

# SKILLS FOR LAW STUDENTS

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## I. INTRODUCTION

Teaching skills to law students has been an enduring issue in the law school community, as it should be. The recent decline in the number of law school admissions nationally has stimulated a return to discussion of curricular reform.<sup>1</sup> Law schools have been challenged to make legal education more relevant to the practice of law.<sup>2</sup> While not disagreeing with the need to offer “skills” courses, I have been ambivalent about the terms of the debate. There is an implication that traditional classroom teachers are not teaching skills. It is something like the designation of certain football players as “skill players.” What does it mean when it is said that the quarterback, running backs, and receivers are the “skill” positions? What are the rest, non-skill players? Feeling similarly disrespected, my usual response has been to assert that we all teach legal skills.

At times, the debate has also involved mischaracterization of what legal educators do. A typical assertion is that the curriculum, especially in the first year, is grounded in theory: “Law schools have long emphasized the theoretical over the useful, with classes that are often overstuffed with antiquated distinctions, like the variety of property law in post-feudal England.”<sup>3</sup> The implication is that theory is not useful. I think that most first year professors would characterize what they teach as foundational, not theoretical. Students are taught what they need to know (terminology and concepts) and what they must be able to do (analytical skills) before moving on to the next level of courses,<sup>4</sup> much like the study of human anatomy comes before the study of surgery.

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1. See Barry R. Vickrey, *The Changing Practice of Law and Law Schools: Why Would Anyone Go To Law School Today?*, 60 S.D. L. REV. 80, 81, 87 (2015); Michael Roster, *Facing up to the challenge: It's time to prepare law students for their profession*, ABA JOURNAL: LEGAL REBELS (Jan. 29, 2015, 8:45 AM), [http://www.abajournal.com/legalrebels/article/facing\\_up\\_to\\_the\\_challenge\\_time\\_to\\_prepare\\_law\\_students\\_for\\_their\\_profession](http://www.abajournal.com/legalrebels/article/facing_up_to_the_challenge_time_to_prepare_law_students_for_their_profession).

2. See Roster, *supra* note 1 (proposing goals to make legal education more practical for future law school graduates).

3. See David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1, <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html>.

4. Katherine R. Kruse, *Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice*, 45 MCGEORGE L. REV. 7, 12 (2013) (“[T]he case method thrives, not because it teaches legal doctrine especially effectively, but because it imparts an essential set of foundational lawyering skills.”).

The mischaracterization is compounded in some quarters. There is a widely held belief that virtually no one in law schools teaches legal skills.<sup>5</sup> Some are bold enough to assert this is because law school professors have no practical skills to teach:

Believe me when I tell you that Georgetown taught me next to nothing about how to be a lawyer. The law schools say it is really about “teaching you to think like a lawyer.” The reason law schools offer up this lie is because the great percentage of “law professors” have never tried a case, have minimal experience in the trenches, or came straight from academia. Look at the resumes of these “law professors.” When I review a “law professor” background, I see such articles as “Law and the 20th Century Application Of Human Gravitational Fields To Mobile Phones.” They almost never write about how to solve getting a temporary restraining order without notice, or how you can file an ex parte application, etc. I’d kick their ass in court. They use the same lecture notes each year, preach from the same casebook of stale cases, and get paid \$150K or more to teach six hours per week. What a job!<sup>6</sup>

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5. See Patrick J. D’Arcy, *The Law School Scam—You Won’t Know Anything About Being A Lawyer* (Apr. 4, 2015), <http://oc-attorney.com/the-law-school-scam-you-wont-know-anything-about-being-a-lawyer-by-patrick-j-darcy-esq/>; Casey C. Sullivan, *5 Skills They Don’t Teach You in Law School*, FINDLAW: GREEDY ASSOCIATES (Mar. 27, 2015, 10:55 AM), [http://blogs.findlaw.com/greedy\\_associates/2015/03/5-skills-they-dont-teach-you-in-law-school.html](http://blogs.findlaw.com/greedy_associates/2015/03/5-skills-they-dont-teach-you-in-law-school.html) (“Sure, law school teaches you how to think, write, read, even drink like a lawyer. But it often doesn’t teach you how to accomplish the actual work of a lawyer.”); Jeena Cho, *10 Lessons You Weren’t Taught in Law School*, LAWYERIST.COM (Mar. 11, 2015), <https://lawyerist.com/80492/10-lessons-werent-taught-law-school/>.

6. Patrick J. D’Arcy, *Law School Is A Scam For Most Students* (Apr. 2, 2014), <http://oc-attorney.com/law-school-is-a-scam-for-most-students-by-patrick-j-darcy-esq/>. Here’s more from Mr. D’Arcy:

As a trial lawyer, I am constantly reviewing the latest cases (as other lawyers do). We NEVER refer to our casebooks or our lecture notes to help us out. They are irrelevant. To prove what BS the “Socratic Method” is (the main learning device used by law schools), watch how fast these same “law professors” simply give you the information during a condensed bar review session, when they did nothing of the sort during your time in law school. Explain to me how the Socratic Method fosters learning when the “law professor” leads a class filled with students with no background in the subject, and peppers them with open-end questions chock full of wrong answers. All that results is mass confusion. What a huge waste of time. If medical schools worked this way, the doctors would have no practical training. Instead, they put them on rotations, and the professors are practicing surgeons. Not law schools – they put someone in charge who typically couldn’t hack it in court. Law schools are fine with it. They graduate functional idiots who do not know how to draft a complaint, take a deposition, know the rules of evidence, serve a complaint, file motions, etc. I learned all of this for the first time after I graduated. Law school is an extended liberal arts education. I tell you this so you can be aware of the problem you will encounter thinking graduating from law school is enough to start your own practice. When law schools speak of “practical training,” just do what I do and laugh your ass off.

*Id.*

Five lessons (at least) from this remarkable paragraph are: (1) Don’t trust a trial lawyer who uses ALL CAPS or snarky quotation marks to make a point; (2) Be skeptical when someone announces in a single sentence that a proposition—in this case that the Socratic Method is BS—has been proven, especially when it challenges a long-standing practice; (3) Be wary of anyone who thinks that a bar review course should be a model for legal education; (4) Note the difficulty of explaining anything to a person who

This sentiment, with only slightly less anger, has been expressed from within the law school community:

So people who have never been trained to teach or to do academic research, and who know almost nothing about the practice of law, are expected to teach other people how to practice law, and spend approximately half their time doing academic research. This by itself is a prescription for disaster, but the situation is made considerably worse by the traditional methods of classroom instruction and evaluation used in law school—methods that most legal academics continue to employ.

The so-called “Socratic method,” which involves a professor cold-calling a randomly chosen student and quizzing the student about the facts of an appellate court case, is an absurdly inefficient way to teach people about law. It fills the first-year classroom with significant amounts of fear and anxiety, which anyone who knows anything about educational theory will tell you are exactly things you want people not to experience when they’re trying to learn something. And it fills upper level classes with boredom and detachment, as everyone but the student on the spot zones out and surfs the internet on their laptops.<sup>7</sup>

Strong stuff. And the criticism of how law schools have been going about the business of training lawyers is not new.<sup>8</sup>

The ongoing discussion of what law schools should be doing has also involved lawyers who have experienced pushback from clients. A New York

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cannot accurately describe what he or she is criticizing; and (5) Don’t confuse the medical schools’ third and fourth years involving clinical rotations as well as the next four years of residency with the first two years of law school.

7. PAUL CAMPOS, DON’T GO TO LAW SCHOOL (UNLESS): A LAW PROFESSOR’S INSIDE GUIDE TO MAXIMIZING OPPORTUNITY AND MINIMIZING RISK 10 (2012). *See also generally* BRIAN Z. TAMANHA, FAILING LAW SCHOOLS (2012).

8. *See, e.g.,* Charles A. Raich, *Toward the Humanistic Study of Law*, 74 YALE L.J. 1402, 1402-03 (1965).

The most important aspect of training for practice is methodology and approach. When the practitioner confronts a new problem, he rarely depends upon what he learned in law school. Subjects are too specialized and technical, too rapidly changing. The practitioner prides himself on his ability to become familiar with any area of law, no matter how new to him, in the course of working on a single case. His stock in trade consists of the ability to analyze and organize facts, the ability to communicate, argue and explain, knowledge of research and writing methods, and a free-wheeling mind. After about one year, the law school has done almost all it can to equip the student in this style; the rest must be learned on the job. If the courses are to be of any value, they must offer something different.

*Id.* *See also* Karl L. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 215 (1948) (“[M]an could hardly devise a more wasteful method of imparting” knowledge about the law.); AM. BAR ASS’N SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (Robeert MacCrate ed. 1992); WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, & LEE S. SCHULMAN, EDUCATING LAWYERS (2007); ROY T. STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION [http://law.sc.edu/faculty/stuckey/best\\_practices/best\\_practices-full.pdf](http://law.sc.edu/faculty/stuckey/best_practices/best_practices-full.pdf) [hereinafter BEST PRACTICES]; A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949 (2012).

Times article on how law firms are dealing with client resistance to legal bills made the following observation:

[F]or decades, clients have essentially underwritten the training of new lawyers, paying as much as \$300 an hour for the time of associates learning on the job. But the downturn in the economy, and long-running efforts to rethink legal fees, have prompted more and more of those clients to send a simple message to law firms: Teach new hires on your own dime.

“The fundamental issue is that law schools are producing people who are not capable of being counselors,” says Jeffrey W. Carr, the general counsel of FMC Technologies, a Houston company that makes oil drilling equipment. “They are lawyers in the sense that they have law degrees, but they aren’t ready to be a provider of services.”

Last year, a survey by American Lawyer found that 47 percent of law firms had a client say, in effect, “We don’t want to see the names of first- or second-year associates on our bills.”<sup>9</sup>

One result has been increasing in-house training by the law firms before the newly hired associates are allowed to work on actual cases.<sup>10</sup>

The American Bar Association, through its accreditation process, has weighed in on this discussion with the adoption of new standards requiring the completion of “experiential” courses totaling at least six credit hours.<sup>11</sup> Included in this requirement are now “simulation” courses that would approximate the

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9. Segal, *supra* note 3. See also Roster, *supra* note 1. As Michael Roster noted:

The legal profession is under immense pressures. Clients are demanding steep discounts and increasingly insist on fixed prices or other forms of value-based fees. Law firm realization rates (that is, revenue received versus what was reported on time sheets) once averaged 92 percent, fell to the lower 80 percent range in recent years and are now moving to the 70 percent range. Many clients won’t allow junior associates to work on their matters, and many law firms aren’t even hiring recent graduates.

*Id.*

10. Segal, *supra* note 3. Furthermore, as noted above, “[m]any clients won’t allow junior associates to work on their matters, and many law firms aren’t even hiring recent graduates.” See Roster, *supra* note 1. But, consider this conundrum:

[T]here is, so far, no evidence to suggest that the employment prospects of a law school graduate have any relationship to whether or not he or she acquired practice skills while in law school. Linking the two (employability and acquisition of practice skills) is an unfortunate case of mistaking correlation with causation. In fact, someone paying close attention to the data would conclude the opposite: that students graduating from schools doing the best job of producing practice-ready attorneys are far less likely to find high-paying legal employment than those who are equally well-known for doing the opposite.

Jennifer S. Bard, “*Practicing Medicine and Studying Law*”: *How Medical Schools Used to Have the Same Problems We Do and What We Can Learn From Their Efforts to Solve Them*, 10 SEATTLE J. FOR SOC. JUST. 135, 137 (2011).

