

SPEAKING THE TRUTH: SUPPORTING AUTHENTIC ADVOCACY WITH PROFESSIONAL IDENTITY FORMATION

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When law students are asked to articulate legal rules in a persuasive communication such as a brief, they may experience internal tension. Their version of the rule, as framed to benefit a particular client's position, may be different from the way they would articulate the rule if they were not taking on an advocate's role. The conflict between those two versions of a legal rule leads some students to wonder if advocacy itself is deceptive, if an advocate's role requires one to sacrifice ethics for success, and if ancient Greek philosophers were correct when they derided persuasive communication as "trickery and magic," and criticized advocates for making arguments that were "artfully written but not truthfully meant." This tension is not unique to students. All advocates must ask themselves whether they can provide a true and accurate version of the law (truthful law) and simultaneously articulate a version of the law that will help their clients. This question speaks to the very nature of law and what it means to be a lawyer. If the question is not successfully resolved, students and lawyers are more susceptible to the cynicism and discontent that permeates the legal profession.

Using Plato's denunciation of rhetoric and rhetoricians as a starting point, Part I of this Article will explore how the first year of law school may create and exacerbate tension between law students' desire to advocate on behalf of their clients and their desire to truthfully communicate the law. Part II will explore how law school could resolve this tension with an explicit discussion of legal determinacy and the lawyer's role in creating law: what students need to hear, when they need to hear it, and where that conversation might be placed within the curriculum. This Article will identify the developing area of professional identity formation as a natural location for an effective discussion, which would ideally occur within the first year of studies. In that discussion, law students can ex-

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plore a view of lawyers as meaning-makers and truth-tellers: rhetoricians who understand and are faithful to the true essence of a law but are also able to create alternatives within the scope of that true law. Students and lawyers can integrate their own identities into this professional identity and maintain authenticity in their advocacy.

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INTRODUCTION

Each year, when I introduce persuasive communication to my first-year law students, a significant group of them express discomfort. The students have spent substantial time and effort developing skills necessary to extract rules of law from legal sources, synthesize those sources, and articulate a rule of law that a court is likely to use to resolve a dispute. Now, I ask them to create a new and, quite possibly, different rule of law: one that, if applied, will benefit the client’s position. They must create and express a version of the law based not only on what they believe the law to be, in the sense that it already exists, but based on what it might be, and to base their articulation on the client’s needs rather than some sense of absolute correctness.

Students may experience this as problematic. Their reactions range from mild puzzlement to significant distress, as they struggle to articulate rules of law in a way that benefits their client's positions. Questions arise: *Is it fair to tell a court that "the law is such-and-such" when I advocate for my client, when I would articulate the rule of law differently if advising the client on a course of action, or predicting what rule the court will use? Are the persuasive techniques we learn simply tricks to manipulate my reader? What right do I have to twist the law to make my client's case seem more attractive?*

My students may not know it, but they are expressing the same concerns voiced centuries ago in ancient Greece, when rhetoric—what Aristotle was to later call “the faculty of observing in any given case the available means of persuasion”—was in its infancy.¹ Then, philosophers critiqued the new art as “trickery and magic”² that could “make the worse case appear the better.”³ I argue in this Article that law students today still struggle with the beliefs underlying these critiques. They seek a way to embrace the role of zealous advocate without abandoning their own authentic voices and convictions about what the law is, and while identifying and understanding their own place within the legal system and their conceptions of justice. Law students should—and generally do—understand that there can be a difference between expressing a version of the law that will advance their client's interests and expressing a version of the law that lawyers would find likely if they were not representing the client. That difference may create a tension for many students, who wish to both truthfully express the law and also serve the client. If this difference—this tension—is not explicitly examined and explored early on, students may unconsciously internalize a variety of troublesome beliefs. For example, they may conclude that although it is possible for lawyers to understand and articulate the true meaning of a particular law, they must ignore this true meaning when advocating for their clients. Alternatively, they may conclude that there is no “true” meaning of law, and laws can be stretched at will to accommodate client interests. In both cases, their conclusions may be subconscious, and as unlikely to be consciously examined as they are likely to negatively impact student beliefs about lawyers and lawyering. Students must be able to separate two assertions that are often conflated: one, that advocates should speak the truth about their topic (i.e., speak the truth about the law), and two, that they should advocate for a desirable outcome (e.g., a just outcome, or one that benefits their client).

Although I observe this concern with my writing students, this problem is not limited to the legal writing classroom, nor unique to first-year students. Instead, I believe this tension addresses the very nature of law and the role of

¹ ARISTOTLE, RHETORIC 7 (W. Rhys Roberts trans., 1994).

² GORGIAS, THE ENCOMIUM OF HELEN 10 (Brian R. Donovan, reprt. 1999), <https://faculty.beidjstate.edu/bdonovan/helen.html> [<https://perma.cc/8SVP-3JQA>] [hereinafter ENCOMIUM OF HELEN].

³ JAMES A. HERRICK, THE HISTORY AND THEORY OF RHETORIC: AN INTRODUCTION 38 (4th ed. 2009).

lawyers, who articulate rules of law and express the meaning of laws as they represent clients. The questions raised ask us to explore what it means to be an advocate and whether success must come at the expense of ethics. These issues speak to fundamental human needs for respect, self-esteem, and self-actualization, and are key to lawyer well-being. Students—and lawyers—who are able to successfully address these questions and reconcile their professional actions with their own values should be much more likely to escape the cynicism and demoralization that permeates the legal profession. Helping law students to think critically about their roles as lawyers and their roles in shaping the law should be a part of the first-year experience; we need not—and should not—hope that students will simply stumble upon an answer at some point in their education. Instead, law schools can help students thoughtfully consider these questions and reconcile this tension in a way that encourages critical thought, supports commitments to justice, and fosters well-being.

Throughout this Article, I reflect on how students may experience law school. These reflections are based on my own observations and conversations with students about how the prevalent pedagogical methods are perceived by some students. My hope is that readers will be motivated to explore more deeply the ways that students experience legal education and think carefully about how our legal education might be improved.

Using Plato's denunciation of rhetoric and rhetoricians as a starting point, Part I of this Article will explore how the first year of law school may create a tension between law students' desire to advocate on behalf of their clients and their desire to truthfully communicate the law. I argue that the predominant Socratic method teaching approach of this year can implicitly reinforce a conception of law held by many new law students: that there is a correct and truthful law waiting to be found. Even as professors strive to suggest that law is not completely determinate, that good arguments for interpretation can be made on both sides of many issues, and that law is changed and developed over time by lawyers acting within the system, students may emerge with a subconscious belief that (1) there is a correct view of the law, and (2) the role of lawyers is not to reveal it but instead argue, for the sake of argument, about plausible versions of the law. As a result, there is a risk that students can accept a view of lawyers as unethical actors in the system. By the time they proactively explore the lawyer's role (if they ever do), it may be too late to undo the damage, or they may simply move to a fully cynical view of law itself: as radically indeterminate, to be shaped and argued however the lawyer wishes. Accepting that view could contribute to cynicism and discontent in the profession that begins in law school but can continue into legal practice.

Part II will explore how law school could resolve this tension with an explicit discussion of legal determinacy and the lawyer's role in creating law. It will propose a framework and nomenclature for developing this aspect of professional identity, and will address what students need to hear, when they need to hear it, and where that conversation might be placed within the curriculum.

The first step is introducing more transparency about the methods and goals of the Socratic method in the classroom. In contrast to the Socratic method employed by Socrates in ancient Greece, where the method served as a means to explore absolute truth, today's Socratic method has dual goals of exploring the law and also developing the skill of making arguments on both sides of an issue.⁴ Both goals must be explicitly revealed to students to avoid confusion. The second step is discussion of the lawyer's role and identity, including the relationship between articulating an argument and expressing the "truth" about the law. Several role models for advocates focus primarily, or even exclusively, on the just outcome of a matter, and give minimal attention to the process in which advocates engage to reach that result, including the process of creating and expressing an interpretation of the relevant rule of law.⁵ Law schools should show students a different model of advocacy: one based in rhetoric, in which lawyers actively create meaning by showing various possible interpretations of the law in a particular social and historical context. This provides a way to act ethically and still advocate zealously.

Other scholars have discussed how the first-year curriculum creates an ethical disconnect for students.⁶ Most notably, scholarship following the Carnegie Report's critique in 2007 has identified and explored professional identity formation as a way to counteract law school's weakness in the "third apprenticeship" of meaning and identity.⁷ And ethics scholars have for many years discussed the various roles that lawyers may adopt as they balance zealous advocacy and professional ethics obligations.⁸ However, relatively little has been said on the precise topic of this Article: tension between articulating an interpretation of law that is true to the law itself and advocating for an articulation that benefits one's client. This Article will strive to address that gap and begin a conversation about how legal educators might improve the situation, by adopting a framework and nomenclature for addressing this aspect of lawyer identity before students can unconsciously form a view of lawyers that negatively impacts their well-being.

I. THE PROBLEM: PLATO'S CRITIQUE AND ITS IMPLICATIONS FOR TODAY'S

⁴ See *infra* Section I.B.

⁵ See *infra* Section II.A.

⁶ See, e.g., WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 4–5 (2007) [hereinafter CARNEGIE REPORT].

⁷ See, e.g., Larry O. Natt Gantt, II & Benjamin V. Madison, III, *Self-Directedness and Professional Formation: Connecting Two Critical Concepts in Legal Education*, 14 U. ST. THOMAS L.J. 498, 498 n.3 (2018); Neil Hamilton, *Empirical Research on the Core Competencies Needed to Practice Law: What Do Clients, New Lawyers, and Legal Employers Tell Us?*, 83 B. EXAMINER 6, 6, 13 (2014); see also William M. Sullivan, *After Ten Years: The Carnegie Report and Contemporary Legal Education*, 14 U. ST. THOMAS L.J. 331, 337–39 (2018) (summarizing work of Educating Tomorrow's Lawyers, a consortium of schools "committed to working toward implementing the reform program outlined in the Carnegie Report.").

⁸ See *infra* Section II.A.1.

STUDENTS

At first glance, looking back to fifth century BCE Athenian philosophers to explore problems faced by twenty-first century American law students seems an inauspicious approach. However, the speakers and writers of that time were the first teachers and scholars of rhetoric.⁹ Much of our current system (both for legal education and for forming effective arguments) is based on work begun at this time.¹⁰ Thus, it is only fitting to begin with views of rhetoric and advocacy that originated then. We can start with Plato.

A. *Plato's Critique*

Rhetoric—"the ability to convince by means of speech"¹¹—was a critically important topic to Plato and the philosophers of his era.¹² At the time, a citizen's ability to persuade peers that his viewpoint should prevail was very helpful, even essential, to his advancement within social and political realms.¹³ Not only was active participation in politics required,¹⁴ but, should a citizen become

⁹ See HERRICK, *supra* note 3, at 33–35.

¹⁰ For example, the parts of an appellate brief follow the components and organization originated by Corax of Syracuse and modified by Aristotle, Cicero, and Quintilian, including the five-part structure of introduction, statement of the case, argument summary, argument, and conclusion. MICHAEL H. FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE 45 (2005). Corax developed the system after the 465 BCE revolution in Syracuse; he realized that instruction in the art of speaking would be critical in the new legal system, which required citizens to represent themselves in court. SONJA K FOSS ET AL., CONTEMPORARY PERSPECTIVES ON RHETORIC 4–5 (30th anniversary ed. 2014).

¹¹ The meaning of the term "rhetoric" is widely disputed, and there is no one commonly agreed-upon definition. Postmodern academics have defined it as "the study and practice of how discourse is carried on in any area whatsoever, comprehending the rules of discourse that obtain in any area as well as an account of how they came into being and continue to change." PLATO, PHAEDRUS 2 (James H. Nichols Jr. trans., 1998) [hereinafter PHAEDRUS]. For the purposes of this Article, readers can use the simpler definition proposed by Plato: "the ability to convince." PLATO, GORGIAS 28 (Walter Hamilton trans., rev. ed. 1971) [hereinafter GORGIAS]. Although Plato conceived of this ability solely as used in speaking, this Article includes written arguments as rhetoric.

¹² See HERRICK, *supra* note 3, at 33–35.

¹³ The use of male pronouns in this Part is deliberate and reflects the society in which Plato lived and worked; rarely, if at all, would a female participate in rhetorical activities. See CHERYL GLENN, RHETORIC RETOLD: REGENDERING THE TRADITION FROM ANTIQUITY THROUGH THE RENAISSANCE 20–22, 25, 27, 65–69, 110 (1997) (discussing the role of women in classical Greece and analyzing female rhetoricians' work). However, free male citizens were entitled to fully participate in the democratic society of ancient Athens. HERRICK, *supra* note 3, at 34 ("Every free male citizen enjoyed the right of *isegoria*, a guarantee of equal opportunity to speak freely in public settings and assemblies."). Herrick notes that "rhetorical education offered its students mastery of the skills of language necessary to participating in political life and succeeding in financial ventures" and thus "opened a new doorway to success for many Greek citizens." *Id.* at 35.

¹⁴ In his Introduction to *Gorgias*, Walter Hamilton notes:

In the small but highly developed democracy . . . , participation by all the citizens in politics w[ere] taken for granted; the most important issues were settled by a debate of the whole citizen

involved in a dispute, he would act as his own representation in a judicial proceeding.¹⁵ When Plato spoke of rhetoric, he was thinking of its practical aspects within political and judicial activities of the time; rhetoric was “the ability to convince[,] by means of speech[,] a jury in a court of justice, members of the Council in their Chamber, voters at a meeting of the Assembly, and any other gathering of citizens whatever it may be.”¹⁶

Rhetoric’s power, as well as its importance, could hardly be overstated for the philosophers of Plato’s era. The art of rhetoric was considered “[t]he greatest and best of human concerns,”¹⁷ with the potential to “lead[] . . . soul[s] through speeches.”¹⁸ Rhetoric gave speakers the ability not only to “speak and [] convince the masses” but also to make listeners their “slaves.”¹⁹ Rhetoric’s enormous power was considered “practically supernatural,”²⁰ perhaps even “a tool of domination not generically different from outright coercion.”²¹

Plato believed that such a powerful tool was susceptible to abuse, and two of his dialogues offer an avenue for us to understand his classical critique of rhetoric and advocacy.²² In *Gorgias* and *Phaedrus*, Plato attempted to show readers how one use of rhetoric was false and dishonorable while another was true and honorable.²³ In *Gorgias*, Plato harshly criticized Sophistic orators.²⁴ Modern audiences might think of the Sophists as the lawyers of this time, because Sophists, much like lawyers, claimed the ability to create arguments on either side of any given matter and thus effectively represent either side in a

body; and the method of lot which governed the appointment of many officials might at any time place an individual in a position of great, if temporary, prominence.

GORGAS, *supra* note 11, at 7, *see also* Stanley Wilcox, *Isocrates’ Fellow-Rhetoricians*, 66 AM. J. PHILOLOGY 171, 175 (1945) (noting that rhetorical training was critical “as a means of self-protection and as an instrument for gaining political power.”).

¹⁵ *See* Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1722–23 (1995) (“In ancient Greece, citizens could not hire advocates; they were required to argue their own cases in court, before large juries drawn by lot.”).

¹⁶ GORGAS, *supra* note 11, at 28 (452).

¹⁷ *Id.* at 26 (451).

¹⁸ PHAEDRUS, *supra* note 11, at 68 (261a).

¹⁹ GORGAS, *supra* note 11, at 28 (452).

²⁰ *Id.* at 34 (456).

²¹ Ernest J. Weinrib, *Law as Myth: Reflections on Plato’s Gorgias*, 74 IOWA L. REV. 787, 794 (1989).

²² Plato’s dialogues are works in which he explored important issues and espoused his philosophical views through fictitious conversations between Socrates and other figures of the day. *See, e.g.*, GORGAS, *supra* note 11, at 7; *see also* THE RHETORICAL TRADITION: READINGS FROM CLASSICAL TIMES TO THE PRESENT 28–29, 52–53, 55–56 (Patricia Bizzell & Bruce Herzberg eds., 2d ed. 2001).

²³ *See* GORGAS, *supra* note 11, at 28 (452), 30–31 (454), 33–35 (455–57); PHAEDRUS, *supra* note 11, at vii, 3.

²⁴ *See* GORGAS, *supra* note 11, at 33–35 (455–57), 60 (473).

dispute.²⁵ In *Phaedrus*, Plato revealed a more proper use of rhetoric than that employed by the Sophists: one that would not merely represent the interests of a particular party but would advance justice in the world.²⁶ In these two dialogues, Plato created a contrast between the Sophistic use of rhetoric and the ethical use of rhetoric, and argued not only that the latter is objectively better but also that the practitioners of it will find happiness, while the practitioners of the former will find misery.²⁷

In the two dialogues, Plato made two separate assertions about rhetoricians (those who use rhetoric to persuade): (1) speakers should know the truth of the subject matter about which they speak,²⁸ and (2) orators (the equivalent to our modern lawyers) should know the truth about justice and injustice (for those are the subjects about which they speak), and should use speech and knowledge of rhetoric to promote justice and benefit society.²⁹ The distinction between these assertions is critical.

1. *Speakers Should Know the Truth of the Subject Matter*

Plato believed that a speaker acts wrongly when he seeks to convince an audience to believe something that the speaker does not know to be true. Only a speaker who knows truth,³⁰ and speaks to the audience with the goal of revealing that truth, is acting correctly.³¹ Rhetoric that aims only to create the *appearance* of truth, without the reality, is to true rhetoric as an artificially created appearance of beauty is to good health—superficially similar but lacking in substance.³²

In *Gorgias*, Plato asserted that there is a distinction between belief and knowledge, and that a person may *believe* something without *knowing* it.³³ Rhetoricians cannot have the time within a single speech of advocacy³⁴ to edu-

²⁵ See HERRICK, *supra* note 3, at 38–39. Indeed, the *Gorgias* dialogue has been called “Plato’s attack on lawyers and law teachers.” L.H. LaRue, *Suggestions Toward Reading/Teaching Plato’s Gorgias*, 63 U. CIN. L. REV. 317, 318 (1994).

²⁶ See PHAEDRUS, *supra* note 11, at viii, 4, 68 (261a–c).

²⁷ GORGAS, *supra* note 11, at 56 (470).

²⁸ See *infra* Section I.A.1.

²⁹ See *infra* Section I.A.2.

³⁰ Plato speaks of the speech “that is written with knowledge in the soul of him who understands” and “the speech of him who knows.” PHAEDRUS, *supra* note 11, at 87 (276a); see also GORGAS, *supra* note 11, at 60 (473) (“[T]ruth can never be refuted.”).

³¹ GORGAS, *supra* note 11, at 112–13 (504) (noting that the “good orator” should “be wholly concentrated on bringing righteousness and moderation and every other virtue to birth in the souls of his fellow-citizens, and on removing their opposites, unrighteousness and excess and vice.”).

³² *Id.* at 47 (465) (comparing “beauty culture” to physical training).

³³ *Id.* at 31 (454) (“[K]nowledge and belief are clearly not the same thing.”). Plato, through Socrates, offers the following proof for this assertion: that one may have true and false beliefs, but not true and false knowledge. Thus, the two concepts must necessarily be distinct.

³⁴ *Id.* at 32 (455) (noting that the orator “could hardly teach so large a number of people matters of such importance in a short time.”). Here, Plato appears to assume that justice

cate an audience to a point of full knowledge; they must necessarily settle for creating a conviction of belief in their audiences, thus creating “belief without knowledge.”³⁵ Plato concluded that the rhetorician “need have no knowledge of the truth about things; it is enough for him to have discovered a knack of convincing the ignorant that he knows more than the experts.”³⁶

Plato found it problematic that someone who does not know the “truth” of a particular matter should use the power of rhetoric to persuade uneducated listeners what to believe on that issue. Only a speaker who knows the truth about his topic should use this powerful tool.³⁷ An honorable persuasive speaker must know the truth about all the particular things of which he speaks,³⁸ or his use of rhetoric will be “ridiculous” and “artless.”³⁹ If he does know the truth, however, he can persuade the audience of that truth while maintaining his own honor.⁴⁰

Plato identified the expert who knows truth as one who has studied and learned about the subject matter to be discussed, just as the doctor is one who has “learnt medicine.”⁴¹ If we apply these observations to our contemporary lawyer, then the rhetorician—the role analogous to our contemporary lawyer role in this discussion—should be one who has “learned law.” In modern times, that is the lawyer acting as an advocate; this lawyer has studied the law generally in law school and has studied the particular topic relevant to a specific case in order to advocate on behalf of a client for that case.⁴² Plato’s assertion that a “good” advocate must know the truth about the matter, and speak that truth of it, should apply to lawyers in the following way: Only advocates who know and speak the “truth” of the law are acting honorably; those who either know that

could be taught, although in other works, such as *Meno*, Plato appears to question whether certain concepts are able to be taught. See PLATO, *MENO AND OTHER DIALOGUES: CHARMIDES, LACHES, LYSIS, MENO* 128–30 (89a–91b), 132–38 (89e–97c) (Robin Waterfield trans., 2005) [hereinafter *MENO*] (discussing whether excellence is teachable).

