

Article

The Teaching of Law in the United States: Studies on the Case and Socratic Methods in Comparison with Traditional Taiwanese Pedagogy

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ABSTRACT

The utilization of casebooks as teaching materials is referred to as the “case method,” and the in-class dialogue or questioning is known as the “Socratic method.” Former Harvard Law professor Christopher Columbus Langdell first developed and employed both pedagogies in the late nineteenth century. The case method Langdell introduced ultimately replaced traditional textbooks with casebooks containing actual decisions and opinions from various state and federal courts. Through reading and analyzing these opinions, law students learn to identify the same or similar issues in factually different cases, helping them to attain an understanding of judicial thinking. Despite the dominance of these two methods in modern American law schools, however, there are increasing challenges and critiques directed at their effectiveness in various aspects, including their failure to equip students with the ability to solve real problems. Meanwhile, different pedagogies have been explored to provide law professors with alternative ways in teaching, and there is an increased emphasis on the many techniques available that are more effective than the Langdell methods in reaching students in classroom. While the U.S. legal system is driven predominantly by the interpretation and application of case law, Taiwan’s is driven by the interpretation and application of

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statutory law. Thus, there is an inherent difference in the training of lawyers in the two countries, respectively, that reflects the inherent difference in the two legal systems. Nonetheless, because the comparison of legal educational systems is an integral part of comparative law studies, the following examination of Taiwanese and American pedagogies will serve to enrich the existing scholarship.

Keywords: *Case Method, Socratic Method, Christopher Columbus Langdell, Legal Education*

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I. INTRODUCTION

Those who are unfamiliar with American law schools may be shocked by a scene in the recent film, *Legally Blonde I*¹: On the first day of classes, Elle Woods, a first year law student at Harvard, is forced to leave her Civil Procedure class because she is unprepared—she has failed to complete the reading assignments in the casebook, and thus is unable to survive the professor’s interrogation. Although Elle’s experience may be a bit exaggerated, it does, to some extent, accurately reflect the classrooms of modern American law schools.

The utilization of casebooks as teaching materials is referred to as the “case method,” and the in-class dialogue or questioning that appears in the film is known as the “Socratic method.” Harvard Law School professor Christopher Columbus Langdell first developed and employed both pedagogies in the late nineteenth century. The case method Langdell introduced ultimately replaced traditional textbooks with casebooks containing actual decisions and opinions from various state and federal courts. Through reading and analyzing these opinions, law students learn to identify the same or similar issues in factually different cases, helping them to attain an understanding of judicial thinking.² The use of the Socratic method in conjunction with the case method enables the professor to guide the student toward an articulation of the ideas expressed in the case.³ It was Langdell’s belief that the law is a science that can be reduced to a limited number of principles embedded in court decisions.⁴ Langdell’s notion of “law as a science” and his two methods of teaching were soon favored by a significant number law professors at Harvard, as well as other schools, and soon became the mainstream pedagogy of all American law schools.

Despite the dominance of these two methods in modern American law schools, however, there are increasing challenges and critiques directed at their effectiveness in various aspects, including their failure to equip students

1. *Legally Blonde*, (Metro-Goldwyn-Mayer Inc. July 13, 2001) *Legally Blonde* is a 2001 comedy film starring Reese Witherspoon, produced by Marc E. Platt for Metro-Goldwyn-Mayer studios and directed by Robert Luketic. It is based on the 2001 novel of the same name by Amanda Brown. The film tells the story of fashion marketing major and bubbly sorority girl Elle Woods’ quest to be regarded seriously at Harvard Law School, and to win back her boyfriend Warner. See MGM.com, *Legally Blonde*, http://www.mgm.com/title_title.php?title_star=LEGALLYB (last visited Jan. 10, 2009). The film was a Golden Globe Award nominee for Best Motion Picture: Musical or Comedy; Witherspoon’s performance also received a nomination. For details, see Jamie Allen, *Globes: ‘Beautiful’, ‘Moulin’ golden*, CNN.COM, Dec. 20, 2001, <http://edition.cnn.com/2001/SHOWBIZ/Movies/12/20/golde%20n.globe.nomonation/index.html> (last visited June 9, 2009).

2. HOWARD ABADINSKY, *LAW AND JUSTICE—AN INTRODUCTION TO THE AMERICAN LEGAL SYSTEM* 87 (6th ed. 2007).

3. Kara Abramson, “*Art for A Better Life*”: *A New Image of American Legal Education*, 2006 BYU EDUC. & L.J. 227, 272 (2006).

4. ABADINSKY, *supra* note 2, at 87.

with the ability to solve real problems. Meanwhile, different pedagogies have been explored to provide law professors with alternative ways to teach particular courses, and there is an increased emphasis on the many techniques available that are more effective than the Langdell methods in reaching students in classroom.⁵

In comparing the use of the case and Socratic methods in American law schools with the pedagogical approaches of Taiwanese legal education, it is important to recognize that the United State's legal system is based in the common law, while Taiwan's is based in civil law. This distinction is significant as case law is considered a major source of law while the civil law tradition recognizes only statutory law, administrative regulations, and custom as its sources of law.⁶ While the U.S. legal system is driven predominantly by the interpretation and application of case law, Taiwan's is driven by the interpretation and application of statutory law. Thus, there is bound to be an inherent difference in the training of lawyers in the two countries, respectively, that reflects the inherent difference in the two legal systems. Nonetheless, because the comparison of legal educational systems is an integral part of comparative law studies, the following examination of Taiwanese and American pedagogies will serve to enrich the existing scholarship.

In order to delineate a clearer and more complete picture of the case and Socratic methods, part II of this essay will provide a brief history of the American legal educational system and the origin of the case and Socratic methods. Part III and Part IV, respectively, will discuss the rationale of both methods and how they operate, and analyze the current critiques of each method. Part V contains a comparison of the U.S. and Taiwanese legal educational systems. I conclude with my own thoughts on whether it is feasible and beneficial to employ either of the American methods in the Taiwanese classroom.

II. A BRIEF HISTORY OF MODERN LEGAL EDUCATION IN THE U.S. AND THE INTRODUCTION OF THE CASE AND SOCRATIC METHODS

A. *Legal Education Before Langdell*

There was no unified or systematic legal regime in colonial America and

5. ROY STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 132 (2007).

6. For details, see PETER HAY, AN INTRODUCTION TO UNITED STATES LAW 3 (Butterworth Legal Publishers 1991) (1976) (describing the case law system); JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPEAN AND LATIN AMERICA 24 (3d ed. 2007) (introducing the source of law in the Civil Law tradition).

no need for lawyers. Each colony was founded separately and functioned independently.⁷ Each developed its own flexible and eclectic legal system, roughly drawn from English common law, but with an overlay of local customs, usages, and eccentricities considered necessary for the particular time and locale.⁸ Beginning in 1642, Harvard College offered a course entitled “Ethicks and Politicks.”⁹ Other colonial colleges also provided courses with respect to natural law, moral philosophy, and government theory.¹⁰ However, these offerings were of little value to young men anxious to learn the rudiments of practicing law.¹¹ That is to say, in the eighteenth century, formalized training for the would-be lawyer virtually did not exist.¹²

There were no collegiate lectures on law before 1780 and no law schools before 1784.¹³ The first independent law school, the Litchfield School of Tapping Reeve and James Gould, is believed to have been founded by Judge Reeve in 1784, and continued to operate until 1833.¹⁴ As Litchfield’s graduates generated considerable social and political influence, it served as a model for several other independent law schools in a number of states.¹⁵ By 1835, there were, or had been, eighteen other law schools independent of a university, each offering programs of instruction resembling Reeve’s and Gould’s at Litchfield. Although most independent law schools seem to have operated for only a few years, such schools were a continuing phenomenon in the first half of the eighteenth century.¹⁶ Despite the apparent narrowness of the Litchfield curriculum,¹⁷ “[t]he Litchfield School and its imitators were the first step into a slow and somewhat reluctant recognition that law was a learned profession and not simply

7. Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L.J. 775, 777 (2004).

8. *Id.* For example, English settlers who arrived in Jamestown, Virginia, 1607 did not bring the common with them as it would have contradicted with the very purpose of the Virginia Company. In fact, the Virginia Company regulated all economic transactions. For details, 1 WILLIAM E. NELSON, *THE COMMON LAW IN COLONIAL AMERICA* 13-14 (2008).

