STETSON LAW REVIEW

VOLUME 38	FALL 2008	NUMBER 1

ARTICLES

FROM VOYEUR TO LAWYER: VICARIOUS LEARNING AND THE TRANSFORMATIONAL ADVOCACY CRITIQUE

Christopher W. Behan[*]

I. INTRODUCTION

Trial advocacy professors can identify with the following lament of Andrew Marvell, a 17th-century poet:

> *But at my back I always hear/Time's winged chariot hurrying near.*[1]

---

1. Marvell's poem is a marvel of metaphysical sophistry, designed to woo a lady:

> *Had we but world enough, and time,*
> *This coyness, lady, were no crime.*
> *We would sit down, and think which way*
> *To walk, and pass our long love's day.*
>
> • • •
>
> *But at my back I always hear*
> *Time's winged chariot hurrying near;*
> *And yonder all before us lie*
> *Deserts of vast eternity.*

Stetson Law Review   [Vol. 38

The most precious commodity in a trial advocacy classroom is time—there is never enough of it. Given sufficient time and coaching opportunities, a good advocacy professor can work miracles, even with marginally-skilled students. Instead, many professors find themselves facing the Sisyphean task of trying to teach trial skills while watching an endless series of identical performances in which identical mistakes are made, despite identical critiques.[2]

The task is made more difficult by the following two great commandments of advocacy teaching:

(1)   Thou shalt critique using only the National Institute of Trial Advocacy (NITA) method, for it is superior to all other possible methods of critique;[3] and

(2)   Thou shalt always give every student equal performance time and an equal opportunity to perform advocacy skills during every advocacy class session.[4]

> *Thy beauty shall no more be found,*
> *Nor, in thy marble vault, shall sound*
> *My echoing song . . . .*
> *The grave's a fine and private place,*
> *But none, I think, do there embrace.*
>
> •   •   •
>
> *Now therefore, while the youthful hue*
> *Sits on thy skin like morning dew,*
> *And while thy willing soul transpires*
> *At every pore with instant fires,*
> *Now let us sport us while we may,*
> *And now, like amorous birds of prey,*
> *Rather at once our time devour*
> *Than languish in his slow-chapped power.*
>
> •   •   •
>
> *Thus, though we cannot make our sun*
> *Stand still, yet we will make him run.*

Andrew Marvell, *To His Coy Mistress*, in *The Norton Anthology of English Literature*, Vol. I, 1691–1692 (M.H. Abrams ed., 7th ed., W.W. Norton & Co. 2000).

2.   Sisyphus was condemned to roll a large stone up the side of a mountain. Encyclopedia Britannica Online, *Sisyphus*, http://www.britannica.com/eb/article-9068010/Sisyphus (accessed Nov. 6, 2008). Every time he would approach the top of the mountain, he would find himself at the bottom, forced to start over once again. *Id.*

3.   *Cf. Exodus* 20:3 (Rev. Stand. Version) (referring to the First Commandment: "You shall have no other gods before me").

These commandments are supplemented by the Advocacy Professor's Creed:

> *Next in importance to the professor's lecture and demonstration, there is only one way to learn advocacy, and that is to get up on one's feet and perform. No one ever learned anything about advocacy by listening and watching (except, of course, to the professor's lecture and demonstration).*[5]

Is there a better way? I suggest there is, provided the advocacy professor is willing to break the two commandments and adopt a heretical approach to the Creed. I do not, however, advocate a wholesale abandonment of learning-by-doing or NITA-style directed critiques. Those techniques occupy a necessary place in the pedagogy of advocacy. I simply suggest that in the right circumstances it is not only acceptable and desirable, but also preferable, to supplement them with different techniques.

The purpose of this Article is to describe and explain the transformational critique, an advocacy-critiquing method that, in my experience and that of others who have used it, has proven to be remarkably effective in improving the student advocate's performance. This method is predicated on the following three foundational principles: (1) Time should not be an artificial constraint in the advocacy classroom;[6] (2) Student advocates deserve the opportunity to correct their errors immediately and "get it right";[7] and (3) Because vicarious learning under the proper conditions works, the remaining students in the group actually improve

---

4. *Cf.* Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 Temp. L. Rev. 1, 28–29 (1993) ("The number of students in each class should be weighed against the amount of class time available for their performances. Where the educational objective is to teach both case theory and basic trial skills, experience has taught that each student should perform at every session.").

5. *Cf. id.* n. 102 ("Optimally, a trial advocacy course should include a lecture-demonstration component as is provided in the NITA model. Complementing the performance session, students should be exposed to a lecture and/or demonstration to show them how to perform that which will be or has been assigned."). *See also* Sanford M. Brook, Mark S. Caldwell & John T. Baker, *National Institute for Trial Advocacy Teacher Training Manual* 5, 11 (2003) (arguing that students learn equally either through listening to and watching others perform or through a professor's lecture and demonstration).

6. *But cf.* Kenneth S. Broun, *Teaching Advocacy the N.I.T.A. Way*, 63 ABA J. 1220, 1221–1222 (1977) (explaining that the NITA National Sessions follow a strict time-regimen).

7. *Id.* at 1222.

their own performances by observing and processing the coaching of the student performer.[8] Due to the effectiveness of vicarious learning under proper conditions in the advocacy classroom, there is no iron-clad requirement that each student perform the advocacy skill each time the class meets.

Part Two of this Article discusses the most common methods of critiquing advocacy. Part Three outlines and explains the principles of the transformational critique. Part Four examines the vicarious-learning theory and explains why the transformational critique works. Part Five provides suggestions for using the critique in a classroom session and for integrating it into the advocacy curriculum, and Part Six concludes the Article.

II. A COMPARISON OF CRITIQUING METHODOLOGIES

Imagine the following vignette from an advocacy professor's personal hell. We enter the scene just after a student has finished a four-minute cross-examination so riddled with errors that the professor must swallow her professional pride in order to comply with the NITA edict never to correct more than one or two mistakes at a time.[9] She picks the most obvious error and delivers her critique.

> I want to talk to you about using close-ended questions on cross-examination. What I heard you say was, "Mr. Witness, why didn't you call the police right away when you saw, as you claim, my client shoot the victim two times?" A better way to ask this question would be to use a close-ended question, such as, "Mr. Witness, you didn't call the police right away, did you?" Close-ended questions help you control the witness and control the cross-examination. Next?

A new student comes to the podium, having ignored most of the previous student's performance and the professor's critique while frantically writing out her own cross-examination on a legal pad.

---

8. *Cf.* Brook et al., *supra* n. 5, at 5.
9. *Id.* at 23 (noting that "[g]enerally, no more than one point should be covered in each critique").

> **Student:** Mr. Witness, you said on direct that you didn't call the police right away when you claim you saw my client shoot the victim twice. If you really saw my client shoot the victim—not once but twice—wouldn't you agree that such an event, assuming arguendo that it happened, which we don't believe it did—at least not with my client— would be important enough to report to the police right away, yes or no?

> **Witness:** That would depend on how I felt at the time. I mean, if I liked the victim, I might report it right away, but if I didn't want to get involved, maybe I wouldn't say anything, like those people in New York in that one case. Or if I was afraid, maybe I wouldn't say anything, because I mean, I did just see your client shoot someone twice, and I might not have wanted anything like that to happen to me.

> **Student:** That was a yes or no question. Answer yes or no.

> **Witness:** I don't remember the question.

> **Student:** Mr. Witness, if you really did see my client shoot the victim two times, wouldn't you agree with me that you, as a reasonable person, should have called the police right away if it was that important, yes or no?

The student advocate is practically shouting at the witness. One hand threateningly holds a pen, pointing and thrusting it at the witness as if it is a weapon; the other hand nervously runs through the student's hair during the performance, creating a tangled rat's nest atop the student's head.

The professor snaps her pencil in frustration. There are nine student performances left to go. Life, she thinks, is too long.

There are several ways to critique and coach this student. This Section of the Article briefly describes three of them, discusses their foundational principles, and analyzes their relative advantages and disadvantages.

A. The NITA Method

Perhaps the most influential method of critiquing trial advocacy is modeled on techniques developed by the National Institute

of Trial Advocacy (NITA).[10] NITA was founded in the early 1970s to improve the quality of trial advocacy among lawyers in the United States.[11] The founders of the NITA successfully developed a systematic method to teach trial advocacy.[12]

There are several hallmarks of the NITA method. First, NITA pioneered the use of controlled case files that permit a focus on discrete trial skills.[13] Each file can be broken down into different parts that permit the instructor to drill and train students thoroughly in a particular skill, such as opening statement, direct-examination, or cross-examination.[14]

The second hallmark of NITA training is its critiquing method.[15] This method is based on the following three principles: (1) a tightly controlled advocacy setting;[16] (2) a philosophy of learning-by-doing;[17] and (3) a systematic four-step method of giving sharply focused critiques.[18]

The third hallmark of NITA training is its careful planning and meticulous structure.[19] Each skill is introduced by a brief lecture and an in-class demonstration that explains and models how to perform the skill.[20] Students previously assigned to prepare for

---

10. *See e.g.* Steven Lubet, *Advocacy Education: The Case for Structural Knowledge*, 66 Notre Dame L. Rev. 721, 721 (1991) (noting that "[f]or most of the last two decades nearly all discussions of advocacy education have begun with consideration of the National Institute for Trial Advocacy (NITA)").

