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## Essay

# Dethroning Langdell

Beth Hirschfelder Wilensky<sup>†</sup>

### INTRODUCTION

I come not to bury the case method. I come merely to dethrone it. While the case method's monopolistic hold on the law school classroom has loosened somewhat in recent years,<sup>1</sup> it is still the dominant approach to pedagogy in many law school classrooms<sup>2</sup>—and especially in the first-year law student experience. That is also true of the case method's traditional pedagogical partners, the Socratic method and the cold call: their dominance has declined somewhat, even while they still have remarkable staying power.<sup>3</sup>

This Essay identifies one fault with our continued acquiescence to these pedagogical mainstays of law school classrooms: it

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1. Jeannie Suk Gersen, *The Socratic Method in the Age of Trauma*, 130 HARV. L. REV. 2320, 2342 (2017).

2. L. Danielle Tully, *What Law Schools Should Leave Behind*, 2022 UTAH L. REV. 837, 845 (“[B]y and large, casebooks and the case method remain paramount.”); Jeremiah A. Ho, *Function, Form, and Strawberries: Subverting Langdell*, 64 J. LEGAL EDUC. 656, 660 (2014) (“[A] strong imprint of Langdell’s model, preserved in formalist conceptions, still remains. We see its survival in the way our textbooks are still called ‘casebooks’ . . .”).

3. Jamie R. Abrams, *Legal Education’s Curricular Tipping Point Toward Inclusive Socratic Teaching*, 49 HOFSTRA L. REV. 897, 900 (2021) (“[D]espite decades of critical voices championing reforms and ongoing modern calls, legal education is still largely conformist, with its curricular core remaining largely unchanged. The Socratic method is still revered, widespread, and central to legal education curricula nationwide.”); Gersen, *supra* note 1, at 2346 (stating that, while she has added other teaching methods, the Socratic method is still the “mainstay” in the author’s classroom).

gives law students inaccurate information about what lawyers actually do and whether they are likely to be successful in law practice. Part I describes the problem in detail. Part II explains the source of that problem—Langdell’s 140-year-old “innovation”—that introduced the Socratic method, the case method, and cold calling to law school classrooms. And Part III suggests alternative pedagogical techniques that should compete for classroom time and syllabus space.

### I. THE PROBLEM WITH OUR PEDAGOGY: IT TELLS OUR STUDENTS ERRONEOUS THINGS ABOUT LAWYERING

First, three student anecdotes:<sup>4</sup>

Anecdote #1: I had a student who struggled in my class. The student had a counseling background, which is perhaps not the typical profile of an entering 1L. The student was tremendously smart—regularly grasping nuanced things about legal doctrine that other students missed—had a terrific work ethic, and accepted feedback gratefully and graciously. But they regularly had difficulty converting all of that into writing on the page, both in my class and on exams. As a result, they did not have the sort of transcript that reflected their talents and intelligence. And then the student enrolled in a clinic—one that involved representing clients facing the most devastating of personal circumstances. And the student’s ability to connect with those clients, to build trust, to listen without judgment, and, as a result, advocate effectively for each client’s needs put this student head and shoulders above other student lawyers in the clinic.<sup>5</sup>

Anecdote #2: I had another student who did just fine in their 1L classes but hated them. This student disliked reading court decisions and writing motions—doing “litigation-type” work. So they understandably thought they would hate practicing law. This experience led the student to experience a crisis of confidence; no matter how frequently I told them how well they were doing, they struggled to believe it. In fact, this student seriously considered dropping out. But in their 2L year, they discovered transactional work. And fact investigations. And client counseling. And all of a sudden, law practice seemed exciting. This student started to see themselves as a practicing attorney and, as a

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4. I have changed some details about these students to protect their identities. And I use the gender-neutral singular “they” intentionally.

5. I know this in part from talking to the student about how much they felt their skills were valued in the clinic, and also from conversations with the student’s faculty supervisors.

result, developed confidence as a law student and excitement about the career paths open to someone with their interests.

Anecdote #3: A number of years ago I had a student who, at the end of the year, gave me perhaps the best comment I'd ever received about my teaching—and the most discouraging comment about the law school experience. This student was from an undergraduate institution that doesn't usually send students to Michigan. They had struggled in many of their 1L classes and had done an adequate, but not standout, job in my class first semester, when we focused on memo writing. And then second semester, we made the shift to persuasive writing. Like many students, this student found their voice with that shift, with that opportunity to engage as an advocate on behalf of a client—even a fictional client. But they did more; this student completely knocked it out of the park. Some students, when you give them a position to advocate for—even for an imaginary client—they just get it. All throughout that second semester, I provided positive feedback to this student, extolling their work and explaining why it was so good. At the end of the school year the student emailed me with this message: "Thank you. Your class is the only thing that made me feel like I belong here."

All of these students—and many, many students like them—turn out to be amazing attorneys. And that shouldn't surprise us, since they excel at skills that are essential to excellent lawyering. But the first year of law school misleads them into thinking otherwise. It makes many of them feel like they don't belong here—in law school, and, as a result, in the legal profession. And if our pedagogy makes them feel that way, our pedagogy is wrong.

I know from talking to lots of students that what these students often felt during their 1L year especially<sup>6</sup>—feeling out of place, worried that they didn't have the necessary abilities to be excellent attorneys—is not an uncommon feeling among law students. To be sure, plenty of students are fine with the case method and its regular partners, the Socratic method and the cold call. Plenty of students even excel at those things. But plenty of students do not. When they enter law school their first year and most of their classes follow that model, we are sending a message to our students: "Excelling in this environment is

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6. I teach mostly the 1L Legal Research & Writing course, so my experiences and thoughts are directed towards the 1L experience. But they also apply to 2L and 3L classes that are similarly dominated by the case method, Socratic questioning, and cold calling.

what it takes to be a successful lawyer.” We know that this isn’t true, but we give them only limited ways to engage their capabilities in doctrinal classes.

In contrast, students have a lot of different ways to be smart in experiential classes. Some students might not be adept at parrying questions about a court decision on the fly, but if you sit down next to them with a piece of writing they produced in their apartment, they light up in their ability to discuss complex legal issues arising out of that same court decision. Some students might struggle with writing, but if you give them a research project, they are the ones who think strategic thoughts about it and then dig deep and find the gem of a case that everyone else missed. And I routinely have students who struggle with various parts of the class and then stand up to give an oral argument on a summary judgment assignment that just blows me away.

This phenomenon is a big source of the disconnect I regularly observe between how students do in Legal Research and Writing (LRW) classes and how they do in casebook classes. Every year, I have students who are at the top of my LRW class while earning meh grades in their casebook classes. Those are the students who are most likely to incorrectly conclude that they are deficient in the key skills needed for success and happiness in law practice—because the majority of what they do in law school tells them that.

