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## Articles

# A Preliminary Inquiry into the Art of Critique

by

RICHARD K. NEUMANN, JR.\*

A profession's secret is the analytical art through which its practitioners work. Donald Schön has used the term "reflection-in-action" to describe the processes through which architects and other professionals unravel and resolve the "uncertainty, uniqueness, and conflict"<sup>1</sup> in the "indeterminate zones"<sup>2</sup> of professional work. He has argued that because these processes cannot be reduced to a code of natural rules, inquiry into them often is closed off.<sup>3</sup> Through a process of "mystification" superior professionals are said to have more "wisdom" or "talent" or "intuition"<sup>4</sup> or other "junk categories"<sup>5</sup> of characteristics. He also has argued that effective reflection-in-action can be understood better and taught better if it is treated as an art, "not inherently mysterious . . . [but instead] rigorous in its own terms."<sup>6</sup> The legal profession's analytical art is primarily diagnostic and predictive<sup>7</sup> or strategic.<sup>8</sup>

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\* Associate Clinical Professor, Hofstra Law School. Copyright 1989 Richard K. Neuman, Jr. All rights reserved. The author is grateful for the comments and suggestions of Lawrence Kessler, Graham Strong, Bernard Jacob, Peter Margulies, Tony Alfieri, Dwight Greene, Robert Douglas, and the participants of Columbia Law School's Clinical Theory Workshop, where a draft of this Article was presented.

1. D. SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER* xi (1987).

2. *Id.* at 12.

3. D. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* 289 (1983).

4. D. SCHÖN, *supra* note 1, at 13.

5. *Id.*

6. *Id.* In professions based on technology, "applied science and research-based technique occupy a critically important though limited territory, bounded on several sides by artistry. There are an art of problem framing, an art of implementation, and an art of improvisation—all necessary to mediate the use in practice of applied science and technique." *Id.*; see also J. WHITE, *THE LEGAL IMAGINATION* xxxiv-xxxv (1973) (practicing law can be like practicing an art, with the possibility of self-expression).

7. Among other things, diagnostic and predictive arts attempt to find deeper meaning in

A teacher of aspiring professionals is caught in a double-bind because of the paradoxical mystery of analytical art, which is secret not because the guild refuses to disclose it, but because it cannot be communicated in explicit terms understandable to a person who has not already mastered it. A profession's analytical arts are received forms of creativity: preceding generations of professionals have worked out the basic paradigm of each art, but a professional can use the art only through a creative and nearly indescribable process of adapting its variable paradigm to the circumstances at hand. And even though a teacher is unable to explain straightforwardly to students the intellectual arts they must learn, the teacher nevertheless must help students overcome the frustration and anger that the paradox causes them.<sup>9</sup>

Critique<sup>10</sup> is the kind of conversation that powers what Schön calls a "reflective practicum,"<sup>11</sup> an institutionalized setting in which a teacher, in direct discussion with individual students about their performances,

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precedent and gaps into which doctrine is likely to grow; to discern a range of meaning in the words of a statute (or an instrument or testimony) and to choose the meaning that is most likely to be accepted by an adjudicator; to uncover an adversary's strategy from early, seemingly ambiguous, actions and on that basis to anticipate the adversary's next attack; to sense the predispositions of jurors at *voir dire* or of judges during argument; and to find the hidden emotional content—in addition to the openly recited facts—in a client interview in order to foresee the client's future behavior in negotiation, in a deposition, and in the courtroom. Some of these examples require the use of doctrinal knowledge; others, the use of psychological or similarly practical knowledge; and still others, the use of both. *See infra* text accompanying notes 60-67.

8. Some strategy involves the manipulation of ideas, such as developing a theory of the case, conducting law reform through impact litigation, or constructing a contract proposal or estate plan that best promotes a client's interests. Other strategy focuses on the manipulation of people in negotiation, in the courtroom theater, and in other settings. *See infra* text accompanying notes 68-71.

9. *See* D. SCHÖN, *supra* note 1, at 166. Long ago, Mark Twain observed the same paradox in the training of river boat pilots. After Twain's master pilot, Bixby, had compelled his apprentice to steer a river boat over an innocuous wind reef that the terrified boy thought was a dangerous bluff reef, the latter—befuddled, frustrated, and angry—exclaimed, "How am I ever going to tell them apart?" "I can't tell you," Bixby replied. "It is an instinct. By and by, you will just naturally *know* one from the other, but you never will be able to explain why or how you know them apart." M. TWAIN, *LIFE ON THE MISSISSIPPI* 82 (Harper & Bros. ed. 1905) (emphasis in original).

10. This sense of the word "critique" does not include the meaning that Robert Condlin has ascribed to it: "analyzing and evaluating the patterns and theories immanent in the methods lawyers use to perform and think about skill practices against conceptions of what would be better, for the purpose of resolving perceived contradictions between theory and practice." Condlin, "*Tastes Great, Less Filling*": *The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45, 48 (1986). In Condlin's meaning, the student is a mere secondary figure, while the teacher theorizes about an idealized world, critiquing life, rather than the student. In a reflective practicum, critique focuses instead on guiding the individual student's development of professional analysis, creativity, and responsibility.

11. *See* D. SCHÖN, *supra* note 1, at 157.

propels those students into professional habits of analysis and creativity. In architecture, critique happens in a design studio; in psychotherapy, through supervision; and in music, during masters' classes. In the structure and content of the conversations Schön has studied, teachers use students' work to *guide* them into thinking—and not to *show* them how to think—like architects, psychotherapists, and musicians. Although the law school clinic corresponds most directly to the settings Schön examines, critique also occurs elsewhere in the law school curriculum: in seminars, in supervised independent study, and in legal writing courses.

And critique itself is an analytical art that can be performed well or poorly. When critique consists solely of pointing out all the student's errors and telling the student how to do the job in a way the teacher considers "right," it leads to empty mimicry, rather than mastery. Although technical skills<sup>12</sup> are a subject for critique, professional analysis is learned most thoroughly—and creativity and a professional personality<sup>13</sup> are developed most deeply—when a critique guides students through forms of teaching that are much more subtle, arduous, and time-consuming than mere explanations. In this way, critique is itself a separate but latent form of art, resembling a cadenza or a raga in its union of defined compositional principles with improvisation. Its status as art is certified by its capacity to awaken and transform its participants and, where there is one, its audience.

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12. Technical skills include matters as "objective" as techniques of drafting and cross-examination and as "subjective" as techniques for channeling aggression constructively. Because critique of technical skills usually focuses on knowledge—much of it tacit—rather than on habits of thought, critique limited to technical skills usually operates at a lower intellectual level than critique of diagnosis, prediction, or strategy. Yet, technical skills invoke deeper issues of analytical art and of the professional personality. See *infra* note 13. For example, technical skills always involve standards of effectiveness and often lend themselves to discussion of a disharmony between a student's theory of action and theory-in-use. When a professional "is asked how he would behave under certain circumstances, the answer he usually gives is his espoused theory of action . . . to which he owes allegiance, and which, upon request, he communicates to others." C. ARGYRIS & D. SCHÖN, *THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS* 6-7 (1974). But "the theory that actually governs his actions is his theory-in-use, which may or may not be compatible with his espoused theory," and he "may or may not be aware of the incompatibility of the two theories." *Id.* at 7. Although a professional's theory of action can be obtained simply by asking for it, his theory-in-use can be discovered only by observing how he actually works. *Id.*

13. The process of becoming a *capable* professional can enlarge character and deepen maturity in a number of ways. It can teach independence, prudence, judgment, self-awareness, self-criticism, and perhaps some amount of courage—all ways in which the aspirant must conquer the self. It should provoke aspirants to create personal standards of quality that are higher than any that could be enforced through the rules of malpractice and professional responsibility. Sometimes a profession's conflicts and responsibilities can help a self-indulgent person develop personal ethics and an active conscience.

But critique is so often done merely as a customary obligation that its artistry remains for the most part latent, its nature and principles generally escaping inquiry. Although many teachers become fine critiquers through instinct, many others do not. Just as good litigators often cannot accurately explain their own work habits, even an instinctively effective critiquer frequently cannot articulate the art of critique. When classroom teachers have the opportunity to critique—as they do with seminar papers and with guided independent study—some find liberation in teaching with a technique that the classroom is simply too cramped to permit, but others feel bewildered or even oppressed by an art that is not self-evident. Most significantly, although critique is the basic medium of clinical teaching and although it is widely used elsewhere in the curriculum, the literature is almost barren of investigation into it.

This article, then, is a preliminary inquiry into the art of critique, meant to open up (but not necessarily to resolve) issues that have not been explored previously. Sections I and II examine the art of Socratic critique and the differences between a class taught with a Socratic critique and one taught with the Langdellian method. Section II particularly considers the effect on critique of students' and teachers' experiences in the classroom, as well as the role of critique in carrying to advanced levels the analytical skills taught in the classroom. Section III explores analytical arts as received paradigms of creativity, as well as the effect of critique on creativity. Section IV discusses some barriers to effective critique, and section V considers some matters of structure and technique.

## I. The Art of Socratic Critique

The term "Socratic" often is used misleadingly to identify a style of classroom teaching in which a professor interrogates students. As actually practiced in the classroom, however, this method is not Socratic at all: the accurate term would be "Langdellian"<sup>14</sup> or even "Protagorean."

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14. Before 1870, students learned little about the skills of analyzing precedent because law was taught almost entirely through lecture, supplemented with treatises and hornbooks. In that year, Christopher Columbus Langdell began giving his contracts students the texts of decisions and questioning them in class about those decisions. See A. SUTHERLAND, *THE LAW AT HARVARD* 162-205 (1967); C. WARREN, *HISTORY OF THE HARVARD LAW SCHOOL* 354-453 (1908); Dente, *A Century of the Case Method: An Apologia*, 50 WASH. L. REV. 93, 93 (1974); Eliot, *Langdell and the Law School*, 33 HARV. L. REV. 518, 523-24 (1920); Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493, 498-99 (1920); Holmes, *Education for Competent Lawyering—Case Method in a Functional Context*, 76 COLUM. L. REV. 535, 542-43 (1976); Morgan, *The Case Method*, 4 J. LEGAL EDUC. 379, 379-80 (1952);

Langdell's technique coincides with the pedagogical technique of Protagoras, the leading Sophist and Socrates' rival. Protagoras taught through eristical questions centered on the interpretation of textual material, a method Socrates scorned.<sup>15</sup> The Protagorean effect was not to help the student gain self-knowledge (which was Socrates' goal), but to teach what the Greeks considered the skills of rhetoric. Protagoras taught students how to develop equally plausible arguments both for and against a given proposition by proving and then refuting each conceivable position, all in order to be able, as advocates, "to make the weaker cause the . . . stronger."<sup>16</sup> Socrates scorned all of this as the teaching of manipulation, rather than analysis and self-knowledge.<sup>17</sup> Whatever the benefits and harms of the Langdellian or Protagorean method<sup>18</sup>—or even the extent

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Patterson, *The Case Method in American Legal Education: Its Origin and Objectives*, 4 J. LEGAL EDUC. 1, 2 (1951). Attendance in Langdell's class immediately plummeted to a handful of students, and the remainder demanded to be lectured to instead. Fessenden, *supra*, at 500-04.

15. It might be more accurate to say that "Plato has Socrates scorn all this." We cannot know whether a given passage in a Platonic dialogue accurately reports Socrates' words, his technique, or even his views. Our contemporaneous evidence about Socrates is limited to the Platonic dialogues, to assorted observations by Xenophon, and to some satirical portraits in the plays of Aristophanes. Xenophon's descriptions of Socrates are too episodic to paint a complete portrait. Because farce works by presenting the plainly untrue as though it were true, and because we cannot know many things the Athenian audience would have taken for granted, Aristophanes confuses as much as he informs. We will never know how much Plato intended to make a literal record of Socrates' teaching and how much he intended to use Socrates as a voice for Platonic theory, but even if Plato had, in the best faith, attempted the former, all we now know about memory suggests that, to an extent we are unable to measure, Plato could not have avoided mutating his observations and idealizing his teacher's personality. See, e.g., E. LOFTUS, *EYEWITNESS TESTIMONY* 110-33 (1979); I. ROSENFELD, *THE INVENTION OF MEMORY* 192-95 (1988). Except in note 37 *infra*, references in this Article are to the Platonic Socrates, rather than to the historical Socrates.

16. Heffernan, *Not Socrates, But Protagoras: The Sophistic Basis of Legal Education*, 29 BUFFALO L. REV. 399, 415 (1980); see also *id.* at 401 n.5 (students of Protagoras taught to develop both sides of an argument); *id.* at 414-15 (Protagoras' goal is to develop advocates); PLATO, *PROTAGORAS* 318e (Protagoras says that he teaches his students how to become real powers in the city as speakers and men of action).

17. See, e.g., PLATO, *GORGIAS* 452-463b; PLATO, *LAWS* 937e-38; PLATO, *MENO* 91b-92a.

The Socratic [Langdellian] method as so often practiced in our schools and courts is many things—it may be rigorous training in rhetoric, a powerful learning experience—but it is usually *not* Socratic. It is what Socrates called eristic, not dialectic. It seeks to win an argument, . . . *not to achieve a synthesis or to reach an understanding*

Woford, *On the Teaching of Law and Justice*, 53 N.Y.U. L. REV. 612, 614 (1978) (emphasis added). "Socrates should be viewed not as the originator of the method of legal instruction but instead as the first critic of the uses to which that method can be put." Heffernan, *supra* note 16, at 416.

18. The often-repeated attacks on and defenses of the Langdellian classroom method need not be recatalogued here. They are amply explored in J. REDLICH, *THE COMMON LAW*

to which it is still used<sup>19</sup>—its notoriety has had the unfortunate effect of inhibiting law school teachers from developing a more truly Socratic method of critique, one that can better teach analytical art to individual students while avoiding the hazards of the Langdellian technique.