9. Charles E. Consalus, *Legal Education During the Colonial Period, 1663-1776*, 29 J. LEGAL EDUC. 295, 307 (1978).

10. *Id.*

11. Moline, *supra* note 7, at 779.

12. *Id.*

13. *Id.*

14. Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: An Historical Framework—A History of U.S. Legal Education Phase I: From the Founding of the Republic Until the 1860s*, 39 J. MARSHALL L. REV. 1041, 1066 (2006).

15. *Id.* at 1067.

16. For details, see Craig E. Klafter, *The Influence of Vocational Law Schools on the Origins of American Legal Thought 1779-1829*, 37 AM. J. LEGAL HIS. 307, 310-13 (1993).

17. At Litchfield, “[t]he course was rooted in the practicalities of the common law governing private disputes, skipping public law topics of Constitutional government and politics, Roman civil law, and ‘stately lectures on the great principles of the Laws of Nature.’” For details, see Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 553 (1997).

another craft to be learned through self-education or apprenticeship.”¹⁸ Meanwhile, colonial universities were unable and often unwilling to incorporate legal education into their curricula.¹⁹ The practicing bar also mostly showed resistance to the transition.²⁰ Slowly but surely, however, the movement to university-based legal education had begun.²¹

During the late eighteenth century, it became possible for students to study law at a college or university. Professional law, however, was taught at only a limited number of colleges and universities, and even then the law program was merely part of the general curriculum.²² In 1826, Judge David Dagget, the former head of an independent law school, was appointed to the vacant professorship in law at Yale. The private institution that Dagget had served was absorbed by Yale as its law school.²³ When Dagget joined Yale, he introduced some of the instructional methods that had been successfully employed at his own school.²⁴ Beginning in 1826, Yale offered a complete “practitioners’ course” in law requiring enrollment for two years. The course included practice in the drafting of legal documents.²⁵ Slightly earlier than Yale, Harvard University established its own law school in 1817.²⁶ Other universities followed, founding law schools or absorbing other, independent law schools. The growth and development of law schools, however, was slow because apprenticeship continued to be the preferred method of preparation.²⁷ By 1840, the LL.B. became the usual form of the first degree in law awarded by universities.²⁸

By 1852, the Harvard curriculum included: Blackstone and Kent,²⁹

18. Moline, *supra* note 7, at 797.

19. *Id.*

20. *Id.*

21. *Id.*

22. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 240 (3d ed. 2005).

23. Moline, *supra* note 7, at 799.

24. *Id.*

25. *Id.*

26. Jones, *supra* note 14, at 1080.

27. Moline, *supra* note 7, at 797. The usual method of apprenticeship training includes some combination of directed reading, conversation with one’s mentor, observation of the practice, and the performance of routine office tasks, particularly the copying of legal documents. For details, see FRIEDMAN, *supra* note 22, at 239.

28. Jones, *supra* note 14, at 1082.

29. Sir William Blackstone was a Judge of the Court of Common. He was also invited to deliver a course of lectures on English Law, and these were so successful that he became the first occupant of the newly founded Vinerian Professorship in 1758. He was offered a seat in the House of Commons and the Headship of New Inn Hall, Oxford, in 1761. The first volume of his “*Commentaries on the Laws of England*” appeared in 1765, being the enlarged substance of his lectures, the fourth and final volume came in 1769, and edition after edition followed down to the middle of the nineteenth century. It was the first time that English Law had been made readable and intelligible to the lay mind. For details, see David Nash Ford’s *Royal Berkshire History, Sir William Blackstone (1723-1780)*, <http://www.berkshirehistory.com/bios/wblackstone.html> (last visited June 9, 2009).

James Kent graduated from Yale College in 1781. He was the first professor of law in Columbia College in 1793-1798. His most memorable work is *Commentaries on American Law* which

Property, Equity, Contracts, Bailments, Corporations, Partnership, Agency, Shipping, Constitutional Law, Pleading, Evidence, Insurance, Sales, Conflicts, Bills, Criminal Law (1848), Wills, Arbitration, Domestic Relations, Bankruptcy, and Torts was added in 1872.³⁰ These subjects were supplemented by moot court exercises.³¹ From 1830 to 1869, the Harvard Law School continued to include a bibliography of recommended texts that reflected the classification.³² The question was: what influences and how effective such a recommended reading list actually had. With such doubt in mind, Christopher Columbus Langdell, the Dean of Harvard Law School from 1870 to 1895, commenced a series of changes that would completely alter the landscape of American legal education.

B. *Langdell's Vision and Reform—The Roots of Modern American Legal Education*

When Christopher Columbus Langdell left the practice of law to become a law professor, he ushered in a new era of legal education, tremendously changing the future of American law schools for generations to come.³³ In the 1870s, Langdell compiled the most prestigious sources of intellectual authority available to build jurisprudence and an educational program that viewed law as a science.³⁴ Up through the mid-nineteenth century, the bar, not the university, determined the legal education of most young practitioners through its apprenticeship system.³⁵ Treatises instead of actual decisions were the written materials from which students were to learn.³⁶ Nevertheless, Langdell persisted, arguing that lawyers should be educated by law schools, and not solely by reading treatises on the law, but rather by examining the actual, written decisions of the courts (the “original sources” of the law).³⁷ He also proposed that the job of “law professor” should be the professor’s full-time job, rather than practicing law full-time and teaching law students as a secondary responsibility. In short, Langdell believed that a law professor should view teaching the law as primary, not

contains four volumes and was published 1826-1830. The masterpiece was highly respected in England and America. The *Commentaries* treated both state, federal and international law, and the law of personal rights and of property, and went through six editions in Kent’s lifetime. For details, see *An Autobiographical Sketch of Chancellor Kent*, 1 S. L. REV. 381 (1872), available at <http://www.law.upenn.edu/about/history/medallions/kent/kent-bio.pdf> (last visited June 9, 2009).

30. Jones, *supra* note 14, at 1083.

31. *Id.*

32. *Id.*

33. W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 4 (1997).

34. Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 430 (1987).

35. Carter, *supra* note 33, at 5.

36. *Id.*

37. *Id.*

practicing it.³⁸

Langdell achieved two major innovations in legal education. First, he constructed the study of law as a “science” similar to natural science with the expectation of promoting the orthodoxy of legal study in the eyes of the university community.³⁹ And second, he introduced the notion of legal formalism—a common law theory that dominated the second half of the nineteenth century.⁴⁰ Under formalism, “[t]he common law contains a systematic, eternal array of broad principles and specific doctrines, all interconnected and logically consistent.”⁴¹ These doctrines were discovered by judges through the study of judicial decisions and a process of inductive reasoning.⁴² To illustrate, each legal doctrine has arrived at its present state by slow degrees of development extending in many cases through centuries.⁴³ This development can be traced mainly through a series of cases. Hence, the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.⁴⁴

However, only small portion of the cases reported were useful and necessary for this purpose and the rest, maybe even the vast majority, were of very limited use to systematic study.⁴⁵ Moreover, the number of fundamental legal doctrines is much smaller than what laymen had assumed.⁴⁶ The same doctrine appears in several different cases, and vast legal treatises are replete with repetition, which only increases the confusion.⁴⁷ “[I]f these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.”⁴⁸

This notion of legal formalism led to Langdell’s most significant contribution to legal education, the case method. Subsequently, Langdell’s approach to law, which classifies cases under a few general principles, turned into the blueprint for the organization of all legal knowledge and was, thus, adopted as the framework for the National Reporter System and the American Law Institute’s Restatement projects.⁴⁹ Leading cases were collected in accordance with doctrinal lines and organized in a fashion in

38. *Id.*

39. Steven B. Dow, *There’s Madness in the Method: A Commentary on Law, Statistics, and the Nature of Legal Education*, 57 OKLA. L. REV. 579, 580-81 (2004).

40. NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM* 7 (1997).

41. Dow, *supra* note 39, at 581.

42. *Id.*

43. Dennis Patterson, *Langdell’s Legacy*, 90 NW. U. L. REV. 196, 197 (1995).

44. *Id.*

45. *Id.* at 198.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 201.

which the holdings became all-important, for it is by virtue of their holdings that cases are classified.⁵⁰

In the second term of the 1870-1871 academic year, Langdell began to apply this doctrine to his teaching.⁵¹ Langdell collected a sufficient group of cases to implement his new pedagogy. His “textbook” in Contracts and in Sales was his selection of cases.⁵² Langdell started the class by questioning students about a particular case.⁵³ After preliminary inquiries as to the facts, arguments, and opinions that had been presented, he posed further questions intended to elicit the views of the students as to the arguments and opinions.⁵⁴ Ultimately, Langdell’s new method expected students to study the case critically through a careful examination of the various aspects of the case, and to form the judgment or dissent of the case on their own.⁵⁵ This pedagogy is known as the “Socratic method.” Initially, Langdell’s experiment was met with student outrage.⁵⁶ They complained openly and bitterly that they were not being taught “the law.”⁵⁷ However, this practice was gradually accepted and students discovered that they not only learned the law, but gained the mental discipline required to fully understand it.⁵⁸

In short, Langdell considered the law to be a science and the two methods he developed to be how this science works. The core of Langdell’s method was to unveil a body of law through close study of selected legal decisions, but not all legal decisions.⁵⁹ Instead, he selected only a few designed to reveal a body of doctrine or illustrate mistaken deviations from the rules.⁶⁰ Langdell also focused the subject of instruction by explaining the legal topic at hand not by lecture, but through what has come to be called the Socratic method: a process of questioning carefully designed on the dialogues.⁶¹ The case and Socratic methods continue to be the primary method of instruction in American law schools today.

