and more than half volunteered less than once a week.[363] The annual *Law School Survey of Student Engagement (Survey)* has produced similar results on three occasions:[364] The 2005 *Survey* of more than 28,000 students found only 49% of full-time third-year students reported spending twenty or more hours per week preparing for class;[365] the 2006 *Survey* of more than 24,000 students[366] found third-years studied for a mean of only twenty-one hours a week;[367] and the 2009 *Survey* found only 54% of third-year students reported studying more than twenty hours a

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360. *See* PINK FLOYD, *Another Brick In The Wall, Pt. 2, on* THE WALL (Capital Records 1979) ("We don't need no education./We don't need no thought control./ No dark sarcasm in the classroom./ Teacher leave those kids alone./ Hey! Teacher! Leave them kids alone!").

361. Mitu Gultai, Richard Sander & Robert Sockloskie, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 242, 245 tbl.2 (2001). In contrast, only 11.2% of first-year students reported studying that little, and 53.2% reported studying more than thirty hours a week. *Id.* at 245 tbl.2.

362. *Id.* at 245 tbl.3. In contrast, 68.8% of first-year students reported completing all or nearly all of their assignments. *Id.*

363. *Id.* at 245.

364. *See* LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2005 ANNUAL SURVEY RESULTS, *supra* note 187, at 8; LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2006 ANNUAL SURVEY RESULTS, *supra* note 187, at 14; LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2009 ANNUAL SURVEY RESULTS, *supra* note 187, at 7.

365. LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2005 ANNUAL SURVEY RESULTS, *supra* note 187, at 6, 8 fig.3.

366. LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2006 ANNUAL SURVEY RESULTS, *supra* note 187, at 7.

367. *Id.* at 14 fig.6.

week.[368] One way to overcome that passivity and to engage students is to give students what Ken Bain called "authentic tasks."[369] We can generate authenticity merely by asking students how they would have done the routine litigation work for a case in the book. When we ask a student to state the elements of a rule in a case, we can sound, well, academic. But when we next want to explore the meaning of each element, it's often easy to frame our questions in the context of how a lawyer would use that element: "If the file in this case had landed on your desk, and you needed to find the facts to satisfy Element #1, who would you have interviewed as potential witnesses? What questions would you have asked them? What exhibits would you have sought? What facts would you have alleged in the complaint? What instruction would you have asked the judge to give?"

Of course, the problem method recommended by *Best Practices* provides even more authenticity, and legal educators—including the AALS—endorsed it long before I was born.[370] Rather than just echoing those endorsements, I want to do what *Best Practices* does not—look at the three serious, yet avoidable, perils that the problem method presents.[371]

2. Some Perils with Problems

Obviously, the problem method is not a cure-all. A determined Kingsfield can couple it with Socratic dialogue and continue to wreak his (or her) havoc in the classroom.[372] Nor do problems fix the size

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368. LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2009 SURVEY RESULTS, *supra* note 187, at 7.

369. Bain's qualitative study of great college teachers found that they presented their students with "intriguing, beautiful, or important problems, authentic tasks that . . . challenge [those students] to grapple with ideas, rethink their assumptions, and examine their mental models of reality." BAIN, *supra* note 78, at 18.

370. *See* Moskovitz, *supra* note 172, at 242 n.3 (quoting David F. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449, 450 (1943) (urging legal education to devote "substantial . . . time" to problem method), *id.* at 249 n.45 (citing REPORT OF THE COMMITTEE ON TEACHING AND EXAMINATION METHODS, HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 85, 87–88 (1942)) (explaining how legal education should require student to "reflect on the application of pertinent materials to new situations and accustom[] him to think[] of case and statute law . . . to be used").

371. *See generally* Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654, 664–66 (1984) (suggesting that the length, complexity, intensity, and applicability problems hinder the effectiveness of teaching using the problem solving method); Stephen Nathanson, *Designing Problems to Teach Problem-Solving*, 34 CAL. W. L. REV. 325, 344 (1998).

372. *See* Moskovitz, *supra* note 172, at 250; Keith A. Findley, *Rediscovering the Lawyer School: Curriculum Reform in Wisconsin*, 24 WIS. INT'L. L.J. 295, 318–19 (2006).

of our classes;[373] in all but the smallest groups, most students will spend a lot of time listening[374] and we will have little time to give attention to individual students.[375] *Best Practices* seems to assume problem method courses will be taught by faculty who have time to provide "informative feedback" to students who have time for "reflection on their own performance" and "ongoing self-assessment."[376] The book then helpfully tells us "the challenge is to figure out how to accomplish all this."[377]

Another difficulty is that problems need time: time to read the problem, time to digest its contents, time to sort through the cases and statutes and identify the relevant doctrines, and time to think about non-doctrinal alternative solutions. Several authors advocate distributing problems in advance of class, and I concur wholeheartedly.[378] I include many of mine in the reading assignments themselves, sometimes *before* the cases and statutes I ask my students to read. The problem then gives students a concrete example of the situations that the doctrine governs.

