**Professor as Mediator: Using Facilitative Mediation to Improve First-Year Law School Pedagogy**

 **By: Amy Mildebrath**

1. Introduction

*“[A]sk questions. If you're uncomfortable about asking questions, say you are uncomfortable about asking questions and then ask anyway.”* – Chimamanda Ngozi Adichie, Americanah

Law school pedagogy, especially the pedagogy of first year, required, doctrinal courses, is the subject of robust debate among legal and education scholars alike.[[1]](#footnote-1) A frequent critique of first-year law school pedagogy is that it fails to create effective lawyers.[[2]](#footnote-2) Students do not leave law school with a nuanced understanding of how to craft legal arguments, nor can they understand and exploit the rhetoric of legal opinions in ways that help them serve their clients.[[3]](#footnote-3)

Another, increasingly urgent critique is that while Law’s role in continued violence against communities of color, LGBTQIA+ communities, and women has grown more central in public consciousness, lawyers have not been trained to use the law to meaningfully respond to and tackle these challenges.[[4]](#footnote-4)

More narrowly, within the walls of law schools, students suffer at alarming rates from mental health problems, food insecurity, substance abuse, and housing insecurity.[[5]](#footnote-5) The disparities created by Law in the world at large are equally poignant within law school classes, in which students of color, women, gender nonconforming students, and students in lower socioeconomic brackets frequently struggle to a higher degree with financial and emotional stress, experience lower degrees of psychological safety within the classroom, and perform less well academically than their white, male, cisgendered, middle-class peers.[[6]](#footnote-6)

Much scholarship exists in the way of unifying these two concerns: many law professors argue that requiring students from the beginning of law school to engage more meaningfully with how Law constructs, maintains, and interacts with race, gender, and class has the general tendency to create more effective lawyers.[[7]](#footnote-7) This essay seeks to explain how to meaningfully engage students at all, and especially with these difficult topics. It posits that such engagement is central to law student well-being, professor well-being, and the well-being of the profession for years to come.

The essay relies on four central premises: (1) In order to engage first year students, law professors can conceptualize themselves as facilitative mediators; (2) mediated discussions led by a facilitative mediator are a form of Socratic dialogue; (3) Socratic dialogue is necessary to develop students with strong, nuanced understandings of the law’s relationship to race, gender, and class; and (4) having a strong and nuanced understanding of the law’s relationship to race, gender, and class is necessary to being an effective lawyer.

This article is intended to fall in line with many of the long-established practices of the law school classroom as much as it is intended to be radical. It is simultaneously a reevaluation of law school pedagogy from the ground up, and a confirmation that some of the oldest practices in legal education provide an opportunity for enormous growth and improvement in the legal profession.

The essay builds upon each of these premises. The next section explains the important dynamic shift achieved from a professor conceptualizing themselves as a facilitative mediator. Next, it introduces a kind of facilitative mediation, the BADGER framework, and explains how the framework is invaluable when structuring a first-year doctrinal law course. Finally, it explains how the BADGER framework creates a form of Socratic dialogue, why that dialogue is so essential to student engagement and well-being, and how that dialogue differs from more conventional implementations of the Socratic method.

1. Professor as Mediator: An Important Dynamic Shift

In education scholarship, tension exists between theorists who believe in the efficacy of teacher-centered instruction, and those who believe in student-centered instruction.[[8]](#footnote-8) Those who advocate for teacher-centered instruction (where professors are considered “the sage on the stage”) bemoan the unstructured and undisciplined nature of student-centered classrooms.[[9]](#footnote-9) They raise concerns about the damage that can be caused when teachers devalue their roles and offer students neither guidance nor support.[[10]](#footnote-10) They argue that teacher-centered classrooms provide students with the sense that they are learning from someone wiser than themselves, who is capable of expanding their understanding and appreciating their growth.[[11]](#footnote-11) They point to the ways in which student‑teacher relationships are integral to students’ academic success.[[12]](#footnote-12)

On the other hand, advocates for student-centered instruction (where professors are considered “the guide on the side”) argue that teacher-centered instruction nearly always integrates lecture as the central instructional method.[[13]](#footnote-13) They point to the volumes of studies tending to prove that lecture is the least effective method of instruction in terms of student learning gains.[[14]](#footnote-14) They note that student-centered classrooms orient learning as the primary goal of instruction.[[15]](#footnote-15)

Law professors are not immune from these debates. They struggle with questions about how much power to give the students, and how much power to take for themselves. Especially in times where conversation may necessarily involve emotionally charged topics, professors tend to attempt to exert higher levels of control over the conversation.[[16]](#footnote-16) They are sensitive to the potential consequences of removing themselves from discussions about race, gender, and class and how those constructs interact with every aspect of the law.[[17]](#footnote-17) They are also aware that they possess a higher degree of knowledge than their students about certain topics, and they want to be able to communicate that knowledge.

Balancing power-sharing and control within the classroom can be especially tricky to achieve for law professors who are not required to have—and often are not provided—any formal teacher training.[[18]](#footnote-18) Different pedagogical strategies abound, and this litany of choices can often serve to overwhelm rather than inform.[[19]](#footnote-19)

This is where the work of a facilitative mediator can become enormously helpful for law professors.[[20]](#footnote-20) Facilitative mediators are at once essential to and separate from the conversation taking place.[[21]](#footnote-21) Their conceptualization of themselves as a “neutral party” affords them the opportunity to ask questions that the parties themselves may not think or wish to ask, making their presence essential.[[22]](#footnote-22) At the same time, their “neutrality” centers the mediation parties, requiring complete party engagement as a necessary condition for a successful mediation.[[23]](#footnote-23) Mediators share power with the parties, while also being in control of the structure and process of the mediation.[[24]](#footnote-24)

This balance of control between mediator and parties gives facilitative mediators the opportunity to encourage parties to engage in lateral thinking about their dispute—thinking that restructures concept patterns and generates new ones.[[25]](#footnote-25) Through techniques like analogizing, generating alternatives, challenging assumptions, suspending judgment, fractionating the problem, and encouraging brainstorming, facilitative mediators get parties to think, feel, and speak differently about their conflict.[[26]](#footnote-26) Without the mediator, the parties would not experience a change, but without party engagement, the mediator would be unable to generate workable solutions. For a professor, being a facilitative mediator makes their role clear: they are there to engage their students in lateral thinking. Specifically, the role of the professor is to engage students in lateral thinking to help them understand the law from many angles, including those angles which view the law as a mechanism of power and oppression.

This process of change—getting parties to recognize that their dispute can be considered through many lenses, that truth is in the eye of the beholder, and that disputes can be rhetorically framed in infinite ways—is at the center of the Socratic method.[[27]](#footnote-27) The facilitative mediator recognizes that unless a speaker’s interests (which inform their positions) are revealed and questioned, they cannot be altered.[[28]](#footnote-28) Notice, however, that the facilitative mediator is not out to prove a party wrong.[[29]](#footnote-29) The mediator is only there to understand parties’ interests in the dispute, and how to use those interests to frame and reconstruct a party’s positions.[[30]](#footnote-30)

Consequently, facilitative mediators do not view disagreement or conflict as stances to be corrected, but as opportunities to expand upon parties’ conceptions of each other’s interests and positions.[[31]](#footnote-31) This positive orientation towards conflict helps mediators because they anticipate and accept disagreement.[[32]](#footnote-32) This constitutes a strong dynamic shift from a professor, who may wish to minimize or control conflict by refraining from asking students questions.[[33]](#footnote-33) Through ground rules, a facilitative mediator creates a culture of respect and dialogue, but she does not invalidate any individual party concerns or behaviors.[[34]](#footnote-34) A similar orientation in a law professor may help the professor experience intellectual excitement regarding conflict in the classroom, rather than fear or discomfort.

Thinking of themselves as facilitative mediators allows law professors to develop a strong and specific orientation towards power-sharing and control in their classroom. Through thinking of themselves as a mediator, a professor reaffirms their own efficacy and the essential nature of their presence within the classroom.[[35]](#footnote-35) It simultaneously centers students and encourages professors to help students move through disagreement by identifying the interests which inform the law and their own positions. Disagreement is therefore essential in the classroom because it is in contrasts that students can see their own beliefs. Like culture, which is often invisible to those who live in it, if all students in a classroom appear to adopt a similar position, they will find it challenging to articulate the interests which inform that position.

This conflict in interests and positions reflects mediations, and the adversarial legal system as a whole. To be a lawyer at all, law students must be able to anticipate, identify, and address the adverse party’s positions. To be an effective lawyer, law students must be able to speak to the adverse party’s interests, and why those interests are less compelling than their client’s. In this way, the conceptualization of themselves as a facilitative mediator not only provides a professor a framework in which to operate pedagogically, it also tends to produce more effective lawyers.