A true Socratic dialogue is divided into two parts: the *elenchus* and the *psychagogia*. In the *elenchus*, the teacher's questions guide the student to an understanding of the nature and extent of his or her ignorance.<sup>20</sup> The *elenchus* ends when the student reaches *aporia*, a state of new-found perplexity. In the *psychagogia* (literally, the leading of a soul), the questions help the student construct the knowledge that the *elenchus* showed was lacking.

The paradigmatic Socratic dialogue appears in the *Meno*.<sup>21</sup> Meno challenges Socrates to prove that real knowledge is found in the self, rather than acquired from others.<sup>22</sup> Socrates brings one of Meno's servants, a boy, into the conversation and asks him a series of questions, at the end of which the boy takes the erroneous position that a square can be doubled in area by doubling the length of its sides.<sup>23</sup> (The boy is not being asked to recite geometry: a square is drawn from which he can reason.) Without telling the boy that he is wrong, Socrates then begins the *elenchus*. He draws lines that double the sides of the original square, which, according to the boy's theory, should produce a square double the area of the original, and he gets the boy's agreement that each line is

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AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS 48-54 (1914); T. SHAFER & R. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE 162-90 (1977); Frank, *A Plea for Lawyer-Schools*, 56 YALE L. J. 1303, 1303-05 (1947); Savoy, *Toward a New Politics of Legal Education*, 79 YALE L. J. 444, 457-62 (1970); Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 551-52 (1973); Stevens, *Two Cheers for 1870: The American Law School*, in 5 PERSPECTIVES IN AMERICAN HISTORY 405, 441-53 (D. Fleming & B. Bailyn ed. 1971); Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 406-18 (1971); Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 124-47 (1968); Note, *Anxiety and the First Semester of Law School*, 1968 WIS. L. REV. 1201, 1202-04 (authored by Lawrence Silver); Note, *How the Law School Fails: A Polemic*, 1 YALE REV. L. SOCIAL ACTION 71, 73 (1970) (authored by Duncan Kennedy); see also articles cited *supra* note 14.

19. See *infra* text accompanying notes 46-49.

20. "‘Elenchus’ in the wider sense means examining a person with regard to a statement he has made, by putting to him questions calling for further statements, in the hope that they will determine the meaning and truth-value of his first statement." R. ROBINSON, *PLATO'S EARLIER DIALECTIC* 7 (1941).

21. PLATO, *MENO* (W. Guthrie trans. 1956).

22. *Id.* at 81e.

23. *Id.* at 82b-e. Although Socrates' conversation with the boy is the paradigmatic dialogue, it is atypically brief and simple. It appears in the *Meno* as a concise illustration of dialogue technique and structure, and not as a full-blown example of interrogation teaching.

drawn in conformity with the boy's theory.<sup>24</sup> Then Socrates asks a sequence of questions that causes the boy to realize that the enlarged figure is not twice, but four times as big as the original. That cannot be the end of the *elenchus*, however, because the boy has not yet experienced *aporia*: he knows something went wrong, but he is not yet able to define exactly what it is that he does not know. Socrates asks another and much more sophisticated sequence of questions (accompanied by more line drawing) that cause the boy increasingly to doubt whether he can come up with any formula for doubling a square by increasing the size of its sides.<sup>25</sup> Finally, Socrates asks the boy point-blank whether he can arrive at such a formula, and the *aporia* is in the boy's answer.<sup>26</sup> Before beginning the *psychagogia*, Socrates interrupts the dialogue to explain to Meno that the boy is more educated now than before, simply because he knows his own ignorance and has some motivation to remedy it.<sup>27</sup> But the boy still has to discover how to double the area of a square, and that—as a form of affirmative knowledge—is the goal of the *psychagogia*. Socrates draws a new square, subdivides it into quarters, and draws a diagonal across each quarter so that the diagonals together form a separate figure inside the square.<sup>28</sup> Then he asks another sequence of questions that cause the boy to develop a mathematically accurate theory of square-doubling.<sup>29</sup>

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24. *Id.* at 83a-b.

25. *Id.* at 83b-e.

26. *Id.* at 84a.

27. Socrates explains:

So in perplexing him and numbing him like the stingray, have we done him any harm? . . . Up to now, he thought he could speak well and fluently, on many occasions and before large audiences, on the subject of a square double the size of a given square, maintaining that it must have a side of double the length . . . Now notice what, starting from this state of perplexity, he will discover by seeking the truth in company with me, though I simply ask him questions without teaching him. Be ready to catch me if I give him any instruction or explanation instead of simply interrogating him on his own opinions.

*Id.* at 84b-d.

28. *Id.* at 84d.

29. The questioning continues:

SOCRATES: Now does this line going from corner to corner cut each of these squares in half?

BOY: Yes.

SOCRATES: And these are four equal lines enclosing this area?

BOY: They are.

SOCRATES: Now think. How big is this area?

BOY: I don't understand.

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

BOY: Yes.



Socrates described his role in this process as that of a mental midwife,<sup>30</sup> the student being the true parent of his or her own knowledge. His goals were not merely to convince the student, but to build independence, "to make every pupil realize that the truth was in the pupil's own power to find, if he searched long enough and hard enough, refusing all 'authoritative statements' and judging every solution by reason alone."<sup>31</sup>

In many poorly done dialogues, a brutal *elenchus* is the dominating feature; the teacher treats the *aporia* as a defeat for the student; and the *psychagogia* is a brief afterthought or happens not at all. Alan Stone has written that often in legal education "the professor's capacity to criticize within the Socratic method exceeds his synthetic or constructive capacity."<sup>32</sup> Socrates and Plato might have phrased it a little differently: many law school teachers have overdeveloped *elenchus* skills and under-

SOCRATES: And how many such halves are there in this figure [the one inside the square]?

BOY: Four.

SOCRATES: And how many in this one [one of the quarters]?

BOY: Two.

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

BOY: Double.

SOCRATES: How big is [the figure inside the square] then?

BOY: Eight feet.

SOCRATES: On what base?

BOY: This one.

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

BOY: Yes.

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

BOY: That is so, Socrates.

*Id.* at 85a-b. *But see infra* note 34.

30. PLATO, *THEAETETUS* 149a-51b.

31. G. HIGHET, *THE ART OF TEACHING* 121 (1950).

A less gifted, or less patient, teacher might say straight away: "Now learn this and don't forget it: to draw a square double the size of a given square, you draw it on the diagonal of that square." The pupil would dutifully repeat this, but he would not *know* it . . . . Unless he can remember that particular sentence, he will forget the truth that it expresses, and in any case, if someone else tells him something different, he may as easily believe that. But the [boy's] opinion will not now be so easily shaken . . . . He has seen that neither a double side nor a side 1 1/2 times as long gives the desired result, and he has a mental picture of how the true double square is built up from four half squares. He is on the way to being able to "give an account," to explain and defend his beliefs.

Guthrie, *The Geometrical Experiment With Meno's Slave*, in PLATO, *PROTAGORAS AND MENO* 110-11 (W. Guthrie trans. 1956).

32. Stone, *supra* note 18, at 415.

developed *psychagogia* skills.<sup>33</sup> That, in fact, may have been the case with the younger Plato, who seems to have gained a deeper appreciation for the *psychagogia* as he matured.<sup>34</sup>

Although the *elenchus* "is so common in the early dialogues that we may almost say that Socrates never talks to anyone without refuting him,"<sup>35</sup> in the later dialogues the *elenchus* becomes "harnessed to the car of construction," and "[r]efutations take less of the total space."<sup>36</sup> Throughout the Platonic dialogues, when Socrates speaks with a student—rather than an adversary—he treats the student with encouragement, if not affection during the *elenchus*;<sup>37</sup> he congratulates the student at the *aporia* because he considers the recognition of ignorance to be an achievement; and the student usually emerges from the *psychagogia* with a sense of accomplishment.<sup>38</sup>

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33. Many law school teachers are under the mistaken impression that an *elenchus* is a complete Socratic dialogue. See, e.g., Cole, *The Socratic Method in Legal Education: Moral Discourse and Accommodation*, 35 MERCER L. REV. 867, 868-69 (1984).

34. In the *Meno*, an early Platonic dialogue, the *psychagogia* with Meno's servant boy is not really satisfying; although Socrates keeps his promise not to explain anything to the boy, the diagonals he draws are such an obvious clue, and his questions are so leading that the boy has not truly invented the theory he agrees to at the end of the *psychagogia*. Although Plato might have stripped this *psychagogia* down for literary reasons, it is also possible that he realized only later in life that a truly effective *psychagogia* requires less guidance than Socrates gave the boy.

35. R. ROBINSON, *supra* note 20, at 7. In the early dialogues, the Socratic *elenchus* "involved persistent hypocrisy; it showed a negative and destructive spirit; [and] it caused pain to its victims." *Id.* at 10.

36. *Id.* at 19.

37. An example of this is seen during the *elenchus* with Meno's servant boy:

SOCRATES: Will it not have a side greater than this one but less than that?

BOY: I think it will.

SOCRATES: Right. Always answer what you think. Now tell me. Was not this side two feet long, and this one four?

BOY: Yes.

SOCRATES: Then the side of the eight-foot figure must be longer than two feet but shorter than four?

BOY: It must.

SOCRATES: Try to say how long you think it is.

BOY: Three feet.

PLATO, *supra* note 21, at 83d-e. How revealing to find this voice from antiquity speaking so like a modern athletic coach, pressing the boy to stretch his mind further—corroborating Donald Schön's belief that professional schools have something to learn from "deviant traditions of education" that include, among others, "athletics coaching." D. SCHÖN, *supra* note 1, at xii.

38. In some situations, no *elenchus* is likely to have much effect. A different picture emerges when Socrates is cast not as the most brilliant person in a given conversation, but as someone who is physically defenseless and discovers the limits of his wit when dealing with the power of the state (certainly, a recurring image for our century). Xenophon recounts that, after Socrates made some politically dangerous remarks, he was summoned by Critias and

A law school critique might contain several dialogues, depending on the intellectual complexity of the issues raised by the student's perform-

Charicles, two leaders of the bloody junta of 404 B.C. (and also two of Socrates' former students). In I.F. Stone's recounting:

They showed him the text of a new law forbidding the teaching of the . . . art of reasoned discourse, "and forbade him to hold conversation with the young."

They were not just forbidding random conversation with the young but telling Socrates he could no longer go on with . . . [his] characteristic mode of philosophic teaching . . . .

Socrates asked, "May I question you, in case I do not understand any point in your orders?"

"You may," said they.

"Well, now," said he, "I am ready to obey the laws. But lest I unwillingly transgress through ignorance, I want clear directions from you. Do you think that the art of words . . . from which you bid me abstain is associated with sound or unsound reasoning? For if with sound then clearly I must abstain from sound reasoning: but if with unsound, clearly I must try to reason soundly."

"Since you are ignorant, Socrates," said Charicles in an angry tone, "we will put our order into language easier to understand. You may not hold any converse . . . whatever with the young."

"Well, then," said Socrates, "that there may be no question raised about my obedience, please fix the age limit below which a man is to be accounted young."

"So long," replied Charicles "as he is not permitted to sit in the Council, because as yet he lacks wisdom. You shall not converse with anyone who is under thirty."

"Suppose I want to buy something, am I not even to ask the price if the seller is under thirty?"

"Oh, yes," said Charicles, "you may in such cases. But the fact is, Socrates, you are in the habit of asking questions to which you know the answer: so that is what you are not to do."

I. STONE, *THE TRIAL OF SOCRATES* 158-59 (1988) (quoting XENOPHON, *MEMORABILIA* 1.2.33-8 (Loeb ed. 1918-25)).

Socrates was not really much of a victim of oppression here. In fact, he was a sympathizer of the junta of 404 B.C., the dictatorship of 411 B.C., and the attempted coup of 401 B.C., in all of which his students were prominent. I. STONE, *supra*, at 140-73. The right-wing dictatorships of 411 and 404 made ample use of state terrorism before they were overthrown. According to an enemy of the junta of 404, that junta killed about as many Athenians in eight months as the Spartans had in the last ten years of the Peloponnesian War. XENOPHON, *HELLENICA* II, IV, 20-23. Stone argues persuasively that Socrates was convicted and condemned in 399 B.C. not because his questioning made him unpleasant—the reason that Socrates implies, with much self-congratulation, in PLATO, *APOLOGY* 20e-24b—but because a threatened fourth coup that year had convinced many that his presence in Athens endangered democracy through the authoritarian teaching that, among other things, permeated the *Republic*. I. STONE, *supra*, at 140-214. Because the junta of 404 surrendered in exchange for an amnesty for themselves and their sympathizers, Stone argues, the real issue in Socrates' trial had to be camouflaged behind the more general accusation of "corrupting the young." Stone's theory is consistent with otherwise ambiguous remarks that Socrates, according to Plato, made to the jury that condemned him. For example: "You surely knew Chaerephon. He was my friend from youth, and a friend of *your democratic majority*. He went into exile *with you* [during one of the dictatorships—while Socrates remained with the junta in Athens], and with *you he returned*." PLATO, *APOLOGY* 20e-21a (Allen trans. 1984) (emphasis added). The Athenian democrats, however, were less than democratic in their treatment of other Greek cities.

ance. The success of each dialogue depends on the teacher's ability to structure the conversation and frame questions according to the basic Socratic principles (none of which has been validated by empirical research). Those principles are the following:

*Structure*: The *elenchus* should culminate in an *aporia*, and the *psychagogia* should result in the student's reaching a new understanding. If the ignorance addressed by the dialogue is based on several misconceptions, there may be more than one *elenchus* and more than one *aporia*. Sometimes additional misconceptions are discovered during the *psychagogia*, and the teacher may have to revert to an *elenchus* before continuing the *psychagogia*.<sup>39</sup> If the *psychagogia* is interrupted for a new *elenchus*, however, it should not be because the teacher sloppily wanders back and forth between the two, but because the teacher really has discovered that an additional misconception interferes with understanding.