50. *Id.*

51. Carter, *supra* note 33, at 22.

52. *Id.*

53. *Id.* at 23.

54. *Id.*

55. ABADINSKY, *supra* note 2, at 88.

56. For details, see Franklin G. Fessenden, *The Rebirth of the Harvard Law School*, 33 HARV. L. REV. 493, 498-99 (1920).

57. *Id.*

58. *Id.*

59. Robert Stevens, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 52 (The Lawbook Exchange 2001) (1983).

60. *Id.* at 52-53.

61. Abramson, *supra* note 3, at 230.

III. THE CASE METHOD AND ITS CRITIQUES

A. *How the Case Method Works*

As mentioned above, Langdell regarded law as a science that consists of certain principles and doctrines. Given that such science deserves serious academic study, Langdell implemented this notion in his teaching. Langdell did not believe that it was necessary for students to review all, or even most, of the cases on a given subject, as he thought that a systematic review would be detrimental because the vast majority of cases were of no value.⁶² Hence, students need only to review “sound” or “good” decisions—as selected by their professors.⁶³ Langdell, therefore, created a casebook containing selected cases that were worthy of examination.⁶⁴ In 1870, he published the complete, first edition of his first casebook, *Cases on Contracts*, and immediately employed this casebook in his teaching of “Contracts” at Harvard.⁶⁵ The main focus of his case method was on original sources of the law and on the methods of case analysis and legal reasoning in case law. Today, some of Langdell’s theories about how, precisely, case law should be taught has been eroded by new ideas, but, even after modification, Langdell’s method is still the basic model for most modern law school courses.

The core, or perhaps the only, material utilized in typical law school courses is the “casebook.” The casebook, sometimes called “cases and materials,” contains judicial opinions, as well as any relevant statutes.⁶⁶ “[I]t also includes some textual material that links the cases together or summarizes case law or statutory law not sufficiently important to be read as primary materials.”⁶⁷ Students are required to acquire a personal copy of the book, since they are assigned opinions to read in preparation for the class.⁶⁸ Following the cases, there are study questions that remind students which aspects of the case are important, confusing, or questionable.⁶⁹ Class sessions are discussions of the principal cases students were assigned to read, so the burden is on the students to make sense of the decision before

62. Russell L. Weaver, *Langdell’s Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 532 (1991).

63. *Id.*

64. *Id.*

65. Bruce A. Kimball, “Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law”: *The Inception of Case Method Teaching in the Classrooms of the Early C. C. Langdell, 1870-1883*, 17 LAW & HIST. REV. 57, 108 (1999).

66. WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES (3d ed. 2002).

67. *Id.*

68. *Id.*

69. *Id.*

coming to class.⁷⁰ The first purpose of the class discussion is to identify the governing rules of law that sustain the case. Then, guided by the instructor, students learn how to “disassemble” a decision and analyze its component parts. Students also learn to “relate one case to another, to harmonize the outcomes [of] seemingly inconsistent cases so that they are made to stand together.”⁷¹ This process of training enables students to acquire not only an approach to thinking and working with cases that constitutes the fundamentals of legal reasoning, but also knowledge of doctrinal rules revealed in such cases.⁷²

In the case method of study, a single correct way of analyzing or organizing opinions does not exist, while it is the process not the outcome that is significant.⁷³ The reason for utilizing class discussion instead of lecture as a method of instruction is to stimulate the students to perform the necessary case analysis and critique themselves, rather than passively listening to a lecture showing them how to do it.⁷⁴

B. *Arguments in Support of the Case Method*

1. *Increased Interest in Learning Law*

Most students may be attracted to the stories of human behavior that underlie each opinion, if for no other reason than that these stories describe lawyers at work, which is what law students have come to law school to learn about.⁷⁵ Under the lecture method, a student is inclined to come into lecture with an empty mind. In reading cases, however, students, whether they approve or not of the decision or are in doubt or perplexity over it, still come into class interested and eager to express their views, or to have their doubts clarified or their puzzles solved.⁷⁶ In addition, reading cases allows students not only to learn legal rules, but to see how those rules have been applied.⁷⁷

2. *Teaching Students How to Read Cases*

The case method is also referred to as a vehicle for teaching students

70. ABADINSKY, *supra* note 2, at 88.

71. *Id.*

72. *Id.*

73. *Id.*

74. BURNHAM, *supra* note 66, at 131.

75. Philip C. Kissam, *The Ideology of the Case Method/Final Examination Law School*, 70 U. CIN. L. REV. 137, 149 (2001).

76. Weaver, *supra* note 62, at 548.

77. *Id.*

how to “read” cases.⁷⁸ Lawyers must know how to analyze cases, and the case method provides a direct way of teaching that skill.⁷⁹ In order to read a case, a student must be able to dissect it into its constituent parts: the relevant facts, the issue, the holding, and the reasons or justifications for the decision.⁸⁰ A student must also learn to brief a case⁸¹—to recognize what the important facts are, what the court decided, and why.⁸² Then, a student considers the arguments of other lawyers and learns whether the court found those arguments to be sound.⁸³ In addition, the case method facilitates students’ skills to synthesize cases, fitting several together to explain what the law is.⁸⁴ All these techniques are the foundations of becoming a lawyer.

3. *Teaching Students to Think Like a Lawyer*

The case method can also be used to help students acquire critical thinking skills.⁸⁵ The case method requires students to think like a lawyer, as critical thinking is essential to a lawyer.⁸⁶ Lawyers must perform in a variety of contexts during their careers, and critical thinking skills are necessary in many of these contexts.⁸⁷ Lawyers bear the duty to assume “direction of all phases of the areas of personal conflict inherent in a complex society and economy. They must be advisers, negotiators, advocates, judges, arbitrators—and frequently administrators and executives having a large amount of quasi-legislative power.”⁸⁸ For example, a lawyer must analyze his/her client’s problem and decide how the case law addresses the problem or whether the client needs another forum such as mediation.⁸⁹ Even more significantly, there are no answers—“there are just good walls and bridges, which hold up under scrutiny, and bad walls and bridges, which fall apart when pressure is applied.”⁹⁰ The walls and bridges are a lawyer’s legal analysis, while cases are the building blocks of the bridges and walls.⁹¹

78. *Id.*

79. *Id.*

80. *Id.*

81. Briefing the case is a process of rewriting the case into a brief form and connecting its principles to other ideas within a legal subject. See Abramson, *supra* note 3, at 267.

82. Suzanne E. Rowe, *The Brick: Teaching Legal Analysis Through the Case Method*, 7 PERSP. TEACHING LEGAL RES. & WRITING 21-22 (2000).

83. *Id.*

84. *Id.*

85. Weaver, *supra* note 62, at 549.

86. Abramson, *supra* note 3, at 267.

87. Weaver, *supra* note 62, at 550.

88. *Id.*

89. Rowe, *supra* note 82, at 21.

90. *Id.*

91. *Id.*

4. *Learning the Law Through a Series of Precedents*

The case method is the only realistic way to learn law in a system based on precedent.⁹² A judge may announce a “rule” in the opinion of a case and even provide language that suggests the rule’s importance and the necessity of applying it in future cases.⁹³ However, the importance of that rule can only be confirmed by reference to how it is applied in subsequent cases.⁹⁴ Is the rule followed or is it distinguished?⁹⁵ The case method is found efficient and effective for students in examining the extent to which judges follow, distinguish, or avoid precedent in determining the “law” in a given area.⁹⁶

5. *Understanding the Legal Process*

An important justification for using the case method is that it can be used to teach students much about the legal process.⁹⁷ It is undeniable that the rules and doctrines contained in legal precedent are an integral part of the American system. Yet, with mere knowledge of precedent, doctrine, and rules, a student is not fully-equipped to practice law.⁹⁸ While judges sometimes work with clear-cut rules that lead them to a specific result, more often than not, no result is mandated.⁹⁹ After analyzing existing law, judges have to exercise discretion in reaching a decision, while in many circumstances, judges must engage in “law making” or “law creation.”¹⁰⁰ The discretionary aspect of law can be revealed by the case method.¹⁰¹

6. *Cultivating Moral Imagination*

Because the case method employs case materials as a basis for exploring the different positions embodied in the case, students develop their imagination as they cannot avoid considering different perspectives.¹⁰² Over time, the practice of paying attention to different sides of a case becomes

92. Weaver, *supra* note 62, at 553.

93. *Id.*

94. *Id.*

95. *Id.*

96. For details, see Walter E. Oberer, *On Law, Lawyering, and Law Professing: The Golden Sand*, 39 J. LEGAL EDUC. 203 (1989).