11. Managing Director’s Guidance Memo on Standards 303(a), 303(b), and 304 at 1, American Bar Association (March 2015), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2015\\_standards\\_303\\_304\\_experiential\\_course\\_requirement\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_standards_303_304_experiential_course_requirement_authcheckdam.pdf).

experience of working on cases, albeit without the presence of actual clients.<sup>12</sup> Michael Roster, writing in a recent ABA Journal column, pushed this idea even further with his “audacious” proposal:

By 2018, every graduate from a U.S. law school will have the knowledge and skills currently expected of a second-year lawyer or higher and as such can function as a midlevel associate, a solo practitioner, an agency or judicial officer, a junior faculty member or in similar capacities. To achieve this proficiency, every student will have had courses or comparable experiences involving all of the following: traditional substantive law, client skills, social service, advocacy and dispute resolution, government and administrative processes, and teaching and scholarly inquiry.<sup>13</sup>

In order to arrive at this outcome, Roster would reform the law school curriculum to bring it more in line with other professional schools, with an emphasis on skills training:

Every profession has certain substantive knowledge at its core (basic sciences in medical school, for example). But professional school graduates then need to acquire the more advanced knowledge and skills that are required to practice their profession. Professions by definition can't be reduced to a series of rules but involve learning how to constantly make difficult trade-offs and judgment calls. And to assure law school graduates have these skills doesn't make law school a trade school. Rather, it's what any professional school should, at a minimum, be doing.<sup>14</sup>

I agree with this, but it should be noted that the program for medical education is not simply four years of medical school. In fact, the medical profession's long-standing judgment is that the medical student is not ready for full-time, unsupervised practice until approximately eight to nine years after entering medical school:

Part of the reason why a facile suggestion that law schools be more like medicals is not particularly helpful is based on a general misperception that medical schools have traditionally taught practice skills. This is not true. Just as law schools have traditionally been viewed as places of scholarship and research, not as trade schools,

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12. *Id.* at 1-2. Standard 304 reads:

A simulation course provides substantial experience not involving an actual client, that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member, and (2) includes the following:

- (i) direct supervision of the student's performance by the faculty member;
- (ii) opportunities for performance, feedback from a faculty member, and self-evaluation; and
- (iii) a classroom instructional component.

*Id.*

13. See Roster, *supra* note 1.

14. *Id.*

medical schools too have eschewed practice skills for an emphasis on the science of medicine. Just as law schools assumed that students would learn practice skills when they began practice, medical schools assumed that students would pick up practical skills during their last two years of medical school in clinical rotations, or during post-graduate supervised residencies working in hospital wards. It is only within the last ten years that medical academics have reconsidered this practice and have only recently begun developing curricula containing direct skill instruction.<sup>15</sup>

The extended time required to become a fully functioning medical professional confirms that a long-range view is needed for legal education.

I find much to agree with in Michael Roster's proposal, preferring his practice-oriented viewpoint to the more bureaucratic emphasis of the ABA on measurement of outcomes. Before going all in on any particular reform, however, I believe it is prudent to assess how well the law schools have been doing in the teaching of legal skills. Without defending all that has gone on under the name of the Socratic Method, I believe that law schools do a better job with legal skills than they are given credit. My purpose with this Article is to reflect on the type of skills that have been taught and to suggest that recognizing and preserving these basic skills will aid the much-needed reform of legal education.

## II. BASIC SKILLS FOR LAW STUDENTS

Although there is an enormous amount of information conveyed during three years of legal education, law school is ultimately not about information. It is primarily about how to think like a lawyer. No lie. Critics would say this is, at best, a conundrum because how can one claim to *think* like a lawyer without being taught to *be* a lawyer? The short answer is that law school is the beginning of a process. Certain analytical skills, or habits of mind, must be developed. A lawyer is a problem-solver and a counselor. There are many things that a lawyer does that can also be done by competent paralegals and other staff. What the lawyer brings is knowledge, experience, and judgment, in order to fashion a strategy and, possibly, a resolution to a problem.

The first year curriculum is not about theory. It is about acquiring foundational analytical skills. It is a bit like learning a foreign language,<sup>16</sup> especially because there is a fair amount of new (and foreign) terminology. But the new terminology is not there for its own sake. The new terminology is there, in part, to provide an alert. It is an important skill to recognize one's lack of knowledge, to recognize what one does not know and to figure out a way to understand and integrate the new information. The law of future interests, to take

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15. Bard, *supra* note 10, at 139-40.

16. To quote my research assistant, Sarah Christopherson: "It really is! During my first year, I told my friends from undergrad that I was 're-learning how to learn' and 're-learning how to write.'" I agree with this observation. This is part of the reason why there is discomfort and anxiety in the first year. The transformation is not painless, but the metamorphosis in terms of habits of mind is usually worth it.

the most extreme example, is not there because it is even remotely useful to the practice of real property law. The first-year curriculum requires working through difficult concepts, like the Rule Against Perpetuities, and fosters good habits of mind. This is why first-year grades are more revealing of ability than generally thought. They represent the result of a work ethic and discipline of character that are related in important ways to the learning of the lawyer's craft that takes place during the first decade of law practice.

### A. READING AND RECITING CASES

The study of law usually begins with the study of cases. Learning how to read a case is a skill. It is not about information. The ability to read cases accurately is the gateway to problem-solving for lawyers. When I took the LSAT, there was a reading section that consisted of short narratives with questions following each narrative. I recall that one of the readings concerned crustaceans in Chesapeake Bay. I wondered at the time why reading and responding to a marine biology narrative had anything to do with measuring one's capacity for the study of law. Later, as I began to teach law, I came to understand that measuring one's ability to read something that was unfamiliar and to respond to questions about that reading had a lot to do with the study and practice of law.<sup>17</sup>

#### 1. Describe Accurately What Has Been Read

This is the fundamental skill for legal analysis.<sup>18</sup> In order to understand something, one must be able to describe it accurately. By insisting on a "clean" recitation of the basic story — procedure, issue, law, application, and conclusion — students learn, through trial and error, to look for and describe with precision each element of the case. This is harder than it sounds. It takes practice and usually at least a year to become proficient at it. In his book, *Outliers*, Malcolm Gladwell argued that it takes approximately 10,000 hours of practice to become

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17. Another example of the importance of describing accurately what one has read came from the late Martin Diamond, who taught a course on The Federalist Papers at the Claremont Graduate School. Professor Diamond was known for an unusual final exam for the course. The exam was given in two parts. For the first part, students were required to describe the argument made in, for example, Federalist Papers Nos. 10, 15, 43, 51, and 78. The exam answers were collected and graded. If a student passed this part of the exam, he or she was then allowed, on a subsequent day, to complete the exam, which consisted of critiquing the argument made in the respective Federalist Papers. Description first, then analysis.

18. See Gary Shaw, *A Heretical View of Teaching: A Contrarian Looks at Teaching, The Carnegie Report, and Best Practices*, 28 *TOURO L. REV.* 1239, 1282 (2012).

Some skills serve as foundations for others. From my perspective, textual exegesis is the first skill that needs to be mastered. Next comes the ability to analyze and synthesize cases, which skills include rule choice, fact development, contextual analysis, narrative development and policy analysis. If students are to be able to competently determine which facets of the law are favorable to their client and which are detrimental to their clients' interests, they must be able to read and interpret the law . . . accurately. A major part of this competence is the ability to read cases accurately.

truly proficient at one's craft, whether it is music, basketball, or law.<sup>19</sup> Whether one agrees with that number, it is true that proficiency at one's craft takes much repetition over time, as well as constant reflection on that practice in order to get better.<sup>20</sup> This is, in itself, a measure of the difficulty with insisting that students be ready to practice upon graduation.

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19. MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* 40-42 (2011). In the music field, I had a friend who was a very good keyboard player. He played both piano and organ very well. As a college student, he had been part of a musical ensemble that toured the country and, as part of the performance, he played the Finale from Louis Vierne's Symphony No. 1 for Organ. No small accomplishment, but he was not at the top level. Later in his career, he sought to advance to a higher level and began to take lessons from a piano master teacher. At their first meeting, she asked him to play a simple scale, to which he obliged. Her response was: "Oh dear." Meaning, there was a lot of remedial work to do. His shortcomings were undetectable to the inexperienced musical ear, but apparently obvious to the master from the outset. There was still quite a bit of room for improvement. Sometimes, you have to be pretty good yourself to realize how good, good really is.

20. See Shaw, *supra* note 18, at 1261-62:

Appellate opinions (and trial court opinions) are an excellent tool for teaching law students the fundamental skills they will need to build upon, and good teachers use appellate opinions for a variety of purposes. First, appellate opinions take a complex area that needs to be mastered and break that complexity down to manageable pieces that can be mastered by a student. As the Carnegie Report and Best Practices properly point out, becoming a good lawyer requires mastering a large number of complex skills. While one approach to teaching students mastery of these skills is to simply expose them to all the issues involved and let them try to master each skill simultaneously (the sink or swim method), the use of Socratic dialogue allows the professor to introduce skills serially instead, allowing students to become familiar with each skill and at least start down the road to mastery before starting on the next skill.

Appellate opinions allow the professor to start with the skill that underlies everything a lawyer hopes to accomplish for his or her clients—the ability to master legal analysis. At a minimum, students need to be able to analyze cases and be able to synthesize the rule of law from a series of cases, which includes the ability to understand what the rule of law has been, how it has changed, and in what direction the law may be heading in the future. While mastering common law analysis is hardly the be-all and end-all of legal analysis, common law analysis provides an intellectual underpinning for students to move on to other skills. It is crucial for students to be able to determine what the relevant rule of law is, what the relevant facts are, and how the rule should apply to the facts. The criticism that use of appellate opinions does not teach the students anything about the factual complexity and indeterminacy of the cases they will handle as lawyers is inappropriate when applied to new students. Appellate opinions are a way to start students on the road to mastering the relationship of facts and law. They can concentrate on that first skill before moving on to another skill—how to handle factual complexity and indeterminacy. As students master the initial skill of relating facts and law, the faculty member then has the opportunity to introduce the student to the many-faceted issues involved in fact discovery in actual cases.

What is crucial to realize is that as students master the skills, good faculty continue to push them to new limits. The depth to which one explores a case with first week law students, as well as the emphasis the professor puts on various aspects of the case, must inevitably differ from the depth and emphasis that the professor concentrates on later in the semester, as well as the progression through the entire first year. As students' mastery of legal analysis improves, faculty start reaching for more complex analyses of the law as well as introducing new skill sets. To characterize the Socratic dialogue as "repeatedly leading students through a highly routinized set of analytical rules and distinctions" either describes a poor teacher or misdescribes the process of learning that takes place under Socratic dialogue. Not only is there nothing in the Socratic dialogue that requires routinization, the need for thoughtful faculty to monitor and recognize their students' progress precludes such a routinization.

*Id.* See generally DONALD A. SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER* (1987).



The recitation of the case is not intended to be an end in itself. It is not like assigning a book report to students to make sure that they have read the book. It is intended to provide an opportunity for the student who has briefed and thought about the case to demonstrate the various skills of storytelling, issue spotting, rule synthesis, application, distinguishing, and policy analysis, among other things.<sup>21</sup> Of course, there is great opportunity for abuse of power here. Yes, the professor may, for personal reasons, choose to play petty ego games and pointlessly hide the ball.<sup>22</sup> Senseless slaughter, however, is not in anyone's best interest. With great power should come great responsibility.<sup>23</sup> The opportunity for development of this most fundamental legal skill should not be wasted.

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21. Professor Campos completely misses this point when he describes the classroom interaction as follows:

[T]he great virtue, from the professor's perspective, of the Socratic method is that it's so easy: it takes up large stretches of class time without requiring the instructor to have anything original or interesting to say. (I have witnessed many law school classes, both as a student and a faculty evaluator, in huge stretches of time were taken up merely reviewing the facts of cases. As one student put it to me, it's as if a good way to study *Macbeth* would be to spend a lot of time asking students where the play took place and who the king of Scotland was).

CAMPOS, *supra* note 7, at 11. This is what an evaluator brings to an evaluation? Breathtaking. The Socratic method is not an exercise in baby-sitting. "Did you do your homework?" This is a good example of why one must be able to describe with some accuracy that which is being criticized. Criticism of a "straw man" is self-serving nonsense. Even the cherry-picked example is off. While it would be odd to spend "a lot of time" on the bare facts of *MacBeth* in the manner described, a basic understanding of the storyline is required. Recitation of the storyline might be one way to gauge the capacity of the students and allow the teacher to determine what other levels of understanding are feasible. In any event, I think Professor Campos's description of the Socratic method tells us more about him than the method.

22. See Shaw, *supra* note 18, at 1266:

Of course, the key to the efficacy of [the Socratic dialogue] approach is thoughtful questioning on the part of the professor. If the professor is merely asking questions for the purpose of hectoring the student or showing the student that no matter what he or she answers, the professor is capable of finding flaws in the answer, then the students called upon will legitimately become resentful, and the other students in the class are likely to learn little about either the called-upon student's thought processes or their own.