*Sequence*: Taking into account the student's state of understanding and the underlying logic of the subject, the teacher must build a sequence of questioning that leads the student through the *elenchus* to the *aporia* and then through the *psychagogia* to insight. To do so, the teacher must identify two kinds of ideas: (1) those the student is to acquire, and (2) the misconceptions that sit in the student's mind, blocking understanding.<sup>40</sup> In the *elenchus*, the teacher should start with what the student already knows and work toward the misconceptions: an *aporia* comes when the student sees that a misconception is inconsistent with the logical ramifications of what he or she already knows. In the *psychagogia*, the teacher must pick up with what the student already knows and work toward the ideas to be acquired. The questions cannot be asked in a random sequence: they must propel the student in the direction to be traveled, each question either building on an earlier answer or creating the groundwork for a later question. If the student is to acquire a broad truth, the questions should get progressively more open; if it is a narrow truth, perhaps the reverse. If any of these principles are ignored, both parties will be frustrated by an aimless dialogue. Even when these principles are observed, the teacher is only partially in control of the dialogue: not only must the contours of the dialogue be fitted to what the student

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Compare, e.g., THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR with W. SHAWCROSS, SIDESHOW: KISSINGER, NIXON, AND THE DESTRUCTION OF CAMBODIA (1979).

39. Socrates often does this. See H. TELOH, SOCRATIC EDUCATION IN PLATO'S EARLY DIALOGUES 22 (1986).

40. In law school teaching, the idea the student is to acquire might be a belief, but more often it is one of the intellectual *processes* through which professionally useful beliefs can be formed. The first few questions of the *elenchus* frequently uncover the idea that blocks understanding, which is usually not clear to the teacher before the *elenchus* begins.

has to say, but during the dialogue an effective critiquer remains willing to make discoveries, including the discovery that the critiquer has made a mistake.

*Economy*: Triage is the essence of dialogue economy. A dialogue should not even be attempted unless the point to be made is a significant one. A misconception is worth an *elenchus* only if it is symptomatic of ineffectual thinking or if the student needs to be persuaded of his or her own ignorance. A student might, for example, make a misjudgment from mere fatigue, lack of time, misapprehension of lawyers' customs, or oversight that is understandable in a neophyte. Although such a misjudgment might be worth discussion, it would hardly merit the investment of an *elenchus* unless, for example, the student stubbornly resists the idea that a misjudgment has in fact happened. A new insight is worth a *psychagogia* only if the student needs either to be convinced of it or to go through the mental exercise needed to reach it. Occasionally, a *psychagogia* need not be preceded by an *elenchus*, and vice versa. If a dialogue is attempted, depth is possible only if the unnecessary is not inquired into.

*Diction*: The questions should go in the direction the teacher believes the dialogue ought to travel. Questions should never be used in a fashion that leads the student to guess. When the teacher wants to elicit something the student knows already, the student can be reminded ("You recall that . . .") or asked a leading question ("These are out-of-state cases?"). When the teacher wants to elicit something that the student could devise with minimal thought, he can simply state it or elicit it with a leading question. Unless there is ample time and the student seems to be enjoying the dialogue, a teacher not only wastes time but appears to be playing a guessing game if the dialogue is pursued to elicit something simple. When the teacher wants to elicit a piece of information—as opposed to an insight—to which the student has not yet been exposed, the teacher can explain it.

*Rhythm*: Three or four separate dialogues back-to-back can exhaust both participants. The better practice is to move back and forth between dialogues and explanations. Only a rare and perhaps oppressive critique is made up entirely of Socratic dialogues, one right after another.

*Alliance*: Because the overwhelming majority of issues fit for a dialogue do not admit of a single right answer, teacher and student often explore together. Although the student learns far more, the teacher also learns.<sup>41</sup> Sometimes, student and teacher discover the same idea at the

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41. Perhaps the three most prominent things a teacher learns after years of critiquing are

same time, although at different levels of understanding. But unless overtly alerted, students have no way of differentiating between “real” questions and questions based on Socratic slyness—that is, questions to which the teacher pretends not to know the answer.<sup>42</sup> Although Socratic slyness is unavoidable in interrogation teaching, it exacts a psychic cost from the student, who wearies and feels abused if each question seems to be one to which the teacher knows the “correct” answer. When the teacher is trying to help the student learn diagnostic, predictive, or strategic art, the student often does not realize that the teacher’s focus is not on the “right” answer, but on the decision-making process through which a useful answer is reached. A student who is told about that focus in a coach-like tone can more often identify the questions that are not Socratically sly, accept the Socratic slyness when it is unavoidably present, and feel an alliance in purpose with the teacher.

A teacher who is trying to help the student develop some aspect of a professional personality can build an alliance—and to some extent minimize the harm caused by Socratic slyness—by openly identifying the questions for which the teacher has never found a wholly satisfactory answer, or about which the teacher has changed his or her mind over the years, or about which reasonable lawyers disagree. In these situations, the proper comment can galvanize a student, who will feel less tested and

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how little the teacher knows, how little can be known, and how to work constructively despite one’s own ignorance.

42. In *Charmides*, Socrates says that he does not want to be treated as though he knows the answers; that he does not know them; and that he will decide in the course of the dialogue (“I inquire . . . along with you because I do not know”). PLATO, *CHARMIDES* 165b in R. ROBINSON, *supra* note 20, at 8. “Throughout the early dialogues, . . . he usually declares himself ignorant of the answers . . .,” but this is “insincere, and constitutes what is known as the Socratic slyness or irony.” R. ROBINSON, *supra* note 20, at 8. In a critique, however, the teacher often does not know the student’s purpose, analysis, or strategy—or even all of the underlying truths toward which the critique is headed. (The act of teaching often reveals to the teacher that what might have seemed simple and straightforward is so subtle and complex as to be knowable only with much greater difficulty than originally supposed.) Against all this professorial ignorance—hard as that ignorance may be for students to imagine—questions can often be acts of gentleness and generosity, rather than the feats of aggression that traditions of cross-examination and Langdellian classes might suggest.

John Gardner wrote that good critiquers of fiction

try to understand and appreciate [what the student has] written . . . . If they cannot understand why [it] is as it is, they ask questions . . . . It takes confidence and good will to say, “I don’t understand so-and-so,” rather than, belligerently, “So-and-so makes no sense.” It is the nature of stupid people to hide their perplexity and attack what they cannot grasp. The wise admit their puzzlement . . . , and when the problem material is explained they either laugh at themselves for failing to see it or they explain why they couldn’t reasonably be expected to understand, thus enabling the author to see why he didn’t get his point across.

J. GARDNER, *ON BECOMING A NOVELIST* 81 (1983).

more challenged. An alliance can also be promoted by giving the student evidence that the teacher has an investment in the student's success. The teacher should seem more interested than distant, should lean forward at the tough moments, and should show a little happiness when the student accomplishes something.

New teachers learning to critique generally fail to conduct effective Socratic dialogues. Shortcomings most characteristic of new teachers include failing to identify the student's misunderstanding (and to design the *elenchus* to expose that misunderstanding to the student); breaking off the *elenchus* before an *aporia* is reached; failing to develop a goal for the *psychagogia*; asking the ultimate question before other questions have caused the student to develop the ideas needed to answer the ultimate question; asking similar questions repetitiously until both teacher and student are frustrated (rather than asking questions that start with what the student knows and then building cumulatively toward the teacher's goal); asking open-ended questions to elicit information that both teacher and student know the student already knows; and poor use of triage (using a dialogue for matters too simple to merit one, for example, or explaining matters that need the deeper treatment of a dialogue).<sup>43</sup>

Even a well-executed dialogue can meet student resistance for several reasons. First, although memorizing is only tedious, real learning can be hard and painful. The student who comes to law school after sixteen or more years of passive and dependent learning can struggle and want to give up as much as the person who finds him- or herself on a running track or in a gymnasium after a lifetime of sedentary existence. Second, a successful dialogue requires independence on the part of the student, and independence itself is frightening to most people. As much as law students may have chosen to study law for the independence, power, and prestige of a profession, many students are more interested in conforming to an easily defined standard, if only they can find it.<sup>44</sup> Third, because a dialogue exposes ignorance, it threatens the student's

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43. Two teachers can improve their own Socratic skills through an exercise like the following: The first teacher adopts the persona of a person to be taught (not necessarily a law student), describes the persona to the other teacher, and states a belief about which agreement is not universal. Using only questions—except for objective information, which can be stated—the second teacher attempts to disabuse the first of the belief, and, after an *aporia*, to lead the first in the construction of a new belief. (If the original belief is complex, there might be more than one *aporia*, and the *psychagogia* may have to be interrupted for at least one additional *elenchus*.) During the dialogue, both teachers make notes on structure and about noteworthy matters of sequence, economy, diction, rhythm, and alliance. After the dialogue, the teachers compare notes, reverse roles, and begin a new dialogue. Dialogue fluency may begin to appear only after many such exercises.

44. See *infra* text accompanying notes 93-98.

sense of mastery. In fact, to the extent that that sense of mastery is illusory, threatening it is the very purpose of the dialogue. A student can learn to survive that threat if the first few dialogues produce some feeling of accomplishment. Fourth, a student might resist out of distrust of the teacher, caused by prior dialogues that have been done poorly and thus have poisoned the well. Finally, no teaching method is without fault. Although carefully used Socratic technique can do much more good than harm, further inquiry may reveal better ways of handling problems such as the periodic need for slyness.

## II. Socratic Critique, Langdellian Classes, and Analytical Art

To some extent, the use of the Socratic technique in critique has been discouraged due to the notoriety of the Langdellian method, even though Socratic technique offers less potential for abuse. The dialectical Socratic method is intellectual therapy for the individual student, while the eristical Langdellian method is a means to explore the sources and uses of doctrine. Langdellian tradition permits several practices that the Socratic method does not. For example, a Langdellian teacher is permitted to abandon a student whose answers are unsatisfactory. This practice is forbidden by the Socratic method because the student's answers reveal the misconception—and the kind of thinking from which it grew—that is the target of the *elenchus*. At the same time, the Langdellian method is so “*elenchus-intense*” and “*psychagogia-deficient*” that students tend to leave a traditional Langdellian class with a sense of failure, rather than a Socratic sense of accomplishment. The parry and thrust, and implied or inadvertent insult, that make the Langdellian method both entertaining and painful may do more to socialize students into “persuasion-mode behavior”<sup>45</sup> than to teach reflection and self-knowledge. That is, theatricality is largely absent from the Platonic dialogues and would be explosive in a critique.

Moreover, in the classroom the Langdellian method “appears to have been abandoned, largely in favor of the rendering of information”<sup>46</sup> through lecture. Shaffer and Redmount found that contemporary law school teachers tend to ask questions in the classroom only as “a garnish to lecture” or as “a way to make lectures more palatable.”<sup>47</sup> They postulate that the decline of interrogation “has perhaps been caused by two factors—an algebraic increase in cognitive information in all areas of the

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45. See *infra* text accompanying notes 99-110.

46. T. SHAFFER & R. REDMOUNT, *supra* note 18, at 167.

47. *Id.* at 168.



law and student demand for pure, clear information rather than exercises which are asserted to provide mental training."<sup>48</sup> That theory, however, ignores two additional factors that might explain the decline of the use of interrogation. The first is that an interrogation method of teaching—whether Langdellian or Socratic—might work well only for the student being interrogated and not for bystanding students who, according to Langdellian but not Socratic theory, are supposed to absorb vicariously the arts being taught. The second is that the Langdellian method ignores certain aspects of Socratic structure and style that may be essential to any form of interrogation teaching. The frustration that causes a particular classroom teacher to interrogate less might be caused by any of these four factors, or by several of them in combination.

Although the decline in interrogation is the single most significant change in law school classroom teaching in the second half of this century, no published study has examined its causes. Nor has any published empirical research considered the questions of whether groups can be taught through interrogation, whether the Langdellian method is less effective because of its divergence from the Socratic model, and whether most law school teachers have mastered the Langdellian and Socratic methods.<sup>49</sup> Shaffer and Redmount merely documented the decline's symptoms through an analysis of transcribed classes, which no one—at least in the published literature—has claimed to be atypical of law school classroom teaching generally.

Although the Shaffer-Redmount transcriptions<sup>50</sup> can be read consistently with any of the four factors discussed here, when the teachers in

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48. *Id.* Among law teachers, an alteration in pedagogy is not normally justified on the ground that it more effectively teaches information. Traditionally, the law teaching profession has considered the teaching of mere information to be a low form of intellectual endeavor, inferior in every respect to the teaching of analytical art. If the traditional values have recently changed so radically, it has been without significant debate in the literature.

49. Even though for half a century the Langdellian method reigned as the basic law school classroom teaching technique, no one has ever published an empirical study of Langdellian technique from which teachers could decide whether it works vicariously or could theorize about how to use it effectively. The few studies of law school classroom teaching have all had far more limited aims, as well as methodological faults, such as validation through final examinations that have not themselves been validated scientifically for accuracy and precision. The studies are summarized by Teich, *Research on American Law Teaching: Is There a Case against the Case System?*, 35 J. LEGAL EDUC. 167, 174-79 (1986). The Langdellian literature is limited to impressionistic and anecdotal celebrations of and attacks on the method. *See supra* notes 14 & 18. The argument that the Langdellian method worked well in the era before student consumerism cannot be proven: not even empirical research can foreclose, so long after the events, the possibility that in that lost paradise just as many students as today did not learn from Langdellian teaching but camouflaged their alienation in quiet and passive avoidance.

50. T. SHAFFER & R. REDMOUNT, *supra* note 18, at 169-82.

those classes attempted interrogation teaching, they did not use—for good reasons or bad—the elemental concepts of Socratic technique. They abandoned an *elenchus* merely because the student had given one or two wrong answers, although in teaching analytical art to an individual student, that is the clearest indication that an *elenchus* should be completed. They did not work toward an *aporia*; they did not separate the *elenchus* and the *psychagogia*; an *elenchus* easily became a guessing game of “hide the ball” because questions were not designed to build the student’s insight cumulatively; and when the teachers attempted a distinct *psychagogia*, they engaged in such flagrant hinting that another guessing game began.<sup>51</sup> It is not at all clear that these teachers could have covered the massive amounts of substantive law to be taught while performing time-consuming dialogues, whether Langdellian or Socratic.<sup>52</sup> It would hardly be surprising if the interrogation aspect of those classes taught only a little diagnostic or predictive art, and if a fair proportion of the students resented the experience. From their point of view, the dialogues were arbitrary because the teacher had structured them so that students succeed largely by guessing what the teacher wants, rather than by independently building intellectual constructs.

