

**ASSESSING EXPERIENTIAL EDUCATION  
IN LAW SCHOOLS:  
TOWARD A MODERN DIPLOMA  
PRIVILEGE**

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INTRODUCTION.....	1136
I. EXPERIENTIAL LEGAL EDUCATION: WHAT AND WHY?.....	1137
II. ASSESSING INDIVIDUAL STUDENTS: THEORY AND PRACTICE.....	1151
A. <i>Theory</i> .....	1151
B. <i>Practice</i> .....	1157
1. Assessment by the Instructor.....	1158
2. Assessment by the Learner .....	1164
3. Assessment by Others.....	1166
C. <i>Summary</i> .....	1168
III. ASSESSING A PROGRAM OF LEGAL EDUCATION .....	1169
CONCLUSION .....	1175
APPENDIX .....	1177

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## INTRODUCTION

Experiential education is an essential part of legal education because it moves law students from theoretical to practical understanding of the law and its implications. Legal education experts recommend significant experiential education in order to make law graduates practice-ready.<sup>1</sup> Practical, experiential skills must be taught, and furthermore, students' learning must be assessed, so all stakeholders—including employers and clients—can be assured that new attorneys are competent to practice.

Assessing the competence of students, and assessing the institution's program of legal education, can be particularly daunting when considering experiential education; while knowledge can be assessed objectively, assessing skills is more subjective. Consistent, accurate assessment is particularly important because I believe law faculty are better situated to assess a broader range of competencies, over a more realistic timeframe, than the bar exam and its graders can.<sup>2</sup>

This Article can be read as an expansion on my previous piece, *Modern Diploma Privilege: A Path Rather Than a Gate*,<sup>3</sup> or as a standalone Article. Whether or not a state adopts a modern diploma privilege, there must be some manner by which stakeholders can be confident that law student competence is being assessed reliably, validly, and fairly and also that a law school's program of legal education is teaching the knowledge, skills, and values that establish the competencies expected of first-year attorneys.

In my observation and experience, faculty work hard to grade fairly and consistently, but other than imposing or suggesting a curve to normalize grade distributions across classes or sections, little to no collaboration or comparison takes place to ensure that

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<sup>1</sup> See *infra* Part III.A.

<sup>2</sup> Catherine Martin Christopher, *Modern Diploma Privilege: A Path Rather Than a Gate*, 107 MINN. L. REV. 2777, 2822 (2023).

<sup>3</sup> *Id.* at 2797-815 (proposing a flexible framework in which state licensure authorities identify the competencies necessary for entry into the practice of law, then partner with law schools to ensure the schools can effectively assess their graduates' proficiency in the delineated competencies). In that piece, I attempted to be clear-eyed about the drawbacks to diploma privilege in general and my proposal in particular. *Id.* at 2812-15. One of the significant aspects of my proposal is that it in effect uses the law school faculty to serve the same function that bar graders would: assessing each student's competence. *Id.* at 2812.

faculty grading practices are reliable, valid, and fair (as those terms are understood and defined more below.)<sup>4</sup> Potential inconsistencies in assessment harm the public by producing law school graduates with inconsistent levels of competence. Inconsistencies are even more likely to exist in the assessment of skills (as opposed to knowledge), where criteria for competence and effectiveness are more difficult to articulate and therefore assess in a consistent, bias-free manner.<sup>5</sup>

This Article thus addresses the assessment of experiential legal education, exploring both the principles undergirding assessment and the practical application of those principles to law schools. Part II reviews what constitutes experiential education in the law school context. Part III examines the assessment of individual students, in theory and in practice.<sup>6</sup> Part IV addresses the assessment of a law school's entire program of legal education, again in both theory and practice.<sup>7</sup> Part V concludes by posing additional questions for future research.

### I. EXPERIENTIAL LEGAL EDUCATION: WHAT AND WHY?

Various efforts have been made to define experiential education in the law school context, and while they differ in precise

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<sup>4</sup> See *infra* text accompanying notes 97, 98. See also DeShun Harris, *Let's Talk About Grading, Maybe: Using Transparency About the Grading Process to Aid in Student Learning*, 45 SEATTLE U. L. REV. 805 (2022).

<sup>5</sup> See Dr. Hoops, MD (@DoctorHoopsMD), TWITTER (June 28, 2021, 7:45 PM), <https://twitter.com/ShariDunawayMD/status/1409598749731602433> [<https://perma.cc/3CU9-SHAT>] ("I got docked a bunch of points on my med school OSCE [Objective Structured Clinical Examination] for wearing hoop earrings during a test. Evaluator wrote 'earrings, unprofessional.'").

Author's Note: this tweet was the catalyst for the entire article. I was irate that a med student (a Latinx woman) was given a lower grade because of her earrings, and I was really concerned that law students would be similarly punished in simulations, externships, clinics, etc. for things other than their competency.

<sup>6</sup> Author's Note: Assessing individual student competencies would be necessary under a modern diploma privilege because a student's successful completion of the program would result in immediate licensure.

<sup>7</sup> Author's Note: Institution-wide assessment would also be necessary under a modern diploma privilege because the program as a whole must be providing the education that gives students the competencies required for practice.

word choices, the thrust is the same.<sup>8</sup> One useful definition of “experiential learning” is: “methods of instruction that regularly or primarily place students in the role of attorneys, whether through simulations, clinics, or externships.”<sup>9</sup> Another definition is the American Bar Association’s description of “experiential[] courses” in Standard 304 as those that

(1) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more . . . professional skills . . . ; (2) develop the concepts underlying the professional skills being taught; (3) provide multiple opportunities for performance; (4) provide opportunities for student performance, self-evaluation, and feedback from a faculty member, or . . . a site supervisor; (5) provide a classroom instructional component; . . . and (6) provide direct supervision of the student’s performance by the faculty member.<sup>10</sup>

In general, defining features of experiential education are that it focuses on the student experience rather than on the instructor, that students regularly role-play as attorneys, that it facilitates the students’ development of professional identity, that it teaches students to think about how they will use information in future contexts, that students engage in self-reflection, and that the overall grade in the course is substantially based on the students’ acts and reflections.<sup>11</sup>

Various kinds of courses, with various labels, can meet these ABA requirements to be an experiential course, including

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<sup>8</sup> Though I am not overly particular about word choices in this arena, I do appreciate some scholars’ efforts to distinguish “experiential learning” from “experiential education”: experiential learning may occur haphazardly, whereas with experiential *education*, “instructors purposefully engage with learners.” Stephen Ellmann, Katherine R. Kruse, Jeffrey C. Brooks, Barbara K. Bucholtz, Kim Diana Connolly, Elizabeth Ford, Nancy M. Maurer, Vanessa H. Merton, Linda H. Morton & Jeffrey Pokorak, *Measuring the Values and Costs of Experiential Education: Report of the Working Group on Cost and Sustainability*, 7 ELON L. REV. 23, 25 (2015).

<sup>9</sup> David I.C. Thomson, *Defining Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING 1, 20 (2015).

<sup>10</sup> STANDARDS AND R. PROC. FOR APPROVAL OF L. SCHS. Standard 304(a) at 20 (AM. BAR ASS’N 2022) [hereinafter Standard 304(a)].

<sup>11</sup> Thomson, *supra* note 9, at 20-23.

simulations, clinics, and externships.<sup>12</sup> Simulations, clinics, and externships are practically and pedagogically different from one another,<sup>13</sup> and various efforts have been made to precisely define different educational experiences that would all constitute “experiential education.”<sup>14</sup>

Of note, since 2017 the American Bar Association has required accredited law schools to provide “one or more experiential course(s) totaling at least six credit hours.”<sup>15</sup> But the emphasis of this Article is not compliance with ABA requirements; rather, it reframes experiential legal education as a crucial part of preparing law students for practice. I encourage faculty to incorporate experiential education and assessment into their institutions and

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<sup>12</sup> Standard 304(a) at 20-21. In addition to the traditional experiential courses, Alyson Drake argues that legal research courses can be designed and taught to meet the ABA’s definition of simulation course, thus constituting experiential education. Alyson M. Drake, *The Need for Experiential Legal Research Education*, 108 LAW LIBR. J. 511, 527-29 (2016). Drake asserts that law schools should be offering experiential legal research courses both because lawyers need to know how to conduct legal research and because the ABA requires experiential education; she notes that several experiential legal research class formats would work, including traditional classroom, flipped classroom, online class, and specialized format. *Id.* at 512-13, 529.

<sup>13</sup> Thomson proposes a series of guiding questions that help distinguish a simulation from a clinic from an externship, including whether the client is actual or simulated, and how the student is supervised. Thomson, *supra* note 9, at 24. *See also* Ellmann et al., *supra* note 8, at 24. (critiquing the idea that simulations, clinics, and externships are “clumped together, suggesting they are interchangeable”)

<sup>14</sup> For example, the AALS Section on Clinical Legal Education has promulgated separate definitions for “experiential learning,” “experiential course,” “clinical legal education,” “law clinic,” “in-house clinic,” “externship or field placement,” “cooperative education program,” “internships,” “simulation course [in various contexts, such as legal research and writing, and advocacy],” “service learning,” “social justice education,” “pro bono program,” “integrated lawyering program,” “experiential module,” “law practicum,” and “law lab.” Section on Clinical Legal Education., ASS’N OF AM. L. SCHS., Glossary for Experiential Education, at 3-12, <https://web.archive.org/web/20230624091938/https://www.aals.org/wp-content/uploads/2017/05/AALS-policy-Vocabulary-list-FINAL.pdf> [<https://perma.cc/HDB2-DZA2>]. For purposes of this Article, however, we need not be bogged down in these granular distinctions. All these courses and concepts fall under the umbrella of experiential education.

<sup>15</sup> STANDARDS AND R. PROC. FOR APPROVAL OF L. SCHS. Standard 303(a)(3) at 6 (2017) (AM.BAR ASS’N, amended 2022).

classrooms not because these pedagogies are required, but because they are valuable.<sup>16</sup>

Indeed, experiential education is widely touted as being a superior, even necessary, method of training new lawyers.<sup>17</sup> This is particularly so because law students are adult learners, and andragogical goals are best met through experiential education.<sup>18</sup> Andragogy—the teaching of adults, as opposed to the teaching of children—has four underlying assumptions: 1) “adults see themselves as self-directing personalities”; 2) adults’ “experience becomes a greater resource for learning”; 3) the type of effective

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<sup>16</sup> The Carnegie Report conceptualizes theoretical and practical legal knowledge as being “complementary,” with each deserving “a respected place in legal education.” WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SCHULMAN, *EDUCATING LAWYERS* 7, 13 (2007) [hereinafter Carnegie Report]. Noteworthy, however, is Spiegel’s rejection of the basic assumption that theory and practice are different, and the struggle of legal pedagogy is to find the right balance between those two things. Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 *UCLA L. REV.* 577 (1987). Spiegel argues further “that our labeling of clinical courses as skills training influences the content of clinical courses and their place within the curriculum. It also affects how we perceive other additions to our doctrinal core.” *Id.* at 579.