1. The Socratic Method, Student Well-Being, and the BADGER Framework of Facilitative Mediation

The work of facilitative mediators provides a lens through which professors may view themselves, but it is of little practical use to professors as they go about constructing their classes. However, the BADGER method of facilitative mediation, developed by Joseph Stulberg and Lela Love and described in detail below, can serve as a blueprint for professors who are aiming to engage students as parties in a mediated discussion about the law.[[36]](#footnote-36) This framework is particularly useful for a few different reasons.

 First, it engages professors as facilitative mediators for every part of their classroom instruction, from planning and writing a syllabus to teaching a specific class. Second, it encapsulates the kinds of considerations that professors need to make if they want to engage in Socratic dialogue that includes discussion of how the law constructs and interacts with race, class, and gender.[[37]](#footnote-37) Finally, it provides a structure to orient instruction towards the well-being, psychological safety, and learning of students in the classroom.

As an additional note, the framework embodies an ethos that law professors may find useful, especially in moments of frustration or tension within their classroom. “BADGER” mediation is named in the hope that mediators using the framework will adopt the qualities of an actual badger—a persistent, optimistic animal that works tirelessly towards achieving its goals.[[38]](#footnote-38) Badgers are not easily unsettled, they are fiercely protective of what is important to them, they are consistent and tenacious.[[39]](#footnote-39) In my experience as a law student, I find this image encapsulates the attitudes of my professors nicely.

1. Elements of the BADGER Framework: PRIOR TO, COMMIT, and BADGER

 The BADGER framework contains three discrete series of steps and considerations. The first series, PRIOR TO, describes a set of considerations to be made prior to serving as a mediator in any dispute.[[40]](#footnote-40) Professors can use these same considerations to structure their course and write their syllabus.

PRIOR TO stands for parties, resources, issues, options for process, rules of behavior, timeframe, and outcomes.[[41]](#footnote-41) Professors, when writing their syllabus, consider the parties (students) in their classroom, and account for the ways in which different student groups will result in inherently different class discussion. They also consider the resources they provide to their students, whether that is a casebook, additional course readings, videos, articles, recorded lectures, or office hours.[[42]](#footnote-42) They additionally identify the issues they want to cover in class.[[43]](#footnote-43) No professor has the time to fully evaluate every aspect of their subject area, so being conscientious about what to discuss and what to leave out and how those decisions relate to the desired outcomes of the course is essential to constructing meaningful lessons.[[44]](#footnote-44) Professors consider options for process when they think about the ways in which students may engage with ideas, whether through individual work, small group discussion, or whole-class discussion. Rules of behavior gives professors a means of establishing control over their classroom environment and how students interact. It provides them opportunities to create a more equitable classroom by encouraging different modes of classroom behavior.[[45]](#footnote-45) Professors consider timeframe when they divide up work for the semester. They strive to avoid covering substantially more or substantially less content than their timeframe provides. Finally, professors begin their semester with an eye towards outcomes—what it is they want their students to learn specifically, and how their classroom instruction will move students towards those goals on a daily basis.[[46]](#footnote-46)

The next set of considerations, COMMIT, describes the ideas mediators need to consider before committing to a specific mediation.[[47]](#footnote-47) In the classroom, the factors are translated as follows:

* Commitment of students to the learning process, generated internally within each student but also within the classroom culture of a particular course.
* Organizational resources are available to enhance student learning.
* Method of instruction chosen for class is appropriate as a means of achieving deep student learning for the topic that day.
* Matters open to student conversation are ripe for discussion, in that students have the requisite background knowledge to meaningfully engage with the topics.
* Incentives exist for students to participate in discussion, in that the discussion is relevant to student learning and will inform students about topics they will be required to understand.
* Talents of the professor are brought to the forefront in the lesson that day so that students have a strong belief in the professor’s credibility and ability to help them.[[48]](#footnote-48)

 This portion of the framework is the least tangible. Rather than connecting directly to some specific set of choices by the professor, COMMIT helps professors frame their mindset moving into individual lessons. It reminds them of the power they have over student commitment[[49]](#footnote-49) and asks them to assure themselves that the resources they have chosen for instruction are connected to their desired outcomes. It asks them to check that they are choosing effective means of discussion and are discussing topics that students are ready and able to learn about. It asks them to evaluate the intrinsic and extrinsic incentives that exist to do well in their class and to participate in conversation and reminds them to approach class with confidence in their efficacy and value as an instructor.[[50]](#footnote-50)

The final series, BADGER itself, describes the process that mediators move through during a mediation. BADGER—standing for begin, accumulate information, develop a discussion strategy, generate movement, elect separate sessions, and reach closure—is a framework the professor uses when designing a lesson.[[51]](#footnote-51) The framework is based fundamentally around asking the right questions to build discussion towards a shared outcome.[[52]](#footnote-52) In other words, BADGER provides professors with a consistent means of structuring Socratic dialogue in individual daily lessons.

 The holistic nature of the framework means that professors can build their entire course around central themes: the importance of student engagement, making decisions with an eye towards outcomes, and expertly navigating conversations in which conflict arises. Although the Socratic dialogue itself will only appear when applying the BADGER framework in a daily lesson, the evaluations that the professor makes during PRIOR TO and COMMIT are what ensure that Socratic dialogue is inclusive and valuable to all students, rather than alienating and dehumanizing.

PRIOR TO asks professors to carefully consider the specific students they have in their room, and structure the class around the needs of those students. COMMIT acts as a kind of safety valve for the decisions made in PRIOR TO, ensuring that professors have fully considered how their pedagogical choices will impact student engagement and learning. This helps ensure that when professors begin a BADGER conversation, they are doing so with appropriate reasoning and context.

1. Using BADGER Mediation to Reimagine the Socratic Method

 The Socratic method, as recommended in this article, and as informed by the BADGER framework, is different in key respects from the Socratic method which has been criticized as a central mechanism of oppression and disenfranchisement in law school.[[53]](#footnote-53)

At the outset, it is important to note that the Socratic method, although discussed extensively in legal scholarship, has no accepted definition.[[54]](#footnote-54) Historically, the method is derived from three, “radically incompatible” accounts of Socrates’s life and teachings.[[55]](#footnote-55) It disappeared for many centuries, reemerging in the United States and cropping up in American law schools in the late nineteenth century.[[56]](#footnote-56) It was developed in tandem with the case method of instruction, and resulted in a process in which individual students were questioned extensively as to the facts and legal elements of (largely) appellate cases.[[57]](#footnote-57)

The Socratic method in law schools contained little reference to the classic texts from which it sprung.[[58]](#footnote-58) Rather, the particulars of the method were shaped by educators seeking to address present concerns, rather by an adherence to a well-defined ancient practice.[[59]](#footnote-59) It became associated with “an aggressive approach to questioning, in which instructors ‘unremittingly’ pushed students to think through cases and their particulars.”[[60]](#footnote-60) At its most extreme, this form of Socratic questioning was described as a hazing ritual in which professors aimed to “destroy” their students.[[61]](#footnote-61) Even in today’s more evenhanded approaches to the Socratic method, students describe feeling anxious, quizzed, and humiliated when they answer “incorrectly.”[[62]](#footnote-62) Students also have difficulty understanding how intensively questioning their classmate about an obscure court case is intended to illuminate the many ways they can personally regard a specific legal problem.

Given the murky history of the Socratic method, and that no clear definition of the method has crystalized in more recent years, this article adopts only its most generalized, accepted definition: teaching through asking questions.[[63]](#footnote-63) This is in close parallel with the essential structure of BADGER mediation. The BADGER framework engages mediators in a distinct process of leveled questioning that tends to result in discussion and can often result in agreement.[[64]](#footnote-64) Through this questioning, mediators build a conversation that reveals to parties the contours of the dispute, as well as a path forward.[[65]](#footnote-65)

Professors taking on the role of a facilitative mediator during instruction have the capacity to transform law school pedagogy in two important ways. First, thinking like a facilitative mediator (and thinking of students like mediation parties) emphasizes the importance of context. Parties could not answer questions regarding—and thus could not mediate—a dispute they knew very little about. Likewise, students cannot deeply discuss a case when their only exposure to its contours is one, trimmed legal opinion.[[66]](#footnote-66) Consideration of resources, made explicitly in the PRIOR TO and COMMIT sections, reminds professors that the assigned readings limit the possible ways students may think about, feel about, and discuss the implications of a case.[[67]](#footnote-67) A greater diversity of resources creates the possibility of better developed interests and perspectives.[[68]](#footnote-68)