Asking students questions for the purpose of hectoring them or showing the professor's superior skills is simply bad teaching. The teacher's inefficacy in such a situation is not the result of some inherent flaw in Socratic dialogue; it is a function of the teacher's misuse of the method or the professor's general ineptitude or thoughtlessness. Ineptitude will render any approach to teaching inefficient. It is inappropriate to disparage Socratic dialogue based on a presumption that its practitioners will not use it properly.

23. SPIDER-MAN (Columbia Pictures 2002). To my fellow law professors, I would say that the anecdotal evidence suggests there has been some abuse of this power. You should examine yourselves and understand the motivations underlying your interest in teaching. Teachers have great influence for both good and evil. On the dark side, there is the allure of power and prestige, similar to what draws certain individuals to politics. This, coupled with the lack of accountability that tenure permits, can make a law school classroom a nasty place. And not just in the classroom. A friend who taught at a top twenty-five law school once told me that if Genghis Khan joined his faculty, it would raise the level of civility. With a concentration of talented, egocentric individuals, the law school faculty is sometimes not unlike a medieval monastery, where some pursue their contribution to the community purpose through murmuring, duplicity, and slander. Life in the "ivory tower" is mostly good, but certainly not all good.

## 2. *Learn How to Synthesize What You Have Read*

In order to manage a large amount of material, the reader must make it simpler. This must be done without losing the essential accuracy of the account. This is the skill of synthesis or summarizing.<sup>24</sup> It involves identifying and discarding the non-essential information and condensing the remaining essential information. Starting with the story of the case (the facts), you can begin to make cuts on the initial read, but this must be tentative, as the final version requires understanding of the rest of the case. Most cases in the casebook are an abridged version to begin with, but there is additional trimming to be done. Why? Because trimming is a necessary part of the process. Information that is useful for context is dropped from the story, having served its purpose. Short cuts are not advisable here, that is, do not let someone else do this for you. I am speaking specifically of “canned briefs,” which stunt one’s growth in developing the essential skill of deciding what is important in the story. The final executive summary version of the story can often be stated in a single paragraph. This will later help with the management of material during exam time.

The statement of the procedure (statement of the case) follows the story and is only important insofar as it will give a context to the issue or issues to follow. Because many of the first year cases focus on the cause of action, it will be important to note whether the plaintiff was dismissed out at a pre-trial stage or whether the jury was given a chance to hear the case. The standard of review is all-important for the outcome of the appeal.

Finding the issue of the case is usually not difficult because it is often expressly stated by the court. Make sure, however, that the initial statement of the issue is revised, as needed, as the opinion progresses. That is, do not take the issue at face value without working through it a few times to make sure it is clear and comprehensive. Now, there are professors who make a big deal out of the statement of the issue. I do not. I think that insistence on a long statement of the issue, loaded up with the essential facts into an adversarial-like statement is not necessary. In fact, this technique may be counter-productive, especially if the issue statement’s advocacy tone distorts the accuracy of the account or takes away from time better spent on the rule and the application part of the brief. There will be time later for fashioning issue statements in actual briefs. When reading cases for classes, make the statement of the issue short and move on.

The rule is the centerpiece of the case. The reader must find it. Without it, one is simply not prepared to recite on the case. Like the issue, the rule should be relatively easy to find. But, because it is the law and must be provided in full, the rule as stated by the court is often too wordy and must be broken down into a more useable form. The process of synthesis requires you to translate what you have read into simple words; this is important when it comes to stating the rule. Translation of the rule into simple English is a common step in the process. Take

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24. Joseph Kimble, *First Things First: The Lost Art of Summarizing*, 8 SCRIBES J. LEGAL WRITING 103 (2001-2002).

care to do this without losing accuracy. In some cases, the determination of what should be the rule is the focus. Be sure to follow the discussion to the end and then work back through the reasoning, including why the court chose this rule to answer the question presented. One may disagree with the court's choice, but the first task involves an accurate yet simple description of the rule. There will be time for evaluation, where the reasoning or the rule itself may be questioned. It is useful here to be reminded that not all of the cases in the book are correct. Some are noble failures and others are just plain failures. One of the tasks of the law student is to decipher which rulings can be trusted. Not everything in the law is right. Law school provides a controlled environment to practice the skill of discernment.

Disagreement with the court's application of the rule is also a common reaction, but again, the first task is description. Describe first, then criticize, if appropriate. Once the rule is understood, the professor often moves the discussion to a hypothetical to test the application of the rule to a different factual scenario. Sometimes, this is counterproductive because the piling on of hypotheticals may cause confusion, and the clarity from the initial description of the case becomes lost. Some professors might find these hypotheticals effective. I think this tactic is flawed.

Learning how to synthesize is best done through briefing the cases before class. Develop shortcuts in the briefing protocol because there will not be enough time to brief as generally recommended. I think a case brief can be reduced to story, procedure, issue, rule, application, and conclusion. One of the purposes of class is to check how your briefs hold up during the class discussion: Were you on track, or did you miss something important? Of course, if the professor promotes confusion, either by design or by incompetence, then all bets are off. At that point, it might be better to resort to a post-mortem study group to check on whether your ability to synthesize cases is on track. There is even a place here for "canned briefs," not as a replacement for your own pre-class preparation, but for a post-class remedy to deal with the lost opportunity to develop this skill. The professor should be the guide for the reading of cases. Through repetition in class, the student comes to hear that guide's voice outside of class.<sup>25</sup>

### 3. *Learn How to Read a Case Forward and Backward*

The basic elements of case's story—procedure, issue, rule, application, and conclusion—are a sequence. They are connected in an order. The sequence of the elements points forward. The story winds up in court and the court notes the procedural setting of the case. The issue points to the rule as the way to answer the issue. The rule provides the framework for the application or discussion, which leads to the conclusion. The sequence can also be read in reverse. The conclusion tells us who won, the application tells us why, and that discussion is

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25. SCHÖN, *supra* note 20, at 176-82.

shaped by the rule, which is the short answer to the issue, which is the question posed by the procedural status of the case, all of which started with a story.

The ability to read a case forward or backward is not a gimmick. The usual reading of a case involves the ability to read both ways. The first reading is likely to be forward only. Thereafter, read back and forth to check one element against another, using each element to clarify the others. The discussion of the application may help solidify the student's understanding of the rule, or the statement of the issue may help to find the rule. This is especially important with edited cases because the editor may have left out a step or two.<sup>26</sup> Even full judicial opinions sometimes have gaps, so reading back and forth helps keep your understanding on track. You can figure out missing steps, just as you can piece together the beginning of a conversation that you have just joined.

#### *4. Learn How to Apply the Principle of What a Case Teaches to Another Situation*

If you can describe a case accurately, in short form, forward and backward, then you are ready to work on what the case teaches. This is not necessarily the conclusion, although it may be. The lessons learned from a case may be multiple and some of these may not be apparent until you read subsequent cases. Reflection on a subsequent case may point back to what was learned in a prior case. I often ask: Where have we seen this problem before? A reliance on holdings may not be enough. Understanding the principle of a case is a valuable skill to develop.

When discussing the exam, I say that the cases are your friends. What I mean is that you do not have to fashion your answer from scratch. To deal with the inevitable curve thrown into an exam question, the difficulty may be addressed by referring to a case from class where that issue was discussed and at least one answer, maybe even a good answer, was provided. At the very least, it helps to enrich the exam answer. Otherwise, the answer may be an abbreviated or stiff rule application. Part of the testing process is finding out which students are adept at finding and applying familiar principles to new problems. To do this right, the student must bring some friends, in the form of cases, to the exam.

#### *5. Understand How to be Responsive to the Question Asked*

The Socratic Method, whether full or modified, practiced in the right way, is an excellent tool for developing another fundamental skill: learning how to be responsive to questions. The payoff will come when the student, now a lawyer, asks questions and has a finely tuned sense of whether an answer is responsive or not. It is amazing, but most people do not have this skill. Only when you have

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26. Without naming names, there is a widely recognized Torts casebook, whose editor appears to be rule-averse and thus the rule rarely appears in the edited version of the case. There might be pedagogical reasons for doing this in an advanced seminar, but not in the first-year. This is truly a case of hiding the ball.

this skill do you realize how useful it is. The question and answer process is very familiar to students, but it is not practiced with much rigor before graduate school. Since students often stick with what they think they know, their answer may be true, but not responsive or tailored to fit the question.

The questioning process in almost any class will provide students, particularly the bystanders, with plenty of practice in developing this skill. Just listen and evaluate. It will take time, but less so if the student concentrates on the responsiveness of the answer. One eventually develops an ear for it, like a piano tuner's for when the pitch is true. This will become a useful, and even necessary, skill in depositions, negotiations, and trials. The ability to gauge when the responder is evasive will usually lead to productive follow-up.

## B. READING AND UNDERSTANDING STATUTES AND REGULATIONS

Although reading and understanding statutes and regulations involves a skill different from reading cases, the general principle still applies: You must be able to accurately describe what you have read. Precision in description is at a premium. This is not a natural skill, like the reading of a narrative. It requires close reading, with particular attention to the structure of the text. Statutes and, even more so, regulations tend to be wordy. To achieve clear understanding, one must simplify, if possible.

### *1. Understand the Structure of the Text*

Grammatical structure is a good place to start. The length of many statutory provisions requires a breaking down of the text so as to not get lost. Here is an example, chosen at random, from the United States Code:

Whoever, being a party in interest, whether as a debtor, creditor, receiver, trustee or representative of any of them, or attorney for any such party in interest, in any receivership or case under title 11 in any United States court or under its supervision, knowingly and fraudulently enters into any agreement, express or implied, with another such party in interest or attorney for another such party in interest, for the purpose of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of the estate, shall be fined under this title or imprisoned not more than one year, or both.<sup>27</sup>

Using the basic framework of subject, verb, and object (with important adjectives and adverbs thrown in), the first cut might be: "Any party, representative, or attorney who knowingly and fraudulently enters into an agreement for fees for services in a receivership or bankruptcy case to be paid

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27. 18 U.S.C. § 155 (2012).

from the assets of the estate shall be fined or imprisoned, or both.” Clarification of what is meant by “knowingly *and* fraudulently” (emphasis mine) will be necessary before the impact of the provision can be known. Otherwise, the provision is now much more accessible. You could further simplify the provision to “fees for services shall not be paid from the receivership or bankruptcy assets” for working memory purposes, but this runs the risk of missing an important element through over-simplification. There is a balance between reader-friendly and reader-misleading. Still, by using the basic grammatical structure as a baseline, it allows the reader a cleaner understanding of the statute.

The structure of introducing the proposition first and exception afterward is another framework-aid that assists in breaking down statutes. To the outsider, it might appear that the law encourages cognitive dissonance by stating inconsistent ideas within the same sentence, but this is often the way of statutory drafting: state a proposition and then state one or more exceptions to that proposition in the same provision. For example, section 1322(b)(2) of the Bankruptcy Code deals with modification of the rights of secured creditors as follows: “[T]he plan may . . . modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor’s principal residence . . . .”<sup>28</sup> The plan may modify the rights of secured creditors, but not with respect to the home mortgage. Understanding the sequence of proposition first, followed by exceptions, and even exceptions to the exceptions (“but not if . . . .”) will help to keep things straight as you break down the statute.

There are many statutes in which the grammatical structure will not be sufficient by itself to break down the provision into an understandable proposition. Diagrams or flowcharts may be employed, which is more the province of masters programs beyond the basic law school training. The Internal Revenue Code provides many examples. Consider a portion of section 1400L, a provision again chosen at random.<sup>29</sup> This is the style of modern statutory or regulatory drafting.

28. 11 U.S.C. § 1322(b)(2) (2010).

29. 26 U.S.C. § 1400L(a).

(a) Expansion of work opportunity tax credit.—

(1) In general. For purposes of section 51, a New York Liberty Zone business employee shall be treated as a member of a targeted group.

(2) New York Liberty Zone business employee. For purposes of this subsection—

(A) In general. The term ‘New York Liberty Zone business employee’ means, with respect to any period, any employee of a New York Liberty Zone business if substantially all the services performed during such period by such employee for such business are performed in the New York Liberty Zone.