<sup>17</sup> *E.g.*, David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 *CLINICAL L. REV.* 191, 193 (2003) (“This essay elaborates on the deficiencies of the case-centered approach to skills training in clinical education and briefly evaluates the merits of existing and potential alternative approaches.”); Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 *VAND. L. REV.* 321, 338-39 (1982) (“[T]he combative nature of the Socratic method tends to substitute sparring for learning . . . .”) (quoting Gary Bellow & Earl Johnson, *Reflections on the University of Southern California Clinical Semester*, 44 *S. CAL. L. REV.* 664, 694 (1971)); Ellmann et al., *supra* note 8, at 23 (“There is little dispute about the value of experiential education.”); Kelley Burton & Judith McNamara, *Assessing Reflection Skills in Law Using Criterion-Referenced Assessment*, 19 *LEGAL EDUC. REV.* 171, 175-78 (2009) (on “The Role and Benefits of Experiential Learning”); Stefan H. Krieger & Serge A. Martinez, *Performance Isn’t Everything: The Importance of Conceptual Competence in Outcome Assessment of Experiential Learning*, 19 *CLINICAL L. REV.* 251, 258-59 (2012) (on the value of apprenticeship and learning from practice); Joni Larson, *Getting up to Speed: Understanding the Connection Between Learning Outcomes and Assessments in a Doctrinal Course*, 62 *N.Y. L. SCH. L. REV.* 11, 22 (2017) (listening to lectures and reading appellate cases “fails to develop any of the skills at the mid- to upper-end of the [skills] taxonomy.”); John O. Sonsteng with Donna Ward, Colleen Bruce & Michael Petersen, *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 *WM. MITCHELL L. REV.* 303, 396 (2007) (on the importance of active learning and metacognition).

<sup>18</sup> For more on the science of learning as it applies to teaching, see generally COMM. ON DEVS. SCI. LEARNING, NAT’L ACAD. PRESS, *HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL* (expanded ed. 2000).

learning tasks change as the adult learner gains education—these are called “developmental tasks”; and 4) “adults seek to apply learning immediately, while children tend to see acquired knowledge solely as a future benefit.”<sup>19</sup> Students learn more effectively if they are intrinsically motivated (learning to satisfy their own interests and curiosity) rather than extrinsically motivated (learning to achieve a reward, such as a grade); this kind of learning requires student autonomy, competence, and relatedness.<sup>20</sup> “Students construct knowledge by assigning meaning to the knowledge, fitting it into their previous life experiences (placing it in context), using it in the classroom, and redefining how the knowledge applies in different settings, both current and foreseeable.”<sup>21</sup>

Experiential education, such as clinical work in law school, capitalizes on these underlying andragogical principles because it is active learning, including problem-solving for actual clients, where both teacher and student are engaged in learning and problem-solving.<sup>22</sup> In these experiential learning settings, “students are far more likely to see their teachers as expert colleagues who are facilitating the students’ learning. Students and faculty are both actively engaged in the shared goal of furthering the students’ professional development.”<sup>23</sup>

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<sup>19</sup> Bloch, *supra* note 17, at 328-29 (summarizing the work of Malcolm S. Knowles, who established the field of andragogy).

<sup>20</sup> Larson, *supra* note 17, at 29.

<sup>21</sup> *Id.* at 30-31 (citing Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F. L. REV. 941, 943 (1997)).

<sup>22</sup> Bloch, *supra* note 17, at 338-53; *see also* Jeff Giddings & Jacqueline Weinberg, *Experiential Legal Education: Stepping Back to See the Future*, in MODERNISING LEGAL EDUCATION 43 (Catrina Denvir ed., 2020) (“[L]egal education needs to cultivate a new kind of lawyer who is trained not only in the use of coding and technology, but also in the skills that cannot be automated, including the very ‘human’ capabilities of creativity, empathy, compassion and emotional intelligence.”).

<sup>23</sup> Cynthia Batt, *A Practice Continuum: Integrating Experiential Education into the Curriculum*, 7 ELON L. REV. 119, 159 (2015).

Despite calls by the MacCrate Report,<sup>24</sup> the Carnegie Report,<sup>25</sup> and Stuckey's Best Practices,<sup>26</sup> among others, experiential education has not exactly taken legal education by storm.<sup>27</sup> Many are dissatisfied with the slowness with which experiential education is being adopted into law school curricula.<sup>28</sup> Interestingly, scholars who propose overhauls to law school curricula overwhelmingly build those proposals around experiential education. Several proposals situate a clinic, externship, or field placement as the pinnacle of legal education, with the rest of the curriculum designed deliberately to prepare

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<sup>24</sup> TASK FORCE ON L. SCHS. & PROFESSION: NARROWING THE GAP, A.B.A. SEC. L. EDUC. ADMISSIONS TO BAR, LEGAL EDUC. AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992).

<sup>25</sup> Carnegie Report, *supra* note 16, at 87-125 (including chapter three, on moving from “thinking like a lawyer” to “lawyering.”).

<sup>26</sup> ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) (including chapter five, on “Best Practices for Experiential Courses”). See generally BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD (Deborah Maranville, Lisa Radtke Bliss, Carolyn Wilkes Kass & Antoinette Sedillo López eds., 2015).

<sup>27</sup> See Robert R. Kuehn & David A. Santacroce, *An Empirical Analysis of Clinical Legal Education at Middle Age*, 70 J. LEGAL EDUC. 1, 36, 45-46 (2023) (describing the “tremendous growth” of clinical legal education over the past fifty years but finding that “there is still much work to be done” to make clinical or field placement opportunities available to every student).

<sup>28</sup> E.g., Susan B. Apel, *No More Casebooks: Using Simulation-Based Learning to Educate Future Family Law Practitioners*, 49 FAM. CT. REV. 700 (2011) (asserting that the Carnegie Report provoked conversation but no action) (citing Drew Coursin, *Acting Like Lawyers: Adapting Medical Education's Experiential Learning Techniques in a Legal Rotations Model*, 2010 WISC. L. REV. 1461 (2010)).



students for that experience.<sup>29</sup> Other proposals include extensive experiential education throughout all three years of law school<sup>30</sup> or six semesters of experiential legal writing with integrated legal drafting assignments throughout the curriculum.<sup>31</sup> Even the most dramatic proposed overhauls to legal education foreground

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<sup>29</sup> E.g., Carolyn Grose, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 CLINICAL L. REV. 489, 512 (2013) (“[T]he traditional clinic is the pinnacle of the legal education pyramid, and . . . as such, the rest of the law school curriculum must build toward it.”); Batt, *supra* note 23, at 119 (proposing deliberate sequencing and scaffolding of legal education from doctrinal classroom to simulation courses and on to externship/field placement); Ann Marie Cavazos, *The Journey Toward Excellence in Clinical Legal Education: Developing, Utilizing and Evaluating Methodologies for Determining and Assessing the Effectiveness of Student Learning Outcomes*, 40 SW. L. REV. 1 (2010) (proposing a Model Clinic Program, discussing its pedagogy and methodology for assessment with a particularly detailed assessment model for this clinical program; describing features such as manuals articulating expectations for both supervisors and students, site visits to observe the student in action, communication with students, seminars to go alongside practical work, learning goals articulated by the students early in the semester, meetings, work experience, and frequent reflection by way of journals, etc.). The emphasis of Cavazos’s Model Clinic Program is on “[c]ontinuous communication and assessment.” *Id.* at 30.

<sup>30</sup> E.g., Christine Cerniglia Brown, *The Integrated Curriculum of the Future: Eliminating a Hidden Curriculum to Unveil a New Era of Collaboration, Practical Training, and Interdisciplinary Learning*, 7 ELON L. REV. 167, 167-68, 174-78 (2015) (proposing a curriculum “based on large-scale collaboration, interdisciplinary techniques, and learned interpersonal skills . . . fostering student development toward a post-conventional moral schema,” including tethered simulation practicums in the first year, complex simulations in the second year, and required clinics or other client-centered experiences in the third year); Sheldon Krantz & Michael Millemann, *Legal Education in Transition: Trends and Their Implications*, 94 NEB. L. REV. 1, 18-41 (2015) (calling for various experiential education reforms, including the inclusion of more clients in the 1L curriculum, simulations for transactional skills, opportunities for law students to specialize in areas of concentration, reconceptualizing the 3L year as a transition to practice, and integrating JD and post-JD education).

<sup>31</sup> Adam Lamparello & Charles E. MacLean, *Experiential Legal Writing: The New Approach to Practicing Like a Lawyer*, 39 J. LEGAL PROF. 135, 138 (2015).

experiential education.<sup>32</sup> (Additional proposals have also been made,<sup>33</sup> no doubt including some that are not referenced here.)

One of the main purposes of experiential education is to train students to utilize information in future problem-solving:<sup>34</sup> “The focus in law school on content knowledge has often missed the mark in that it fails to recognize that students who become practicing attorneys are expected to be able to do something with that knowledge.”<sup>35</sup> In 2014, the Institute for the Advancement of the American Legal System conducted a project called Educating Tomorrow’s Lawyers, which identified numerous “foundations” for practice—none of them were about legal knowledge; they were all

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<sup>32</sup> *E.g.*, Sonsteng, *supra* note 17, at 446-52 (proposing a curriculum consisting of three overarching modules complete with articulated learning outcomes, progressing from “fundamentals” to “substance and fundamental legal practice skills” to “transition from student to lawyer,” as well as faculty supervised studies and intensive residential practicums); Cody Thornton, *Shared Visions of Design and Law in Professional Education*, 6 NE. U. L.J. 21 (2013) (recommending that instead of adopting medical school or business school models, that law schools adopt a “design studio” model, adapting that pedagogy’s focus on creative problem-solving to the legal education context); Leslie Bender, *Hidden Messages in the Required First-Year Law School Curriculum*, 40 CLEV. ST. L. REV. 387, 388-90 (1992) (proposing a fundamentally reconceptualized required curriculum with courses called things like “Justice, Law, and Truth-Finding,” “Interpreting and Writing Legal Texts,” “Resolving Disputes,” etc., asserting that such a reconceptualization would foreground values and show students the role lawyers have in shaping law, not just memorizing it, which in turn would emphasize that lawyering is about people). Bender critiques the traditional curriculum for separating doctrine into fixed categories, emphasizing learning substantive content over “processes of reasoning, argumentation and law-making,” “emphasiz[ing] private disputes and litigation” thus “encourage[ing] students to assign intellectual priority to doctrinal categories over processes of law, of change, and over practical skills.” *Id.* at 392-93.