11. Broun, *supra* n. 6, at 1220.

12. *Id.*

13. *See* Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us about Teaching Law Students to Make Ethical, Professionally Responsible, Choices*, 23 QLR 643, 702 (2004) (stating that NITA case files "call upon the 'students' to read the factual material, decide on the legal and factual theories they will pursue, marshal the evidence and legal arguments they need, anticipate their adversaries [sic] theories and arguments and prepare to meet them, prepare their witnesses, decide upon and obtain trial exhibits, and then perform the trial under the scrutiny of experts, who provide feedback").

14. *See* Lubet, *supra* n. 10, at 721 (describing the uses of a NITA case file in a NITA advocacy course).

15. *See generally* Brook et al., *supra* n. 5 (providing an overview of the NITA skills approach).

16. *Id.* at 17–19 (prescribing the requirements for a NITA advocacy performance).

17. Broun, *supra* n. 6, at 1220 (stating that NITA's "teaching method is an adaptation of a classical educational theory—learning by doing"); Brook et al., *supra* n. 5, at 5.

18. Brook et al., *supra* n. 5, at 19–21.

19. *Id.* at 11 (describing the importance of providing an overview of the NITA method and format of training to students).

20. *See id.* at 17 (explaining that an advocacy teacher should demonstrate how to do a particular skill).

practicing the skill within the confines of the case file are then given an equal opportunity to perform in a courtroom setting.[21]

In a true NITA-training experience time is tightly controlled. Each student performs essentially the same skill (direct- or cross-examinations of the same witness, for example) and receives a critique from the instructor in the same allotted amount of time.[22] The instructor's failure to control time strictly can be disastrous to a NITA training session.[23]

The NITA critique consists of the following four parts: head-note, playback, prescription, and rationale.[24] NITA instructors are taught to identify only one—or at the most, two—deficiencies to address during a critique.[25] This is for two reasons. First, time constraints do not permit addressing more than one or two deficiencies.[26] Second, NITA theory holds that an advocate is only cognitively capable of processing one or two corrections at a time.[27]

The critique begins with the headnote, which is a short statement of the advocacy principle upon which the instructor

21. *Id.* at 17–18; *see* Lubet, *supra* n. 10, at 721 (noting that students are provided with opportunities to play out various roles in a courtroom setting).

22. This information is based on the Author's experience as a graduate of the NITA teacher-training program as well as his experience as an instructor at NITA and in NITA-style advocacy training courses; *see* Broun, *supra* n. 6, at 1221–1222 (explaining the structure and timing of a NITA training course).

23. *See* Brook et al., *supra* n. 5, at 23 (noting that in a NITA course, "eight students and two teachers are in one performance room. Assuming that each student receives one critique from each of the two teachers, students will hear sixteen different critiques in a single performance session."). Keeping in mind the NITA "learning-by-doing" ethos, lengthy critiques would sabotage the goal of getting all students to perform. Indeed, the NITA materials implicitly state as much in the prohibition against telling war stories, in which the authors advise, "*More importantly, war stories take time away from performances and critiques.*" *Id.* at 25 (emphasis added). As an example of the time pressure at a NITA course, Kenneth Broun's description of the schedule at the NITA three-week course is instructive: instructors and students are fully engaged nearly every minute of the course. *See* Broun, *supra* n. 6, at 1221–1222 (laying out, in considerable detail, the schedule at a NITA training course).

24. Brook et al., *supra* n. 5, at 19–21.

25. *See* Gilda Tuoni, *Two Models for Trial Advocacy Skills Training in Law Schools—A Critique*, 25 Loy. L.A. L. Rev. 111, 118–120 (1991) (discussing the intense organization, quick pace, and structural inflexibility required to implement a NITA-style intensive advocacy course).

26. Brook et al., *supra* n. 5, at 23 (stating that "[g]enerally, no more than one point should be covered in each critique").

27. *See id.* (asserting that "[m]ore experienced teachers learn that as a course progresses, some students are able to listen and adapt to two critique points").

will base the critique.[28] Returning to the vignette above, the instructor might say,

> Ms. Smith, I would like to talk to you about asking argumentative questions on cross-examination.

The next step, playback, is arguably the most important.[29] The instructor reads the mistake back to the advocate in the advocate's own words.[30] This requires careful listening and note-taking skills, but it is critical to the NITA critique.[31] If playback is done correctly, there is no room for the student advocate to argue that her words were misheard, misquoted, or misconstrued.[32] Thus, the instructor might say,

> What I heard you say was, "Mr. Witness, if you really did see my client shoot the victim two times, wouldn't you agree with me that you, as a reasonable person, should have called the police right away if it was that important, yes or no?"

Following the headnote and the playback, the instructor gives a prescription, a way to correct the deficiency.[33] The prescription must be short, precise, and correct. Additionally, it must be sufficient to correct the deficiency.[34] In our vignette, an appropriate prescription would be,

> The best way to avoid asking argumentative questions on cross-examination is to focus on single-fact leading questions. For example, in this case you might say, "Mr. Wit-

---

28. *Id.* at 19–20 (The headline focuses the students on the teacher's critique so it should be concise, specific, and attention getting.).

29. *Id.* at 20 (stating that "[p]layback is arguably the most difficult and most important aspect of the NITA critique").

30. *Id.* (indicating that "[i]n playback, the teacher repeats word for word a snapshot of the student's performance that is the subject of the critique").

31. *See id.* (noting that teachers find it the most difficult, but it is effective because it leaves no doubt as to what the student actually said).

32. *See id.* (stating that a word-for-word snapshot of a student's performance leaves no doubt what the student said).

33. *Id.* (noting that another name for the prescription is "the fix").

34. *See id.* (instructing NITA trainers that "[a]n inability to suggest a 'fix' damages a teacher's credibility. For this reason, the critique must focus on something that the teacher is *able to fix*." (emphasis added)).

ness, let's focus on what you did *not do* after the shooting. You did not call the police right away? You did not call the police that day, did you? Or the next day? Or the day after that? Or twenty days later? In fact, you did not call the police until March 15th, did you? This was two months later."

This prescription would be appropriate because the advocate learns the appropriate principle and receives an example that correctly models how it could be done.

The final step is the rationale, the reason why the prescription works.[35] Like the above prescription, the rationale must be based on sound advocacy principles.[36] It must be concise and easy to remember,[37] and it must help the advocate understand not only how to make a change, but also why the change is important.[38] A rationale for the prescription in our vignette could be,

On cross-examination, facts are always more powerful than argument. The witness cannot disagree with a fact. As the facts come out, the jury begins to make your argument for you. They connect the dots. Meanwhile, the witness is totally under your control.

When the critique ends the student advocate returns to her seat, and the next performance begins.

There are several advantages to the NITA approach. It is clearly superior to the models it replaced, such as the war story, in which an instructor would take students back to an earlier time and place and tell the story of his own superior performance of the trial skill,[39] or the almost equally useless technique of the

---

35. *Id.* at 21.

36. *Cf. id.* at 21 (giving examples of prescriptions and rationale based on good advocacy principles).

37. *See id.* at 23 (stating that "[g]ood critiques are brief" and suggesting that teaching points be limited because students will hear many points during the class and may adopt only a few at a time).

38. *See id.* at 21 (stating that "[s]tudents must be given a reason for changing their behavior").

39. Professors Steven Lubet and James McElhaney have written separately about the "war story" and "dog-and-pony show" method of teaching trial advocacy. *See* Steven Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. Leg. Educ. 123, 124 (1987) (asserting that "[o]nce largely the province of part-time instructors who taught

instructor saying, "I would have done it differently."[40] The NITA method provides a systematic approach to critiquing advocacy performances. With its emphasis on time, discipline, and adherence to the four-step critiquing process, the NITA method ensures that all students receive essentially the same opportunity to practice the skill and to learn by doing. Personality conflicts and charges of partiality are avoided when an instructor follows the NITA method. Where the playback is done correctly, it is particularly difficult for student advocates to claim they are being treated unfairly.

The NITA method works especially well with licensed attorneys who already have some advocacy experience.[41] Their time is at a premium, and they are self-motivated learners who want to get the greatest benefit from their investment of time and money. Moreover, the combination of a good headnote, playback, prescription, and rationale is likely to make more of an impression on licensed professionals whose practical experience provides the needed context to make the training worthwhile.[42] The NITA method is, for the most part, an ideal approach for advocacy training within the confines of a three- to five-day NITA course for professional attorneys.

This is not to say that the method is perfect. Its emphasis on equal time and learning-by-doing permits many errors to go uncorrected. An instructor who must wait until the end of a performance to select only one or two errors risks reinforcing deficient habits by letting them pass by without comment or correc-

---

using makeshift materials and war stories drawn from their own experiences, trial practice is now often taught by full-time tenured faculty") (footnote omitted); James W. McElhaney, *Toward the Effective Teaching of Trial Advocacy*, 29 U. Miami L. Rev. 198, 202 (1975) (discussing the once-prevalent "dog and pony shows" that formed the bulk of the trial advocacy curriculum).

40. *See* Brook et al., *supra* n. 5, at 26 (observing that "[w]hen a teacher remarks, '*I would do it this way*,' or '*I believe this is the best way to do it*,' the critique becomes judgmental and teacher-centered").