This becomes especially important when applying the framework to help students see and understand the law’s relationship with race, gender, sex, and class.[[69]](#footnote-69) By providing students certain resources over others, the professor limits the extent to which students can engage with “the dialectic between social structures, ideologies, and political commitments that motivate and constitute the law.”[[70]](#footnote-70) A contextual method of case instruction which pairs case opinions with other resources such as legal briefs, news articles, or academic papers, provides students with ample opportunity to “think like lawyers” about the many layers of argument that go into forming a finalized legal opinion.[[71]](#footnote-71) The use of structured Socratic questioning as means of eliciting student response helps the professor generate multi-faceted classroom discussion examining those layers. On a societal level, this training of students to understand the law’s constructions of race, gender, and class means that the legal profession can keep pace with greater lay understanding about what justice might look like.[[72]](#footnote-72) On an individual level, lawyers with a deep understanding of the assumptions and motivations of the law are better lawyers, and they are better able to serve their clients and address injustice.[[73]](#footnote-73)

Second, thinking like a facilitative mediator whose goal is to “badger” the parties into a purposeful discussion changes the way professors seek to engage with students. The BADGER framework creates a much more humane application of the Socratic method because it encourages professors to use questioning as a means of understanding positions and interests, rather than as a means to test individual students about their understanding of a topic. This version of the method presupposes that students have valuable insight to bring to conversations about the law, even if they lack in-depth legal knowledge.[[74]](#footnote-74) It builds on knowledge students already have to construct new modes of understanding.[[75]](#footnote-75) It also makes every student in the room essential to the discussion. Focusing on the thoughts of one student limits the perspectives others are exposed to and can evaluate. Spreading questions out to a greater number of students increases class engagement, as well as the richness of ideas students can experience.[[76]](#footnote-76) This process of engagement not only allows for true and lasting learning, it also has prosocial benefits that will serve all students in law school.[[77]](#footnote-77)

1. Using BADGER Mediation to Enhance Student Engagement and Well-Being

Law student well-being is a longstanding concern of the American Bar Association, as well as the legal academy.[[78]](#footnote-78) Law students experience anxiety and depression at extremely high rates and suffer from steep financial burdens imposed by school.[[79]](#footnote-79) Substance abuse is rampant in law school and the legal profession.[[80]](#footnote-80) Although efforts have been made to improve law student well‑being, these efforts have fallen short of their goals.[[81]](#footnote-81)

Many different approaches are needed to tackle law student well-being, but one avenue of improvement is through a focus on student engagement within the classroom. When people experience complete engagement—cognitive, emotional, and behavioral engagement—they additionally experience a sense of happiness and well-being.[[82]](#footnote-82) This sense of well-being is generated by the feeling of learning and the feeling of being valuable within one’s environment.[[83]](#footnote-83) When students do not feel that their contributions in class are meaningful or necessary, or worse if they feel their contributions are actually discouraged, they experience corresponding decline in their belief in their ability to be a good law student and ultimately a good lawyer.[[84]](#footnote-84) Every law student is vulnerable to this decline in self-confidence, but students who embody identities that are typically devalued in the law are at a far greater risk.[[85]](#footnote-85) If the legal profession is committed to increasing its diversity, then supporting diverse students is imperative.

 Viewing classroom discussion as a form of mediated dialogue prioritizes student engagement because it makes student contributions essential to the lesson. Through an unwavering focus on student engagement through mediated dialogue, professors ensure that for some amount of time each week, their students have the opportunity to meaningfully contribute to their environment. This can be key for students who feel isolated, left out, or forgotten about.

 While focusing on various viewpoints of the law has the effect of building stronger lawyers who can do more for society, focusing on the individual student expressing those viewpoints has the effect of building a stronger individual, who feels more capable of influencing the world around them. In short, conceptualizing themselves as mediators helps professors address the issues of the “forest” and increase the health of individual “trees.”

1. Applying the BADGER Mediation Framework

 The following section applies the BADGER framework to the law school classroom to illuminate the way that the specific elements of the framework coalesce to create an interactive classroom environment. Each heading and subheading mirrors those used in Lela Love and Joseph Stulberg’s book and explores each step of the process fully.

1. Begin Discussions
2. Set the Procedural Framework

Law professors often do not control the set ups of their rooms, and the lecture style forum classroom is particularly poor for encouraging robust classroom discussion. To the extent that professors can control the layout of their classroom, they can choose setups which encourage discussion such as circles and semi-circles. Even dividing the class in half and having each half face each other may encourage participation across the aisle. This could be particularly effective if students sat on one side or the other based upon an opening question relevant to that day’s topic. Unfortunately, most doctrinal courses have been and will continue to be taught in lecture halls,[[86]](#footnote-86) so often professors must make do.

Other procedural concerns—like that of the mediator—concern food or other external wellness of the participants.[[87]](#footnote-87) Although professors cannot be expected to bring snacks to class, nearly half of all law students have expressed at least some concern about food security,[[88]](#footnote-88) so working to keep course costs low and staying updated about what those costs may be is a way to help ensure that well-fed students show up to class.

1. Get Started

 For mediators, getting started involves setting the tone of the mediation.[[89]](#footnote-89) The mediator must decide whether to set a formal or informal tone, is wise to avoid jargon or being overly cumbersome, and must avoid being prejudicial.[[90]](#footnote-90) For professors, getting started also means setting the tone of a class or of the semester, whether formal or informal. The professor may equally wish to avoid “jargon,” at least until they are assured that students take meaning from important vocabulary. The beginning of class can be quick, clear and establish an initial roadmap for the period.[[91]](#footnote-91) It can orient students to the topic that day and can provide them a mental schema upon which to attach new information.

 Getting started can be used as a way of demonstrating an openness to students and student ideas, and the tone and organization of the beginning of the lesson can instill student confidence in the competency of the professor.[[92]](#footnote-92)

1. Accumulate Information
2. Ask Helpful Questions

As class moves into instruction, questioning begins. Therefore, so does Socratic dialogue.[[93]](#footnote-93) As in mediation,[[94]](#footnote-94) questions get discussion flowing and help the professor understand the students’ existing mental schemas. Questions at the beginning of a class that are overly broad or too specific will not establish student background knowledge.[[95]](#footnote-95) Questions that are directed exclusively to one student can alienate the rest of the class and so do little to foster broad engagement. Professors can instead choose to engage with many students early and often. This can be accomplished by asking helpful questions, and gradually increasing the complexity of the questioning as class progresses. The intuition that easy questions must be asked before people are willing or able to answer difficult ones is excellently captured by The Middle Voice’s questioning framework.

1. Startup Questions

Mediators find questions that begin with what, who, when, and where are “particularly effective start-up questions.”[[96]](#footnote-96) These questions should be easy for the party to answer because the party knows the information to share.[[97]](#footnote-97) Facts of a case can normally be gleaned within the first few paragraphs of the case text and are easily located online. Therefore, students are likely to feel comfortable engaging in these early questions.

Consider the following example from a Torts class. Review the accompanying footnotes to understand the pedagogical decisions behind the interaction.[[98]](#footnote-98)

Professor: Alright, John, who[[99]](#footnote-99) was the plaintiff in this case?

John: Uh, Palsgraf I think.

Professor: Yes, Palsgraf.[[100]](#footnote-100) Anna, did you catch Palsgraf’s first name?[[101]](#footnote-101)

Anna: Helen.

Professor: Perfect, Helen Palsgraf is our plaintiff, so she’s our client for today. Alright, Andrew, what happened to our client?

Andrew: Ms. Palsgraf was on a train platform when a man dropped a box of dynamite when he was getting onto a train, and she got hurt in the explosion.

Professor: Yes, a man did drop a box of dynamite, and she did get hurt. Stacy, can you clarify a little more?[[102]](#footnote-102) How did Helen get hurt?

Stacy: Well, the explosion didn’t hurt her exactly. But the explosion knocked over a scale and that fell on her, and she was hurt pretty badly. There were some lasting effects.[[103]](#footnote-103)

Professor: Perfect, so we know Helen Palsgraf was on a train platform when a box of dynamite was dropped by another passenger getting on a train. We also know that she got hurt because the explosion caused scales to fall on her. Okay, why was the package of dynamite dropped in the first place? Kevin?

Kevin: I’m not sure.

Professor: No problem, we’ll come back to you Kevin.[[104]](#footnote-104) Ryan?

Ryan: The railroad employees were trying to help the passenger get on the train before it left, and they pushed him, so he dropped the package on the tracks.

Professor: Exactly. So a man was getting on the train, he was pushed by railroad employees who were trying to help him board. This caused him to drop the package of dynamite he was carrying, and when it exploded it caused a scale to fall on our client. So our client wants compensation for her injuries. Who does she want to sue? Myranda?

Myranda: I guess she probably would sue the guy who was holding the package.[[105]](#footnote-105)

Professor: That’s true, he would have been a good party to bring a claim against. But our client can’t find him, and she doesn’t know who he is. But she wants compensation and there is another party she could sue instead. Leon what do you think? Who else could she bring a claim against?