³⁵ GORGIAS, *supra* note 11, at 32 (454).

³⁶ *Id.* at 38 (459). Plato goes on to assert, and Gorgias to concede, that the student of rhetoric must “know right and wrong,” either before he begins a course of rhetorical study or through his completion of that course. *Id.* at 39 (460).

³⁷ PHAEDRUS, *supra* note 11, at 88 (277 b–c) (“Until someone knows the truth of each of the things that he speaks or writes about; and becomes able to define every thing [sic] in relation to the thing itself . . . before this he will not be able to handle with art the class of speeches . . . either for teaching something or for persuading something.”).

³⁸ See *id.* at 66 (259e) (“[T]he speaker’s thought[s] [must] already exist, with knowledge of the truth about the things that he is going to say.”).

³⁹ *Id.* at 70 (262c).

⁴⁰ Once the truth is known to the speaker, the art of rhetoric can help him to persuade others. RICHARD M. WEAVER, *THE ETHICS OF RHETORIC* 15 (1953) (noting that a rhetorician appears to say “I do not compel anyone to learn to speak without knowing the truth, but if my advice is of any value, he learns that first and then acquires me. . . . [W]ithout my help the knowledge of the truth does not give the art of persuasion.”).

⁴¹ GORGIAS, *supra* note 11, at 39 (460).

⁴² See James Boyd White, *The Ethics of Argument: Plato’s Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 872–73, 894 (1983) [hereinafter White, *Ethics of Argument*].

the true law is something other than what they promote, or who speak without bothering to discover what the true law is, are acting dishonorably.

Plato described Sophists (the group willing to argue both sides of a matter) as less interested in knowing and sharing truth with their audience than in pleasing their listeners and achieving agreement through flattery.⁴³ For Plato, speakers who use rhetorical techniques to obtain assent merely by pleasing the audience “without drawing any distinction between better and worse pleasures or concerning themselves in the slightest degree with anything except the giving of gratification by any means, good or bad,” should be condemned.⁴⁴ Instead, speakers should focus their whole concentration on benefitting their audiences and “on bringing righteousness and moderation and every other virtue to birth in the souls of [their] fellow citizens.”⁴⁵

2. *Orators Should Know the Truth About Justice*

Plato also believed that orators should know the truth about matters of justice and injustice and use their rhetorical skill to promote justice. He saw no contradiction or conflation in suggesting that the good orator, who uses rhetoric when appropriate, is someone who has learnt about right and wrong⁴⁶ rather than someone who has simply learned about the subject matter of the law. Quite naturally given the role of rhetoric in his time and place, he spoke mainly about rhetoric as it related to “power in the state, primarily about questions of justice and injustice.”⁴⁷ Despite his assertion that a speaker should understand the “truth” of his subject matter, Plato’s primary directive for orators was that “rhetoric should always be used towards the end of justice.”⁴⁸ Speakers should know and advocate only that which is true and in the best interests of the listeners. Not only is this the ethical choice, it is also essential to speakers’ own hap-

⁴³ GORGIAS, *supra* note 11, at 44–45 (463) (noting that rhetoric used merely to persuade listeners of a particular viewpoint, without knowledge that the viewpoint was true and in the best interests of the listener and society “certainly isn’t a fine or honourable [sic] pursuit” but is a “spurious counterfeit of a branch of the art of government” which only “masquerades as an art”). Pleasure and good are not identical. *See id.* at 95–106 (495–500). For Plato, it was essential that the orator’s goal must be the best interests of the audience, rather than simply their pleasure. *Id.* at 126–27 (513).

⁴⁴ GORGIAS, *supra* note 11, at 107 (501); *see also* PLATO, LACHES, PROTAGORAS, MENO, EUTHYDEMUS 107, 109 (Protagoras 313e) (W.R.M. Lamb trans., 1924) [hereinafter LACHES, PROTAGORAS, MENO, EUTHYDEMUS] (warning that unless a listener has “a doctor’s knowledge” of one’s own soul, it is dangerous to expose oneself to the speech of a Sophist).

⁴⁵ GORGIAS, *supra* note 11, at 113 (504).

⁴⁶ *Id.* at 30–31 (454), 38–41 (459–61).

⁴⁷ White, *Ethics of Argument*, *supra* note 42, at 855.

⁴⁸ *Id.* at 861 (translating GORGIAS at 527); *see also* GORGIAS, *supra* note 11, at 148 (527) (translating the passage as “oratory is to be employed only in the service of right, and the same holds true of every other activity.”).

pinness.⁴⁹ Plato firmly believed that happiness was connected to upright conduct.⁵⁰ Only when acting honorably could a speaker truly be content.

If we apply this part of Plato's advice, the modern advocate must assert justice, and work to promote the truth about right and wrong.

The difference in thinking of an advocate as one who knows truth about law versus one who knows truth about justice is, for us (although perhaps not for Plato), a critical distinction: We can separate the ideas of knowing the subject matter (and thus the truth) of a given law and knowing the truth of right and wrong, justice and injustice, in terms of an ultimate outcome or course of action. A focus on justice is obviously relevant to contemporary legal practice; after all, the modern lawyer who argues for a specific outcome in a particular case is usually asserting that the proposed outcome is not only legally correct but is also the "just" outcome for that matter.⁵¹ However, it is surely possible to know the "truth" of the law and not know what the just outcome of a matter should be, or, alternatively, to not know the truth of the law but know what the just outcome should be. And we might easily believe that law students enter law school wanting to do both: truthfully articulate the law *and* advocate for a just result (or, at least, believe that the system in which they operate will lead to a just result).⁵² Even if lawyers believe the client's desired outcome is just, there may be tension; advocates who are not convinced they are truthfully articulating the law will feel ethically compromised, inauthentic, and just as discontent as if they were advocating for an unjust result.

Unfortunately, the first year of law school may leave some law students with the impression that there is truthful law that can be identified and articulated by students, but that lawyers' focus is not to articulate that law but instead to assert whatever interpretation of the law will benefit their clients. This formative year of law school may obscure the roles lawyers hold in making and

⁴⁹ GORGIAS, *supra* note 11, at 116–17 (507).

⁵⁰ See, e.g., *id.* at 56 (470) ("I maintain that men and women are happy if they are honourable [sic] and upright, but miserable if they are vicious and wicked."); see also *id.* at 117 (507) ("[W]e can win happiness only by bending all our own efforts and those of the state to the realization of uprightness and self-discipline.").

⁵¹ We might hope that the two are the same, and indeed in the posture of a lawyer arguing in court, one expects that the lawyer will assert that the two are identical: "[I]n every case the lawyer on each side must maintain that the result he or she is arguing for is both required by the law and itself fundamentally just." JAMES BOYD WHITE, KEEP LAW ALIVE 95 (2019). And yet we know that, as James Boyd White argues, the modern lawyer is in a sense "the modern rhetorician in its purest form" because "the lawyer always speaks in the service of someone else whose interests he represents and he accordingly says not what he believes to be true or right about an issue he addresses, but whatever will persuade his audience to act in furtherance of those interests." White, *Ethics of Argument*, *supra* note 42, at 872.

⁵² One might believe, as do some proponents of the "neutral partisan" role of the lawyer, that the lawyer need not necessarily advocate for the just result to achieve justice; the adversarial system, with its opposing parties representing competing views, will allow an impartial judge to find and achieve that just result. See *infra* Section II.A.1 (discussing neutral partisan role).

shaping law; it may seem to create for students the choice between turning away from the role of zealous advocate for their clients or embracing that role at the expense of being truthful.

B. Law School and the Socratic Method

Law school—particularly the curriculum and pedagogical approach prevalent in the first year—tends to implicitly suggest to students that a “truthful law” exists and is discoverable. Many students come to law school, and first-year classrooms, seeking to learn “the law” and believing that there is a specific, determinate version of the law (i.e., “truthful law”) to be found.⁵³ Students may experience the Socratic method’s truth-seeking, epistemic function and perceive classroom activities as intended to reveal the “true,” black-letter law on a given topic. And yet the Socratic method, as practiced in the first-year classroom, also has an eristic function: of developing and exploring arguments on both sides of an issue as students learn to “think like lawyers.”⁵⁴ These dual purposes, which are rarely explicitly revealed and discussed with students, may cause students to internalize an ethical tension about articulating “the law,” an uneasiness about the ethics of advocating a particular view of the law when it may not be the “true” law. And this tension is often not explicitly addressed, much less resolved, in the formative first year.

To show how the tension develops, this Section explores the Socratic method as described by Plato, as introduced into law schools by Christopher Columbus Langdell, and as I believe it may be experienced by a significant number of modern law students.

1. The Socratic Method in Plato’s Dialogues

The method Socrates used to teach his own students had specific characteristics: a goal (seeking truth), a process (question-and-answer), and a source (the student’s own soul).⁵⁵ All can be observed in the quintessential example of the Socratic method: the conversation between Socrates and an uneducated youth,

⁵³ See James Boyd White, *An Old-Fashioned View of the Nature of Law*, 12 THEORETICAL INQUIRIES L. 381, 398 (2011) [hereinafter White, *Old-Fashioned*] (noting that the view that law school will teach a specific set of rules that are “the law” is “a view that law students often bring to law school with them.”).

⁵⁴ See *infra* Section I.B.3.

⁵⁵ See William C. Heffernan, *Not Socrates, but Protagoras: The Sophistic Basis of Legal Education*, 29 BUFF. L. REV. 399, 411 (1980). Socrates himself provided no written record describing his method, so our understanding of it relies upon the written descriptions of his students, most notably Plato. See, e.g., *id.*, at 404 (noting that “it is hard to be sure of the accuracy of descriptions of the teaching methods of a man who left no writings.”); James E. MacDonald, *Socratic Method and the Teaching of Law and Virtue*, 7 J. LEGAL STUD. EDUC. 19, 20–21 (1989) (arguing that it is reasonable to rely primarily on Plato’s depiction of Socrates rather than that of Xenophon or Aristotle).

described in the *Meno* dialogue.⁵⁶ There, Socrates set out to prove to Meno that “the soul is immortal and has had many previous lives; what we call learning is in fact the recollection of knowledge that the soul had before.”⁵⁷ To demonstrate that this must be true, Socrates asked Meno’s enslaved boy a mathematical question: If a square has sides of two feet and an area of four square feet, what length sides would a square have whose area was double the original?⁵⁸ The boy has no prior knowledge of the topic, and begins by offering incorrect answers.⁵⁹ Socrates, through careful questioning (and some drawing in the sand), eventually leads him to the correct conclusion.⁶⁰ Socrates argued that this means the boy had the knowledge within him all along and only needed questioning to draw it out and make it apparent to him.⁶¹

Although this classic example deals with a mathematical truth, Socrates’s main focus in Plato’s dialogues was not mathematical truth but moral truths about justice and injustice, right and wrong.⁶² And Socrates suggested that, as with mathematical answers, there were absolute truths to be found for these questions. Through deliberate questions, truth about these weighty matters could be revealed, just as one might expect the scientific method to reveal truths about science.⁶³ The questioner acts as a “mental midwife, the student being the true parent of his or her own knowledge.”⁶⁴ One key aspect of the method was the *elenchus*, or refutation, whereby the teacher’s artful questioning showed the student that a previous statement could not be true, was incon-

⁵⁶ See PLATO, *MENO AND OTHER DIALOGUES*, 112–23 (80a–85d) (Robin Waterfield trans., 2005) [hereinafter *MENO*].

⁵⁷ DOMINIC SCOTT, *PLATO’S MENO* 1 (2006); see also *MENO*, *supra* note 56, at 113–14 (81b–d) (Socrates is claiming that “the human soul is immortal—that it periodically comes to an end (which is what is generally called ‘death’) and is born again, but that it never perishes.”). Plato claims that the soul has, over time, learned everything and is capable of recalling it; “The point is that the search, the process of learning, is . . . nothing but recollection.” *Id.* at 114 (81d).

⁵⁸ See *MENO*, *supra* note 56, at 115–16 (82b–d).

⁵⁹ See *id.* at 116 (82e).

⁶⁰ See *id.* at 120–122 (84d–85c).

⁶¹ See *id.* at 122–24 (85c–86b). This assertion ignores the distinction between knowledge of a particular fact (the answer to the specific question) and knowledge of a method (how to arrive at that answer). Plato’s description suggests that Socrates’s goal is to teach the answer, but one might argue that in fact Socrates is teaching the boy a process of problem-solving with respect to a particular type of problem.

⁶² Heffernan, *supra* note 55, at 408 (“For him, question and answer were a means of awakening his students to *ethical* truth.”); see also MacDonald, *supra* note 55, at 21 (discussing “Socrates’ preoccupation with ethical concerns”); *id.* at 25 (“[T]he Socratic method was always conceived as a method for discovering and teaching truth.”).

⁶³ Plato’s own Academy appeared to have taken a scientific approach and encouraged students to engage in scientific study: “[T]he Academy not only dispensed knowledge, but also produced it.” William L. Benoit, *Isocrates and Plato on Rhetoric and Rhetorical Education*, 21 *RHETORIC SOC’Y Q.* 60, 67 (1991).

⁶⁴ Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 *HASTINGS L.J.* 725, 732 (1989) [hereinafter Neumann, *Art of Critique*].

sistent with other statements made or beliefs held by the student, and thus must be abandoned or modified.⁶⁵

Notably, Socrates's method required no sources for knowledge other than the student's own mind; Socrates believed that "a person's soul contains all ethical knowledge"⁶⁶ and that there was no need to consult outside sources.⁶⁷ While the answers might be known to the teacher,⁶⁸ the teacher's role was not to impart knowledge by telling the student the correct answers.⁶⁹ Instead, the teacher's interaction with the student would allow the truth to come forth.

Plato was careful to distinguish the method employed by Socrates (or at least, Socrates as Plato chose to portray him) from the Sophistic approach to discourse. In the *Euthydemus* dialogues, Plato provides a clear contrast between his Socratic method and the Sophistic style, although both utilize a similar question-and-answer process.⁷⁰ In *Euthydemus*, Plato describes how the Sophist brothers Euthydemus and Dionysodorus engaged in dialogue with the student Cleinias on the topic of learning.⁷¹ The question before them was: Who learns, "the wise or the foolish?"⁷² In playful debate, the brothers refute Cleinias's answers regardless of the position he takes.⁷³ They are able to do so because they change their approach to defining "learn" depending on the position they currently argue.⁷⁴ Those who are foolish (or, in some translations, ignorant) may

⁶⁵ *Id.* at 730; see also MENO, *supra* note 56, at 120 (84b). The resulting confusion, or feeling of being stuck, is known as *aporia*. See *id.* at viii (defining *aporia* as "having no resources," "having no way to progress," "being in an impasse," and "being stuck"). *Aporia* was necessary (although not enjoyable from the student's perspective) to motivate the student to continue searching for knowledge, after realizing that the initial understanding was incorrect or incomplete.

⁶⁶ Donald G. Marshall, Emeritus Professor, Socratic Method and the Irreducible Core of Legal Education Lecture (Jan. 19, 1994), in 90 MINN. L. REV. 1, 11 (2005) ("Teaching ethical truths is, therefore, simply a matter of finding the questions that were keys to unlock the soul and allow the student to discover knowledge he always possessed.").

⁶⁷ See Heffernan, *supra* note 55, at 410–11 (noting that "Socrates was determinedly hostile to textual analysis of any kind" and citing *Protagoras* 347C as evidence that Socrates believed that "[t]he best people . . . entertain each other from their own resources It is the truth, and our own minds, that we should be testing.").

⁶⁸ It is not entirely clear whether Socrates himself believed that he already knew the answers to his questions, or whether the process was one in which both questioner and answerer sought truth and discovered it together through the process. See Amy R. Mashburn, *Can Xenophon Save the Socratic Method?*, 30 T. JEFFERSON L. REV. 597, 614–15 (2008) (discussing whether Socrates claimed actual knowledge of moral truths and used his approach to demonstrate those truths, or "whether [his method] was used solely to illustrate the falsity of other beliefs.").

⁶⁹ See Heffernan, *supra* note 55, at 409 ("According to Socrates, learning is a form of recollection by which a student recovers from his soul knowledge he has always possessed but of which he was, for one reason or another, no longer consciously aware.").

⁷⁰ See LACHES, PROTAGORAS, MENO, EUTHYDEMUS, *supra* note 44, at 389.

⁷¹ See *id.* at 389–95.

⁷² *Id.* at 393.

⁷³ *Id.*

⁷⁴ *Id.*

“learn” because they acquire knowledge they did not previously have;⁷⁵ but those who are wise (and already have knowledge) may “learn” because they quickly gain understanding (e.g., those who are “wise” will be the ones who are readily able to learn a teacher’s lesson, while those who are foolish would struggle to understand it).⁷⁶ Whichever position Cleinias takes, he ends up losing the argument and appearing to contradict himself because he fails to distinguish between the two meanings.⁷⁷ Plato contrasts this playful, bantering argument with the Socratic method, when Socrates engages in a discussion with Cleinias about pursuing philosophy and caring for virtue.⁷⁸ The brothers’ argument only led to confusion (and laughter), while leaving Cleinias “not a whit the wiser as to the true state of the matters.”⁷⁹ In contrast, Socrates’s approach leads the young man to a resolution: an answer to the question posed.⁸⁰

Euthydemus highlights an important distinction between Plato’s Socratic method and the Sophistic approach. For Plato, the ultimate goal was to seek truth, and the truth was absolute and could be recalled from the soul’s prior knowledge of those truths.⁸¹ Plato’s Socrates believed in truth that existed apart from human expression of it, a kind of divine energy.⁸² The method’s process included disputation, as the teacher posed questions and the student responded, often by arguing a particular point. These disputes, however, were always a dialectical activity; their purpose was finding and revealing truth.⁸³ The Sophists engaged in similar activities (the characteristic question-and-answer process), but with a very different goal: For Sophists, the process was eristical rather than dialectic.⁸⁴ The eristical approach views dispute as desirable in of

⁷⁵ See *id.* at 395.

⁷⁶ *Id.*

⁷⁷ Socrates eventually explains to the confused young man that the argument turns on the ambiguous nature of the word learning, which can be applied

on the one hand to the case of a man who, having originally no knowledge about some matter, in course of time receives such knowledge; and on the other hand[,] the same word is applied when, having the knowledge already, he uses that knowledge for the investigation of the same matter.

Id. at 401.

⁷⁸ See *id.* at 403.

⁷⁹ *Id.* at 401.

⁸⁰ *Id.* at 407. Socrates was not above using ambiguity to advance his own arguments. Rebecca Bensen Cain argues, however, that his use of ambiguity “enables him to put forward the interpretation which he thinks is best,” at least in this example. REBECCA BENSEN CAIN, *THE SOCRATIC METHOD: PLATO’S USE OF PHILOSOPHICAL DRAMA* 74 (2007). Following the work of Francisco Gonzalez, Cain notes that Plato criticizes the brothers’ eristical approach less because they use ambiguity and more because their argument does not help the student to a greater understanding: “[T]he boy has not gained anything from the experience.” *Id.* at 72.

⁸¹ See Marshall, *supra* note 66, at 11.

⁸² See Heffernan, *supra* note 55, at 408–11.

⁸³ *Id.* at 408 (“For [Socrates], question and answer were a means of awakening his students to ethical truth.”).