41. Indeed, it should be remembered that this was the original target audience for NITA training. *See* Broun, *supra* n. 6, at 1220–1223 (discussing the ABA's role in helping establish NITA in order to improve the quality of the trial bar in the United States, observing that most NITA participants are lawyers with less than five years' experience, and noting the success NITA training has had with the practicing bar).

42. *See* Tuoni, *supra* n. 25, at 120 (asserting that given the intense schedule, rigid structure, and limited opportunities for reflection, a NITA-style course "is arguably more suited to the continuing legal education of lawyers who have had at least some background in lawyering skills than to law students").

tion.[43] Students rarely get the opportunity to actually correct their mistakes within the same training session. (Although, to be fair, the method does allow limited repeat performances if enough time remains.) The four-step method lacks flexibility and can seem rigid and dogmatic to instructors who would like to try different methods,[44] let alone to students who are exposed to the method for days on end.[45] Finally, the strict mental discipline required for NITA training is exhausting; I have noticed that it is the rare instructor who can carry on using the NITA method consistently throughout an entire NITA short course.

Because its benefits considerably outweigh its drawbacks, the NITA method's influence extends far beyond its original target audience. Indeed, the NITA method now forms the backbone of many, if not most, trial advocacy courses in law school.[46] The extent to which the NITA method belongs in a law school classroom, and what else should be added to it, has been a matter of discussion in advocacy literature for several years.[47]

---

43. Anyone who has served in a leadership position in the armed services is aware of the adage that a leader sets a new, lower standard by failing to correct observed errors. *See* Dept. of the Army, H.Q., *Army Leadership: Competent, Confident, and Agile*, Field Manual 6–22, ¶ 7–52 (Oct. 12, 2006) (available at www.train.army.mil) (asserting that "[l]eaders who consistently enforce standards are simultaneously instilling discipline that will pay-off in critical situations"); Dept. of the Army, H.Q., *The Army Noncommissioned Officer Guide*, Field Manual 7–22.7, ¶ 2–35 (Dec. 23, 2002) (available at www.adtdl.army .mil) (describing on-the-spot corrections as "[o]ne of the most effective administrative corrective measures").

44. Perhaps in recognition that not all teachers love the NITA critique all the time, NITA training materials admonish would-be dissenters that "[s]tudents learning trial skills often expect consistency, uniformity, and predictability . . . . This tremendously successful approach is not meant to stifle a teacher's creativity, but is simply a conceptual framework that has withstood the test of time." Brook et al., *supra* n. 5, at 19.

45. In a thoughtful article on advocacy teaching, Kenny Hegland writes that students in NITA courses often find their instructors to be dogmatic. Kenny Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. Leg. Educ. 69, 79–80 (1982).

46. Lubet, *supra* n. 10, at 721 (stating that "some" variant on the NITA method has been adopted at virtually every American law school).

47. Much of this discussion is beyond the scope of this Article. *See generally* Ronald J. Allen, *NITA and the University*, 66 Notre Dame L. Rev. 705 (1990) (exploring the place of the NITA training model in the larger context of the university); Marilyn J. Berger & John B. Mitchell, *Rethinking Advocacy Training*, 16 Am. J. Tr. Advoc. 821 (1982) (asserting that traditional skills-based trial advocacy training in law school does not do enough to help teach students the complex thought processes required for being a trial lawyer); Hegland, *supra* n. 45 (discussing the prevalence of the NITA method in law schools but questioning its failure to explore the moral and ethical dimensions of trial advocacy); Lubet, *supra* n. 39 (praising the NITA method for teaching advocacy but noting that more than skills training is needed in a law school advocacy course); Tuoni, *supra* n. 25 (noting the popular-

From the standpoint of critiquing and improving advocacy skills, the NITA method is not always a perfect fit in the law school classroom.[48] There is little time for reflecting and contextualizing the lessons learned.[49] The constant stress of being at the "firing range," as Professor Kenny Hegland calls it,[50] may not work as well for law students as it does for lawyers with some professional experience.

In my opinion, one of the biggest drawbacks of using the NITA method in the law school classroom has to do with repeat deficient performances. This phenomenon occurs when the first student makes a mistake that is more or less duplicated by all the remaining students. For some reason, law students waiting their turn to perform do not seem to process or to apply fully critiques given to the performing student. It may be that their attention is partially diverted by last-minute preparation and the attendant anxiety of their own upcoming performances. It may be that they lack sufficient professional experience and context to appreciate the value of the abbreviated NITA-style prescription and rationale. A critiquing method that works well in a three- to five-day intensive seminar targeted to licensed professionals does not necessarily translate to a semester-long academic environment with inexperienced students.[51]

---

ity of NITA-style two- or three-week "intensive" advocacy courses at law schools but questioning their usefulness with students who are not given time to reflect on their learning experiences and who do not have the experience to process fully what is happening during the course).

48. *But see* Lubet, *supra* n. 39, at 126 (with reference to NITA-style advocacy training at law schools, observing that "it would not be overreaching to say that trial practice teaching—as [a] method—has been all but perfected").

49. *See e.g.* Tuoni, *supra* n. 25, at 120. Tuoni writes,

Students have little time for reflection or planning, particularly in the ten-day course. As such, the long-term benefits that this type of skills training offers law students are questionable . . . . Before students are able to get their bearings straight regarding one aspect of the trial, the course has moved on to the next topic. Before all of the skills can be studied, much less mastered, the course is over.

Id.

50. Hegland, *supra* n. 45, at 69.

51. *See* Tuoni, *supra* n. 25, at 120 (concluding that the NITA method may be better suited for practicing lawyers than for law students because the demands of such a course require mainly memorization and leave little time for "reflection or planning").

B. Video Performance Review

Video performance review has been an integral part of advocacy training for more than thirty years.[52] Indeed, the most influential of advocacy training systems, the NITA method, specifically incorporates video review as part of its curriculum.[53] Because it can be used in its own right as a primary critiquing method for advocacy training, this Article treats video review as a separate critiquing method.

The principle behind video review is that the recording increases self-awareness and enhances a student's learning.[54] As the authors of an early article discussing the use of videotape in the classroom wrote, "[t]he opportunity to see oneself perform, to have that performance criticized, and to engage in self-analysis may be one of the more effective methods available to teach the law student many necessary lawyering skills."[55]

There are several key elements to a video performance review.[56] First, the student performs the advocacy skill in a realistic setting.[57] The performance can vary in length from a simple direct- or cross-examination to an entire trial.[58] Second, as the student is performing, video equipment captures and records the performance for later review.[59] Third, the student watches the re-

---

52. *See e.g.* Stephen Wizner, *Walking the Clinical Tightrope: Between Teaching and Doing*, 4 U. Md. L.J. Race, Religion, Gender & Class 259, 261 (2004) (recalling that when the author began clinical teaching in the early 1970s, many schools were already employing videotape review of student performances to "facilitate critical reflection").

53. *See* Brook et al., *supra* n. 5, at 26–27 (describing how to integrate videotaping and how to conduct a video review of an advocacy performance); Broun, *supra* n. 6, at 1221 (stating that student performances in a NITA course are videotaped for later review by the student and an instructor).

54. E. Gordon Gee & Donald W. Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 BYU L. Rev. 695, 873 (1977).

55. *Id.* (noting that prior to video review the lack of immediate playback was "a major ailment of the Socratic teaching method").

56. For an excellent guide to setting up and conducting a video review, see David L. Hayden et al., *Training Trial and Defense Counsel: An Approach for Supervisors*, Army Law. 21, 34, app. C (Mar. 1994) (noting the organizational structure of a successful video review).

57. *See generally id.* (noting that a familiar setting is beneficial and an adversarial environment is not conducive to learning new skills).

58. *See generally id.* (explaining that the critiques should focus on one segment of the entire performance).

59. *See generally id.* (reviewing that the video performance allows the student to see how they really appear to a jury).

corded performance.[60] This can occur in the presence of an instructor, who will give another critique, or alone, where the student can review the performance introspectively and make note of what needs to be improved, or both.[61]

From the standpoint of improving one's self-awareness of irritating habits, nervous tics, and distracting mannerisms, few critiquing methods can top video review. The student has the opportunity to see herself as she is seen and hear herself as she is heard. In the words of Anthony J. Bocchino, "[e]very lawyer knows the horror of . . . seeing themselves on videotape. Lawyers, like everyone else, have a problem seeing and hearing themselves the way that everyone else does."[62]

For example, in our earlier vignette, the student might use video review to identify such problems as pointing a pencil at a witness, using filler words, or engaging in distracting mannerisms during a video review. Eye contact, hand gestures, body movement, and the like are ideal subjects for the disinterested milieu of video review.[63]

Video review does, however, have its limitations as a critiquing method. Professor Steven Lubet has identified the following three problems with video review: (1) it emphasizes the idea that appearance is more important than content; (2) it encourages lazy critiques that focus on superficial shortcomings; and (3) it suggests, in essence, that trial advocacy is easier than it actually is, simply a matter of gaining some polish.[64] Additionally, video review can consume considerable time and resources, particularly if an instructor evaluates the video performance with the student.[65]

---

60. *See generally id.* (noting that areas to concentrate on during video review include posture, eye contact, and word choice).

61. *See generally id.* (mentioning also that a "video critiquer" who was not present at the original performance may provide additional feedback).