These questions serve a variety of functions. They establish a class understanding of the case; they serve as a formative assessment for students who answer the questions; the provide an opportunity for numerous students to feel a sense of success early on in the course; they create a classroom culture of participation; they provide the professor with information about existing mental schemas students have. The feeling of success and community that can be built during startup questions is essential to the underlying goal of promoting student engagement and well-being. It is an opportunity to situate students as equal, independently valuable, and valued. This lays the foundation for more difficult conversations that are likely to take place.

1. Open-Ended but Focused Questions

Just like in mediations, open-ended but focused questions in the law school classroom “invite persons to answer in their own words but they target the subject matter.” Consider the following example of this style of questioning from a Constitutional law class. Review the accompanying footnotes to understand the pedagogical decisions behind the interaction.

Professor: Okay, so we’ve established that our client sells lottery tickets, and that the federal government just passed a regulation to prevent our client from doing that. We also know that our client wants to challenge the federal government’s ability to pass that regulation as being an over extension of the commerce power. So, our client has found a lawyer. What precedent would the lawyer have found had she researched the issue after the lawyer was retained?[[106]](#footnote-106)

Hillary: (Raised hand)[[107]](#footnote-107) Well, the lawyer would have found Gibbons v. Ogden, which doesn’t look so good for our client.

Professor: Why’s that?[[108]](#footnote-108)

Hillary: If I remember correctly, that case says that the commerce power is super expansive—that the federal government can regulate what they want basically.

Professor: That’s true! But let’s be more specific about the language. Can anyone flip back and find exactly what Gibbons says about the commerce power?[[109]](#footnote-109)

Jeff: Yeah, I found it. It says that the commerce power “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.”[[110]](#footnote-110)

Professor: Yes. Acknowledges no limitations other than are prescribed in the Constitution. Okay so what is a place in the Constitution that might limit the power of the federal government over the states?

 Open-ended but focused questions are not necessarily the core of class discussion going forward, but they continue to build a foundation of trust and community within the classroom.

1. Justification Questions

Succinctly, justification questions are why questions.[[111]](#footnote-111) For a law school classroom, these questions might look like “why did the court side with or against the plaintiff?”[[112]](#footnote-112) or “why did the court decline to decide the question?” Just like in mediation, these questions elicit substantive and perceptual answers which each serve important functions in the classroom. A substantive response “displays a [student’s] rational justification” for believing an answer to be true.[[113]](#footnote-113) A perceptual response forces a student to reveal whether their justification for an answer has more to do with their background knowledge or values than with the legal issues at stake in the case.[[114]](#footnote-114)

Consider the following example of this style of questioning from a Criminal Law class. Review the accompanying footnotes to understand the pedagogical decisions behind the interaction.

Professor: Okay, so we know a lot about our client now, thanks to your peers. We know our client is a Black man convicted of armed robbery and the murder of a white policeman. We know that he was sentenced to death by a Georgia trial court, and that sentence was upheld by the appellate court and the Georgia Supreme Court. We also know that he has petitioned the United States Supreme Court to hear his case, and that’s when we got added as lawyers. Why did he petition the Supreme Court to hear his case? Isn’t he guilty?

Carmen: Yeah he was found guilty of murder. But he doesn’t want the death penalty. He is saying that the way the death penalty is administered in Georgia violates the eighth and fourteenth amendments.

Professor: Perfect. Someone add to that. Why does he think the administration of the death penalty in Georgia is unconstitutional?

Stuart: He thinks that the state killing people is wrong, even if they committed murder.[[115]](#footnote-115)

Professor: So, that’s good. That might be what our client is ultimately trying to argue. But he is introducing evidence to support the argument that the state shouldn’t kill him. What does he argue? What evidence does he want to introduce? Haley?

Haley:[[116]](#footnote-116) (Raised hand) He uses this study. . . I forget the name of it. But he uses a study to show that whether someone is sentenced to death in Georgia has to do with the race of the victim, and also the race of the perpetrator. He’s using the study to show that the death penalty in Georgia is racially discriminatory.

Professor: Exactly. The Baldus study. It’s a statistical analysis that he wants to use to show the court that the equal protection clause has been violated.

Startup questions, open-ended but focused questions, and justification questions are designed to get the ball rolling and to get as many students involved as possible. Using this method helps ensure that twenty minutes into a lesson, a substantial number of students have engaged with the material. Without this initial engagement, more difficult conversations that must take place later in the lesson will stall out. Giving students this early opportunity to experience a sense of success and mastery will not only inspire a feeling of mental well-being, it is also critical for student learning.

1. Support Conversation

Mediators, like professors, support conversation through their nonverbal communication and through verbal reinforcement and clarification[[117]](#footnote-117) to “encourage disclosure and further communication.”[[118]](#footnote-118) Part of this process involves getting parties to care about what the other side is saying.[[119]](#footnote-119) To get law students to care about what other law students are saying, the professors can “seek[] to ensure [they] understand the [students’] communications” without criticizing or disparaging them.[[120]](#footnote-120) In summarizing and reframing each student’s response before moving on to the next student, professors help answers flow together, making each response a meaningful part of the conversation.[[121]](#footnote-121) The professor also demonstrates care and attention for the student, which directly contributes to student well-being.[[122]](#footnote-122)

1. Mine the Conversation for Gold

 Just like the mediator, professors can identify and emphasize “what elements of the conversation will turn two monologues into a dialogue.”[[123]](#footnote-123) This process can be especially valuable for professors who are concerned that allowing student ideas dominate the classroom may result in a poor understanding of the law. By mining student responses for “gold” and plucking those gold nuggets from the conversation to emphasize for the class, the professor has control over where the conversation goes but does not dominate the conversation.[[124]](#footnote-124)

1. Develop the Discussion Strategy
2. Identify and frame the “Issues”

As professors listen to students talk, they next “distill a series of negotiating issues.”[[125]](#footnote-125) In the classroom, “negotiating issues” are those legal topics which most require analysis and understanding. These issues have been distilled from the opening conversation. Consider again how the conversation from the Torts class above can move from teeing up the facts of the case into a lengthier debate about proximate cause—the important legal idea that is the reason for studying the case in the first place. The discussion of the case from the client’s perspective provides a framework upon which students can attach their understanding of proximate cause.

Framing of the “issues” for discussion can be an important moment for anti-racist work in both mediations and the classroom.[[126]](#footnote-126) In mediations, which issues are considered relevant enough to be discussed can be influenced by the implicit biases of the mediator.[[127]](#footnote-127) Like the mediator, the professor is cognizant of how emphasizing certain aspects of a case or concept over others may contribute to upholding or dismantling the structure of racism, sexism, or classism in America.[[128]](#footnote-128)

1. Develop an Agenda

 Breaking down the “issues” that will be discussed in class explicitly provides a roadmap for students to use as they continue to attach new information to their mental schemas.[[129]](#footnote-129) It also gives students a strong sense of efficacy over their own education to see that the issues they raised at the beginning of class are now being used to deepen their understanding of the topic.

1. Generate Movement

 Just as the mediator must “manage the process and chair the discussions” but must not “do so in a lockstep manner, constricted by self-imposed blinders”[[130]](#footnote-130) a law professor embodying the work of a facilitative mediator is flexible and adaptable during class discussion.

Two situations are the bane of the educator’s existence: silence stemming from students not understanding, and silence stemming from student discomfort with the subject matter. In both of these scenarios, it is extremely tempting to charge ahead through a lecture format, or to ask students questions only to immediately correct them. But neither of these solutions generates movement.[[131]](#footnote-131) It shifts the spotlight back onto the professor and away from student learning.

Sometimes, students just do not feel they can answer the question being posed. When this happens, professors turn to their toolkit to find creative ways to generate movement, rather than plowing through the lesson, leaving students behind in the process.

1. Information

Stulberg and Love point out, “People often change their mind with new information. A mediator is interested in two things: what people know and what they don’t.”[[132]](#footnote-132) The mediator “uses both dimensions to move parties toward an agreement.”[[133]](#footnote-133) Professors likewise use the things students do and do not know to move students towards understanding. Thus, if students get stuck, professors tap back into the goldmine that they cracked open at the beginning of class. Starting with what students understood about the case, the professor can reemphasize key elements that might guide students to an answer.[[134]](#footnote-134)

Providing a variety of information that students can use to gain understanding of a topic increases student engagement and can increase a professor’s sense of efficacy and satisfaction with the course. A properly invigorated class discussion steers the professor and students away from the classroom equivalent of an impasse.

1. Perspective

Another way to generate movement in mediation is by focusing on party perspectives.[[135]](#footnote-135) Whereas a focus on perspective is valuable to mediation parties who have reached an impasse due to disagreement, focusing on student perspective in the law school classroom is valuable to generate conversation when discussion has stalled out because of boredom, unpreparedness, or confusion, as well as during a moment of outright disagreement.