97. Weaver, *supra* note 62, at 554.

98. *Id.*

99. *Id.*

100. For details, see GEOFFREY C. HAZARD JR. & MICHAEL TARUFFO, *AMERICAN CIVIL PROCEDURE: AN INTRODUCTION* 51-57 (Harry H. Wellington ed., 1995) (1993).

101. Weaver, *supra* note 62, at 554.

102. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 113 (1993).

“habitual.”¹⁰³ This process, as carried out through the case method, “works simultaneously to strengthen both the student’s power of sympathetic understanding and his ability to suppress all sympathies in favor of a judge’s scrupulous neutrality.”¹⁰⁴

7. *Developing Mental Toughness*

Lawyers sometimes have to perform under difficult conditions. For example, they have to deal with questions from a judge or argue against opposing counsel at a hearing. When encountering these situations, lawyers need to think quickly and respond immediately.¹⁰⁵ Through the class discussion encouraged by the case method, students’ views become subject to critical examination by their professors and peers, preparing them for these situations.¹⁰⁶ Moreover, the students of the case method may soon find themselves trapped in a dead end.¹⁰⁷ “He is given no map carefully charting and laying out all the byways and corners of the legal field, but is left, to a certain extent, to find his way by himself.”¹⁰⁸ If he successfully transcends, he experiences the feeling that he has gained this knowledge of the law by himself.¹⁰⁹ The legal content of his mind has a personal nature; he has made it himself. As a result of this forced personalization of the law, students learn to “question the validity and applicability of every generalization and develop toughness and resilience of mind and the capacity and willingness to form and act upon . . . considered judgment in important situations.”¹¹⁰

C. *Critiques of the Case Method*

1. *The Problem with the Case Book*

Langdell’s ideas about the casebook flowed naturally from his conception of law.¹¹¹ Students are required only to read decisions that show the development of fundamental rules, or illustrate their meaning and application.¹¹² Langdell stated that the “growth of the law is to be traced in the main through a series of cases; and much the shortest and best, if not the

103. *Id.*

104. *Id.* at 114.

105. Weaver, *supra* note 62, at 552.

106. *Id.*

107. David D. Garner, *The Continuing Vitality of the Case Method in the Twenty-First Century*, 2000 BYU EDUC. & L.J. 307, 327 (2000).

108. *Id.*

109. *Id.*

110. *Id.* (quoting Edmund M. Morgan, *The Case Method*, 4 J. LEGAL EDUC. 379, 380 (1952)).

111. Weaver, *supra* note 62, at 569.

112. Fessenden, *supra* note 56, at 506.

only way of mastering the doctrine effectually is by studying the cases in which it is embodied.”¹¹³ In fact, Langdell’s theory was pushed to extremes.¹¹⁴ By excluding decisions that were not sufficiently faithful to the “fundamental” rules and doctrines, Langdell’s casebooks included a very limited and inaccurate view of law.¹¹⁵ The overemphasis on principles and doctrines implies that, in a given case, lawyers and judges were searching for the one true rule.¹¹⁶ This view ignored the realities of law. Decisions that did not completely fall in line with fundamental rules are as much a part of the law as those that are faithful to the fundamental rules, and they must be considered if one is to understand the law.¹¹⁷

2. *The Case Method Encourages Students to View Law in an Incomplete Conception*

The case method can undermine or even drive out all other considerations in legal education.¹¹⁸ It leads to the inadequate attention to the socio-ethical side of law.¹¹⁹ Therefore, law school graduates are not sufficiently educated in the responsibility of lawyers both for the wider legal system and in the ethics of their particular practice.¹²⁰ In addition, the case method can deter creative legal scholarship as the case method results in students’ “obedience” to the selected decisions.¹²¹ Also, students study nothing but principles and doctrines of the common law which are deemed answers for all legal questions. Statutes and legislative documents, an obvious and significant source of law, are paid very little or no attention.¹²²

3. *The Case Method Omits the Fact Finding and the Legal Process*

The case method’s emphasis on principles and doctrines also indicates that there is no attention to fact finding, a process in which courts are regularly engaged.¹²³ The facts of a case are set out by the judge in the written decision.¹²⁴ To illustrate, the case method captures only a small

113. Weaver, *supra* note 62, at 569 (quoting CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS VI (1871)).

114. Weaver, *supra* note 62, at 569.

115. *Id.*

116. *Id.*

117. *Id.* at 570.

118. James R. Maxeiner, *Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law and the Case Method*, 35 INT’L J. LEGAL INFO. 1, 31 (2007).

119. *Id.*

120. *Id.*

121. Garner, *supra* note 107, at 337.

122. Dow, *supra* note 39, at 585.

123. *Id.*

124. *Id.* at 586.

picture of the legal process, typically the level of decision-making in courts. Although case method has the merit of bringing out the legal issues in a case with an economy that is considered helpful in the time-limited classroom, such reason alone should not eliminate the opportunity, in some legal cases, to examine all of the documents involved.¹²⁵ The legal process is more complex than the economic portrayal of legal facts within appellate decisions.¹²⁶ The issues within a lawsuit that most affect its outcome may be present in the pre-appellate stages of a case, and typically lawyers first confront a legal problem from its beginning, not at the appellate level of the legal process.¹²⁷ Students who study only appellate decisions lose the opportunity to contact with reality and hence enter other stages of a legal problem without necessary skills.¹²⁸ Unfortunately, in most cases, the disagreements do not exist in the accuracy of rules and doctrines but in the fact.¹²⁹

4. *The Case Method Fails to Teach Lawyering*

Here is the real world: before there are cases, there are human beings with problems.

“Every practicing lawyer realizes that clients do not present themselves in lawyer’s offices with well-defined fact patterns, clear adversarial positions, or precisely formulated objectives or goals. In short, real life clients look nothing like appellate cases. Instead, they most often provide partial information, and their presentation can be distorted by self-interest and intense emotions such as anger, fear, or shame. Their immediate goals may be in conflict with their long-term interests. Parties whom they perceive as their adversaries may in fact be their allies, and parties they believe to be their allies may in fact be adversaries.”¹³⁰

In the early stages of representation, successful lawyering needs skills in various aspects including listening, fact investigation, interest clarification, negotiation, and planning.¹³¹ However, the case method does not even purport to address these skills.¹³² Certainly, lawyers read cases, but the case reading aims mainly at helping to solve the clients’ problems.¹³³ Despite that

125. Abramson, *supra* note 3, at 268.

126. *Id.*

127. Weaver, *supra* note 62, at 553.

128. Abramson, *supra* note 3, at 269.

129. *Id.*

130. Janeen Kerper, *Creative Problem Solving vs. the Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351, 353 (1998).

131. *Id.*

132. *Id.*

133. Myron Moskovitz, *From Case Method to Problem Method: The Evolution of a Teacher*, 48 ST. LOUIS U. L.J. 1205, 1206 (2004).

the main purpose of the case method is to train students to “think like a lawyer,” Langdell and his followers were criticized for fleeing from the practice of law and attempting to teach students to “think like a law professor.”¹³⁴ Therefore, the replacement of the case method with the “problem method” is gradually obtaining market share in recent years.¹³⁵

D. *Analysis*

Despite the increasing acceptance, even advocates of the problem method admit that “creative problem solving does not abandon the adversary method.”¹³⁶ In fact, the problem method can be deemed the variation or the evolution of the case method which functions better than the traditional case method in teaching real lawyering. In a report to the Stanford University Academic Senate in 1997, Paul Brest, former Dean of Stanford Law School, affirmed the irreplaceable value of the case method while acknowledged the necessity of problem-solving method in clinical courses:

“[T]he case method has made American legal education a success . . . seldom emulated-by lawyers and educators throughout the world In the past three decades, legal education has undergone some changes The most significant development with respect to professional training was the introduction of clinical education . . . included courses where students engaged in role-playing in simulated students the opportunity to work with real clients under the mentorship of practicing lawyers. Clinical instruction was designed, among other things, to compensate for the lack of an apprenticeship requirement for admission to the bar-and also to provide some relief from . . . three years of case analysis.”¹³⁷

Furthermore, the case method, though originated at Harvard Law School, has been broadly adopted by institutes of other disciplines after

134. *Id.* at 1214.