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373. *See, e.g.*, Hawkins-Leon, *supra* note 358, at 10 (stating that research shows problem method should not be used in classes of more than forty); Shapiro, *supra* note 354, at 249 (stating that many faculty say problem method works best in small classes); *cf.* Moskovitz, *supra* note 172, at 261 (stating that problem method can be used in large classes, but works better in classes small enough for students to turn in their work).

374. *Best Practices* condemns this as "vicarious learning." *See* STUCKEY ET AL., *supra* note 1, at 135 (citing Schwartz, *supra* note 243, at 351–53).

375. *See* Moskovitz, *supra* note 172, at 261 (asserting that smaller classes permit students to submit their work for faculty review); Shapiro, *supra* note 354, at 272 ("I would not encourage grading, or even collecting the original answers that the students bring to class.").

376. STUCKEY ET AL., *supra* note 1, at 143 (quoting SULLIVAN, *supra* note 2, at 178). *Compare* STUCKEY ET AL., *supra* note 1, at 254 ("[L]ength of time it takes to read and evaluate large numbers of problem-based essay[s]" is one reason why law faculty do so few formative or summative assessments), *with* Ogden, *supra* note 371, at 664 (expressing concerns about costs of small class sizes).
The closest *Best Practices* comes to addressing this issue is its statement that in the problem method, "students work, usually in small groups." STUCKEY ET AL., *supra* note 1, at 146 (quoting Nathanson, *supra* note 371, at 326 (1998)).

377. STUCKEY ET AL., *supra* note 1, at 143.

378. Findley, *supra* note 372, at 319; Hawkins-Leon, *supra* note 358, at 9 (asserting that the key feature of problem is advanced distribution, so students can better prepare); Moskovitz, *supra* note 172, at 250; Shapiro, *supra* note 354, at 254; *see also* Roy Freedle, *How and Why Standardized Tests Systematically Underestimate African-Americans' True Verbal Ability and What to Do About It: Towards the Promotion of Two New Theories with Practical Applications*, 80 ST. JOHN'S L. REV. 183, 217 (2006) (stating that advance distribution of questions means students come to class knowing what will be addressed, so less need for snap judgments).

So what perils does the problem method pose? First, the more complex the relevant law is, the more likely students will get lost in the doctrine.[379] Besides authenticity, the problem method's great advantage is that it requires students to reach the *Taxonomy*'s third and fourth levels of learning (Application and Analysis), but students can't climb that high until they have mastered Levels 1 and 2, i.e., the doctrine that the problem concerns.[380] My early efforts to use problems often crashed and burned for that reason. Today, I use a pure problem method only when the legal rules are fairly clear.[381] When the rules are more difficult, we first go through the cases and work out a tentative set of rules before plunging into the problem. For the most difficult doctrines, I use what most would call hypotheticals: fact patterns of only a paragraph or two that target only one specific element or aspect of a doctrine.[382]

Second, problems tempt some students to avoid the law altogether.[383] I learned this when I first began teaching. I devoted three weeks of Contracts II to a drafting exercise involving a non-competitive clause. Some students represented a new employee; some represented an employer. I gave everyone copies of several Texas cases and statutes that purported to define the acceptable breadth of a non-compete clause. The Texas Supreme Court had used a multi-factored "common calling" test for years;[384] the Texas Legislature adopted a statute;[385] the courts then refocused the common calling test and finally overturned it.[386] The legislature

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379. Nathanson, *supra* note 371, at 343–44.

380. *See supra* text accompanying notes 30–36.

381. *Cf.* Shapiro, *supra* note 354, at 270 (asserting that problem method works best in statutory courses where a single statute supplies the rule).

382. Professor Nathanson takes the opposite approach. He says that a problem's legal issues should be "minimal," to the point where he stopped using a problem that involved a set of rules "conceptually simple to practicing lawyers," but which his students found difficult. Nathanson, *supra* note 371, at 332–33.

383. *See generally* Ogden, *supra* note 371, at 665–66 (recounting how many times the applicable law will change and if students focus on law more than the process then those students may arrive at the wrong answer).

384. Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 172 (Tex. 1987), *superseded by statute, infra* note 385.

385. Act of June 16, 1989, ch. 1193, § 1, 1989 Tex. Gen. Laws 4852 (codified as amended at TEX. BUS. & COM. CODE ANN. § 15.50–51 (West 2011)).

386. DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 683 (Tex. 1990) ("Common calling" is "not the primary focus of inquiry"); *id.* at 685 (leaving "for another day" how statute changes common law test); Webb v. Hartman Newspapers, Inc., 793 S.W.2d 302, 304 (Tex. App. 1990) (holding that the 1989 statute overturns *Hill's* common calling test).

responded with another statute[387] and went so far as to command the court to abandon its common law rules.[388]

I had high hopes. Students first would have to master the doctrine, so they could determine how long their clause could last and how much territory it could cover. Then they would have to use that knowledge to negotiate the terms of the clause and draft the exact language. They were to turn in the clause itself and an explanation of how they reached it. This seemed to be the perfect way to show students how lawyers would use the rules we were learning in class. Most students loved the exercise. Each year, several told me it was the first time in law school they had felt like real lawyers.

Unfortunately, many of these students fell into a trap I did not intend. They latched on to the first case's "common calling" test, without noticing (or using) the later cases and the statute that overturned that test.

Yes, as *Best Practices* urges, I had given students a question they found intriguing or important.[389] Yes, I had helped them realize that "their 'thinking' could benefit people who might actually exist."[390] And yes, I had helped some of them commit malpractice. The obviously authentic tasks of negotiating and drafting were so interesting that they overlooked the "homework": reading books to figure out what the law was. The next year, I added express warnings about the importance of determining the legal rules, but some students stuck with the simple, long-dead "common calling" test. The next year, I inserted an explicit warning about the need to read *all* of the cases and statutes I provided. Some students continued to commit malpractice. After four years, I gave up. Today, if I could work up the courage and energy to face all those papers, I would have the class as a whole discuss the legal issues before letting anyone begin to negotiate. When I do use problems (none as extensive as the non-compete fact pattern), I now use a checklist to make sure students point out the relevant legal issues and rules.

A third difficulty with problems is that they can cause students to focus on individual trees and to lose sight of the forest to which we

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387. Act of June 19, 1993, ch. 965, 1993 Tex. Gen. Laws 4201 (codified as amended at TEX. BUS. & COM. CODE ANN. § 15.50–52 (West 2011)).

388. *Id.* at § 15.52 ("The criteria for enforceability of a covenant not to compete provided by . . . [statute] are exclusive and preempt any other criteria for enforceability . . . under common law or otherwise.").

389. STUCKEY ET AL., *supra* note 1, at 143 (citing BAIN, *supra* note 78, at 18).

390. STUCKEY ET AL., *supra* note 1, at 147 (citing Wegner, *supra* note 241, at 39–40).

are trying to introduce them.[391] It's difficult (or impossible) to design a problem that fully explores all aspects of a doctrine. Since most of our students are new to the subject, they will focus on what is most immediate—the issues raised by the problem—rather than worrying about the big picture. And when we use problems, we must be careful to provide the structure and framework that students need to make sense of the jumble of cases and statutes we give them.[392]

Each of these dangers can be prevented with some time and care on our part; none should be a reason for ignoring *Best Practices'* recommendations.

F. HOW THE BEST TEACHERS TREAT STUDENTS

Perhaps the most puzzling aspect of *Best Practices* is that it sometimes seems more interested in condemning some of its readers than in persuading them.[393] For example, it complains that most lawyers and law professors think negatively, are critical and pessimistic, and depersonalize their teaching and their subjects;[394] it condemns us for focusing on "tough-minded analysis," "hard facts," and "cold logic" at the expense of "emotion, imagination, and morality."[395] To those charges, I plead guilty.[396] Yet *Best Practices* does not seem to realize that we negative-thinking, critical, pessimistic, depersonalizing readers who think in terms of "hard facts" and "cold logic" probably will not be impressed with claims based on personal opinion and anecdotes.[397] Instead, we will want

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391. Nathanson, *supra* note 371, at 434–44.
392. *See* BAIN, *supra* note 78, at 26–27 (stating that people learn by building mental structures of the knowledge they encounter); MCKEACHIE & SVINICKI, *supra* note 25, at 59–60 (stating that people store knowledge in "structures such as networks with linked concepts, facts, and principles").
393. *See generally* STUCKEY ET AL., *supra* note 1, at 30 ("The harm to students is caused by the educational philosophies and practices of many law school teachers.").
394. *Id.* at 34 (quoting Krieger, *supra* note 15, at 117).
395. *Id.* at 32 (quoting Hess, *supra* note 11, at 78–79).
396. *Cf.* MONTY PYTHON AND THE HOLY GRAIL (Michael White Productions 1975) (Statement of plague-infected old man thrown on top of cart full of corpses: "But I'm getting better!").
397. *Best Practices* does provide some empirical evidence when it argues that law schools psychologically harm students. Page 31 discusses a longitudinal study of students at one law school, G. Andrew H. Benjamin, et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers,* 1986 AM. B. FOUND. RES. J. 225 (1986), and page 33 summarizes another study that compared students at one law school to undergraduates in an upper-division psychology class at another university. Krieger, *supra* note 15 (discussing Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law*

logic and empirical studies, quantitative and qualitative. To reach us, *Best Practices* needs to speak a language that *we* understand.