(B) Inclusion of certain employees outside the New York Liberty Zone.

(i) In general. In the case of a New York Liberty Zone business described in subclause (II) of subparagraph (C)(i), the term ‘New York Liberty Zone business employee’ includes any employee of such business (not described in subparagraph (A)) if substantially all the services performed during such period by such employee for such business are performed in the City of New York, New York.

(ii) Limitation. The number of employees of such a business that are treated as New York Liberty Zone business employees on any day by reason of clause (i) shall not exceed the excess of—

Patience and tenacity are required here. This is not a skill that every lawyer will enjoy doing, but the ability to tackle a complex statute or regulation is an essential part of what lawyers do in identifying and solving legal problems.

## 2. *Translate the Text*

The writing of a statutory provision or regulation will never win a prize for literature. They have a far different audience than those who appreciate a finely drafted phrase or clever metaphor. Lobbyists, legislators, lawyers, and judges will all come to scrutinize the language from many different vantage points. The drafter must not only think about the clarity of the essential proposition, but also must anticipate how the provision might be misinterpreted. Hence, the language tends to be over-inclusive and thus wordy.<sup>30</sup> Translation of the text into a simpler, more workable proposition is a necessary part of the process.

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(I) the number of employees of such business on September 11, 2001, in the New York Liberty Zone, over

(II) the number of New York Liberty Zone business employees (determined without regard to this subparagraph) of such business on the day to which the limitation is being applied.

The Secretary may require any trade or business to have the number determined under subclause (I) verified by the New York State Department of Labor.

(C) New York Liberty Zone business.

(i) In general. The term 'New York Liberty Zone business' means any trade or business which is—

(I) located in the New York Liberty Zone, or

(II) located in the City of New York, New York, outside the New York Liberty Zone, as a result of the physical destruction or damage of such place of business by the September 11, 2001, terrorist attack.

(ii) Credit not allowed for large businesses. The term 'New York Liberty Zone business' shall not include any trade or business for any taxable year if such trade or business employed an average of more than 200 employees on business days during the taxable year.

(D) Special rules for determining amount of credit. For purposes of applying subpart F of part IV of subchapter A of this chapter to wages paid or incurred to any New York Liberty Zone business employee—

(i) section 51(a) shall be applied by substituting 'qualified wages' for 'qualified first-year wages',

(ii) the rules of section 52 shall apply for purposes of determining the number of employees under this paragraph,

(iii) subsections (c)(4) and (i)(2) of section 51 shall not apply, and

(iv) in determining qualified wages, the following shall apply in lieu of section 51(b):

(I) Qualified wages. The term 'qualified wages' means wages paid or incurred by the employer to individuals who are New York Liberty Zone business employees of such employer for work performed during calendar year 2002 or 2003.

(II) Only first \$6,000 of wages per calendar year taken into account. The amount of the qualified wages which may be taken into account with respect to any individual shall not exceed \$6,000 per calendar year.

This is just Subsection (a) of Section 1400L. It goes on for several more pages. This is clearly not for amateurs. If you are going to tackle this, you will need a diagram or flowchart for the various propositions within a subpart of a single provision.

30. See RICHARD MITCHELL, *LESS THAN WORDS CAN SAY* 142-44 (1979).

Part of that process is to understand the meaning of the words used. Sometimes, words are given their “ordinary” meaning and, other times, the words have a special meaning for that provision. You do not have an accurate understanding of a provision until you have accounted for whether the word or phrase in question is governed by its ordinary meaning or its special meaning. For example, section 109 of the Bankruptcy Code defines who is eligible to file bankruptcy under the respective “chapters” of the Code. The phrase “[a] person may be a debtor under chapter 7 of this title” seems simple enough, but, in this case, you have to account for the meaning of the word “person.”<sup>31</sup> As used in the Bankruptcy Code, the term “‘person’ includes an individual, partnership, and corporation.”<sup>32</sup> “Individual” is the word the Code uses for what we would normally term a “person.” The reader does not necessarily develop a feel for this. There is no substitute for checking. However, there is a canon of construction that says that, unless indicated to the contrary, words are given their contemporary, common meaning.<sup>33</sup>

Canons of construction provide guidance for the interpretation of statutes.<sup>34</sup> “The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said.”<sup>35</sup> The plain meaning of words and phrases should be given effect.<sup>36</sup> The reading of the statute is shaped by the rules of grammar. Thus, the effect of a modifying clause is generally confined to the last antecedent, unless there is a good reason to do otherwise.<sup>37</sup> Context will play a role. All words are given meaning; if possible, effect should be given to every part of the statute and every word.<sup>38</sup> Individual statutory provisions should be read in light of the whole statute and harmonized, if possible, in order to avoid a construction that leads to an absurd or unreasonable conclusion.<sup>39</sup> The statute is to be applied “‘according to its letter and spirit.’”<sup>40</sup> Canons of construction may also help to interpret the meaning of silence. If a statute, for example, provides a list of required elements or options, it may be assumed that the legislature intended the list to be exclusive, to the exclusion of other elements or options.<sup>41</sup>

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31. 11 U.S.C. § 109(b) (2010).

32. 11 U.S.C. § 101(41) (2010).

33. See *United States v. Smith*, 756 F.3d 1070, 1072 (8th Cir. 2014); *In re Aiken*, 296 N.W.2d 538, 540 (S.D. 1980); *Bd. of Regents v. Carter*, 228 N.W.2d 621, 625 (S.D. 1975).

34. See generally NORMAN J. SINGER & J.D. SHAMBLE SINGER, *SUTHERLAND STATUTORY CONSTRUCTION: STATUTES AND STATUTORY CONSTRUCTION* (7th ed. 2011).

35. See *Martinmaas v. Engelmann*, 2000 SD 85, ¶ 49, 612 N.W.2d 600, 611 (quoting *Moss v. Gutterson*, 1996 SD 76, ¶ 10, 551 N.W.2d 14, 17).

36. *Id.*

37. See *State v. Ventling*, 452 N.W.2d 123, 126 (S.D. 1990); *Kaberna v. Sch. Bd. Of Lead-Deadwood Sch. Dist. 40-1*, 438 N.W.2d 542, 543 (S.D. 1989).

38. See *Peterson ex rel. Peterson v. Burns*, 2001 SD 126, ¶ 32, 635 N.W.2d 556, 568; *Maynard v. Heeren*, 1997 SD 60, ¶ 14, 563 N.W.2d 830, 835.

39. See *Dakota Plains Ag Center, LLC v. Smithey*, 2009 SD 78, ¶ 47, 772 N.W.2d 170, 186; *Schafer v. Shopko Stores, Inc.*, 2007 SD 116, ¶ 12, 741 N.W.2d 758, 763.

40. See *In re Aiken*, 296 N.W.2d 538, 540 (1980) (quoting *Masek v. Masek*, 228 N.W.2d 334, 336 (S.D. 1975)).

41. See *In re Estate of Flaws*, 2012 SD 3, ¶ 19, 811 N.W.2d 749, 753; *Rush v. U.S. Bancorp Equip. Fin., Inc.*, 2007 SD 119, ¶ 10, 742 N.W.2d 266, 269.



The reading and understanding of statutes is an acquired skill. If it was easy, anyone could do it. There is no pattern similar to the sequence described above for the reading of cases. Do not be averse to reading statutes and regulations because it is hard. It will become easier over time and your ability to decipher difficult materials will prove useful in many different contexts. It is a skill that is essential to the practice of law and there is plenty of opportunity to develop that skill during law school.

### C. LEARN HOW TO TELL A STORY<sup>42</sup>

Lawyers are in the communication business, and stories are an essential part of communication. Stories have the power to reach us at different levels of consciousness. A story that might on the surface provide amusement, or romance, or thrills, can also speak to deeply embedded values.<sup>43</sup> From early childhood on, stories assist with the development and clarification of what may be called a person's "moral infrastructure."<sup>44</sup> People think in terms of stories. They use stories to help process or filter new information. It is not simply about information, however, it is about persuasion.

Lawyers use storytelling for persuasion. "Trying a case is telling a story. It is not 'like' telling a story; it *is* telling a story."<sup>45</sup> Lawyer and screenwriter, Jonathan Shapiro, writes that the lawyer's use of storytelling goes well beyond the courtroom:

The more I thought about it, the more I realized that storytelling applies to everything a lawyer does. We tell stories to get jobs and clients. We tell them to get promoted, in our dealings with bosses and opposing counsel, when we explain things to witnesses. We use storytelling techniques when we write a statement of facts for a motion or brief, create a chronology, draft interrogatories, or take depositions.

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42. See generally JIM M. PERDUE, WINNING WITH STORIES: USING THE NARRATIVE TO PERSUADE IN TRIALS, SPEECHES & LECTURES (2006); Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239 (2012) [hereinafter *Storytelling*].

43. In discussing the popularity of the movie *The Shawshank Redemption*, director Frank Darabont made the following observation:

The film seems to be something of a Rorschach for people. They project their own lives, their own difficulties, their own obstacles, and their own triumphs into it, whether that's a disastrous marriage or a serious debilitating illness that somebody is trying to overcome. They view the bars of *Shawshank* as a metaphor for their own difficulties and then consequently their own hopes and triumphs and people really do draw strength from the movie for that reason.

Charlie Rose: *A discussion with the cast of "The Shawshank Redemption"*, (PBS television broadcast Sept. 6, 2004), <https://charlieroose.com/videos/9398>.

44. *Storytelling*, *supra* note 42 at 240. See generally BRUNO BETTELHEIM, THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES (1976).

45. Robert J. Muldoon, Jr., *An Introduction to Trial Advocacy*, Mass. CLE, Inc., CTRA MA-CLE 1-1, § 1.1 (2014).

Sometimes we even get to tell stories to a judge or jury. Only lawyers on television go to trial on a regular basis. Most lawyers—most litigators—will see their doctor more often than they will see a jury. . . .

But throughout their career, all lawyers will have to present compelling narratives in and out of court. The types and forms of these stories are infinite. But the fundamental purpose of lawyer storytelling never changes. The practice of law is the business of persuasion.

Storytelling is the most effective means of persuasion. No other skill so elegantly or completely combines a lawyer's ability to think, organize, write, and speak. This is why, everything else being equal, a credible lawyer capable of telling a well-reasoned story that moves the listener will always beat the lawyer who cannot.

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The remarkable thing is how few lawyers seem to realize they are supposed to be storytellers at all.<sup>46</sup>

One can develop storytelling skills during law school, although it is seldom taught directly.<sup>47</sup> The opportunity to acquire and nurture storytelling skills starts with the recitation of cases. If the professor, however, regards this as a tedious exercise to determine if the student has read the case, this learning opportunity will surely be missed. Likewise, if the student uses “canned” briefs as a shortcut for preparation, there will be little or no development of storytelling skills. Recitation of the case allows the professor to check on the student's ability to read and restate with accuracy, while at the same time it allows for measured commentary on the recited narrative, with its inclusion of the important facts and exclusion of the less important ones. Even if this is not done with the direct intention to develop storytelling skills, these skills will emerge with practice in recitation as well as learning while others recite. There will be other opportunities in courses on appellate advocacy, trial practice, negotiation, and courses that have a motion practice component.

### *1. Learn the Basic Elements of Storytelling*

Storytelling is much more than telling facts in chronological order.<sup>48</sup> You will need to: find your theme; figure out where to begin the story; figure out how to balance between background (who, when, and where) and action (what, how, and why); figure out when to deliver the important facts; figure out how to “squeeze” the facts to include important inferences; figure out how to express your

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46. JONATHAN SHAPIRO, *LAWYERS, LIARS, AND THE ART OF STORYTELLING—USING STORIES TO ADVOCATE, INFLUENCE, AND PERSUADE* 6-7 (2014).

47. Kruse, *supra* note 4, at 19-20.

48. See, e.g., David J. Dempsey, *Master the Magic of Storytelling*, Vt. B.J., Fall 2003, at 32, 32.

theme through thoughtful word choices and metaphors; and figure out how to build toward the ending of your story.

Find the theme for your story. A theme is a concise statement of why you should win or why your position is better. They are like “sound bites” with a sense of urgency. Every story has a theme. Look for it. This may take some time, as the best statement of the theme may not come forth until you fully understand the case. It may not even emerge until you are in the midst of your trial preparation with a focus group.