⁸⁴ See, e.g., LACHES, PROTAGORAS, MENO, EUTHYDEMUS, *supra* note 44, at 375.

itself, and does not claim that the process of proposal and disputation will necessarily result in truth.⁸⁵ The word “eristic” itself derives from the Greek “fond of wrangling,” and it carries with it nuances of “hair-splitting, disputatious, and specious reasoning.”⁸⁶ Persuasion, in this more Sophistical view, need not be connected to truth.⁸⁷ For the Sophists, truth was not absolute but relative,⁸⁸ “absolute truth was unknowable and perhaps nonexistent and had to be established in each case according to the perspective of the individual involved.”⁸⁹ Truth resided in humans and was expressed (and expressible) by them.⁹⁰ Not surprisingly, the Sophists found ambiguous language not only acceptable but also essential: “[T]he incomplete, ambiguous, and uncertain world could be interpreted and understood only by means of language” and “truth and reality do not exist prior to language but are creations of it.”⁹¹ In contrast, for Plato (and his Socrates), truths were not relative but absolute; the true definitions of virtue, courage, or excellence would not change based on context, and when a proposed definition could do so it was evidence that the definition was insufficient.⁹² And although the method included both eristic (refutation) characteristics and epistemic (knowledge-seeking) characteristics, and this combination

⁸⁵ Indeed, the Merriam-Webster definition of *eristic* includes “characterized by disputatious and often subtle and specious reasoning” and “argumentative as well as logically invalid.” *Eristic*, MERRIAM-WEBSTER, www.merriam-webster.com/dictionary/eristic [<https://perma.cc/J7RR-VG3F>] (last visited on Feb. 16, 2020). Somewhat unfairly, the Sophists’ use of eristic approaches has resulted in today’s understanding of “sophistic” having negative nuances, such as “plausible but fallacious,” *Sophistic*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sophistic> [<https://perma.cc/M5XK-MQ5J>] (last visited on Feb. 16, 2020), and the term “sophist” to refer to a person who “makes good points about an issue—until you realize those points aren’t entirely true, like a political candidate who twists an opponent’s words or gives misleading facts during a speech,” *Sophist*, VOCABULARY.COM, <https://www.vocabulary.com/dictionary/sophist> [<https://perma.cc/RWQ7-CQ3W>] (last visited Feb. 16, 2020).

⁸⁶ MacDonald, *supra* note 55, at 24.

⁸⁷ See J. Christopher Rideout, *Ethos, Character, and Discoursal Self in Persuasive Legal Writing*, 21 J. LEGAL WRITING INST. 19, 35 (2016) (“The Sophists, who saw the world as uncertain and who distrusted philosophical or theological systems of knowledge, did not feel compelled to anchor persuasion in truth.”).

⁸⁸ For the Sophists, truth was not found from gods or Platonic universal forms but was “relative to places and cultures;” they believed that “reality itself is a linguistic construction rather than an objective fact.” HERRICK, *supra* note 3, at 41; see also MacDonald, *supra* note 55, at 23 (“The Sophists, impressed with the variability of customs from place to place and time to time, relativized ethical concepts to given places and times.”).

⁸⁹ SONJA K. FOSS ET AL., *supra* note 10, at 5–6.

⁹⁰ See HERRICK, *supra* note 3, at 41. The Sophist Protagoras wrote “man is the measure . . . of all things; of things that are not, that they are not; of things that are, that they are.” *Id.* at 45.

⁹¹ SONJA K. FOSS ET AL., *supra* note 10, at 6.

⁹² See, e.g., William Epstein, *The Classical Tradition of Dialectics and American Legal Education*, 31 J. LEGAL EDUC. 399, 403–04 (1981).

could be conflicting and confusing,⁹³ the ultimate goal of the Socratic method was seeking truth rather than creating arguments.⁹⁴

2. *Langdell's Scientific Method in Law School*

In 1870, Christopher Columbus Langdell became the Dean of Harvard Law School and famously introduced a new method of teaching that was called “Socratic.”⁹⁵ Although controversial at first, this method fairly quickly gained popularity and, by the beginning of the twentieth-century, was widely accepted as a remarkable innovation and the prevailing approach in legal education.⁹⁶ As originally proposed, the method was similar to the original Socratic method in both goal and process; however, as eventually justified, it had real and significant differences from the original Socratic method.⁹⁷

Langdell's first goal in using this method was ostensibly the same as Socrates's: to find the truth (here, the truth of the law).⁹⁸ His process was, like Socrates's, dialectical question and answer between teacher and student.⁹⁹ In contrast to earlier forms of legal education, which encouraged apprenticeships and depended on lectures to transfer knowledge about the black-letter law from teacher to student, Langdell's approach placed a much greater focus and emphasis on formal knowledge.¹⁰⁰ Langdell believed that “[the] law [is] a sci-

⁹³ Rebecca Bensen Cain argues: “One of the major drawbacks of [the Socratic method], from my point of view, is that the elenctic and epistemic functions are at cross-purposes. They have different immediate aims and follow a different set of rules for how to achieve that aim.” CAIN, *supra* note 80, at 58–59. As a result, “Socrates is playing by two sets of rules which come into conflict on many occasions.” *Id.* at 59.

⁹⁴ See Heffernan, *supra* note 55, at 415, 420–21.

⁹⁵ See ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 52–64 (1983); Epstein, *supra* note 92, at 399.

⁹⁶ STEVENS, *supra* note 95 at 63 (“By the beginning of the twentieth century, then, the case method, although far from unanimously approved, was recognized as *the* innovation in legal education.”).

⁹⁷ Both critics and proponents of the Langdellian approach tend to agree that what is currently used in law school is not a true “Socratic method.” Harris Wofford, *On the Teaching of Law and Justice*, 53 N.Y.U. L. REV 612, 614 (1978) (“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.”).

⁹⁸ See STEVENS, *supra* note 95, at 53 (noting the method's “original purpose was to isolate and analyze the relatively few principles of the common law that the Harvard system postulated.”).

⁹⁹ See Epstein, *supra* note 92, at 406.

¹⁰⁰ Langdell's changes arose in a climate in which

[t]he new university education would not be about shaping the self, as the earlier American college had been. Instead, the updated university curriculum emphasized testing and criticizing beliefs in order to build up a body of well-established “facts” that are supported by a true understanding of the principles according to which things work.

CARNEGIE REPORT, *supra* note 6, at 5. “Langdell's new law school embraced the emphasis on formal knowledge by presenting law as a science in the making.” *Id.*

ence,”¹⁰¹ and that the principles of that science could be discovered through the study of judicial opinions.¹⁰² Langdell saw no need to discuss statutes¹⁰³ or the experience of practicing law.¹⁰⁴ With his approach, the classroom experience would consist of questions, posed to one or more students, about a particular case: What were the relevant facts? What was the procedure? What was the holding of the court? What was the reasoning behind that holding? And if the facts were slightly different—in this way or that—would that have altered the outcome?¹⁰⁵

The approach treated law as a science and, at least superficially, appeared to be similar to the scientific method. Like the scientific method, Langdell’s method begins with a starting hypothesis about a matter of interest to teacher and student: the student’s initial answer to the teacher’s question about a case or its rule of law, for example.¹⁰⁶ Just as observation in science tests the hypothesis and proves it correct or incorrect, the continued “observation” of the law, through repeated questions and answers, should reveal whether the student’s initial understanding is correct or needs to be further refined.¹⁰⁷ Not only is there superficial similarity between the scientific method and Langdell’s version of the Socratic method, the comparison is quite attractive: The idea that “the basic questions of politics and law have answers that possess the same clarity and finality as the answers to mathematical questions” is truly alluring.¹⁰⁸ Under this approach, the legal system was “a unitary, self-contained,

¹⁰¹ STEVENS, *supra* note 95, at 52; Edmund M. Morgan, *The Case Method*, 4 J. LEGAL EDUC. 379, 379 (1952).

¹⁰² CARNEGIE REPORT, *supra* note 6, at 5 (“Judicial decisions were analyzed in a scientific spirit as specimens from which general principles and doctrines could be abstracted.”).

¹⁰³ See Richard K. Neumann, Jr., *Osler, Langdell, and the Atelier: Three Tales of Creation in Professional Education*, 10 LEGAL COMM. & RHETORIC 151, 170 (2013) [hereinafter Neumann, *Three Tales of Creation*] (noting that “[a]s a genre, casebooks are based on the idea that nearly all we can know about what happens in the law comes from litigation in the form of judicial opinions.”).

¹⁰⁴ Langdell also started the pattern of hiring law faculty who had no experience practicing law. See *id.* at 177–79. Langdell believed that “experience in learning law” was the only relevant experience to teach the law, “not experience in the work of a lawyer’s office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law.” *Id.* at 178–79.

¹⁰⁵ See Epstein, *supra* note 92, at 409–16.

¹⁰⁶ See *id.* at 409, 411.

¹⁰⁷ See MacDonald, *supra* note 55, at 28–29. He notes:

One cannot resist noting the parallel between the Socratic method and Sir Karl Popper’s analysis of scientific method. Of course, no one would pretend that Socrates foresaw the place empirical observation would occupy in modern science. For Socrates the method was essentially one of conceptual analysis. Even so, one is hard put otherwise to discern a distinction between the interplay of hypothesis and *elenchus* in the Socratic method and that paradigm of scientific method that Popper describes as “conjecture and refutation.”

Id.

¹⁰⁸ Anthony T. Kronman, Robert S. Marx. Lecture: Rhetoric (Feb. 23, 1999), in 67 U. CIN. L. REV. 677, 683 (1999).

value-free, and consistent set of principles that could then be applied to each new case as it occurred.¹⁰⁹

Like the original Socratic method and the scientific method, Langdell's approach appeared to be dialectical. The dialectical approach proposes that truth can be discovered by assessing reasoned argument on the different points of view; thus, if one party proposes and defends a particular assertion, and the other party proposes and defends the competing proposition, truth should be ascertainable.¹¹⁰ This is the approach Socrates employed, and it is the approach Langdell suggested could be employed in the classroom to reveal the law to students.¹¹¹

So far, so good. But Langdell did not seek only to reveal black-letter law; he also intended the method to simultaneously teach the analytical skills associated with "thinking like a lawyer."¹¹² And it was that goal, not the goal of finding "truth" of the law, that would eventually become the primary justification for use of the Socratic method in law school classrooms.¹¹³

To achieve that end, the classroom would not only include eristical activities alongside the dialectical ones, but it would also emphasize the eristical activities as the point of the endeavor.¹¹⁴ In this sense, the law school classroom using a "Socratic" method would be less classically Socratic and more Sophistic in its aspects.¹¹⁵

In key ways, the goal of "thinking like a lawyer" leads law professors to encourage eristical argument as they model the process of making arguments on both sides of a case.¹¹⁶ Today's law professors, like the Sophists, focus more on the game of debate itself than on the moral education or absolute truth-

¹⁰⁹ STEVENS, *supra* note 95, at 53.

¹¹⁰ *Dialectic* is defined as "systematic reasoning, exposition, or argument that juxtaposes opposed or contradictory ideas and usually seeks to resolve their conflict: a method of examining and discussing opposing ideas in order to find the truth." *Dialectic*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/dialectic> [<https://perma.cc/9EMS-SPVD>] (last visited Feb. 17, 2020).

¹¹¹ See Epstein, *supra* note 92, at 399–400.

¹¹² See, e.g., Neil Hamilton & Verna Monson, *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 325, 376 (2011) (describing the method as one where the instructor is shaping right doctrinal answers and analytical processes with a clear standard of professional excellence at the technical skills involved).

¹¹³ See STEVENS, *supra* note 95, at 56 ("Although Langdell emphasized the case method as a means of studying rules scientifically, in practice he was the instrument of change in a different direction.").

¹¹⁴ See Heffernan, *supra* note 55, at 411.

¹¹⁵ See *id.* at 412. Professor Heffernan makes a compelling case that today's law professor is more like the Sophist Protagoras than Socrates. See *id.* at 418–20.

¹¹⁶ See Mashburn, *supra* note 68, at 621 ("In classical Socratic terminology, therefore, the ideal law teacher assumes both the Sophist and midwife roles.").

seeking that was so important to Socrates.¹¹⁷ Professor Heffernan, who has argued that the “Socratic method” as used in law school is more akin to the method of the Sophist Protagoras, noted that “[f]or Protagoras, as for law professors, the aim of instruction is not to expose students to substantive points of knowledge (although this is a byproduct of their training) but instead to equip them with the technique by which instruction is carried out.”¹¹⁸

From the outset, the dual goals of Langdell’s method caused confusion.¹¹⁹ Were professors conveying information (truth about law), modeling skills (eristical debate), or both, and which one should dominate? Even in Langdell’s own classroom, students noted that he seemed more focused on the “why” and “how” than the rules themselves,¹²⁰ and the American Bar Association in 1891 criticized the method for giving insufficient attention to what lawyers really needed to know: the law.¹²¹ Despite Langdell’s self-proclaimed belief that “law is a science, and that all the available materials of that science are contained in the printed books,”¹²² those who promoted the approach increasingly did so because of its ability to teach students how to think like a lawyer.¹²³

This is partially true because Langdell’s proposal that law could be treated as a science, which was met with skepticism at its introduction, had even less support within the legal academy by the end of the twentieth century.¹²⁴ The Legal Realism movement of the 1930s shifted the American legal system’s approach away from a formalistic view of law as true science and towards legal realism.¹²⁵ Legal realism “takes the notion of law as a prediction of what human officials will do, more than as an existent, objective, determinable limit or boundary on client behavior.”¹²⁶ By the 1970s, the legal academy had rejected the premise of law-as-science.¹²⁷

¹¹⁷ See Heffernan, *supra* note 55, at 412 (noting that “law professors are not permitted to use their classrooms to carry out direct moral instruction of their students”); Neumann, *Art of Critique*, *supra* note 64, at 729.

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.” Socrates scorned all of this as the teaching of manipulation, rather than analysis and self-knowledge.

Id.

¹¹⁸ Heffernan, *supra* note 55, at 420.

¹¹⁹ See STEVENS, *supra* note 95, at 53.

¹²⁰ See *id.* at 55.

¹²¹ See *id.* at 58.

¹²² *Id.* at 53 (quoting Langdell’s speech published in the English *Law Quarterly Review* in 1887).

¹²³ *Id.* at 55–56.

¹²⁴ See *id.* at 156.

¹²⁵ *Id.* (noting that the Realist movement “kill[ed] the Langdellian notion of law as an exact science”).

¹²⁶ Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 625 (1986). Perhaps the clearest description of pure legal realism is Llewellyn’s well-known statement: “What . . . officials do about disputes is, to my mind, the law itself.” KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR*

This shift might have cast doubt upon the Socratic method's utility in law school: Legal truths were not absolute as Plato's had been, but mutable over time and subject to varying interpretations. For that reason, the legal academy might have moved away from the method, choosing some other way to teach "thinking like a lawyer" without the overtones of truth-seeking. But despite the demise of law-as-science as a core principle, the method lived on: Its supporters argued that the method's true genius was not necessarily its truth-finding function, but its ability to promote analytical thought that would allow lawyers to predict what courts would do.¹²⁸ In that sense, the question-and-answer process could provide an active learning approach to discovering the law of a particular line of cases or of specific lines of doctrine. Proponents believed that if presented well, the method exposed students not only to doctrines of a particular area but also to typical problems in that field; it then could encourage them to analyze the problems and the law themselves rather than passively accepting the description of the law as stated in lecture format by a professor.¹²⁹ The active engagement of the student (either specifically, in conversation with the professor, or vicariously, by following the conversation of a fellow classmate with the professor) would ensure a more thorough understanding, and would allow the student to practice the analytical approaches of judicial decision-makers.¹³⁰ Thus, the method persevered and retained strong defenders.¹³¹ Today, it "remains the law's signature pedagog[y]"¹³² and continues to be the approach that is used "almost exclusively in the first phase of doctrinal instruction."¹³³

LAW AND ITS STUDY 12–13 (2012). We might also consider the words of Justice Holmes, who noted that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

¹²⁷ See, e.g., Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 249 (1978) (stating that "[t]he primitive conception that in some way men can arrive at true propositions and by reasoning logically from these premises arrive at new legal truths or specific decisions by deduction alone[] is a false and mischievous way of looking at the legal universe."). To be sure, legal realism did not win the day completely; there are plenty of critiques of pure realism. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY*, 20–24 (1988) (hereinafter *LAWYERS AND JUSTICE*). But few would deny that this view has had a profound influence on the American legal system and has a firm hold in today's legal education.

¹²⁸ See STEVENS, *supra* note 95, at 269 (noting that in the post-1945 era of legal education, "most legal educators and practitioners regarded it as an unparalleled method for training students to be lawyers.").

¹²⁹ See Morgan, *supra* note 101, at 384.

¹³⁰ *Id.*; see also Epstein, *supra* note 92, at 416–18.

¹³¹ See Elizabeth G. Porter, *The Socratic Method*, in *BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD* 101, 102 (Deborah Maranville et al. eds., 2015) (arguing that the method has been undervalued and "is an easily scalable, effective, deeply engaging way to achieve active student learning").

¹³² *Id.* at 101.

¹³³ CARNEGIE REPORT, *supra* note 6, at 50.

3. *Critiquing the Method: Risks for Today's Students*

Despite its success, many scholars have criticized the Socratic method's use in law school.¹³⁴ In 2007, the Carnegie Foundation's Report on legal education asserted that the method, although it might be effective in training students to "think like lawyers," prevented students from integrating ethical and moral values into their understanding of lawyering.¹³⁵ By placing matters of justice "secondary to formal correctness,"¹³⁶ the method obscures the ethical aspects of lawyering and results in a "loss of orientation and meaning" for law students.¹³⁷ The Carnegie Report identified a "hidden curriculum" within law school, one that both "shapes, [and] misshapes, [legal] education," consisting of lessons that were never explicitly expressed yet nonetheless were effectively received by the students.¹³⁸

¹³⁴ See, e.g., Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955, 958–70 (2005). In the 1970s and 1980s, detractors made a variety of allegations: It was psychologically harsh to students, discriminatory to females, ineffective in conveying practical skills, and more. *Id.* at 973–87 (discussing and arguing against several leading critiques of the method as used in law school); see also Benjamin V. Madison, III, *The Elephant in Law School Classrooms: Overuse of the Socratic Method as an Obstacle to Teaching Modern Law Students*, 85 U. DET. MERCY L. REV. 293, 294–95, 303–09 (2008) (arguing for an overhaul of the legal education system through diversifying its teaching methods). More recently, the method has been described as "out of fashion among those who write about legal pedagogy." Porter, *supra* note 131, at 101–02 (discussing critiques of method and defending method against these critiques).

¹³⁵ CARNEGIE REPORT, *supra* note 6, at 57. The Carnegie Report suggested that the method downplayed justice and "force[s] students to separate their sense of justice and fairness from their understanding of the requirements of legal procedure and doctrine." *Id.* While the Report conceded that the case-dialogue method was capable of "encompass[ing] distinctions between moral and legal issues," it ultimately concluded that, as used in the classroom, it did not do so. *Id.* at 59 (noting that "neither the typical course nor the case book used ventures to raise the question.").

¹³⁶ *Id.* at 58.

In order to gain facility in legal reasoning, case-dialogue teaching often forces students to separate their sense of justice and fairness from their understanding of the requirements of legal procedure and doctrine. Matters concerning the "equities" of a situation may be aired in class discussion, but almost always as second thoughts about "policy."

Id. at 57.

¹³⁷ *Id.* at 7. Around the same time as the Carnegie Report, another study of best practices in law school pedagogy argued that the method was overused in law schools. See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 102–04 (2007) (concluding that the Socratic method is pedagogically ineffective and that teachers' use and abuse of it can psychologically damage students' "sense[s] of self-worth, security, authenticity, and competence"). And Elizabeth Mertz, a lawyer-anthropologist, conducted a comprehensive study of law school classrooms and released a linguistic study of the "language of law school," which blamed the method for students experiencing a "linguistic rupture, a change in how they view and use language." ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" 22 (2007).

¹³⁸ CARNEGIE REPORT, *supra* note 6, at 31–32. Mertz's study made similar conclusions, stating that law school encourages students to "los[e] touch with some fundamental aspects of what brought [them] to law school in the first place: concerns with justice, fairness, or helping people." MERTZ, *supra* note 137, at 11. Mertz also noted the connection between this dis-

In this Article, I suggest the extensive use of the Socratic method in the first year of law school creates the risk of providing another “hidden curriculum” lesson; some students will receive a lesson about what it means to be an advocate and express the meaning of a given law as it applied to a set of client facts. As students simultaneously experience the epistemic, truth-seeking function of the method and the eristic, disputation activities of it, they may internalize the idea that legal truth exists and is discoverable, but that the role of lawyers is not to speak that truth; instead, a lawyer’s role is to identify arguments on either side as the Sophists did, disregarding the actual truth of the matter. Like the hidden lesson identified by the Carnegie Report, in which students experience a disconnect between their sense of justice and the formal lessons of the law, this lesson has negative implications for student well-being and ethical identity because it creates a tension between students’ ideas of what the law is and their ideas of what they must say the law is to serve their clients. The tension arises in part from student expectations upon entering law school and the challenge of accepting law school’s threshold concept of the malleability of law. It is exacerbated when professors employ the Socratic method without explicitly acknowledging the method’s dual (and sometimes conflicting) goals.