<sup>33</sup> *E.g.*, Jamison Wilcox, *Borrowing Experience: Using Reflective Lawyer Narratives in Teaching*, 50 J. LEGAL EDUC. 213, 213 (2000) (proposing “that the curriculum might be enriched by supplementing casebook readings with a number of books of a type rarely used in law courses: books written for the intelligent nonprofessional reader that recount and reflect upon stories of attorneys’ work,” such as *A Civil Action* by Jonathan Harr).

<sup>34</sup> Grose, *supra* note 29, at 494 (one of the goals of clinical pedagogy is learning for transfer); Keith A. Findley, *Assessing Experiential Legal Education: A Response to Professor Yackee*, 2015 WIS. L. REV. 627, 629 (2015) (“[T]he rationale for clinical education is much more about effective pedagogy for adult learners (both about substance and skills) and the need to create effective lawyers, not just as beginning attorneys, but as life-long learners and reflective practitioners.”); Binder & Bergman, *supra* note 17, at 207 (asserting that properly designed, skill-centered courses encourage knowledge transfer).

<sup>35</sup> Larson, *supra* note 17, at 26.

so-called “soft skills.”<sup>36</sup> Teaching these foundational skills is not limited to clinical or other experiential classes, of course—they can and should be taught in doctrinal settings.<sup>37</sup>

Although experiential education is increasingly seen as vital to legal education, how to measure students’ progress or competency is not intuitive.<sup>38</sup> Assessment has now entered the

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<sup>36</sup> *Foundations for Practice*, INST. FOR ADVANCEMENT AM. LEGAL SYS. (Aug. 17, 2023), <https://iaals.du.edu/projects/foundations-practice> [<https://perma.cc/32ER-AHJ9>].

<sup>37</sup> Sophie M. Sparrow, *Teaching and Assessing Soft Skills*, 67 J. LEGAL EDUC. 553, 558-63 (2018). See also Grose, *supra* note 29, at 501 (writing about utilizing “Clinical Goals and Methods in Non-Clinic Classes”). Grose uses a “Role Assumption and Reflection” framing and assessment framework in her Estates and Trusts class, including mock interviews. *Id.* at 504–08 (“[A]s part of the final project, I ask: How did your client change over the course of the semester? How did your lawyer/lawyering change over the course of the semester? How did your approach to the doctrine change as you anticipated having to advise your client?” (emphasis omitted)).

<sup>38</sup> See, e.g., Em R. Wright (@E\_R\_Wright), X, (Jun. 16, 2022, 10:23 AM), [https://twitter.com/E\\_R\\_Wright/status/1537455863778230273](https://twitter.com/E_R_Wright/status/1537455863778230273), Jun. 16, 2022 (“I just graded my batch of briefs as a first-year prof and am desperate to read more on [assessing experiential education].”);

chat.<sup>39</sup> Not coincidentally, just as the American Bar Association began requiring experiential education in law schools, so it also began requiring a specific focus on assessment, including program and course-level learning outcomes as well as formative and summative assessment.<sup>40</sup>

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<sup>39</sup> A surprising number of law review articles discuss the value of assessment without addressing how, precisely, to do it. For samples of otherwise-excellent articles that omit discussion of how to conduct assessment, see Drake, *supra* note 12, at 521, 528; Batt, *supra* note 23; *Experience the Future: Papers from the Second National Symposium on Experiential Education in Law*, 7 ELON L. REV. 1, 2-12, 12-23, 43-57 (2015) (the “Working Group on Vision and Mission Subcommittee” report did not mention assessing students or program) (the “Working Group on Vocabulary and Collaboration” report offers definitions for pedagogy terms, program types, kinds of courses, but does not define “assessment” or its synonyms) (the “Working Group on Integrating Curricular Goals” report suggests “sketch[ing] out a conceptual framework for developing a coherent experiential education program and integrating that program into the broader law school curriculum in a way that contributes to a more balanced and thorough professional formation” and offers a series of questions to ponder but nothing about assessment); Erwin Chemerinsky, *The Ideal Law School for the 21st Century*, 1 UC IRVINE L. REV. 1 (2011) (including a discussion of curriculum but not assessment); Krantz & Millemann, *supra* note 30, at 48-49 (article subsection entitled “Evaluation of Legal Education and Learning Outcomes” suggests that “law schools will likely have to seek guidance from experts in learning theory,” without more); or Ellman et al., *supra* note 8, at 29-31 (2015) (noting valuable opportunities for “feedback on student performance” and “[f]acilitation of [s]tudent [r]eflection” and that those add value to student learning in all experiential education settings, but without exploring how to provide that feedback or facilitate the reflection); Brown, *supra* note 30, at 167-68 (“[F]uture curricula should require assessment based on large-scale collaboration, interdisciplinary techniques, and learned interpersonal skills. This shift in assessment should include fostering student development toward a post-conventional moral schema necessary to enrich our profession.”) (recommending pass/fail final exams, final simulations, reflection papers, but without discussing rubrics, etc.). *But see* Symposium, *Experience the Future: Experiential Education in Law*, 6 NE. U. L.J. 1 (2013) (symposium hosted by Northeastern University School of Law in partnership with the Alliance for Experiential Learning in Law, called “Experience the Future”; the fourth plenary session was entitled “Assessments: The Right Stuff and Measurement,” and the papers were published in the symposium issue)

<sup>40</sup> STANDARDS AND R. PROC. FOR APPROVAL OF L. SCHS. Standards 301-302, 314-315 (2014) (ABA, amended 2022). Steven C. Bahls, *Adoption of Student Learning Outcomes: Lessons for Systemic Change in Legal Education*, 67 J. LEGAL EDUC. 376, 404 (2018) (“[T]he implementation of student learning outcomes is, perhaps, the most significant systemic change in law school curricula in the past century.”). But credible arguments have been made that the ABA standards stifle innovation. *See, e.g.*, Erwin Chemerinsky, *supra* note 39, at 16 (2011) (describing the founding of UC Irvine School of Law and the tension between being “sufficiently traditional to be credible, but sufficiently innovative to justify why we exist”)

There has been a certain amount of resistance from faculty on the subject of assessment.<sup>41</sup> Faculty concerns about learning outcomes assessment include “uncertainty about the process, time commitments required, . . . leadership’s commitment to the process,” the potential for assessment to create disparate workload burdens, the cost versus the value of assessment, “the process’ inability to capture nuanced learning,” as well as the potential loss of academic freedom.<sup>42</sup> Regarding the disparate burden that assessment may foist on different law school employees, one source warns: “if outcomes assessment became a ‘check the box’ compliance measure that was seen as having little independent value, the work would likely become gendered and discounted.”<sup>43</sup> Law schools may also resist embracing assessment practices because of attachment to traditional teaching methods, the stress of reworking something that already appears to be successful, attachment to “outdated” curriculum/teaching/assessment practices, fear of a negative effect on law school rankings, and ineffective use of technology.<sup>44</sup> Reorienting law faculty’s thinking on assessment can be disorienting, though it need not be terribly

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<sup>41</sup> Sharon K. Sandeen, *Professional Learning Communities and Collaborative Teams: Tools to Jump-Start the Learning Outcomes Assessment Process*, 6 NE. U. L.J. 189, 199-200 (2013). See also Catherine Martin Christopher, *Normalizing Struggle*, 73 ARK. L. REV. 27, 33-34 (2020). Interestingly, none of the five major legal traditions (civil, common, communist, customary/tribal, and Islamic/Sharia) appear to prioritize experiential education in their methods of instruction, yet “while the clinical method has been met with much resistance in all traditions, it is nonetheless universally alive and vibrant. It is seen as an alternative if not an additional mode of instruction and preparation for the student’s entry into the profession.” Richard A. Boswell, *Book Review*, Richard J. Wilson, *The Global Evolution of Clinical Legal Education: More than a Method*, 67 J. LEGAL EDUC. 1081, 1081-82 (2018).

<sup>42</sup> Andrea A. Curcio & Alexis Martinez, *Assessment in Practice: A Law School’s Journey into Learning Outcomes Assessment*, NAT’L. INST. FOR LEARNING OUTCOMES ASSESSMENT (March 2021), [learningoutcomesassessment.org/wp-content/uploads/2021/03/AIP\\_Curcio\\_Martinez-1.pdf](https://learningoutcomesassessment.org/wp-content/uploads/2021/03/AIP_Curcio_Martinez-1.pdf) [https://perma.cc/ZB3W-4JTC]. In response to these faculty concerns, Curcio & Martinez recommend the following: simple rubrics, collaboratively developed; an assessment committee drawn from a diverse range of employment statuses within the institution; and sharing cumulative student data with faculty. *Id.* See also BARBARA E. WALVOORD, *ASSESSMENT CLEAR AND SIMPLE: A PRACTICAL GUIDE FOR INSTITUTIONS, DEPARTMENTS, AND GENERAL EDUCATION* 8 (2004).

<sup>43</sup> Curcio & Martinez, *supra* note 42 (citing Cassandra. M. Guarino & Victor M. H. Borden, *Faculty Service Loads and Gender: Are Women Taking Care of the Academic Family?*, 58 RSCH. IN HIGHER EDUC. 672-94 (2017)), [learningoutcomesassessment.org/wp-content/uploads/2021/03/AIP\\_Curcio\\_Martinez-1.pdf](https://learningoutcomesassessment.org/wp-content/uploads/2021/03/AIP_Curcio_Martinez-1.pdf) [https://perma.cc/ZB3W-4JTC]).

<sup>44</sup> Sonsteng, et al., *supra* note 17, at 333-34.

time-consuming.<sup>45</sup> Barry, Dubin & Joy identify assessment as one of three “future challenges” for clinical education.<sup>46</sup>

Faculty resistance to assessment likely also stems from the difficulty of the grading process and our collective aversion to doing more of that unpleasant task.<sup>47</sup> But assessment is not the same as grading or testing, especially in law school.<sup>48</sup> Traditionally, exams in law school have served the purpose of ranking students against one another,<sup>49</sup> which is not the same as measuring competence, giving actionable feedback, or acquiring information from students

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<sup>45</sup> Margaret Martin Barry, *Reflections on Identifying and Mapping Learning Competencies and Outcomes: What Do We Want Law Students to Learn?*, 62 N.Y.L. SCH. L. REV. 131, 152 (2017) (“This may mean equating teaching with scholarship in faculty reviews, supporting innovative teaching, rethinking the role of and approach to student evaluations, and generally creating an atmosphere that encourages and supports faculty commitment to student learning.” (footnotes omitted.))