The search for the right theme is one of the most critical tasks facing a trial lawyer in presenting a case to a jury. Human beings do not absorb facts in the abstract. The theme gives them the necessary perspective to understand the evidence. If the plaintiff attorney does not provide jurors with the right theme, the defense will, or jurors will do it for themselves.

The most powerful themes appeal to a broad spectrum of humanity and tie into people’s basic needs. Themes are the core ingredient of great literature, play, and cinema—and of winning cases.<sup>49</sup>

People are theme-seeking creatures. If you do not provide a theme, someone else will, and it will not be one to your liking. When you find your theme, it will shape everything that follows, but the theme itself may remain in the background until the time is right for disclosure. For example, “this is a case about greed” (or poor choices, or broken promises) is a standard beginning for opening statement. It may be a case about greed, but you do not have to headline it. For the reasons discussed below with the strategy of storytelling, it is often better to let the theme emerge throughout the narrative and to allow your audience to embrace it before you name it.

Your theme will affect the sequence of your narrative. The theme will help you think about where to begin your story. Some contemporary practitioners urge plaintiffs’ lawyers to make the case about the defendant, not about the plaintiff.<sup>50</sup> David Ball argues that the opening statement should begin with the defendant, and only at the end should the plaintiff enter the opening story.<sup>51</sup> The theme may influence the order of proof as well. The considerations of primacy and recency suggest that the evidence that best resonates with your theme should come first and last, with the rest in the middle.<sup>52</sup> But the theme is not the only consideration, so visualize the impact of the order of evidence. Good storytellers place the important points judiciously.

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49. William S. Bailey, *Tie Your Case Together With A Good Theme*, Trial, Feb. 2001, at 58, 58.

50. See, e.g., RICK FRIEDMAN & PATRICK MALONE, *RULES OF THE ROAD: A PLAINTIFF LAWYER’S GUIDE TO PROVING LIABILITY* 151-53 (2D ED. 2010); DAVID BALL & DON C. KEENAN, *REPTILE: THE 2009 MANUAL OF THE PLAINTIFF’S REVOLUTION* 129-38 (2009).

51. DAVID BALL, *DAVID BALL ON DAMAGES* 3 (3d ed. 2011).

52. See, e.g., ESU 6 Professional Development, *Primacy-Recency*, YOUTUBE (Apr. 7, 2011), <https://www.youtube.com/watch?v=psOtPH9bFVU>.

Find metaphors that support your themes. People like stories, but are wary of what lawyers are trying to sell. Metaphors are short stories, usually very short.<sup>53</sup> They often get past the typical resistance to lawyers before the deflector shields (a metaphor) have a chance to be activated.<sup>54</sup> Metaphors shape thinking by influencing how information is taken in by the listener.<sup>55</sup> Once Johnnie Cochran was able to sell “if the glove don’t fit, you must acquit,” the rest was easy.<sup>56</sup> But metaphors must be used with caution. Every virtue has a dark side: “Skillful use of metaphor is one of the highest attainments of writing; graceless and even aesthetically offensive use of metaphors is one of the most common scourges of writing, and especially of legal writing . . . .”<sup>57</sup>

The chosen theme will affect word choices. If you say your theme over and over, like a mantra, and then write or edit your opening statement, it will be different as a result. Try to do this with verbs and nouns. With adjectives and adverbs, not so much. Verbs and nouns are the tools of fact; adjectives and adverbs are the tools of opinion. With too much opinion, your story begins to sound like argument.

As a storyteller, think about the balance between background and action. It is like the trial lawyer’s distinction between foundation and evidence, but much more interactive. With economy of words, set the stage for what the listener needs to know in order to understand the action. Learn what to include and what to exclude in the story. You may have the floor, but you do not necessarily have the attention. Do not abuse the privilege and make the audience listen to everything, just because it is significant to you. It must be important for the story. Be a detective and learn how to squeeze the facts<sup>58</sup> to draw out the favorable inferences. But do not oversell. This is easier said than done.

53. See Jonathan K. Van Patten, *Metaphors and Persuasion*, 58 S.D. L. REV. 295 (2013) [hereinafter *Metaphors*]. See also Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 Wis. Women’s L.J. 225 (1995).

54. *Metaphors*, *supra* note 53, at 295:

Metaphors can make a point in a single phrase or sentence. In its compact version, it may take the listener by surprise. The point works swiftly, before the listener has a chance to set up defenses. An effective metaphor’s humor and insight has a way of getting past the normal resistance of a listener. Brevity, humor, creativity, and insight provide great camouflage for the true nature of the metaphor, which is argument. A skillfully delivered metaphor does not feel like argument. It is like the soft-sell. It reaches down to the subconscious without seeming to lecture or demand.

*Id.*

55. Linda L. Berger, *What Is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. Ass’n Legal Writing Directors 169, 169 (2004):

Metaphor is a lens. Through this sentence, I intend to call your attention to metaphor’s power to focus, to filter, and to block. . . . Metaphor is a map. Its power to shape and direct your understanding by superimposing a known structure onto a new concept makes metaphor fundamental to thinking and learning.

*Id.* (internal footnotes omitted).

56. JEFFREY TOOBIN, *THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON* 420 (1996) (QUOTING JOHNNIE COCHRAN). See also VINCENT BUGLIOSI, *OUTRAGE: THE FIVE REASONS WHY O.J. SIMPSON GOT AWAY WITH MURDER* 193-94 (1996).

57. BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* 558 (2d ed. 1995).

58. Don Keenan, an Atlanta lawyer, calls this “squeezing the orange.” I have heard Mr. Keenan speak in several seminars in which he used this metaphor in the context of trial advocacy.

## 2. *Understand the Strategy of Storytelling*

People do not like to be told what to think or even how to think. But lawyers do this all the time. Give the audience space to make the decision and it might stick; if you do not give them space, they will resist. The story is a way to advocate without appearing to do so. This is persuasion by indirection. This is the soft-sell.

The sequence or timing of the telling of the facts is important. What you want is the audience to be led at the beginning, but to be ahead at the end. Good storytelling requires audience participation, not necessarily verbal (although a few “amens” going off in the mind would be good). At least by the midway point, you want the audience to be invested in your narrative emotionally and to arrive at the conclusion before you do. This is similar to Gerry Spence’s advice on cross-examination: “Don’t beat up a witness until the jury gives you permission to do so.”<sup>59</sup> You want the audience to embrace your theme before you name it.

The storyteller’s credibility is important. The storyteller is a guide and the guide must be trustworthy. This is difficult in these times because lawyers do not have a lot of built-in trust in their favor. You can earn it sometimes by going “off-code,” that is, by going against the stereotype of the arrogant, obnoxious, and irritating lawyer. Probably the best way to do this is to get out of the way of the story. The power of a well-crafted story will bring credibility and trust to the storyteller. One way to break the power or spell of the story, however, is to intrude with editorializing. Editorializing is a break in the narrative that usually involves telling the audience what to think. If you must editorialize, do it as a guide, not as an advocate. It is too early for the advocacy of the hard-sell. There will be time to close the deal. Learn how to close with the story. If you have done it right, the audience will be there already. You will be confirming what they have already decided.

## 3. *Learn To Tell Stories Through Practice*

Although there are some who are natural-born storytellers, the ability can be learned. Why not try it in law school, especially during class recitation? Reliance on “canned briefs” is a missed opportunity and it will stunt your growth.<sup>60</sup> Writing a brief is an excellent way to develop the skill of storytelling. The statement of the facts in the brief, the opening statement at trial, and the statement of facts in a complaint are important advocacy opportunities. Understanding how the facts can drive the legal result suggests that significant time be devoted to fashioning the story. Learning how to control a situation by controlling the narrative is also a

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59. RICK FRIEDMAN, *ON BECOMING A TRIAL LAWYER* 111 (2008).

60. This is sheer conjecture, but I wonder if some who complain that law school does not teach how to be a lawyer have missed this opportunity by relying on canned briefs.

vital aspect of the classes in negotiation and alternative dispute resolution. There are plenty of opportunities to work on this skill during law school.

#### D. UNDERSTAND ARGUMENTATION<sup>61</sup>

Argument is at the core of what lawyers do, whether in litigation or transactional work. Law students are not strangers to argument. We have all grown up with it, in varying degrees. For those that are natural-born arguers, it probably started around the dinner table. Arguing for the keys to the car, against being grounded, shifting blame to someone else, or, in college, discussing the nature of evil or debating who will make the Final Four—people who come to law school are well-acquainted with argument. But whereas argument may have been a by-product of the environment before, it moves to center stage in law school.

##### *1. Know When You Are on Offense and When You Are on Defense*

Learning how to make and defend arguments runs throughout the law school curriculum. Probably the best advice I heard on argument was from Professor Ken Graham at UCLA: “There are two ways to win a race—run faster than anyone else or make sure that no one runs faster than you.”<sup>62</sup> In terms of argument, it means that you can win by making sure the other side does not win. It also means that you should not try to win the arguments you cannot win, just do not lose them. Many lawyers, being naturally aggressive, try to win every argument. They would be better off winning the ones they can win and not losing the ones they cannot win. How does one win by not losing? Herein lies the power of the tiebreaker, or the power of the middle.

##### *2. Claim the Middle Ground for Your Side*

Not all arguments are equal. Some are definitely stronger than others. These cases usually get resolved as uncontested matters through summary disposition or by guilty pleas. As to the cases where there are legitimate arguments on both sides, an important strategic goal is to frame the argument to claim the middle ground for your side. That is, in contested arguments, there is ultimately a tiebreaker, like the burden of proof or the standard of review. If the matter is too close to call, who wins? You should figure out who wins in the event of a tie. Unlike baseball, where invocation of the “tie goes to the runner rule” is relatively rare, the middle ground in legal argument can be fairly broad—whoever occupies the middle ground has a tactical, if not ultimate, advantage.

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61. See generally WILLIAM A. RUSHER, HOW TO WIN ARGUMENTS (1981).

62. This was articulated during an annual lecture on “How to Pass the Bar Exam” and was intended as a humorous presentation. But it stuck with me and has proved to be one of the most useful pieces of advice from my time in law school.

### 3. Understand the Structure of Your Argument

Debate in high school or college is viewed as good preparation for law school. This is true, to a point.<sup>63</sup> One thing that is useful from the experience is the attention to understanding types of argument. This is part of the study of rhetoric, which provides us with the basic categories of argument: definition, comparison, relationship, circumstance, and authority.<sup>64</sup> When you recognize the type of argument that you are making, or that is being made against you, you understand, from a structural standpoint, what makes it work and how it can be attacked. For example, with an argument based on comparison you want to show that the similarities are significant and the differences not material. The attack focuses on the opposite: the similarities are superficial and the differences are significant. Figuring out the type of argument helps one to process it more quickly and to form a coherent plan for response. These plans differ depending on the type of argument, but at least you will have plan for dealing with each type.

### 4. Develop a Feel for What is Weak with Your Position

It is good to believe in your argument. You can't sell what you won't buy. But there is a downside. Sometimes, you like your argument so much that you cannot see the other side.<sup>65</sup> More importantly, you do not see your argument as the other side sees it, creating a blind spot. A blind spot prevents understanding your own argument. Scout yourself. In order to see your argument as the other side sees it, try writing out the opening (story) and closing (argument) for the other side.<sup>66</sup> As you do this, identify what has been bothering you about your position. When you are shaping your argument, try it out on others, especially non-lawyers.

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63. To the extent that the debating experience encourages sheer quantity to overwhelm the opponent, there might need to be some rehabilitation to become a more effective—and persuasive—arguer.

64. See Jonathan K. Van Patten, *Themes and Persuasion*, 56 S.D. L. REV. 256, 264-79 (2011) [hereinafter *Themes and Persuasion*]. See generally EDWARD P.J. CORBETT, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 110-45 (2d ed. 1971) (identifying and discussing the five basic types of argument: definition, comparison, relationship, circumstance, and testimony).