Law students may come to law school expecting to learn “the law,” believing that lawyers are distinguished from laypeople because of their knowledge of laws.¹³⁹ The idea that the law is not an established set of rules “may be counter-intuitive, alien, or even objectionable.”¹⁴⁰ As James Boyd White notes:

This is a view that law students often bring to law school with them. They expect that we shall teach them a set of rules. These are the rules they will apply as lawyers, and knowledge of them is what sets them apart from the non-lawyer, to whom they are unknown. A large part of a good legal education is disabusing them of this view.¹⁴¹

Moving away from that view, however, to a more nuanced view of law, is not as easy as it sounds. Melissa Weresh has persuasively argued that the malleability of law is a “threshold concept” in legal education: a concept that causes a “cognitive shift in the [learner’s] thinking process.”¹⁴² Such concepts are characterized, in part, by being both troublesome and transformative; they are

connect and psychological distress. *See id.* at 27 (reporting on psychiatrist Alan Stone’s review of the method, which found it could negatively impact “students’ interpersonal relations and sense of self-esteem, a theme echoed in current studies of psychological distress among law students.”).

¹³⁹ *See White, Old-Fashioned, supra* note 53, at 398. Of course, law students come to law school for many other reasons as well, and surely not all of them would endorse the view that the law might be a fixed set of rules. Still, it seems uncontroversial to maintain that one reason students enter law school is to learn “the law,” and that many students have not given serious thought to the law other than as a set of rules.

¹⁴⁰ Melissa H. Weresh, *Stargate: Malleability as a Threshold Concept in Legal Education*, 63 J. LEGAL EDUC. 689, 711 (2014).

¹⁴¹ White, *Old-Fashioned, supra* note 53, at 398.

¹⁴² Weresh, *supra* note 140, at 689–90.

difficult to master, but, once accepted, mark an irreversible shift in the way one views the world and the discipline.¹⁴³ Such a shift does not come easily.

The dual goals of the Socratic method in the law school classroom may exacerbate the challenge that students face in accepting this threshold concept. “The challenge of any pedagogy is to make the invisible visible, both in the mind of the teacher and the mind of the learner.”¹⁴⁴ Unfortunately, the Socratic method makes it all too possible for the invisible to remain invisible. Here, the invisible suggestion is that the law is not created and shaped by people but instead exists as an already-formed, unchanging truth just waiting to be discovered and shared.¹⁴⁵ The epistemic, truth-seeking function of the method encourages rather than discourages a view that there is a true law that may be discovered and applied. While the method may expose students to the ideas that there are “good arguments on both sides,”¹⁴⁶ it also reinforces the idea that it is the better argument that prevails and is “correct” in some absolute sense. Elizabeth Mertz asserts that it is an “obvious and ubiquitous feature of Socratic method teaching” to insist on “a dialogic or argumentative form from which, eventually, legal truth emerges.”¹⁴⁷ There is, after all, usually a “right” doctrinal answer about what the current state of the law is, and that “legal truth,” to the students, is almost certainly black-letter law revealed by the appellate courts’ decisions. As the students engage in the question-and-answer of the method, they are constantly searching for the “right” answer: the doctrinal law that they eventually glean from class discussion of the opinions (or, failing that, will obtain from commercial outlines and guides). That black-letter law in turn provides the information that the students are rewarded for knowing and using on their all-important final exams. One popular critique of the case dialogue method is that it “hides the ball” and that the method is undesirable because students “don’t learn the material effectively from the Socratic method.”¹⁴⁸ This critique

¹⁴³ See *id.* at 694–95.

¹⁴⁴ CARNEGIE REPORT, *supra* note 6, at 59.

¹⁴⁵ See MERTZ, *supra* note 137, at 59.

¹⁴⁶ See Morgan, *supra* note 101, at 384.

¹⁴⁷ MERTZ, *supra* note 137, at 59. She goes on to note:

This has some very obvious parallels with courtroom discourse and with the U.S. legal system’s overall dependence on procedure as a guarantor of justice. (As long as both parties get their day in court, represented by attorneys who will engage in vigorous linguistic combat on their behalf, justice is done)[.] The classic Socratic dialogue in law teaching, then, both indexes and mirrors a core legal model not only of how knowledge or truth is obtained but also of how justice is achieved.

Id.

¹⁴⁸ Brian Leiter, *The “Socratic Method”: The Scandal of American Legal Education*, LEITER REP.: A PHILOSOPHY BLOG (Oct. 20, 2003, 12:15 PM), https://leiterreports.typepad.com/blog/2003/10/the_socratic_me.html [<https://perma.cc/LTM9-7C7D>] (“If the Socratic method were really an effective way to teach students law, why would almost all law students (including the very best ones) turn to commercial outlines?”).

reveals students' perception that the purpose of the Socratic method in law school is to provide them with knowledge of true law.¹⁴⁹

A student who focuses on the epistemic aspects of the Socratic method "can reduce the course to the black-letter law, either through hornbook or the more laborious method of reading the cases; the teacher cannot prevent it, and his examination in any event seems to ask for nothing that a bright student cannot provide on the basis of hornbook reading."¹⁵⁰ The sources for first-year classes do little or nothing to contradict this view; first-year mandatory classes have not changed much from the requirements of the Langdellian era and "reflect[] a nineteenth-century view of law and how it's made."¹⁵¹ Casebooks often provide minimal, if any, context about the historical or social considerations at the time the opinion was issued; whether the class includes any coverage of those considerations, or any discussion of how the laws change over time, depends almost entirely on the inclinations (and the time constraints) of the professor.¹⁵² The case dialogue method relies on "highly redacted accounts of legal proceedings that render fact-patterns in condensed formulas."¹⁵³ The Carnegie Report asserted that using these redacted accounts "can give the misleading impression that facts are typically easy to 'discover,' rather than resulting from complex processes of interpretation that are shaped by pressures of litigation."¹⁵⁴ Similarly, the method's reliance on judicial opinions also suggests that the law is like those facts: it, too, exists within nature.¹⁵⁵ In the first year, discussions about where the law comes from, how it develops, and who develops it may be brief, early, and easily forgotten: a lecture during Orientation, per-

¹⁴⁹ And that knowledge is required not only for first year exams but also to pass the bar exam; thus, the message that a "correct" law exists is both introduced in the first year and reinforced later in legal education.

¹⁵⁰ James Boyd White, *Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) to Be*, 36 J. LEGAL EDUC. 155, 159 (1986) [hereinafter White, *Doctrine in a Vacuum*].

¹⁵¹ Neumann, *Three Tales of Creation*, *supra* note 103, at 172 (noting that the curriculum established by Langdell is "remarkably close to the required curriculum at most law schools today"). Evidence has often moved to second year, Legal Writing has been added, and Professional Responsibility is required at some point. These changes aside, the standard first-year experience seems close to what Langdell proposed for Harvard in the 1871–72 academic year. *Id.*

¹⁵² Deborah L. Rhode notes that "The standard casebook approach offers no sense of how problems unfolded for the lawyers or ultimately affected the parties. Nor does it adequately situate formal doctrine in social, historical, and political context." DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 198 (2000) [hereinafter INTERESTS OF JUSTICE].

¹⁵³ CARNEGIE REPORT, *supra* note 6, at 53. Like the Sophists, today's law professors focus on textual analysis, rather than on the person's soul, for the acquisition of knowledge. See Heffernan, *supra* note 55, at 418–20.

¹⁵⁴ CARNEGIE REPORT, *supra* note 6, at 53.

¹⁵⁵ Law students may miss the "performative character" of legal texts. See MERTZ, *supra* note 137, at 60.

haps, or the first few class sessions in Civil Procedure.¹⁵⁶ Because the majority of the students' time is dedicated to reading case law and extracting from it the law of the case, without reference to who created the law or how, law school tends to obscure and minimize the role that people, including lawyers, play in creating the rules that are eventually adopted by the court.¹⁵⁷

Students experience a high cognitive load in law school, working at high levels of Bloom's Taxonomy;¹⁵⁸ they are asked not only to understand and retain content, but to learn and apply new analytical skills, and then to apply both the content and the skills to new factual scenarios. This poses significant challenges to their information processing abilities.¹⁵⁹ Many students will try to minimize cognitive strain as much as possible by focusing only on what appears to be absolutely necessary: learning "rules of law and substantive policies."¹⁶⁰

¹⁵⁶ Civil Procedure courses often begin by tracing the development of personal jurisdiction over several decades. This affords an opportunity for the professor to show (at least implicitly, and often explicitly) how historical, economic, and social considerations influenced the development of the rules. *See, e.g.*, RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS (7th ed. 2016) (covering personal jurisdiction in the second chapter); LINDA J. SILBERMAN ET AL., CIVIL PROCEDURE: THEORY AND PRACTICE (2d ed. 2006) (same); A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH (3d ed. 2011) (same); STEPHEN C. YEAZELL, CIVIL PROCEDURE (7th ed. 2008) (same).

¹⁵⁷ CARNEGIE REPORT, *supra* note 6, at 57 (noting that "the typical form in which the case books present cases may even suggest something misleading about the roles lawyers play, more often casting them as distanced planners or observers than as interacting participants in legal actions."); *see also* Cramton, *supra* note 127, at 255 ("In individual courses, and in the law curriculum as a whole[,] the dominant emphasis is on lawyers as appliers of law rather than as creators of law."). Mertz notes that the case-dialogue method also obscures the role of clients. *See* MERTZ, *supra* note 137, at 13 ("[W]ritten case law and legislation do little to capture the overall shape of legal interventions in our lives."); RICHARD J. WILSON, THE GLOBAL EVOLUTION OF CLINICAL LEGAL EDUCATION: MORE THAN A METHOD 135 (2018) (noting that the method involves "'doing' only a small element of what a lawyer does, and that doing is without any human contact or interaction at all. . . . [I]f there is an element of doing, it is in the library, not in life lived by clients.").

¹⁵⁸ Bloom's Taxonomy was initially developed by a committee led by educational psychologist Dr. Benjamin Bloom in 1956 and was revised by a group of cognitive psychologists in 2001. It categorizes different levels of learning, from easier to harder: remembering, understanding, applying, analyzing, evaluating, and creating. *See* Patricia Armstrong, *Bloom's Taxonomy*, VAND. U.: CTR. FOR TEACHING, <https://cft.vanderbilt.edu/guides-sub-pages/blooms-taxonomy/> [<https://perma.cc/6VXW-SKUM>] (last visited Feb. 16, 2020) (summarizing original taxonomy and revised version).

¹⁵⁹ *See* Madison, *supra* note 134, at 309–10.

¹⁶⁰ David P. Bryden, *What Do Law Students Learn? A Pilot Study*, 34 J. LEGAL EDUC. 479, 504 (1984). This is not because students are lazy—or, at least, not any lazier than people generally. Mental activity involving complex problems is characterized by "laziness, a reluctance to invest more effort than is strictly necessary." DANIEL KAHNEMAN, THINKING, FAST AND SLOW 31 (2011). Humans generally will wish to avoid working more than necessary, and thinking is hard work. One cognitive scientist has argued that "[h]umans don't think very often because our brains are designed not for thought but for the avoidance of thought." DANIEL T. WILLINGHAM, WHY DON'T STUDENTS LIKE SCHOOL?: A COGNITIVE SCIENTIST

Thus, the epistemic aspects of the method might lead students to think that, just as a medical student might uncover the kidney through dissection in a Gross Anatomy class, and then explore the dimensions of that organ, a law student could uncover the rule of offer and acceptance through Socratic dialogue in a Contracts class, then explore the dimensions of that doctrine as an object of nature, existing without reference to the human influence in shaping or changing it. Dissecting judicial opinions to extract and discuss rules of law seems epistemic to the students: a search for the correct answer, a sense that the law is determinate.

At the same time as they absorb the epistemic aspects of the method, law students are exposed to its eristical aspects.¹⁶¹ These are intended to encourage “thinking like a lawyer” and involve creating and exploring a variety of plausible interpretations of a rule of law.¹⁶² This part of the classroom experience might suggest that the law is indeterminate: that a plausible argument can be created for virtually any position. Lawyers appear to behave, not as if the law is a kidney, but as King Louis XII of France accused, as if it is shoe leather. “Lawyers use the law as shoemakers use leather; rubbing it, pressing it, stretching it with their teeth, all to the end of making it fit their purposes.”¹⁶³ Or to borrow from Humpty Dumpty, as if “[w]hen *I* use a word, . . . it means just what *I* choose it to mean—neither more nor less.”¹⁶⁴ Substitute “law” for “word,” and you may get a sense of what it feels like for a novice to experience the eristical aspects of the Socratic method.

Despite the tension between the dual aspects of the method, a law professor may not choose to engage in, or even see the need for, a discussion of the potential conflict, because the professor may not immediately or instinctively see the problem created. Professors, legal experts, and scholars, who have long understood the concept of malleability or determinacy within the law, may fail to see the possibility of confusion for novice students, because the epistemic and eristical aspects of the method do not seem contradictory to them.¹⁶⁵ There is, af-

ANSWERS QUESTIONS ABOUT HOW THE MIND WORKS AND WHAT IT MEANS FOR YOUR CLASSROOM 4 (2009).

¹⁶¹ Given the dual goals of the classroom, the professor is forced to engage in activities that use the dialectical, question-and-answer approach of the classic Socratic method both to reveal the black-letter law and simultaneously to model the eristical process of making arguments on both sides of a case. *See* Mashburn, *supra* note 68, at 620–21.

¹⁶² *See, e.g.*, Epstein, *supra* note 92, at 417–19.

¹⁶³ W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 69 (2010) [hereinafter *FIDELITY TO LAW*].

¹⁶⁴ LEWIS CARROLL, *THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE* 124 (1872).

¹⁶⁵ Perhaps this is due to what cognitive psychologists call the “curse of knowledge,” which is the metacognitive error that occurs because humans experience great “difficulty in imagining what it is like for someone else not to know something that you know.” STEVEN PINKER, *THE SENSE OF STYLE* 59 (2014); *see also* PETER C. BROWN ET AL., *MAKE IT STICK: THE SCIENCE OF SUCCESSFUL LEARNING* 115 (2014) (defining the curse as “our tendency to underestimate how long it will take another person to learn something new or perform a task

ter all, a truth-seeking function in the classroom: the courses are designed to teach what “the law” is, and lawyers can and do “find” the law as it has been interpreted and applied by parsing through judicial opinions, identifying rules, and synthesizing various cases into a legal rule capable of application to future client facts. Doctrinal professors do in this sense teach the truth about the law,¹⁶⁶ although perhaps not truth in an absolute sense: not what we might call “noble truth” about the nature of justice itself, or what goals one should pursue in life.¹⁶⁷ But certainly professors do seek to reveal more mundane truths about the law: what is the correct understanding of a particular common law concept, or an accurate interpretation of a statutory term or phrase.¹⁶⁸

And yet, of course, professors understand the law is not a kidney; we have moved far away from Langdell’s formalistic approach (if it even existed in pure form during Langdell’s time).¹⁶⁹ On the other extreme, neither is the law shoe leather; it is not “radically indeterminant,” as W. Bradley Wendel notes, or “at least no sensible participant in the legal system acts as if the law is radically indeterminate.”¹⁷⁰ The process of finding—and articulating—what the law may mean in different situations and different times is the job of lawyers, and their work changes and creates law over time.¹⁷¹

Professorial expertise does not ensure that the professors will recognize the gap between what they know and what the students know, nor does it ensure that they will address the challenges faced by students in this area. Expertise

that we have already mastered.”); HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL 44 (John D. Bransford et al. eds., expanded ed. 2000) [hereinafter HOW PEOPLE LEARN] (“In fact, expertise can sometimes hurt teaching because many experts forget what is easy and what is difficult for students.”).

¹⁶⁶ See Epstein, *supra* note 92, at 406 n.9 (“Though decried by most legal educators, truth seeking in legal education, and in law for that matter, refuses to die.”).

¹⁶⁷ Professors, like Sophists in classical time, may see their roles as teaching arguments or speech and not moral education. See, e.g., MacDonald, *supra* note 55, at 25 (noting Sophists’ goal “was not the scientific one of *discovering* the truth, but the practical one of *teaching*.”). Like the Sophists, law professors tend to “remain[] value-neutral while showing their students how to influence the courts on questions of right and wrong.” Heffernan, *supra* note 55, at 415–16.

¹⁶⁸ Mertz observes that there may be no right answers in law school, but there are certainly wrong ones. MERTZ, *supra* note 137, at 63. Students might assert that their classroom experience demonstrates that there are indeed “right” doctrinal answers.

¹⁶⁹ The Carnegie Report noted that law “is quite unlike the physical or biological systems underlying engineering or medicine, which can be adequately described in abstraction from intention and purpose” but “this cultural and ethical aspect of the law receives far less attention in the critical first year than its formal, analytical features.” CARNEGIE REPORT, *supra* note 6, at 84. Similarly, James Boyd White points out that it is “simply impossible . . . that the law is a system or scheme of rules that are in practice applied more or less rationally to produce a set of intended or desired results.” White, *Old-Fashioned*, *supra* note 53, at 398.

¹⁷⁰ FIDELITY TO LAW, *supra* note 163, at 14.

¹⁷¹ See, e.g., Michael J. Cedrone, *The Developmental Path of the Lawyer*, 41 CAP. U. L. REV. 779, 825 (2013) (“Stated differently, lawyers generate law, they do not merely research and repeat it.”).

does not guarantee effective teaching.¹⁷² And although professors are experts in their field and in analytical skills, they may not be experts in the area of pedagogy.¹⁷³ For the most part, law professors come to the classroom having received no training in the Socratic method or its effective application other than experiencing it for themselves in their own legal education.¹⁷⁴ The structure of the legal academy may also discourage, rather than encourage, professors from pursuing additional training in pedagogy.¹⁷⁵ As a result, many professors who employ some version of the Socratic method may not have thought deeply about how the activities of the method may be perceived by the students. And some defenders of the “classic” version of the Socratic method assert that effective use of the method requires hiding the underlying methodology from the students.¹⁷⁶

The combination of these factors creates a gap between students and professors in understanding and experience. The professors are fully aware that there is not an absolute law handed down from on high to find; this concept, all too clear to them, feels unnecessary to explicitly divulge to the students. To the professors, for example, the almost-exclusive reliance on judicial opinions as sources is not problematic; the professors understand that the judicial opinion is unique amongst texts, because it not only expresses the law but also creates it.¹⁷⁷ But to the student, a focus on reading the texts to extract and observe the law can easily miss the fact that the text—and its author—is creating the law,

¹⁷² Many experts in an area are ineffective in teaching it, because it is difficult for them to remember what it was like *not* to know what they now know, and to create the foundation and steps for others that they created for themselves as they learned. See HOW PEOPLE LEARN, *supra* note 165, at 44.

¹⁷³ See, e.g., INTERESTS OF JUSTICE, *supra* note 152, at 196 (“We do not effectively educate legal educators.”).

¹⁷⁴ See, e.g., Patricia Cranton & Ellen Carusetta, *Perspectives on Authenticity in Teaching*, 55 ADULT EDUC. Q. 5, 7 (2004) (“Most new faculty receive no formal teacher training; they uncritically absorb techniques, strategies, and styles from their own prior experiences as students and from their colleagues and the norms of the academic community.”); see also Melissa J. Marlow, *Does Kingsfield Live?: Teaching with Authenticity in Today’s Law Schools*, 65 J. LEGAL EDUC. 229, 234–35 (2015).