62. Anthony J. Bocchino, *Ten Touchstones for Trial Advocacy—2000*, 74 Temp. L. Rev. 1, 8 (2001).

63. *See* Albert Bandura, *Social Foundations of Thought and Action: A Social Cognitive Theory* 66 (Prentice-Hall, Inc. 1986) (discussing the behavioral observations that people witness during replays of interpersonal interactions). In my experience, video review allows students to witness behavioral tendencies but limits their ability to notice substantive errors in their presentations.

64. Lubet, *supra* n. 10, at 734 n. 40.

65. In my experience teaching advocacy to law students, new lawyers, and experienced lawyers, the video review component requires extra rooms, extra instructors, extra equipment, and extra effort for all parties involved. I personally believe that under most circum-

If the instructor simply assigns the student to review the video on his or her own time, most of the benefits of the method are lost. In large part this is because a student left to his or her own devices may fail to identify critical errors or develop effective corrective strategies.[66]

Using our earlier vignette again, an unguided student might miss several errors in "questions" such as:

> Mr. Witness, you said on direct that you didn't call the police right away when you claim you saw my client shoot the victim twice. If you really saw my client shoot the victim—not once, but twice—wouldn't you agree that such an event, assuming arguendo that it happened, which we don't believe it did—at least not with my client—would be important enough to report to the police right away, yes or no?

Some errors will be obvious, such as the excessive length, confusing verbiage, and compound nature of the question. However, the student might not understand that the phrase "saw my client shoot the victim twice" reinforces the prosecution's theme; or that language such as "assuming arguendo that it happened" is unlikely to impress anyone but another law student; or that shouting "yes or no" at the end of a speech does not turn it into a leading question.

C. Student-Centered Performance Critiques

Some professors may choose to abandon the rigid four-step NITA methodology in favor of a Socratic-type dialogue with the

---

stances, video review produces benefits that are marginal at best. To borrow a common expression, with video review it seems that the juice isn't worth the squeeze. In one of the courses I assisted in teaching at another institution, every student performance was faithfully recorded on videotape for later individual review by the students. The recording camera malfunctioned during one session, and the students all assured me that it did not matter; few of them had videotape players at home (they had all moved to the DVD format), and none of them intended to watch the videos anyway.

66. *See* Bandura, *supra* n. 63, at 67 (writing on the use of "[s]elf-observation through recordings and videotape replays . . . to aid acquisition of skills"). According to Bandura, "uninstructed replays do not necessarily ensure that observers will notice what they are doing wrong or that they will glean from their behavior the necessary corrective changes." *Id.*

performing student.[67] Rather than providing the diagnosis and delivering the prescription to the student, the goal of this type of critique is to bring the student an awareness of the error and how to correct it through careful questioning.[68] It is therefore student-centered rather than instructor-centered.

Using our earlier vignette, a professor using this method might question a student as follows:

> **Professor:** Ms. Smith, let's talk about cross-examining this witness. Where did you run into a problem with this witness?
>
> **Student:** I couldn't get the witness to answer yes or no to my question about whether he should have called the police when he saw my client shoot the victim.
>
> **Professor:** I think that's a good point. Why do you think that is?

---

67. I note that the use of a Socratic dialogue to teach trial advocacy has not been a subject per se of scholarly writing; perhaps this is because of the entrenched status of NITA-style education in advocacy. Nonetheless, both from personal experience (as a student and a teacher) and from conversations with other advocacy instructors, I know that the use of a Socratic dialogue—a method of getting the student to identify the problem and find a prescription for it, as opposed to the instructor strictly following NITA protocol and identifying errors—is not uncommon. For some of us, its occasional use is a type of guilty pleasure in the advocacy classroom, a break from handing down edicts from on high. Further, the tendency of the Socratic method in the traditional classroom to improve overall oral advocacy skills *has* been identified and written about. *See e.g.* Neal Kumar Katyal, Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 Harv. L. Rev. 65, 117 (2006) (observing that the decline in the use of the Socratic method in classrooms has "undermined the development of advocacy skills"); Michael Vitiello, *Teaching Effective Oral Argument Skills: Forget about the Drama Coach*, 75 Miss. L.J. 869, 872 (2006) (introducing the idea that "when properly used, the Socratic method is an effective tool by which many lawyers learned the art of oral advocacy").

68. *Cf.* Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?* 43 Cal. W. L. Rev. 267, 270 (2007) (citing William C. Heffernan, *Not Socrates, But Protagoras: The Sophistic Basis of Legal Education*, 29 Buff. L. Rev. 399, 401–402 (1980)). Professor Jeffrey Jackson provided a succinct and useful definition of the Socratic method. He wrote,

> [T]he heart of the Socratic method lies in professor-student interaction. In the most traditional sense, the professor calls upon a student and engages that student in a colloquy, either about a case or about some other problem. As the student answers, the professor poses other questions in an attempt to get the student to delve into the problem in more detail.

Id. at 272–273.

Student: I think I was trying to get him to agree with me about what he should have done.

Professor: That's right. One reason you couldn't get the witness to answer yes or no is that you asked an argumentative question. You asked the witness whether he would *agree* with you that he should have called the police. What prosecution witness is ever going to agree with a defense attorney?

Student: You have a good point there. So would it have been better to say, "You should have called the police, right?"

Professor: You're getting closer. Is there a problem with words like "should" or "could"?

Student: I don't know. They probably are still argumentative. You could always disagree about what someone should have done. Or you could argue that you couldn't have done something.

Professor: That's correct. The way to avoid problems like this is simply to focus on the facts. You can save the value judgments for your closing argument, when the witness will not be around to quibble with you. What is the key fact you are trying to emphasize here?

Student: That the witness did not call the police right away.

Professor: And why is that important? How does it fit into your theory of the case and your theme?

Student: Because if he had really seen something that horrible, he would have called the police right away. We do not think he really saw it.

Professor: So let's talk about how the facts can make this argument for you. If you state to the witness that he didn't call the police right away, can the witness disagree with you?

Student: No.

Professor: So how would you ask the question?

> **Professor:** Mr. Witness, you didn't call the police right away, did you?

> **Professor:** Good. And then you could continue that same line of questioning to discuss each time he didn't call the police.

Depending on time, the student performer may or may not be given the opportunity to perform again and to correct the mistake.

This type of critique may be a better pedagogical and theoretical fit in the law school environment than the NITA method because it focuses on the student's learning process.[69] As with a careful Socratic dialogue, this interaction can help the student identify the error and even come up with the proper solution and rationale for correcting it.[70]

However, a student-centered critique is not without limitations. First, it is time consuming. Compared to the NITA method's headnote-playback-prescription-rationale formula, the student-centered critique is a model of inefficiency. Related to this is the second weakness—time constraints rarely permit a student to correct the deficiency immediately with a second performance. Finally, it is a great temptation to engage in pleasant diversions such as war stories and mini-advocacy lectures while leading students down the primrose path of self-discovery.

A variation of the student-centered critique is the peer critique.[71] To be used successfully, the peer critique requires a great

---

69. I note that there is a tremendous amount of scholarly debate in the legal academy concerning the use of the Socratic method. While it is beyond the scope of this Article to plunge into the debate, the subject seems to raise great passion, among both proponents and opponents of the method. *Compare* Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 Hofstra L. Rev. 955, 959 (2005) (summarizing all arguments for and against the use of the Socratic method and strongly advocating its continued use) *with* Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 S.D. L. Rev. 347, 350–351 (2001) (debunking the validity of the Socratic method in the classroom). Nonetheless, the use of Socratic-type dialogue remains a widespread and important part of the law school teaching experience.

70. *See* Jackson, *supra* n. 68, at 277–278 (explaining that the Socratic method forces students to recognize and work through problems in a way that teaches the analytical skills necessary for a practicing lawyer).

71. For an example of a course that included a peer critique as part of an integrated trial advocacy and evidence course, see Alan D. Hornstein & Jerome E. Deise, *Greater than the Sum of Its Parts: Integrating Trial Evidence and Advocacy*, 7 Clin. L. Rev. 77, 92–93

deal of intervention and focused guidance from the professor be-
cause students often lack the experience to provide meaningful
feedback to each other. The two extremes of peer critique include
the vicious ad hominem attack[72]—"You really are not very good at
this and should probably consider transactional work"—and the
empty, cheerful platitude[73]—"I really liked the way you used
words to ask questions, and you have a great smile that lights up
the room." Between these extremes lies a variety of unhelpful or
damaging comments.

   Some professors, however, have succeeded with peer critiques
by providing a focused peer review template and strict time limits
for peer review.[74] For example, in our earlier vignette, non-
performing students might be assigned discrete, observational
tasks. One student, for instance, could focus on body language,
another on the tone of voice, and still another on distracting per-
sonal mannerisms. In general, student critiques should focus on

(2000) (discussing the benefits of a trial advocacy and evidence class that used peer cri-
tiques following student performances). Hornstein and Deise seemed pleased with the
overall success of integrating peer critiques and cooperative learning strategies in their
classroom. *See id.* at 119 (noting that the techniques used in the class improved the educa-
tional experience for the students). Hornstein and Deise's method, which included student
critiques and brainstorming sessions that helped the performing students refine their
advocacy skills, *id.* at 93, is remarkably similar to the clinical-education technique called
"rounds" in which professors and students engage in an interactive process designed to
harness everyone's input and creative energy to solve problems. *Cf.* Susan Bryant & Elliott
S. Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education?* 14 Clin. L. Rev. 195,
195–196 (2007) (noting that rounds is an engaging technique used to allow students to
draw on the experiences of the group to find answers).