Law teachers and law students are so used to this hostile reaction that they incorrectly assume it is the natural response to any teaching method based on interrogation. But a lecturing teacher—even one who throws in a few questions as “garnish”—is in total control of the classroom. A teacher shares power when teaching primarily through skillful interrogation. Although the class’ destination remains the same, for the teacher the route begins to take unexpected turns; students more openly voice the width and depth of their understanding and misunderstanding, to which the route must be adapted, and the teacher joins the students in learning because the dialogue can enrich even an expert’s appreciation. To the laity, it must seem bizarre that a teaching method in which the teacher has total control can be considered less authoritarian than a

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51. Some of these characteristics appear even in the idealized class described in D’Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461, 467-68, 477 (1987). But for a very different and masterful example, see the transcribed class taught by Soia Mentschikoff and reproduced in Kelso, *In Quest of a Theory of Lawyering: Some Hypotheses and a Tribute to Dean Soia Mentschikoff*, 29 U. MIAMI L. REV. 159, 176-95 (1975).

52. Forty years ago, Karl Llewellyn worried about “the hugely growing quantity of information about subject matter which is needed for competence [but which] has . . . greatly increased the tendency in case teaching to concentrate upon subject matter at the expense of training in craft-skills.” Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 215 (1948).

teaching method in which the teacher deliberately surrenders a significant amount of control.<sup>53</sup>

Perhaps the Langdellian method does not work because students do not learn art vicariously. Or perhaps it worked once but will no longer because students today are less compliant and must learn much more doctrine. Or perhaps, interrogation teaching may work only if modeled on the original Socratic paradigm, rather than on the Langdellian divergence, and the Socratic version may eat up so much time that it cannot work in the classroom. In the absence of methodologically sound empirical research, we can never know whether the Langdellian method is as inherently effective as many teachers once thought and whether the reasons for its decline are inside or outside the control of law faculties.

In critique, a teacher is somewhat less burdened by the absence of empirical research. The issue of vicarious learning does not arise unless the critique happens in a group, nor is the teacher significantly hindered by the increased complexity of doctrine, since the goal of critique is to teach arts and not information. An individually critiqued student does not have the opportunity to withdraw, fail to prepare, or engage in the other forms of passive resistance that occur in the classroom. On the other hand, a critiquing teacher cannot retreat into lecture, but instead must master a more sophisticated teaching technique. Although re-

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53. Although a generation of students have, for the most part, complained that the Langdellian method is demeaning and sadistic, that it increases their anxiety, and that Langdellian classes are directionless, no published empirical study has ever explored the question of whether these complaints are caused by inherent characteristics of the Langdellian version of interrogation teaching; by characteristics inherent in any form of interrogation teaching; by inartful use of the Langdellian method; or by a general resistance, in an age of affluence, to training involving rigor and hardship. Although students sometimes blame teachers for abusing power and teachers sometimes blame students for intellectual complacency, the fault might lie more truly in the situation than in the people involved. Law school faculties often assume that the classroom is the natural venue for the teaching of analytical art. That unexamined assumption seems to grow out of the fact that present law school budgets could not possibly be stretched far enough to give every student individual or small-group instruction in analytical art. But the paucity of one's budget is hardly evidence that the things one can buy with it will actually do the desired job. In addition, no published study—at least in the legal literature—has investigated whether other professions teach their analytical arts to students in large classes, or whether other professions' analytical arts are sufficiently analogous to ours that their pedagogy can assist legal education. Although the information used may be different from profession to profession, the general processes of diagnosis and prediction, for example, would appear to be essential to a number of professions. See, e.g., *infra* note 63. If empirical research would show that those professions are truly able to teach diagnostic and predictive arts in large classes, legal education could be enriched with the knowledge of how that is done. On the other hand, if educators in other professions have largely abandoned classroom teaching of analytical art, if they now successfully teach analysis outside the classroom, and if their analytical arts are fundamentally analogous to the law's, law teachers might wonder at the dichotomy, both in method and in the ability to pay for it.

search has never empirically validated the method for inherent effectiveness, isolated the skills and techniques that make it most effective, or confirmed that most critiquing teachers have those skills and have mastered those techniques, Socratic critique has at least the appearance of being the most effective medium in the contemporary law school curriculum for the teaching of analytic art.<sup>54</sup>

If there is little place in the classroom for a complete *elenchus* and a complete *psychagogia*, it may be more than ironic that the pedagogy best adapted to teaching analytic art has survived primarily in a teaching format nurtured by clinicians. In *The Structure of Scientific Revolutions*,<sup>55</sup> Thomas Kuhn theorized that bodies of scientific thought are periodically replaced through a recognizable process. For a time, an established system of thought will occupy scientists with the solution of questions left open by the scientific breakthroughs that created the system in the first place. That period comes to an end when three things happen: (1) phenomena are noticed that the system should be able to explain but cannot; (2) scientists operating outside the system achieve breakthroughs that explain both those phenomena and a substantial portion of the phenomena that the established system had previously purported to explain; and (3)

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54. Veblen considered the case method of teaching to be evidence that law schools lack academic rigor, and he denounced the case method in the same terms later used by some case method teachers to denounce clinical teaching. He believed that the more a school relied on the case method, the more it devoted itself "with great singleness to the training of practitioners, as distinct from jurists"—meaning scholars, not judges—and that teachers using the case method "stand in a relation to their students analogous to that in which the 'coaches' stand to the athletes." T. VEBLIN, *THE HIGHER LEARNING IN AMERICA* 211 (1918). Veblen was certainly wrong in concluding that the development of such critical thinking is not a legitimate part of a liberal education. Undergraduate education would be enriched if similar teaching occurred in the first year of college, using any text (such as *Genesis*) that is susceptible of many meanings and that the class can—at least for the sake of the exercise—agree to consider completely self-contained and literally authoritative.

Veblen correctly perceived, however, that effective case method teachers *are* coaches, training their students in a mental athleticism (in a way that ought to be exported to other fields, including Veblen's). Not only does an effectively critiquing teacher "coach" the ability to think, just as a good case method teacher does, but the critiquer does so under circumstances that might be more likely to produce successful results for an individual student, primarily because in critique the student profits from the teacher's undivided attention.

Veblen held some other controversial views about law, lawyers, and legal education. He believed that law is stigmatized by "the unscientific and unscholarly nature of the required training," *id.* at 207; that lawyers are "exclusively occupied with the details of predatory fraud," T. VEBLIN, *THE THEORY OF THE LEISURE CLASS* 156 (1899); and that law enjoys a high status because "no taint of usefulness . . . other than for the competitive purpose, attaches to the lawyer's trade, . . . and success in the profession is therefore accepted as marking a large endowment of that barbarian astuteness which has always commanded men's respect and fear," *id.*

55. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 92-135 (1962).

the breakthroughs leave unresolved a host of new questions to occupy new scientists, who will establish a successor body of thought.

Something like that happened when the Langdellian revolution began in 1870. The prior use of lectures, treatises, and hornbooks had conveyed scarce raw knowledge to students who lacked even college degrees in a society that was still forming its legal norms and traditions and was grateful for lawyers who simply knew the rules of common law. But by Langdell's time, lawyering had become sophisticated enough to need something that lectures, treatises, and hornbooks could not provide: training in the interpretation of precedent, which was then beginning to burgeon; and in the use of doctrine, which was becoming increasingly more complex. A similar type of revolution may be happening now. While classroom teachers find a growing tension between teaching doctrine and trying to teach analytical art, and while the teaching of analytical art is disappearing from classrooms after the first year, clinicians and other critiquing teachers have begun to find ways of teaching analytical art more thoroughly and more convincingly than might have been possible in the classroom even during the Langdellian golden age. Eventually, a consensus may be reached that analytical art is to be part of the classroom agenda only during the beginning of the first year of law school, and even then only to prepare students for the more searching teaching that they will later be required to experience in critique.

### III. Creativity and Analytical Art

One of the most important goals of critique is the development of creativity. Generally, research on creativity tends to define it as the capacity to solve problems through insights that are arrived at independently and that are—at least to the problem-solver—novel.<sup>56</sup> The problem to be solved might be mundane or profound, practical or artistic. A painter trying to capture late afternoon light in an apple orchard must solve a problem (or, more likely, several problems), and the prob-

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56. See McKeachie, *The College Teacher and Creativity*, in *CREATIVITY IN ITS CLASSROOM CONTEXT* 53, 53 (Schwartz ed. 1964); Richards, Kinney, Benet & Merzel, *Assessing Everyday Creativity: Characteristics of the Lifetime Creativity Scales and Validation with Three Large Samples*, 54 *J. PERSONALITY & SOC. PSYCHOLOGY* 476, 478 (1988); Stein, *Creativity as Intra- and Inter-Personal Process*, in *THE CREATIVE ENCOUNTER* 19, 19 (Holsinger, Jordan & Levenson eds. 1971). The novelty or originality of an insight is measured by whether the person professing it learned it from another or discovered it independently—regardless of whether others have also discovered it. No researcher in the field of creativity has taken the position that an insight can be novel only once, on the first occasion when it is discovered by a human. Nor could that position reasonably be taken, given that insights, solutions, and even places have been—and, in the nature of things, must be—discovered over and over again. See Richards, Kinney, Benet & Merzel, *supra*, at 578-80.

lem-solving process the painter uses might not be terribly different from that of a lawyer trying to develop a theory of a case—although, of course, each would use a different set of tools. Researchers specializing in creativity generally agree that creativity is a process, rather than an innate and mysterious personality trait,<sup>57</sup> and that some types of teaching promote creativity while others repress it.<sup>58</sup>

The literature on creativity often divides the creative process, more or less, into the following stages:

- (1) a recognition stage, in which the problem is noticed in the form of a gap in knowledge, a frustration, an impending struggle (such as a negotiation or a cross-examination), or even a need to decide between or among several desirable alternatives;
- (2) a preparation stage, in which the problem is analyzed and information gathered in a fairly open-ended manner;
- (3) an option-generation stage, in which the largest reasonable number of potential solutions are hypothesized;
- (4) an option-evaluation stage, in which potential solutions are tested (either analytically or empirically) for effectiveness; and
- (5) a decisional stage, in which the evaluations are compared and the best option chosen.<sup>59</sup>

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57. Stein, *supra* note 56, at 19.

58. See *infra* notes 74 & 82.

59. See, e.g., T. AMABILE, *THE SOCIAL PSYCHOLOGY OF CREATIVITY* 79-81 (1983) (describing a similar five-step process); J. DEWEY, *HOW WE THINK* 12-15 (1933) (describing creativity as problem-solving); J. ROSSMAN, *THE PSYCHOLOGY OF THE INVENTOR* 57 (1931) (describing a similar seven-step process for inventions). Scholars in this field use varying terminology in identifying the various stages.

In common parlance, "creativity" describes only the undisciplined mood associated with option-generation. Research has discovered, however, that option-generation is useless without the other four stages, and that each of those other stages is built on highly self-disciplined critical thinking. Although a person poor at option-generation cannot produce the richness—which sometimes seems to be the strangeness—of creative thought, a person who is poor at recognition glides through life missing opportunities for creativity, and option-generation is aimless and unrealistic unless that person is also good at preparation, option-evaluation, and decision. Thus, a permissive environment is actually thought to be counter-productive to creativity. E. TORRANCE, *ROLE OF EVALUATION IN CREATIVE THINKING* 22 (1964). Frequently, different stages—particularly option-generation and option-evaluation—become intertwined, and at least some parts of them often occur unconsciously, which led Graham Wallas to use the terms "incubation," "illumination," and "verification" instead. G. WALLAS, *THE ART OF THOUGHT* 80 (1926).

In the daily stream of thought these . . . stages constantly overlap each other as we explore different problems. An economist reading a Blue Book, a physiologist watching an experiment, or a business man going through his morning's letters, may at the same time be "incubating" on a problem which he proposed to himself a few days ago, be accumulating knowledge in "preparation" for a second problem, and be "verifying" his conclusions on a third problem. Even in exploring the same problem, the mind may be unconsciously incubating on one aspect of it, while it is consciously employed in preparing for or verifying another aspect.

In practice, the creative process often is not as segmented as this: stages tend to overlap each other, and a fair amount of the work is done unconsciously.

The main stages of the legal profession's analytical art—diagnosis, prediction, and strategy—track the stages of creativity so closely that all of them can be treated as branches of a single process.

In *diagnosis*, an ambiguity in drafted words or in evidence or some gap in doctrinal or factual knowledge is noticed (recognition); raw information that might explain the ambiguity or help fill the gap is gathered (preparation); the largest reasonable number of competing explanations is proposed (option-generation); each explanation is assessed for accuracy (option-evaluation); and the most accurate explanation is chosen (decision).<sup>60</sup> Similarly, in *prediction*, a need to know the future behavior of courts or of individuals is noticed (recognition); raw information relevant to the future is gathered (preparation); the largest reasonable number of competing predictions is postulated (option-generation); each prediction is assessed for likelihood (option-evaluation); and the most likely prediction is chosen (decision).<sup>61</sup> Diagnostic and predictive judgments both rest on the same habits of thought: recognizing what John Dewey called a “forked-road situation . . . that is ambiguous, that presents a dilemma, that proposes alternatives”;<sup>62</sup> developing and testing the largest number of reasonable hypothesized alternatives in ways that efficiently link those alternatives to concrete, clarifying information while avoiding premature judgment;<sup>63</sup> wondering—in light of what is already known—what else could also be true and then testing any relevant hypotheses so discovered; aggressively seeking information from the largest practical variety of sources; refusing to guess, assume, or be satisfied with

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*Id.* at 81-82. As a result, even remarkable solutions tend to surface into consciousness “unexpectedly, with surprising suddenness.” T. AMABILE, *supra*, at 85.