135. “[T]he merit of the problem method is that it more effectively forces the law student to reflect on the application of pertinent materials to new situations and accustoms him to thinking of case and statute law as something to be used, rather than as something merely to be assimilated for its own sake. An AALS report lists five virtues of the problem method: (1) it approximates the lawyer’s approach to the law, (2) it affords training in planning and advising, (3) it broadens the range of matters open to the student’s consideration, (4) it increases the effectiveness of instruction where case law is inadequate (primarily where legislation is involved), and (5) it provides a stimulus to student interest.” For more information, see Myron Moskowitz, *Beyond the Case Method: It’s Time to Teach with Problems*, 42 J. LEGAL EDUC. 241,270 (1992).

136. Kerper, *supra* note 130, at 354.

137. Paul Brest, Report of the Dean of the Law School to the Stanford University Academic Senate (Jan. 23, 1997), http://facultysenate.stanford.edu/archive/1996_1997/reports/105603.html.

some extent of alternation. For example, eighty percent of classes are built on the case method at Harvard Business School because this method is considered beneficial for students to “develop their muscles for making decisions and allows them to discover important ideas for themselves.”¹³⁸ Although cases at business school tend to consist of much more information and situations than the appellate cases used in law schools, a careful study conducted by a Harvard Business School professor comparing the methods used in several of Harvard’s professional schools found that alternative “case methods” do indeed develop different skills.¹³⁹ Therefore, Professor Todd Rakoff and Martha Minow of Harvard Law School suggest retaining the case method, while conducting certain reforms in accordance with the business school model.¹⁴⁰ With respect to the material, they advise that case writers get their materials from practitioners and write cases through consultation with them.¹⁴¹ Hence, “case studies can be written effectively in installments, with five to fifteen pages laying out the initial situation up to a decision point for a key actor like the lawyer consulted by a client, and a next installment that details choices made, repercussions encountered, and new issues identified.”¹⁴² The duty of the faculties is to induce students to engage in the analysis of complex, rich factual descriptions of problems and in the generation of alternative avenues for problem-solving.¹⁴³ This process simulates what lawyers actually do: formulate unique assessments of options based on specialized knowledge about the institutional, conceptual, and practical benefits and difficulties of each.¹⁴⁴

Additional evidence demonstrates the constant dominance of the case method in American law schools. For example, a number of law schools, on their information webpage for prospective students, signify that the case method is the principal method of teaching in most courses, as well as describe the purpose, functions and descriptions of the method.¹⁴⁵ As revealed in the section of “Frequently Asked Questions” on Stanford Law School’s webpage:

138. Colleen Walsh, *From Law School to Business School—Evolution of the Case Method*, HARV. UNIV. GAZETTE, Apr. 3, 2008, <http://www.news.harvard.edu/gazette/2008/04.03/13-case-method.html>.

139. Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 604-05 (2007) (citing David A. Garvin, *Making the Case*, 106(1) HARVARD MAG. 56, 56 (2003)). The report indicated that Business school students, for example, generate alternative solutions and choose among them more ably than the typical law student; medical school students more successfully learn to identify what they do not know and how to find it out.).

140. *Id.* at 605.

141. *Id.* at 606.

142. *Id.*

143. *Id.* at 605.

144. *Id.*

145. Ralph Brill, *Course Information: The Case Method*, <http://www.kentlaw.edu/faculty/rbrill/classes/BrillTortsF2007Day/CoursePages/courseinfo/Case.html> (last visited June 9, 2009).

While we do not envision the case study method displacing the appellate case method or clinical programs, we do believe that the case method can be used in conjunction with existing teaching methods to add considerable educational value. Case studies and simulations immerse students in real-world problems and situations, requiring them to grapple with the vagaries and complexities of these problems in a relatively risk-free environment—the classroom.¹⁴⁶

The University of Denver, Sturm College of Law also informs the 1L students in its Law School Learning Aids that since courts do not often specifically state the issue, the holding or the rule, the case method is designed to help students acquire skills at reading cases, distilling rules from those cases, and learning to apply such rules to solve clients' problems.¹⁴⁷

Concerning the various critiques, the case method itself has never aimed to teach the techniques of fact finding, legal process or lawyering. The original objective of such method is to train for skills in disassembling a decision and analyzing its component parts. Actually, fact finding, legal process or lawyering are techniques which law school graduates have no difficulty in acquiring after one or two year legal practice. Such objections to the case method seem to deviate from the primary focus of the case method.

To sum up, the case method not only remains the predominant teaching methodology utilized in most American laws schools, but also influences the pedagogies in other professional schools. Nevertheless, business schools' alternatives to the case method actually provide possible solutions to critiques facing the case method simultaneously. The more problem-solving-oriented case method, which enables students to learn more about the practice of law, will further sustain the prevalence of the case method.

IV. THE SOCRATIC METHOD AND ITS CRITIQUES

A. *How the Socratic Method Works*

The Socratic method has long been recognized as “active teaching.”¹⁴⁸ It is usually used in conjunction with the case method. This method is meant to cultivate and to extract ideas through the method's rigorous in-class

146. Stanford Law School, Frequently Asked Questions, <http://www.law.stanford.edu/publications/casestudies/faq> (last visited Jan. 31, 2009).

147. Sturm College of Law, Law School Learning Aids: Case Method, <http://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/case-method> (last visited June 9, 2009).

148. Abramson, *supra* note 3, at 272.

questioning.¹⁴⁹ Lawyers, after all, must learn to think quickly and argue their position fluently and convincingly in front of others. The standard form of the Socratic method starts with the professor's selecting a student to describe a case assigned for the day—to report the facts, holding, and reasoning.¹⁵⁰ Then, sometimes moving from student to student, sometimes not, the professor asks more advanced and difficult questions with regard to the implications of the holding in the case and the relationship of that holding to other cases in a certain area.¹⁵¹ Through this process of questioning, the professor guides the student toward an articulation of the ideas expressed in the case. The professor may ask one student a series of questions or divide the questioning among a number of students.¹⁵² She or he may ask students to make arguments for both parties, and then may adjust the facts of the case by offering a “closed hypothetical” to see how the rules of the case might function in a different fact pattern.¹⁵³ Ordinarily, this questioning process lasts the entire class session. The professor neither lectures nor provides answers.¹⁵⁴ Students are forced to develop conclusions on their own based on the guidelines provided by the professor's questioning.¹⁵⁵ Just as Langdell asserted, students are expected to discover the truth of the matters being considered.¹⁵⁶

B. *The Justification of the Socratic Method*

1. *The Socratic Method Is an Effective Way of Educating Law Students*

For students, the risk of being questioned stimulates all students in the class to participate vigorously in an exploration of the limits and strength of legal arguments.¹⁵⁷ Students learn legal analysis by performing it in their own minds or in an oral exchange with the professor.¹⁵⁸ Questioning students forces them to confront the weaknesses of each position, and ultimately trains them to assess the strength of legal arguments on their own.¹⁵⁹ Therefore, in the preparation stage, a student could have asked himself/herself potential questions before class, and the kinds of questions

149. *Id.*

150. BURNHAM, *supra* note 66, at 131.

151. *Id.*

152. Abramson, *supra* note 3, at 272.

153. STUCKEY, *supra* note 5, at 214.

154. Abramson, *supra* note 3, at 272.

155. For details, see Phillip E. Areeda, *The Socratic Method(SM) (Lecture at Puget Sound 1/31/90)*, 109 HARV. L. REV. 911, 914-15, 922 (1996).

156. STUCKEY, *supra* note 5, at 210.

157. Areeda, *supra* note 155, at 916.

158. *Id.* at 921.