Consequently, my biggest regret about the book is that it presents one of its most important points in just one sentence, with no hint of the critical thinking or the research that produced the idea. Here is *Best Practices'* full paragraph:

> As Ken Bain put it, "[a]bove all, [the best teachers] tend to treat students with what can only be called simple decency."[398]

Here is the supporting footnote:

> 341. BAIN, *supra* note 299, at 18.[399]

Best Practices cannot find room for a single sentence about how Bain reached that conclusion: his national search for higher education's best teachers, followed by several years of intensively studying sixty-three such teachers, interviewing them and their

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Students? Evaluating Changes in Motivation, Values, and Well-Being, 22 BEHAV. SCI. & L. 261, 265 (2004)). Both studies produced disturbing results. Benjamin,et al., *supra*, at 247, found that while between 3–9% of people in industrial nations suffer depression, 17–40% of the law students in their study did, and 20–40% had "elevated symptoms" of depression. Sheldon & Krieger, *supra*, at 272 tbl.3 (finding significant reductions in law students' "life satisfaction" and large increases in depression and physical symptoms). These findings deserve considerable attention.

On the other hand, when the book claims that faculty–student out-of-class interaction improves students' intellectual development, STUCKEY ET AL., *supra* note 1, at 18, it cites a 1999 essay, Susan B. Apel, *Principle 1: Good Practice Encourages Student-Faculty Contact*, 49 J. LEGAL EDUC. 371, 374 (1999), which depends largely on two literature reviews (one from 1980 and the other from 1993), admits that "most" of the studies discussed in those literature reviews "fail to identify and control for all variables: one may question their findings," Apel, *supra*, at 374, and concedes that those same studies produced "somewhat equivocal" findings. *Id.*

Another empirical claim by *Best Practices* will take a dozen pages in my next article to unravel. The book says that "more than 600 studies" show that cooperative learning is more productive than competitive or individualistic learning. *See* STUCKEY ET AL., *supra* note 1, at 119–20 (citing Hess, *supra* note 11, at 94), who in turns cites DAVID W. JOHNSON, ROBERT T. JOHNSON & KARL A. SMITH, COOPERATIVE LEARNING: INCREASING COLLEGE FACULTY INSTRUCTIONAL PRODUCTIVITY 1 (1991), but who ignores page 38 of that same book, which speaks of "[o]ver 375 studies. . . ." JOHNSON, JOHNSON & SMITH in turn cite DAVID W. JOHNSON & ROGER T. JOHNSON, COOPERATION AND COMPETITION: THEORY AND RESEARCH 16 (1989), who refer to "521 research studies . . ." and who later say on page 41, "[o]ver 50 percent of these findings [from the 521 studies] were significantly in favor of cooperation . . .," taking us from *Best Practices'* "more than 600 studies" to "Over 50 percent" of "521 studies", with a stop in between at 375 studies.

398. STUCKEY ET AL., *supra* note 1, at 116 (alteration in original) (quoting BAIN, *supra* note 78, at 18).

399. *Id.* at 116.

students, videotaping their classes, and examining their syllabi, reading materials, and lesson plans.[400] We get no clue that his great teachers were neither soft nor indulgent, or that the book was published by Harvard University Press.[401] Had I not encountered Bain's work before I read *Best Practices*, I would have regarded his pronouncement about "simple decency" as nothing more than the personal opinion of someone who just happened to agree with whatever point *Best Practices* was trying to make.[402]

So let me end this article (and introduce the next one) by addressing the concerns that the typical law professor is likely to have about Bain's point.

First, when Bain urges us to treat students with "decency," isn't he telling us to coddle and indulge them? The surest way to avoid embarrassing or upsetting students is to refrain from pointing out their errors, to say nothing when they fail to prepare, and to give them only questions that are easy to answer. I suspect Robert M.

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400. *See supra* text accompanying note 161–72.

401. Bain's criteria included "strong evidence of helping and encouraging their students to learn in ways that would usually win praise and respect from both disciplinary colleagues and the broader academic community", and students who said the professor had "'transformed their lives,' 'changed everything', and even 'messed with their heads.'" BAIN, *supra* note 78, at 9–10.

402. My tendency to negative, critical thinking was not helped by *Best Practices*' summary of what at first appeared to be another extensive, national qualitative study of "context-based instruction":

> Wegner observed first year law teachers using the problem and case approach successfully at very different schools located far apart. . . .
> The professors each asked questions that were clearly genuine, not rhetorical. They functioned in unison with their students as they approached a shared task, and modeled the role of "senior partner" working with more junior associates. They involved students in the performance of analytical routines, but these routines were not solely critical, designed to take apart someone else's argument or a judicial text. Instead, they presented lucid examples of constructive thinking, that is, how to foresee and avoid problems, how to understand the potential views of a range of real or potential disputants, and how to look behind positions to interests and search for common ground. *Both* professors. . . .