65. See Shaw, *supra* note 18, at 1273:

The ability to understand the counterarguments to one's position requires one to dissociate himself or herself from an emotional attachment to that original position. It requires the student to be able to dispassionately look at his or her argument and see the potential flaws and weaknesses in it. It requires the student to be able to determine what presumptions underlie the argument and determine how and why those presumptions might be subject to challenge. In other words, it requires a student to be able to ruthlessly explore the validity of his or her reasoning and honestly and accurately assess that reasoning, including facing the potential consequence that his or her reasoning was wrong. It requires the student to acquire metacognitive skills—the ability to understand his or her thought processes—so that the student may trace them and explore their truth or falsity.

*Id.* See also FRIEDMAN, *supra* note 59, at 141 (“[W]e risk creating our own blind spots, hiding the power of the other side's arguments from ourselves.”).

66. See, e.g., KEITH EVANS, *COMMON SENSE RULES OF ADVOCACY FOR LAWYERS* 85-86 (2004). Evans's rule for closing argument is in three parts: (1) when you have an idea of what a case is about, write your closing argument; (2) write your opponent's closing argument; and (3) perfect your closing argument. *Id.*

Embrace the resistance to what you are selling; do not ignore it. Figure out what the resistance is and where it is coming from. That is what focus groups do for lawyers. Take the resistance to heart and recast your argument accordingly.

### 5. *Develop a Bullshit Detector*

Not everyone is telling you the truth. You may have figured that out already with certain experiences growing up, especially dating experiences. In law school, you must face squarely the problem that not everything you read is reliable. It may be “the Law,” but it is full of disagreements and contradictions within. My rough estimate, and it will vary from course to course, is that ten to twenty percent of the cases in the casebook are wrong.<sup>67</sup> It is your job to figure out which ones are wrong and why. This is a basic skill for lawyers (and a life skill as well). To do this, you must employ healthy skepticism. The seeming elusiveness of the first year class experience encourages this development. Everything must be questioned. Do not get stuck on that phase, however. Eventually, your questioning will lead you to figure out whom you can trust. You can use a mentor (and probably should) to help you through this thicket, but eventually you will have to grow into making this assessment on your own.

This type of assessment goes well beyond the cases. If you are going to prove your case, you must figure out what will hold up under attack. Even trustworthy clients can let you down. In addition, you need to discern where the other side is weak. Learn how to spot the lie.<sup>68</sup> Find it as soon as you can and then plan how to expose it for maximum effect. Liars can be taken down by exposing the lie.<sup>69</sup>

Bullshitters, on the other hand, present a different problem. They are neither, *per se*, liars nor truth tellers, although they are capable of both.<sup>70</sup> They appear to have an advantage in argument because they play by different rules when it comes

67. The number goes up considerably for Constitutional Law, depending on which time period you are studying. They can't all be right. I remember a conversation with my first law teacher at UCLA, Professor J.A.C. Grant, in which he told me: “I started teaching Constitutional Law in 1927 and everything I taught is now wrong.”

68. See e.g., PHILLIP HOUSTON, MICHAEL FLOYD, SUSAN CARNICERO & DON TENNANT, *SPY THE LIE: FORMER CIA OFFICERS TEACH YOU HOW TO DETECT DECEPTION* (2012); PAMELA MEYER, *LIESPOTTING: PROVEN TECHNIQUES TO DETECT DECEPTION* (2010).

69. And sometimes they cannot, especially if the lying is so widespread that the truth gets buried. In the famous Lee Marvin palimony case, Marvin was asked about his reaction to the eleven week trial:

“The only thing that I really got out of it was that I learned how to lie,” he said. . . .

“That’s true. I learned how to lie. You had to. Everybody lied. Witnesses, lawyers. I never knew that’s how they do it.”

“Didn’t anybody tell the truth during the trial?” he was asked.

“Of course not,” he said.

Jimmy Breslin, *Fame? For Marvin, It’s Now a Scandal*, CHICAGO TRIBUNE, April 29, 1979, at 379, <http://archives.chicagotribune.com/1979/04/29/page/379/article/fame-for-marvin-its-now-a-scandal/index.html>. I am indebted to Alexander Yensan (USD Class of 2016) for finding this quote.

70. HARRY G. FRANKFURT, *ON BULLSHIT* 33-34 (2005).

Her statement is grounded neither in a belief that it is true nor, as a lie must be, in a belief that it is not true. It is just this lack of connection to a concern with truth—this indifference to how things really are—that I regard as of the essence of bullshit.



to the truth.<sup>71</sup> Bullshitters have no conscience when it comes to telling a lie or stretching the truth, and that is what makes them potentially more dangerous. In a sense, they are harder to detect because they slip in and out of the truth.<sup>72</sup> Bullshitters are everywhere, even among our friends. Developing a bullshit detector will alert you to the situation and help you to deal with this in argument, and in life.

## 6. Do Not Editorialize During the Argument

If people need space in order to arrive at the decision you want them to, do not tell them what to think while you are trying to persuade. If you have commentary running alongside, it distracts from the argument itself. This applies especially when attacking the other side. Let the argument carry the water, not your commentary about how the other side's argument is illogical, unsupported, or, my favorite, disingenuous. It will not help carry the argument across the finish line. It is a form of *ad hominem* argument, which is the least convincing type of argument.<sup>73</sup>

Argument by typeface, such as making the key points of your argument in ALL CAPS, is bad form. It implies a lack of respect to the reader, i.e. that the reader will not get it without the typographical emphasis. The same applies to argument through quote marks around terms, purportedly to show misuse of the terms or to denigrate the other side through sneering. For example: "The reason law schools offer up this lie is because the great percentage of 'law professors' have never tried a case, have minimal experience in the trenches, or came straight from academia."<sup>74</sup> When the writer cannot even bring himself to speak of law professors without sneering at every opportunity through the use of quote marks, it actually says much more about the speaker and his deep-seated anger than it does about the argument.

Do not carry the argument with adjectives and adverbs. The use of clear or clearly, obvious or obviously, or manifestly, within the argument will not help to

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71. *Id.* at 53-54.

What bullshit essentially misrepresents is neither the state of affairs to which it refers nor the beliefs of the speaker concerning that state of affairs. Those are what lies misrepresent, by virtue of being false. Since bullshit need not be false, it differs from lies in its misrepresentational intent. The bullshitter may not deceive us, or even intend to do so, either about the facts or about what he takes the facts to be. What he does necessarily attempt to deceive us about is his enterprise. His only indispensably distinctive characteristic is that in a certain way he misrepresents what he is up to.

*Id.*

72. *Id.* at 52:

On the other hand, a person who undertakes to bullshit his way through has much more freedom. His focus is panoramic rather than particular. He does not limit himself to inserting a certain falsehood at a specific point, and thus he is not constrained by the truths surrounding that point or intersecting it. He is prepared, so far as required, to fake the context as well.

*Id.*

73. See CORBETT, *supra* note 64, at 91-92.

74. D'Arcy, *supra* note 6.

seal the deal. They beg the question, at best, or create resistance, at worst. If it is not clear or obvious to the reader, then the claim that it is undermines your credibility. Likewise, with frankly or honestly, such an editorial comment implies that you may not have been fully frank or honest before saying so. In addition, do not delay the argument by telling what is going on in your mind, especially by disclosing your doubts as you begin: "Well, this is just off the top of my head . . . ." Humbleness does not play well either: "This might be a stupid question, but . . . ." Nothing good comes of these editorial comments.

#### E. OTHER IMPORTANT SKILLS THAT ARE LEARNED IN LAW SCHOOL

Like many things, what a student gets out of law school is dependent on what the student puts into it. Those who spend their time playing cards or video games, instead of studying, are missing out. Likewise, one can often gauge how a student is doing if he or she is spending more time at the bar than at the library. Students need to take responsibility for their own education and their development in learning the craft of being a lawyer. The necessary steps along the way include a course in trial techniques, where skills-based lessons go well beyond the courtroom, and a course in appellate advocacy, where writing and delivering an argument develop essential lawyer skills.

##### *1. Learn the Skill of Asking Good Questions*

Good lawyers know how to ask questions, and law students must learn this skill. Questions are an instrument of control. Questions frame the issues, control the agenda or discussion, lead to the discovery of evidence and arguments, and are the means through which evidence comes into the courtroom.

Know the difference between open-ended and closed-ended questions. This is key to taking depositions, as well as for examination at trial.<sup>75</sup> The progression of a lawyer's questions is generally open-ended to closed-ended, but be prepared to vary the pattern, so long as you do this consciously. Learn how to lay foundation.<sup>76</sup> This is a skill not only for trial, but also for negotiation. Like brick-laying, this takes practice. Know the difference between fact and opinion. This is important for controlling a witness, especially on cross-examination.<sup>77</sup> Asking for the witness's opinion allows him or her to run free; everyone is entitled to his or her own opinion, but not their own facts.

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75. See DAVID MALONE & PETER HOFFMAN, *THE EFFECTIVE DEPOSITION: TECHNIQUES AND STRATEGIES THAT WORK* 135-55 (4th ed. 2012); Henry L. Hecht, *Taking the Deposition*, in *EFFECTIVE DEPOSITIONS* 243, 286-90 (Henry L. Hecht, ed. 1997).

76. See generally EDWARD J. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* (6th ed. 2005).

77. See generally JAMES W. MCELHANEY, *MCELHANEY'S TRIAL NOTEBOOK* (4th ed. 2006).

## 2. *Learn How to Spot Issues*

On the medical side, diagnosis is key.<sup>78</sup> Patients come in and the doctor must identify and solve the problem, if possible, just like a detective.<sup>79</sup> On the legal side, many of the clients already have a diagnosis of their problem and it may even be correct. But some problems do not have a readily identifiable label or may have been misdiagnosed by the lay client. Here is where the skill of issue spotting, taught mainly in the first-year, comes into play. Lawyers are problem-solvers, like doctors and other professionals, and the beginning of the process is diagnostic. While the skill of issue spotting tested on exams is sometimes overdone, it is useful to push students in that direction. My own preference, however, would be to more fully develop this skill in a practicum setting, where the relationship involves an experienced practitioner and the student who has the requisite foundational skills to understand the thought process of the practitioner.<sup>80</sup> Otherwise, issue-spotting becomes relegated to an academic exercise, often distanced from practical problem solving. In other words, the skill of issue spotting, while an important part of the first year, is best left for polishing by the adjunct professor or practitioner.

## 3. *Learn How to Read Between the Lines and Understand What Is Not Being Said*

As a case develops, it usually gets better or it gets worse; it rarely stays the same. This may be because the client has given less than “the whole truth and nothing but the truth” or because the client has certain blind spots about the strengths and weaknesses of the case. Clients rarely have a clear-eyed view of the case that will hold throughout, and it may take a while for the lawyer to discover this. One way to help this along is to “read between the lines.” There are

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78. See, e.g., Audiobook: THE GREAT COURSES, BETTER LIVING, MEDICAL SCHOOL FOR EVERYONE: GRAND ROUNDS CASES (May 2, 2014); Audiobook: THE GREAT COURSES, BETTER LIVING, MEDICAL SCHOOL FOR EVERYONE: EMERGENCY MEDICINE (Oct. 23, 2015).

79. See, e.g., *House M.D.* (Fox television broadcast 2004-2012).

80. SCHÖN, *supra* note 20, at 36-37:

When someone learns a practice, he is initiated into the traditions of the community of practitioners and the practice world they inhabit. He learns their conventions, constraints, languages, and appreciative systems, their repertoire of exemplars, systematic knowledge, and patterns of knowing-in-action.

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A practicum is a setting designed for the task of learning a practice. In a context that approximates a practice world, students learn by doing, although their doing usually falls short of real-world work. They learn by undertaking projects that simulate and simplify practice; or they take on real-world projects under close supervision. The practicum is a virtual world, relatively free of the pressures, distractions, and risks of the real one, to which, nevertheless, it refers. It stands in an intermediate space between the practice world, the ‘lay’ world of ordinary life, and the esoteric world of the academy. It is also a collective world in its own right, with its own mix of materials, tools, languages, and appreciations. It embodies particular ways of seeing, thinking, and doing that tend, over time, as far as the student is concerned, to assert themselves with increasing authority.

unidentified forces that are acting on the situation and that must be discovered before the full picture becomes clear.