For example, allowing for choice in instruction may be as helpful in moving students towards discussion as it is in mediation.[[136]](#footnote-136) This might look like questions such as, “would we like to keep discussing this topic or would we like to move on?” or “would you like a moment to read the paragraph on page 254 explaining the court’s reasoning, or can someone provide a summary now?” Questions like this may cause students to express the reason they are not participating. A student, in response to the first question may offer “I would like to move on. I think I understand this topic.” Without this response, the professor may be forced to inaccurately speculate about why students are not participating, at the expense of student engagement.

Additionally, citing examples with which people can identify not only helps move the conversation forward, it also provides an opportunity for professors to involve students who may otherwise feel left out of the conversation.[[137]](#footnote-137) Vivid examples, whether provided by the professor or (even better) solicited from students, help place the law in a more concrete framework and more easily allows the new information to attach to existing mental schemas.[[138]](#footnote-138) Letting silence ring is also a classic strategy in teaching pedagogy as well as mediation.[[139]](#footnote-139) Simply giving students a chance to think before moving on to the next question may generate responses that would otherwise be missed.

 Focusing on perspectives may also be especially valuable in helping integrate anti-racist practices into instruction. On one hand, being mindful of (and directly addressing) perspectives that are informed by implicit bias or a misunderstanding of the way systems of oppression operate is essential to create a feeling of psychological safety within the classroom for all students.[[140]](#footnote-140) A feeling of psychological safety is critical for student engagement, since feeling unsafe hinders many of the higher-order thinking processes necessary for class discussion and generally discourages students from participating.[[141]](#footnote-141) On the other hand, finding opportunity to place emphasis on perspectives which are traditionally underrepresented, or which are underrepresented in the classroom, helps all students feel involved in and necessary to the success of the conversation.[[142]](#footnote-142)

1. Elect “Separate Sessions”

 In The Middle Voice, electing separate sessions refers to the choice as to whether to caucus with parties individually.[[143]](#footnote-143) In a first-year doctrinal course, electing “separate sessions” refers to spontaneously or premeditatedly asking students to work with one another in small groups rather than with the professor in a large setting. Stulberg and Loves’ framework encourages mediators to use caucus only when it is necessary,[[144]](#footnote-144) while some mediation frameworks include caucus as a necessary procedural step. Professors can be similarly flexible in their approaches as to when students should work together.[[145]](#footnote-145)

1. When and Why

 Stulberg and Love advocate for the use of caucus because “people have a psychological need for a safety zone during discussions. They need time to consider ideas, evaluate what others have said, and brainstorm solutions without feeling pressured into making an immediate response.”[[146]](#footnote-146) The same is true in the law school classroom. Many times, students are hesitant to share in front of the whole class because they are not confident that they have integrated new information correctly into their existing mental schemas (more colloquially—they do not want to “look stupid.”)[[147]](#footnote-147) Some time to brainstorm with their peers and double check their thinking provides a psychological safety zone.

 Group work also provides opportunity for the professor to meet with smaller groups of students at a time and ask more probing questions in a smaller setting. Spotlighting one student in a group of three is much less problematic than in group of sixty. Placing students in small groups therefore affords the opportunity for professors to get to know their students and address student learning on a more individual level.

 Group work may also be a mechanism for community building.[[148]](#footnote-148) Professors may choose to allow students to group randomly and encourage students to change groups throughout the semester. This increases student exposure to diverse ideas and helps students cultivate skills necessary for working in team environments in their careers.[[149]](#footnote-149) It is also likely to encourage participation in whole class discussion, since students are more likely to feel comfortable talking in front of a group of people they know well.[[150]](#footnote-150) Alternatively, professors may assign groups which remain permanent throughout the semester. This encourages students to rely on each other and work with one another in a sustained fashion, also developing skills important in their careers.[[151]](#footnote-151)

 Regardless of the choices surrounding the role of group work in the class overall, students working with each other fosters a sense of community which speaks directly to student well-being.[[152]](#footnote-152) Especially for first year law students, who are in courses with the same set of peers for the entire year, allowing students to get to know each other in both social and professional ways is highly beneficial.[[153]](#footnote-153)

1. Reach Closure

 The final step of the BADGER process requires that parties “reach closure” in some way, even if not through explicit agreement.

1. Outcomes

The Middle Voice explains that at the end of a mediated discussion, parties should “have a clearer understanding of their situation.”[[154]](#footnote-154) In a mediation, whether parties have a clearer understanding will be evident from interacting with them and asking personalized questions. But in a class of sixty students, it will be less clear whether students have gained a clearer understanding of materials without assessing them in any way.

Assessment is necessary to measure whether student learning is taking place.[[155]](#footnote-155) Assessment can be in the form of in-class questions that take place every day, short multiple-choice quizzes that can be taken in class or online, or in class polls which may serve as a basis for discussion.[[156]](#footnote-156) These assessments should be employed routinely, not only to conform with ABA requirements,[[157]](#footnote-157) but also to help engage students in metacognitive processes in which they assess their own learning.[[158]](#footnote-158)

Assessments should not normally be burdensome to professors. While practice essays may have a marked effect on student learning,[[159]](#footnote-159) they do consume a lot of time. Providing practice essays with sample answers is a good way to avoid time-consuming feedback processes. There are additionally many assessment options which do not absorb much time or resources, and which provide myriad educational benefits to students.

Together, this process of leveled questioning, followed by class discussion—whether it be in whole-class or small-group format—is used as a means of fostering student engagement and student learning. Professors, like mediators, can watch their students understand a topic differently, and can provide guidance to students as their understanding deepens and grows.

1. Conclusion

The BADGER framework allows professors to customize the process for individual classes with varying dynamics, while also providing a grounding framework for professors to rely on when creating instruction over the course or a semester or over the course of years. The framework taps into intuitive understandings of how human beings engage and learn, and how they can go about discussing difficult topics. These intuitions are extremely valuable to the work of a law professor, who is tasked with encouraging students of widely variant backgrounds and experiences to think more deeply and meaningfully about the law. Through the use of BADGER mediation techniques, professors center student engagement with complex ideas while also cementing the need for the professor in the room. Professors guide and structure in-depth conversations by providing valuable resources and asking valuable questions. The resulting classroom dynamic is one of shared power and shared understanding, tolerance for the ideas of others, and student confidence in their ability to succeed as lawyers. This is the classroom dynamic that will keep law students healthy and will keep legal profession relevant for years to come.