These concerns about our pedagogy aren’t about being “nice” to students or going easy on them. And they aren’t just about making sure students feel like they belong and have a healthy law school experience—though those things are important.<sup>7</sup> They’re about being authentic as legal educators, about evaluating students on the things that genuinely matter. You can even think that we coddle students too much and that we should not bend our pedagogy to their “feelings” and still recognize that a pedagogy that sends an inaccurate message about what skills make for an excellent attorney is poor pedagogy. It isn’t just that there are lots of different ways for students to show their talent and to feel successful; it’s that these other things that get short

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7. See Tully, *supra* note 2, at 843 n.30 (collecting citations showing that “[t]here is no shortage of evidence that law schools produce negative psychological effects for students”).

shrift (or no shrift) in our classrooms are *actual markers* of successful lawyering.<sup>8</sup> Why are we sending the message that they aren't?<sup>9</sup>

So I propose this test, which I will call the Authentic Pedagogy Test: law school pedagogy (broadly defined to include teaching and assessment methods) should accurately inform students about the likelihood that they will be a successful and satisfied practicing attorney. If our pedagogy sends a different message—if it routinely and incorrectly tells large numbers of students that they are not cut out for the practice of law, that they don't possess the right skill set, or that their interests don't align with what lawyers actually do—then the pedagogy we are using is bad. It's inauthentic. It's mired in the past.

To see why we need the Authentic Pedagogy Test, it's useful to contrast the legal profession with other professions that require graduate study. Take medical school for example. A medical student might spend much of her first year in learning activities—memorizing how systems of the human body operate, or dissecting a cadaver to learn anatomy—that don't much line up with what doctors do every day.<sup>10</sup> But note a big difference between medical school and law school: pretty much every student

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8. I am not the first law professor to make this observation. See, e.g., Kathryn M. Stanchi, *Step Away from the Case Book: A Call for Balance and Integration in Law School Pedagogy*, 43 HARV. C.R.-C.L. L. REV. 611, 612 (2008) (“[T]he separation of doctrine, theory and lawyering skills . . . sends a distorted message to students about what excellent lawyering is and what lawyers need to know.”); Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. LEGAL EDUC. 562, 574 (2015) (“The case-based Socratic method focuses on a very narrow and distorted range of legal skills.”); Peggy Cooper Davis, *Slay the Three-Headed Demon!*, 43 HARV. C.R.-C.L. L. REV. 619, 623 (2008) (criticizing law school pedagogy as too narrowly focused on logical thinking even though lawyers “serve our clients and the larger society in quests that test us in logic, psychology, public policy judgment, self-awareness, performativity, and ethics”).

9. The answer to this question could fill an entire article, so I won't try to address it in detail here. But I suspect that our pedagogy has remained so firmly anchored to the Langdellian trio for several reasons, including inertia, costs, and survivorship bias. For a discussion of survivorship bias effects in particular, see O.J. Salinas, *Secondary Courses Taught by Secondary Faculty: A (Personal) Call to Fully Integrate Skills Faculty and Skills Courses into the Law School Curriculum Ahead of the NextGen Bar Exam*, 107 MINN. L. REV. 2663 (2023).

10. For an overview of how medical education compares to—and differs from—legal education in the United States, see generally 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 (2011). Professor Bard describes the

arrives at medical school with a good sense of what the foundational activities of a doctor are because they have been patients. So even if they struggle in the medical school classroom or lab, they can envision themselves as a practicing physician if they anticipate that they might be excellent at the things they have regularly observed physicians do: interact with patients, problem-solve about symptoms, weigh the benefits and drawbacks of different treatment options, etc. As a result, they are also more likely to be able to connect what they do in the classroom with what doctors actually do. Even if memorizing information on the adrenal system doesn't come easily to a medical student, they surely understand that committing that information to memory might be fundamental to their skill in diagnosing and treating patients.

Conversely, most students who show up for their first year of law school have only a fuzzy understanding of what lawyers actually *do*. They may never have been a client of a lawyer; and, if they have, it is likely to have been for only one type of legal work: an estate attorney working on a grandparent's will, a family law attorney handling a parent's divorce, a criminal defense attorney representing them in a misdemeanor case, etc. So they have limited ability to see far enough ahead to what lawyers actually do to picture themselves doing that work—especially when we don't give them the tools to do that in our classrooms.<sup>11</sup> And the exceptions—those students who do have a deeper understanding of what lawyer work looks like—usually have gained that understanding through a parent or other close family member who is a lawyer. When we allow our pedagogy to ossify around a very narrow set of skills, we exacerbate the inequities between students who arrive at law school primed with knowledge gained from years of exposure to lawyers and their work and those whose exposure to lawyers and their work is limited or nonexistent.

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first two years of medical education as being primarily devoted to teaching students "basic medical science." *Id.* at 161.

11. Some non-classroom-based options have arisen to fill in the gap, helping students learn about what lawyers actually do and what skills they draw on in their jobs. For example, Professor Jonah Perlin hosts a popular podcast called "How I Lawyer," which he describes as "[a] podcast dedicated to learning about the legal profession by learning from the stories of those who do it. Each week the podcast interviews a lawyer about what they do, why they do it, and how they do it well." *How I Lawyer Podcast with Jonah Perlin*, HOW I LAWYER, <https://www.howilawyer.com> [<https://perma.cc/KR8J-9M2A>].

To the extent that some of what we teach and how we teach it is foundational to higher-level thinking and doing, we may also need to do a better job with messaging. In other words, some aspects of our pedagogy engage students in things that lawyers might not regularly do but are essential building blocks on which novices develop those lawyer skills. For example, tools like CREAC or IRAC<sup>12</sup> may seem formulaic, but teaching students to use them breaks down many steps that an experienced attorney often does in her head subconsciously. We should make sure we regularly explain to students how what we do in our classrooms connects to what they will do as lawyers. But my concerns about our pedagogy go beyond things that could be solved through better messaging.

All three of the students I described above are going to be—or, in some cases, have already become—outstanding attorneys. But their 1L experience told them something very different. And that’s not because they lacked confidence in themselves, or couldn’t see the “big picture” sufficiently to understand how their 1L work connected to law practice, or were too “soft” for law school or—well, fill in whatever other blame-the-student justifications you have heard for the stubborn resilience of Langdell’s methods. The reason these students thought they would not be good attorneys is because that is what we told them through the 1L curriculum.

## II. LANGDELL AND LAW SCHOOL PEDAGOGY

By now the shift that Langdell’s methods worked on the law school curriculum is well-known among those of us interested in law school pedagogy, so I provide just a brief overview here. Before Christopher Columbus Langdell got his hands on the curriculum, law school classes primarily consisted of lecture, during which professors would “summariz[e] legal rules and even read[] aloud from textbooks and treatises,” and provide “an authoritative-seeming answer” to the occasional student question.<sup>13</sup> Langdell’s principal insight was that students would learn the material better if they read the original sources—the cases—themselves, to discern the underlying principles and evaluate

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12. See *Organizing a Legal Discussion: IRAC/CRAC/CREAC*, COLUM. L. SCH. WRITING CTR., <https://www.law.columbia.edu/sites/default/files/2022-06/WC%20Handout%20IRAC%2C%20CRAC%2C%20CREAC.revised%205.22.pdf> [https://perma.cc/FQ3B-X4LS].

13. Gersen, *supra* note 1, at 2321.



the reasoning.<sup>14</sup> And, of course, he introduced the Socratic method as a fundamental part of his new pedagogy, calling on students and questioning them in a manner that “required students in class to analyze particular cases’ reasoning, rather than having the professor state general propositions of law for students to ingest.”<sup>15</sup>

In fact, the “Langdell method” is really three separate pedagogical techniques which, for purposes of this Essay, I break down as follows:

- I use “case method” to refer to the technique of assigning appellate court opinions from which students discern aspects of legal doctrine, analyze that doctrine, and apply it to different scenarios.
- I use “Socratic method” to describe an approach to questioning whereby the professor asks a student a series of questions designed to elicit information about the reading material, expose weaknesses in the student’s thinking, and lead the student to the “right” answer.<sup>16</sup>
- I use “cold calling” to refer to the classroom technique in which the professor selects and calls on students to answer questions out of the blue instead of seeking volunteers.