   72. Ad hominem means "attacking an opponent's character rather than the opponent's
assertions." *Black's Law Dictionary* 43 (Bryan A. Garner ed., 8th ed., West 2004). This type
of critique is likely offered by a student who is prejudiced towards or has a general dislike
for the performing student. The feedback does not focus on performance or offer any sub-
stantive advice, but instead focuses on the performing student as a person.

   73. This type of critique does not provide the performing student with any degree of
pedagogical benefit. It offers nothing substantive because it is more like a compliment.
Perhaps because the student is afraid or unable to formulate constructive criticism, he or
she provides unhelpful praise.

   74. James H. Seckinger, a trial advocacy professor at the University of Notre Dame
School of Law, introduced me to the focused peer critique several years ago. Students in
the classroom were assigned to watch the performing student and provide a brief critique
on discrete style-related criteria, such as distracting mannerisms, use of hands, eye con-
tact, use of notes, and so forth. Professor Seckinger prepared a critique sheet for use by the
students and made peer critique assignments in advance. Similar methods are used at
other schools to try to ensure the involvement of non-performing students in the advocacy
training experience. *See Educating Advocates Conference* (Gulfport, Fla., Nov. 16, 2007)
(notes from conference on file with *Stetson Law Review*) (summarizing comments from
several professors at various law schools across the country on teaching trial advocacy).

areas that can readily be observed and commented on without a great deal of advocacy training or experience.

Returning to our advocacy vignette, a focused peer critique of the student performance might proceed as follows:

> **Professor:** Before I make my comments, let's hear from our peer critiquers. Who was assigned to look at body language?
>
> **Student 1:** I was. [Addressing the performing student.] What I noticed was that most of the time, you were pointing your pen at the witness and making a stabbing motion. Every time you did it, the witness would flinch and back away from you. I think this could be viewed as a threatening gesture.
>
> **Professor:** Excellent point. How about tone of voice? Who had that?
>
> **Student 2:** During the cross-examination, you sounded very angry and impatient with the witness. The tone was definitely hostile. Also, I'd like to make a comment about your word choice, specifically the word arguendo. I would have . . .
>
> **Professor: [breaking]** Thanks for the comments. Remember, you are limited to commenting on what I asked you to look for. Now, who was looking for distracting personal mannerisms?
>
> **Student 3:** I was. What you did was this thing where you would run your fingers through your hair. Not the hand that was pointing at the witness but the other one. I kept wondering how messed up you were going to get your hair, and I thought that might be something that would distract a jury or a witness.
>
> **Professor:** Thank you. Now, I'd like to talk to you about the form of your questions on cross-examination. . . .

A focused peer critique has several advantages.[75] First, it gives the professor several additional sets of eyes, each looking for a discrete and well-defined advocacy critique point. This permits the professor to focus on more substantive advocacy skills. Second, students conducting peer critiques stay engaged in the process and pay attention to the student performer. Third, the student performer benefits from hearing stylistic criticism from peers; such comments tend to be very similar to what jurors would notice about an advocate's performance.

The primary disadvantages of peer review are similar to those of the student-centered critiques. Without careful discipline, peer critique can be enormously time consuming. If a professor is unwilling to interrupt students who want to go beyond their assigned critiques, there is a potential for irrelevant, unhelpful, or even harmful comments.

D. Summary

The main methods used to critique advocacy performances in the classroom have both strengths and weaknesses. The primary strength of the NITA critique is its systematic, disciplined approach to identifying and correcting discrete advocacy mistakes. In the law school classroom, its primary weaknesses are its inflexibility and its design as a method for licensed professionals rather than law students. The video review is unparalleled in its ability to enhance the process of self-awareness of mannerisms, voice, and appearance in a student advocate. Its shortcomings are that it can be resource- and time-intensive, and it tends to elevate style over substance. Student-centered critiques, such as a quasi-Socratic dialogue with the performing student, fit well within the pedagogical model of a law school. Their chief drawbacks include a lack of efficiency and the absence of opportunities for students to re-perform or practice an advocacy skill. The final category, peer critiques, can be valuable but require a great deal of professorial focus and intervention to make them work.

In an advocacy classroom organized according to the mandate that all students must receive equal performance time, each of the above critiquing methods ultimately sacrifices the individual

---

75. Hornstein & Deise, *supra* n. 71, at 93.

development of the performing advocate to the mandate. There is never enough time to coach, correct, and mentor, never enough time to help the individual performer improve. The next Section introduces a critiquing method that develops the advocacy skills both of the performing advocate and of the rest of the class. The theory is that what transforms one, transforms all.

III. THE TRANSFORMATIONAL CRITIQUE

The transformational critique is predicated on three principles. First, time should not be an artificial constraint in an advocacy classroom. Second, for each performing student, the instructor has the obligation to take the time to identify errors, to provide prescriptions, to coach the performing advocate, and to supervise repeat performances until the skill is mastered. Third, focusing time and attention on the performing student will not hurt the other students in the class because the principles of vicarious learning ensure that the individual attention paid to one student's performance benefits all student performances.

A. Description of the Transformational Critique

What I call the transformational critique is certainly not a creature of my own invention. Indeed, I suspect that in some form or another, many experienced advocacy instructors employ individual variations of the transformational critique, particularly when coaching trial teams or in other settings where time is not a limiting factor and fewer students are involved. Since my first exposure to the transformational critique in a classroom setting,[76]

---

76. I first experienced the transformational critique approximately six years ago, while assigned as an advocacy professor at the U.S. Army Judge Advocate General's School (JAG School) in Charlottesville, Virginia. Every year, the JAG School invites Mr. Joshua Karton, an actor, writer, and advocacy consultant, to conduct a week-long course on communication and trial advocacy. As a new advocacy professor, I was privileged to take the course.

The course is remarkably different from any advocacy course I have taken or taught, before or since. Because Mr. Karton is not a lawyer, he approaches advocacy training from a different perspective. He teaches his students to connect with jurors and judges using many of the techniques that fledgling actors use in becoming adept at stagecraft. Thus, a student practicing cross-examination, for example, might spend more time working on nonverbal communication skills than on asking leading questions. It is beyond the scope of this Article—and beyond the scope of my expertise—to discuss the theater training aspects of Mr. Karton's teaching method. In a recent article, Neal Katyal writes of his own experi-

I have been fascinated by what it accomplishes not only for the performing student, but for all the other students in the classroom.

For example, in an advocacy course taught by Joshua Karton, the transformational critique reigns supreme.[77] In a four-hour morning session with twelve to sixteen students in attendance, sometimes only one or two students will perform.[78] Mr. Karton closely watches their performances, interrupts them, provides them with correctional guidance, and makes them perform again—and, if necessary, again and again. If an initial performance is riddled with multiple deficiencies, he carefully addresses one error at a time. Sometimes, after a student masters one concept, the student sits down. Often, however, a student continues until the entire performance is perfect.[79]

One might ask about the remaining students in the room: Does their learning suffer? I have made two observations. First, in almost every case, the other students in the room are absolutely enthralled as they watch Mr. Karton at work. They are fully engaged and absorbed in the learning process taking place before their eyes. The week I took the course I performed only twice, and yet I was mesmerized by what was taking place in the classroom right before my eyes. Second, the non-performing students actually *improve the quality of their own advocacy* through the phenomenon of vicarious learning. It is not rare for a student performing later in the day to avoid all the errors his or her peers committed and worked through, instead turning in a superlative advocacy performance.

The goal of the transformational advocacy critique is for the student performer to experience a personal and professional transformation as an advocate.[80] A beginning advocate can change an inept performance into a competent one. A more experienced advocate can turn a competent performance into a stellar one. The flexibility of the transformational critique permits an

---

ence with Mr. Karton in regards to advocacy training. *See* Katyal, *supra* n. 67, at 117. Although Katyal does not refer to Mr. Karton by name, Mr. Karton has told me the same story that Professor Katyal relates in his article.

77. *Supra* n. 76 (discussing the Author's personal experience with Joshua Karton).

78. *Id.*

79. *Id.*

80. *Id.*

instructor to focus on substance, style, word choice, tactical approaches, or any combination of these that will help improve the student's overall performance.

B. Principles of the Transformational Critique

The transformational critique can easily be integrated into the advocacy classroom if the instructor is willing to adhere to some fundamental principles. Some of these principles involve a major shift from the paradigm of the typical law school advocacy class, whereas others require only minor modifications.

First, the instructor must reject the idea that all students are entitled to equal time on their feet during every advocacy session. If one accepts the principles of vicarious learning and realizes that it can also take place in the advocacy classroom, there is no need to sacrifice teaching at the altar of equal time.[81] It is important, however, for students to understand this from the beginning of the course. The instructor must clearly explain the methodology and expectations at the outset.[82]

Second, the instructor should not permit a student to complete an entire error-riddled performance. Most of the commonly used critiquing methods follow the NITA model—no critique takes place until the performance ends, at which point the instructor must limit her comments to the one or two most egregious or noticeable errors.[83] Transformational critiquing demands a different approach. As soon as the instructor identifies errors that must be fixed, it is time to step in and take corrective action. To borrow an aphorism from the military, an uncorrected mistake becomes the new standard.[84]

Third, the instructor must apply a critiquing methodology that not only identifies errors quickly, but also provides a way to overcome the errors. Charles H. Rose III has lectured on the

---

81. *See infra* nn. 85–86 and accompanying text (observing that semester law courses allow for greater time on student critique than NITA training programs and discussing why it is necessary for a student to continue his performance until it is done correctly).