STUCKEY ET AL., *supra* note 1, at 147 (emphasis added) (quoting Wegner, *supra* note 241, at 39–40). In one sense, *Best Practices* merely overlooked how the phrase "Wegner observed first-year law teachers . . . at very different schools located far apart . . . ," followed by "The professors . . . They . . . They . . . Instead they . . ." might be misread to include more than two teachers. STUCKEY ET AL., *supra* note 1, at 147 (quoting Wegner, *supra* note 241, at 39). But when one is trying to persuade negative, critical, pessimistic thinkers, such things matter.

Lloyd had this in mind when he lamented that the Socratic method "has vanished from American law schools" because of perceptions that it is "too intimidating, too adversarial, and too demeaning" and because few professors want to be rigorous.[403] So let me be blunt. *Nothing* in *Best College Teachers* suggests "decency" involves lower standards. For example, Bain recounts how Harvard's Richard Light studied 1,400 Harvard students and alumni and found that the courses they considered the best were the courses that had "high demands."[404] Bain constantly urges us to challenge students, to require them to confront and conquer difficult tasks, and to teach them critical thinking and reasoning skills.[405] He writes that "[t]he most successful teachers expect the highest levels of development from their students."[406]

And he tells us to apply high standards even to under performing students. In the chapter labeled "Expecting More from Students with Low Grades," Bain describes how Northwestern University dramatically increased the performance of minority students with low biology grades by enrolling them in a once-a-week small class that required them to work through advanced problems in biology.[407] He argues that the best teachers "quietly yet forcefully couple lofty ideals with firm confidence in what students can do" and "expect 'more' from their students";[408] he insists that students engage in "higher-order intellectual activity: encouraging them to compare, apply, evaluate, analyze, and synthesize, but never only to listen and remember."[409]

So what does Bain mean by "simple decency"? First, it is not rigor imposed for its own sake or for the sake of the professor's ego. The study excluded teachers who some students described as "brilliant" but who other students said wanted to show "how much power he had over their lives," boasted of how many students flunked the course, and set "harsh and arbitrary demands."[410] Rigor for the sake of being difficult is not the same as rigor about learning.

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403. Lloyd, *supra* note 190, at 681–82.
404. BAIN, *supra* note 78, at 36 (quoting RICHARD J. LIGHT, THE HARVARD ASSESSMENT SEMINARS 8–9 (1990)).
405. *Id.* at 83–89.
406. *Id.* at 45. The "levels" to which Bain refers are the six stages of learning identified and explained in BLOOM ET AL., *supra* note 21. *See supra* text accompanying notes 30–64.
407. BAIN, *supra* note 78, at 79–83.
408. *Id.* at 95–96.
409. *Id.* at 102.
410. BAIN, *supra* note 78, at 137–39.

In contrast, the great teachers that Bain found created an atmosphere in which students could focus less on self-defense and survival and more on learning.[411] They:

(a) "[D]isplayed not power but an investment in students";[412]

(b) "[T]ried to take their students seriously as human beings and treated them the way they might treat any colleague, with fairness, compassion, and concern";[413]

(c) Used "conversational tones" when speaking in class;[414] and

(d) Made it clear when they disagreed with a student that they were not judging the student's soul or value as a human being.[415]

Bain's findings are indirectly supported by a quite different study, although I apologize for the analogy it suggests. Researchers at the University of Washington let laboratory rats practice on a maze until they could complete it forty times in less than thirty minutes.[416] The researchers then divided the rats into three groups.[417] The control group was left alone for a while, then returned to the maze, which its members completed an average of thirty-five times in thirty minutes,

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411. Dr. Johnson correctly observed, "[W]hen a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully."   JOHN BARTLETT, FAMILIAR QUOTATIONS 355 (Emily Morison Beck ed., 15th ed. 1980). But his focus probably is more on escaping rather than on learning how to perfect a security interest under U.C.C. Article 9.

412. BAIN, *supra* note 78, at 139. For example, I start and end class on time: when we ignore the clock, we tell students our time is more valuable than theirs. Another example is knowing students' names. Looking at a seating chart before calling on students suggests they are so unimportant that we cannot be bothered to learn even one simple fact about them, and empirical studies show that this technique increases student learning. *See, e.g.*, Judith A. Sanders & Richard L. Wiseman, *The Effects of Verbal and Nonverbal Teacher Immediacy on Perceived Cognitive, Affective, and Behavioral Learning in the Multicultural Classroom*, 39 COMM. EDUC. 341, 348 (1990) (describing that a study of 952 college students in Western universities found that using student names and maintaining eye contact with them were "significantly related to behavioral learning for all four ethnic groups," i.e., Asian, black, Hispanic, and White).