The search for anomalies helps to discover hidden forces. An anomaly is something that deviates from what is standard, normal, or expected. Looking for anomalies may help to solve an apparent conundrum. Radiometric mapping, used in petroleum exploration, provides a good metaphor for this. Hydrocarbon (petroleum) deposits are discovered through measurement of levels of radiation on the surface of the earth. The hydrocarbon deposits in the ground affect the radioactivity level of the material above the deposits. The goal of radiometric exploration is to search for these anomalies.<sup>81</sup> What can be seen cannot be explained (an anomaly), except through the existence of an unseen force.<sup>82</sup> The lawyer is a detective and must figure out all the forces that are acting upon the situation. Or else, keep things going until they can be identified.<sup>83</sup>

#### 4. *Learn How to Deal with Adversity*

This is a yet another basic life skill, but it is particularly important for law students. Conflict is inherent in the business. Part of the process is to bring you along emotionally, so that you can be effective later on in conflict situations. Immunity through adversity is like a child who develops resistance to diseases through experiencing sickness. This is not to justify the countless acts of meanness and sadism, as inflicted by emotionally stunted law professors. They will have to answer for such cruelty some day. But, if students survive with their body, mind, and soul intact, they will be stronger and more interesting people throughout the rest of their lives.

Know yourself. Try to understand why you do the things you do, especially the stupid stuff. In poker, one plays the player, not the cards.<sup>84</sup> This means that the better player will win over time, despite the ebb and flow of the particular hands. The skilled poker player studies the opponent and, in some ways, knows that player better than he or she does. In negotiation class, students are encouraged to know themselves first. In order to figure out why you do the things you do, self-reflection is necessary. You must again scout yourself. It is about time to do it now, if you have not already done so, because your opponent has already been

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81. Jerome G. Morse & Robert Zinke, *The Origin of Radiometric Anomalies in Petroleum Basins—A Proposed Mechanism*, OIL & GAS J., June 5, 1995, at 36.

82. A similar metaphor comes from the discovery of the planet, Pluto. After the discovery of Uranus, scientists predicted that there was yet another planet further out there. Based on the then observable physical evidence, scientists predicted that there was an object out there that they could not see, but whose presence was believed to be exerting a gravitational pull on another object that they could see. See Charles Q. Choi, *Dwarf Planet Pluto: Facts About the Icy Former Planet*, SPACE.COM (July, 22, 2015, 12:00 PM), <http://www.space.com/43-pluto-the-ninth-planet-that-was-a-dwarf.html>; NINE PLANETS, *Pluto Facts*, <http://nineplanets.org/pluto.html> (last visited Feb. 9, 2016).

83. See DASHIELL HAMMETT, RED HARVEST 75 (Libr. Classics of the U.S., The Library of America ed. 1999) (“Plans are all right sometimes . . . [a]nd sometimes just stirring things up is all right—if you’re tough enough to survive, and keep your eyes open so you’ll see what you want when it comes to the top.”).

84. STEPHEN LUBET, LAWYERS’ POKER: 52 LESSONS THAT LAWYERS CAN LEARN FROM CARD PLAYERS 137-46 (2006).

scouting you. You need to find your weakness and deal with it before your opponent seizes on it. Identify the wolf, who has been roaming around your inner mind, unchecked.<sup>85</sup>

The result of learning how to deal with adversity will be a certain mental toughness that will serve both you and your clients well.<sup>86</sup> Clear thinking and the ability to make good judgment calls under conditions of adversity are the hallmark of a good lawyer. It is better to learn how to deal with adversity now, during law school, rather than later, with real clients and real consequences hanging in the balance. It is a jungle out there. Despite the sometimes emotional roller coaster environment, law school is still a relatively safe place to learn this skill. When the Socratic Method is practiced with skill and compassion, students are forced to use their minds in a new way, and the public setting of this exercise fosters mental and emotional toughness. Students get the benefit of mentors and observers without damaging the lives of real people. When the process is done constructively, the emotional scars of law school are worth it. Much improvement comes from learning from your one's mistakes. You will have taken your development to another level when you can also learn from the mistakes of others.

### 5. Learn How to Do Computer Research

Technological advances have materially changed how law is practiced. Indeed, it is hard to imagine how it was done before the copy machine and the personal computer. The development of computerized databases for legal research is a game changer. When I started doing research as a law clerk for a medium-sized Los Angeles law firm, the appellate lawyer I worked for wanted case authority for certain propositions. This sent me to the West Digest System and I spent many hours running down foundational propositions. With Westlaw and LexisNexis, this is now easy. To find the necessary authority, you type it in and the magic machine reads thousands of volumes, cover to cover, in under ten seconds. Amazing! Together with information available on the Internet, the personal computer is an indispensable tool for the lawyer. Know how to use it. This begins in law school.

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85. See Anuradha Edirisuriya, *Kung Fu (1972) TV Series Quotes (Season 1)*, WISDOM, JUSTICE & LOVE (Apr. 8, 2012) (quoting *Kung Fu* (ABC television broadcast 1972)), <https://anuradhaedirisuriya.wordpress.com/2012/04/08/kung-fu-1972-tv-series-quotes-season-1/> ("He who conquers himself is the greatest warrior.").

86. Hear, O Grasshopper, the words of Master Kan:

To hit a target . . . is to exercise the inner strength. Indeed there are two kinds of strengths. The outer strength is obvious: it fades with age and succumbs to sickness. Then there is the ch'i, the inner strength. Everyone possesses it, too. But it is indeed much more difficult to develop. The inner strength lasts through every heat and every cold. Through old age and beyond.

*Id.* (quoting *Kung Fu* (ABC television broadcast 1972)).

## 6. *Learn How to Work Well With Others*

Undergraduate study, especially for the high-end achievers that wind up at law school, may have been a solitary enterprise. Law school provides many opportunities for group work situations—study groups, appellate advocacy briefs, moot court, alternative dispute resolution, trial teams, and law review. Working well with other sizable egos is a good introduction to the lawyers' world.

## 7. *Think Like a Lawyer, Talk Like a Real Person*

The study of law, especially in the first year, is akin to learning a foreign language. There is different—sometimes exotic—terminology. It is important to learn this vocabulary and the frame of reference that shapes each area of the law. It is also important to be able to come back from that world and to reconnect with the regular citizens for whom you work.<sup>87</sup> The study of law should be transformative, but you must connect with your pre-transformation self. You cannot give the impression that you are talking down to anyone, whether it be a client, an employee, court personnel, or a juror. You will lose before you know it.

### F. LIFE SKILLS THAT ARE ESSENTIAL LAWYER SKILLS TO BE WORKED ON IN LAW SCHOOL

Law students bring many skills to the study of law. It is important that some of those skills continue to be nurtured and improved. Reading literature other than cases is a skill that seems to atrophy during law school. Why? Ironically, because students are too busy reading cases. I try to encourage students to continue their "outside" reading, especially during school breaks. Do not lose the desire to read serious stuff. It keeps you fresh, even though it takes time.

Writing continues to be an essential skill and law school is an excellent place to improve.<sup>88</sup> Shorter is better. No clutter. Listening is an essential life skill that is taught effectively by use of the Socratic method. Students must listen at least as much as they speak in order to keep up with the conversation.<sup>89</sup> Listening is not the period of silence when you are not talking. An effective listener must really listen to what the other person has to say, and law students are challenged

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87. See Gerry L. Spence, *How to Make a Complex Case Come Alive for a Jury*, A.B.A. J., April 1986, at 62, 64 ("The problem is that we, as lawyers, have forgotten how to speak to ordinary folks."); GERRY SPENCE, *TRIAL BY FIRE: THE TRUE STORY OF A WOMAN'S ORDEAL AT THE HANDS OF THE LAW* 33 (1986) ("In a profession whose very core is communication, the law schools, all of them, had dedicated themselves to destroying our God-given power to speak to each other simply, precisely – and to hear."). In typical Spence fashion, the premise is wildly overstated, but the proposition that we should teach law students to speak in simple, precise terms is well taken.

88. See generally Jonathan K. Van Patten, *Twenty-Five Propositions on Writing and Persuasion*, 49 S.D. L. REV. 250 (2004) [hereinafter *Twenty-Five Propositions*].

89. See generally MORTIMER J. ADLER, *HOW TO SPEAK HOW TO LISTEN* (1983).

to do this when their classmates are reciting.<sup>90</sup> Listening is classic multi-tasking. Learn how to speak in public, which is similarly taught through law school's theoretical teaching style, specifically the technique of recitation and the Socratic method. Speaking without notes allows you to speak from the heart. Lawyers tend to be the most effective participants in meetings because of their many skills, especially the skill of problem solving. Develop your skill at making good judgments about tough issues. Work on developing your memory skills. Remembering names is important for clients, friends of clients, potential clients, and for picking a jury. Finally, pick your fights wisely. This applies in many different contexts. Win the fights that you can win, and do not lose the fights that you cannot win. You do not have to fight like a terrier at the first sign of conflict. Figure out how to make the fight take place under favorable circumstances when it does occur. All of these skills will be enhanced with attention to their development through the many opportunities provided in law school. Take advantage of them. Legal education is a two-way process. You do not reap the benefits without making a serious investment of your time and energy.

### III. SKILLS LEARNED IN LAW SCHOOL ARE FOUNDATIONAL FOR PRACTICE

With legal education, it takes a while to achieve the finished product. Although the process of learning the craft varies with the individual, the truth is that a law school graduate, much like a medical school graduate, is not yet ready. Not even the Bar's certification of competency for successful bar exam takers can change this fact. Competency within certain defined parameters—mostly about “the law”—does exist, but proficiency does not, not yet. Of course, there are many things that can be done right out of law school. As long as you recognize what you know and, especially, what you do not know, you will be okay. Do not be afraid to ask for directions. You can even level the playing field against experienced practitioners with extra effort. But are you the finished package? No. This does not mean law school is a scam. It simply means a finished lawyer cannot be crafted in three years.

The medical education model has it just about right. The first two years of medical school are spent on basic science courses.<sup>91</sup> In the first year, the focus is

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90. SHAPIRO, *supra* note 46, at 33-34:

Listening is the most underappreciated requirement of becoming a good storyteller. But it is never taught in law schools. Perhaps because [it] is antithetical to the temperament and habits of most lawyers. Listening is how we gather information. It is how we make sense of the world. What we hear is the source of our story material, the foundation of all storytelling.

Yet just listening is not enough. We also have to be open to what people are telling us and write our stories based on what we hear, not what we think we hear or want to hear. Bad listeners are always miscast as storytellers.

See also Mark Bennett, *Jury Selection: Simple Rule 2: The Blind Date Rule*, BENNETT & BENNETT: DEFENDING PEOPLE (Aug. 5, 2009), <http://blog.bennettandbennett.com/2009/08/jury-selection-simple-rule-2-the-blind-date-rule/> (explaining that listening is essential to jury selection).

91. It should be noted that this is beginning to change in the medical schools from pure science to applied science. See Jennifer S. Bard, *Teaching Health Law: What We In Law Can Learn From Our*

on anatomy, physiology, and pharmacology (how things work); and in the second year, the focus is on pathology (when things are not working).<sup>92</sup> The third and fourth years are spent on clinical rotations,<sup>93</sup> which largely involves observation, but may involve some “hands-on” medical practice, depending upon location.<sup>94</sup> For the most part, neither the observation nor the hands-on work involve the exercise of judgment calls, which are at the heart of what is to follow. It is generally understood that, after four years of medical school, the graduates are nowhere near ready to practice medicine.<sup>95</sup> The next level, residency, takes the medical school graduate closer to the end. Resident medical students become immersed in the practice of making judgment calls. The experience is, in some ways, equivalent to a junior associate in a law firm.<sup>96</sup> Although some finish their

*Colleagues In Medicine About Teaching Students How To Practice Their Chosen Profession*, 36 J.L., Med. & Ethics 841, 841-42 (Winter 2008) [hereinafter Bard II].

92. *Id.* at 843.

Although there are significant differences in methodology and objectives, the closest analogy between legal and medical education is to compare the three years of law school to the first two years of medical school. Medical school starts with two years of primarily classroom training followed by two years of very closely supervised training while rotating through the major departments in a fully operational hospital.