<sup>46</sup> Margaret Martin Barry, Jon C. Dubin, & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 74 (2000) (“We must consider what standards we should establish to guide the quality of clinical programs . . . which require clinical teachers to teach nonclinical courses. . . . Assessing our standards also includes truly considering our commitment to diversity within our programs, both with regard to the faculty and the student body, and appreciating the challenges of such a commitment.”).

<sup>47</sup> LawProfBlawg, *The (De)grading: Why Do Law Professors Hate Grading So Much?*, ABOVE THE LAW (Dec. 22, 2015, 4:44 PM), <https://abovethelaw.com/2015/12/the-degrading/> [<https://perma.cc/494R-7Q4M>]; see also Staci Zaretsky, *Why Does It Take Soooo Long for Law Profs to Grade Exams?*, ABOVE THE LAW (May 18, 2015, 11:48 AM), <https://abovethelaw.com/2015/05/why-does-it-take-soooo-long-for-law-profs-to-grade-exams/> [<https://perma.cc/A2QX-RGB4>].

<sup>48</sup> Herbert N. Ramy, *Moving Students from Hearing and Forgetting to Doing and Understanding: A Manual for Assessment in Law School*, 41 CAP. U. L. REV. 837, 841-42 (2013); Victoria L. VanZandt, *Creating Assessment Plans for Introductory Legal Research & Writing Courses*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 313, 321-22 (2010); Sonsteng et al., *supra* note 17, at 407-08 (“Assessment involves more than testing. It includes reinforcement and feedback, which can include praise, constructive criticism, and any other verbal or written critique that enables students to understand their mastery of a particular topic or learning objective. Learning theorists agree that adult students need specific feedback in order to stay motivated. Too often law schools use negative reinforcement that is only useful in changing bad behavior rather than providing positive reinforcement.” (footnotes omitted)).

<sup>49</sup> Steven I. Friedland, *Rescuing Pluto from the Cold: Creating an Assessment-Centered Legal Education*, 67 J. LEGAL EDUC. 592, 613 (2018) (Historically, assessment in law schools has been “used primarily to sort students and rank their competency levels.”).

about what material was mastered or what teaching methods were effective.<sup>50</sup>

Rather, effective learnings outcome assessment of students measures each student's competency, establishing a finish line that all students are capable of crossing.<sup>51</sup> In short, assessment is about teaching, not about grading. Law faculty who are able to reframe assessment as a teaching activity, rather than as grading, will find themselves less resistant to assessment.<sup>52</sup>

Instead of testing students to rank them, "assessment gives us the ability to capture and refine what lawyers actually do, so we are better able to instruct, guide, and prepare our students for entry into the legal profession."<sup>53</sup> There is "Substantial Agreement on the Most Important Competencies" first-year attorneys are expected to demonstrate,<sup>54</sup> and because of this, educational experiences can be designed to teach and assess those competencies.<sup>55</sup>

Moreover, "[t]he current hiring environment for law students suggests an assessment, or skills-based, approach will better

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<sup>50</sup> Sonsteng et al., *supra* note 17, at 344 ("Rather than using assessment as a tool to refine teaching methods, achieve greater learning objectives, and ensure consistent grading, students are tested and assigned grades primarily for the propose of compiling class rank.").

<sup>51</sup> Sandeen, *supra* note 41, at 203 ("LOA [Learning Outcomes Assessment] means that where a student attends law school or where he is ranked in his class will mean less than what he learned or achieved when he was there.")

<sup>52</sup> See Jessica Erickson, *Experiential Education in the Lecture Hall*, 6 NE. U. L.J. 87, 89 (2013) (arguing that "the push for experiential education in law schools is really a push for better teaching").

<sup>53</sup> Docia L. Rudley, *Bridging the Divide Between Assessment and Accreditation*, 62 N.Y.L. SCH. L. REV. 35, 42 (2017). Rudley writes movingly about the value of assessment, noting that assessment is "an organizing principle around which all of our best ideas coalesce," allowing law faculty to "measure how close or far we are from achieving our educational goals"; that "assessment fosters powerful collaborations among faculty, staff, and students"; and that "through the framework of assessment, we can build meaningful, sustainable partnerships with legal practitioners and others whose expertise we can leverage to create more comprehensive systems of evaluation." *Id.* at 40-43.

<sup>54</sup> Neil Hamilton, *Law Firm Competency Models & Student Professional Success: Building on a Foundation of Professional Formation/Professionalism*, 11 U. ST. THOMAS L.J. 6, 25 (2013) (subheading title).

<sup>55</sup> See Christopher, *supra* note 2, at 2798-804 (Section II.A).

position graduates for practice.”<sup>56</sup> Employers increasingly look for associates with practical skills.<sup>57</sup> Law firms themselves are increasingly using competency models to assess associates.<sup>58</sup>

In short, experiential education and learning outcomes assessment are mandated by the American Bar Association, but regardless of this accreditation requirement, they should both be adopted because they provide valuable, even superior, educational outcomes for law students, and “examining the value of assessment independent of its regulatory context might allow us to avoid succumbing to the pressure of approaching assessment as a ‘must do.’”<sup>59</sup>

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<sup>56</sup> Larson, *supra* note 17, at 16. Furthermore, “changes in students or in the legal profession can spur demand for change at law schools.” Bahls, *supra* note 40, at 405. *But see* Jason Webb Yackee, *Does Experiential Learning Improve JD Employment Outcomes?*, 2015 WIS. L. REV. 601 (2015) (finding that schools with more experiential education do not have better employment outcomes and asking whether the expense of experiential education is worth it). In response to Professor Yackee, Findley asserts that “inadequacy in the hiring metrics and heuristics that are currently available to employers” is no reason to reduce emphasis on experiential education. Findley, *supra* note 34, at 628.

<sup>57</sup> Daniel Thies, Comment, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 599-608, 613-14 (2010) (“[G]raduates with practical training will be best situated to succeed in the emerging [~2010] job market.”) (“[T]he [2008] recession may help to produce a change in priorities as students begin to seek law schools that best prepare them for the job market.”)

<sup>58</sup> Hamilton, *supra* note 54, at 8. Most firms identify desired associate competencies that include not only “[a]nalytical skills,” “[e]ffective written and oral communication skills,” and “[l]egal competency/expertise/knowledge of the law”; but also “[i]nitiation and maintains strong work and team relationships,” “[g]ood judgment/common sense/problem-solving,” “[b]usiness development/marketing/client retention,” “[p]roject management, including high quality, efficiency, and timeliness” etc. *Id.* at 9 tbl.1. The firms’ hiring decisions likewise prioritize “[i]ntegrity/honesty/trustworthiness,” “[e]ffective written and oral communication skills,” “[a]nalytical skills: identify legal issues from facts, apply the law, and draw conclusions,” “[i]nitiative/ambition/drive/strong work ethic,” “[g]ood judgment/common sense/problem solving,” “[d]edication to client service/responsiveness to client,” “[c]ommitment to firm, its goals, and values,” “[i]nspires confidence,” “[r]esearch skills,” etc. *Id.* at 15 tbl.5. Hamilton notes that all this is after an initial applicant screening that employs class rank and law school rank. *Id.* at 16.

<sup>59</sup> Rudley, *supra* note 53, at 40. *See also* Marie Summerlin Hamm, Benjamin V. Madison, III & Ryan P. Murnane, *The Rubric Meets the Road in Law Schools: Program Assessment of Student Learning Outcomes as a Fundamental Way for Law Schools to Improve and Fulfill Their Respective Missions*, 95 U. DET. MERCY L. REV. 343, 378 (2018) (“Perhaps most notably for the law teachers, the concept of compliance slowly gave way to creating a ‘culture of assessment,’ with the specific goal of enhancing student learning.”).



## II. ASSESSING INDIVIDUAL STUDENTS: THEORY AND PRACTICE

### A. Theory

Intuitively, students are measured on whether they've learned what they were supposed to from a course.<sup>60</sup> The process of assessment breaks down that intuition into two important inquiries: What were students supposed to learn, and how should their mastery be measured?

Defining what students are supposed to learn is the process of establishing learning outcomes.<sup>61</sup> Learning outcomes, in turn, describe “how students will use information, with focus on what they can *do* with what they have learned.”<sup>62</sup> “A learning outcome is not merely a ‘goal’ or a test of knowledge. It encompasses the *actions*

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<sup>60</sup> See Andrea A. Curcio, *A Simple Low-Cost Institutional Learning-Outcomes Assessment Process*, 67 J. LEGAL EDUC. 489, 490-91 (2018) (“Outcome-measures assessment shifts the legal education lens from whether students have achieved a passing grade in a series of classes to whether students have acquired competencies . . . .”); VanZandt, *supra* note 48, at 320 (“Assessment of student learning refers to a process of evaluating students’ attainment of defined learning outcomes.”).

<sup>61</sup> For information on developing learning outcomes for experiential legal programs, see KELLY TERRY, GERALD HESS, EMILY GRANT & SANDRA SIMPSON, *ASSESSMENT OF TEACHING AND LEARNING: A COMPREHENSIVE GUIDEBOOK FOR LAW SCHOOLS* 136–38 (2021); Sandeen, *supra* note 41, at 204-09. For information on developing learning outcomes in law schools generally, see Anthony Niedwiecki, *Law Schools and Learning Outcomes: Developing a Coherent, Cohesive, and Comprehensive Law School Curriculum*, 64 CLEV. ST. L. REV. 661 (2016). For information on developing learning outcomes in higher education generally, see, e.g., MARY E. HUBA & JANN E. FREED, *LEARNER-CENTERED ASSESSMENT ON COLLEGE CAMPUSES: SHIFTING THE FOCUS FROM TEACHING TO LEARNING* 108 (2000); Sandi Osters & F. Simone Tiu, *Writing Measurable Learning Outcomes* at 2-4, <https://www.gavilan.edu/research/spd/Writing-Measurable-Learning-Outcomes.pdf>.

<sup>62</sup> See Joni Larson, *Getting up to Speed: Understanding the Connection Between Learning Outcomes and Assessments in a Doctrinal Course*, 62 N.Y. L. SCH. L. REV. 11, 13 (2017) (listening to lectures and reading appellate cases “fails to develop any of the skills at the mid- to upper-end of the [skills] taxonomy.”); *But see* Krieger & Martinez, *supra* note 17, *passim* (rejecting the Carnegie Report’s conception of outcomes assessment—what lawyers *do*—and arguing instead that educators should assess whether students are *thinking* like lawyers).

students should be able to perform to *demonstrate* they have learned the material.”<sup>63</sup>

Just as experiential education can be conceptualized at the institutional level or at the course level, learning outcomes can be articulated at the program level or the course level. For example, learning outcomes should be drafted “for “the law school as an organization[,] . . . based on the student’s year . . . [and] expectations within a course.”<sup>64</sup> This Part focuses on assessment of individual students; Part IV, *infra*, will discuss assessment of an institution’s program of legal education.