159. Abramson, *supra* note 3, at 273.

the instructor asked can be self-posed after class.¹⁶⁰ The internalization of that questioning process is not an illusion.¹⁶¹ It is the essence of legal reasoning and the achievements of the Socratic method.¹⁶²

In addition, the Socratic method enhances the learning process by asking students to examine a decision from many different angles.¹⁶³ For example, they might be asked to think about the limits of a decision or to examine value judgments that influenced the decision.¹⁶⁴ Students can also be asked advanced questions such as “what motivated a court to reach a decision,” “what policy considerations did it mention,” “what unstated considerations may have been present,” and so on.¹⁶⁵ This process of examination via dialogue provides students as well as professors with the opportunity to attain many new insights about the decisions they read.¹⁶⁶

Furthermore, compared to the lecture method, the Socratic method is superior. In the class taught by the lecture method, students are inclined to dutifully take notes from the delicately prepared lectures and have no motivation to read them until a week before the exam.¹⁶⁷ Then, two weeks after the exam, what students learned from the notes has been completely forgotten.¹⁶⁸ Conversely, the Socratic method awakens students’ interests and encourages discussion and learning.¹⁶⁹ The Socratic method entails active student participation in the learning process.

“[I]t is a pedagogy based on the premise that active learning almost always produces understanding of a higher quality than passive learning. It is a recognition of the wisdom conveyed by the old saw: ‘Tell me, and I will forget. Show me, and I will remember. Involve me, and I will understand.’”¹⁷⁰

It is, however, necessary to add some pressure on students.¹⁷¹ The Socratic method can be referred to as a “friendly assault.”¹⁷² It is the duty of

160. Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 117 (1999).

161. *Id.*

162. Areeda, *supra* note 155, at 922.

163. Weaver, *supra* note 62, at 548.

164. *Id.*

165. *Id.*

166. *Id.*

167. Burnele V. Powell, *A Defense of the Socratic Method: An Interview with Martin B. Louis (1934-94)*, 73 N.C. L. REV. 957 (1995).

168. *Id.*

169. *Id.*

170. Donald G. Marshall, *Socratic Method and the Irreducible Core of Legal Education*, 90 MINN. L. REV. 1, 9 (2005).

171. Powell, *supra* note 167, at 958.

172. *Id.*

the instructor to make known to students where their opinions are off-base or consisting of a logical hole.¹⁷³

2. *The Socratic Method Teaches Students the Essential Skills of Being a Lawyer*

The purpose of the Socratic method is to teach students “analytical thinking” and, as an added bonus, give students “a little practice in oral communication.”¹⁷⁴

“[I]f law schools lower their standards and alter their methodology, ultimately the law students will suffer. Untrained in independent thought, critical analysis, and verbal communication in their undergraduate education and not fully exposed to it in their legal training, law students will enter the legal market completely unprepared to face the challenges that await them.”¹⁷⁵

In the real world of practicing law, lawyers are regularly called upon to defend the interest of their clients before strangers in a public setting along with little opportunity for advance preparation.¹⁷⁶ Therefore, it is the prerequisite for a lawyer to be comfortable with spontaneous public speaking, and the Socratic method seems to be the best pedagogy to teach this skill.¹⁷⁷

C. *Critiques of the Socratic Method*

1. *Critiques from a Mental Health Perspective*

(a) *The Socratic Method Creates Anxiety*

The strongest critique of the Socratic Method is that it harms students by nurturing severe anxiety.¹⁷⁸ Instructors’ quick criticism of imperfect student answers results in the student’s public degradation, humiliation, ridicule, and even dehumanization.¹⁷⁹ This cruel and psychologically-abusive process may scar students for life, even among the students who do not speak in

173. *Id.*

174. *Id.* at 970.

175. Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 473 (1996).

176. Anthony Kronman, *The Socratic Method and the Development of the Moral Imagination*, 31 U. TOL. L. REV. 647, 648 (2000).

177. *Id.*

178. Abramson, *supra* note 3, at 273.

179. Kerr, *supra* note 160, at 118.

class because the possibility that they may be called on is intimidating.¹⁸⁰ The stress students endure during Socratic questioning is considered a side effect of this method that can overshadow the entire learning process.¹⁸¹

In the Socratic method, the pressure on a student comes not only from the instructor, but also can be attributed to disrespectful treatment from the student's peers.¹⁸² There are "[s]tudents who roll their eyes at answers they deem unacceptable, throw pencils down in disgust, and resort to crude name-calling."¹⁸³ This kind of behavior is a signal of the competition that inevitably occurs as, in the Socratic classroom, students will find ways to distinguish themselves from their equally outstanding peers, and some will resort to strategies designed to insult other students, rather than finding more constructive ways to stand out.¹⁸⁴

(b) The Socratic Method Does Not Serve the Psychological Need of Law Students

Law school usually attracts fairly aggressive, proactive people who like certainty and being in control over their environment, and who also possess passion for justice.¹⁸⁵ As the goal of the Socratic Method is to understand the conceptual framework of legal rules and doctrines, students attempt to gain control of the course material while the professors' job is to challenge students' assertions.¹⁸⁶ As a consequence, students are left with the impression that law is nothing but a series of arguments and that the ultimate result does not relate to the earlier belief of justice or fairness.¹⁸⁷

2. *The Socratic Method Is Ineffective in Teaching Lawyering, Inefficient, and Filled with Uncertainty*

The Socratic method focuses merely on the abstract, and the skills of case-based legal reasoning are often deemed to be overly academic and library-based.¹⁸⁸ Nevertheless, the true work of a lawyer consists of solving the real problems of real clients. It relies very little on the abstract legal rules, principles, and theories explored in Socratic dialogue.¹⁸⁹ It is also criticized for its lack of efficiency because of the very limited material that

180. *Id.*

181. Abramson, *supra* note 3, at 274.

182. Elizabeth Garrett, *The Role of the Socratic Method in Modern Law Schools*, 1 GREEN BAG 199, 203 (1998).

183. *Id.*

184. *Id.*

185. Andrew Moore, *Conversion and the Socratic Method in Legal Education: Some Advice for Prospective Law Students*, 80 U. DET. MERCY L. REV. 505, 507 (2003).

186. *Id.*

187. *Id.*

188. Kerr, *supra* note 160, at 119.

189. *Id.*

can be covered in a given period of time.¹⁹⁰

Moreover, notwithstanding the fact that the Socratic method may give students the impression that the law is not as certain, predictable, and ordered as they expect, the deliberately and carefully controlled process of questioning, coupled with a narrow set of legal materials, seems to actually overlook the unpredictability that can exist in the law.¹⁹¹ “[R]ather than revealing a set of clear, unchanging rules that can be immediately applied to produce an equitable result, professors demonstrate that rules contain ambiguities, courts disagree on the law, and application of a particular rule can produce undesirable effects when the facts are changed.”¹⁹² Confusion and anxiety are common reactions to this process.¹⁹³

3. *Critiques from the Feminist Perspective*

Feminist legal scholars have developed a related critique of the method based on its adverse impact on female law students.¹⁹⁴ According to their arguments, Socratic classrooms are male-oriented, competitive environments that “stack the deck” against women and their more cooperative and communal styles of learning.¹⁹⁵ Because women feel intimidated and alienated in “patriarchal and hierarchical Socratic classrooms,” women often feel they do not have anything to contribute and their voices are excluded from the debate.¹⁹⁶ The dominant male voice in the classroom may cause female students to under-perform on the examinations that later determine career prospects.¹⁹⁷

D. *Analysis*

Although doubts about the Socratic Method have never ceased, no teaching methodology has been developed to completely replace it. In reality, advocates distrusting the Socratic Method continue to apply such method by moderating the tension surrounding it. Professor Elizabeth Mertz, a law professor at the University of Wisconsin, prefers to use lecture-discussion method or to switch back and forth from the Socratic Method to lecture-discussion which is known as “Soft Socratic.”¹⁹⁸

190. Abramson, *supra* note 3, at 275.

191. Stropus, *supra* note 175, at 458.

192. Moore, *supra* note 185, at 508.

193. *Id.*

194. Kerr, *supra* note 160, at 121.

195. For details, see Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 46-51 (1994).

196. Kerr, *supra* note 160, at 121.

197. Guinier et al., *supra* note 195, at 28.

198. Stephanie B. Goldberg, *Beyond the Socratic Method*, 36(2) STUDENT LAW. 18 (2007),

Moreover, Professor Roy Stuckey, a professor of clinical legal education at the University of Southern California, albeit urging reduced reliance on the Socratic Method, acknowledges the inevitability of using it to achieve goals which other methods cannot.¹⁹⁹ He notes that the method is effective for simulating the tension of a courtroom and establishing a model for legal analysis with cautions that it is never used as a tool for humiliation or embarrassment.²⁰⁰