While these three teaching methods often travel together, they don’t have to. A professor could use the Socratic method to interrogate students about something other than court cases, or cold call on students to offer an opinion on something using non-Socratic dialogue.<sup>17</sup> And, of course, any of these teaching meth-

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14. *Id.* at 2321–22.

15. *Id.* at 2322.

16. This isn’t a perfect definition, and it isn’t a universally agreed-upon definition. Some professors define “Socratic method” to incorporate the case method, cold calling, or both. *See, e.g.*, Lani Guinier, Michelle Fine & Jane Balin, *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 3 n.11 (1994) (“We refer here to the Socratic method, or case-study method, which was developed and originally implemented by Christopher Columbus Langdell at Harvard Law School in the late 19th century.”); Gersen, *supra* note 1, at 2324 (“The term ‘Socratic method’ most commonly refers to a professor proceeding through a combination of calling on students (‘cold-calling’) and asking them questions to elicit reasons and arguments.”).

17. *See, e.g.*, Davis, *supra* note 8, at 621 (observing that Socratic discussions “are not as narrow as they once were,” and that they now “incorporate insights from many disciplines, like economics and psychology, that can properly inform judicial decision-making in a post-realist world”).

ods can be deployed aggressively and nastily—or with care, civility, and an encouraging tone.<sup>18</sup> Not all cold calling Socratic interlocutors are Professor Kingsfield of *The Paper Chase*.<sup>19</sup> But I intend to take on all three of these common aspects of law school pedagogy and show why we overemphasize and over-rely on them to our students' detriment—and to the detriment of the quality of the legal education we provide.

#### A. WHAT LANGDELL GOT RIGHT

The Socratic method has tremendous value when done well. (It's also tremendously painful when done poorly.) It is valuable partly for the reasons that Langdell himself promoted: it insists that students do the thinking themselves, as a means of learning *how* to think. At its best, engaging in Socratic dialogue requires students to reason through difficult propositions, confront inconsistencies in their conclusions, and rethink their prior stances.<sup>20</sup>

Some early students resisted Langdell's approach. They "had no thought of forming any judgment on their own" and thought it "the height of presumption to have, and much more to express, an opinion" when they "had not studied law at all."<sup>21</sup> It would be nearly unimaginable to hear students voice such complaints today. Rather, law professors in the year 2023 have come to expect that students enter law school having already formed plenty of judgments about the legal system and how well it does—or, more typically, does not—dispense justice. And many students are eager to dispel the suggestion that their lack of knowledge about specific legal doctrines means they "know nothing" worth sharing their thoughts about. Modern students are largely right: the experience and intelligence they bring to the

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18. See, e.g., Gersen, *supra* note 1 ("I hope that all professors can agree that insults, cruelty, incivility, contempt, and sadism are not only unnecessary but also antithetical to the Socratic method.").

19. See *THE PAPER CHASE* (20th Century Fox 1973); JOHN J. OSBORN, JR., *THE PAPER CHASE* (1971).

20. Part of Langdell's vision was also that students could discern the principles of law as "science." Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 598 (2007). Of course, that is no longer a goal, since modern legal thinkers tend to view that framing as folly. For a critique of the "law as science" approach, see *id.* at 601 ("'Truth,' in modern and post-modern views, is much more constructed, much less simply discovered, than the Langdellian model of 'science' supposes.").

21. Franklin G. Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493, 499 (1920).

law school classroom give them the foundation they need to grapple with complex ideas and assess the reasoning in cases they read rather than merely absorbing the doctrine, unchallenged. To the extent that Langdell took students seriously as thinkers about the law, he was right.<sup>22</sup>

Langdell got another big thing right: he discovered active learning! At its best, the Socratic method engages students (well, one student at a time—more on that in a minute) in active learning techniques. That’s good because people learn better when their brains have to work to figure out material, rather than having it lectured at them.<sup>23</sup> One popular book on the science of learning explains that “added effort increases comprehension and learning,”<sup>24</sup> and uses the term “desirable difficulties”<sup>25</sup> to describe effort that promotes learning. The authors describe one particular kind of highly effective desirable difficulty:

The act of trying to answer a question or attempting to solve a problem rather than being presented with the information or the solution is known as *generation*. . . . Overcoming [those] mild difficulties is a form of active learning, where students engage in higher-order thinking tasks rather than passively receiving knowledge conferred by others.<sup>26</sup>

When I first read that description, it immediately called to mind the Socratic method—or at least what the Socratic method accomplishes when done well.

#### B. WHAT LANGDELL GOT WRONG

To the extent that we should rely less on Langdell’s methods, it isn’t so much that Langdell was wrong for his time but rather that his approach is wrong for ours. That is partly because our students have changed; as a group they are more diverse along nearly every dimension.<sup>27</sup> It is also, of course, because the

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22. See, e.g., Gersen, *supra* note 1, at 2326 (observing that Langdell’s “innovation was to put the student’s thought process at the heart of the classroom experience in place of the professor’s authoritative views”).

23. See generally PETER C. BROWN, HENRY L. ROEDIGER III & MARK A. MCDANIEL, *MAKE IT STICK: THE SCIENCE OF SUCCESSFUL LEARNING* 67–101 (2014) (describing how overcoming “short-term impediments” results in stronger learning).

24. *Id.* at 87.

25. *Id.* at 68.

26. *Id.* at 87.

27. In fact, the American Bar Association requires law schools to “provid[e] full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities,” and

practice of law has changed.<sup>28</sup> The variety of things a lawyer might do in her practice has expanded greatly, as has the variety of lawyer jobs our students will end up doing.<sup>29</sup> And some lawyering skills whose value has remained consistent across time might not have been *recognized* as valuable in earlier eras. For example, it is hard to imagine that there was ever a time when the ability to connect with clients and really listen to their problems wasn't an essential part of excellent lawyering, but it's easy to imagine that until more recent times, that skill's importance was not recognized to the extent it is now. What follows are some specific problems with Langdell's approach to preparing modern law students for the modern practice of law.

### 1. The Case Method and the Socratic Method

I address these together because Langdell tied them together so closely—and because they regularly remain linked in

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demonstrate “a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.” *2022–2023 Standards and Rules of Procedure for Approval of Law Schools*, A.B.A. 15 (2022), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2022-2023/22-23-standard-ch2.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2022-2023/22-23-standard-ch2.pdf) [https://perma.cc/5HE8-YCH2] (setting forth Standard 206(a)); see also Tiffany D. Atkins, #ForTheCulture: *Generation Z and the Future of Legal Education*, 26 MICH. J. RACE & L. 115, 120 (2020) (asserting that “[l]egal education cannot and should not remain untouched” by cultural changes); Tully, *supra* note 2, at 841 (“In contrast to the status quo, a reimagined 1L year would meet our students where they are now, not where they were (and who they were) one hundred years ago.”).