Once learning outcomes have been established, teaching begins, and in due time, students’ mastery of the material should be measured. When does that measurement occur, and how? Measurement can take place at the end of the course, called summative assessment,<sup>65</sup> or during, which is called formative assessment. “Formative assessments allow law schools to identify at-risk students earlier in their law school careers, provide academic support where necessary, and identify individual and group strengths and weaknesses.”<sup>66</sup> On the other hand, “[s]ummative assessment allows professors to measure student progress against the initial, pre-course assessment (if done) and over the course of a semester.”<sup>67</sup> Formative assessment probably gives students more, better, actionable feedback, since the incentive to improve in a particular course decreases once the final grade is posted.<sup>68</sup>

When we think of assessing student work, we instinctively think about *direct* assessment: direct measurement of the student’s

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<sup>63</sup> Larson, *supra* note 62, at 14. *See also* GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 12 (Inst. for L. Sch. Teaching, 2000) (“Law students should not just know; they should be able to do what they know.”) (citing ALVERNO COLLEGE FACULTY, STUDENT ASSESSMENT-AS-LEARNING, at Alverno College 3 (1994)).

<sup>64</sup> Larson, *supra* note 62, at 13. *See also* ABA Standard 302 (describing minimum learning outcomes required by the ABA).

<sup>65</sup> *See* Ramy, *supra* note 48, at 839-41 for a discussion of the problems presented by assessing solely by means of a final exam.

<sup>66</sup> Lamparello, *supra* note 32, at 187.

<sup>67</sup> *Id.*

<sup>68</sup> *See* Sandeen, *supra* note 41, at 191-97 (explaining that the overarching themes of assessment are a focus on student learning, intentionally engaging in both formative and summative assessments, utilizing the feedback loops, and creating an institutional culture of learning).

work product, probably by the instructor.<sup>69</sup> *Indirect* assessment, on the other hand, would be something like surveying employers about students' or graduates' competencies. While the use of direct assessment may be more obvious (and practical),<sup>70</sup> both direct and indirect assessment information can provide valuable insights into student competency.<sup>71</sup>

Assessment tools should be crafted carefully so as to measure learning and competency as accurately as possible: “[t]here is no point in undertaking a measurement that will not provide you with good quality data.”<sup>72</sup> No one assessment tool is the best item with which to measure even one particular competency<sup>73</sup>; rather, “[a]ssessment should . . . employ[] a diverse array of methods, including those that call for actual performance, using them over time so as to reveal change, growth, and increasing degrees of integration.”<sup>74</sup> These practices allow for a more “accurate picture of learning.”<sup>75</sup> Importantly, the assessment process has two “feedback loops.”<sup>76</sup> In the first, students get “feedback about their knowledge

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<sup>69</sup> Hamm et al., *supra* note 58, at 373.

<sup>70</sup> *Id.*

<sup>71</sup> Sparrow, *supra* note 37, at 570.

<sup>72</sup> LORI E. SHAW & VICTORIA L. VANZANDT, STUDENT LEARNING OUTCOMES AND LAW SCHOOL ASSESSMENT: A PRACTICAL GUIDE TO MEASURING INSTITUTIONAL EFFECTIVENESS 109 (2015).

<sup>73</sup> Lambert W. T. Schuwirth & Cees P. M. Van der Vleuten, *Programmatic Assessment: From Assessment of Learning to Assessment for Learning*, 33 MED. TCHR. 478, 481 (2011) (analyzing assessment of medical school learning). *See also* MICHAEL HUNTER SCHWARTZ, GERALD F. HESS & SOPHIE M. SPARROW, WHAT THE BEST LAW TEACHERS DO 261 (2013) (“The [law] teachers we studied vary considerably in the kinds of assessments they offer and the feedback they give, but they are deeply thoughtful about integrating assessment as part of learning.”).

<sup>74</sup> Alexander W. Astin et al., *9 Principles of Good Practice for Assessing Student Learning*, AM. ASS’N FOR HIGHER EDUC. (1996). *See also* Sparrow, *supra* note 37, at 566 (“Effective assessments—according to research—need to evaluate and grade a student’s foundational skills by assessing students in multiple ways, and give students opportunities for practice and feedback.” (footnotes omitted)).

<sup>75</sup> Astin et al., *supra* note 74. The authors assert that assessment should be “ongoing not episodic,” and that it is acceptable to be “collecting the same examples of student performance or using the same instrument semester after semester” to demonstrate growth. *Id.* The authors recommend that faculty, librarians, administrators, and students all participate in the assessment process, and that assessment helps “educators meet [their] responsibilities to students and to the public.” *Id.*

<sup>76</sup> Larson, *supra* note 62, at 17.

and skill level,” while in the second, teachers get information on whether the students have learned what they should have.<sup>77</sup>

Students may demonstrate mastery of material<sup>78</sup> quickly, or it may take longer; assessment as a process has the flexibility to measure development over various time horizons. Larson argues that the speed of information and skill acquisition need not be a material concern, so long as mastery is eventually achieved: “content knowledge and skill development based on that knowledge become the constant and time becomes the variable.”<sup>79</sup> Gillespie, Zabar, and Kalet concur, suggesting (in the medical school context) that “dwell time,” that is, years in school, may not be the best marker of competence.<sup>80</sup>

In general, experts agree that assessing students should be done frequently, with numerous low-stakes assessments.<sup>81</sup> This allows students to see their developmental progress, which demonstrates their growth. “Effective grading takes into account achievements made throughout a course, recognizes class

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<sup>77</sup> Larson, *supra* note 62, at 17.

<sup>78</sup> A variety of fascinating taxonomies describe hierarchies of competencies, *e.g.*, Bloom’s Taxonomy, Dale’s Cone of Learning, Miller’s Pyramid of Competence, and the idea of “entrustable professional activities.” See Colleen Gillespie, Sondra Zabar & Adina Kalet, *Learning Outcomes and Performance in Medical School: Programmatic Assessment at NYU School of Medicine*, 62 N.Y.L. SCH. L. REV. 73, 82–85 (2018) (discussing “entrustable professional activities”). For more on Bloom’s Taxonomy, a verb-focused hierarchy of learning that goes from “remember” at the bottom through “create” at the top, see *What Is Bloom’s Taxonomy*, BLOOM’S TAXONOMY, [https://bloomstaxonomy.net/#:~:text=Bloom's%20Taxonomy%20is%20a%20hierarchical,the%20end%20of%20the%20course.\[https://perma.cc/9VHJ-HNDG\]](https://bloomstaxonomy.net/#:~:text=Bloom's%20Taxonomy%20is%20a%20hierarchical,the%20end%20of%20the%20course.[https://perma.cc/9VHJ-HNDG]) (last visited Jan. 22, 2024). For more on Dale’s Cone of Learning, see Sonsteng et al., *supra* note 17, at 399-400. For more on Miller’s Pyramid of Competence, which is structured much like Bloom’s Taxonomy but is intended specifically for medical education, see George E. Miller, *The Assessment of Clinical Skills/Competence/Performance*, 65 ACAD. MED. S63 (Sept. Supp. 1990). For a helpful visual, see Gillespie, *supra*, at 87 fig.3.

<sup>79</sup> Larson, *supra* note 62, at 32.

<sup>80</sup> Gillespie et al., *supra* note 78, at 81.

<sup>81</sup> *But see* Judith Welch Wegner, *Law School Assessment in the Context of Accreditation: Critical Questions, What We Know and Don’t Know, and What We Should Do Next*, 67 J. LEGAL EDUC. 412, 441-44 (2018) (literature review showing mixed results when analyzing whether “formative assessment in standard classrooms make[s] a difference”).

participation, provides feedback, and encourages collaborative work.”<sup>82</sup>

Ideally, assessment itself is a teaching tool, designed to give students actionable feedback on their performance and identify areas for improvement. Faculty resistance to assessment can also be reduced by reframing assessment as teaching, rather than as additional grading burdens. Some scholars make an important distinction between “assessment *for* learning” and “assessment *of* learning,”<sup>83</sup> with the former being superior.<sup>84</sup> When assessment is used as a tool *for* learning it in fact becomes a teaching tool; students learn from the assessment itself. Assessment *of* learning, on the other hand, may feel (to both student and teacher) like final judgment of a student’s abilities.

Perhaps surprisingly, instructors need not be the exclusive arbiter of students’ competence.<sup>85</sup> Rather, incorporating assessments from multiple sources allows for triangulation and more accurate measurement of students’ skills.<sup>86</sup> Along with instructors, the students themselves can weigh in with an opinion regarding their competency. This can be conducted by careful self-reflection.<sup>87</sup> Peers, classroom observers, and simulation

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<sup>82</sup> John O. Sonsteng with Donna Ward, Colleen Bruce & Michael Petersen, *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 410 (2007).

<sup>83</sup> “Behind this rather inconspicuous terminology hides nothing short of a revolution in the conceptual framework of assessment.” Schuwirth & Van der Vleuten, *supra* note 73, at 478.

<sup>84</sup> Gillespie et al., *supra* note 78, at 85 (discussing assessment in the medical school context for a legal education audience).

<sup>85</sup> Where instructors are assessing student work, however, grading should be calibrated so as to increase interrater reliability. Hamm et al., *supra* note 59, at 381 (“[L]aw professors need to calibrate their evaluation in filling out assessment rubrics.”). In fact, interrater reliability can be increased by taking several steps: involve raters (e.g., faculty) in the development of rubrics, train the raters on how to conduct the assessments, and calibrate ratings by comparing them after the assessment has taken place. *Id.* at 382. Training raters for consistency improves interrater agreement, Miller, *supra* note 78, at S65 (discussing medical education), and increases the validity of the assessment, Hamm et. al., *supra* note 59, at 389-90.

<sup>86</sup> ANDREA SUSNIR FUNK, *THE ART OF ASSESSMENT: MAKING OUTCOMES ASSESSMENT ACCESSIBLE, SUSTAINABLE, AND MEANINGFUL* 32-33 (2017) (defining “triangulation” in the assessment context).