60. Concerning the role of option-generation and testing in medical diagnosis, see *infra* note 63.

61. See *supra* note 7.

62. J. DEWEY, *supra* note 59, at 14. At the threshold of diagnosis and prediction, students often fail to recognize two things: that they are in “a forked-road situation” with a choice to be made, and that the quality of the student decision will shape events to follow. Unless both can be recognized, diagnosis and prediction cannot even begin, and the mind instead “glides smoothly,” *id.*, and unwarily from mood to mood, rather than from insight to insight.

63. Research suggests that good medical diagnosis depends not only on superior knowledge, but also on hypothesis-generation and evaluation skills: “greater flexibility in generating alternative hypotheses based on minimal information,” “greater sensitivity to critical findings [and] early sensitivity to cues,” “comprehensive, efficient use of negative proof,” and avoidance of “premature closure.” Kelso, *supra* note 51, at 168; see also *id.* at 169-76 (explanation of the research's adaptability to law).

appearances; recognizing patterns in events and interrelationships among ideas;<sup>64</sup> and identifying the concept that explains a situation's essence. Diagnosis and prediction thus depend on the paradox of disciplined curiosity.<sup>65</sup> The curiosity arises from a kind of chaotic openness that Dewey called "the spirit of wonder,"<sup>66</sup> and the discipline from a very practical and opposite tendency, which Dewey called "organization of the means required to realize an end."<sup>67</sup>

64. Sallyanne Payton calls this "peripheral vision":

[the] ability to see what is going on in the total environment, to understand how things connect. Lawyers with well-developed peripheral vision can be awesome in their ability to look at problems from many different perspectives, to see not only what is presented but what is not presented, to think across doctrinal categories, to spot threat or opportunity originating from outside of what seems to be the boundaries of a problem.

Payton, *Is Thinking Like A Lawyer Enough?*, 18 U. MICH. J.L. REF. 233, 241 (1985).

65. See J. DEWEY, *supra* note 59, at 35-40, 46-51.

66. *Id.* at 39. To some extent, curiosity is a product of the "flexible wonder of childhood," too often lost in the "indifference," "dogmatism," and "routine" of adulthood (perhaps especially in the atmosphere of a law school). *Id.* But curiosity is also aided by a mature ability to use questions, which legal education does teach well and which R.G. Collingwood considered essential to the critical method of history:

No one with any grasp of method will go on asking the same question all the time . . . . He asks a new question every time. And it is not enough to cover the ground by having a catalogue of all the questions that have to be asked, and asking every one of them sooner or later: they must be asked in the right order. Descartes, one of the three great masters of the Logic of Questioning . . . insisted upon this . . . . These questions are not put by one man to another man, in the hope that the second man will enlighten the first man's ignorance by answering them. They are put . . . to the [self]. This is the Socratic idea which Plato was to express by defining thought as "the dialogue of the soul with itself" . . . .

R. COLLINGWOOD, *THE IDEA OF HISTORY* 273-74 (1946). Donald Schön has used a phrase that, in the present context, may be somewhat more immediate: the professional's "reflective conversation with a situation that he treats as unique and uncertain." D. SCHÖN, *supra* note 3, at 163.

67. J. DEWEY, *supra* note 59, at 49. As much as law school teachers care about intellectual orderliness, in some ways it is undertaught both in critique and in the classroom. For example, law school teachers often bemoan students' inability to organize their thoughts into the type of argument that, like a Euclidean proof, substantiates each subconclusion in a logical progression until the ultimate conclusion becomes inevitable. In fact, much student writing reflects the misconception that an argument is nothing more than a random collection of comments that seem favorable to the proposed conclusion. A student who cannot structure proof of a conclusion of law does not understand the inner logic of proof and therefore lacks one of the two most basic attributes of lawyerly thinking. (Critical skepticism is the other.) It may be true that structural thinking is not generally taught in undergraduate schools, that students can become overwhelmed by the details of legal analysis, and that they may not fully understand the decision-making process for which argument must be designed. But legal education does surprisingly little to address argument structure, and a critiquer who tries to teach this kind of orderliness cannot expect much assistance. At the time this Article was written, no law school text on the market contained any significant material on the architecture of a proof of a conclusion of law. Certainly, students are taught how to analogize, distinguish, synthe-



*Strategy* also tracks the creative process. In strategy, a need to control a particular situation is noticed (recognition); raw information about assets and impediments is gathered (preparation); the largest reasonable number of competing methods for controlling the situation is suggested (option-generation); each method is assessed for effectiveness (option-evaluation); and the most effective method is chosen (decision).<sup>68</sup> Strategy depends particularly on the following: identifying a goal event that, if it were to occur, would be most likely to subjugate on favorable terms the situation the attorney needs to control;<sup>69</sup> generating the largest possible number of alternative methods of causing the goal event; evaluating each method for effectiveness; selecting the most effective method, together with one or more back-up methods to be used in case the chosen method falters; executing the chosen method in a way that tests it for effectiveness and permits a shift to a back-up method if necessary; and repeating the entire process for back-up goals if the initially chosen goal becomes unattainable.<sup>70</sup> Strategy requires a refusal to place oneself at the

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size, elicit policy, and so forth, but those are excavation and engineering work, not architecture. Although the Aristotelian syllogism might have some value in science, it does not reflect the way lawyers or law professors think, and it is in decline even among academic logicians. See S. TOULMIN, *THE USES OF ARGUMENT* 94-107 (1964) (proposing an influential and rather lawyerly competitive structure). The IRAC formula of legal writing texts is really designed for law school examinations, in which the grader is not faced with a real-life "law" decision and instead cares largely about awarding points for issue spotting, rule memorization, and analysis (IRAC is an acronym that stands for Issue, Rule, Analysis, and Conclusion).

68. See *supra* note 8.

69. For example, if a client complains of the on-going behavior of other people, the goal event might be any of the following: a preliminary injunction that so greatly restricts behavior that a favorable negotiation becomes more or less inevitable; a permanent injunction, a declaratory judgment, or damages gained through trial; a permanent injunction, a declaratory judgment, or damages gained through a motion for summary judgment; a criminal conviction; action by a regulatory agency; legislation; or negotiation without invoking any official forum.

70. Clinicians have developed a litany with which to critique the student's strategic thinking. For each goal, the teacher asks:

What was your goal?

What was your strategy for achieving it?

From what array of strategies did you choose this one?

Why did you reject the others?

What led you to believe that the strategy you chose would accomplish the goal?

What led you to believe it would do so more effectively than the alternatives?

What risks did your strategy create?

In retrospect, did you make the best choice? Why or why not?

What back-up strategy were you prepared to use in case your chosen strategy had to be abandoned?

What did you do to minimize the risks your strategy created?

Did you do everything necessary to execute the strategy?

Did you do anything that impeded the strategy?

While executing the strategy, how did you test it for effectiveness?

How did you protect or promote opportunities to switch strategies, if necessary?

mercy of events or to act on motivations that are not strategic;<sup>71</sup> the self-discipline to act only after understanding how, in a particular situation, actions can influence events; an eye for opportunity; and the agility with alternatives and information on which diagnosis and prediction also depend.

These processes seem to be impossible tasks for many lawyers and law students. Although law school class work is directed at diagnosis and prediction—at least in regard to doctrine and authority—many lawyers and law students, with distressing ease, ignore ambiguities, gaps in knowledge, and behavior that must be predicted; generate only limited ranges of explanations and predictions; and subject those explanations and predictions only to the most superficial analysis. In strategy, the results tend to be even worse. When confronted with the need to develop a strategy, the first response, even of many experienced litigators, is to act on the first “good” idea that occurs to them; to continue to pursue that idea despite mounting evidence that the idea is ineffectual or even counter-productive; and when a case is lost, to devalue the case as one that could not have been won. Lawyers and law students tend to “slide” into strategies<sup>72</sup> without knowing the full range of options available and without knowing the value of the few options they do consider. The less voluble lawyers and law students show signs of feeling rocked about by events they believe to be beyond their capacity to influence, while the more voluble camouflage perplexity behind what, in an analogous context, has been called a “smokescreen of strategic bluster.”<sup>73</sup>

Can critique remedy any of this? And to what extent is critique impeded by the difficulties both teachers and students have with creativity? Although further studies are needed, the research outside legal edu-

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If you obtained the goal, was that because of the strategy and its execution, or was it because you were saved by fortuitous events not within your control?

If the goal proved to be beyond reach, what lesser or alternative goal would you have pursued and with what strategy?

Rarely do the economics of legal education permit the use of the full litany, and as a result, strategic thinking might be undertaught, perhaps in favor of technical skills.

71. An action is not strategic if it is taken to create a reassuring illusion of doing something about the problem; to hide fear, to vent anger, or otherwise to satisfy the strategist's emotional needs; to avoid admitting the error of earlier actions; or to maintain momentum. The process of deciding to act is not strategic if it occurs without evidence that the action will cause the desired result; without evaluating alternative actions; or without a clear concept of the goal.

72. For a concise but comprehensive description of the same catastrophic tendency in another setting, see Sherry, *The Slide to Total Air War*, THE NEW REPUBLIC, Dec. 16, 1981, at 20-25.

73. *Id.* at 23.

cation has reached consensus on some basic points, and other matters fit for further inquiry can be suggested.

In several ways, critique might profitably treat the creative process as athleticism to be coached. To do so, critique should place less emphasis on the student's static final product and more on the intellectual process through which the product came to be. Beginning in first-year classrooms, legal education criticizes students for poor preparation, option-generation, and option-evaluation, but students are never told how those activities fit together into an intellectual protocol on which analytical art is based. Critiquers (like theater critics) too often evaluate the state and effect of the student's performance, rather than the process of creating the performance (which might interest a drama coach or a script-writing teacher).

Additionally, critique can be used to cultivate an atmosphere of creativity. In both classroom and clinic, the teaching of analytical art is all the more difficult because, for reasons that seem intractable, the mood of a law school is not one that encourages creativity.<sup>74</sup> It provokes fear and defensiveness through test anxiety and pressure to conform<sup>75</sup> and

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74. Ernest Hilgard has suggested "a series of questions that can be asked of an educational program to find out whether it is encouraging creativity":

1. Does the student *initiate* inquiry on his own, or only inquire along lines set by others?
2. Is there an opportunity to *exhibit* and *take responsibility* for successive evidences of creativity . . . . That is, does the student learn to take satisfaction in *small* evidences of creativity?
3. Are there opportunities for the student's original work to be judged according to *individual progress* rather than according to group norms?
4. Is there time in the program for a substantial investment of time in *idiosyncratic specialization*? . . .
5. Is there evidence that the progressive changes during the academic year are toward *greater diversity of talent* rather than toward greater conformity?

Hilgard, *Creativity and Problem-Solving*, in *CREATIVITY AND ITS CULTIVATION* 162, 180 (H. Anderson ed. 1959) (emphasis in original). Because professional thinking is so hard to begin to grasp, law students usually cannot be asked to start their own inquiries. Students are often placed in a passive position, where they respond to the inquiries and assignments put to them by others. Law school teachers often are so impressed by the sea of student misunderstanding that small and tentative steps toward creativity are hard to notice. Because work in a professional school must be evaluated by standards of practical effectiveness, it must be graded according to group norms, with little regard for individual progress. And students cannot specialize idiosyncratically: they must learn to think and perform as lawyers do.

75. Lon Fuller believed that "[i]f legal education is to retain its vitality . . . we must do everything in our power to remove the incubus of the examination" because creativity has much difficulty operating in a mind "that is oriented to examinations [and] has to ask itself anxiously at every turn that most inhibitive of questions, 'What will other people think?'" Fuller, *On Teaching Law*, 3 *STAN. L. REV.* 35, 43 (1950) (emphasis added); see also T. SHAFER & R. REDMOUNT, *supra* note 18, at 46 (law students are under pressure to conform). Einstein recalled that when he first began to study physics, the coercion to stuff his mind with

through verbal aggression and snap evaluation of ideas as soon as they are expressed. Option-generation, however, depends on an uninhibited flow of association, during which judgment is suspended and ideas that later evaluation shows to be sound arrive mixed together with ideas that eventually turn out to be wrong or even silly.<sup>76</sup> Paradoxically, the critical judgment on which option-evaluation depends can impoverish option-generation, censoring sound ideas before their potential can be noticed.<sup>77</sup> Option-generation is more productive when ideas are treated as things to be played with and to be savored for their taste and touch, and when fantasy facilitates the flow of association.<sup>78</sup> Although a few students come to law school without what Teresa Amabile calls a "strict dichotomy between work and play,"<sup>79</sup> most are not so fortunate. Some styles of critique might help to weaken that dichotomy<sup>80</sup>—possibly by

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detail "had such a deterring effect upon me that, after I passed the final examination, I found the consideration of any scientific problems distasteful to me for an entire year." T. AMABILE, *supra* note 59, at 92 (quoting P. SCHILPP, ALBERT EINSTEIN: PHILOSOPHER-SCIENTIST 18-19 (1949)). But law school pressures to conform do not come only from faculties. They also come from students themselves in the form of peer pressure, career competition, and strong concerns with security and with ordering things and people. A faculty can modulate only marginally the stresses and pressures that law students inflict on themselves and on each other and the stresses and pressures that are inflicted on students by society in general. *See id.* at 74-75, 160, 196-97 (summarizing general research on the debilitating effect of conformity and fear of failure on creativity).

76. T. AMABILE, *supra* note 59, at 72, 73, 80, 86, 180-83 (summarizing the findings of a number of researchers); G. WALLAS, *supra* note 59, at 93-105 ("the final 'flash,' or 'click' . . . is the culmination of a successful train of association, which may have lasted for an appreciable time, and which has probably been preceded by a series of tentative and unsuccessful trains").