28. Though one commentator, writing as early as 1933, derided Langdell and his methods as based in the erroneous belief that “law . . . was to be discovered in a library and nowhere else.” Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 908 (1933). According to Professor Frank,

[t]he lawyer-client relation, the numerous non-rational factors involved in persuasion of a judge at a trial, the face-to-face appeals to the emotions of juries, the elements that go to make up what is loosely known as the ‘atmosphere’ of a case,—everything that is undisclosed in judicial opinions—was virtually unknown (and was therefore meaningless) to Langdell.

*Id.*

29. See, e.g., Rakoff & Minow, *supra* note 20 (describing Langdell's case method as being “well-suited to the [then] paradigmatic law practice of adjudication”); Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 653 (2007) (“[S]ince many students are not inclined toward litigation and will ultimately end up as regulatory or transactional lawyers, it makes sense to introduce them to these areas in their first year, rather than misrepresenting our legal system as predominantly litigation-driven and leaving them to find their preferred professional roles by trial and error.”).

many law school classrooms. The case method and Socratic questioning are lauded for teaching budding lawyers to “think like a lawyer.” But as many commentators have pointed out, those methods are less good at teaching students to “do like a lawyer.”<sup>30</sup>

There is of course a relationship between doing and thinking. Certainly, sound thinking is essential for effective doing—and thus teaching students to think like lawyers sometimes must precede teaching them to produce lawyer work. But the relationship goes in the other direction too: doing *enhances* thinking, it doesn’t *displace* it.<sup>31</sup> How many of us have found that sitting down to write has forced us to sharpen our ideas, identify a relationship between concepts we hadn’t previously recognized, or maybe even change our conclusion? I regularly observe students similarly become much better at thinking about a legal question when the mechanism of thinking is applying the doctrine in writing, rather than orally answering questions about cases that develop the doctrine.

And if the goal is to engage students in critical thinking skills, the pairing of Socratic dialogue and case method is tremendously inefficient. Calling on a single student at a time to answer questions leaves most students on the sidelines for most of the class.<sup>32</sup> The case method is similarly inefficient at teaching doctrine in many classes, at least once students have learned the key lawyering skill of reading cases closely and extracting infor-

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30. *E.g.*, Davis, *supra* note 8, at 621 (praising the Socratic method as a means of developing students’ “analytic” skills, but bemoaning its failure to develop “practical” lawyering skills); Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 120 (1999) (arguing that the Socratic method “cannot effectively teach either legal rules or practical lawyering skills”); Ho, *supra* note 2, at 668 (“[T]he Langdellian model . . . limit[s] opportunities for transfer of skills development in a career that depends more on the practice than the acquisition of knowledge.”).

31. *See, e.g.*, Rubin, *supra* note 29, at 663. Professor Rubin suggests that the purpose of incorporating skills exercises into the doctrinal classes is “to reify the classroom material. It is one thing to decide, after reading a contract, that the language is ambiguous, or that the judge misinterpreted ambiguous language; it is quite another to try to express a simple transaction in unambiguous contractual language of one’s own.” *Id.*

32. Some professors call on as many as thirty students in a single class session, thus bringing in more students but for less time per student. *See, e.g.*, Gersen, *supra* note 1, at 2344. I suspect that approach at least has an upside: the high possibility of being called on keeps students more engaged throughout the class.

mation from them. It funnels student class-preparation time toward one particular activity—reading appellate decisions—at the expense of doing things like (as just two examples) reading motions that apply doctrine or watching an oral argument in which the policy implications of the doctrine are a central point of contention. If the goal is to engage students with thinking about the doctrine, there are many ways to do that, and a lot of them are better than the Socratic method and the case method.

The case method also buries many things that happened prior to the onset of the litigation—things that form the daily work of lawyers who engage in activities like strategic planning, counseling, negotiation, drafting, and interviewing. And it buries things that happen *during* the litigation—things that are the bread-and-butter of a litigator’s job but not an appellate judge’s job. For example, Sherri Lee Keene and Susan McMahon criticize legal education’s focus on appellate opinions because it “presents students with a view of facts as set and fixed and offers them little experience with conflicting witness testimony, fact investigation . . . , or narrative framing—all essential parts of competent lawyering.”<sup>33</sup>

## 2. Cold Calling

How important is it for students to develop the skill of offering an instantaneous response to a legal question? That’s the skill that we value when we cold call on students and query them, whether about a court decision, a hypothetical, or the policy implications of some regulation.<sup>34</sup> How much should we be sending the message to students that this skill—the ability to deftly handle a cold call of that sort—is valuable in the legal profession? While some commentators have written about the importance of students “being put on the spot,”<sup>35</sup> I am skeptical. To be sure, *some* aspects of *some* kinds of law practice benefit from this skill—oral argument certainly, some limited kinds of in-person client counseling, and perhaps a few other things. But those

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33. Sherri Lee Keene & Susan A. McMahon, *The Contextual Case Method: Moving Beyond Opinions to Spark Students’ Legal Imaginations*, 108 VA. L. REV. ONLINE 72, 80 (2022); see also Rakoff & Minow, *supra* note 20, at 600 (“By focusing on appellate cases, we also assume that the facts of the problem are known: if not because they are really known, then because the rules of procedure will treat them as no longer contestable.”).

34. See, e.g., Davis, *supra* note 8, at 621 (“[Q]uick-witted Socratic discussion of appellate opinions is the iconic law school experience.”).

35. Gersen, *supra* note 1, at 2346.

circumstances are the exception, not the rule. The vast majority of the work that lawyers do is the sort of work that allows for reflection before providing any sort of answer.

Even the lawyer tasks that seem to require on-the-spot answers usually incorporate the sort of preparation and reflection that aren't present in the classroom cold call. Oral arguments and conversations with a client seeking advice are usually characterized by a deep level of preparation often involving hours of research, analysis, and strategizing with colleagues. And of course, the attorney frequently is already an expert in the relevant area of the law or has developed some expertise while preparing for the argument or conversation. Even a junior attorney's oral response to questions from a senior attorney about a legal issue in a pending case is usually preceded by the junior attorney having conducted research for several hours, immersing herself in the facts of the case, or engaging in some similar amount of preparation. And outside of oral arguments, most attorneys can say to a client or colleague, "hmmm, that's a new question for me. Let me look into it and get back to you because I want to make sure I give you the right answer."<sup>36</sup>

That is nothing like the classroom cold call, where even the most diligent student is a novice who has at most read a few case excerpts and accompanying notes in a casebook and reflected on what she read for perhaps twenty extra minutes.<sup>37</sup> The skill of being able to hear your name called in a room of eighty colleagues and immediately parry a question from an interlocutor with much more expertise and knowledge is not one that students are likely to need much in law practice.

This is not to say that developing oral communication skills is unimportant for law students. On the contrary, oral communication skills are probably under-taught and under-valued in law school relative to how frequently lawyers must use them in communicating with colleagues, clients, opposing counsel, and judges. Insisting that students engage in oral communication around legal questions is valuable. Providing them with plenty

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36. Of course, even at oral argument, attorneys have the ability to deflect some unexpected questions with some version of: "With the court's permission, I'd be happy to submit a supplemental letter addressing that."