<sup>87</sup> See *infra* text accompanying notes 135-151.

participants can also provide assessment of students' competency.<sup>88</sup> Why engage in multiple assessments from multiple stakeholders? Because this "triangulation" allows for "assessing the same outcomes using a variety of methods [and] yields more valid and reliable observations about the achievement of desired learning goals."<sup>89</sup>

Legal education may pose particular (if not unique) challenges for assessment of student learning. For example, "[l]aw professors using assessment-centered methods must also account for the pervasive competitiveness of the law school environment."<sup>90</sup> Assessment should be framed for students using a growth mindset, so students understand that struggling is not a sign of failure.<sup>91</sup> Further, law schools may need to rethink class sizes in order to incorporate more experiential learning methods, especially in doctrinal classes.<sup>92</sup> Law schools can also reduce faculty scholarship expectations and facilitate the creation and sharing of course materials in order to ease the burden of incorporating more experiential learning methods in the classroom.<sup>93</sup>

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<sup>88</sup> For example, the Daniel Webster Scholar Honors Program at the University of New Hampshire Franklin Pierce School of Law incorporates assessments by faculty/teachers, peers, judges, lawyers, court reporters, and the students themselves. John Burwell Garvey & Anne F. Zinkin, *Making Law Students Client-Ready: A New Model in Legal Education*, 1 DUKE F. L. & SOC. CHANGE 101, 121 (2009). In the program's Pretrial Advocacy and Trial Advocacy courses, feedback comes from faculty, upper-level students, peers/classmates, court reporters, judges, attorneys, standardized clients, and witnesses. ALLI GERKMAN & ELENA HARMAN, AHEAD OF THE CURVE: TURNING LAW STUDENTS INTO LAWYERS 7-8 (Inst. For Advancement of Am. Legal Sys. 2015).

<sup>89</sup> See Marie Summerlin Hamm, Benjamin V. Madison, III & Ryan P. Murnane, *The Rubric Meets the Road in Law Schools: Program Assessment of Student Learning Outcomes as a Fundamental Way for Law Schools to Improve and Fulfill Their Respective Missions*, 95 U. DET. MERCY L. REV. 343, 383 (2018). Formative assessment in lecture halls is possible, too, of course. See Jessica Erickson, *Experiential Education in the Lecture Hall*, 6 NE. U. L.J. 87, 97-104 (2013) (describing the process of "[d]etermining [l]earning [o]bjectives", "[d]eveloping [a]ssessments", and "[c]reating [l]earning [a]ctivities" for doctrinal classes). Professors can teach foundational "soft" skills in large doctrinal classes by identifying the learning goals for the course, then choosing teaching and learning methods. Sophie M. Sparrow, *Teaching and Assessing Soft Skills*, 67 J. LEGAL EDUC. 553, 558-61 (2018).

<sup>90</sup> Sonsteng et al., *supra* note 82, at 394.

<sup>91</sup> Christopher, *supra* note 41, at 5733-34. See also Sonsteng et al., *supra* note 82, at 394 ("In order to discover what the student does not know the student must make a mistake.").

<sup>92</sup> Erickson, *supra* note 89, at 108.

<sup>93</sup> *Id.* at 107-09.

### B. Practice

This Section addresses specific practices that help assess student competencies effectively. Again, assessment is *not* the same as grading.<sup>94</sup> Grading is assigning a value judgment to student work product, while assessment is measuring student competence with respect to a set of clearly articulated expectations.<sup>95</sup> Assessment provides actionable feedback to both student and instructor.

Assessments of students must be reliable, valid, and fair.<sup>96</sup> An assessment tool is valid if it actually measures what it intends to measure, is reliable if the scoring produces consistent results, and is fair if all students can perform well regardless of their demographics.<sup>97</sup> To increase validity of an assessment tool, the faculty who use the tool (*e.g.*, a rubric) should help design it.<sup>98</sup>

When designing assessments of individual students' competencies, there are three important considerations. First, assessing student competencies should be done “on a competency or mastery scale rather than on a curve.”<sup>99</sup> Second, feedback can be provided using qualitative or quantitative methods; both can be valuable.<sup>100</sup> Third, students must be assessed repeatedly; a single assessment does not give a complete picture of competence:

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<sup>94</sup> See *supra* text accompanying notes 49-53. See also Ramy, *supra* note 48, at 841-42; VanZandt, *supra* note 48, at 321-22.

<sup>95</sup> “Increased uniformity will not cure the grading system of its inaccuracies. However, uniformity will often increase accuracy—a goal to which every legal education system should aspire.” Sonsteng et al., *supra* note 82, at 410 (citing Jeffrey Evans Stake, *Making the Grade: Some Principals of Comparative Grading*, 52 J. LEGAL EDUC. 583, 588-617 (2002)) (footnote omitted).

<sup>96</sup> AM. EDUC. RSCH. ASS'N ET AL., STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 11-72 (2014); MUNRO, *supra* note 64, at 105-10 (2000); Friedland, *supra* note 50, at 594-95 (using the term “efficiency” in connection with “fairness”).

<sup>97</sup> Ramy, *supra* note 49, at 848-51. Inconsistencies in assessing student work lead to reliability problems with the data that can have spillover effects into institutional assessment. Curcio, *supra* note 61, at 510 (“[V]ariability in raters’ assessments of the same student work leads to potential reliability problems with the data” when it comes time for institution-wide program assessment.).

<sup>98</sup> Curcio, *supra* note 60, at 509.

<sup>99</sup> Sparrow, *supra* note 89, at 566-67.

<sup>100</sup> See Judy Rosenbaum, Carol Morgan & Carol Newman, *Assessment of Learning Outcomes in Transactional Skills Courses*, 18 TENN. J. BUS. L. 593, 604 (2016); see also MUNRO, *supra* note 63, at 111-17; Hamm et al., *supra* note 59, at 375.

“examinee performance on a single case is a poor predictor of performance on others.”<sup>101</sup> By necessity, these repeated assessments must be administered quickly, so feedback is provided to students in such a timeframe as to be actionable.<sup>102</sup>

### 1. Assessment by the Instructor

The instructor is, of course, a natural person to conduct assessment of student learning. Being the expert in the room who is teaching information and skills, the instructor is appropriately—though not uniquely<sup>103</sup>—positioned to assess student learning. Instructors can assess students in a variety of ways, such as asking students questions in class or in an interview, administering questionnaires or surveys, requiring students to complete exams or papers, observing the students performing tasks, reviewing portfolios of student work product, or interviewing students’ supervisors from other contexts (such as employers).<sup>104</sup> Instructors may make use of multiple choice questions, group feedback, self-assessment, and peer-assessment, as well as activities such as the “minute paper,” the “muddiest point,” providing empty or partial outlines for students to complete, and single-issue hypotheticals.<sup>105</sup> Teaching assistants can also lead “learning groups” that help students develop mastery.<sup>106</sup> “Think-aloud” interviews, borrowed from medical school pedagogy, can be adapted for legal education.<sup>107</sup> Assessment tools for legal research and writing classes could include tests, quizzes, or exams; pre- and post-tests;

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<sup>101</sup> Miller, *supra* note 78, at S65 (discussing medical school education).

<sup>102</sup> Margaret Ryznar, *Reaction to Shope, Real World Problem-Solving in the Digital Classroom*, in *Upward! Higher: How a Law Faculty Stays Ahead of the Curve*, 51 IND. L. REV. 413, 461 (2018).

<sup>103</sup> See discussion *infra* Parts III.B.2 and III.B.3 regarding self-assessment and assessment by others.

<sup>104</sup> See MUNRO, *supra* note 63, at 117-25; see also Osters & Tiu, *supra* note 61, at 5.

<sup>105</sup> Ramy, *supra* note 48, at 856-67, 872-85.

<sup>106</sup> *Id.* at 867-72 (summarizing Jay M. Feinman & Marc Feldman, *Achieving Excellence: Mastery Learning in Legal Education*, 35 J. LEGAL EDUC. 528 (1985)).

<sup>107</sup> Krieger & Martinez, *supra* note 17, at 281-88 (describing how to create hypotheticals for think-aloud assessments, how to conduct interviews, and how to use the “[i]nterviews to [a]ssess [s]tudent [r]easoning in [p]ractice”; including transcripts of two student interviews with instructor commentary on the students’ cognitive flexibility, adaptive expertise, and schema).



“other types of small-scale embedded direct assessment tools,” interviews, or portfolios of work product.<sup>108</sup>

Many, if not all, of these assessment methods can be made more reliable, valid, and fair by the use of rubrics.<sup>109</sup> Rubrics assist the evaluator by providing detailed and objective criteria against which student performance can be measured, rather than a more holistic assessment (e.g., “This exam feels like a B”) which risks subjectivity on the part of the evaluator.<sup>110</sup> Furthermore, a student who receives only a letter grade or point total, rather than more detailed assessment of specific criteria, will struggle to find actionable feedback. A grade of A or F may convey to a student what went well—everything or nothing—but middling grades are not specific enough to convey to the student the various strengths and weaknesses demonstrated in the work product.<sup>111</sup>

Rubrics can be similar across assignments or they can be tailored.<sup>112</sup> For example, in a legal writing course with multiple assignments, I prefer to use consistent (or at least similar) rubrics for all assignments to help students see that my expectations are the same regardless of the subject matter of the assignment<sup>113</sup>: good

<sup>108</sup> VanZandt, *supra* note 48, at 358-59, 366.

<sup>109</sup> Competency-based assessment is superior to norm-based assessment in this context. Norm-based assessment is designed to rank students against one another, as opposed to competency-based assessment, which measures each student against a standard. In fact, there are three types of “benchmarking”: “norm-referenced” (e.g., using grading curves), “value-added/longitudinal” (comparing an individual’s performance to their own earlier performance), and “criterion-referenced” (measuring students against a standard). Hamm et al., *supra* note 59, at 383-84; Ramy, *supra* note 48, at 847-48 (stating that norm-referenced is ranking students versus their peers, while criterion-referenced “measures student performance in relation to a specific set of criteria”). The Daniel Webster Scholars Honors Program rates students against standards, not against a curve. Garvey, *supra* note 88, at 121.

<sup>110</sup> Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics—Explicit Grading Criteria*, 2004 MICH. ST. L. REV. 1, 7 (2004). Put another way, a rubric “articulates a framework for successful student learning by merging the criteria for the goal with a rating scale.” Hamm et al., *supra* note 59, at 375.

<sup>111</sup> Sparrow, *supra* note 110, at 8-9.

<sup>112</sup> John Erbes & Rebecca J. O’Neill, *Assessment of Professional Values in Experiential Education in Law: Becoming Who We Are Through Practice*, 62 N.Y.L. SCH. L. REV. 103, 115 (2017-2018) (describing a self-assessment tool tailored to a client interview task, in which the self-assessment was also essentially a guide to completing the assignment).