413. BAIN, *supra* note 78, at 145. Here, I think Bain means listening carefully to student questions and student answers without interrupting, answering e-mails promptly, looking students in the eye when we talk with them, and expecting them to do only those things that we have done ourselves. I think he also would include openly admitting when we make a mistake or find ourselves lost for a good answer, as well as openly celebrating when a student finds a hole in one of our arguments.

414. *Id.* at 118–19.

415. *Id.* at 77.

416. *Stress Hinders Rats' Decision-Making Abilities*, SCIENCE DAILY (Nov. 21, 2008), http://www.sciencedaily.com/releases/2008/11/011118150635.

417. *Id.*

only a slight decrease.[418]   The second group received a series of unpredictable electric shocks for an hour, and then returned to the maze. Even though the shocks had ceased, this group averaged only twenty-three complete runs in thirty minutes, a one-third decrease. Lest anyone doubt that stress can reduce performance, a third group suffered the same series of shocks, but then received muscimol, a drug that temporarily deactivates the area of the brain that processes information about rewards, stresses, and fears.[419] Thus immunized to stress and fear, the third group did as well as the control group.[420] Similarly, psychologists speak of the Yerkes–Dodson Performance Curve, a U-shaped curve that shows how the quality of a person's performance improves with increasing levels of anxiety and stress, but only up to a certain point, after which increasing stress dramatically reduces quality.[421]   Industrial researchers know stress that is not a necessary part of a job reduces employee productivity and performance.[422]

Of course, as a negative, critical thinker I was satisfied neither with Bain's qualitative work nor with quantitative research done on rats and employees.[423] So I began reading the few empirical studies that *Best Practices* does invoke, and I went looking for more.[424] My goal was to disprove *Best Practices*' claim that the way we treat our students—and the extent to which we interact with them, in and out of class—is as important as the content and knowledge we present them.[425]

I found an astounding amount of quantitative research. The *Law School Survey of Student Engagement* had all kinds of findings: how law students say they spend their time; what they believe they are learning; how they assess the quality of a variety of law school

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418. *Id.*
419. *Id.*
420. *Id.*
421. *See* P.L. Broadhurst, *Emotionality and the Yerkes-Dodson Law,* 54 J. EXPERIMENTAL PSYCHOL. 345, 348 (1957).
422. *See* Loraleigh Keashly, *Some Things You Need to Know but May Have Been Afraid to Ask: A Researcher Speaks to Ombudsmen about Workplace Bullying,* 3 J. INT'L OMBUDSMAN ASSOC. 10, 14 (2010) (noting that workplace bullying increases use of sick leave, absenteeism, employee turnover, and symptoms associated with Post-Traumatic Stress Disorder).
423. *See* STUCKEY ET AL., *supra* note 1, at 34 (quoting Krieger, *supra* note 15, at 117).
424. *See supra* note 285.
425. *See* STUCKEY ET AL., *supra* note 1, at 105–06.

activities, services, and their relationship with faculties, etc.[426]   If your school participates, your dean receives the actual data for your school and statistical comparisons to your peer schools, similarly-sized schools, schools of similar type, and all participating schools.[427]

There is exponentially more quantitative research at the undergraduate level, almost all of which was done with the kind of rigorous methodology that delights neurotics like me.   A 2005 synthesis of research published between 1989 and 2002 has a bibliography of 140 pages that lists about 2,500 works.[428] There are huge studies that track how different aspects of university teaching and life affect student learning, student motivation, and student development throughout their undergraduate years.[429]   There are highly specialized studies.[430] General or specific, the studies contain more statistics and more "hard facts" than I ever hope to see again.[431]

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426.   *See id.* at 115 (citing the LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2006 ANNUAL SURVEY RESULTS, *supra* note 187, at 13).

427.   LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2006 ANNUAL SURVEY RESULTS, *supra* note 187, at 6–7.

428.   ERNEST T. PASCARELLA & PATRICK T. TERENZINI, 2 HOW COLLEGE AFFECTS STUDENTS 651–792 (2d ed. 2005) (listing references synthesized by the authors in their study on the impacts of college on students).

429.   *See, e.g.,* ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE?: FOUR CRITICAL YEARS REVISITED 23 (1993) (citing a study with a final longitudinal sample of 24,847 students at 159 four-year institutions); George D. Kuh & Shouping Hu, *The Effects of Student–Faculty Interaction in the 1990s,* 24 REV. HIGH. EDUC. 309, 314 (2001) (referencing a sample size of 5,409 randomly selected students from 126 institutions to approximate 54,488 students who completed the College Student Experiences Questionnaire between 1990 and 1997); Maureen Franklin, *The Effects of Differential College Environments on Academic Learning and Student Perceptions of Cognitive Development,* 36 REV. HIGHER EDUC. 127, 129–30 (1995) (citing a study which randomly selected 22,553 students from 290,249 students who took the CIRP survey conducted by UCLA's Higher Education Research Institute).