In addition, during each annual workshop held by the American Association of Law Schools (the AALS), advice regarding cautious use of the Socratic Method was repetitively given, but the necessity and value of the method also were never refuted. In the 2003 workshop, Debra Green, a professor of Florida Coastal School of Law, advocated the essentiality of creating a dynamite classroom which can be achieved through the Socratic Method while recommended new law instructors to manage students and their personalities (i.e. shy students who are unwilling to talk, or students who routinely want to get the class off track) in order to alleviate the inefficiency of the Socratic Method.²⁰¹ Also, in the 2007 workshop, Kimberly Robinson, a professor of Emory University School of Law, suggested new law school teachers give a brief explanation of the style they use and the reason for using it, particularly on the occasion of the Socratic Method, as this will help their students understand the learning process.²⁰²

Similar as the case method, the Socratic Method is still the most commonly used pedagogy among law schools in the U.S. Significant numbers of law schools particularly introduce the method on their webpage for incoming students. For instance, the law school webpage of the University of Chicago Law School explicitly notes that:

“University of Chicago professors who rely on the Socratic Method today use participatory learning and discussions with a few students on whom they call (in some classrooms, randomly) to explore very difficult legal concepts and principles. The effort is a cooperative one in which the teacher and students work to understand an issue more completely. The goal is to learn how to analyze legal problems, to reason by analogy, to think critically about one’s own arguments and those put forth by others, and to understand the effect of the law on those subject to it. Socratic discourse requires

available at <http://www.abanet.org/ltd/studentlawyer/oct07/goldberg.shtml> (last visited June 9, 2009).

199. *Id.*

200. *Id.*

201. Debra L. Green, *Creating the Dynamics for a “Dynamite” Classroom* (2003), available at <http://www.aals.org/profdev/nlt2003/green.pdf> (last visited June 9, 2009).

202. Kimberly J. Robinson, *Perspectives from the Third Year of Teaching* (June 30, 2007), <http://www.ialsnet.org/documents/nlt2007/KimberlyRobinsonJenkinsOutline.pdf>.

participants to articulate, develop and defend positions that may at first be imperfectly defined intuitions. Lawyers are, first and foremost, problem solvers, and the primary task of law school is to equip our students with the tools they need to solve problems.”²⁰³

Emory University Law School also proclaims, on the information page of its admissions office for international applicants, that professors primarily use the Socratic Method which means that, instead of just lecturing, the professor engages the students in debate and discussion in an attempt to get them to see different angles of the case at hand.²⁰⁴ Resembling information can be found also on the webpage of Denver University Sturm College of Law,²⁰⁵ University of Kentucky College of Law,²⁰⁶ California School of Law,²⁰⁷ American University Washington School of Law²⁰⁸ and University of Arkansas School of Law.²⁰⁹

Therefore, use of the Socratic Method in the system of American legal education does not seem to be decreasing in the present time.

With respect to the critiques, whether the Socratic method is efficient or uncertain is a completely subjective matter and should be left to the instructor to determine. A professor may deem developing students' ability in critical analysis through one case in one class is more efficient than quickly going through multiple cases in one class. Hence mere issue of preference does not seem to provide a solid ground for abolishing the Socratic method. In addition, whether anxiety generates a beneficial effect or a detrimental effect is indefinite. In fact, that cognitive anxiety increases physiological arousal can have either a positive or negative effect on performance depending on how much arousal there is.²¹⁰ The critique from the mental perspective failing to provide scientific evidence loses its plausibility to some extent.

203. University of Chicago Law School, The Socratic Method, http://www.law.uchicago.edu/socrates/soc_article.html (last visited June 9, 2009).

204. Emory University School of Law, Frequently Asked Questions, <http://www.law.emory.edu/admission/frequently-asked-questions/programs-of-study.html> (last visited June 9, 2009).

205. Sturm College of Law, Law School Learning Aids: Socratic/Case Method, <http://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method> (last visited June 9, 2009).

206. University of Kentucky, College of Law, Law School: An Overview, http://www.uky.edu/law/prospective_students/an_overview.html (last visited June 9, 2009).

207. California School of Law, The Socratic Method, <http://www.californiaschooloflaw.com/index.php?page=how-our-program-works> (last visited June 9, 2009).

208. Washington College of Law, the Law School Approach, <http://www/wcl.american.edu/pub/handbook/approach.html> (last visited June 9, 2009).

209. University of Arkansas School of Law, Teaching Methods, http://www.uark.edu/admin/urelinfo/CatalogofStudies/00-01_COS_pdf/08a.pdf (last visited Feb. 6, 2009).

210. Miguel Humara, *The Relationship Between Anxiety and Performance: A Cognitive-Behavioral Perspective* 1, ATHLETIC INSIGHT 1, 3 (1999), <http://www.athleticinsight.com/Vol1Iss2/CognitivePDF.pdf> (last visited June 9, 2009).

V. COMPARING LAW TEACHING IN TAIWAN TO AMERICAN PEDAGOGIES

A. *How the Differences Between the Civil Law System and the Common Law System Affect Legal Education*

The Pedagogy of legal education cannot contradict a country's legal system and culture. In a civil law country, the primary source of law is a code.²¹¹ A code is not merely a collection of statutes, or written laws that have been promulgated and enacted.²¹² Instead, it is a highly sophisticated as well as organized and systematic treatment of an entire body of law.²¹³ A code usually contains a general part and specific parts. The former deals with issues common to the entire body of legal problems the code is made to regulate, while the latter are composed of provisions concerning particular legal questions.²¹⁴ The fact that most laws are codified in statutory form is considered the most significant feature distinguishing a civil law system from a common law system, in which judge-made law established in court decisions predominates.²¹⁵

Owing to the culture of codification, legal education in civil law countries such as Taiwan emphasizes the interpretation of the major codes promulgated by the legislative body.²¹⁶ In spite of the role of the courts in interpreting and adjusting statutory legislation, the codes remain the principal source of law. In order to understand their meaning, it is not enough to merely read and interpret the text of the norms.²¹⁷ It is also necessary to have a solid perception of the underlying conceptual issues that the code is meant to address.²¹⁸ Only if the law student is familiar, through study of the relevant treatises and commentaries, with the legal concepts used by the legislature "to structure the legal material contained in the code and to give it intellectual consistency, can he or she hope to make sense of the often highly abstract language of the code."²¹⁹ Under such method of structuring codes, and the attendant legal culture, students in civil law countries favor a dogmatic approach to legal issues.²²⁰

Despite the abstract character of the codes leaving much room for

211. SHARON BYRD, INTRODUCTION TO ANGLO-AMERICAN LAW & LANGUAGE 3 (2d ed. 2001).

212. *Id.*

213. *Id.*

214. NIGEL FOSTER, GERMAN LEGAL SYSTEM AND LAW 3 (2d ed. 1996).

215. For details, see Graham Hughes, *Commonlaw System*, in FUNDAMENTALS OF AMERICAN LAW 10-14 (Alan B. Morrison ed., 1996).

216. Rainer Grote, *Comparative Law and Teaching Law Through the Case Method in the Civil Law Tradition—A German Perspective*, 82 U. DET. MERCY L. REV. 163,167 (2005).

217. *Id.* at 168.

218. *Id.*

219. *Id.*

220. *Id.*

interpretation by the courts, judges have never regarded themselves as lawmakers, and court decisions are not formally considered to be sources of law.²²¹ Hence, even in those cases where they are regarded as reliable authority in statutory interpretation, the academic analysis of court decisions usually still does not contain facts, arguments, or policy aspects, which constitute an integral part of case analysis under the case method employed in American law schools.²²² In other words, the civil law legal culture confronts legal problems with more concerns regarding conceptual issues than with the analysis of individual court decisions.²²³

The legal culture of codification and emphasis on conceptual issues shape the teaching methodology in civil law countries. Legal education in the universities still proceeds mostly through formal lectures in which the professor typically offers an organized, abstract, one-way presentation.²²⁴ Students are not required to prepare or rework the material covered or even to attend the class. Although the formal lecture may be found helpful in memorizing interpretation of codes, scholarly theories, and legal knowledge, it fails to elevate students' analytical or communication skills to a professional standard.²²⁵

B. *How Do Case Method and Socratic Method Fit into Present Philosophy of Taiwanese Law Teaching?*

1. *The Status Quo of Legal Education and Teaching Pedagogies in Taiwan*

Modern legal education system in Taiwan is similar to the Japanese system mainly because its foundation was established during the late period of Japanese colonial rule in Taiwan with the establishment of the Law Faculty in 1928 at Taihoku (Taipei) Imperial University under the College of Liberal Arts and Political Science.²²⁶ After World War II, the university was renamed National Taiwan University and the College of Liberal Arts and Political Science was divided into the College of Liberal Arts and the College of Law.²²⁷ The Law Faculty was then converted to the Law Department. Such developments ushered in a new era in the history of

221. *Id.* at 169.