<sup>113</sup> Sparrow, *supra* note 110, at 25 (explaining that rubrics can be scaled for the level of the course, such that a 1L, 2L, or 3L rubric can be scaffolded versions of one another).

legal research, well-synthesized, with thorough analysis that includes comparison and contrast with precedent cases. This means that my rubrics do not contain “correct” answers, as a professor might prefer to use when grading traditional doctrinal final exams.<sup>114</sup>

My favorite rubrics for assessing experiential learning in law schools are those that describe the qualities present in the students’ work product and assign a competency level.<sup>115</sup> My rubrics include categories such as “Proficient,” “Adequate,” “Approaching,” and “Novice,” with descriptions of the quality of work I would expect to see in those categories.<sup>116</sup> I typically assign point values to each category and competency level so that my assessment also serves a grading function.<sup>117</sup> Importantly, student performance need not be flawless in order to be competent or proficient.<sup>118</sup> Assessors “are determining competency and that competency can include mistakes.”<sup>119</sup>

An example of a rubric for a trial brief written in a second-semester legal writing course is included in the Appendix.<sup>120</sup> This

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<sup>114</sup> Sparrow, *supra* note 110, at 8-9. Rubrics that include answers are typically the type used to calculate or justify a letter grade after submission of the work product; these rubrics may or may not be shown to students after the fact. *Id.*

<sup>115</sup> For another perspective on how to draft rubrics, see Hamm et al., *supra* note 59, at 375-76.

<sup>116</sup> Assessment of student work via this kind of performance criteria is sometimes called “Primary Trait Analysis.” BARBARA E. WALVOORD & VIRGINIA JOHNSON ANDERSON, EFFECTIVE GRADING: A TOOL FOR LEARNING AND ASSESSMENT 67 (1998). Word choice for these criteria descriptors can be up to the instructor; other category descriptors could include “highly competent,” “competent,” and “developing” (these are the terms used at Regent University School of Law). Hamm et al., *supra* note 60, at 380. Category descriptors could also include “competent,” “not yet competent,” and “merit.” Karen Barton, Patricia McKellar & Paul Maharg, *Authentic Fictions: Simulation, Professionalism and Legal Learning*, 14 CLINICAL L. REV. 143, 180 (2007). Additional category descriptors include “novice,” “advanced beginner,” “competent,” “proficient,” and “expert.” VanZandt, *supra* note 48, at 356 n.204 (citing MICHAEL ERAUT, DEVELOPING PROFESSIONAL KNOWLEDGE AND COMPETENCE 124 (1994)). Category descriptors could also range from “does not meet expectations” to “outstanding.” Erbes & O’Neill, *supra* note 112, at 120.

<sup>117</sup> See *supra* text accompanying note 94-96. See also WALVOORD & ANDERSON, *supra* note 116, at xvi-xvii (“[T]he warning that ‘you can’t use grades for assessment’ is a common shibboleth . . . [T]he grading process, when well employed by skillful teachers, can yield rich information about student learning.”).

<sup>118</sup> Hamm et al., *supra* note 59, at 385.

<sup>119</sup> *Id.* at 382.

<sup>120</sup> Editor’s note: see appendix starting on page 1177.

kind of rubric allows me to assess student work product against specific criteria and assign it a competency level, and, by extension, a point value. When I return the rubrics to students with their graded work product, they can see not only what assessment I gave their work but what stronger work product would have looked like.<sup>121</sup> This is designed to give the students actionable feedback for future assignments.<sup>122</sup>

Importantly, students engage with my rubrics before, during, and after they complete their assignment.<sup>123</sup> I distribute the rubric at the same time as the assignment materials and we spend class time discussing it. I explain how I developed it, and I point out which sections of the assignment are worth the most points. I explain that these point distributions reflect the importance of each component of the assignment.<sup>124</sup> For example, I find that law students often fail to adequately grapple with counterarguments, which is a skill that is important to me, so my rubrics often have a separate line for assessment of counterarguments, along with a hefty number of points assigned.<sup>125</sup>

After distributing the assignment and its rubric, I welcome student feedback on the rubric. Students are welcome to ask questions, raise concerns, or offer revisions to the rubric.<sup>126</sup> This process not only gives my adult students ownership over their

<sup>121</sup> See Sparrow, *supra* note 110, at 7. Teachers are encouraged to describe not just A-level work, but also B, C, and D-level work. *Id.* at 9.

<sup>122</sup> Julie Ross & Diana Donahoe, *Lighting the Fires of Learning in Law School: Implementing ABA Standard 314 by Incorporating Effective Formative Assessment Techniques Across the Curriculum*, 81 U. PITT. L. REV. 657, 672 (2020) (asserting that feedback should in fact feed-forward, providing the student information not just on the work product submitted but on future work).

<sup>123</sup> Author's Note: Because I use consistent rubrics throughout a semester, we can also use the rubric when discussing a sample answer—students can find it illustrative to assess someone else's writing. Interestingly, students are typically harsher critics than I am.

<sup>124</sup> See Sparrow, *supra* note 110, at 9 (stating that a rubric “direct[s] students to the most important tasks” by assigning points or a percentage of the score to specific tasks). See also Sparrow, *supra* note 37, at 565 (noting that “we [teachers] denote that these [things] are important” when we grade them).

<sup>125</sup> Sparrow, *supra* note 110, at 18-20 (noting that rubrics allow teachers to identify our priorities, then test and/or assess accordingly).

<sup>126</sup> Sparrow, *supra* note 37, at 569 (asserting that, where a foundational skill is “hard[er] to define and harder to measure [*e.g.*, being respectful] . . . it is extremely valuable to engage students in discussing this foundation skill” which is good andragogy).

learning but helps me help them: if the rubric is vague or incomprehensible to them, it is an ineffective learning tool.<sup>127</sup> By giving students a genuine opportunity to critique the rubric, we can collectively develop a rubric that is the most effective.

The rubric is finalized a reasonable amount of time before an assignment is due. I encourage students to use the rubric as a checklist as they revise and finalize their work product; if time permits, I use class time for this process. Students can bring a near-final draft to class, and I distribute copies of the finalized rubric. Students work quietly while I narrate my grading process via the rubric, and I encourage them to make notes of things they can improve in their drafts.

Once students have handed in their assignments, I begin grading using the finalized rubric (and by making comments in the margin of student submissions<sup>128</sup>). I use the rubric as-is, but I make notes to myself on how the rubric can be improved for the next class assignment.<sup>129</sup> These updates to the rubric are typically made in response to student work product that contains a quirk or weakness I had not anticipated. For example, the first time I used a qualitative rubric for a persuasive trial brief, I adapted the rubric I had used the previous semester for an objective office memo. The office memo rubric described a proficient rule section as one that “[s]ynthesizes relevant sources into one coherent rule framework” and “[p]resents rules in appropriate hierarchy/scaffold.” As I was grading the trial briefs, I realized that many briefs presented the

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<sup>127</sup> See, e.g., Heidi Goodrich Andrade & Beth A. Boulay, *Role of Rubric-Referenced Self-Assessment in Learning to Write*, 97 J. ED. RSCH. 21 (2003) (providing sample rubric for 7th and 8th grade students that describes a four-out-of-five score for “sentence fluency” as “[m]y essay marches along but doesn’t dance,” which I argue is too vague to provide specific feedback for improvement; by contrast, the description for five-out-of-five “sentence fluency” includes “my paper is a delight to read out loud,” which may be a more identifiable characteristic (emphasis added)).

<sup>128</sup> I endeavor to make my feedback temporary, specific, and hopeful. See generally Paula J. Manning, *Understanding the Impact of Inadequate Feedback: A Means to Reduce Law Student Psychological Distress, Increase Motivation, and Improve Learning Outcomes*, 43 CUMB. L. REV. 225 (2013).

<sup>129</sup> It is possible to revise rubrics during the grading process as the rubric’s weaknesses or vagueness becomes apparent. This can be done even if rubrics were distributed to students before the assignment was submitted, though, for fairness’ sake, students should be warned that the rubric may be revised during the grading process. Students will, by and large, be understanding so long as the instructor explains why and how mid-grading revision may take place. See Sparrow, *supra* note 110, at 35.

rules accurately but in unpersuasive ways, such as emphasizing the burden placed on the moving party. As a result, for the next iteration of the rubric, I added “[r]ules are effectively objective/persuasive for document’s purpose” to the “Proficient” category descriptor, and “[r]ules are presented objectively when they should be persuasive (or vice versa)” to the “Adequate” category.<sup>130</sup>

Once I have assessed all the students’ work product, I can begin adjusting my teaching to address demonstrated weaknesses.<sup>131</sup> These adjustments help complete the feedback loop which assessment is designed to facilitate: I teach the students, they show me what they learned, I teach more based on their current skill level.<sup>132</sup>

After students receive their assessments from me, I encourage them to review my feedback several times. I share that when I receive feedback on my own writing, I struggle at first to separate my emotional reaction from my cognitive one. I explain to students that if their feelings are hurt by my feedback, that is a natural and understandable reaction. Once their emotions are under control, I encourage them to review the feedback at least twice, once for surface-level corrections and again for the deeper, more substantive comments. I spend class time asking students to identify a few areas for improvement, including making a specific plan for how to make those improvements. “Do better next time” is not an actionable goal! But “Finalize text 24 hours before deadline and use remaining time to polish citations” is.<sup>133</sup> Spending class time

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<sup>130</sup> See Sparrow, *supra* note 110, at 9 n.27 (“I believe that all rubrics are ‘works in progress’ . . .”).

<sup>131</sup> For a table illustrating evidence of student learning and possible corrective measures, see TERRY et al., *supra* note 61, at 144.

<sup>132</sup> See MICHAEL HUNTER SCHWARTZ, SOPHIE SPARROW & GERALD HESS, *TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* 155–170 (2009) (describing the assessment cycle).

<sup>133</sup> One way to create an effective plan is to set “S.M.A.R.T. goals,”—goals that are specific, measurable, achievable, relevant, and time-bound. See *generally SMART Goals: A How to Guide*, in *PERFORMANCE APPRAISAL PLANNING 2016-2017*, at 3 (Univ. of Cal. 2016-2017), [https://www.ucop.edu/local-human-resources/\\_files/performance-appraisal/How%20to%20write%20SMART%20Goals%20v2.pdf](https://www.ucop.edu/local-human-resources/_files/performance-appraisal/How%20to%20write%20SMART%20Goals%20v2.pdf) [<https://perma.cc/UTG6-A4DM>].

grappling with, modeling, and discussing assessment is a valuable learning experience for students.<sup>134</sup>

## 2. Assessment by the Learner

The instructor is not the only person positioned to assess a student's competence. Self- and peer-assessment may be "ultimately more useful to students" than instructor assessment, particularly when the assessment is formative rather than summative.<sup>135</sup> After all, as practicing lawyers, today's students will have to edit their own work as well as provide and receive feedback to and from colleagues.