1. *See e.g.*, Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. Legal Educ. 562, 563 & 566 (2015) (questioning the pedagogical effectiveness of the Socratic method, a foundational approach to law school teaching appearing most often in first year courses). [↑](#footnote-ref-1)
2. *Id.* at 571 (pointing to deficiencies in law students’ research abilities when entering the profession); *id.* at 574 (“The case-based Socratic method focuses on a very narrow and distorted range of legal skills.”). [↑](#footnote-ref-2)
3. Sherri L. Keene & Susan A. McHahon, *The Contextual Case Method: Moving Beyond Opinions to Spark Students’ Legal Imaginations*, 108 Va. L. Rev. Online 72, 79 (2022). [↑](#footnote-ref-3)
4. *See* Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. Legal Educ. 352, 355 (2015) (“The movement exposes to the mainstream what black communities have argued . . . for centuries: Law is not fair, does not treat people equally, and its violence is lethal and routine.”); Keene & McHahon, *supra* note 3, at 78 (“A student who does not understand the role of bias, policy preference, or other non-legal factors play in decisions will not be as effective an advocate for their client.”). [↑](#footnote-ref-4)
5. Jordana A. Confino, *Where are We on the Path to Law Student Well Being? Report on the ABA CoLAP Law Student Assistance Committee Law School Wellness Survey*, 68 J. Legal Educ. 650, 650 (2019); Ind. univ. ctr. for postsecondary rsch., the covid crisis in legal education: 2021 annual survey results 11 (2021), https://lssse.indiana.edu/wp-content/uploads/2015/12/COVID-Crisis-in-Legal-Education-Final-10.28.21.pdf. [↑](#footnote-ref-5)
6. *See e.g.*, Erin C. Lain, *Racialized Interactions in the Law School Classroom*, 67 J. Legal Educ. 780, 786–­87 (2018) (explaining that students of color may become disengaged because they lack a sense of psychological safety in the classroom); Abrams, *supra* note 1, at 566 n.24. [↑](#footnote-ref-6)
7. *See* Akbar, *supra* note 4, at 365 (“Law is transformed from its common image in the liberal ­imagination—as the cure-all for the ails of inequality—into just one tool among many for challenging a social order in which race, gender, sex, and class determine power relations and the material conditions in which people live.”). [↑](#footnote-ref-7)
8. Gert Biesta, *The Rediscovery of Teaching: On Robot Vacuum Cleaners, Non-egological Education and the Limits of the Hermeneutical World View*, 48 Educ. Phil. & Theory 374, 387 (2016) (describing the debate between teacher-centered instruction and student-centered instruction as “all too common.”). [↑](#footnote-ref-8)
9. *Id.* [↑](#footnote-ref-9)
10. *Id.* (explaining that student-centered approaches to learning have led to “a demise of . . . the teacher”). [↑](#footnote-ref-10)
11. *See generally id.* (emphasizing the human need to be *taught* rather than simply to learn). [↑](#footnote-ref-11)
12. Marina Micari & Pilar Pazos, *Connecting to the Professor: Impact of Student-Faculty Relationship in a Highly Challenging Course*, 60 Coll. Teaching 41, 42 (2012) (“[S]tudents’ academic self-concept [is] strongly correlated to their relationships with faculty, including their sense of professors’ . . . respect for students.”). [↑](#footnote-ref-12)
13. Deborah L. Borman & Catherine Haras, *Something Borrowed: Interdisciplinary Strategies for Legal Education*, 68 J. Legal Educ. 357, 366 (2019). [↑](#footnote-ref-13)
14. *Id.* (citing the “raft of studies” which demonstrate that lecturing must be supplemented with opportunities to practice). [↑](#footnote-ref-14)
15. *See* Biesta, *supra* note 8, at 374. [↑](#footnote-ref-15)
16. Lain, *supra* note 6, at 791–92. [↑](#footnote-ref-16)
17. *See id.* at 791 (describing professors who seek to control the direction of racialized interactions as “largely acting out of fear.”). [↑](#footnote-ref-17)
18. Borman & Haras, *supra* note 13, at 357. [↑](#footnote-ref-18)
19. Abrams, *supra* note 1, at 562 (“[E]xciting innovations in legal education are frenetically swirling around us.”). For professors who are unsure about the fundamentals of pedagogically sound instruction, even the best ideas will have trouble finding application. The process laid out in this paper relies on fundamental understandings of human learning that will result in positive learning outcomes in numerous contexts. [↑](#footnote-ref-19)
20. This paper adopts Leonard Riskin’s conceptualization of a facilitative-broad mediator. A facilitative-broad mediator “seeks to help the parties define, understand, and resolve the problems [the parties] wish to address. She encourages [the parties] to consider underlying interests. . ..” Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, *in* The Nature of Mediation 229, 232 (1995). Like a facilitative-broad mediator, a professor helps students seek and define the legal and factual problems within cases and operate as active agents to work through and resolve some of those problems. The facilitative mediator does not herself provide “assessments, predictions, or proposals” but instead “helps the participants better understand their legal situation.” *Id.* While worthwhile critique regarding the framing of “facilitative-broad” mediators has been raised by Riskin himself, these debates are outside the scope of this article. *Id.* at 235. [↑](#footnote-ref-20)
21. *Id.* at 230 (explaining that mediators frame their role as enhancing and clarifying communication between parties, without providing their own opinion on the dispute). [↑](#footnote-ref-21)
22. *See* Monica Hanaway, Psychologically Informed Mediation 13 (2020) (explaining that facilitative mediation involves a process in which “the parties’ deeper interests are explored, with the aim in assisting the parties in reaching their own voluntary and mutually agreeable resolution.”). [↑](#footnote-ref-22)
23. *See* Riskin, *supra* note 20, at 230 (“[T]he parties . . . develop better solutions than any that the mediator might create.”). [↑](#footnote-ref-23)
24. Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 J. L. & Pol’y 102, 123 (2010). [↑](#footnote-ref-24)
25. John W. Cooley, The Mediator’s Handbook 254 (NITA, eds., 2d ed. 2006). [↑](#footnote-ref-25)
26. *Id.* at 256 (analogizing: “One can use analogies to provide movement. The problem under consideration is related to the analogy and the analogy is developed along its own lines. At each stage, the developed analogy transferred back to the original problem to see if any aspects are useful to a solution. Ask ‘what’s similar?’”; *id.* at 255 (generating alternatives: “The most fundamental principle of lateral thinking is that any particular way of looking at things is only one from among many other possible ways. Using the generation of alternatives technique, one does not search for the best approach, but rather looks for as many different approaches as possible. In the lateral search, the alternatives generated do not have to be reasonable in themselves. Even if they are not reasonable, they may spark or precipitate reasonable solutions.”); *id.* at 256(challenging assumptions: “When using this technique, one challenges (1) the necessity of boundaries and limits in problem solving; and (2) the validity of concepts. Ask ‘why?’”); *id.* (suspending judgment: “Judgement is suspended during the generative state of thinking and applied during the selective stage.”); *id.* (fractionating the problem: “Using this technique, one breaks down a situation into fractions and then restructures the situation by putting the fractions together in a new way. Ask ‘what if?’); *id.* (encouraging brainstorming: “Brainstorming has three features: a formal (or special) setting; suspended judgement; and cross-stimulation.”). [↑](#footnote-ref-26)
27. *Compare* Borman & Haras, *supra* note 13, at 381–82 (“[In a Socratic] dialogue, the aim is for *dis*equilibrium, creating opportunities for a renewed understanding that comes from difference”) *with* Joseph B. Stulberg & Lela Love, The Middle Voice: Mediating Conflict Successfully 11 (3d ed. 2019) (“[H]ow can the mediator reorient the way disputants see their conflict and each other so that they view a developed solution?”). [↑](#footnote-ref-27)
28. *See* Riskin, *supra* note 20, at 230. [↑](#footnote-ref-28)
29. *See id*. [↑](#footnote-ref-29)
30. *See id*. [↑](#footnote-ref-30)
31. *See* Caroline Harmon-Darrow et al., *Defining Inclusive Mediation: Theory, Practice, and Research*, 37 Conflict Resol. Quarterly 305, 306 (2020) (explaining how alternative dispute resolution is founded on conflict theory, or the idea that conflict is an inherently neutral force which may be used for positive or negative ends). [↑](#footnote-ref-31)
32. *See* Elizabeth E. Bader, *The Psychology and Neurobiology of Mediation*, 17 Cardozo J. Conflict Resol. 363, 363 (2016) (“Mediation was, I found, in large measure the process of helping parties, and often their attorneys, work through their initially exaggerated sense of themselves and the possibilities for settlement in order to arrive at a realistic resolution of the dispute.”). [↑](#footnote-ref-32)
33. *See* Lain, *supra* note 6, at 791–92. [↑](#footnote-ref-33)
34. Izumi, *supra* note 24, at 123 (explaining that mediators are “deliberate in planning and conducting each mediation to ‘place and keep the power of self-determination with the parties, while protecting all parties’ abilities to present issues and concerns equally in the mediation session.’”). [↑](#footnote-ref-34)
35. Facilitative mediation involves a process in which “the parties’ deeper interests are explored, with the aim in assisting the parties in reaching their own voluntary and mutually agreeable resolution.” Monica Hanaway, Psychologically Informed Mediation 13 (2020). Facilitative mediation therefore maintains a spotlight on the parties (students) while leaving essential the role of the mediator (professor). [↑](#footnote-ref-35)