¹⁷⁵ See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 58–61 (2012) (arguing that professors are encouraged to pursue scholarship rather than teaching). Certainly, the structure of law school does not necessarily support an emphasis on pedagogy, although many law schools and many professors passionately believe in the value of good pedagogy. Promotion and tenure decisions often rest on production and placement of scholarship, which can be easily measured and assessed. Teaching is more difficult to measure; it often occurs within a “black box” of the classroom, seen only by the teacher and students themselves, and often assessed primarily, or even exclusively, by student evaluations. One can hardly be surprised if strategic tenure-track professors choose to devote more time and attention to scholarship than to pedagogy; indeed, from an economic standpoint, they would be foolish not to prioritize in that way.

¹⁷⁶ See, e.g., Mashburn, *supra* note 68, at 619–20.

¹⁷⁷ Legal texts have a “performative” character. “[T]hey report on a decision made by the judge or judges, but at the same time the texts themselves actually *are* the decisions: the words of the texts constitute or ‘perform’ the decisions.” MERTZ, *supra* note 137, at 60.

and that this act of creation followed from a lawyer's articulation of the law's meaning.¹⁷⁸

Professors face a considerable challenge in the Socratic method classroom, in which their "students, anxious to learn the 'meaning' of words or phrases, strive mightily to find *the* answer that can be valid in all contexts, [and] the teacher must show that meaning shifts continuously with changing contexts, that words have shifting components of meanings."¹⁷⁹ In doing so, the teachers often "ignore the fact that their students simply do not understand the purposes and justifications for the Socratic method," and "fail to recognize how profoundly this lack of understanding alters its effectiveness."¹⁸⁰ It should not surprise us that use of the method, without an explicit discussion of its purpose and limitations, creates a real danger "that the 'game' played well will *seem* real, obscuring the approach's manipulability and its vulnerability to objective reality."¹⁸¹

Thus, the hidden curriculum behind the Socratic method in law school implicitly suggests to students that there is a true law, a right answer to a legal question, but that lawyers themselves are not focused solely on finding and speaking it but instead on articulating plausible arguments for opposite outcomes. As practiced within law school, the method has both Socratic and Sophistic aspects to its approach, and employs both the epistemic function of revealing truth and the eristic function of game playing with arguments.¹⁸²

¹⁷⁸ As Professor Merritt has noted, ideal pedagogical goals of the model include showing that the law develops over time through judicial interpretation and preparing students to advocate for changes in the law. See Deborah J. Merritt, *The Strange Case of the Case Method*, LAW SCH. CAFE (June 29, 2018), <https://www.lawschoolcafe.org/2018/06/29/the-strange-case-of-the-case-method/> [<https://perma.cc/W6ZA-XUPK>] (asserting that although method theoretically achieves "at least five pedagogic goals" including showing that law develops over time and through judicial interpretation and preparing "students to advocate for changes in the law," the method "has been quietly subverted to accomplish primarily the [] goal [of] instructing students on doctrinal principles"). Merritt argues that only a small group of students will accomplish all five goals. *Id.*

¹⁷⁹ Epstein, *supra* note 92, at 417; see also Julie M. Spanbauer, *Teaching First-Semester Students that Objective Analysis Persuades*, 5 J. LEGAL WRITING INST. 167, 175 (1999) ("Given this combination of factors, it is no wonder that the first-semester student, as novice legal thinker, is often seduced into a search for *the* right answer."). Viewing malleability of law as a "threshold concept" reminds us that such concepts are unfamiliar, troublesome, and threatening to the novice. See Weresh, *supra* note 140, at 694, 711.

¹⁸⁰ Mashburn, *supra* note 68, at 642.

¹⁸¹ Steven Alan Childress, *The Baby and the Bathwater: Salvaging a Positive Socratic Method*, 7 OKLA. CITY U. L. REV. 333, 339 (1982) ("The professor can guard against this impression by a candid and self-conscious examination of the 'game' itself."); see also Morgan, *supra* note 101, at 385 (noting that only after students have "become accustomed to this process and ha[ve] acquired a sufficient background in the fundamental subjects of the first year" will they be able to understand the complexities of the case: whether it was argued well or poorly on one or both sides; whether facts were omitted or disallowed from evidence; whether the outcome was based on an erroneous view of the law).

¹⁸² See Heffernan, *supra* note 55, at 408–09, 414. While it might be possible to use Socratic method to teach the art of analysis to law students, see Neumann, *Art of Critique*, *supra* note

Professors in my position can observe that some students accept, perhaps at a subconscious level, that the truth-seeking epistemic function reveals the truthful law itself, that their education provides them with the rules, and that those rules are to be revered and respected. The eristic disputation role in the classroom—the bandying about of different positions and articulations—is but an academic game that leads to the ultimate resolution (by the appellate court) of what the law is, and to the revelation that the lawyer on the losing side was wrong and misguided.¹⁸³ Professors may speculate that many (or even most) students know, or at least suspect, that the law cannot mean everything and anything; it cannot be that the law can be manipulated to support any and every assertion. And they know, or at least suspect, that the law is not static and absolute. But to what degree is the law mutable? And who has authority to articulate competing visions of it? “The law,” at least for some students, seems to be both objective and subjective, absolute and completely nebulous, and their own role with respect to its creation and articulation—speaking it into existence—may be unclear. The fact that within the litigation process each lawyer tries to persuade the jury of her side is not evidence that there is no truth but evidence that the lawyer is indifferent to it. A student might easily feel troubled that “we do not discuss the political and social forces shaping not just statutory law, but common law and judicial opinions as well” and experience this approach as implying “that the law will not change and if you disagree with it you are just wrong.”¹⁸⁴

Thus, some students might agree with classical criticisms that advocacy is “trickery and magic,” and that advocates who “have persuaded and do persuade anyone about anything are shapers of lying discourse.”¹⁸⁵ This puts them in the position of advancing arguments that are “artfully written but not truthfully meant.”¹⁸⁶ That must surely feel inauthentic and wrong,¹⁸⁷ contributing to the phenomenon of law students becoming cynical and depressed over their years

64, at 730 (discussing how to move toward “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”), both critics and proponents of the Langdellian approach tend to agree that what is currently used in law school is not a true “Socratic method.” See discussion *supra* note 97.

¹⁸³ Justice Robert Jackson famously remarked of the Supreme Court that “[w]e are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). The nuances of this lesson, however, may not be clear to the first-year student who assumes that finality equates to correctness, at least at some level.

¹⁸⁴ E-mail from Daniel Zemel, Graduating Student, Univ. of Richmond School of Law, to author (May 28, 2019, 8:38 PM) (on file with author) (discussing his experience with law school’s pedagogical approach, specifically in the first year).

¹⁸⁵ ENCOMIUM OF HELEN, *supra* note 2, at 10.

¹⁸⁶ *Id.* at 11.

¹⁸⁷ Mertz notes that the method causes students to become divorced from their authentic voices “as they take on the voices and perspectives pushed on them by the demands of legal discourse.” MERTZ, *supra* note 137, at 135.

in law school.¹⁸⁸ Just as Plato predicted, speakers who do not know that they speak the truth will be unhappy. More recent research confirms this view: Lawyers who struggle to provide zealous representation of clients although they feel negatively about the way in which they do so may “suffer long-term psychological damage as a result.”¹⁸⁹

We need not condemn the Socratic method itself. Like any teaching approach, it has both advantages and disadvantages. But we should not be blind to its potential implications for novice advocates and their sense of authenticity when they are asked to play the role of advocate and articulate not the “truthful law” but what they perceive to be a warped and twisted version of it. The legal academy’s failure to explicitly recognize—and transparently reveal—the method’s eristical characteristics as well as its dialectical and epistemic characteristics creates this tension. Fortunately, it is within our control to resolve it, with an explicit discussion about the lawyer’s role with respect to law and the legal system, a discussion that encompasses what “truthful law” is, what role the lawyer plays in shaping it and articulating it, and how lawyers act within the

¹⁸⁸ See MERTZ, *supra* note 137, at 27 (reporting on psychiatrist Alan Stone’s review of the Socratic method, which found it could negatively impact “students’ interpersonal relations and sense of self-esteem, a theme echoed in current studies of psychological distress among law students.”); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1407 (1997) (“At least since 1970, studies have consistently found that law students report an unusually high level of stress, psychiatric symptoms, substance abuse, anxiety, depression, and internal conflict . . . [and] develop a greater than average amount of psychological distress during the first year of law school which continues after graduation.”) (internal citations omitted); Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425, 441–44 (2005) [hereinafter Krieger, *Inseparability of Professionalism*] (summarizing data on levels of emotional distress among practicing lawyers, increasing levels of clinical depression experienced by law students over their time in law school, and decreasing levels of well-being in law students over their first year of law school); Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 261–62 (2004) (finding declines in subjective well-being, intrinsic motivation, and community service values over the first year of law school); Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883, 883 (2007) (noting that “the emotional distress of law students appears to significantly exceed that of medical students and at times to approach that of psychiatric populations”).

¹⁸⁹ Sofia Yakren, *Lawyer as Emotional Laborer*, 42 U. MICH. J. L. REFORM 141, 145 (2008). In 2008, Sofia Yakren came to the same conclusion as Plato did centuries earlier: Advocates who argue for something they do not believe are miserable. See *id.* at 141. Yakren studied emotional labor theory, which holds that “organizationally defined behavior norms require workers to manipulate their emotions in ways that cause psychological distress.” *Id.* at 145. She concluded that:

[E]motional labor theory teaches what the legal profession has neglected to perceive—that a lawyer [who struggles with negative views about a “client, case or legal strategy”] must strain to exhibit the requisite outward expressions despite her personal feelings, and, in some cases, will suffer long-term psychological damage as a result.

Id.

legal system to promote justice. Part II discusses what law students need to hear, when they need to hear it, and where this conversation could be placed within the curriculum.

II. SPEAKING TRUTHFUL LAW: WHAT STUDENTS NEED TO HEAR AND WHEN THEY NEED TO HEAR IT

This Article thus far has suggested using the Socratic method could encourage some students to unconsciously believe that an absolute, truthful law exists, can be “found” by reading judicial opinions in the classroom, and cannot be changed by lawyers’ alternative articulations. This position is inconsistent with the modern legal academy’s understanding of law. Nonetheless, it lingers in the “hidden curriculum” of law school, working its way into the subconscious mind of many first-year law students and creating a lingering unease about articulating law when advocating for clients. And while the second and third years of law school provide different styles of legal instruction and surely work to develop a law student’s concept of how law is made and used, that subconscious idea, planted at the most impressionable time in a law student’s studies, could be difficult to dismiss completely. When students do consciously dismiss it, they may do so by adopting another extreme position: that the law can mean anything and everything, and that advocates are not only permitted (by professional rules) but encouraged to adopt any nonfrivolous argument that suits their client’s objectives, disregarding their own understanding of truthful law in the situation. Even if the lawyer agrees that the client’s interests are compatible with justice and should be advanced, that position creates ethical tension with students’ desire to speak truthfully. Students should learn to explicitly separate and dissect the two assertions about advocacy that Plato conflated: that the good advocate should speak the truth about the law and that the good advocate should argue for justice. This Part discusses what law students need to hear to resolve the tension, when they could most benefit from that discussion, and where in the curriculum we might find space for that discussion.

As a threshold observation, one way to minimize the problem is simply a more explicit and transparent explanation of the Socratic teaching method. Students who understand the multiple purposes of the Socratic method and the reasons why professors choose to use the method could be less inclined to give way to cynicism. However, this alone will not inoculate students from cynicism and distrust of the advocate; we need a robust discussion of the lawyer’s role and how advocates can both speak truthfully and advocate for clients: how they can succeed without abandoning ethics. Thus, I propose that first-year law students should explicitly discuss the role of lawyers as advocates.

Section A of this Part will discuss two existing models for the lawyer as advocate: the “neutral partisan” and the “officer of justice.” Unfortunately, these models do not address the particular challenge identified here: how to resolve the advocates’ desire to articulate “truthful law” and yet still advance the interests of their clients. I propose a different model: one that explicitly

acknowledges that law is neither determinate nor radically indeterminate; it is malleable, but its malleability is constrained; it is shaped by human actors.¹⁹⁰ Next, Section B discusses the timing of this discussion. To be most effective, law schools should provide a discussion of that model early in the curriculum, before a misunderstanding of law's determinacy or the lawyer's role may take hold within a student's subconscious mind. Finally, Section C suggests a place for this discussion: within the context of a Professional Identity Formation program beginning in the first year of law school.

A. Models for the Lawyer as Advocate

A novice advocate who faces the concerns identified in Part I would benefit from an explicit discussion of the lawyer's role in the legal system: the relationship between the lawyer and the law, including how the lawyer creates law and why the lawyer can create alternative interpretations of a rule of law in an advocacy setting while still acting truthfully and authentically. However, many of the leading models that discuss the lawyer in an advocacy role tend to focus on the tension that exists if the lawyer believes that the client's desired outcome and goals are not "just" in a broad sense (not in the best interests of society or not corresponding to some absolute concept of justice).¹⁹¹ These approaches focus on the second of Plato's assertions, that the advocate should know justice and advocate to achieve the just outcome.¹⁹² And as Plato did in *Gorgias*, they conflate or ignore the other assertion: a good advocate is one who knows the truth and advocates that truth.

Section A.2 below proposes an approach that addresses the advocate's relationship with truthful law. It begins with Professor Wendel's concept of fidelity to law and continues with James Boyd White's ideas of law as rhetoric.¹⁹³ This vision of lawyers—as advocates who can identify the dimensions of truth within a law and create meanings for that law that are consistent with it and yet also supportive of client interests—can resolve the problem identified in Part I and support students in their development of an authentic advocate identity. Advocates may articulate and advocate for a variety of interpretations of the law without jeopardizing their ethics. They may and should take an active role in shaping the law, as they act within a specific time and place and with other actors in the system to create meaning for the law as it relates to a particular matter. This view acknowledges that lawyers do more than simply represent their clients' interests and more than simply report truthful law. By articulating possible versions of law, they speak the law into existence; that law becomes truthful law adopted by the courts; the advocates themselves create, not merely report, truthful law.

¹⁹⁰ See discussion *infra* Section II.A.2.

¹⁹¹ See *infra* Section II.A.2.

¹⁹² See discussion of Plato's critique *supra* Section I.A.

¹⁹³ See *infra* Section II.A.2.

1. *Advocates as Neutral Partisans or Officers of Justice*

This Section explores two models of advocacy that students may encounter in law school: the neutral partisan and the officer of justice. We might think of these two models as the extreme ends of a spectrum of lawyering roles; the first is the kind of advocate that Plato criticized, while the second is the kind that he praised.¹⁹⁴ Both, however, share Plato's focus on the ultimate goal of achieving justice while paying little attention to a focus on expressing the truth of the subject matter. The first argues that the advocate should argue for her client's interests; even if those specific goals are unjust, the dialectical process will achieve justice. The second argues that the advocate should take all interests (not only the client's) into account and decline to advance an outcome that is unjust; she will argue for just outcomes and thus achieve justice.

a. *Neutral Partisan*

The neutral partisan is probably the primary (and perhaps the only) role of advocacy to which a student is exposed in law school.¹⁹⁵ For many years it was considered the "dominant model of ethical lawyering."¹⁹⁶ Arguably, it still is.

In this model, the advocate relies on the concept of "role morality," which allows her to act, in her capacity as lawyer, in ways that would be repugnant to her in her role as an individual member of society.¹⁹⁷ Rather than considering

¹⁹⁴ See discussion *supra* Section I.A.

¹⁹⁵ See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 37 (1978); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 15 (1975). This model was dramatically articulated in Monroe Freedman's 1966 article, in which he argued that a criminal defense lawyer should place a client on the stand even if that client would commit perjury and should discredit a witness even if the lawyer knows the witness to be telling the truth. See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469 (1966). Freedman's article revived interest in legal ethics, which had been largely dormant in the decades before; it was quickly followed by Richard Wasserstrom's exploration of role morality and Charles Fried's discussion of whether the good lawyer can be a good person. See, e.g., David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 878 (1999) [hereinafter Luban, *Reason and Passion*] ("It scarcely exaggerates to say that Fried and Wasserstrom reinvented legal ethics as a philosophical topic."); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 38 (1992) [hereinafter Rhode, *Pervasive Method*].

¹⁹⁶ Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1629 (2002); see also LAWYERS AND JUSTICE, *supra* note 127, at 393 (arguing that the standard conception of lawyer's role is in fact an accurate representation of American legal practice); FIDELITY TO LAW, *supra* note 163, at 29 (describing the standard conception as the default position of legal ethics).

¹⁹⁷ See Wasserstrom, *supra* note 195, at 7–8. Neutral partisans act in accordance with two primary principles of conduct: neutrality with respect to the ethical ends of their clients, and partisanship to advance those ends, even by means that the lawyer would consider improper in a non-legal context. Simon, *supra* note 195, at 36–37. Thus, if the client wishes to disinherit the client's children for reasons the lawyer feels are wrong, or if the client could avoid taxes by using a legal loophole that the lawyer feels unfairly benefits the wealthy, the lawyer

the interests of all affected parties and preferring the interests of society over the interest of one individual, the “amoral lawyer” explicitly decides to “prefer[,] in a variety of ways the interests of the client . . . over those of individuals generally.”¹⁹⁸ The lawyer need not assess whether the client’s desires are in the best interests of society, or indeed even in the best interests of the client in a moral sense; she need only determine whether they are legally permissible.¹⁹⁹ The neutral partisan model appears to meet all Plato’s fears about a dishonorable orator: This advocate would say “not what he believes to be true or right . . . , but whatever will persuade [the] audience to act in furtherance of [the client’s] interests.”²⁰⁰ Adopting this role makes “the moral world of the lawyer . . . a simpler, less complicated, and less ambiguous world than the moral world of ordinary life.”²⁰¹

The neutral partisan can still defend her role as a societal good, so long as one assumes that lawyers are participating “in a complex institution which functions well only if the individuals adhere to their institutional roles.”²⁰² The role of each attorney in an adversarial system is to represent client interests and, through the competition of those representations, an impartial and effective judicial system will reach a good and just result.²⁰³ As an advocate, the neutral

need not decline representation but may ethically proceed, so long as the proposed goals and the means by which the lawyer and client might achieve them are not actually illegal. Wasserstrom, *supra* note 195, at 6–8. Accordingly, the model triggers a third principle that governs how society should act: nonaccountability, or the premise that society should not find the lawyer morally culpable, as an individual, for acting as the role demands. *See id.* at 8–10. To say “I did it as a lawyer, not as a person” is sufficient justification for any legally permissible act that advances the client’s interests, even if such act appears morally questionable. *See id.* at 9.

¹⁹⁸ Wasserstrom, *supra* note 195, at 5.

¹⁹⁹ *Id.* at 5–6 (“Once a lawyer represents a client, the lawyer has a duty to make his or her expertise fully available in the realization of the end sought by the client, irrespective, for the most part, of the moral worth to which the end will be put or the character of the client who seeks to utilize it” provided that the end is “not illegal.”); *see also* Dolovich, *supra* note 196, at 1629 (describing the “‘neutral partisan:’ one who does whatever possible, within the bounds of the law, to serve her client’s interests regardless of what the lawyer herself thinks of the client’s ends.”) (quoting William Simon).

²⁰⁰ White, *Ethics of Argument*, *supra* note 42, at 872.

²⁰¹ Wasserstrom, *supra* note 195, at 9. For example, it allows lawyers to say “but that is not my concern” when faced with criticisms of helping to promote an unethical outcome (the classic case, perhaps, being the criminal defense attorney who represents a client known to be guilty). *Id.*

²⁰² *Id.*

²⁰³ *See, e.g.,* Dolovich, *supra* note 196, at 1633–34 (noting the neutral partisan works through the adversarial system to allow an impartial observer “to discern what is truth and what is sophistry.”). This view of the adversarial system is similar to the connection made between the scientific method and the Socratic method; this argument that adversarial litigation leads to truth “often invokes an analogy between adversarial adjudication and an idealized image of scientific inquiry, in which every thesis is subjected to raking criticism aiming to probe for weaknesses, unearth contrary evidence, and ensure that no proposition enters the corpus of scientific doctrine based on wishful thinking.” David Luban, *Twenty Theses on Adversarial Ethics*, in *BEYOND THE ADVERSARIAL SYSTEM* 134, 144 (Helen Stacy & Michael

partisan is thought to advance values of truth-discovery through the process of litigation rather than the process of the single advocate's speech; the approach assumes the principle of "procedural justice," a legitimacy that is "inherent" to the judicial proceeding itself.²⁰⁴ It is a mechanism through which truth and justice are secured, and thus advocates can assure themselves that they are "serving the needs and interests of the justice system and thus performing a vital service for society as a whole."²⁰⁵ Whether advocates who detach their true selves from their professional roles are actually able to function happily, or whether this approach comes "at too great a personal cost to lawyers . . . because it results in no self at all," is debatable.²⁰⁶ And the model's focus on the morality of the client's cause or desired outcome (or whether the pursuit of that outcome will lead to justice) gives little or no attention to the validity of the argument itself, in the sense of whether it is based on some view of truthful law.²⁰⁷

Lavarch eds., 1999). Just as with the Socratic method, however, the comparison between true scientific method and the adversary system is problematic. *See* LAWYERS AND JUSTICE, *supra* note 127, at 69 ("Perhaps science proceeds by advancing conjectures and then trying to refute them; but it does not proceed by advancing conjectures that the scientist knows to be false and then using procedural rules to exclude probative evidence."); *see also id.* at 68–74 (critiquing the idea that truth emerges from the adversarial system); INTERESTS OF JUSTICE, *supra* note 152, at 53–58 (explaining and critiquing the premise that "an adversarial clash between opposing advocates is the best way of discovering truth."); FIDELITY TO LAW, *supra* note 163, at 17–48 (summarizing the standard conception and criticisms of it).