37. See, e.g., Anne M. Coughlin & Molly Bishop Shadel, *The Gender Participation Gap and the Politics of Pedagogy*, 108 VA. L. REV. ONLINE 55, 68 (2022) (describing cold calling as being forced to engage in public speaking "without advance notice—and about a topic in which the speaker has little expertise and almost no language").

of opportunities to do so is an important step; even if practice doesn't necessarily make perfect, it certainly helps. But it's less clear that cold calls are necessary—or even particularly useful—as a means of helping students develop those skills. The anxiety that the cold call produces for many students is unnecessary and can actually *undermine* the value of the lesson.<sup>38</sup>

Even Supreme Court Justices don't necessarily shine—or opt to participate—under all circumstances. I was recently struck by Justice Kagan's remarks about the Supreme Court's adjustments to oral arguments during COVID. During the year when the courtroom was shuttered and the Court held arguments by telephone, the Justices had agreed that they would ask questions sequentially, starting with the Chief Justice and then going in order of seniority. Court watchers immediately noticed that Justice Thomas—who historically has almost never asked questions at oral argument<sup>39</sup>—regularly used his allotted time to do so. Justice Kagan explained that when the courtroom reopened for in-person arguments, the Justices had to decide whether to continue with the one-at-a-time approach to questioning or return to the free-for-all that characterized the Court's usual approach. As Justice Kagan said in her remarks:

[A]ll of us liked the fact that Justice Thomas was a very active participant in that way of doing things. Justice Thomas really didn't like the free-for-all and didn't participate in it. But when . . . everybody had a turn, he became a very active and a very astute questioner, and everybody liked that.<sup>40</sup>

As a result, when in-person arguments resumed the Justices agreed that “if Justice Thomas wanted it, he would always have the privilege of the first question.”<sup>41</sup>

What lessons should we draw from this example? First, we shouldn't force students primarily into one particular sort of

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38. See *id.* at 68–69 (observing that when a professor forces a student to either handle a cold call on a painful topic or publicly “pass” when called on, “that student certainly will not have learned anything about the material from such an interaction”).

39. Laura Wagner, *Clarence Thomas Asks 1st Question from Supreme Court Bench in 10 Years*, NPR (Feb. 29, 2016), <https://www.npr.org/sections/thetwo-way/2016/02/29/468576931/clarence-thomas-asks-1st-question-from-supreme-court-bench-in-10-years> [<https://perma.cc/C738-UNGC>].

40. Tony Mauro, *The Marble Palace Blog: An Inside Look at How Justices Handled Oral Arguments During the Pandemic*, LAW.COM (Aug. 26, 2022), <https://www.law.com/nationallawjournal/2022/08/26/the-marble-palace-blog-an-inside-look-at-how-justices-handled-oral-arguments-during-the-pandemic/?slreturn=20221030132037> [<https://perma.cc/D9SX-NDMY>].

41. *Id.*



class participation. Students who don't excel at the cold call—or even fear it—are equally as likely to be talented legal analysts as their classmates who don't mind cold calls.<sup>42</sup> But more than that, offering students other ways to engage in class doesn't just make that engagement comfortable for more students. It ensures that *everyone* benefits from those students' participation. Law professors frequently justify cold calling on the grounds that it is essential to include everyone's voice in the classroom.<sup>43</sup> That is an important goal. But cold calling elevates formal participation over substance. It gives the appearance of including all voices without ensuring that those voices are actually able to participate meaningfully. It thus risks being an empty gesture at diversifying the voices we hear in class.<sup>44</sup>

Just as the other Justices appreciate Justice Thomas's "astute" questions and benefit from his active participation in oral argument, our students benefit from the active participation of *all* of their classmates. And just as the Supreme Court adjusted its practice to ensure Justice Thomas's voice is heard, it is up to us to figure out how to engage all of our students. If the Supreme Court can do it for Justice Thomas, we can do it for our students.

### III. WHAT THE AUTHENTIC PEDAGOGY TEST SUGGESTS WE SHOULD BE DOING

What would it look like to implement a pedagogy that adopts authenticity as its guiding principle for effective teaching? As a reminder, the Authentic Pedagogy Test is this: law school pedagogy should accurately inform students about the likelihood that they will be successful and satisfied practicing attorneys. It probably goes without saying that incorporating more skills training is an essential aspect of satisfying that test.

The point is not that we should anticipate what every law student wants or expects to do in practice; we surely cannot, and

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42. More generally, the world of law and business undervalues introverts and the talents they bring, a phenomenon which attorney Susan Cain explores in depth in her book *Quiet: The Power of Introverts in a World That Can't Stop Talking*.

43. See Gersen, *supra* note 1, at 2344.

44. See Guinier et al., *supra* note 16, at 4 ("Our data suggest that many women do not 'engage' pedagogically with a methodology that makes them feel strange, alienated, and 'delegitimized.'"); Coughlin & Shadel, *supra* note 37, at 71 (urging professors "to design classes that encourage student participation from the beginning, so that students feel comfortable speaking and listening to one another").

we should not try.<sup>45</sup> But just as surely, we *can* identify the most common skills and kinds of law practice, and we can align our pedagogical approaches in a way that hits those skills and modes of thinking, especially in the first year. A survey of those skills is beyond the scope of this Essay, but I hope that the suggestions I offer below are a useful starting point for any professor who is eager to rethink their reliance on Langdell’s methods.<sup>46</sup> Every law student (barring those who truly aren’t right for law practice) should finish 1L year with a sense of what skills they have that make them suited to law practice, what kinds of practice they are most suited for, and what skills they are less proficient at. That is one reason an Authentic Pedagogy Test is useful: it is less about checking boxes on a lengthy list of specific skills and more about capitalizing on the broad array of strengths that students bring to law school and showing how they translate into success as an attorney.

Before I offer specific suggestions, I want to acknowledge that many professors—including doctrinal professors who typically teach large classes in core subject areas—are already doing a lot to disrupt the Langdellian trio of case method/Socratic questioning/cold calling.<sup>47</sup> Many of the teaching methods I endorse already appear in law school classrooms.<sup>48</sup> One of my goals is to challenge all of us to consider whether we are doing *enough*

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45. See Steven K. Homer, *From Langdell to the Lab: The Opportunities and Challenges of Experiential Learning in the First Semester*, 48 MITCHELL HAMLINE L. REV. 265, 270 (2022) (“Much of what lawyers do in their day-to-day work is idiosyncratic to that field of practice or to practice in that jurisdiction. . . . It would be impossible for any legal education . . . to prepare all its graduates for whatever practice might demand of them.”).

46. For an overview of several of the most significant reports on what law schools should be teaching and which skills are essential for law practice, see Beverly Petersen Jennison, *Beyond Langdell: Innovating in Legal Education*, 62 CATH. U. L. REV. 643, 657–62 (2013).

47. Legal writing professors are routinely on the receiving end of mistaken assumptions about what and how we teach, and I don’t want to make that mistake with my non-experiential colleagues here.

48. See Kerr, *supra* note 30, at 123–25 (describing “quasi-traditionalist” approaches that modify or use portions of the Langdellian method, and “counter-traditionalist” approaches that reject Socratic dialogue); Gersen, *supra* note 1 (favoring an “inclusive dialogue” over a Socratic “hide-the-ball exercise”). See generally Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1 (1996).

of these things.<sup>49</sup> Do skills-focused lessons make only sporadic appearances in our first-year Contracts classes, or do we routinely incorporate them? What would happen if we doubled the number of doctrinal concepts we teach through small-group, in-class writing activities instead of through Socratic questioning about appellate decisions? What would happen if we built in more “thinking” time in every class, instead of creating an environment in which rapid responses to professor questions are expected? We might find that students who are unimpressive when answering a cold call about an appellate decision turn out to be excellent at engaging in analysis through different means. And I suspect that we will discover that *all* of our students learn the doctrine better.