77. Schiller wrote that creativity is suppressed

if the intellect examines too closely the ideas already pouring in, as it were, at the gates. Regarded in isolation, an idea may be insignificant, and venturesome in the extreme, but it may acquire importance from an idea which follows it; perhaps, in a certain collocation with other ideas, which may seem equally absurd, it may be capable of furnishing a very serviceable link. The intellect cannot judge all these ideas unless it can retain them until it has considered them in connection with these other ideas. In the case of a creative mind, it seems to me, the intellect has withdrawn its watchers from the gates, and the ideas rush in pell-mell, and only then does it review and inspect the multitude. [Uncreative people] reject too soon and discriminate too severely.

Stein, *supra* note 56, at 21-22.

78. *See* T. AMABILE, *supra* note 59, at 67, 80, 86, 180-83.

79. *Id.* at 198.

80. Research suggests that only a few people are "born" creative; that only a few people lack the capacity to be creative; and that many people have a partially and unevenly formed creativity that can be enhanced.

Intelligence does not necessarily correlate with creativity: some degree of intelligence has been found to be necessary for creativity, but in high IQ ranges some people are fluidly creative while others' creativity has been crippled for one reason or another. *See id.* at 84. In fact, those students who are "addicted" to school achievement" tend to be very intelligent but lacking in creativity, a characteristic noticeable even in childhood. M. WALLACH & N. KO-

guiding students into doing analytical work "for the sheer intrinsic pleasures involved . . . [as] an end, not a means"<sup>81</sup> to career advancement—and other styles might have the opposite effect. No empirical research with law school students or legal work, however, has validated these assumptions, much less identified a range of beneficial or detrimental styles.<sup>82</sup>

Option-generation and option-evaluation both depend on the ability to recategorize things and thus to see them differently from the ways in which they are usually seen, which some researchers call "breaking perceptual set."<sup>83</sup> The entire process of creativity depends on what Vera John-Steiner has called "discipline in the shadow of failure":<sup>84</sup> the ability to tolerate frustration and the self-discipline to continue to explore even when discouraged. The creative process also depends on an individual's having effective decision-making skills and a work style that concentrates thought for sustained productive periods and, when productivity sags, diverts the consciousness while the unconscious mind continues the

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GAN, *MODES OF THINKING IN YOUNG CHILDREN: A STUDY OF THE CREATIVITY-INTELLIGENCE DISTINCTION* 303 (1965).

A few other factors have been found to have some correlation with creativity, but, like intelligence, none of them has been found to be dispositive. The factors examined include birth order, parental attitudes, and the political mood of the era in which a child grew up. See T. AMABILE, *supra* note 59, at 184-85.

81. Crutchfield, *Conformity and Creative Thinking*, in *CONTEMPORARY APPROACHES TO CREATIVE THINKING* 120, 122 (H. Gruber, G. Terrell & M. Wertheimer eds. 1962).

82. In one study, however, a researcher "asked several hundred creative psychologists and chemists to describe the teachers who had the greatest facilitating and inhibiting influences on their creative development." T. AMABILE, *supra* note 59, at 164 (summarizing Chambers, *College Teachers: Their Effect On Creativity Of Students*, 65 J. EDUC. PSYCHOLOGY 326 (1973)). The typical facilitating teacher

- (1) treated students as individuals;
- (2) encouraged students to be independent;
- (3) served as a model;
- (4) spent [a] considerable amount of time with students outside of class;
- (5) indicated that excellence was expected and could be achieved;
- (6) [was] enthusiastic;
- (7) accepted students as equals;
- (8) directly rewarded [the] student's creative behavior or work;
- (9) [was an] interesting, dynamic lecturer; and
- (10) [in terms of rapport with students, was] excellent on [a] one-to-one basis.

*Id.* The respondents said "that their most important contacts with the facilitating teachers occurred not in the classroom, but in less formal settings, such as the laboratory, the office, or the home." *Id.* In contrast, the typical inhibiting teacher "(1) discouraged students (ideas, creativity, etc.); (2) was insecure (hypercritical, sarcastic); (3) lacked enthusiasm; (4) emphasized rote learning; (5) was dogmatic and rigid; (6) did not keep up with [the] field [or otherwise was] generally incompetent; (7) had narrow interests; and (8) [was] not available outside the classroom." *Id.* On the other hand, "a certain interpersonal detachment between . . . teachers and their students may also be helpful" in fostering creative independence. *Id.* at 195.

83. *Id.* at 72-73.

84. V. JOHN-STEINER, *NOTEBOOKS OF THE MIND: EXPLORATIONS OF THINKING* 73 (1985); see also T. AMABILE, *supra* note 59, at 77 (examining social and environmental influence on creativity and offering a framework for analyzing creative behavior).

task.<sup>85</sup> Here again, although various styles of critique might help or hurt, no empirical studies with law students or legal work has validated that assumption or identified those styles.

When a teacher is creative and understands others' creativity, that teacher can do much good with critique that is systematic, intensive, and demanding but at the same time supportive and encouraging. A student who tends toward premature diagnosis, for example, can discover that fact through critique. That student can learn about the rigidity that causes judgment to be made before hearing adequate evidence and to adhere to that judgment even after contrary evidence has appeared. A student whose well-developed critical thinking skills impoverish option-generation also can gain insight into that problem through critique. And a student who generates a multitude of options and seems uncritically satisfied with most of them can discover in critique exactly how diagnosis, prediction, and strategy are thus debilitated. In ways like these, a skilled critiquer can provide therapy for the intellect.

A critiquing teacher is also in a position to set a creative example. The types of creativity a teacher exhibits in a critique are more easily emulated by students than the types of creativity a teacher exhibits in the classroom. Because the student's work is the subject of critique, the critiquer's creativity tends to be closer to the work that students are learning to do, while a classroom teacher's creativity—focused as it is on the frontiers of doctrine—tends to be more forbidding and outside the experience most students can imagine for themselves. Unfortunately, damage can be done when a critiquer either intimidates flows of association with premature judgment<sup>86</sup> or, at the opposite extreme, fails to critique an analytical process because, even though a student's ideas sound not quite right, the teacher cannot determine how the student went wrong.

#### IV. Barriers to Effective Critique

##### A. Role Masks

Both teachers and students hide, at times, behind role masks. A researcher once administered Gough's California Psychological Inventory to ninety-four first-year law students—all male—to test the hypothe-

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85. T. AMABILE, *supra* note 59, at 66-67, 74, 80; *see also* G. WALLAS, *supra* note 59, at 79-105 (discussing when efforts to concentrate on a thought should be made).

86. The criticism of ideas as soon as they are expressed can paralyze option-generation. Hallman, *Techniques of Creative Teaching*, 1 J. CREATIVE BEHAV. 325, 325-26 (1967); *see also* E. TORRANCE, *supra* note 59, at 16. Even a teacher sophisticated about creativity can do harm by commenting on a student's unevaluated idea-generation if the teacher has inadvertently mistaken it for the student's final judgment.

sis that professional success (in this case, first-year grades) could be correlated with personality characteristics. No such correlation was apparent, but the researcher was shocked by the personality profiles. He found that the students sampled

wear a social mask and attempt to make a strong and definite impression on others; they act and react in great measure on the basis of the social role which they have adopted and which they feel is expected of them . . . . While they publicly project strength, activity, and enthusiasm, their private personality is one of awkwardness, defensiveness, and nervousness.<sup>87</sup>

The researcher concluded that the students "are frequently engaged in playing a part . . . and have not as yet really dealt with their genuine feelings. It is unlikely that the experience of law school will change this pattern" because the emphasis in law is on posturing and role-playing, which, according to the researcher, might have been one of the things that made law attractive to these students in the first place.<sup>88</sup>

Even if role masks are strikingly common in the legal profession, they are not unknown in other professions, and for some people, they might be a more or less inevitable response to what Donald Schön has called the "paradox of . . . having to plunge into doing—without knowing, in essential ways, what one needs to learn."<sup>89</sup> That paradox does not exist when a student is asked to learn mere knowledge or even mere skills. It does occur, however, when students in a professional school are asked to acquire completely new manners of thought that cannot be memorized and that can be articulated only with the greatest difficulty. A student naturally feels vulnerable and inadequate when he realizes that what he must learn cannot be explained. Although some students are able to deal with these feelings simply by discussing them openly, others may try instead to protect themselves by acting out a perceived role of

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87. Reich, *California Psychological Inventory: Profile Of A Sample Of First-Year Law Students*, 39 PSYCHOLOGICAL REP. 871, 873-74 (1976).

88. *Id.* at 874.

89. D. SCHÖN, *supra* note 1, at 166. Lon Fuller described the same problem:

The good student really wants contradictory things from his legal education. He wants the thrill of exploring a wilderness and he wants to know where he stands every foot of the way. He wants a subject matter sufficiently malleable . . . that he can have a sense of creative participation in defining and formulating it. At the same time he wants that subject so staked off and nailed down that he will feel no uneasiness in its presence and experience no fear that it may suddenly assume unfamiliar forms before his eyes.

Fuller, *supra* note 75, at 42-43. Fuller believed that "[n]o teacher is skillful enough to satisfy these incompatible demands . . . . Rather, he should *help the student to understand himself*, should help him to see that he wants (and very naturally and properly wants) inconsistent things of his legal education[:] both security and adventure." *Id.* at 43 (emphasis added).

lawyerliness, projecting more in appearance and gaining less in substance. The proportion of students with role masks may vary from profession to profession, depending on the way the profession's work is perceived by the laity and on the types of people most attracted to the profession.

An intellectually secure student needs no role mask and encounters the mystery of analytic art confident that she can eventually "break it open."<sup>90</sup> On the other hand, student uneasiness at making critiquable decisions usually grows out of a role-playing student's need to work from a script and from a fear of independence. Even if a student does not object to being held responsible for decisions, and even if the student's ego would not be threatened by revealing uncertainty, the result may still be a contentious student who thinks that perplexity is inconsistent with an attorney's bluster. These problems seem to be far more common with male than with female students,<sup>91</sup> and they are extraordinarily frustrating to the critiquer trying to reach the real student.<sup>92</sup>

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90. D. SCHÖN, *supra* note 1, at 166. Describing the process of teaching in architecture design studios, Schön wrote that such a student

must be able to put aside what she knows in order to enter into the as yet unknown world of someone else, to experience a zone of uncertainty where, having given up for the moment her usual ways of seeing, she is still unconnected to the other's way of seeing. For this, she needs a capacity for cognitive risktaking [and] the strong sense of self on which this capacity depends. [But for most students, a demand that they participate in such a process asks] them to exhibit, in order to learn, that which they most need to learn.

*Id.* at 139.

91. The evidence for this is purely anecdotal, but it is an impression widely shared among teachers who do substantial amounts of critiquing. Men might more easily don role masks simply because of the general but spurious impression that lawyer work is intrinsically male work. See Eyster, *Analysis of Sexism in Legal Practice: A Clinical Approach*, 38 J. LEGAL EDUC. 183, 188 (1988); Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29, 39 (1987); Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 40, 53-54 (1985).

At least part of the cause, however, might lie in other explanations. Perhaps many men have been *weakened* by society's indulgence and by the idea that they will be able to do the work if they "know the moves"—and are thus not well prepared for experiences in which they must confront their own inadequacies without the false reassurances of competitive bonding. Perhaps too, many women—trained to look always for faults in themselves—discover in becoming professionals that what had oppressed them earlier in life has also led to a certain kind of strength. Although they themselves might not be fully aware of that strength, it may help them be less defensive and more self-reflective in professional school, when the result is most critical to the achievement of professional effectiveness.

92. If a student is adamant about living behind a role mask, there is little the critiquer can do, other than show patience, receptivity, and encouragement. Some role-masked students at times may be able to come out from hiding and accept difficult advice. But that does not happen easily, and the effect might be transitory. The extent to which a student's ego feels threatened can be reduced somewhat by giving the student some genuine evidence that he or



A role mask can be equally damaging when worn by a teacher. Teachers may be encouraged to don role masks by their experience in practice, where posturing and role-playing predominate, or by the predicament of requiring students to learn analytical art that the teacher can barely articulate. To students, a role-masked teacher is not genuine, but only the aggregate of all the roles the teacher tries to play. A teacher's own genuineness, however, is often one of the most valuable resources in helping a student understand, accept, and overcome the paradox that causes many students to hide behind role masks: to become professionals, students must learn an analytical art that cannot fully be explained.

### B. Students' Compulsion to Mimic

Although many students approach professional work as modes of analysis to be mastered, others seem to hear evaluations of their work only in terms of what the teacher "wants." Beginning students sometimes express this openly: "Would you give me a better idea of what you want?" "This work was very hard; I didn't know what you wanted." "Thank you for spending extra time with me; I think now I understand what you want." At more advanced levels, the sentiment is less directly expressed—perhaps because some students begin to feel ambivalent about the effect of mimicry on their own independence—but it is still often acted upon. Some mimicking students "counterlearn" because, instead of learning, they limit themselves to a temporary performance of whatever they believe the teacher "wants," while others "overlearn" because, with diligent literalism, they treat the critiquer's commentary as "a set of expert procedures to be followed mechanically in each situation."<sup>93</sup>

The urge to mimic subverts an education. That urge may grow out of the student's fear of becoming an independent decision-maker, with all the terrible freedom and responsibility inherent in making decisions. It also may be based on the idea that an education is a game, with a score and rules that should be set out clearly, rather than an experience through which the student becomes intellectually and emotionally larger and stronger (which is more like exercise than sport). Perhaps the urge to mimic is related to "the current mood of vocationalism and consumer-

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she is respected as an individual and liked. Evidence can include an openness of manner on the teacher's part, a general spontaneity, and a receptiveness to the student's point of view. A student can be persuaded to grow only where the teacher has created what John Gardner called "a general atmosphere of helpfulness." J. GARDNER, *supra* note 42, at 81. Many criticisms are best expressed as advice.

93. D. SCHÖN, *supra* note 1, at 154-55.

ism,"<sup>94</sup> which now afflicts students in virtually all professions, making them "resistant to the demands of any reflection on practice that does not promise immediate practical utility."<sup>95</sup> Although clinicians tend to be as distressed at this mood as classroom teachers are,<sup>96</sup> a student's urge to mimic might also be a more or less natural reaction to the paradox of the way professional thinking must be learned. If professional thinking cannot be explained fully, a student can almost be forgiven for assuming that "lawyerliness" is acquired by imitating the outward appearance—the "moves"—that are empty unless they result from professional analysis.