²⁰⁴ Simon, *supra* note 195, at 38. The model's defense of the adversarial system as a dialectical route to ultimate truth and justice is attractive; its "practical appeal is often irresistible, particularly when coupled with a regulatory framework that permits lawyers to avoid advocacy that appears personally distasteful or financially imprudent" simply by allowing lawyers to decline unwanted clients. INTERESTS OF JUSTICE, *supra* note 152, at 58 (noting that "most legal ethics experts agree [that] the moral justification for current adversarial principles is ultimately unconvincing."); *see also* LAWYERS AND JUSTICE *supra* note 127, at 92 (arguing that the adversarial system, despite its flaws, is justified because it does "as good a job as any at finding truth and protecting legal rights," "some adjudicatory system is necessary," and "it's the way we have always done things").

²⁰⁵ Dolovich, *supra* note 196, at 1634–35. The view that advocates should be, first and foremost, "zealous" representatives of their clients to the detriment of the lawyer's other, potentially competing roles (officer of the legal system and public citizen) may be supported by the Model Rules. *See* MODEL RULES OF PROF'L CONDUCT pmbl. no. 2, 8 (AM. BAR ASS'N 2019). For example, the American Bar Association states, in the Preamble to the Model Rules, that "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done." *Id.* at no. 8 (noting that the "lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious."). As several commentators have noted, this leaves open the question of whether a lawyer can assume justice is done if the opposing party is *not* well represented. *See, e.g.,* INTERESTS OF JUSTICE, *supra* note 152, at 15 ("But this faith in adversarial processes remains plausible only if all interests have adequate representation and comparable access to information and legal resources.").

²⁰⁶ Yakren, *supra* note 189, at 153. Yakren analyzes the neutral partisan model and notes that "[l]iterature analyzing the legal profession's answer to lawyers' personal-professional conflicts perceives a deeper, potentially more disabling, psychological danger than the legal profession likes to admit." *Id.* at 152.

²⁰⁷ *See* Pepper, *supra* note 126, at 624 (noting that "[a] relatively little explored problem is the dynamic between the amoral professional role and a skeptical attitude toward law.").

b. Officers of Justice: Moral Advocate

The neutral partisan model is by no means the only model available to today's advocate, nor need we lament the lack of a model that would be acceptable to Plato. Recall that in Plato's vision, the ideal advocate would have the goal of finding the truth of justice for any given matter and then advocating for that just result.²⁰⁸ The advantages of this approach for justice overall are clear: the advocate advances the just position, and that action is both morally good for the speaker and necessarily good for the audience and the society in which the speaker operates.²⁰⁹

The modern equivalent to Plato's position might be Deborah Rhode's "officers of justice" role model.²¹⁰ It represents the other end of the spectrum from the neutral partisan model: Instead of focusing narrowly on the client's interests and ignoring all others, it considers "all the societal interests at issue in a particular practice setting," including but not limited to those of the client.²¹¹ Lawyers should make decisions and take actions based on principled convictions and with the goal of achieving just ends, and should be able to justify their conduct "under consistent, disinterested, and generalizable principles."²¹² Client objectives, while relevant, "must be tempered by other important concerns."²¹³ If a lawyer finds the client's goals repugnant, she need not "rely on some idealized model of adversarial . . . processes" to justify her own role; she should withdraw from representation and decline to use her powers of rhetoric to advance those goals.²¹⁴ One might imagine Plato might have been comfortable with this view of advocacy.²¹⁵

²⁰⁸ Not surprisingly, this view does not specifically address the question of how to manipulate a specific law to create an end result, for the Athenians did not have the same legal system as we do.

²⁰⁹ Indeed, in the *Gorgias* dialogue, Socrates asserts that "the orator will never will to do wrong" and that the advocate who knows right and wrong would thus be incapable of doing wrong, because he would always be "talking about right." GORGAS, *supra* note 11, at 40 (460). As Walter Hamilton notes, these assertions depend on the assumption "that all wrongdoing is the result of ignorance, and that perfect knowledge of what is right must inevitably issue in perfect conduct." *Id.* at 39, n.1.

²¹⁰ INTERESTS OF JUSTICE, *supra* note 152, at 17. Rhode's model is not the only critique of neutral partisanship that focuses on moral ends. See, e.g., LAWYERS AND JUSTICE, *supra* note 127, at 173 (arguing for a "[m]oral activism" approach in which the lawyer considers third-party interests).

²¹¹ Deborah L. Rhode, *Legal Ethics in an Adversary System: The Persistent Questions*, 34 HOFSTRA L. REV. 641, 657 (citing her INTERESTS OF JUSTICE, *supra* note 152, at 66–80, 113, 213). William Simon similarly argues that lawyers should act in a way that will, overall, "seem likely to promote justice." WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 138 (1998).

²¹² INTERESTS OF JUSTICE, *supra* note 152, at 67.

²¹³ *Id.* at 18.

²¹⁴ *Id.* at 67. Rhode notes that in making such choices, "lawyers must assess their actions against a realistic backdrop, in which wealth, power, and information are unequally distributed, not all interests are adequately represented, and most matters will never reach a neutral tribunal." *Id.* "The less confidence that attorneys have in the justice system's capacity to de-

However, the student who looks for moral instruction within law school, and hopes that legal education will prepare her to serve as an officer of justice, may be disappointed. Law school is not designed for moral education, although it may produce moral questions as a byproduct.²¹⁶ “Teachers of law understandably do not ordinarily think of themselves as teachers of virtue, even though law is so saturated with the concept of justice that its very symbol is the scale of justice.”²¹⁷ Many law professors appear to believe that ethical action cannot be taught, or at least that it cannot be taught in law school.²¹⁸

Neither the neutral partisan nor the officer of justice model pay much attention to the attorney’s relationship with the law itself and the level to which that law may be molded or manipulated to suit either the client’s desires (in the neutral partisan model) or the interests of society balanced with the client’s (in the officers of justice model). The neutral partisan model’s discussion of means tends to focus on tactical and strategic decisions: whether it is proper to discredit a truthful witness, for example.²¹⁹ The discussion of means in Rhode’s model also focuses primarily on tactics and strategy: Should, for example, an advocate use the statute of limitations as a defense against a claim that is otherwise worthy and just?²²⁰ While advocates “should, of course, be guided by relevant legal authority,”²²¹ both models tend to assume that the law is sufficiently malleable to support a variety of interpretations and also that the advo-

liver justice in a particular case, the greater their own responsibility to attempt some corrective.” *Id.* Rhode does not assert that an advocate would have to withdraw from representation in all cases of repugnant clients; she makes an explicit exception, for example, for criminal defense work. *See id.* at 72.

²¹⁵ Plato, who found it essential for orators to know right and wrong (as discussed *supra* in Section I.A), might have enjoyed Sharon Dolovich’s theory, expanding on Rhode’s model, that “any complete account of ethical lawyering needs a theory of moral character.” Sharon Dolovich, *supra* note 196, at 1630.

²¹⁶ *But see* MacDonald, *supra* note 55, at 33–34 (arguing that effective use of the Socratic method allows exploration of the students’ own moral opinions and leads them to discover what justice is).

²¹⁷ *Id.* at 29. Rideout argues that if advocates should possess good character to appear credible, “effective teachers of rhetoric should, among other things, offer moral advice on the development of good character,” but most teachers of persuasive communication “undoubtedly do not regard themselves as moral instructors.” Rideout, *supra* note 87, at 22.

²¹⁸ *See, e.g.,* W. Bradley Wendel, *Moral Judgment and Professional Legitimation*, 51 ST. LOUIS U. L.J. 1071, 1074 (2007) (discussing the “self-imposed mystification that relies upon an implicit belief that ethical reasoning for lawyers is a skill that cannot be taught in traditional law school courses.”); *see also* W. Bradley Wendel, *Should Law Schools Teach Professional Duties, Professional Virtues, or Something Else? A Critique of the Carnegie Report on Educating Lawyers*, 9 U. ST. THOMAS L.J. 497, 498 (2011) (arguing that “moral and social dimensions of legal reasoning are already embedded *within* legal reasoning.”).

²¹⁹ *Cf.* Wasserstrom, *supra* note 195, at 6–7.

²²⁰ INTERESTS OF JUSTICE, *supra* note 152, at 71.

²²¹ *Id.* at 67 (noting that “[m]ost ethical dilemmas arise in areas where the governing standards already leave significant room for discretion” and “attorneys may confront cases in which the applicable rules are so indeterminate or inadequate that reference to broader moral principles is necessary.”).

cate understands the level of determinacy within the system. Both approaches, then, are similar in their view that advocates should focus on how to achieve an end result that is just. Advocates might do so indirectly, by engaging in a dialectical process to reach a just result; alternatively, they might do so directly, by explicitly advocating the just result. Plato agreed that the advocate should work for justice.²²² But that is not the only question with which advocates may struggle. Plato—and our current models—overlook the critical question addressed in this Article.

These approaches do not adequately address the question of whether and how lawyers should be willing and able to manipulate “the law” itself as a means to their desired ends, whether those ends are “just” or simply those desired by their clients. After all, lawyers might be convinced of the justice of their clients’ desired outcomes and yet reluctant to manipulate the law if they feel, as Part I suggests novice advocates may, that there is an underlying truthful law to which they should remain loyal.²²³ The Model Rules of Professional Conduct (“Model Rules”) require, at a minimum, that advocates act not only as “zealous advocate[s]” but also as “officer[s] of the legal system.”²²⁴ As such, lawyers do have certain constraints about the way they articulate the law: They must not misrepresent the law,²²⁵ nor make “frivolous” arguments.²²⁶ Even considering these constraints, an advocate who has an underlying belief in a true law could feel uneasy about artfully articulating it in a way that could be inconsistent with its essential truth (without necessarily “misrepresenting” it within the meaning of the Model Rules’s prohibition). Legal realism may have taken hold in legal education as the “ordinary religion of the law school classroom.”²²⁷ But students may still question the pure realist concept that the law has minimal determinacy and few constraints.

I believe that students seek a way to achieve both desires: to express truthful law and to advocate for clients. And they will not happily accept the idea of radical indeterminacy in the law or the view of lawyers as willing to manipulate true law. They need a new model.

²²² Plato argued that the orator should use his powerful skill to work for justice and good. See GORGIAS, *supra* note 11, at 35 (457) (“The orator can speak on any subject against any opposition in such a way as to prevail on any topic he chooses, but the fact that he possesses the power to deprive doctors and other professional men of their reputation does not justify him in doing so; he is as much bound to make a proper use of his oratory as the possessor of physical superiority [is bound to use his strength for good].”).

²²³ See discussion *supra* Part I.

²²⁴ MODEL RULES OF PROF’L CONDUCT pmbl. no. 8 (AM. BAR ASS’N 2019).

²²⁵ *Id.* r. 3.3 cmt.

²²⁶ *Id.* r. 3.1.

²²⁷ Cramton, *supra* note 127, at 252.

2. *Proposed Model: Advocates as Meaning-Makers*

I propose an alternative vision of the lawyer's role: one in which a lawyer seeks to understand the truth of a law, understands the range of interpretations that are still truthful within law, and engages in a meaning-making process to help the community define itself and decide how to engage in a process of decision-making. Within this vision, advocates can speak the "truth" about the law and its meaning while still advocating for their clients. This model can solve the problem identified in Part I by envisioning a lawyer who recognizes both that the law is not completely indeterminate and has underlying truth to it *and* that the law is not completely determinate and has a number of possible, permissible versions that might be acceptable in an advocacy setting. For the former, we must explore what "truthful law" might be. For the latter, we can then view that law through the lens of rhetoric and see truth as constituted, not located; it is created, not found.²²⁸

Our starting point for this model is Professor Wendel's argument that lawyers should think of their role as being faithful to the law itself rather than to the interests of any individual or group.²²⁹ Wendel asserts that rather than allowing the system to determine justice (as in the neutral partisan view) or allowing the lawyer to determine justice (as in the officers of justice view), we should allow the political process to determine justice by respecting that process's given meaning to the law itself: in effect, asserting truthful law.²³⁰ Wendel acknowledges that law has some indeterminacy, but he holds that it is also true that "the law can bear some objective meaning," and lawyers should be required to identify their best understanding of what the law actually does mean rather than an arguably plausible view of what it might possibly mean.²³¹ Thus, the challenge is assessing the degree of determinacy within the law in a given context and situation.²³² Law, in this approach, is neither purely formalistic nor purely realistic: Its meaning is neither entirely determinant nor entirely indeterminate; "[t]he law is purposive[,] it is *about* something, and legal interpreta-

²²⁸ See Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 J. LEGAL WRITING INST. 3, 5 (2010) ("[R]hetoric looks at how the law works by exploring a meaning-making process, one in which the law is 'constituted' as human beings located within particular historical and cultural communities write, read, argue about, and decide legal issues.").

²²⁹ See FIDELITY TO LAW, *supra* note 163, at 168.

²³⁰ See *id.* at 2. Wendel argues that "[c]itizens can appeal to legal entitlements, which are different from mere interests or desires, because they have been conferred by the society as a whole in some fair manner, collectively, in the name of the political community." *Id.*

²³¹ *Id.* at 14; see also *id.* at 72 (noting that "fidelity to law requires lawyers to aim at recovering the best understanding of the existing law, and to act on that basis."). Lawyers ought not "to be morally permitted to work around legal prohibitions on the client's conduct, simply because the lawyer believes the law has got it wrong as a matter of justice." *Id.* at 135.

²³² See *id.* at 70 (noting that "some interpretations of the law just won't do, no matter how they appear to fit with a formalistic reading of the applicable legal texts.").

tion is aimed at recovering that meaning.”²³³ Wendel’s approach provides considerably more constraint on an advocate’s articulation of rules than the Model Rules do: It is not enough that a lawyer’s articulation not be “frivolous” or “misrepresentative,” it must be, in some sense, an accurate representation of the law’s true meaning.²³⁴

One can understand Wendel’s approach more clearly with a concrete example; fortunately, one need only look to the news to find examples of how lawyers might choose to speak “truthful law”—or decline to choose that path. Becky Roiphe and W. Bradley Wendel identify one recent example: when the Department of Justice’s (DOJ) Senior Litigation Counsel argued, in the summer of 2019, that the legal requirement of “safe and sanitary” conditions in migrant detention centers did not require the government to provide items such as soap, nor necessarily allow the children to sleep.²³⁵ Making this argument, while it did not subject the DOJ attorney to ethical disciplinary action, put her in the position of stretching the law to an unrecognizable degree. Like Humpty Dumpty, she had to assert that the word “sanitary” meant whatever she chose it to mean, despite the difficulties of arguing that “sanitary” did not include soap or toothbrushes.²³⁶ The concept of truthful law, in contrast, asserts that the law has limits: while the exact parameters of “sanitary” may be debated, the meaning must remain within those limits. Wendel’s view gives us an outside boundary for determinacy of the law: some constraints for “truthful” law. These constraints address one end of our concern: they tell us that the law is not radically indeterminate.

Thus constrained, advocates may remain concerned about the other end of the concern: whether the law may be “radically determinate” or whether they may assert alternative (arguable) views of the law, what their precise role is in

²³³ *Id.* at 196. “[T]he whole point of the law is to differentiate between something you can get away with, and something that is authorized, as a matter of right, and regulated by rules of general application.” *Id.*

²³⁴ Wendel’s focus is primarily advising clients and structuring transactions, not advocating for a client in litigation. *See id.* at 13. Indeed, he sees litigation as “a special case” in which “lawyers are permitted to assert the *arguable* legal entitlements of clients, leaving it up to the workings of the adversary system to evaluate whether the lawyer’s position is plausible.” *Id.* There is, thus, less constraint in advocacy (although still more constraint than the floor provided by the Model Rules).

²³⁵ *See, e.g.,* Meagan Flynn, *Detained Migrant Children Got No Toothbrush, No Soap, No Sleep. It’s No Problem, Government Argues.*, WASH. POST (June 21, 2019, 3:59 PM), <https://www.washingtonpost.com/nation/2019/06/21/detained-migrant-children-no-toothbrush-soap-sleep/> [<https://perma.cc/KM5U-QMSP>]; *see also* Becky Roiphe & W. Bradley Wendel, *The DOJ Lawyer Was Wrong to Argue that the Conditions in the Detention Centers are Sanitary, but the Personal Attacks are Misplaced* (Aug. 19, 2019) (unpublished op-ed) (on file with author). The Ninth Circuit panel of judges expressed disbelief at the position, and formally rejected it in an August 15, 2019 opinion. *Flores v. Barr*, 934 F.3d 910, 911–12 (9th Cir. 2019).

²³⁶ *See Flores*, 934 F.3d at 915 (noting that the government’s “cramped understanding” of the phrase “safe and sanitary” is “untenable”).

creating or shaping law, and how far they can go while still remaining ethical. James Boyd White and his view of the lawyer as rhetorician addresses these concerns.

White sees a good degree of indeterminacy in the law for an advocate.²³⁷ His “law as rhetoric” approach encourages advocates to strike a balance between thinking of law on the one extreme as determinate, with advocacy simply as “the application of doctrine learned in law school to the facts of a client’s case,” and on the other extreme as radically indeterminant, because “in one’s practice the doctrine must be learned—and that means rethought, reconstructed—over and over again, from many points of view.”²³⁸ In argument “the identity, the meaning, and the authority of the materials are always arguable, always uncertain,”²³⁹ and thus the law itself cannot be truthful in the sense that entering students or laypeople might expect. A rule should be viewed “not as a command that is obeyed or disobeyed but as the topic of thought and argument—as one of many resources brought to bear by the lawyer and others both to define a question and to establish a way to approach it.”²⁴⁰ This view sees lawyers as rhetoricians and law as rhetoric; the law exists as a social and cultural activity by which the lawyers, their clients, and the system all act to resolve problems and deal with differences.²⁴¹ The lawyers provide the court with a variety of possible meanings for the law, a range of options. And within that acceptable range, the advocate may permissibly—and ethically—point out the one or more options that would benefit the client. This approach is similar to Wendel’s argument that because “there is a range of meanings that the law can reasonably be understood to bear—within that range, there is nothing wrong with the lawyer adopting a view that is consistent with her client’s interests.”²⁴²

Within the litigation context, this approach shares some aspects of the neutral partisan model; it includes some reliance on procedural or institutional safeguards to ensure justice.²⁴³ However, there is an important distinction: The

²³⁷ See White, *Old-Fashioned*, *supra* note 53, at 393.

²³⁸ White, *Doctrine in a Vacuum*, *supra* note 150, at 161. White conceives of law “as an expressive and rhetorical activity.” *Id.* at 163.

²³⁹ James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 689 (1985) [hereinafter White, *Law as Rhetoric*].

²⁴⁰ *Id.* at 689 n.4.

²⁴¹ See *id.* at 691–92 (“It is a way of telling a story about what has happened in the world and claiming a meaning for it by writing an ending to it.”).

²⁴² FIDELITY TO LAW, *supra* note 163, at 54.