This Part highlights some specific ideas. Some of those things would require sizable changes, but many would not. Even incremental changes in our pedagogy would give many more students the opportunity to recognize a successful future attorney in themselves.

#### A. OUR PEDAGOGY SHOULD INFORM STUDENTS ABOUT THE FUNDAMENTAL WAYS THAT ATTORNEYS USE THE LAW IN THEIR WORK PRODUCT

We probably assign students too many cases to read and discuss in class. It’s not that assigning cases to read is bad pedagogy. In fact, just the opposite is true: students need to learn to parse court opinions for a variety of purposes, including those that were close to Langdell’s heart. But reading and discussing cases is only one pedagogical tool, and our overreliance on it—and on appellate cases in particular—crowds out other important ones. The variety of things we could do with student preparation and class time if we released our hold on the case method as the dominant way of teaching is nearly limitless. We could use that class time to instead have students engage with legal materials in ways that attorneys actually do.

We should start by giving serious consideration to *which* courses benefit most from reading cases as the principal material. We assign cases to teach students how to do things like deduce the legal standard, recognize various interpretive methods, study and critique different judicial ideologies, identify the ways

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49. One staunch defender of the Socratic method and cold calling explains that she regularly incorporates “other modes of teaching that require student collaborations”—including many that I identify below—but explains that “the mainstay is still the Socratic method.” Gersen, *supra* note 1, at 2346.

the law has developed over time, and understand the relevance of facts to a court's decision. This is obviously not an exhaustive list, but the point is that students need to learn to do those things, and reading cases is usually the best way for them to do that. Certainly Constitutional Law, for example, is well-suited to developing those skills by reading and discussing appellate decisions; court decisions are central to what Constitutional Law is under our modern legal system.<sup>50</sup> But it's harder to make that case for many courses.

Why, for example, does learning Torts require students to read lots and lots of cases about individual torts, as opposed to replacing some of those cases with a Restatement-like description of some torts? Imagine what things a professor could then do with both the student preparation time and class time she would free up. To be clear, a Torts class that followed this model would still assign students cases to read so that they could practice the skills that reading cases develops and see how the common law operates. But it would do less of that.

What would happen if we assigned students fewer cases to read? What new pedagogical opportunities would that open up? We might include less instruction in how to pull the legal standard from court decisions and more instruction in using real-world documents to apply it. If we experiment more with giving the students the blackletter law directly, we might be able to do more in the way of working with the law.

Here's one example of what that might look like: imagine that we didn't assign *Celotex*<sup>51</sup> as reading in Civil Procedure. (How many attorneys remember what *Celotex* says, beyond the boilerplate they routinely quote at the beginning of a summary judgment motion?)<sup>52</sup> A Civil Procedure professor might instead provide a brief description of the general standard that *Celotex*

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50. See Harold Anthony Lloyd, *Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice, and the Humanities*, 49 WAKE FOREST L. REV. 1213, 1236 (2014). But see Abrams, *supra* note 8, at 576–79 (identifying ways that a professor can incorporate a skills-based framing into a Constitutional Law class).

51. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

52. See, e.g., Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI. L.J. 561, 562, 583–84 (2012) (“*Celotex* has become the standard teaching decision on summary judgment,” yet, “in a surprising number of summary judgment cases, federal courts do not even cite *Celotex*,” and “where courts do cite *Celotex*, some federal judges do not seem to acknowledge, understand, or apply the elaborate *Celotex* conceptual framework.”).

establishes and then assign as reading the summary judgment filings—motion, opposition, and perhaps a curated set of the discovery documents—from an actual case. In class, the professor could then walk the students through the materials, asking the class to identify the alleged disputes of fact and discuss whether the record actually contains a dispute and, if so, whether the dispute is material.

Approaching the material in this way is likely to lead students to understand it at a deeper level. I have discovered this in my Legal Practice class, in which my students draft a summary-judgment motion or opposition in their second semester. Even though they have (usually) taken Civil Procedure in their first semester, I regularly discover that they don't really understand what "the point" of a summary judgment motion is, how attorneys use discovery in crafting their arguments, and what courts are really trying to do when they implement the "reasonable jury" standard. It is not until they approach summary judgment from the perspective of an attorney crafting an argument from a curated set of discovery materials that it clicks.

One possibility, then, is that we are teaching summary judgment in exactly the right way: we introduce students to the foundational cases in Civil Procedure in the first semester and then have them apply the standard in their legal writing class in the second semester. But placing doctrine in a separate silo from skills sends an inaccurate message about the relationship between those things and undermines student learning.<sup>53</sup> And that approach relies too much on serendipity to ensure that students have the right doctrinal foundation at the right time for the skills assignment.

A better approach is to develop stronger pedagogical collaborations between faculty teaching the same students, to break

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53. See Stanchi, *supra* note 8. Professor Stanchi envisions "retool[ing] a number of courses so that legal skills, such as problem solving, advocacy, writing, and negotiation, are central to the course." *Id.* at 212. She writes that "the courses [she] envision[s] would expose students to fundamental doctrinal concepts but in a practical context that would show them the use of doctrine in realistic and diverse lawyering situations." *Id.* at 213; see also Abrams, *supra* note 8, at 575 (noting that without a skills-based framing, "a torts student could leave a course seeing tort law through the lens of appellate law, which distorts the critical role of fact gathering, client narrative, damage calculations, and settlement considerations," and "a family law student could . . . think[] that family law is about litigation, without seeing the central role of contracts, mediation, negotiation, financial valuation, and client counseling").

down those artificial walls between doctrine and skills. For example, Civil Procedure, Torts, and Legal Writing faculty could work together to develop an assignment that required students to draft part of a Rule 12(b)(6) motion for a Torts complaint, selecting the specific claim based on what the students were learning in Torts when they arrived at the 12(b)(6) part of their Civil Procedure syllabus. Drafting a Rule 12(b)(6) motion forces students to grapple with how the substantive *and* procedural doctrines actually work. This doesn't have to be a long assignment. It doesn't even have to require work outside of class or individualized student assessment; it can be crowdsourced during class in small groups, followed by immediate, class-wide feedback.<sup>54</sup>

Note that much of this would require more coordination among law faculties to ensure that the student experience covers all of these bases, but this coordination would be worth the effort. Learning to read and extract information from cases is but one important legal skill, and we overemphasize it to the detriment of our students' learning of other equally important skills. If everyone is doing their own thing and teaching in whatever way they want, then whether students actually encounter a variety of teaching methods and learn a diverse set of skills is mostly a matter of luck. But if faculty collaborate to provide an integrated curriculum, our students will be better prepared for the realities of legal practice.

#### B. OUR PEDAGOGY SHOULD INFORM STUDENTS ABOUT THE WORK TRANSACTIONAL ATTORNEYS DO

We teach in a litigation-oriented way even in our non-litigation classes. For example, students learn Contracts and Property primarily by reading appellate decisions, and thus learn mostly about contracts and property disputes that ended up in litigation. That represents a tiny slice of the world of contracts and

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54. An even more robust option is to develop "companion classes," which Professor Sandra Simpson has described as a

coordinated effort . . . to create a co-class course that is attached to a podium course, such as civil procedure, torts, criminal law, Constitutional law, contracts, and property. The attachment to a podium first-year course will lend legitimacy to the course and its content. If, for example, a civil procedure course is normally a four credit course, then it could become a six or seven-credit course to add the skills content that students are deficient in.