430.   *See, e.g.,* Susan H. Frost, *Fostering the Critical Thinking of College Women Through Academic Advising and Faculty Contact,* 32 J. C. & STUDENT DEV. 359, 361 (1991) (referring to a study of how faculty contact and advising affected 267 women at two residential liberal arts colleges); Marybeth Gasman, Mentoring Programs for African-American College Students and Their Relationships to Academic Success, (unpublished student paper presented at the meeting of the Conference on People of Color in Predominantly White Institutions: Different Perspectives on Majority Rules) (Lincoln, NE April 1997) *available at* http://digitalcommons.unl.edu/; Sanders & Wiseman, *supra* note 412, at 455–57 (explaining research on how faculty behavior in the classroom, for example smiling at students and addressing them by name, affects African-Americans, Hispanics, Asians, and Caucasians).

431.   *See generally* ASTIN, *supra* note 429, at 22–24.   One author omitted his data but offered to send copies to those who requested, warning that "copying and postage costs will be hefty." *See id.* at xv.

Many of those statistics and data relate to *Best Practices'* claims that our interpersonal relationships with students, in and out of the classroom, are as important to their learning as the rules and the logic that we try to teach.[432]   Others concern *Best Practices'* admonition that we move from Socratic dialogue to group work.[433]

That is the next article. It is aimed at the audience *Best Practices* is most likely to perplex and puzzle, if not downright offend: introverted faculty. We are the ones who focus on doctrine, logic, and "hard facts"; we are the ones who distrust the personal opinion, emotions, feelings, and anecdotal evidence that permeate *Best Practices*.[434]   We are the ones who will be most confused when, for example, the book spends eighteen pages discussing Socrates and his method without once referring to (let alone celebrating) the "life of the mind" or the joys of thinking.[435]   And we are the faculty who have the most to learn from the book—*if* it would speak our language.

The fact is that considerable, though not all, empirical evidence throughout higher education shows that no matter how well we know our fields or how important we consider the doctrines we teach, our words reach fewer students than we suspect.[436]   If we really believe it is important for our students to learn what we know, and to learn it well, we must understand a strange new world that many of our students inhabit, a world in which *how* we say something, how we *personally connect* with students, and what we get *them* to say is as important as what we say.[437]   This empirical research will be the focus of the next article in this series: *A Critique of Best Practices in Legal Education, Part II: What Introverted Law Professors Need to Know About Empirical Research on Faculty–Student Interaction and About Group Work.*

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432. *See* STUCKEY ET AL., *supra* note 1, at 105 ("'Without exception, outstanding teachers know their subjects extremely well.' The most knowledgeable teachers, however, are not necessarily excellent teachers.").

433. *Id.* at 132–33.

434. *See id.* at 107 (explaining legal educator's preference for scholarship overteaching methodology).

435. *See id.* at 207–25.

436. *See generally* LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2006 ANNUAL SURVEY RESULTS, *supra* note 187, at 9, 11 (citing survey results showing the percentage of students that never received prompt feedback from faculty members and the influence it had over several aspects of their education).

437. *See generally* Kuh & Hu, *supra* note 429, at 314 (describing the effects of faculty interaction on student efforts and learning).

APPENDIX A:
NON-DOCTRINAL SKILLS TO LEARN IN CONTRACTS

SOME READING SKILLS THAT WE'LL LEARN:

Using the textbook's table of contents, chapter and subchapter headings, etc. to focus our attention as we read.

Reading *every* word in a judicial opinion, statute, etc., no matter how unimportant it seems to be.

Understanding *every* word in a judicial opinion, statute, etc., and not reading further until we do understand the meaning of the last word we read.

Identifying the issues, rules, analysis, and conclusions in a judicial opinion.

Stating the issue and the holding (or creating an issue and a holding when the court does not expressly do so).

Deriving express rules from judicial opinions.

Deriving implied rules from judicial opinions, e.g., inferring rules from the examples the court gives, from *dicta*, and from a court's discussion of a rule's values or purposes.

Integrating/synthesizing a series of judicial opinions into a single set of rules.

Distinguishing between elements and factors.

Dividing a rule into elements or factors.

Using judicial opinions, examples, and statutes to define a key term in a rule.

Distinguishing between facts, arguments, rules, and conclusions.

Distinguishing between relevant and irrelevant facts.

Taking notes as we read.

Reading a statute (which involves different skills than reading a case).

Noticing what a judicial opinion (or a statute) does *not* say.

Reading actively, i.e.,

-Reading with a purpose;

-Monitoring our attention levels;

-Reading for the main idea;

-Questioning the arguments and logic that a court uses;

-Making predictions about what a court will do;

-Testing those predictions–does the court do what we expected?;

-Connecting what we're reading with our personal experiences.

SOME THINKING SKILLS THAT WE'LL LEARN:

Using precedent and analogy to resolve a legal issue.

Distinguishing between mandatory and persuasive precedent.