A teacher is practically obligated to confront the problem of mimicry openly when the symptom appears. The teacher can make clear throughout a critiquing relationship that the object of critique is not the student's product, but instead the magical and mysterious process through which the product is created. If a student speaks of what the teacher "wants" (or words to that effect), the teacher's response should be to reorient the discussion toward a standard of effectiveness and the need for, and professional satisfaction to be gained from, intellectual independence. It sometimes helps to talk about the difference between a professional school, where standards of effectiveness can be identified, and an undergraduate school, where students are not being prepared for practical work, where teachers lack standards geared to real-world effectiveness, and where—in the absence of such standards—students often acquire the impression that grades are based on a teacher's seemingly arbitrary personal preferences.

While a student's use of mimicry is generally suspect, occasionally a teacher can use mimicry to shock students into understanding something about the importance of intellectual independence. An example is provided by Bernard Greenhouse, the cellist of the Beaux Arts Trio, who was taught by Pablo Casals:

He would play a phrase and have me repeat it. And if the bowing and the fingering weren't exactly the same as his . . . he would stop me and

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94. *Id.* at 313.

95. *Id.* "When a student mimics the creative process itself, the effect can be what Tony Alfieri calls "transformational": a student with little experience in professional creativity needs some structure with which to start, and if the student finds it by temporarily modeling after others' creative processes (rather than their products), the result is often more independence, rather than less. Alfieri, *Antinomies of Poverty Law and a Theory of Dialogue Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE (forthcoming, Spring 1989). Some students constructively use mimicry in this way, but many more use it instead to avoid independence.

96. See, e.g., *Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future*, 36 CATH. U.L. REV. 337, 344-64 (1987) (transcript of panel discussion at Catholic University Law School Conference on Clinical Education, Oct. 18, 1986).

say, "No, no. Do it this way." And this went on for quite a few lessons. I was studying the Bach D-Minor Suite and he demanded that I become an absolute copy. . . . [F]inally, the two of us could sit down and perform and play all the same fingerings and bowings and all the phrases alike. And I really had become a copy of the Master. It was as if that room had stereophonic sound—two cellos producing at once. . . . And at that point . . . , he said to me, "Fine. Now just sit. Put your cello down and listen to the D-Minor Suite." And he played through the piece and changed *every* bowing and *every* fingering and *every* phrasing and all the emphasis within the phrase. I sat there, absolutely with my mouth open, listening to a performance which was heavenly, absolutely beautiful. And when he finished, he turned to me with a broad grin on his face, and he said, "Now you've learned how to improvise Bach . . . ." <sup>97</sup>

One cannot avoid suspecting that, before Greenhouse, Casals had legions of students eager to imitate the master; that he struggled to help them become themselves in spite of their urge to become him; and that he finally discovered that he could break the cycle of mimicry by indulging it and then shocking the student into the realization that there is an infinite variety of ways to be professionally effective.<sup>98</sup>

Ultimately, a critiquer will suffer either superficiality or antagonism if students cannot be persuaded to overcome the urge to mimic. Students can make such intense demands for over-direction and for models fit for mimicry that the teacher who satisfies those demands guarantees both shallow critiques and popularity among students. At some law schools, a teacher's popularity with students is treated—on the basis of unexamined assumptions—as an objective and positive fact for the purpose of personnel decisions, rather than as evidence that, upon closer inspection, might tend to show that teaching has been either rich or shallow. Where that is so, a teacher may need obstinacy, a strong sense of self, and perhaps a quiet kind of courage to continue, over many years of teaching, to persuade students not to mimic.

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97. D. SCHÖN, *supra* note 1, at 176-77 (emphasis in original).

98. Certainly, Casals' strategy was extreme. A very different but also extreme strategy was followed by Mark Twain's Bixby, who left his apprentice alone in the wheelhouse on a part of the river that the apprentice knew well. Bixby then arranged for crew members to shout up false messages about the river depth until the apprentice panicked and called for the engines to be reversed. When he realized that he had been hoodwinked, the apprentice railed at Bixby, who replied, "I want you to learn something by that experience. Didn't you *know* there was no bottom in that crossing?" The apprentice answered that he did. "Very well, then," said Bixby. "You shouldn't have allowed me or anybody else to shake your confidence in that knowledge. Try to remember that. And another thing: when you get into a dangerous place, don't turn coward. That isn't going to help matters any." M. TWAIN, *supra* note 9, at 116-18 (emphasis in original).

### C. Persuasion-Mode Thinking

A teacher or student afflicted with persuasion-mode thinking<sup>99</sup> tends to act more or less continually on hidden agendas and strategies; to evade responsibility for negative results; "to minimize self-analysis and to reserve it for private moments when it will not weaken instrumental effectiveness";<sup>100</sup> to argue in ways that are subtle but "needlessly stylized and hyperbolic";<sup>101</sup> and to treat others often as objects and as types, rather than as individually unique. When persuasion-mode personalities listen, it is less out of curiosity than out of a search for ammunition that can be used to gain or maintain control. The traditional wisdom is that persuasion-mode behavior is profitable in negotiation and in the courtroom, where the struggle is for control rather than insight, and where the "self-sealing properties of persuasion-mode habits"<sup>102</sup> minimize tentativeness, doubt, and perplexity over the unknowable and gray areas of life.<sup>103</sup>

In noncompetitive settings, however, persuasion-mode behavior produces over-simplified reasoning, self-serving speech, and a reduced loyalty to truth. "Persuasion-mode habits predispose lawyers to take evaluative stands automatically" so that they "regularly . . . make statements that, on reflection, they know to be false" because reflexive—rather than *reflective*—position-taking produces the traditional rewards: "victory, authority, status, wealth."<sup>104</sup>

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99. This model of behavior was first described by C. ARGYRIS & D. SCHÖN, *supra* note 12, although they used different terminology. Robert Condlin was the first to discuss it in the legal literature. See Condlin, *The Moral Failure Of Clinical Legal Education*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 327-32 (D. Luban ed. 1984) [hereinafter Condlin, *Moral Failure*]; Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223, 233-35 (1981) [hereinafter Condlin, *Socrates' New Clothes*]. Schön has recently explored the subject in further detail. See D. SCHÖN, *supra* note 1, at 255-302. Condlin's term for this model is used here only because it is more descriptive than Argyris and Schön's.

The appearance here of Condlin's terminology does not imply an endorsement of his extravagant accusations about the "moral failure" of clinical education as a whole. Those accusations are themselves an excellent illustration of persuasion-mode rhetoric. They are soundly analyzed and for the most part refuted by Redlich, *The Moral Value of Clinical Legal Education: A Reply*, 33 J. LEGAL EDUC. 613 (1983), and Bellow, *On Talking Tough to Each Other: Comments on Condlin*, 33 J. LEGAL EDUC. 619 (1983).

100. Condlin, *Moral Failure*, *supra* note 99, at 330.

101. *Id.* at 326.

102. *Id.* at 330.

103. Jonathan Hyman has argued convincingly that, despite impressions popular among lawyers, persuasion-mode representation is in many situations counter-productive. See, e.g., Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Counselors?*, 34 UCLA L. REV. 863, 863-89 (1987) (arguing that traditional lawyer's role may be less efficient and will not always lead to "wise agreements"). Unfortunately, we are only beginning to develop effective methodologies of representation not based on the persuasion mode.

104. Condlin, *Moral Failure*, *supra* note 99, at 330.

Persuasion-mode behavior can be destructive in other ways as well. "It causes one to impute rather than explore others' ends, shut off rather than encourage legitimate objection, ignore rather than raise debatable but relevant issues, and accumulate rather than share decision-making authority."<sup>105</sup> In a student, persuasion-mode thinking blocks learning. In a teacher, it is often seen as manipulative and controlling. Even where the teacher's persuasion-mode tendencies are very slight, a persuasion-mode student, conscious of the teacher's authority, easily sees "paternalism and arrogance."<sup>106</sup> In short, the very qualities many lawyers use to project forcefulness can inhibit both teaching and learning.

Persuasion-mode behavior is one of the most powerful and potentially destructive forces in a critique. A student locked into persuasion-mode behavior is more interested in a power struggle than in learning, although such a student is often at the same time polite and deferential. Even worse, a teacher locked into persuasion-mode behavior has a very limited capacity to "reach" students, who feel confronted rather than helped.<sup>107</sup>

The opposite pattern of behavior might be called the inquiry-mode:<sup>108</sup> an un-self-conscious curiosity and sense of wonder that is one

105. *Id.* at 329.

106. *Id.*

Few teachers intend to aggrandize themselves at the expense of their students; few are unfeeling; few compete over interpretations of work product just to win. Yet many are perceived in these ways. Because of the setting, almost anything that teachers and students say or do is ambiguous. Each communication has several plausible meanings, ranging from the most positive to the most negative. The most common scenario begins with a teacher statement intended as helpful but heard as attack. The student, concerned about being attacked, responds defensively. The teacher does likewise, for the same reason . . . Each side believes, with some justification, that it joins the attack reluctantly and in self-defense.

*Id.* at 327-28 (footnote omitted).

107. Even a teacher with a noncombative demeanor may succumb to persuasion-mode behavior. As Condlin has pointed out,

The persuasion mode is not always associated with bad, unpleasant, aggressive behavior. The mode is just as often a low-visibility, indirect, and even cordial method of manipulating others. A person argues for outcomes that are "in the other person's best interest." That they are also identical with the first person's desires is not acknowledged, to either person. . . . The persuasion mode is used among friends as well as enemies and people feel good about it as often as they feel resentful. . . . [T]he true test of persuasion-mode behavior is in what it seeks to accomplish (e.g., victory rather than understanding or uncoerced agreement) and by what strategies (e.g., private, unilateral, competitive, and self-sealing actions rather than public, bilateral, cooperative, and self-reflective ones).

*Id.* at 328.

108. Condlin uses the less descriptive term "learning mode." Condlin, *Socrates' New Clothes*, *supra* note 99, at 228; see also D. SCHÖN, *supra* note 1, at 141-42 (discussing mode of learning in which one both advocates his own views and inquires into the views and interests of

of the foundations of creativity. Ultimately, a teacher and student can be fully effective in their respective roles only when each can lay aside persuasion-mode instincts and, in a spirit of inquiry, build the pedagogical equivalent of a therapeutic alliance. The teacher must gain enough self-knowledge to be able to identify his or her own persuasion-mode behavior and enough self-discipline to be able to eliminate it from critique. At the same time, the teacher must be able to recognize persuasion-mode responses in students, who use them as defenses in the very threatening situation in which they find themselves. Finally, the teacher must be able to inspire sufficient trust and show enough leadership that students feel safe and are encouraged to respond with inquiry, rather than persuasion.

How can a teacher simultaneously inquire and guide? As a starting point, the teacher can play hide-the-ball only with great circumspection. A purely inquiring critiquer does not conceal what he or she is up to, but that degree of purity would leave significant gaps in analytical training for a practical profession. Sometimes, a critiquer has to take the position that the student must unlearn a bad idea in order to learn a better one, and sometimes a Socratically sly<sup>109</sup> *elenchus* and *psychagogia* are the most effective way to do that. But with surprising frequency, the critiquer's better idea is not as good as some other ideas discoverable through the dialogue—if only the critiquer would be open to them—and the student's bad idea can, with some mutation, become part of a well-reasoned synthesis. A student can be deeply and constructively moved by hearing of the critiquer's own perplexity and curiosity, especially when the critiquer shows that his own thinking has evolved during the course of the discussion. Graham Strong has pointed out that a "good critiquer mixes freedom with control, and tends to exert more control as to structure, and to leave more freedom as to substance, in the common search for learning."<sup>110</sup>

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others). In 1952, in a now-famous talk on teaching, Carl Rogers said that "anything that can be taught to another is relatively inconsequential." Rogers found that when he examined the results of his own teaching, "either damage was done, or nothing significant occurred," and that consequently he was no longer interested in being a teacher and was "only interested in being a learner." *Id.* at 89-90 (quoting C. ROGERS, *FREEDOM TO LEARN: A VIEW OF WHAT EDUCATION MIGHT BE* 277 (1969)). Put less abstractly, Rogers concluded that when he professed received wisdom ("taught"), his students did not learn anything significant, but that they could learn a great deal if he and they learned together. The latter might not be teaching in the sense of "professing," but it is teaching if teaching is defined as creating a situation from which others learn. *Id.* at 91-92.

109. See *supra* note 42.

110. Letter from Graham Strong to Richard Neumann (Sept. 12, 1988) (on file at *The Hastings Law Journal*).

#### D. Other Products of Anxiety

Some students are deafened by anxiety: they have a need for reassurance that is so compelling that their memories seem not to record criticism; or, upon hearing initial criticism, they become so traumatized that they want the critique to end and hear almost nothing until it does; or they spend so much time seeking reassurance that little is left for criticism. A student deafened by anxiety may become unusually passive in a critique, saying little more than "uh, huh," "yes," or "I understand." When a student becomes that passive, a critique is not actually happening because there is no give and take. A critique will not truly begin until the teacher's questions so draw the student out that she becomes actively engaged. At the other extreme, and more rarely, a student may withdraw from the critique by chattering so incessantly that little of substance can be discussed. There, in a different way, the student is not actively engaged in the task at hand and will not be until the teacher exercises firm topic control.<sup>111</sup>

Anxiety can also cause a student to rationalize habitually. Rather than reflecting self-critically on a performance, an habitually rationalizing student thinks of an apparently good justification for everything, even if the reason thus given is not the real reason for what happened. A student who did something merely because it seemed pleasant at the time can—on the spur of the moment in a critique—provide a perfectly logical reason that is insincere because it was not in the student's head at the time of the performance. "Rationalization," Thomas Shaffer has written, "is a lawyer's style and pretense."<sup>112</sup> Useful though it might be in client representation, rationalizing impedes the rationalizer's own personal growth. It may be so habitual that a student who states a rationalization with an air of self-confidence may at the same time feel a desperate desire for help with the very problem the rationalization covers up.