Sandra Simpson, *Law Students Left Behind: Law School's Role in Remediating the Devastating Effects of Federal Education Policy*, 107 MINN. L. REV. 2561, 2600 (2023).

property law. And it represents an even tinier slice of the work of attorneys whose practice is devoted to contracts or property matters, since once a dispute becomes the subject of a lawsuit, the litigators usually take over. Our focus on the case method in those classes in particular is a missed opportunity to reach students whose interests and talents lie outside of litigation.<sup>55</sup>

Opportunities abound for refocusing student attention on the transactional work that lawyers do. For example, Kathryn Stanchi suggests that we “retool a number of [doctrinal] courses so that legal skills, such as problem solving, advocacy, writing, and negotiation, are central to the course.”<sup>56</sup> Professor Stanchi envisions that such a course would be centered around client problems, which students would then engage with by researching the law, using both primary and secondary sources, and thus “learn[ing] how to incorporate these ideas into their practice.”<sup>57</sup> Edward Rubin, former Dean at Vanderbilt Law School, suggests that “[w]hen students study transactions, they could draft and negotiate, as well as read, a contract.”<sup>58</sup>

Even within the confines of the case method, professors can counter the litigation-oriented focus of appellate decisions. For example, Professor Emily Zimmerman suggests that students “be given the opportunity to develop alternatives-to-litigation counterfactuals.”<sup>59</sup> Under that approach, professors would engage students on questions about how the conflicts they read about in cases could have been avoided or resolved outside of litigation.<sup>60</sup>

### C. OUR PEDAGOGY SHOULD INFORM STUDENTS THAT ATTORNEYS MUST BE ABLE TO WORK WELL WITH CLIENTS

Clients are nearly absent from the 1L curriculum. Students certainly encounter plenty of individuals and entities in their class reading—but as parties to a court case, not as clients of a lawyer. As a result, our curriculum hides a foundational part of

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55. See, e.g., Homer, *supra* note 45 (“Focusing on these other kinds of practice [like regulatory and transactional work], rather than intimating that litigation is the main path for most lawyers, would help law students who are not drawn to litigation more clearly see paths for themselves.”).

56. Stanchi, *supra* note 8.

57. *Id.* at 613.

58. Rubin, *supra* note 29, at 663.

59. Emily Zimmerman, *Pushing Back Against Langdell*, 83 U. PITT. L. REV. ONLINE 1, 4 (2022).

60. *Id.*

being a lawyer: representing a client. Even in classes like legal writing, where students are placed directly in the role of attorney and instructed to represent a simulated client, students struggle to engage with the person described on the printed page as an actual client.<sup>61</sup>

At Michigan, we have experimented with one answer to this problem: get students interacting with clients early by partnering with local non-profit organizations to train and assign our 1Ls to client-centered work.<sup>62</sup> As part of their required LRW class, many of our students have worked with a local immigrant rights organization to guide green-card holders through the naturalization process or with a local tenants' rights organization to interview potential clients and write an intake memo. We also offer an optional elective that 1Ls can take in their second semester doing guardian ad litem work in the child welfare system. What these opportunities have in common is exposure to direct client work without running afoul of student practice rules, which usually prohibit 1Ls from doing substantive work that lawyers ordinarily do.

Even where we can't assign a real client, we can regularly remind students of where their client fits into the work we are doing in class. One way to do that, even within the case method, is to start not with the facts as written in the case but instead with the source of the facts that end up in the opinion. Where do facts come from? How do good lawyers find the facts? How do they get clients to provide them with facts? How do they conduct fact investigations that produce the things they need to marry the facts to the legal standard?

Even just tweaking some of what we ask in a Socratic dialogue can make a subtle difference. For example, Professor Jamie Abrams suggests reframing questions about a court opinion to focus students' attention on the client and the attorney-client relationship. Instead of asking "What are the facts of the case?",

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61. Here's just one example: for one assignment, I place students in the role of junior attorney in a company's General Counsel's office. I assign them to research and write a memorandum analyzing whether an employee's whistleblower claim against the company will survive a 12(b)(6) motion to dismiss. Even when we spend time in class explaining why the General Counsel might want a junior attorney to analyze this question and discussing the role of an in-house lawyer, students regularly forget that they work for the defendant when they write their memos. It turns out that it's hard to represent a pretend client.

62. For a detailed description of this program, see Nancy Vettorello & Beth Hirschfelder Wilensky, *Reimagining Legal Education: Incorporating Live-Client Work into the First-Year Curriculum*, MICH. BAR J., Aug. 2017, at 56, 56–57.



Professor Abrams suggests: “What happened to the plaintiff?” and “Why did the plaintiff seek counsel?”<sup>63</sup> Instead of “What is the court’s holding?”, Professor Abrams suggests: “How does the court’s holding meet the client’s objectives?”<sup>64</sup> Those small shifts help keep the clients in the lawsuits from being invisible to students.

D. OUR PEDAGOGY SHOULD INFORM STUDENTS THAT ATTORNEYS REGULARLY COLLABORATE WITH OTHERS AND BENEFIT FROM WORKING THROUGH LEGAL ISSUES TOGETHER

Cold calling typically puts students on the spot one-at-a-time to answer the professor’s questions. Even where the professor brings in multiple students sequentially to tackle a thorny issue “together,” the dynamic is still that of a professor-directed lesson and not an organic conversation. That dynamic doesn’t reflect how attorneys typically collaborate.

One common concern about abandoning cold calls imagines a binary approach: it’s either cold calls or relying exclusively on volunteers.<sup>65</sup> But those are no more the only options for student participation than lecturing and Socratic dialogue are the only options for organizing a seventy-five-minute class session. Relying exclusively on volunteers has serious drawbacks, most significant among them that it usually results in the same voices regularly dominating the classroom. But there are many alternatives to the fully “cold” call. Even shifting to “warm” calls—alerting students at the beginning of class that they are on the call list—reduces some of the immediate stress that students experience when they hear their name called to answer questions, without undermining student motivation to prepare for class.<sup>66</sup>

And both of these concerns—about the lack of collaboration and the stress of the spotlight—can be addressed by shifting the focus away from a single student to pairs or small groups. Asking

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63. Abrams, *supra* note 8, at 569.

64. *Id.*

65. See, e.g., Gersen, *supra* note 1, at 2344. Although Professor Gersen equates cold calling with the Socratic method, she captures the binary view well here: “[F]rom the standpoint of equal educational opportunity in most class settings, the Socratic professor is better positioned to ensure that all students have opportunities to practice participation than a professor who relies on volunteers already most inclined to offer up their thoughts.” *Id.*

66. See, e.g., Coughlin & Shadel, *supra* note 37, at 70 (“A system in which students know when they will be expected to speak leads to better preparation and often a better classroom discussion.”).

students to pair up and discuss a series of questions and then picking a pair to share with the class avoids making a single student feel put on the spot and isolated—even where the pair is picked “cold” and the professor then engages the pair in Socratic-like dialogue.<sup>67</sup> Classmate pairs are also likely to correct each other’s obviously-incorrect answers quickly and privately, without the embarrassment a student might experience after realizing she has answered incorrectly in front of the entire class. Further, the “pair-then-share” approach has another benefit: it gives students the opportunity to think about the questions before responding in front of the entire class. And that brings me to my next suggestion.