82. Albert Bandura, who developed the theory of vicarious learning, has written that "[o]bservational learning can be improved more effectively by informing observers in advance about the benefits of adopting modeled behavior than by waiting until the observers happen to imitate a model and then rewarding them for it." Bandura, *supra* n. 63, at 77.

83. Brook et al., *supra* n. 5, at 23.

84. *Supra* n. 43 (discussing the military's practice of on-the-spot corrections).

"What, Why, How" critique, which tells a student what the mistake was, why it was a mistake, and how to fix it.[85] This method, an offshoot of the NITA critique, is less rigid and doctrinal than the NITA critique.[86] In the context of a transformational critique, it is the perfect way to transition from identifying an error to repairing it.

Fourth, the instructor must commit to staying with the performing student until the identified errors are corrected and mastered in practice. This may require multiple performances and re-performances. Where several errors have been identified in a brief period of time, the instructor should not let the student resume her seat until she has corrected all of the errors.[87]

Fifth, the instructor must be aware of the other students in the room who are experiencing a vicarious learning process. The instructor should ask the non-performing students focused questions that help the students identify not only mistakes but also successes. Students serving as witnesses or jurors should be invited to share thoughts, impressions, and feelings pertaining to the student performance.[88] In this way, the instructor can maintain maximum class focus and engagement.

---

85. Charles H. Rose III, Conference, *Educating Advocates Conference* (Stetson U. College of Law, Gulfport, Fla., Nov. 16, 2007) (notes from conference on file with *Stetson Law Review*). Professor Rose discussed why the NITA critique is not ideally suited to the law school environment and gave several suggestions on how to tailor the NITA approach to this setting, such as stopping the student when he makes a mistake and correcting the mistake immediately. *Id.*

86. *Id.*; *see* Charles H. Rose III, *Teacher's Manual to Accompany Fundamental Trial Advocacy* 20–21 (Thompson West 2007) (discussing how the additional time in a semester-long class provides an opportunity for law professors to go beyond the limits of the typical NITA critique).

87. According to Bandura, one danger of the summary evaluation of a performance is that it provides little informative feedback. *See* Bandura, *supra* n. 63, at 67. This can affect not only the performer, but can also diminish observers' perceptions of their capabilities. *Id.* Bandura writes that "[p]erformance feedback should be structured in ways that build self-percepts of efficacy as well as skill. This dual goal is promoted by highlighting successes and gains, while correcting the deficiencies in subskills." *Id.* Thus, an important part of the transformative critique is for the performing student to persist until she achieves success. This benefits her from both a skills and self-perception standpoint, and it also helps those observing the performance and critique.

88. This is an example of the peer critique or "rounds" method. *See* Bryant & Milstein, *supra* n. 71, at 206–207, 236 (explaining the "rounds" method). For additional information on the "rounds" method, review *supra* notes 71–73 and accompanying text.

C. The Transformational Critique at Work: An Example

The following is an example of the transformational critique at work. We will return to the following vignette used earlier in this Article:

> **Student:** Mr. Witness, you said on direct that you didn't call the police right away when you claim you saw my client shoot the victim twice. If you really saw my client shoot the victim—not once but twice—wouldn't you agree that such an event, assuming arguendo that it happened, which we don't believe it did—at least not with my client— would be important enough to report to the police right away, yes or no?

> **Witness:** That would depend on how I felt at the time. I mean, if I liked the victim, I might report it right away, but if I didn't want to get involved, maybe I wouldn't say anything, like those people in New York in that one case. Or if I was afraid, maybe I wouldn't say anything, because I mean, I did just see your client shoot someone twice, and I might not have wanted anything like that to happen to me.

> **Student:** That was a yes or no question. Answer yes or no.

> **Witness:** I don't remember the question.

> **Student:** Mr. Witness, if you really did see my client shoot the victim two times, wouldn't you agree with me that you, as a reasonable person, should have called the police right away if it was that important, yes or no?

Having heard this much of the student's performance, the instructor has heard enough. The instructor should interrupt the performance and proceed with the transformational critique. The script that follows is representative of how the critique might go, but it is certainly not exclusive in its approach. Unlike the doctrinaire approach of the NITA critique, the transformational critique adapts itself to the skills of the instructor and to the needs and the personality of the student.

Professor: This is a good point to stop. You've given us several things to work on. I'm going to start with two related concepts. First, your cross-examination was argumentative. Second, your questions were too long, and it was difficult for the witness to understand what you were looking for. We can solve both of these problems at the same time. To solve the problems, you need to ask single-fact, leading questions. Focus on the facts. The jury will make the arguments for you in their heads as the facts unfold. Let's work on that right now. Start your cross-examination at the same place, but this time substitute single-fact, leading questions.

Student 1 [performing student]: Mr. Witness, you said on direct that you didn't call the police right away when you saw my client shoot the victim, correct?

Professor: We'll stop there. This is a leading question, but it actually has several facts in it. [Directed to the rest of the class.] Who can tell me how many facts are in this question?

Student 2 [from class]: First, the witness said something on direct. Second, the witness saw the client shoot the victim. Third, the witness did not call the police right away.

Professor: Good. [To performing student.] We can do without repeating what the witness said on direct. So you can leave that question out. Now, a question for you: Under your theory of the case, did your client actually shoot the victim?

Student 1: No. We think the witness is lying about that. We don't think it was possible for the witness to see it. Also, we think the witness had a motive later on to say our client did it.

Professor: If your client didn't shoot the victim, you don't want to sponsor that idea in the minds of the jurors. So what you want to focus on is what the witness actually saw, and what the witness actually did, or in this case didn't, do. Let's start again, and this time leave off repeating what the witness said on direct and go from there.

Stetson Law Review [Vol. 38

Student 1: Mr. Witness, you claim to have witnessed a shooting on June 5th?

Witness: That's correct.

Student 1: You saw someone shoot the victim in this case. [Sarcastic tone.]

Witness: Yes. It was your client.

Student 1: In other words, you saw a *person* shoot the victim in this case, correct? [Voice rising in frustration, finger and pen pointing and stabbing again.]

Witness: Yes, your client is a person, and I saw him shoot the victim.

Student 1: And you did not call the police right away, did you?

Witness: No.

Professor: Now we are starting to get somewhere. You're asking single-fact, leading questions. That is what you need to do on cross-examination. What we need to do now is work on letting the questions and facts control the witness. You ran into some trouble here, and I think it is because you are not using enough facts in your cross-examination. You have not taken us to the scene. What was it like that night?

Student 1: Well, the case file says it was dark, and it says that one of the streetlights was broken. And the witness was sitting in a café with his back to the street. There were some signs taped to the window.

Professor: Those facts will help set things up for you. Start your cross-examination over. Set the scene with these facts. Make it look as if it would be impossible for the witness to see what happened. Go one fact at a time. Work slowly. Don't be afraid to take your time. Then we can move on to the issue of reporting or not.

Student 1: Mr. Witness, on June 5th you went to Mo's Café?

Witness: Yes.

Student 1: You went at night?

Witness: Yes.

Student 1: And it was dark out, correct?

Witness: Yes.

Student 1: There was a streetlight in front of Mo's Café, wasn't there?

Witness: Yes.

Student 1: Isn't it true that one of the bulbs in the streetlight was broken?

Witness: I don't know. I think so.

Student 1: So only one of the bulbs was working?

Witness: Yes.

Student 1: Mo's has a big plate glass window that faces the street, doesn't it?

Witness: Yes.

Student 1: And that window has signs and papers taped to it?

Witness: Yes. Advertisements and stuff.

Student 1: When you entered Mo's, you sat in a booth, correct?

Witness: Yes.

Student 1: You were facing towards the bathroom, right?

Witness: Yes.

Student 1: That means your back was to the window.

Witness: Yes.

Student 1: At about 8 p.m., you heard two gunshots, didn't you?

Witness: Yes.

Student 1: So you turned and looked outside, right?

Witness: Yes.

Student 1: And you claim that you saw a person shooting the victim, isn't that true? [Sarcastic tone, pen pointing at the witness.]

Witness: Yes. It was your client. I saw him with a gun.

Student 1: So you looked behind you and through a paper-covered window *after* you heard a gunshot, in the dark, with a broken streetlight, and you claim you saw my client. Wouldn't you agree that's ridiculous? [Heavy sarcasm, pen stabbing back and forth.]

Witness: I know what I saw. I saw your client shoot the victim. Twice.

Professor: [Interrupting] You were doing *so well*, and then something went very wrong. [To the class.] What happened here?

Student 3: She was controlling the witness with the facts, and then he started to get argumentative. She started getting sarcastic and aggressive again.