²⁴³ For example, Wendel would allow criminal defense attorneys to assert extreme interpretations of the law, noting those lawyers have “virtually no obligation to ascertain that a legal argument is plausible” because of constitutional and procedural issues unique to the criminal context. *Id.* at 188 (“Criminal defense lawyers rightly believe that they are permitted to ‘put the state to its proof . . .’”). Within civil litigation, lawyers have less leeway to argue weaker interpretations, but more than in the advising context, because of procedural safeguards. See *id.* (arguing that “lawyers for the parties in civil litigation also have some latitude to press weaker legal arguments, subject to legal prohibitions on relying on totally unsupported positions.”). The greater latitude allowed in Wendel’s view for zealous advocates to articulate

focus is on *a* (but not *the*) truthful interpretation of the law rather than an overall “just” outcome for the case.²⁴⁴ This is zealous advocacy, but with an increased focus on the latter part of the phrase: “[L]awyers should represent their clients zealously *within the bounds of the law.*”²⁴⁵ Law is “a practice of reasoning, subject to certain kinds of constraints[;]” this model includes more constraints on that zeal: the argument must exceed a standard of simply “non-frivolous,” but need not claim that there is a single correct interpretation of the law.²⁴⁶

This approach rejects the neutral partisan’s dialectic approach to achieving the “truth” of an objectively just outcome through the clash of competing arguments. It explicitly acknowledges that the truth about what the law means is less “a system of rules” and more “a structure of thought and expression built upon a set of inherently unstable, dynamic, and dialogic tensions.”²⁴⁷ This approach allows for change within the law through advocates’ actions, because it explicitly acknowledges the various roles within litigation—lawyers who assert various interpretations of the law and a decision-maker who chooses—and yet it does not allow complete freedom to manipulate the “truth” of the law.²⁴⁸

The level of truth within the law comes down to a balance between forces that we might think of in terms of formalism versus realism, or in more classical terms, absolute versus relative truth. The more flexible (legal realism) approach to legal truth can be compared with the Sophists’ approach to truth generally. Scholars have suggested that the Sophists subscribed to “a philosophy of language and knowledge that suggested that the only ‘reality’ we have access to ‘lies in the human psyche, and its malleability and susceptibility’ to linguistic manipulation.”²⁴⁹ The few works we have from the well-known Sophist practitioner and teacher of rhetoric Gorgias,²⁵⁰ for example, suggest that he held a

various versions of law relies on the assumption that “for the most part, . . . the procedures and personnel of the tribunal will take care of the ‘bounds of the law.’” *Id.*

²⁴⁴ See, e.g., *id.* at 78.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 194.

²⁴⁷ White, *Old-Fashioned*, *supra* note 53, at 386 (arguing it is “an activity of mind and language: a kind of translation, a way of claiming meaning for experience and making that meaning real.”).

²⁴⁸ See, e.g., FIDELITY TO LAW, *supra* note 163, at 207 (“The observed fact that legal meaning can take shape through the process of application of law does not provide license to conclude that evasion of the law is ethically permissible.”).

²⁴⁹ HERRICK, *supra* note 3, at 43.

²⁵⁰ Gorgias, like Socrates, was a real person and not merely Plato’s literary creation; he may even have been familiar with Plato’s literary depiction of him. See Vessela Valiavitcharska, *Correct Logos and Truth in Gorgias’ Encomium of Helen*, 24 RHETORICA 147, 155 n.22 (quoting Gorgias, upon hearing of Plato’s *Gorgias*, as remarking “[h]ow well Plato knows how to satirize[.]”). The real Gorgias has been acclaimed as the founder of the Sophist movement and of extemporaneous oration. C. Francis Higgins, *Gorgias*, INTERNET ENCYCLOPEDIA OF PHIL., <https://www.iep.utm.edu/gorgias/> [<https://perma.cc/96QL-D7YT>] (last visited Feb. 28, 2020).

relativistic epistemology, in which humans are unable to objectively perceive reality and each individual holds “subjective mental images” of what life truly is.²⁵¹ In contrast, Plato believed in more absolute truths, and found this Sophistic view of truth distressing.²⁵² An explicit acknowledgement of the difference in these views, and of the way in which legal education may confuse them, can resolve a novice advocate’s unease and ethical distress about articulating the law in a way that may not be precisely consistent with the way an appellate court previously articulated it. Viewing law as a rhetorical activity allows us to identify “an interactive process of persuasion and argumentation that is used to resolve uncertain questions in this setting and for the time being.”²⁵³ “Recognizing that the law is constructed by human beings as they interpret, compose, and interact makes it possible for the law student to imagine a voice and a place to fit within the legal rhetorical community.”²⁵⁴

White’s approach to lawyering softens the ethical tension between advocacy and authenticity (in the sense of telling the truth) by including, as a critical component, the understanding that a lawyer’s assertion that the law “is” or “requires” something is neither intended nor received as actual truth.²⁵⁵ The assertion that lawyers make—and which can be made truthfully—is that the argument and assertions about what the law is and requires is “the best case that [the lawyers’] capacities and resources permit [them] to make on this side of the case.”²⁵⁶ While this approach may not change the actual argument made, it could change the way advocates perceive their roles within the system.

²⁵¹ Bruce McComiskey, *Disassembling Plato’s Critique of Rhetoric in the Gorgias*, 10 RHETORIC REV. 205, 205 (1992). Bruce McComiskey argues that this view of truth would have been appealing to Athenians at the time Gorgias spoke; because relativistic truth does not allow for knowledge of immutable truth, that approach supports democracy “since democracy depends on the ability to change the opinions of others and the willingness to allow one’s own opinions to be changed.” *Id.* at 210. Perhaps this view of law should be similarly appealing to us today as supportive of pure democracy and democratic institutions: Law is “something that lawyers themselves make all the time, whenever they act as lawyers, not something that is made by a political sovereign.” White, *Law as Rhetoric*, *supra* note 239, at 696. Lawyers, who are commanded by the ABA to act as “public citizens,” may well have a special obligation not only to promote the rule of law but also to “further the values of participatory democracy.” Kirsten K. Davis, *Rhetorical Criticism as Essential Legal Skill: Some Thoughts on Developing Lawyers as “Public Citizens”*, 16 COMM. L. REV. 43, 43–44 (2016).

²⁵² For Plato, “[s]uch a radical view of truth was a threat to conservative Athenians steeped in Homeric virtues and traditional Greek piety.” HERRICK, *supra* note 3, at 41. After all, Plato preferred oligarchy to democracy, and rhetorical skills for the uneducated masses could be dangerous; if true knowledge was available to anyone, and not limited to those of wealth and high birth, the very system he supported would be undermined. *See* McComiskey, *supra* note 251, at 207.

²⁵³ Berger, *supra* note 228, at 5–6.

²⁵⁴ *Id.* at 11.

²⁵⁵ *See* White, *Ethics of Argument*, *supra* note 42, at 882 (“No one in the courtroom would be surprised to learn that [a lawyer’s statement that “justice requires” or “the law requires”] is a form of argument and not a statement of personal beliefs.”).

²⁵⁶ *Id.*

White's view of law as rhetoric also includes a vision of how the lawyer serves justice. White's conception of the lawyer's role explicitly rejects Plato's position that engaging with justice can be an objective, abstract activity.²⁵⁷ Instead, it must "always [be] culturally conditioned" and is a process or an activity: "[a] way[] of doing things with preexisting materials and expectations."²⁵⁸ Lawyers "preserve and improve a language of description, value, and reason" so that society has the tools to discuss conflicts and find a way to resolution.²⁵⁹ When two lawyers litigate a matter, they serve justice not because they both state the "truth" of justice in the case in some absolute sense (the Platonic role), nor precisely because the two opposing positions can be assessed by the impartial judge to determine which one is "true" (the neutral partisan role's reliance on the adversarial system), nor even because one or the other necessarily states a faithful view of truthful law (Wendel's view of how lawyers should articulate legal entitlements when advising clients). Instead, they serve justice because they "define the boundaries," they show "what even these parties, opposed as they are, must agree to, and they tell [the judge] what topics the culture requires [the judge] to face and deal with."²⁶⁰ The opposing arguments show judges "what [they have] not yet dealt with in [their] own thinking" and "provide . . . a testing ground for [their] own thoughts."²⁶¹

Through this "culture of argument," lawyers make and remake language and meaning in the community and facilitate the process by which members of that community discuss questions and conflicts and decide what should be the outcome of a particular case. Lawyers create the "practices that make possible thought about justice of a kind that is at once realistic and idealistic."²⁶²

Ultimately, whatever view of the end of justice is acceptable to a student and developing advocate (and that choice will be an individual one), thinking about law as a rhetorical activity provides a helpful foundation for understanding advocacy as compatible with truthful action. Students deserve to understand from the beginning of their studies that advocacy is a creative process. It is an act of communication, of making meanings between parties to solve problems and resolve disputes. In articulating versions of the law, advocates do much more than simply represent those clients' interests. They speak the law into ex-

²⁵⁷ See *id.* White articulates this role of the lawyer explicitly as a response to Plato's attack in *Gorgias*, and many readers may enjoy the Socratic dialogue he uses to present it. See, e.g., *id.* at 872–94.

²⁵⁸ *Id.* at 880.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 883.

²⁶¹ *Id.* at 883; see also FIDELITY TO LAW, *supra* note 163, at 196. The legal system enforces the distinction between a version of "the law" as any plausible interpretation and "the law" as the best possible view that the lawyer can assess at the time of the decision by these "rhetorical practices that take certain considerations into account, as part of the justification of legal judgments, and exclude other considerations as irrelevant." *Id.*

²⁶² White, *Ethics of Argument*, *supra* note 42, at 889.

istence; they create the possible law, the law that then becomes truth; they speak truthful law.

One can imagine law professors and lawyers reading this discussion and thinking “well, of course—this is nothing new.” But remember that these topics, perhaps old to professors, are brand new and difficult for first-year students. Even legal ethics experts disagree about the proper model for an ethical lawyer’s role within the system, and about the level of determinacy within the law. Practicing lawyers may (or, perhaps, should) struggle with these issues. As David Luban notes, “[i]t is unreasonable to expect lawyers to have a professor’s facility with abstractions (let alone Hercules’ facility) or a professor’s leisure for reflection.”²⁶³ And yet legal education appears to assume novice advocates require minimal assistance in grasping and grappling with these issues, just as we assume law students will easily grasp the dual (and sometimes dueling) goals of the Socratic method. While law professors may not be able to solve all the ethical dilemmas within the practice of law, we might at least attempt to explicitly articulate the challenges faced, and we might consider when would be an appropriate time to discuss each challenge. The next Section suggests that the first year of law school is an appropriate time for law students to consider the role they play in creating and shaping the law, and the level of determinacy they may encounter in the laws that they encounter.

B. *Timing*

An explicit discussion of the view of lawyers as meaning-makers could resolve the tension experienced by novice advocates; it could allow them to feel truthful and authentic as they express varying articulations about the meaning of a particular rule of law. The legal education system seems to assume that students will come to an understanding of their role with respect to articulating the law, and their role within the system, in some way, somehow, at some point over the course of their education. But our current approach does not ensure that the discussion will happen at all. And if it does, it is likely to occur in the later years of law school, when cynicism about the law and the lawyer’s role have already begun to settle in many students.²⁶⁴ At that point, it may well be too late. This Section reviews some psychological studies showing that early misconceptions have surprising power to influence, even if those misconceptions are revealed and corrected later; thus, it is critically important that law school include an explicit and robust discussion of legal determinacy early in the first year.

As some students enter law school with the belief that they are there to “learn the law,” and then experience a classroom dynamic that appears to re-

²⁶³ Luban, *Reason and Passion*, *supra* note 195, at 895 (critiquing a particularly complex aspect of William Simon’s model as overly advanced for practicing attorneys).

²⁶⁴ See, e.g., Krieger, *Inseparability of Professionalism*, *supra* note 188, at 443 (showing increasing levels of depression from pre-law to first-year law students).

veal “the law,” their belief in determinant law is reinforced. People tend to filter new information through their existing beliefs, and to accept and emphasize information that tends to support previously held beliefs but reject and deemphasize information that tends to contradict those beliefs.²⁶⁵ And these underlying beliefs and concerns may linger, even if a discussion of legal determinacy and lawyer roles in the second or third year of study contradicts the initial misconception of law and even if students consciously reject the idea of absolute legal determinacy. Cognitive psychologists have demonstrated that unconscious beliefs, even ones that are consciously disavowed, can impact feelings and behavior.²⁶⁶ Indeed, it is a “well-known cognitive principle” that the human brain’s way of organizing knowledge²⁶⁷ can result in unconscious associations (including, but not limited to negative biases) about topics.²⁶⁸ People form attitudes not only through conscious, logical thought processes but through unconscious or subconscious processes.²⁶⁹

Once formed, subconsciously held beliefs can persist even if the individuals cannot clearly articulate why they hold the belief or specifically relate the information that led them to it. For example, a study was performed on people who were unable (because of a type of amnesia) to retain newly received information in their memory.²⁷⁰ The participants received information about candidates that either indicated that the candidates held views similar or dissimilar to the participants’ views on various issues.²⁷¹ When asked later to choose a candidate, the participants preferred the candidates whose views had been described as similar to their own, even though the participants could not, due to

²⁶⁵ See KAHNEMAN, *supra* note 160, at 80–81 (explaining confirmation bias, in which “people . . . seek data that are likely to be compatible with the beliefs they currently hold.”).

²⁶⁶ Lawyers may be most familiar with the concept of how subconsciously held views can influence behavior in the context of implicit bias. See, e.g., sources cited *infra* note 279 and accompanying text.

²⁶⁷ Our minds organize information into categories, structures called schemas, and then pull information from a relevant schema to understand how the world works. See JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* 12–13 (2012). This allows us to operate on a daily basis without reexamining every piece of information we receive; we can make inferences and judgments based on our prior understanding of what *kind* of situation we now face. See *id.* We have a schema for types of people and base our expectations of their behavior on that schema. *Id.* at 12. For example, if we hear our doorbell ring, and see a man in a brown uniform standing on our front porch, with a van marked “UPS” in the driveway, we will expect that upon opening the door he will hand us a package and ask us to sign for it. See *id.*

²⁶⁸ See John T. Jost et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ORG. BEHAV. 29, 43 (2009) (“[K]nowledge is organized in memory in the form of semantic associations that are derived from personal experiences as well as normative procedures and rules.”).

²⁶⁹ See generally KAHNEMAN, *supra* note 160.

²⁷⁰ Jason C. Coronel et al., *Remembering and Voting: Theory and Evidence from Amnesic Patients*, 56 AM. J. POL. SCI. 837, 838 (2012).

²⁷¹ See *id.*

their amnesia, actually recall what the candidates' positions were.²⁷² The “belief echoes” continued to influence, even though the beliefs themselves were gone.²⁷³

Subconscious beliefs also continue to influence actions and thought even after the individual learns the original impression or information was false. For example, psychological studies have demonstrated that people may continue to believe previously received false information about political candidates even after receiving corrected information.²⁷⁴ This is particularly true when the initial information conformed to the individuals' original beliefs or feelings.²⁷⁵ For example, in one study, participants read factual information about a fictitious political candidate: that the candidate had received political contributions from a convicted felon.²⁷⁶ Even after reading another article that directly stated that the prior information was erroneous (that the contributor was not a felon, but a law-abiding citizen with a name similar to a convicted felon), participants who had received the initial negative information held a more negative view of the candidate than participants who had received no information about the contribution.²⁷⁷ This is known as belief persistence, in which “people maintain their misperceptions even in the face of seemingly credible corrections.”²⁷⁸

There is no reason to think that these phenomena are limited to the political sphere. After all, we know that lawyers are impacted by implicit bias.²⁷⁹ And

²⁷² Instead of justifying their choice with recalled information about the candidates' positions, the participants articulated general feelings about the perceived trustworthiness or likeability of the candidates. *See id.* at 844. Thorson notes that “the automatic affective response generated by the initial information had shaped their summary evaluations.” Emily Thorson, *Belief Echoes: The Persistent Effects of Corrected Misinformation*, 33 POL. COMM. 460, 464 (2016).

²⁷³ Thorson, *supra* note 272, at 476.

²⁷⁴ *See, e.g., id.*

²⁷⁵ *See id.* at 462.

²⁷⁶ *Id.* at 466.

²⁷⁷ *Id.* at 467–69.

²⁷⁸ *Id.* at 462.

²⁷⁹ *See, e.g.,* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006) (noting that implicit biases “can produce behavior that diverges from a person's avowed or endorsed beliefs or principles”); *see also* PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION A-7 (2012) (citing studies that implicit bias “predicts the rate of callback interviews,” “predicts awkward body language which could influence whether folks feel that they are being treated fairly or courteously,” “predicts how we read the friendliness of facial expressions,” “predicts more negative evaluations of ambiguous actions by an African American,” “predicts voting behavior in Italy,” and “predicts binge drinking, suicide ideation, and sexual attraction to children”), <https://cdm16501.columbia.edu/digital/collection/accessfair/id/246> [<https://perma.cc/U3E2-GHFF>]; Jost et al., *supra* note 268, at 42–43 (citing “studies, which have been replicated and extended in literally hundreds of peer-reviewed articles, establish[ing] that people can possess attitudes, stereotypes, and prejudices in the absence of intention, awareness, deliberation, or effort”); Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for*

lawyers are often unaware of the gap between their conscious actions and beliefs and their unconscious beliefs, including within the ethical arena.²⁸⁰ When cognitive load is high or when we are stressed or rushed (as in much of law school), people are more likely to rely on mental shortcuts and instinctive feelings.²⁸¹ Such reliance could obscure the ability to assess whether a feeling (of uneasiness, for example, about whether lawyers are speaking truthful law or simply pandering to clients' wishes with manipulative techniques) is well-founded or based on inaccurate information or perceptions.²⁸² The "belief echo" impact of determinant law might persist.²⁸³

The most effective way to reduce the impact of belief echoes and belief persistence is not to allow false information to gain a firm hold initially.²⁸⁴ To prevent the mistaken belief in the first place, law school should provide a discussion of lawyers' roles in articulating and shaping law at the outset: in the first year. That foundational discussion would help students make sense of the rest of their legal education, including their summer internships, and could encourage engagement in upper-level courses as well as healthy habits and mindset.

C. Placement

One suspects that for most law schools, the only required class in which a robust version of this discussion would occur is a Professional Responsibility class.²⁸⁵ A class on legal ethics seems a natural location for this conversation,

Civil Litigators, 4 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 278, 281 (2014) (noting the effect of implicit bias within the courtroom).

²⁸⁰ Research on behavioral legal ethics suggests that there is a disconnect between lawyers' "perceptions of their ethics or moral code and their actual behavior when faced with ethical dilemmas." Catherine Gage O'Grady, *Behavioral Legal Ethics, Decision Making, and the New Attorney's Unique Professional Perspective*, 15 NEV. L.J. 671, 672 (2015). This disconnect is likely to be more significant for the less experienced lawyer. *Id.* at 679.

²⁸¹ Daniel Kahneman has described how our mind uses two different systems to operate: "System 1," which consists of intuitive reactions and operates "automatically and quickly, with little or no effort," and "System 2," which consists of deliberate attention to solving problems and concentrating on issues. KAHNEMAN, *supra* note 160, at 20–21. If cognitive load is high, people have more difficulty paying attention and revert to System 1, which requires less concentration than System 2. *See id.* at 22–23. Daniel Kahneman puts it simply: "[A]nything that occupies your working memory reduces your ability to think." *Id.* at 30. Increased cognitive load thus decreases our ability to think carefully. O'Grady, *supra* note 280, at 686. Not surprisingly, it can also "contribute to poor ethical decision making." *Id.*

²⁸² Cognitive psychologist Daniel Willingham has concluded that thinking (perhaps particularly the deliberate thinking characterized by Kahneman as System 2) is "slow, effortful, and uncertain," and we would rather avoid it if we can. WILLINGHAM, *supra* note 160, at 4, 14. He notes deliberate thinking does not guide people's behavior in most situations and that human minds "are not especially well-suited to thinking." *Id.* at 14.

²⁸³ *See* Thorson, *supra* note 272, at 460.

²⁸⁴ *See id.* at 476.