#### E. OUR PEDAGOGY SHOULD INFORM STUDENTS THAT ATTORNEYS REGULARLY HAVE TIME TO THINK ABOUT LEGAL PROBLEMS

The problem with cold calls is not just the stress of suddenly having a spotlight on you in front of eighty classmates. It is also the speed with which the student is expected to absorb the professor’s questions and respond. The Socratic method prioritizes the ability of a student to orally and quickly work through a legal issue.<sup>68</sup> Especially when paired with cold calling, it requires students to engage in off-the-cuff discourse with their professor on material they probably read the previous day. Many students don’t shine in that environment. But many of those same students *do* shine when given a legal question and time to think through their answer, to write and revise, to think some more, and to revise again. Which model more closely resembles the work that practicing lawyers do? Should we be sending students the message that the “best” future lawyers are those who can nail a Socratic cold call? Certainly there are lawyers whose practice benefits from those skills—e.g., appellate and trial attorneys. But they are rare. Most lawyers value—and have the benefit of—time to mull over a question before picking up the phone

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67. See, e.g., *id.* (suggesting that guiding students in paired or group conversations can promote better classroom discussion).

68. The traditional law school exam also prioritizes a kind of speed in working through legal issues. While the problem isn’t quite the same as with in-class cold calls, exam performance also sends students an inaccurate message about their likelihood of success in law practice. Law practice rarely resembles a law school exam—especially the in-class exam—which typically requires students to read through several lengthy issue-spotter prompts, synthesize an entire body of doctrinal material, and organize and draft multiple essays in a three- or four-hour, nonstop block.

and calling a client or to strategize about a motion before sitting down to start writing, even when working against a court-imposed deadline.<sup>69</sup>

While the constraints of the classroom's clock mean we cannot always mimic that amount of "thinking" time in class, there is no reason not to build in *some* thinking time for questions. What would that look like? "I'd like you all to consider these questions about X case. I'm going to give you two minutes to think about them and then I'll call on someone." Those two minutes are likely not practical for every set of questions a professor might ask during class, but if you try it you might discover that the dialogue that follows is much more productive.<sup>70</sup> And you will reinforce for students the value of thinking about a legal issue before talking about it.

#### F. OUR PEDAGOGY SHOULD INFORM STUDENTS THAT ATTORNEYS USUALLY WORK FROM A BASE OF EXPERTISE

Even when lawyers *are* called on to quickly parry questions on a legal topic, it is usually a legal topic about which they have developed some expertise.<sup>71</sup> In some sense, everything that happens in law school (or in any learning environment) is about helping students build expertise. And that frequently leads students to feel frustrated. Sometimes, that frustration is good; it is a source of those learning-rich desirable difficulties.<sup>72</sup> But if we don't ever give students the opportunity to practice *using* what they've already learned, we deprive them of the ability to see how what they are learning will transform how they practice law. A practicing attorney frequently doesn't have to stop and read a bunch of appellate cases before fielding a quick client question in her area of practice. And attorneys who already have a store

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69. See Kaci Bishop & Alexa Z. Chew, *Turducken™ Legal Writing: Deconstructing the Multi-State Performance Test Genre*, 26 LEGAL WRITING: J. LEGAL WRITING INST. 113, 137–38 (2022).

70. See Coughlin & Shadel, *supra* note 37, at 71 ("Sometimes, the silent students have the most useful insights.").

71. See Bishop & Chew, *supra* note 69, at 135 ("Much of what becomes a person's intuitive thinking is thinking that is practiced enough to become automatic. Thus, an experienced attorney might give advice to a client in the moment and an experienced litigator might make decisions on the fly. This fast thinking is not an innate instinct, but knowledge built and refined through repetition over time.").

72. See *supra* notes 23–26 and accompanying text.

of knowledge about the law start their research multiple steps ahead of where a law student does.<sup>73</sup>

To mimic that experience for students, I build in assignments that explicitly draw on the knowledge students have already developed, to show them how that knowledge makes the work different. Here is one example of how I do that when I teach legal research. One of the biggest challenges of teaching legal research to 1Ls is that they know very little law. That means that they have to start every research project at the beginning and often don't even have a good sense of what *kind* of question the research question is; a Civil Procedure question might masquerade as a Torts question to a novice. And they don't have good instincts about things like whether a legal question is likely to raise issues of state law, federal law, or both, or whether the answer is likely to be statutory, regulatory, or something else. As a result, most research assignments don't do a good job of showing students how a practicing attorney, someone who *does* have good instincts about those things, would tackle a question.

So I developed an in-class research exercise designed to do that. I took a topic my students had already learned about in their Torts class—assumption of risk—and built a research prompt around it. I did not use the phrase “assumption of risk” in the prompt. I simply described the factual scenario—a little league coach who was injured in a freak accident during a player's celebratory home-run trot<sup>74</sup>—and asked them to research defenses to the coach's lawsuit against the player. Most students recognized that the question involved assumption of risk and, as a result, were able to locate the relevant set of materials on Westlaw or Lexis quickly, so they could then spend time sifting through cases from the jurisdiction. Even those who

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73. See, e.g., Homer, *supra* note 45, at 279. In describing the syllabus choices for a skills-based 1L class, Professor Homer writes:

[W]e were aware that the place at which an expert would begin any process is not necessarily the easiest place for a novice to begin learning. Often, the beginning of a process requires professional judgment. It is the most complex moment because it requires synthesis of so much of the expert's mature judgment to coalesce in the 'diagnostic' and strategic aspects of, for example, the first meeting with the client.

*Id.*

74. This prompt was based on an actual lawsuit. See Jaime Uribarri, *Little League Coach Sues Player for \$600,000 Over Injury Suffered from Helmet Toss*, N.Y. DAILY NEWS (Jan. 16, 2014), <https://www.nydailynews.com/sports/league-coach-sues-player-helmet-toss-article-1.1582135> [https://perma.cc/PGK8-7SAR].

didn't immediately think of assumption of risk as the relevant doctrine nevertheless recognized that the question was a Torts question, knew something about defenses to Tort claims, and had some sense of how to structure their research as a result. In other words, they were able to approach the question more like a practicing attorney would than a novice would, and thus appreciate that the struggles they might feel as a novice do not indicate that they will similarly struggle as an attorney.

#### CONCLUSION

How are we supposed to do all of this *and* teach doctrine? Well, maybe we teach less doctrine. That's OK! We already don't get to anything approaching all of it in any "doctrinal" class.<sup>75</sup> And the payoff for teaching less doctrine may be that the doctrine we *do* teach is learned better, more deeply, and with greater transferability to doctrine we don't teach. And—equally as importantly—we will be sending our students an important message about their potential for a successful and satisfying career practicing law.

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75. See, e.g., Joan W. Howarth, *What Law Must Lawyers Know?*, 19 CONN. PUB. INT. L.J. 1, 6–7 (2019) (“[T]he Torts doctrinal knowledge base required for the Multistate Bar Exam is quite extensive, covering many more areas of torts doctrine than [is] necessary for competence, and significantly more doctrine than is regularly covered in a four-credit Torts class.”).