Professor: That's right. We need to get back to just the facts. The facts tell us that the witness didn't actually see anyone shoot. There's no need for sarcasm. Start with when the witness heard the gunshots. You know what he *actually* saw. Get that information from him. Then move on to what he *didn't* report. You won't need to argue with him then.

Student 1: At about 8 p.m., you heard two gunshots, didn't you?

Witness: Yes.

Student 1: So you turned and looked outside, right?

Witness: Yes.

Student 1: You saw the victim lying on the ground?

Witness: Yes.

Student 1: You saw blood?

Witness: Yes.

Student 1: The victim appeared to be seriously wounded?

Witness: Yes.

Student 1: You didn't call the police right then, did you?

Witness: No. I assumed someone else would do it.

Student 1: But you didn't call, did you?

Witness: No.

Student 1: And you didn't call the police the next day, did you?

Witness: No.

Student 1: In fact, you didn't call the police for two weeks, right?

Professor: I'll stop you here. Question for the witness: Were you able to say anything about seeing the client shoot the victim?

Witness: No. I really couldn't. There wasn't anywhere to put it. I just had to answer the questions yes or no.

Professor: So, facts help us control the witness. They also help make the argument for you. You have let the facts tell the story for you. We know that the witness was facing away from a dark alley with a broken streetlight. Between the witness and the alley was a plate glass window covered with posters. The witness heard two gunshots and then turned around. His attention was focused on the victim. He didn't call the police for two weeks. You can use all this on argument. Also, it sets you up for cross-examining the witness about his motive to lie about your client. I have another question for the group. What happened to Student 1's pen this time around?

Student 4: She wasn't stabbing with it.

Professor: Believe it or not, focusing on the facts and letting the facts do the work for you takes care of lots of other problems as well. Student 1, good job. You can take a seat now. Let's move on to Student 2 . . . are you ready?

The transformational critique is time consuming. Its end product, however—a student who has not only received criticism, but has received the opportunity to correct her deficiencies immediately and get them right—is worth the investment in time. The performing student's confidence, in most cases, will be much greater than that of a student who has just received a NITA-style critique. The difference is that a successful performance, rather than a prescription that highlights deficiencies, awaits the student at the end of a transformational critique.

At this point, the second student will perform. Although it is highly likely that this student will commit errors on cross-examination, they will be different errors from those the first student committed. The final performer of the day will, in most circumstances, perform with markedly fewer errors than the first performer. In some cases, that student's performance will approach perfection. Consequently, the final performer will require less time on his or her feet than the first performer. The impact of the transformational critique on the other students in the class justifies what might seem to be a disproportionate investment of time on the initial student performances.

In the next Section of this Article, I explain how and why vicarious learning works in the advocacy classroom. The final Section of the Article discusses how to use the transformational critique in an advocacy course.

IV. VICARIOUS LEARNING IN THE ADVOCACY CLASSROOM

Vicarious learning occurs when a student obtains an educational benefit from watching others participate in a learning activity.[89] According to Albert Bandura, it is possible for observers to "acquire cognitive skills and new patterns of behavior by observing the performance of others."[90] In essence, the theory is that the observing student can test ideas and process information as he or she observes others participate in the learning process.[91]

---

89. *See* Richard Cox, Jean McKendree, Richard Tobin, John Lee & Terry Mayes, *Vicarious Learning from Dialogue and Discourse: A Controlled Comparison*, 27 Instructional Sci. 431, 432, 449 (1999) (suggesting that students be allowed to learn through listening to student-instructor dialogues about issues with which they are struggling as an alternative to direct instruction).

90. Bandura, *supra* n. 63, at 49.

91. *Id.* (explaining that just as children acquire language through modeled expressions

Scholars who have studied vicarious learning suggest it is effective because the observer has a lower emotional and cognitive "processing load" than the participant:[92]

> The student is not as emotionally caught up in trying to defend a position or struggle with a new idea publicly. There is less of a cognitive load when they concentrate on the content and process of what is being said. It allows a unique opportunity to reflect on the roles of the teacher and learner and to view each from the others' perspective. In general, it allows focusing on the unfamiliar role of social derivation without the added stress of participating.[93]

Vicarious learning, a voyeuristic activity,[94] is the antithesis of learning-by-doing[95]—it is learning by watching, listening, and thinking about what another person is actually doing.

There are several possible models for vicarious learning. The first involves observing a recognized expert.[96] The advantage of this model is that the expert can model "skilled behaviour" in a "clear, unequivocal, error-free[,] and instructionally uncluttered way."[97] This type of vicarious learning already exists in most advocacy programs through the time-honored tradition of expert modeling, in which an experienced advocate demonstrates a "correct" example of the skill that the student advocates will shortly perform.[98] As any experienced advocacy instructor can attest, ex-

---

heard, students can acquire new skills through listening in the classroom).

92. Jean McKendree, K. Stenning, Terry Mayes, John Lee & Richard Cox, *Why Observing a Dialogue May Benefit Learning*, 14 J. Computer Assisted Learning 110, 117 (1998).

93. *Id.*

94. *See id.* (noting that "there are two distinctions in play—*voyeurism* versus *participation* and *consumption* versus *construction*") (emphasis in original).

95. Indeed, as Tuoni has observed, the "general ethos" of most trial advocacy courses is learning by doing, at least one reason for which is that it is considered frustrating for everyone to watch someone else perform. Tuoni, *supra* n. 25, at 114.

96. Cox et al., *supra* n. 89, at 432 (comparing whether experts or novices are better models for the vicarious learner).

97. *Id.*

98. *See e.g.* Brook et al., *supra* n. 5, at 17 (describing that the NITA method begins with a lecture and demonstration given by a professor). *See also* Jean McKendree, *The Role of Discussion in Learning*, http://www.ltsn-01.ac.uk/ltsn_images/pdfs/mcKendree _amee_2002.pdf (accessed Nov. 6, 2008) (noting that observing experts is an oft-used method for teaching clinical skills or master classes in subjects such as music or architecture).

pert modeling has a significant impact on subsequent student performances as students strive to duplicate what they have seen experts demonstrate, including tactical decisions, mannerisms, and even humor.

The second model involves observing a dialogue between other students, or between other students and a tutor.[99] The advantage of this model is that it is student-centered—the observer benefits from the questions of her observed peers and gets answers to questions she may not have asked herself.[100] The final model involves observing an unskilled performer.[101] The advantage of this model is that the observer can learn which responses to avoid based on the reactions received by her peers' performances.[102] The transformational advocacy critique seems to fall somewhere between the second and third vicarious learning models; it involves an unskilled student performance corrected in real time by an expert instructor.

Research suggests that students benefit considerably from watching educational dialogues in which unskilled students learn a new concept or skill.[103] In one study, researchers in Scotland set up an experiment to measure the effectiveness of vicarious learning techniques in teaching students how to diagram sentences.[104] Using computer and audio technology, the researchers created computer QuickTime movies of sentence diagramming that featured three different types of vicarious learning models.[105] Stu-

---

99. *See* Cox et al., *supra* n. 89, at 432, 447–449 (discussing the potential for vicarious learning by observing tutor-student and student-student dialogues).

100. *Id.* at 432 (explaining the model of the unskilled performer being rewarded or punished for different behaviors and describing the likely benefits of instructing students by allowing them to observe dialogue between other students and tutors).

101. Bandura, *supra* n. 63, at 75–76. The classic example of this is Bandura's experiments involving children and aggressive behavior. *Id.* His research showed that children will model either aggression or cooperation, depending on which is effective or rewarded in modeled behavior. *Id.*

102. Cox et al., *supra* n. 89, at 432 (discussing the potential educational benefit of permitting students to observe an unskilled performer's learning process).

103. *See id.* at 443, 449 (indicating that providing students with student-tutor dialogue was one of several instructional methods that improved test scores in one study).

104. *Id.* at 443.

105. *See generally id.* at 436–442 (discussing the domain and methodology of the study). The computer captured the results of an on-screen sentence-diagramming program. *Id.* at 435. The researchers created three QuickTime movies that each displayed two windows on-screen. *Id.* at 435–437. In each movie, the left window displayed a captured sentence-diagram from the computer program. *Id.* at 435. For each of the three movies, the display

dent research subjects were divided into five groups, each of which took a pre-test, participated in some form of grammar instruction (with the exception of the control group, which had no instruction at all), and then took a second test.[106] Three groups watched the QuickTime movies to experience vicarious learning. One group watched the tutor diagramming sentences while thinking aloud. Another group viewed a student diagramming sentences in dialogue with a tutor, who provided feedback and correction. A third group watched a student diagramming sentences with no dialogue at all.[107]

Students who watched the QuickTime movies depicting either the tutor diagramming sentences or the student diagramming sentences in dialogue with a tutor received the best test results.[108] In comparing the tutorial discourse with the student-tutor dialogue, the researchers found the student-tutor dialogue to be "richer in educationally important respects" than the tutorial discourse.[109] For example, researchers observed that in the student-tutor dialogue, the tutor offered corrective feedback to the student and served as a memory aid. This type of interaction, they hypothesized, could emphasize for vicarious learners the need to exercise greater care in their own performances.[110] In addition, vicarious learners may internalize the tutor's cooperation with and positive reinforcement of the performing student, using them later as vicarious reinforcement for their own performances.[111] Finally, the student-tutor dialogue is valuable to vicarious learners because they may

---

in the right window varied. *Id.* In the first movie, the left window displayed the computer program results as a tutor diagrammed the sentences, and the right window displayed a transcript of the tutor speaking aloud as he diagrammed the sentences. *Id.* at 437. In the second movie, the left window displayed the computer program results as a student diagrammed the same sentences, and the right window displayed a transcript of a dialogue between the student and a tutor. *Id.* at 436–437. In the third movie, the left window displayed the computer program results as the student diagrammed the sentences, but the right window was left blank. *Id.* at 437.