222. Juernage R. Ostertag, *Legal Education in Germany and the United States—A Structural Comparison*, 26 VAND. J. TRANSNAT'L L. 301, 331 (1993).

223. Grote, *supra* note 216, at 169.

224. *Id.* at 174.

225. Yukio Yanagida, *A New Paradigm for Japanese Legal Training and Education—In Light of the Legal Education at Harvard Law School*, 1 ASIAN-PAC. L. & POLICY J. 1, 17 (2000).

226. CHANG-FA LO, *THE LEGAL CULTURE AND SYSTEM OF TAIWAN* 21-22 (2006).

227. *Id.* at 22.

Taiwanese legal education.²²⁸ For several decades, only a limited number of law schools existed in Taiwan including National Taiwan University, National Chengchi University, National Chung-Shing University, Soochow University, Fu-Jen University, and Chinese Culture University.²²⁹ Yet, in the past decade, many universities have established new law departments.²³⁰ In the August 2004 to July 2005 academic year, 32 universities established law departments or related institutions.²³¹

With respect to the methodology of teaching, the main stream teaching method, like Germany and Japan, is still the lecture through which instructor sets out the legal structure and explains the legal system in a pattern easier for students to understand.²³² Interactions between a law professor and his/her students are rare. Professors do not regularly question students in class, and students are not expected or encouraged to speak, ask questions or challenge their professors.²³³

In Taiwan, only a very limited number of law professors adopt the so-called “question and answer” or “Socratic” method²³⁴ as the principal way of teaching since many professors consider the interactive teaching inappropriate and are afraid that it will cause unnecessary delay to the schedule.²³⁵ They favor teaching through the delivery of their knowledge to students in what they feel to be a systematic and effective process.²³⁶ Other reasons for the Socratic Method’s unpopularity include: (a) most law professors in Taiwan do not possess sufficient knowledge regarding the more interactive teaching methodologies; (b) others are unwilling to adopt alternative teaching methodologies with the concern of being challenged by students; and (c) still others are unwilling to invest time and effort into redesigning their teaching material.²³⁷ During the exam, students are also then graded based on their memory performance.²³⁸ Consequently, the scarcity of interaction between instructors and students deprives students of

228. *Id.*

229. Chang-fa Lo, *Possible Reform for Legal Education in Taiwan: A Refined “J.D. System”?*, 1 ASIAN J. COMP. L. (article 7) 1, 1 (2006).

230. *Id.*

231. *Id.*

232. Chang-fa Lo, *Driving an Ox Cart to Catch up with the Space Shuttle: The Need for and Prospects of Legal Education Reform in Taiwan*, 24 WIS. INT’L L.J. 42, 62 (2006).

233. *Id.*

234. For example, Professor Chang-fa Lo of National Taiwan University uses the Socratic Method to teach various courses including Anglo-American Legal System, Anglo-American Law of Contracts, Private International Law and WTO Law. *See* Lo, *supra* note 229, at 3 n.8. In addition, the author also applies the Socratic Method in the Seminar on Financial Laws and Regulations class.

235. Lo, *supra* note 232, at 62.

236. Lo, *supra* note 229, at 3.

237. *Id.*

238. Lo, *supra* note 232, at 63.

the opportunity to think and analyze deeper legal issues.²³⁹ As Professor Chang-fa Lo of National Taiwan University College of Law pointed out, “failure to engage students in the classroom not only affects students’ attitude toward the course but also frustrates the development of independent thinking and reasoning skills.”²⁴⁰ Hence, Taiwanese law students are often criticized by practitioners for their lack of capability in independent analysis and research as well as poor ability of expression.²⁴¹ Unfortunately, these abilities and skills are the essence of being an attorney.

The gap between legal education and practice generates the necessity of conducting reforms on the current methodology of teaching in Taiwanese law schools.

2. *Fitting Case Method and Socratic Method into Taiwanese Legal Education*

Civil law and Taiwanese scholarly writings do not deny all the benefits of the American case method and Socratic method like, namely, fostering a critical and analytical mind, promoting active learning, and enhancing communication skills.²⁴² However, the inevitable consequence, were the case method to be adopted in a civil law country, is the mismatch arising from the fundamental difference in the definition of the source of law and legal culture. That means, assuming that the case method is the appropriate remedy to the insufficiency of the civil law lecture method, it would still need to undergo a process of modification in order to fit into the civil law culture. The civil law “case method,” abiding by the civil law tradition, would therefore train the student to find the applicable law, transfer the facts into legal problems, argue for or against the application of the law by using the proper interpretation techniques, consider the consequences of each possible decision, consider insufficiency and ambiguity in the law, and consider whether an analogy²⁴³ is available.²⁴⁴ In short, the function of the case method in civil law legal education would be to ensure the accuracy of conceptual jurisprudence rather than to learn to discover the body of rules and doctrines in court decisions, since those principles have already been codified in the statutory law, and judicial decisions are not acknowledged as an independent source of law in civil law systems.

239. Lo, *supra* note 229, at 3.

240. Lo, *supra* note 232, at 78.

241. Xu-Tien Huang, *Taiwan Di Chu Ta Hsueh Fa Hsueh Chiao Yu Chih Chin Hsi, Kai Ke Ting Wei Yu Tse Lueh* [The Past and Present of the Legal Education in Taiwan: Identity and Strategies of Reform], 304 TAIPEI BAR J. 73, 74 (2005).

242. Yanagida, *supra* note 225, at 10; Lo, *supra* note 232, at 78.

243. The word “analogy” can be translated into Taiwanese legal terminology, “Lei Tui Shi Yong.”

244. Ostertag, *supra* note 222, at 324.

As the function of the Socratic method in facilitating the effectiveness of the case method has been somewhat assured, if the case method is, under appropriate alteration, considered feasible in Taiwan, the facilitator, the Socratic method, can be accepted with no obstacles. Furthermore, under the premise that the Socratic method's function in teaching law students' ability in critical analysis and self-study remains untouched, the focus of the Socratic method may shift from guiding students to analyze the holding of the case to leading students to accurately interpret the law and properly apply them to the given scenario.

VI. CONCLUSION

Although the notion that "law as a science" and the case method and the Socratic method formed by Langdell are constantly challenged, their significance in the system of American legal education has yet to be shaken. Critiques appeared as soon as the two methods were adopted, but have continually failed to bring major changes or substitutes to the Langdell system.²⁴⁵ Even advocates of the problem method admit that "creative problem solving does not abandon the adversary method." In fact, the problem method can be deemed the variation or the evolution of the case method which functions better than the traditional case method in teaching real lawyering.

As for the Socratic method, critiques against it do make some sense, but they are not unsolvable. Actually, the method could be improved by explaining the purpose of the method on the first day of class, by not intentionally embarrassing anyone, and by not relying exclusively on that one method.²⁴⁶

Finally, advantages associated with the case method and the Socratic method are apparent. They surely function better in developing students' abilities of critical analysis and active learning than the present lecture method applied by most Taiwanese law professors. However, because of the inherent differences between the civil law and common law systems, it would be impossible to transplant the case method utilized in American law schools without any modification. In a civil law environment such as Taiwan, the emphasis of the case method would need to shift from the discovery of legal rules and doctrines within cases to the accurate interpretation and application of codified law to particular facts. In his reform suggestion of the case method, Professor David Slawson of Southern California School of Law remarks:

245. Dow, *supra* note 39, at 587.

246. For details, see STUCKEY, *supra* note 5, at 211-25.

“A casebook designed to be used in my suggested way of teaching might be organized in the following manner. Each subject within the larger subject—consideration in the law of contracts, for example—would be introduced with a textual explanation such as that found in a hornbook or practice manual The explanation would include the principles and policies underlying the law. Next would appear a small number of cases chosen for their simple, straightforward application of the law”²⁴⁷

Such suggestion seems to lean toward the Civil Law approach—teaching rules and principles first, then the application. It delivers an encouraging message that the case method can be incorporated into the legal culture and legal education of Civil Law countries with very little impediment.

Last but not least, regardless of how the Case method and the Socratic method alters in Taiwan, it is critical to ensure that the medication does not impact the original objective of both methods, namely developing the ability of critical analysis. Otherwise, shifting the focus of both methods from building a critical mind to accurately interpreting the rules can constrain students’ creativity in problem solving and therefore destroy the very fundamental element, the lawyer-like thinking and analysis, of these two methods.

247. W. David Slawson, *Changing How We Teach: A Critique of the Case Method*, 74 S. CAL. L. REV. 343, 345 (2000).

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