Distinguishing between statutes, regulations, and ordinances.

Translating an intuitive conclusion into a legal argument.

Using inductive reasoning.

Using deductive reasoning.

Using analogy to use a judicial opinion involving certain facts to resolve a dispute that involves *different* facts.

Assessing the strength of precedent in a particular dispute.

Applying or linking facts to rules and rules to facts.

Building a legal argument.

Determining the scope of a statute, regulation, or body of law, i.e., does it apply to a particular dispute?

Dealing with legal rules that change.

Persuading a judge, arbitrator, or other dispute-resolver to adopt the rule that best protects your client's legitimate interests.

Processing what is said during a meeting, conference, hearing, or trial into a usable set of notes.

Assessing the strength of our client's case, *independent of our sympathy for that client*.

Using rules to predict how a court or arbitrator will resolve a dispute.

Using words accurately and precisely.

Using the elements or factors of a rule to draft jury instructions.

Dealing with conflicting persuasive precedent.

Dealing with rules that unjustly fail to protect our client's legitimate interests.

Dealing with situations where the text and purpose of a rule conflict.

Assessing where we are in the stages of learning.

Using the rules of grammar to determine meaning and to communicate meaning.

Dealing with uncertain or vague rules.

Using a rule's purpose to interpret or apply it.

Recognizing values that lay behind a judicial opinion or statute, using them to predict how courts will use the resulting rule, and using them to persuade a court to protect our client's legitimate interests.

Focusing on one task for an extended period of time.

Recognizing when commencing (or continuing) a lawsuit is not in our client's best interests (even when the client has the law on her side).

Recognizing the difference between having a legal right and enforcing that right.

Using the elements or factors of a rule

-to determine which witnesses and documents we should seek during discovery;

-to determine which allegations we put in a complaint;

-to determine which witnesses to call at trial and which questions to ask them;

-to draft jury instructions.

Creating an attorney-client relationship (a natural fit for a Contracts course).

Translating legal terms into language that clients and witnesses can understand.

Speaking before a large group.

SOME PROFESSIONAL SKILLS THAT WE'LL PRACTICE:

Being prepared for every meeting, conference, hearing, and trial (and recognizing that proper preparation is a matter of ethics).

Arriving long enough before each meeting, conference, hearing, and trial to have enough time to arrange our notes, review them, and be prepared to start as soon as the proceedings begin.

Maintaining our focus on the subject of a meeting, conference, hearing, or trial throughout the proceedings.

Listening carefully to what clients, colleagues, opposing counsel, etc. have to say, even if we disagree with it.

Refraining from interrupting other speakers.

Treating clients, colleagues, witnesses, opposing counsel, etc. with dignity and respect, even if we disagree with what they say.

Asking for help in dealing with physical, mental, emotional, or other difficulties that prevent us from competently representing our clients.

Staying in a meeting room, hearing, deposition, or court proceeding until the person in charge declares a break or recess.

Promptly filing documents, answering requests, etc.

Maintaining the confidentiality of actual and prospective clients.

Time management.

Refraining from advising family, friends, etc., until one has become an attorney.

Arguing for a client without selling our soul.

Avoiding conflicts of interest.

Acting with one's conscience in mind.

APPENDIX B:
A DAILY AGENDA

WEDNESDAY, FEBRUARY 22

THE BATTLE OF THE FORMS (Part 5)
Start: §2-207 and p. V-58
I. REVIEW: THE SIGNIFICANCE OF THE ORDER OF THE FORMS
  A. With an Exchange of Forms
  B. With an Oral Agreement followed by Written Confirmations
II. THE THIRD METHOD OF CREATING A CONTRACT: SHIPMENT & PAYMENT
  A. The Facts
      1. Fox's/Buyer's purchaser order = $2.50/ft
      2. Valmont's/Seller's sales acknowledgment = $3/ft
      3. Both forms = same subject matter and quantity
      4. Both forms have different fine print
      5. Valmont/Seller ships the goods
      6. Fox/Buyer takes the goods
  B. Formation Under §2-207(1)
  C. The Relevance of §2-207(2)
  D. The Relevance of §2-207(3)
III. BACK TO THE FIRST METHOD OF FORMATION (BY EXCHANGE OF FORMS), WITH DIFFERENT FINE PRINT
  A. The Facts
      1. Fox's/Buyer's purchase order's fine print = 1 year warr.
      2. Valmont's/Seller's sales acknowledge = 90 day warr.
  B. Formation
  C. Terms Under §2-207(2)
      1. The literal reading of (2)'s "The additional terms"
      2. A literal reading of Comment 3
      3. Comparing the literal reading with our other results
      4. Stretching Comment 3
      5. Stretching Comment 6
  D. The 'Law'
      1. WHITE AND SUMMERS, UNIFORM COMMERCIAL CODE
      2. The Majority Approach
      3. The Minority Approach