36. *See generally* Stulberg & Love, *supra* note 27. BADGER mediation has practitioners “Begin” mediations after moving through a specific set of considerations, outlined *infra* Section III.A, “Accumulate information” from mediation parties, “Develop a discussion strategy” once they have adequate understanding of party interests and goals, “Generate movement” in the conversation between parties, “Elect separate sessions” where necessary, and finally “Reach closure.” *Id.* [↑](#footnote-ref-36)
37. While the bare framework will not always naturally result in these kinds of considerations being made, this article seeks to employ it in that manner. [↑](#footnote-ref-37)
38. Stulberg & Love, *supra* note 27, at 50. [↑](#footnote-ref-38)
39. *Id.* [↑](#footnote-ref-39)
40. *Id.* at 38. [↑](#footnote-ref-40)
41. *Id.* [↑](#footnote-ref-41)
42. Nancy J. Soonpaa, *The Ins and Outcomes of Writing an Effective Syllabus*, 67 J. Legal Educ. 833, 841 (2018); *see* Keene & McHahon, *supra* note 3, at 72 (describing how different resources create different classroom dynamics). [↑](#footnote-ref-42)
43. *See* Soonpaa, *supra* note 42, at 839 (explaining how choices about outcomes in a course dictate choices about content selection). [↑](#footnote-ref-43)
44. *See id.* [↑](#footnote-ref-44)
45. *See A Conversation with Hassan Batts*, *in* Re-Centering: Culture and Knowledge in Conflict Resolution and Practice 215, 219 (Mary Adams Trujillo et al. eds., 2008) (explaining that ground rules can function inequitably in mediation environments); *see also* Sharon Press & Ellen E. Deason, *Mediation: Embedded Assumptions of Whiteness?*, 22 Cardozo J. Conflict Resol. 453, 459–61 (2022) (raising concerns regarding how to make ground rules more equitable). When considering rules for engagement in the classroom, professors can be likewise conscientious about how those rules impact students with different cultural expectations. [↑](#footnote-ref-45)
46. Soonpaa, *supra* note 42, at 837–40. [↑](#footnote-ref-46)
47. Stulberg & Love, *supra* note 27, at 46. [↑](#footnote-ref-47)
48. *See* Micari & Pazos, *supra* note 12, at 42 (“[S]tudents’ academic self-concept [is] strongly correlated to their relationships with faculty, including their sense of professors’ . . . respect for students.”). [↑](#footnote-ref-48)
49. Michael F. Shaughnessy, *An Interview with Anita Woolfolk: The Educational Psychology of Teacher Efficacy*, 16 Educ. Psych. Rev. 153, 154 (2004) (correlating positive student outcomes with a teachers’ sense that their capabilities foster student learning and engagement). [↑](#footnote-ref-49)
50. *Id.* [↑](#footnote-ref-50)
51. Stulberg & Love, *supra* note 27, at 50. [↑](#footnote-ref-51)
52. *See generally id.* at 66–75 (describing methods of questioning that generate productive conversation). [↑](#footnote-ref-52)
53. Borman & Haras, *supra* note 13, at 380. [↑](#footnote-ref-53)
54. Jack Schneider, *Remembrance of Things Past: A History of the Socratic Method in the United States*, 43 Curriculum Inquiry 613, 613 (2013). [↑](#footnote-ref-54)
55. *Id.* at 615. [↑](#footnote-ref-55)
56. *Id.* at 625. [↑](#footnote-ref-56)
57. *Id.* at 626. [↑](#footnote-ref-57)
58. *Id.*  [↑](#footnote-ref-58)
59. *Id.* at 634. [↑](#footnote-ref-59)
60. *Id.* at 627. [↑](#footnote-ref-60)
61. *Id.* [↑](#footnote-ref-61)
62. Anna Huggins & Alex Steel, *The Relationship Between Class Participation and Law Students’ Learning, Engagement, and Stress: Do Demographics Matter?*, 46 Univ. New South Wales L. Rsch. Series 1, 1 (2016). [↑](#footnote-ref-62)
63. Schneider, *supra* note 54, at 624; Borman & Haras, *supra* note 13, at 380 (“The Socratic method uniquely leverages prior knowledge, engages students in real-time practice and feedback, and incorporates testing as a social learning experience that is personally meaningful for students.”). [↑](#footnote-ref-63)
64. As discussed *infra*,Section V,the BADGER mediation framework includes startup questions, open-ended but focused questions, and justification questions, followed by a process of deeper questioning as parties move towards closure. [↑](#footnote-ref-64)
65. Stulberg & Love, *supra* note 27, at 91–102. [↑](#footnote-ref-65)
66. Keene & McHahon, *supra* note 3, at 78 (“Without training beyond opinions, students would not understand the importance of framing, how it is necessary (but might not be sufficient) to win a case in the face of influences pushing a decision maker to rule against her client.”). [↑](#footnote-ref-66)
67. Akbar, *supra* note 4, at 368 (“In classrooms and court opinions, what goes named and unnamed generates a view of how the world is and how it should be—even how it *could* be.”).  [↑](#footnote-ref-67)
68. *See* Keen & McMahon, *supra* note 3, at 85 (“[I]n reading the briefs and recognizing what when unsaid [in the opinion], a student may realize that they need to look beyond the opinion to determine the complex motivations and interests that really drove a court’s decision.”). [↑](#footnote-ref-68)
69. This does not imply that facilitative mediation, or facilitative mediation frameworks are particularly adept at helping mediators or mediation parties address larger power dynamics in mediations as they relate to race, gender, and class. *See, e.g.*,Izumi, *supra* note 24, at 103. As with most processes, frameworks can be employed in racist and anti-racist ways, are vulnerable to the implicit biases of the humans involved in the process, and exist within a larger, capitalistic structure that often discourages social progress. Izumi, *supra* note 24, at 103. However, this essay aims to use the framework in a way that helps students expose, understand, and discuss inequalities in the law. [↑](#footnote-ref-69)
70. Akbar, *supra* note 4, at 367. [↑](#footnote-ref-70)
71. Keen & McMahon, *supra* note 3, at 82; *see also* Abrams, *supra* note 1, at 568 (explaining how a client-centered method of case instruction softens the teacher-student hierarchy, invites diverse participation, and is more transferable to other law courses and experiences). [↑](#footnote-ref-71)
72. Akbar, *supra* note 4, at 355. [↑](#footnote-ref-72)
73. *See* Keen & McMahon, *supra* note 3, at 77 (“The traditional case method thus both blinds future lawyers to possible injustices baked into the system and leaves them unequipped to counter those injustices when they occur.”). [↑](#footnote-ref-73)
74. Riskin, *supra* note 20, at 230 (“The facilitative mediator assumes that parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than . . . the mediator.”); [↑](#footnote-ref-74)
75. Borman & Haras, *supra* note 13, at 367 (“[A]ctivating prior knowledge acts as a hook to learning.”). [↑](#footnote-ref-75)
76. Borman & Haras, *supra* note 13, at 386. [↑](#footnote-ref-76)
77. Borman & Haras, *supra* note 13, at 386. [↑](#footnote-ref-77)
78. Confino, *supra* note 5, at 650. [↑](#footnote-ref-78)
79. *Id.* [↑](#footnote-ref-79)
80. *Id.* [↑](#footnote-ref-80)
81. *Id.* at 703. [↑](#footnote-ref-81)
82. Kristy S. Cooper et al., *Reflectiveness, Adaptivity, and Support: How Teacher Agency Promotes Student Engagement*, 123 Am. J. Educ. 109, 111 (2016). Cognitive engagement refers to being mentally absorbed in a subject. Behavioral engagement is the outward appearance of engagement, such as a student raising their hand or talking in class. Emotional engagement comes from a unity between cognitive and behavioral engagement. It is a sense of happiness *and* well-being springing from a meaningful focus on the topic. [↑](#footnote-ref-82)
83. Lain, *supra* note 6, at 787. [↑](#footnote-ref-83)
84. *Id.* [↑](#footnote-ref-84)
85. *Id.* [↑](#footnote-ref-85)
86. Abrams, *supra* note 1, at 563. [↑](#footnote-ref-86)
87. Stulberg & Love, *supra* note 27, at 53. [↑](#footnote-ref-87)
88. Ind. Univ. Ctr. for Postsecondary Rsch., *supra* note 5, at 9. [↑](#footnote-ref-88)
89. Stulberg & Love, *supra* note 27, at 59. [↑](#footnote-ref-89)
90. *Id.* at 61. [↑](#footnote-ref-90)
91. Michael Linsin, *How to Use the Preview Strategy to Improve Behavior,* Smart Classroom Mgmt., https://smartclassroommanagement.com/2012/06/23/how-to-use-the-preview-strategy-to-improve-behavior/ (last visited Dec. 8, 2022). [↑](#footnote-ref-91)
92. Micari & Pazos, *supra* note 12, at 42 (citing studies which find “students’ academic self-concept to be strongly related to their relationships with faculty, including their sense of professors’ approachability, accessibility, and respect for students”). [↑](#footnote-ref-92)
93. This section borrows heavily from Assistant Professor of Law Jamie R. Abrams’ *Reframing the Socratic Method*. Her ‘adaptations’ to the Socratic method focus largely on changing the *kinds* of questions asked, more so than *how* and *to whom* the questions are posed. Abrams, *supra* note 1, at 564-65. Thus, this paper will focus on an appropriate process for questioning, but the substantive questions provided as examples come from Professor Abrams’ framework. *Id.* Her framework (1) consistently positions the client at the center of the Socratic dialogue; (2) asks students to consider the legal research and weight of authority as a precursor to client guidance and case outcomes; and (3) consistently and frequently sensitizes students to skills within the Socratic dialogue. *Id.* [↑](#footnote-ref-93)
94. Stulberg & Love, *supra* note 27, at 66. [↑](#footnote-ref-94)
95. Douglas K. Newell, *Ten Survival Suggestions for Rookie Law Teachers*, 33(4) J. of Legal Educ. 693, 699 (1983). [↑](#footnote-ref-95)
96. Stulberg & Love, *supra* note 27, at 66. [↑](#footnote-ref-96)
97. *Id.* [↑](#footnote-ref-97)