#### V. Putting the Elements of Critique into Action

A critique is preceded by a preparation phase, and the critique tends to organize itself into an opening phase, in which the themes of the critique are first stated and in which teacher and student agree on how the

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111. If these strategies do not succeed, and if the teacher has developed in the student some reservoir of trust, the only strategy left may be to tell the student frankly what is going wrong and ask the student's help in solving the problem.

112. Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721, 750 (1975).

rest of the critique will proceed; an interpretation phase,<sup>113</sup> which constitutes most of the critique and during which the themes are developed and supported through discussion of the student's performance; and a closure phase, in which the themes are brought together in such a way that the student can accept the teacher's assessment and in which teacher and student agree on what the student will do about it.

#### A. The Preparation Phase

If either teacher or student is unprepared for the critique, it will waste the time of both. For the teacher, preparation means assembling an agenda and planning for the difficulties of covering it, considering the student's performance, intellect, and personality. Critiques work best when the teacher selects a relatively small number of issues in analytical art or professional personality, uses the performance to develop those themes, and covers technical skills secondarily to fill out the picture. Critique is much less productive when it is largely an unthematic discussion of the details of technical skills.

Although a critique is by nature spontaneous, some thought is needed beforehand about which subjects are best suited for explanation and which for dialogue. For each anticipated dialogue, the teacher must decide what the goals of the *elenchus* and of the *psychagogia* will be, and with what questions each should start. Few dialogues work out exactly as anticipated. The goal of an *elenchus* can change when the teacher discovers that the student holds a misconception different from the one the teacher had supposed. One planned *elenchus* can become several, as new misconceptions are discovered during the dialogue. The goal of a *psychagogia* can change when the teacher gains new insight during the dialogue. But a dialogue is rarely effective if the teacher has not selected goals and initial questions in advance. Without goals, the dialogue sputters and frustrates both parties. The initial questions set up the whole course of the *elenchus* and *psychagogia*. A teacher with much skill and experience at dialogues can plan one very quickly, but a beginner needs time and reflection.

If the work to be critiqued was written,<sup>114</sup> it should be marked up and returned in time for the student to prepare. If the work was a video-

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113. This is Susan Bryant's term. I am indebted to her for several insights on critique structure.

114. For several reasons, written work may be more fertile than performances for the teaching of analytical art. If a student knows that work will be evaluated by high standards, the act of writing can often cause the student to develop more careful and complete diagnoses, predictions, and strategies. Thinking is not merely inseparable from writing; writing enlarges and fills out the thinking it expresses, and it exposes analytical problems and demands that



taped performance, the teacher should select those portions that best develop the themes of the critique, unless the whole performance has a dramatic unity that in itself is valuable to the teaching. If a performance was not videotaped—certainly a less satisfying situation—the material should be covered in the most pedagogically effective sequence, rather than in the order in which the teacher's notes were taken.

The student's preparation should enable him or her to speak to the goals of the performance; the diagnoses, predictions, and strategy on which it was based; the technical skills used; issues of professionalism raised by the performance; and the process through which the performance was planned. If the performance was written, the student should prepare by rereading it; reflecting on the teacher's written comments; re-thinking the substance of the writing; and re-examining the process through which the writing was produced, reviewing outlines and notes. If the performance was videotaped, the student is far better prepared if permitted to view the entire tape before the critique. If the performance was acted out but not videotaped, the student should, among other things, at least try to relive in imagination all of its details.

## B. The Opening Phase

Near the beginning of the critique, the teacher's assessment has to emerge. For the teacher, that happens out of the logic of exposition: the assessment, after all, contains the themes of the critique. For the student, it is a psychological imperative: without any sense of the teacher's ultimate judgment, a discussion of the performance can cause the student nearly unbearable anxiety, and the benefits of the discussion will be lost on the student. The teacher should proceed carefully, however, for a coldly delivered assessment can arouse so many barriers to critique that whatever discussion ensues is likely to have little effect on the student. For example, consider the following critique of a student's performance in a negotiation:

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they be solved. Because the written product is static and lacks drama, it lends itself better to discussion of the analytical *process* through which it was created. In critiques of performances, on the other hand, both teacher and student can easily be seduced into focusing almost solely on technique, which is more visibly new to the student. Many students are eager to cultivate the look of lawyerliness, and even a teacher who cares about substance can sometimes find it hard to crack the final appearance of the performance and reach the process through which the performance came to be. Moreover, the spontaneity of a performance provides abundant variables and excuses that can obscure faults in the reasoning on which the performance was supposed to be based, although these distractions can be reduced somewhat by requiring the student to submit a critiquable pre-performance writing that analyzes in full the diagnoses, predictions, and strategies with which the performance has been planned.

*Teacher:* I think that you probably conceded more than was necessary to get the few concessions you obtained. Your adversary had a better sense of the leverages available to both sides, and you seemed not to have a coherent negotiating strategy. Your offer-and-demand pattern made your lack of planning obvious to your adversary, who took advantage of it. And the threats you made were empty and were delivered in a way that gave your adversary an excuse for a temper tantrum, which intimidated you.

Compare the opening phase of a critique in an architectural design studio, vividly recalled by both teacher (named Dani) and student (Michal) eight years after the event:

*Dani:* . . . Toward the end of the semester, I saw Michal was struggling with her work, [which] I asked her to show me . . . It was uninspired, institutionalized, and the whole thing looked a little like a motel. I did not like it, but I did not say so. I just asked Michal if she liked what she was doing.

*Michal:* The evening before the session with Dani, I remember thinking, This is not what I want . . . And [when] he asked, "What do you think? Do you like it? What do you feel about it? . . . I was able to tell him the truth, that it really was not at all what I wanted and that, actually, I wanted . . . three things . . . First, . . . I want nature to be dominant. I also told him, I want it to be a social experience for the groups that visit . . . And the third thing is, I want it to be a place that will develop their senses—that will sensitize them to changes, to feel. [After the critique] I came home and sat down and [started reworking the building]. That evening, I was very focused and I finished the building layout.<sup>115</sup>

There is beauty in this. Had the teacher expressed his judgment, the student's sense of failure would have been confirmed and deepened, and later creativity inhibited. Instead the student was energized. She was able for the first time to articulate what had bothered her about her own work and, after further discussion, she started on a redesign that turned out to be far more valuable than the original.<sup>116</sup>

A law teacher might instead have asked, "What was your goal?" That question sounds more lawyer-like, and it is certainly keyed to a standard of effectiveness. But Dani's questions are better. They ripped away the curtain of defensiveness: in the student's mind they changed the subject from "What was wanted of me?"<sup>117</sup> to "What can I accomplish here, and how can my teacher help accomplish it?" Although some students do not have Michal's sense that there is something lacking in the performance under critique, a surprisingly large number of them do. When a teacher begins a critique with the question, "In terms of the

115. D. SCHÖN, *supra* note 1, at 143-45.

116. *Id.* at 144-50.

117. *Id.* at 150.

work that went into this performance, what do you think are your strengths and your weaknesses?" students tend to make modest lists of strengths that they are—and often should be—proud of, and to produce prodigious and sometimes over-large lists of weaknesses. What is less common is Michal's sudden ability to articulate in precise concepts her previously vague sense of dissatisfaction about a performance. She is unusual in the *speed* with which she reached precision, not in the fact that she was *able* to do it all. Many students can reach the same point through dialogue—a *psychagogia* without an *elenchus*, the *aporia* being the student's simple statement of dissatisfaction. Those who cannot are fewer than one might think.

There is another value to beginning a critique this way: it helps the student learn how to analyze his or her own performances. Once the student has graduated, continued growth will depend in part on self-critique, and the critiquing style illustrated here subtly encourages the student to develop the diagnostic art of self-assessment. The opposite is caused by a critiquing style that encourages student passivity.

### C. The Interpretation Phase

The interpretation phase may be structured in either of two ways. Some performances lend themselves to evaluation theme by theme: teacher and student talk, referring to the student's paper or videotape only for reference. This is most appropriate when the themes are few and large and when only a few of the performance's details illustrate the themes. When details are more important, it is better to examine the performance from beginning to end, discussing each theme as it appears.

Effective critique avoids two extremes. At one extreme, the teacher lacks objectively conceptualized standards, and the teacher's evaluations therefore seem inconsistent, arbitrary, and even whimsical. At the other extreme, the standards are so rigid and so personal that the teacher coerces students into modeling themselves after the teacher. The goal of critique is not to turn the student into a clone of the teacher: the critiquer's purpose is instead to help the student find manners of thought that are effective and at the same time work within the student's personality. Some aspects of performance are always wrong and can be fixed in only one or two ways per fault. Others are always wrong, but each can be fixed in a number of ways—often more ways than the critiquer alone can imagine. Still others work badly in some situations but not in others. And still others are not really wrong at all, but merely offend the critiquer's taste.

A good critiquer is dogmatic only about those things that are consistently wrong and that can be fixed in only one or two ways. And as to other matters, a good critiquer is careful to separate true ineffectiveness from taste that the critiquer simply does not share. As to things that work well in some situations but not in others, the critiquer's goal is to help the student understand the difference. As to those things that are consistently ineffective but admit of many solutions, a good critiquer teaches students how to choose among the solutions.<sup>118</sup>

When the student must make a decision during or after the critique, the most effective sequence is to guide the student through option-generation and option-evaluation, dealing with issues of creativity as they arise, and, ultimately, asking the student to decide. In the architectural design studio, Dani suggests, in quick sketches, several ways in which Michal might accomplish what she wants: in her words, he "very freely went over all kinds of possibilities."<sup>119</sup> As Donald Schön points out, "[i]t is important here that Dani suggests many ways—not one best way—to achieve the effects Michal wants. He does not instruct her in the best way to do it; he works with her to open up a range of possible means for her experimentation."<sup>120</sup> In effect, the student has been told, "You must judge your work—and I will join you in judging it—on the basis of your success in producing what you intend."<sup>121</sup> Moreover, it cannot be said that because legal work is judged by standards of effectiveness this approach might work in architecture but will not work in law. Architecture, too, is judged by standards of effectiveness: if the building is

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118. John Gardner described the corresponding problem in the teaching of fiction: Nothing is easier than to give the student specific actions, even specific sentences, that will solve his story's problems; and at a certain point in the young writer's development it may perhaps be valuable to do such things, so that the student can get the hang of it. But basically what teachers need to teach students is not how to fix a particular story but how to figure out what is wrong with the story and how to think about alternative ways of fixing it. . . . I've frequently worked with writing assistants—young writers with successful first novels—whose inexperience as teachers led them to focus on finding the best solution to problems in the writing placed in their care, led them, in other words, to show the student writer what to do to make his fiction work. In case after case, when I myself looked at the student's work later, I felt there were a number of possible solutions to the problems . . . and that in suggesting only one solution, the one he himself would choose, my assistant had done an unwitting disservice to the student. What the beginner needs to learn is how to think like a novelist. What he does not need is a teacher who imposes his own solution, like an algebra teacher who tells you the answer without showing [you] how he got there, because it is *process* that the young writer must learn . . . .

J. GARDNER, *supra* note 42, at 87-88.

119. D. SCHÖN, *supra* note 1, at 145.

120. *Id.* at 152.

121. *Id.* at 153.

unsturdy or does not satisfy the uses to which it is put, the architect has failed. In law—as in architecture—there is a huge variety of ways in which something can be done effectively and an equally huge variety of ways in which it can be done poorly.

Students react better when evaluations are expressed purely in terms of the performance's practical effectiveness, a standard that students can accept as objective if it is explained carefully. ("I think the typical judge would react to this argument in the following way . . . and for the following reasons . . . .") The best approach is one that combines personal acceptance with professional requirements—one that demands and encourages at the same time. Students should feel that the teacher likes them and wants them to succeed, but expects them to make the painful effort needed to reach professional standards. Students begin resisting when a teacher talks about personal preferences ("I don't like . . ."). If a teacher cannot conceptualize a criticism in an impersonal way, either the teacher does not really understand what is wrong or, in truth, nothing is wrong.

In a balanced critique, the student's weaknesses and strengths are both identified. If the student has done anything well, the teacher should let the student know, but in a way that suggests that the comment is not an act of charity. Critical judgments are best directed at the performance as an event and not at the student as a professional.<sup>122</sup> If the teacher's manner implies that the performance can be separated from the student, the student can more easily shed the thinking that caused whatever failures the performance might represent.

Finally, vague and unspecific comments are of little value to students.<sup>123</sup> At the end of the critique the student should understand the themes both theoretically and in terms of the performance. In this sense, theory consists of the ideas the student must understand to do better. If the student is told, "You didn't control the witness," the student has not been given an explanation of the idea or ideas on which improvement would have to be based. The student might not yet understand some *concept* of control—a principle, an idea, a theory. The skill of developing themes for critique is the skill of identifying that kind of concept. The theory must be tied down to the performance. If the teacher does not analyze examples of noncontrol in the critique, the student will not learn how to identify and fix questioning that fails to do the job.

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122. Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L.J. 277, 297.

123. *Id.* at 296.

#### D. The Closure Phase

In the closure phase, the teacher's purposes are to tie up the loose ends that have come untangled during the interpretation phase; to explore any intellectual doubts or emotional shock the student might still have about the substance of the critique; and to agree on goals for the future. The student should be able to leave persuaded, motivated, and able to articulate the weaknesses and strengths of the critiqued work.

### Conclusion

Not only is art the subject of critique, but effective critique is itself art. When observing a master critiquer at work or when being critiqued oneself by a master, who has not—after a certain point—been enlarged and electrified by the revelatory unfolding of meaning that, in its effect on the psyche, is the essence of evocative or cathartic art? But the art of critique is quite distinct from the arts addressed by critique: the art of critique functions differently, and it does not come automatically to a person who has mastered the critiqued arts. In fact, I suspect—and I think most experienced critiquers also suspect—that the art of critique has been even less widely mastered than the critiqued arts have been. But the empirical evidence is so sparse at this point that we cannot know whether the art of critique is inherently more difficult or simply has been studied less.