*Id.*

93. One of the beneficial programs that the University of South Dakota School of Medicine does as “orientation” for the clinical rotations is an extended session with patients who talk about their experiences with doctors and what they wish doctors knew about patients. I had just given (and survived) a presentation on medical malpractice and stayed an additional two hours for this fascinating program. The participants all spoke candidly about their experiences. Very, very good stuff for students to hear just before going into the field. I’m not sure this is practical with legal clients, because of confidentiality concerns, but it is worth thinking about.

94. My oldest daughter, now a pathologist, had an excellent experience as a University of South Dakota medical student, which included delivering babies at the Pine Ridge Indian Reservation and a month-long session in Ecuador, half in urban medicine and half in rural medicine.

95. Bard, *supra* note 10, at 155-56.

[I]t is important to understand why law schools cannot simply adopt a medical model of prolonged, intense practice-based supervision based not only on a four-year curriculum but also a seven-year comprehensive program. As a September 2011 White Paper by the National Health Policy Forum (“the White Paper”) explains, “[a]greement is longstanding in the medical profession that undergraduate medical education is insufficient to prepare freshly minted MDs for hands-on, independent medical practice.” The current system of extended postgraduate, hospital-based training, commonly referred to as “residency” but called Graduate Medical Education (GME) within the world of US-based medical training, was developed based on this common understanding. Although ostensibly designed to provide specialized training beyond the standard skills necessary to practice in medicine, it has become the de facto standard for all medical school graduates who hope to practice in any kind of private setting to obtain admitting privileges in a hospital or to gain reimbursement from either federal or private health insurance.

*Id.* (emphasis added).

96. See, e.g., Amanda Becker, *Howrey law firm shifts pay, development of entry-level attorneys*, WASH. POST (Apr. 26, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/23/AR2010042303429.html>; *One large law firm starts residency training program for non-partner track associates*, LEGAL SKILLS PROF BLOG (Oct. 22, 2013), [http://lawprofessors.typepad.com/legal\\_skills/2013/10/one-large-law-firm-starts-residency-program-for-non-partner-track-associates.html](http://lawprofessors.typepad.com/legal_skills/2013/10/one-large-law-firm-starts-residency-program-for-non-partner-track-associates.html); Elie Mystal, *A ‘Teaching Law Firm’ Like a Teaching Hospital? Why the Hell Not?*, ABOVE THE LAW (Jun. 5, 2012) <http://abovethelaw.com/2012/06/a-teaching-law-firm-like-a-teaching-hospital-why-the-hell-not/>.



residency after the fourth year, it is common to do a fifth year, where specialization within their chosen field becomes the final passage to a practicing medical doctor.

The law school experience is definitely different from medical school, but what they share is that it takes time to shape the professional. If law school was solely about information, it could easily be done in three years, especially with the summarization of information provided by the bar exam process. There is a certain amount of seasoning that is required to transform the foundational skills and knowledge into problem solving, reflecting good judgment. For example, students take evidence before taking a trial practice course. At the University of South Dakota, we have a world-class teacher of evidence in Chris Hutton.<sup>97</sup> I have observed, however, a “deer in the headlights” reaction of students in the trial practice course. It is almost as if they have not had evidence, which is not true. It just takes time to absorb the rules of evidence and to make the quick, correct calls that are necessary at trial. With experience, the “game begins to slow down” and the calls become instinctive. There are no shortcuts; repetition and reflection eventually lead the way.

The lengthy maturation process is evident with the development of effective legal writing skills. In my own case, although I had a reasonably successful undergraduate record, it was not until I took a graduate history seminar with Professor A.J. Slavin, that I began to learn the craft of writing. Two years on law review, with the second year focused on editing other students’ writing, also proved to be indispensable. Yet, I was nowhere near the writer I needed to be upon graduation from law school. It would take many more years of academic writing, brief writing, and finally, of thinking and teaching about writing, to get there.<sup>98</sup> There was, of course, relative effectiveness along the way, as there is with the growth of any professional. The process should begin in earnest in law school. The increasing emphasis on fundamentals in the legal writing program should be encouraged.

The law schools bear some responsibility for the dissatisfaction of their graduates. Expectations shape one’s assessment of the outcome. The combination of student debt with the perceived lack of employable skills in a declining job market has fostered this discontent. While the law schools may have oversold their product on the employment end, they have, on the whole, delivered a valuable education. Ironically, they have undersold its value, in terms of skills. The law schools seem to have pled *nolo contendere* to the charges from their critics.

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97. Professor M. Christine Hutton is the co-author of JOHN W. LARSON, MARY CHRISTINE HUTTON, *South Dakota Evidence* (2d ed. 2013), a three-time recipient of the John Wesley Jackson Outstanding Professor of Law Award, and winner of the University-wide Belbas-Larson Award for Excellence in Teaching.

98. My thinking about writing is set out in *Twenty-Five Propositions*, *supra* note 88; *Themes and Persuasion*, *supra* note 64; *Storytelling for Lawyers*, *supra* note 42; *Metaphors and Persuasion*, *supra* note 53; and Jonathan K. Van Patten, *On Editing*, 60 S.D. L. REV. 1 (2015). I am in debt to the members of the USD Law Moot Court Board and the South Dakota Law Review for helping me with this process.

You are not studying to be an auto mechanic or a plumber.<sup>99</sup> You will be able to write a will soon enough, if you have not already done so in law school. The important thing is to understand the principles that govern the disposition of property through wills, trusts, and other will substitutes. A course in estate planning will help the transition to the implementation of those principles to solve real life problems. Similarly, a course in Civil Procedure does not produce a trial lawyer. The drafting of complaints, for example, is harder than it looks. We are no longer in the minimalist world of notice pleading. The complaint, answer, counterclaim, and cross-complaint are all advocacy opportunities. They require an understanding of storytelling and argumentation. The opportunity to acquire these skills during law school is there.

Ultimately, I think the answer to making legal education better is not structural. It involves personnel, that is, the law professors. For too long, the law schools have emulated the university academic model, with emphasis on research and publication, to the detriment of the teaching of lawyering skills. The better model, for a professional school, is the medical school, with a sizable portion of its faculty engaged in the practice of medicine.<sup>100</sup> The scholarship of the medical school faculties appears to be more grounded in what is real. All too often on the legal scholarship side, considerations of promotion and tenure seem to dominate, that is, publishing is an end in itself, rather than scholarship tied to teaching.<sup>101</sup> Although the market of qualified candidates for teaching positions has been very favorable for law schools for a very long time, the hiring results have been skewed

99. Trades, such as automobile repair and maintenance or plumbing, involve manual jobs that require a particular set of skills acquired through experience and specialized training. Professions, such as law and medicine, require a significant amount of higher education, often a graduate degree. The difference between a trade and a profession in practical terms, however, is less evident. See, e.g., ROBERT M. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* (1974); National Public Radio Interview by Connie Goldman with Robert Pirsig, in St. Paul, MN. (broadcast July 12, 1974, published April 21, 2005) (“Art is anything you can do well. Anything you can do with quality.”).

100. See Bard II, *supra* note 91, at 843-44:

The most fundamental difference between the people who teach today’s medical students and those who teach today’s law students is that the former love to practice medicine while the latter love to study the law. Medical school professors, have completed medical school, a three- to five-year residency, depending on specialty, and two or more multi-year fellowships, and are very likely in the active practice of medicine every day of their working lives. Medical school professors do conduct research and, indeed, are under considerable pressure to obtain funding. However, given the increasing complexity of medical research, the training required . . . most increasingly comes through a doctorate program, not in medical school. The purpose of medical education is to train practicing physicians.

*Id.*

101. The phrase from Professor Paul Savoy referring to “pious incantations of academic bullshit” is regrettably too often apt. I do not have the citation for this memorable phrase. It was pointed out to me by a former colleague and friend, the late Professor John Hagemann. I believe it should not be lost to posterity for lack of a cite. In no way do I intend to broadly characterize legal scholarship in this manner. It should be applied to those publications that truly deserve the label. See also Ronald K.L. Collins, *On Legal Scholarship: Questions for Judge Harry T. Edwards*, 65 J. LEGAL EDUC. 637, 638 n.13 (2016) (quoting Adam Liptak, *Keep the Briefs Brief, Literary Justices Advise*, N.Y. TIMES, May 20, 2011) (“What the academy is doing, as far as I can tell is largely of no use or interest to people who actually practice law.”); *id.* at 638 n.14 (quoting Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399, 415-416 (2012)) (“I haven’t opened up a law review in years . . . . No one speaks of them. No one relies on them.”).

in favor of academic credentials over experience. I think more hiring decisions should be influenced by law schools' stated desire to integrate "skills" with legal doctrine.

As I noted earlier, I find much to agree with in Michael Roster's article.<sup>102</sup> There is no clear boundary between the foundational courses of the first year and the skills courses of the upper division years. In fact, some attention to basic skills applications during the foundational courses may serve to remind first year students why they decided to go to law school. No small feat during the otherwise disorienting plunge into the foundational legal principles. I applaud Roster's desire to teach an "advanced contracts" transactional course as greatly beneficial for the development of lawyers. We should do more of this. The boundaries that have divided the curriculum into separate cells need to be loosened. I do not mean "open borders," but we should draw on the experience, judgment, and perspective of reflective practitioners to better integrate law and practice.<sup>103</sup>

I started this Article with some reservations about the debate on curriculum reform. While in agreement with the general direction of the reform, I believe that the reformers have unfairly characterized the Socratic method and have thus undervalued the teaching of skills currently being done through the casebook method.<sup>104</sup> I agree with Professor Gary Shaw's assessment:

The ability to read, analyze, and synthesize cases is a foundational skill for the other skills that law students ultimately need to master. By using materials that place concerns such as fact-finding, negotiating, and counseling as secondary, it allows students to focus on the foundational skills that are necessary for them to master the higher level skills that are necessary to be effective lawyers. Further, nothing in the use of court opinions precludes faculty from

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102. Roster, *supra* note 1. I should also note that he and I were colleagues, for a time, at the law firm of McKenna & Fitting, in Los Angeles, California. I have not seen him in over forty years and I was happy to observe that he has prospered and is contributing to the profession in important ways.

103. With some hesitation, I offer the following example from DAVID EAGLEMAN, *INCOGNITO: THE SECRET LIVES OF THE BRAIN* (2011). In Japan, there is the highly skilled art of chick "sexing." It is important to determine, as early as possible, the sex of a baby chick. The males, when identified, are "tossed," because it is not economically beneficial to feed out male chickens. This is apparently a very difficult call early on and the better chick sexers are highly valuable for what they do. This skill apparently cannot be taught, as such, but it has been found that those apprentices, who are watched by the master sexer who simply indicates yes or no after the choice that has been made by an apprentice, will ultimately become better sexers than those who do not. In a somewhat weird way, I think this is an example of Donald Schön's practicum, which I think can be a model for the transition from law school to practice. See SCHÖN, *supra* note 20, at 170-72. There is much that can be gained from "hanging out" with an experienced practitioner, some of which cannot even be articulated. This is possibly the benefit that students gained in the old Inns of Courts where dinner and conversation with the experienced barrister or solicitor served as an important part of the learning process.

104. See, e.g., BEST PRACTICES, *supra* note 8, at viii. Robert MacCrate summarized the critique in his Foreword to Best Practices:

[L]aw Schools should: [1] broaden the range of lessons they teach, reducing doctrinal instruction that uses the Socratic dialogue and the case method; [2] integrate the teaching of knowledge, skills and values, and not treat them as separate subjects addressed in separate courses; and [3] give much greater attention to instruction in professionalism.

*Id.*

emphasizing the breadth of law practice. To the extent that using case law as the subject of Socratic dialogue may result in the students receiving a skewed, oversimplified vision of the lawyers' functions, this is again the result of ineffective teaching rather than an innate flaw in the Socratic dialogue.<sup>105</sup>

As the development of skill sets progresses, fact-finding, negotiating, and counseling, as well as litigation strategy, transactional planning, and ethical awareness will follow.

#### IV. CONCLUSION

You are not alone. The collaborative aspect of law school learning should not be missed. Development of your listening skills and consideration of different viewpoints offered by colleagues is part of the maturation process. Working well together becomes its own reward. It will make you a better professional. The journey in learning one's craft is a lengthy one. Find a good mentor, if not in law school, then thereafter, and continue to learn.

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105. Shaw, *supra* note 18, at 1259-60.