98. This interaction is using the client-centered framework presented by Professor Abrams in *Reframing the Socratic Method*, *supra* note 1. [↑](#footnote-ref-98)
99. Notice the inclusion of “who” and “what” questions in the following exchange. [↑](#footnote-ref-99)
100. Notice the way in which the professor confirms some element of every student answer, even when, as with Myranda’s answer *infra*, the response is technically wrong, or, as with John’s answer, the response is incomplete. The professor acknowledges how the answer may have been arrived at, but then continues toward building a class understanding of the case. [↑](#footnote-ref-100)
101. Notice the careful phrasing of this response. It provides Anna an opportunity to help her classmate, but it does not belittle John for not knowing. “Did you catch” implies that it is a fact easily missed, but the continued questioning regarding Ms. Palsgraf’s full name centers the importance of her as a client. [↑](#footnote-ref-101)
102. Notice that the professor asks for student clarification, rather than clarifying themselves. [↑](#footnote-ref-102)
103. Notice how the professor reframes this answer to center the important parts. At this point in the discussion, the professor does not see the need to center the exact nature and extent of the plaintiff’s injuries, and so leaves that detail out when reframing. [↑](#footnote-ref-103)
104. The professor at this stage of the process prioritizes conversational momentum over encouraging students to think more deeply when they give answers like this one. This would look somewhat different later in the process. [↑](#footnote-ref-104)
105. In this two or three-minute interaction, the professor engages with over 10% of a sixty-student class and alternates calling on male and female students. Also notice the way in which the discussion is teeing up the more difficult legal concept at issue in this case—proximate cause. [↑](#footnote-ref-105)
106. This interaction is using the client-centered framework presented by Professor Abrams in *Reframing the Socratic Method*, *supra* note 1. This question was provided by that framework. [↑](#footnote-ref-106)
107. As questions get more complicated, professors may stop cold-calling and rely on the classroom culture of participation that they build throughout the semester. They may ask for multiple student perspectives on the same question or may ask students to fill in any gaps their peers may not have mentioned or considered. The Mediator-Professor is willing to accept even short or unsure answers and encourage students to build upon each other. All of this is done with the aim of elevating student voices and ensuring that a variety of student perspectives are shared and validated. [↑](#footnote-ref-107)
108. Notice how the professor encourages the student to explain more about their answer to understand where the answer is coming from—whether it is an understanding of the case or some other information the student is aware of. [↑](#footnote-ref-108)
109. Now that the professor understands the source of the student answer, notice how the professor shifts the conversation back to the concrete legal text and away from the student’s less specific description. [↑](#footnote-ref-109)
110. Notice the way that encouraging students to quote the text connects student’s own reasoning with the language of the legal document, much like they will be encouraged to do in legal practice. [↑](#footnote-ref-110)
111. Stulberg & Love, *supra* note 27, at 67. [↑](#footnote-ref-111)
112. Abrams, *supra* note 1, at 569. [↑](#footnote-ref-112)
113. *See* Stulberg & Love, *supra* note 27, at 68. [↑](#footnote-ref-113)
114. *Id.* [↑](#footnote-ref-114)
115. Notice how this answer, although technically incorrect, provides an opportunity for discussion about the criminal legal topic at issue—what kinds of evidence can be used to support the *interest* in eliminating the death penalty. See how the professor transitions the discussion back to this topic in the next line. [↑](#footnote-ref-115)
116. Notice that the professor continues to distribute these questions throughout the classroom, engaging as many students as possible. Remember that justification questions are introductory to the substantive conversation which will ultimately dominate class. [↑](#footnote-ref-116)
117. Verbal reinforcement and clarification often takes the form of reframing and summarizing. Dwight Golann & Jay Folberg, Mediation: The Roles of Advocate and Neutral 163 (Vicki Been et al. eds., 2d ed. 2011) (“Helping disputants to reach agreement often requires finding a way to modify their perspective, or frames, on a controversy”); James R. Beattie, Jr., *Socratic Ignorance: Once More into the Cave*, 105 W. Va. L. Rev. 471, 476 (“If teaching is viewed as a process of eliciting information from students, information that will eventually lead to the answers we are looking for, then plainly we must pay close attention to what our student is saying.”). [↑](#footnote-ref-117)
118. Stulberg & Love, *supra* note 27, at 70. [↑](#footnote-ref-118)
119. Lynn Duryee & Matt White, Mastering Mediation 232 (Jo A. Darden ed., 2012) (“The secret to maintaining passion and enthusiasm is to cultivate curiosity.”). This is true in the mediation context as well as the classroom, and is equally true for mediator, professor, and student. The degree to which any party is curious about the interaction is directly correlated to their engagement with it. Cultivating curiosity means making the interactions between professor and student relevant to the class as a whole through reframing and connecting. [↑](#footnote-ref-119)
120. *See* Micari & Pazos, *supra* note 12, at 45 (“[T]here is often a tendency for faculty to assume that talent and hard work alone will get students through the course, when in reality many other factors—including their own behavior towards students—can play important roles.”). [↑](#footnote-ref-120)
121. Ken Bryant & Dana L. Curtis, Reframing (2004), *reprinted in* Mediation: The Roles of Advocate and Neutral 163, 163 (Vicki Been et al. eds., 2011) (“Your goal is to accurately reflect the message sent by the speaker, while simultaneously molding the statement into an *aid for easier communication*”) (emphasis added). [↑](#footnote-ref-121)
122. Micari & Pazos, *supra* note 12, at 41 (“The relationship between college students and their teachers has been shown repeatedly to have an impact on the quality of the students’ experiences and learning.”). [↑](#footnote-ref-122)
123. Stulberg & Love, *supra* note 27, at 72. [↑](#footnote-ref-123)
124. *See generally* Julie A. Oseid, *Talk Less, Smile More*, 68(1) J. of Legal Educ. 176, 177–78 (2018). After losing her voice during an illness, Professor Oseid was forced to confront the fact she spoke in class almost twice as much as she thought she did. When she stopped lecturing at all, her class “generated one of the richest conversations of the semester.” [↑](#footnote-ref-124)
125. Stulberg & Love, *supra* note 27, at 78. [↑](#footnote-ref-125)
126. Press & Deason, *supra* note 45, at 466. [↑](#footnote-ref-126)
127. *Id.* at 467. [↑](#footnote-ref-127)
128. *See generally id.* [↑](#footnote-ref-128)
129. Linsin, *supra* note 91. [↑](#footnote-ref-129)
130. Stulberg & Love, *supra* note 27, at 32. [↑](#footnote-ref-130)
131. Beattie, *supra* note 118, at 479. [↑](#footnote-ref-131)
132. Stulberg & Love, *supra* note 27, at 93. [↑](#footnote-ref-132)
133. *Id.* [↑](#footnote-ref-133)
134. *See* discussion *supra* note26, for a list of specific strategies. [↑](#footnote-ref-134)
135. Stulberg & Love, *supra* note 27, at 95. [↑](#footnote-ref-135)
136. *Id.* [↑](#footnote-ref-136)
137. Beattie, *supra* note 118, at 485. [↑](#footnote-ref-137)
138. Newell, *supra* note 95, at 697. [↑](#footnote-ref-138)
139. *See* Oseid, *supra* note 125, at 183 (explaining how professorial silence encouraged student participation). [↑](#footnote-ref-139)
140. Lain, *supra* note 6, at 783. [↑](#footnote-ref-140)
141. *Id.* at 784. [↑](#footnote-ref-141)
142. *Id.* at 796. [↑](#footnote-ref-142)
143. Stulberg & Love, *supra* note 27, at 103. [↑](#footnote-ref-143)
144. *Id.* [↑](#footnote-ref-144)
145. If professors encourage the practice only once or twice a semester, it is unlikely to have as many positive effects as if it is employed more regularly. Procedures which are completely unexpected and out of the norm are likely to be approached with much more hesitancy, caution, and suspicion than procedures which are customary. [↑](#footnote-ref-145)
146. Stulberg & Love, *supra* note 27, at 104. [↑](#footnote-ref-146)
147. Newell, *supra* note 95, at 168. [↑](#footnote-ref-147)
148. Jodi S. Balsam, *Teaming Up to Learn in the Doctrinal Classroom*, 68 J. of L. Educ. 261, 269 (2019). [↑](#footnote-ref-148)
149. *Id.* [↑](#footnote-ref-149)
150. Newell, *supra* note 95, at 168. [↑](#footnote-ref-150)
151. Balsam, *supra* note 149. [↑](#footnote-ref-151)
152. *Id.* [↑](#footnote-ref-152)
153. *Id.* [↑](#footnote-ref-153)
154. Stulberg & Love, *supra* note 27, at 119. [↑](#footnote-ref-154)
155. *See* Soonpaa, *supra* note 42, at 842. [↑](#footnote-ref-155)
156. *Id.* [↑](#footnote-ref-156)
157. Am. Bar Ass’n, Standards and Rules of Procedure for Approval of Law Schools 2022-2023 1 (2022). [↑](#footnote-ref-157)
158. Jennifer A. Gundlach & Jessica R. Santangelo, *Teaching and Assessing Metacognition in Law School*, 69 J. of Legal Educ. 156, 157 (2019) (“In learning, as in professional practice, ‘content and procedural knowledge alone are insufficient for persistent and self-directed growth’ of expertise; ‘knowledge of *how* one learns content or practices a procedure’ is critical.”). [↑](#footnote-ref-158)
159. *Id.* at 158. [↑](#footnote-ref-159)