    106.   *Id.* at 438–439.
    107.   *Id.* at 439 (describing how the student groups watched the QuickTime footage for twenty minutes before taking the post-test).
    108.   *Id.* at 443 (providing the author's statistical methodology and results in detail).
    109.   *Id.* at 447.
    110.   *Id.* at 447–448.
    111.   *Id.* at 448. Cox notes that his analysis is consistent with an earlier study of vicarious learning by Albert Bandura entitled *Social Learning Theory* (Prentice-Hall, Inc. 1977). *Id.*

> Recognize[ ] the predicament of the student in the recording as one he or she has experienced or is likely to experience. The observing student empathises with the observed's misunderstandings and difficulties. The vicarious learner may observe errors being made and corrected (or left uncorrected) which he or she (the vicarious learner) would subsequently avoid.[112]

Although these hypotheses require further research,[113] their implications for the transformational critique are significant. Applying them to the transformational critique, one could surmise that the critique works for the following reasons: (1) the live interaction between an unskilled student performer and a skilled instructor presents opportunities for dialogue that do not exist with a more prescriptive model such as the NITA critique; (2) students observing the student performer have a reduced cognitive load that permits them to process and to internalize what is going on without the stress of live performance; (3) the corrective feedback and practice opportunities emphasize mistakes and errors for students to avoid in their own performances; and (4) the observed performance provides vicarious reinforcement that will be internalized by the observer and will help shape his or her future performances.

The transformational critique suggested has the potential to change the way advocacy is taught in the classroom to law students. What I have observed in my own learning and teaching experiences and have discussed anecdotally with others, however, has not yet been the subject of a formal empirical study in an advocacy classroom. Properly conducted, monitored, and reported, such a study would be an invaluable tool in determining just how much of a difference a transformational critique could make in the classroom.

---

112. *Id.* The author also acknowledged that a reading tutorial approach could lessen the cognitive load on the vicarious learner when compared with a reading dialogue approach. *Id.*

113. *See id.* at 450 (suggesting several questions for additional research).

V. INTEGRATING THE TRANSFORMATIONAL CRITIQUE IN THE ADVOCACY CLASSROOM

It is certainly not the intent of this Article to suggest that the transformational critique replace all other teaching and critiquing methods in the advocacy classroom. It is but one of many possible methods that an advocacy teacher can use. In this Section, I will briefly describe how the critique can be integrated into an advocacy teaching curriculum and then discuss how to employ it in a class session effectively.

A. Fitting the Transformational Critique into the Advocacy Curriculum

A good advocacy curriculum establishes a firm foundation of competency in basic advocacy skills.[114] Those basic skills are then integrated into increasingly complex tasks, concluding with the most complex task of all, the trial.[115] Along the way, the instructor may choose to integrate training in ethics and professionalism, evidence, procedure, strategy, and other advocacy-related subjects.[116]

In order to prepare an advocate for trial, the instructor must be conversant with the advocate and be prepared to employ a variety of techniques. Drills are used to help with foundational skills, such as the form of a question or voice modulation.[117] Small factual vignettes, often taken from NITA case files or other professionally prepared files, can be used to teach more complex skills such as conducting a short direct- or cross-examination. Formal lectures and student dialogues teach theory and cerebral

---

114. *See* Rose, *supra* n. 86, at 1 (acknowledging that the proper system will establish a baseline for competency in trial advocacy); *see also* James J. Brosnahan, *Suggestions for Enriching the Teaching of Trial Advocacy*, 16 Am. J. Tr. Advoc. 193, 193 (1992) (discussing ten components of a good advocacy course).

115. *See* Berger & Mitchell, *supra* n. 47, at 833 (deciding that complex fact patterns are most effective for developing thought processes similar to those of an experienced attorney); *see also* Rose, *supra* n. 86, at 5 (stating the instructor may assign increasingly complex case files depending on the abilities of the students).

116. *See generally supra* n. 47 and accompanying text (recognizing the debate surrounding the NITA method and questioning whether the method should incorporate other areas of law, such as moral and ethical dimensions, and their impacts on trial advocacy).

117. *See* Brosnahan, *supra* n. 114, at 198–202 (suggesting how voice training drills can be integrated into an advocacy course).

Stetson Law Review [Vol. 38

tasks such as case theory and case analysis.[118] Tools such as video review, peer critiques, or wired jury rooms can help students see themselves and their performances in new ways.[119] For example, video review can be valuable in helping a student evaluate longer performances.[120]

It would be presumptuous to suggest that the transformational critique replaces all that has come before in advocacy skills training. It does, however, have its place alongside the more established methods, tools, and techniques. I suggest that the transformational critique is ideal for complex skills, such as openings, closings, voir dire, and direct- and cross-examinations. When a student is performing these skills, many sub-skills or techniques are at play, such as posture, body language, use of notes, use of language, eye contact, form of the questions, speech patterns, case preparation, theme and theory, gestures, movement, and so forth—all combined into an integrated whole. The transformational critique gives the advocacy instructor the opportunity to correct multiple deficiencies and therefore helps students learn how all aspects of advocacy work together. Cross-examination, for example, requires much more than simply asking leading questions of a witness in order to be effective. The transformational critique can assist in integrating multiple advocacy skills in successive performances until the student experiences success. Therefore, for inexperienced student advocates, the transformational critique may be a better fit for complex skills than the NITA critique.

B. Integrating the Technique into the Classroom Experience

From a time-management perspective, it is important to understand how to use the transformational critique. Instead of dividing the time available by the number of students in the class to determine performance time, think of the class period in thirds. I generally spend the first third of a class working with one or two

---

118. *Cf.* Ohlbaum, *supra* n. 4, at 4 (arguing that insufficient attention is paid in advocacy curriculums to teaching case theory, the heart of every trial).

119. *See id.* at 3. (pointing out the importance of videotaping student performances and subsequent "video-reviews").

120. Brosnahan, *supra* n. 114, at 206–207. With video review, each student could complete two, half-hour exercises in a one-week course. *Id.* at 207.

students, depending on the skill being practiced. The first student gives enough of a performance for me to identify several errors. We work on each error in turn, with successive performances until the student has made significant progress. With each successive performance, I may identify additional errors or points for improvement to be worked on in the next performance.

In the second third of the class, I work with between two and four students, again depending on the skill. Student performances in the second third of the class are almost always a significant improvement over performances in the first third. The performances tend to be shorter and more efficient than the initial performances. Students still commit errors, but they are different errors and generally, but not always, take less time to correct.

In the final third of the class, several more students have the opportunity to perform. At this point in the class they generally "get it," and the performances are significantly better than those at first. Consequently, I revert to more of a NITA-style critique at this point,[121] quickly identifying mistakes, prescribing solutions, and directing short re-performances so the student can demonstrate mastery of the skill. If the vignette is short enough, the skill is discrete enough, and the class is small enough, it is often possible for every student to perform, even though the first student may perform for twenty minutes and the last student for three.

Occasionally, it takes more than one third of the class time to help the first student make sufficient progress. Although this does not happen often, I believe it is important to stay with the student until he or she experiences some success.[122] For the other students, the time is not wasted; they see the importance of mastering the skill, and every critique and correction assists their own learning processes. In my experience, students rarely resent extra time spent with a struggling student; in fact, it is heartening to feel the entire class mentally willing the performing student to succeed.

---

121. *See* Brook et al., *supra* n. 5, at 19–21 (discussing the following four elements of a NITA critique: headline, playback, prescription, and rationale).
122. There are extreme cases where the definition of success will need to be modified; not everyone has what it takes to be an advocate.

As part of my critique process, I involve the non-performing students. I ask student witnesses what they experienced during a particular line of questioning. I have students focus on distracting mannerisms and nervous tics. We talk about whether a particular line of questioning or strategy worked in this case. Thus, all students learn and develop collectively as the performing student masters the skill.

VI. CONCLUSION

The transformational critique maximizes the available learning time in an advocacy classroom. The technique focuses on an individual student performer. The instructor identifies errors, provides prescriptive advice and coaching, and guides the student through repeated performances until the student masters the skill. Unconcerned about having to give equal performance time to every student, the instructor takes whatever time is necessary to help *this* student. Contrary to conventional wisdom, the other students are not left to wander like lost sheep in the wilderness. Through the phenomenon of vicarious learning, their cognitive loads are lessened, and they are able to make significant improvements to their own performances by processing the performances of their peers.

Returning to the shared lament of Andrew Marvell and the advocacy professor about the lack of time,[123] there is hope. Through the use of a properly administered transformational critique, it is indeed possible to overcome "time's winged chariot" at our backs and make real Marvell's bold declaration:

> *Thus, though we cannot make our sun/Stand still, yet we will make him run.*[124]

---

123.   *See supra* n. 1 and accompanying text.
124.   Marvell, *supra* n. 1, at 1691–1692.