²⁸⁵ In the summer of 2019, Research Assistant Gemma Fearn (expected J.D. 2021) reviewed school websites to assess the ethics requirements for the "top thirty law schools" according

and the American Bar Association requires each law school to offer a class that focuses on ethics (or, at least, on professional responsibility).²⁸⁶ Unfortunately, professional responsibility classes often tend to focus on preparation for the Multistate Professional Responsibility Examination rather than for the ethical practice of law.²⁸⁷ We probably cannot assume that a Professional Responsibility class will effectively cover all ethical issues, including the role of the lawyer in articulating law. And although students might choose to take electives (either in the form of traditional classes or experiential learning opportunities such as clinics) that discuss the advocate's role and relationship with legal determinacy, we cannot assume all students will take one of these classes.²⁸⁸

to U.S. News & World Report. Her research indicates that to the extent these schools require more than the ABA-mandated two-credit course in Professional Responsibility, it is usually only to make that required course worth three credits (as opposed to, for example, requiring additional ethics classes). (Schools that require a three-credit course to satisfy the ABA requirement include: University of Texas, University of Minnesota, Notre Dame, Boston University, University of Alabama, Emory University, University of Georgia, and University of Iowa). Gemma Fearn, *Top 30 Law School Assertions* (2019) (unpublished student research, University of Richmond School of Law) (on file with author). While this is neither a comprehensive nor necessarily representative data set for law schools, it might prompt those readers who are within the academy to ask themselves about their own institution's graduation requirement for Ethics courses.

²⁸⁶ Standard 303. CURRICULUM

(a) A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following:

(1) one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members; . . .

AM. BAR ASS'N, *ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2019-2020*, at 16, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf [<https://perma.cc/V9DR-JJ5P>].

²⁸⁷ See, e.g., Muriel J. Bebeau & Verna E. Monson, *Guided by Theory, Grounded in Evidence: A Way Forward for Professional Ethics Education*, in *HANDBOOK OF MORAL AND CHARACTER EDUCATION* 557, 562 (L. Nucci & D. Narvaez eds., 2008) ("Courses are designed to teach legal rules, rather than to teach legal ethics, and their primary purpose appears to be to prepare students for the professional responsibility licensing examination required in all states."); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 *NOTRE DAME L. REV.* 1, 10 (1999) ("The law of lawyering has mostly swallowed up what could potentially be a more explicitly value-centered professional responsibility education, so that students' exposure to legal ethics consists primarily of exegesis of the disciplinary codes and other legal texts."); see also James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere*, 60 *CIN. L. REV.* 83, 83-84 (1991) (noting "well-founded" critiques that legal education was not doing enough to teach legal ethics).

²⁸⁸ Elective courses on ethics, like elective courses on professional formation, "draw 'the choir' from the student body who are very interested in personal and professional growth toward later stages of development [on professional formation learning outcomes]." Neil Hamilton & Jerome M. Organ, *Thirty Reflection Questions to Help Each Student Find Meaningful Employment and Develop an Integrated Professional Identity (Professional Formation)*, 83 *TENN. L. REV.* 843, 876 (2016).

Even if we assume that all professional responsibility courses provide a discussion of lawyers' roles in shaping law and the determinacy of the law, or that every student will take an upper-level jurisprudence class, ethics seminar, or experiential learning class (such as a clinic) that explicitly discusses the nuances of legal realism, this information might come too late to effectively assuage law students' concerns.²⁸⁹ Such classes are often available only during the second or third year of law school.²⁹⁰ As discussed above, the beliefs formed during the formative year of study may well linger, subconsciously, even if an explicit discussion corrects the underlying misconceptions.²⁹¹ Fortunately, a discussion of this particular issue could easily fit into the first-year portion of a Professional Identity Formation (PIF) program.

PIF began to gain serious attention as a result of the Carnegie Report's critique of legal education in 2008 and the surrounding conversations about whether law schools needed to do more to support ethical development within their students.²⁹² The Carnegie Report articulated three "apprenticeships" of law, including one focused on doctrinal knowledge, one on skills, and one on "identity and purpose."²⁹³ This third apprenticeship's primary purpose was "to teach the skills and inclinations, along with the ethical standards, social roles, and responsibilities that mark the professional."²⁹⁴ One of the main conclusions of the Carnegie Report was that this third apprenticeship received less attention than the other two, and needed to be more fully developed and emphasized in law schools.²⁹⁵

The third apprenticeship is broadly defined, and the term "professional identity formation" can cover a multitude of topics, including the skills important to legal employers upon hiring or the skills law schools should consider in admitting new students.²⁹⁶ For our purposes here, however, it includes the

²⁸⁹ If we could be certain that Professional Responsibility courses would fully cover all ethical issues in addition to the Model Rules of Professional Responsibility, we might consider simply moving PR to the first-year curriculum as a solution. However, many experts in the field believe that first-year students are not ready for extensive discussions of professional responsibility. *See, e.g.,* Rhode, *Pervasive Method*, *supra* note 195, at 51 ("If the course occurs in the first year of training, many students will not yet know enough to grasp the full dimensions of professional dilemmas."). Instead, Rhode suggests discussion of ethical issues throughout the curriculum, with a "required introduction" within the first year. *See id.* at 54.

²⁹⁰ Research Assistant Gemma Fearn (expected J.D. 2021) conducted research on PIF course offerings. *See* Gemma Fearn, *PIF Course Offerings* (2019) (unpublished student research, University of Richmond School of Law) (on file with author).

²⁹¹ *See supra* Section II.B.

²⁹² *See, e.g.,* Sullivan, *supra* note 7, at 331.

²⁹³ CARNEGIE REPORT, *supra* note 6, at 27–29.

²⁹⁴ *Id.* at 28.

²⁹⁵ *See* Sullivan, *supra* note 7, at 334 (noting that the Carnegie Report concluded that the third apprenticeship was "generally marginal and often hard to clearly identify in the curriculum").

²⁹⁶ *See, e.g.,* Marjorie M. Schultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620,

concept of assisting a newcomer to the profession to develop a sense of oneself as a lawyer, including the lawyer's role relative to the articulation and creation of law. The development of a lawyerly identity—a sense of how one relates to the law, to one's clients, to the legal system, and to society as a whole—fits squarely within the PIF umbrella.²⁹⁷ Viewing the determinacy (or malleability) of law as a threshold concept within legal education further supports the placement of this topic in a professional identity course; because such concepts are transformative, mastering a threshold concept “can shift [] the learner's identity.”²⁹⁸

PIF is separate from professionalism, or the ability to act in a manner that comports with the norms of the profession. It is also separate from the rules of professional responsibility, or the ability to act within the constraints that profession has set out for itself as a floor for ethical behavior. PIF, in contrast, deals not only with the lawyer's understanding of professional culture, and not only with the ability to fit in with that culture by behaving appropriately, but with the lawyer's own sense of self: how she, personally, sees herself in the role of lawyer, how her own ethics and moral code integrate with her actions as a lawyer, how she interacts with the law itself, and how her actions may promote justice.²⁹⁹

“[L]aw-learning is fundamentally a process of human development that must embrace the relationships and tensions between self, client, legal system, and society.”³⁰⁰ Although one might hope that this type of development would occur during law school without explicit effort, that seems unlikely. The current methods might achieve this goal in theory, but in practice perhaps only the highest achievers in a classroom realize all the learning goals we might hope to accomplish.³⁰¹ Indeed, the statistics on lawyer dissatisfaction and disconnect with their profession suggest that many lawyers may never fully develop a pro-

623–25 (2011); Heather Buchanan, *Denver Law Course Highlights Lawyer Well-Being and Foundations for Practice*, IAALS (Sept. 27, 2018), <https://iaals.du.edu/blog/denver-law-course-highlights-lawyer-well-being-and-foundations-practice> [<https://perma.cc/N27M-A9NQ>].

²⁹⁷ See Margaret Chon, *Multidimensional Lawyering and Professional Responsibility*, 43 SYRACUSE L. REV. 1137, 1139 (1992) (“Role-playing—in the sense of us playing the roles rather than the roles playing us—is the process of expressing our identities, including our ethical identities.”).

²⁹⁸ Weresh, *supra* note 140, at 691. Weresh notes that although it is difficult for students to accept the concept of legal malleability, once it is understood, “students cross a threshold and their understanding of the law, and of legal reasoning, is transformed. They no longer will view the law as a fixed set of rules but will appreciate the role the advocate has in shaping legal argument and the resulting institution of law.” *Id.* at 711.

²⁹⁹ See E. SCOTT FRUEHWALD, *HOW TO GROW A LAWYER: A GUIDE FOR LAW SCHOOLS, LAW PROFESSORS, AND LAW STUDENTS* 164 (2018).

³⁰⁰ Cedrone, *supra* note 171, at 782.

³⁰¹ See FRUEHWALD, *supra* note 299, at 165 (“Traditional teaching of legal ethics in law school has not created professional identity for lawyers.”); Merritt, *supra* note 178 (arguing only a small portion of students achieve all the goals of Socratic method);

professional identity that satisfies them, and that “many lawyers appear to exist in painful conflict with their professional selves.”³⁰²

In the decade since the Carnegie Report concluded that the third apprenticeship was “generally marginal and often hard to clearly identify in the curriculum,”³⁰³ law schools have taken significant steps towards achieving actual change in their curricula.³⁰⁴ By 2011, Educating Tomorrow’s Lawyers (ETL) had emerged as a “consortium of schools committed to working toward implementing the reform program outlined in the Carnegie Report.”³⁰⁵ The Holloran Center for Ethical Leadership in the Professions at the University of St. Thomas School of Law has played a leading role in gathering data, developing resources, and training legal educators to successfully implement PIF programs.³⁰⁶ Since 2014, the Center has offered workshops to law school faculty and staff that focus on professional identity formation.³⁰⁷ The American Bar Association has also taken note of the need for more “third apprenticeship” work in law school, and promulgated Standards 301–302, which require law schools to provide rigorous education and learning outcomes related to ethics.³⁰⁸

³⁰² Yakren, *supra* note 189, at 156. While Yakren’s comment is more focused on the general ethical conflict lawyers may feel in representing clients or outcomes that are morally problematic, her comment would be equally valid to the specific challenge discussed in this Article of lawyers who feel uneasy in their promotion of a particular interpretation of law.

³⁰³ Sullivan, *supra* note 7, at 334.

³⁰⁴ See, e.g., *id.* at 331, 334, 338, 343 (describing reaction and response to the Carnegie Report).

³⁰⁵ *Id.* at 337.

³⁰⁶ *Id.* at 343 (discussing the Holloran Center’s workshops aimed as exploring research and “experiment[ing] with approaches to integrating professional formation more fully into the curriculum, classrooms, and clinics” and identifying Holloran Center’s pioneering work with a “model formation curriculum” that won the ABA’s Gambrell Professionalism Award in 2015).

³⁰⁷ See *id.* at 343; Jerome M. Organ, *First-Year Courses/Programs Focused on Professional Development and Professional Identity Formation: Many Flowers are Blooming*, PD Q., Aug. 2017, at 24, available at <http://www.stephanoffmedia.com/wp-content/uploads/2017/07/PDQ-Aug2017.pdf> [<https://perma.cc/KE5J-BLL5>]. The author of this Article participated in one such workshop in the spring of 2018.

³⁰⁸ Standard 301 states:

Standard 301. OBJECTIVES OF PROGRAM OF LEGAL EDUCATION

(a) A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.

(b) A law school shall establish and publish learning outcomes designed to achieve these objectives.

AM. BAR ASS’N, REVISED STANDARDS FOR APPROVAL OF LAW SCHOOLS 14 (Aug. 2014), available at https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201406_revised_standards_clean_copy.authcheckdam.pdf [<https://perma.cc/BX3F-9KS7>]. Standard 302 requires schools to develop learning outcomes that will “at a minimum, include competency” in the “[e]xercise of proper professional and ethical responsibilities to clients and the legal system” as well as

While law schools' reactions to the call for PIF has varied, there seems to be an interest in developing PIF across the three years of law schools and in ensuring that PIF, including its ethical aspects, is introduced early (in the first year of school).³⁰⁹ This movement is encouraging, if overdue; long before the Carnegie Report, legal ethics scholars had called for increased focus on ethics across the curriculum as well as early introduction of the topic.³¹⁰ By August 2017, at least thirty law schools had developed “a required first-year course that has some intentional emphasis on professional development including professional formation.”³¹¹ By November 2019, that number had increased to sixty-two.³¹² And early introduction of PIF appears advisable, not only for the reasons discussed above regarding unconscious beliefs, but also to capitalize on student interest; one professor noted that there is a six-week period at the start of each semester of the first year when students are “excited about the ideology

“[o]ther professional skills needed for competent and ethical participation as a member of the legal profession.” *Id.* ABA Standards 301–02 were legally effective at the end of the ABA meeting in August 2014. AM. BAR ASS'N, *Transition to and Implementation of the New Standards and Rules of Procedure for Approval of Law Schools*, ABA (Aug. 13, 2014), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2014_august_transition_and_implementation_of_new_aba_standards_and_rules.pdf [<https://perma.cc/HL5M-ZN82>].

³⁰⁹ See Hamilton & Organ, *supra* note 288, at 876 (noting that legal education's “usual mistake [in teaching PIF ethics] has been to create engagements that appeal to the students at later stages of development but do not appeal to the earlier stage students.”).

³¹⁰ See, e.g., INTERESTS OF JUSTICE, *supra* note 152, at 200–03; Rhode, *Pervasive Method*, *supra* note 195, at 54 (advising “required introduction to professional responsibility issues in the first year, an upper-level course that gives them central treatment, and efforts at integration in other core courses and in special supplemental events such as panels, lectures, and so forth.”); see also Deborah L. Rhode, *The Professional Responsibilities of Professors*, 51 J. LEGAL EDUC. 158, 164–66 (2001).

³¹¹ Organ, *supra* note 307, at 24.

³¹² Rupa Bhandari & Jerry Organ, *Law School Professional Development Initiatives in the First Year*, HOLLORAN CTR. <https://www.stthomas.edu/hollorancenter/learningoutcomesandprofessionaldevelopment/professionaldevelopmentdatabase/> [<https://perma.cc/5925-QXT3>] (last visited Mar. 7, 2020) (listing sixty-two “first-year, required, law school professional development initiatives based on information from law school websites as of November 2019.”). Forty-four law schools have a “required, credit-bearing course[] in the first-year” and eighteen have a non-credit course of graduation requirement. *Id.* Leading law schools are among the schools taking this step. In summer 2019, a review by Gemma Fearn (expected J.D. 2021) of websites of law schools identified by U.S. News & World Report as the “top thirty law schools” revealed that at least eight appear to provide some kind of class in the first year that provides PIF experiences. Several either require or offer as an elective a first-year course that satisfies the ABA Professional Responsibility requirement, including the University of Southern California (required 1L Legal Ethics), Arizona State University (required 1L three-credit PR course), University of California Irvine (required 1L Legal Profession course), University of Michigan (1Ls eligible to take PR course as first-year elective), Duke University (nonacademic, professional development credits required beginning 1L year), Vanderbilt (1L Life of the Law course), Harvard (week-long January Experiential Term), and University of California Los Angeles (Introduction to the Lawyer/ Client Relationship course). See Gemma Fearn, *PIF Course Offerings (2019)* (unpublished student research, University of Richmond School of Law) (on file with author).

of fighting for justice” and most open to discussions of how they can promote that.³¹³ This excitement provides an opportunity for the discussion of the lawyer’s role and the lawyer’s relation to the law and legal system, and potential for students to internalize foundational beliefs that can help them maintain enthusiasm and commitment to their chosen career, not only during law school but after graduation and throughout their practice.³¹⁴ Law students exposed to this information “build their knowledge about practices and practice settings in an intelligent way,” “learn what questions to ask” about their career, and “become more interested in lawyers” and lawyering.³¹⁵

Developing the precise dimensions of an “ideal” PIF program would require thoughtful attention not only to the issues discussed within this Article but also to the particular qualities of a school’s students. Different schools have different focal points and opportunities, with students who plan to enter a wide variety of fields; what is best for one school might be ill-suited for another. One might imagine a variety of PIF programs that could include the type of discussion recommended here.

Schools might also successfully choose to integrate PIF concepts, including the ones that are the focus of this Article, across the curriculum. Starting in the first year, each law professor might plan to include some discussion of legal determinacy and lawyering roles into the class. While this type of conversation already occurs in legal writing classrooms across the country, there is no good reason to silo it; instead, the concepts can and should be discussed and reinforced in each class.

CONCLUSION

Law students arrive eager to learn the law; they enter school with the layperson’s conviction that law exists in an absolute form, to be found and applied. They are greeted with the Socratic method, with its confusing mixture of truth-seeking and disputation activities; they experience the “ordinary religion” of law school in the form of legal realism and its approach that law can be stretched to almost any measure while they simultaneously learn, through repetition in the classroom, that there are correct doctrinal answers and that this telling of “true” law will be rewarded on exams. The sources of law, and the role

³¹³ Danny DeWalt, *Practical Lessons Learned While Building a Required Course for Professional Identity Formation*, 14 U. ST. THOMAS L.J. 433, 434 (2018). Professor DeWalt notes that “[d]uring this time there is a rare culture of humility and openness that provides a pedagogical advantage. Students seem more inclined to listen to anything that will help them succeed in law school and the profession.” *Id.*

³¹⁴ See, e.g., Hamilton & Organ, *supra* note 288, at 876. Part III of that article provides reflection questions on “Understanding my Role as a Lawyer, Particularly in Terms of My Responsibilities to the Legal System.” *Id.* at 889–91.

³¹⁵ Ann Southworth et al., *Some Realism About Realism in Teaching About the Legal Profession*, in 1 THE NEW LEGAL REALISM: TRANSLATING LAW-AND-SOCIETY FOR TODAY’S LEGAL PRACTICE 74, 76 (Elizabeth Mertz et al. eds., 2016) (describing the required first-year course on The Legal Profession at UC Irvine Law School).

of lawyers in creating and changing law, are obscured. The result may be that students internalize a view that advocates cleverly manipulate arguments to win at any cost, heedless of the truth of the law. That view negatively impacts students' perceptions of themselves as advocates, contributing to cynicism and discontent that increases during law school. This contribution may be small, but its pernicious addition to the cumulative impact that makes law school emotionally fraught for many and soul crushing for some is all the more distressing because it is unnecessary.

Some students, perhaps those who are particularly motivated or who fortuitously encounter a discussion of the topic, will come to a comfortable understanding of the determinacy of law and the lawyer's role in articulating truthful law. But many students need more help than law professors might expect; they need help to make these connections and the connections among their own goals (for successful and meaningful employment), formation of a professional identity, and law school curriculum.³¹⁶ Placement of this discussion within a PIF program in the first year of law school could resolve the tension discussed in Part I and set students off on a good start towards understanding their relationship with law, not only intellectually but at a gut level of *feeling* the appropriateness of articulating varying meanings for law, believing that they can authentically articulate versions of the law's meaning while remaining loyal to their own voices, senses of self, and commitment to honesty.³¹⁷

We need not rely on serendipity and simply hope that students will somehow figure it out. An early discussion of the relationship between lawyers and law, and the role of lawyers within the legal system, could forestall mistaken beliefs before they take hold, and avoid this particular danger of legal education's hidden curriculum. First-year law students can find a balance between Plato's absolute truth and Sophistic relativism, between extreme formalism and extreme realism. They can identify a truthful law to which they can be faithful, more constrained than the Model Rules's prohibition on non-frivolous or misleading arguments but less constrained than the Langdellian concept of law as a science. They can imagine a role for themselves in shaping and creating law, a role within the system that could promote justice, at a time when they are likely focused on and energized about justice and their ability to produce it. They can see themselves not only speaking truthful law but creating it, articulating meanings between parties to shape one that will work in this situation for this purpose. And in the process of exploring law, its determinacy and its sources, they

³¹⁶ See Hamilton & Organ, *supra* note 288, at 861–63.

³¹⁷ Happiness research firmly supports the proposition that people are more content when engaged in activities they identify as meaningful and connected to a greater good. See, e.g., RHODE, INTERESTS OF JUSTICE, *supra* note 152, at 45 (Rhode quotes *The Importance of What We Care About* by Harry Frankfurt: "Individuals are most fulfilled when they are engaged in work that they find meaningful and when they have reflected, at the deepest level, about what work meets that definition."). PIF, and the creation of an identity consistent with an individual's sense of ethics, should increase happiness amongst lawyers. See Hamilton & Monson, *supra* note 112, at 328–29.

can also explore themselves: their own level of comfort in how far to stretch the meaning of a specific rule in a specific situation, based on their own moral center and ethical beliefs. This type of self-exploration is precisely what can be provided within PIF programming. Some answers, Socrates would agree, can only be found within. So, after all, who knows? Perhaps this particular process would placate even Plato.