Self-assessment and peer-assessment promote active learning, facilitate the student's understanding of standards, foster the development of transferrable skills, cultivate life-long learning, and develop the skills required to give and receive feedback, all while reducing the time required for instructors to conduct assessment.<sup>136</sup> This subsection will discuss self-assessment, while the following subsection will discuss assessment by others (including peers).

Reflection should be done regularly.<sup>137</sup> Meaningful self-reflection "goes beyond merely considering what has happened — it requires an assessment of the assumptions underlying one's beliefs."<sup>138</sup> It "requires purposeful thinking and contextualizing of what is already known[;] relating learning to existing knowledge, values and beliefs[;] considering a range of solutions or options[;] and developing one's previous knowledge, values and beliefs."<sup>139</sup> Self-reflection may increase a student's emotional quotient, which may in turn reduce mental unwell-ness.<sup>140</sup>

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<sup>134</sup> Sparrow, *supra* note 37, at 565 ("[A]ssessment is teaching . . . [and] grading is a highly effective teaching and learning tool.").

<sup>135</sup> Chie Adachi, Joanna Hong-Meng Tai & Phillip Dawson, *Academics' Perceptions of the Benefits and Challenges of Self and Peer Assessment in Higher Education*, 43 ASSESSMENT & EVALUATION HIGHER EDUC. 294, 294 (2018).

<sup>136</sup> *Id.* at 294, 295-96. See also Nina W. Tarr, *The Skill of Evaluation as an Explicit Goal of Clinical Training*, 21 PAC. L.J. 967, 994 (1990) ("[Self-assessment] makes [students] lifetime learners, gives them independent responsibility for their own learning, helps them apply theory to reality, and facilitates the grading and feedback process.").

<sup>137</sup> Burton & McNamara, *supra* note 17, at 174.

<sup>138</sup> *Id.* at 175.

<sup>139</sup> *Id.* (footnotes omitted).

<sup>140</sup> *Id.* at 171-72.

Much of my discussion above, on how I use rubrics with students, demonstrates not only how I assess students as their instructor but also how I facilitate students' self-assessment. Using the rubric as a checklist or revision tool helps students "reflect on the quality of their work, judge the degree to which it reflects explicitly stated goals or criteria, and revise accordingly."<sup>141</sup> Students do not instinctively understand how to self-assess their work, particularly because as novices in the given field, they do not yet know what high-quality work looks like.<sup>142</sup> Instructors must teach students how to self-assess by defining criteria, teaching students how to apply the criteria, and giving students feedback on their self-assessment.<sup>143</sup> Self-assessment tools can be teaching documents, such as a self-assessment guide on a client interview assignment which in turn creates a structure for students to follow during the interview.<sup>144</sup> Instructors' sense of assessment as a burden can be lessened if we think of assessment as a teaching practice.

"[K]ey themes of reflection [include]: purposeful thinking and contextualizing[sic] of what is already known; relating learning to existing knowledge values and beliefs; considering a range of solutions or options; and developing one's knowledge, values and beliefs."<sup>145</sup> Reflection is thus more than the student simply describing what they have done; rather, reflection involves the student's insights into their own work, connecting it to previous knowledge, assessing their own assumptions, and generating options for different future performance.<sup>146</sup>

Reflection, carefully designed, can serve as an important self-assessment in which the student gives themselves feedback that is

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<sup>141</sup> Heidi Andrade & Anna Valtcheva, *Promoting Learning and Achievement Through Self-Assessment*, 48 THEORY INTO PRAC. 12, 13 (2009).

<sup>142</sup> See Peggy Cooper Davis, *Casebooks, Learning Theory, and the Need to Manage Uncertainty*, in LEGAL EDUCATION IN THE DIGITAL AGE 243 (Edward Rubin ed., 2012) ("To be effective, simulations must both encourage students to be reflective and function at the 'growing edge' of the students' abilities.").

<sup>143</sup> Andrade & Valtcheva, *supra* note 141, at 17.

<sup>144</sup> Erbes & O'Neill, *supra* note 112, at 115. For a sample rubric, see *id.* at 123.

<sup>145</sup> Burton & McNamara, *supra* note 17, at 181-82.

<sup>146</sup> *Id.* at 182. For a sample rubric for assessing reflection, see *id.* at 187.

no less valuable than that provided by observers, such as faculty.<sup>147</sup> The quality of a student's self-reflection can itself be assessed with a rubric.<sup>148</sup> The rubric should articulate or explain various levels of proficiency, so that when one level is selected on the rubric, the student can understand where their performance exists on a continuum of competence.<sup>149</sup> Additionally, students can be given samples of previous student work so they can, with instructor guidance, assess that work against the rubric; this way, the students develop an understanding of what work product is expected and appropriate.<sup>150</sup> Self-evaluation is "consciously attempting to step into the shoes of a critic."<sup>151</sup>

### 3. Assessment by Others

Assessment from a variety of sources can be used to triangulate accurate information about a student's competency; instructors are natural assessors, and students themselves can provide valuable information about their progress toward competency. Third parties can also provide insights. These third parties may include peer students, employers, clients, and even the

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<sup>147</sup> The Daniel Webster Scholar Honors Program at the University of New Hampshire Franklin Pierce School of Law utilizes journals and self-reflection in numerous classes, such as Pretrial Advocacy. GERKMAN & HARMAN, *supra* note 88, at 10. These self-assessments form part of the portfolio of materials reviewed by bar examiners in determining the students' competencies to practice. Garvey, *supra* note 88, at 121.

<sup>148</sup> See generally Jodi S. Balsam, Susan L. Brooks & Margaret Reuter, *Assessing Law Students as Reflective Practitioners*, 62 N.Y.L. SCH. L. REV. 49 (2018). See also HUBA & FREED, *supra* note 61, at 251-52 (providing a framework for assessing a student's self-assessment).

<sup>149</sup> See Balsam et al., *supra* note 148, at 56-57; Brown, *supra* note 30, at 173 ("[P]rofessional formation transpires in a continuum, not as an instant magical moment of transformation.").

<sup>150</sup> See Balsam et al., *supra* note 148, at 56-57 (discussing how the authors specify that they spend class time discussing the sample work product and debriefing with the students in order to calibrate expectations).

<sup>151</sup> Ross & Donahoe, *supra* note 122, at 675.



actors role-playing in simulations.<sup>152</sup> This subsection focuses primarily on peer assessment.

Peer evaluation, along with self-assessment, can be effective “to deepen student understanding, encourage student cooperation, and develop students’ abilities to be self-regulated learners.”<sup>153</sup> Both “serve as a complement to professor feedback and allow students to gain both confidence and authority in accomplishing the goals of the course.”<sup>154</sup> “Students often create their own peer review environments when they work in study groups or on collaborative projects.”<sup>155</sup> After all, “[t]he ultimate goal of formative assessment is for students to be able to evaluate and revise their own work.”<sup>156</sup> Peer assessment supports students as they “assist and [develop] respect [for] fellow pupils.”<sup>157</sup>

Specific conditions for quality assessment exercises include: (1) delineating clear criteria or goals on which to base the assessment; (2) performing specific tasks, rubrics, or checklists for the assessment; (3) modeling by the professor; (4) providing an opportunity for reflection; and (5) carefully considering the timing of the formative assessment.<sup>158</sup>

Perhaps especially in the law school context, however, peer assessment can be emotionally fraught. Law students are

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<sup>152</sup> See Miller, *supra* note 78, at S65 (describing the use of standardized patients in medical school training and suggesting, in the medical education context, that standardized patients could be trained to assess student performance). Miller cautions, however, that more study of the use of standardized patients is necessary before incorporating them more fully into medical certification procedures. *Id.* at S66. Miller suggests that standardized patients could potentially be used to assess only certain skills, but which ones those might be is a question yet to be answered. *Id.* Medical education also makes use of mannequins (personified by their names, Stan and Harvey) in some experiential education settings. Binder & Bergman, *supra* note 17, at 211-12. By contrast, the use of standardized clients in legal education is described in one program. See Garvey, *supra* note 88, at 121-22.

<sup>153</sup> Ross & Donahoe, *supra* note 122, at 662.

<sup>154</sup> *Id.* at 673.

<sup>155</sup> *Id.* at 677.

<sup>156</sup> ORG. FOR ECON. COOP. & DEV., FORMATIVE ASSESSMENT: IMPROVING LEARNING IN SECONDARY CLASSROOMS 65 (2005).

<sup>157</sup> Ross & Donahoe, *supra* note 122, at 677 (quoting Owasso Indep. Sch. Dist. No. 1-011 v. Folvo, 534 US 426, 433 (2002)).

<sup>158</sup> *Id.* at 677-78 (citing SCHWARTZ et al., *supra* note 73, at 262-63).

competitive and typically graded on a curve, and they are often hyper-aware that getting good grades requires “beating out” their classmates. Care should be taken to ensure that peer assessment is a positive learning experience.<sup>159</sup> Peer assessments should not figure into the grade of the student being assessed, though instructors could conceivably encourage quality feedback by grading the peer *providing* the assessment on the thoughtfulness and thoroughness of the feedback.

I tend to use peer assessment in upper-level classes, where students are more confident, and are somewhat beyond the intense grade (and curve) stresses of the 1L year. I am also more likely to use peer assessment in small classes, where students have had the opportunity to develop a sense of community and trust in the classroom—I do not introduce peer assessment until midway into the semester in order to allow for some camaraderie to develop. Furthermore, I allow students to select their own partners for peer review. Even though I typically have a good sense of the students’ interpersonal dynamics by the time I introduce peer assessment, I do not presume to know the extent to which they trust each other to give and receive feedback. Choosing their own partners may mean that they gravitate toward peers who will not push or challenge them; while this may be sub-optimal from a learning standpoint, I would rather they get watered-down feedback than emotionally damaging feedback.

### C. Summary

Using these practices, *better* grading can itself be “a tool to improve our students’ learning,” “evaluate students more effectively and efficiently,” allow faculty to “better plan individual courses and the law school curriculum,” and “improve a [grading] procedure already prominent in legal education.”<sup>160</sup> Assessment can be made less unpleasant and more exciting when it is reframed as teaching rather than grading.

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<sup>159</sup> See generally Cassandra L. Hill, *Peer Editing: A Comprehensive Pedagogical Approach to Maximize Assessment Opportunities, Integrate Collaborative Learning, and Achieve Desired Outcomes*, 11 NEV. L.J. 667, 669-70 (2011).

<sup>160</sup> Sparrow, *supra* note 110, at 5.

None of the foregoing is intended to convey that the Socratic method is inappropriate in law school learning. Admittedly, “use of the Socratic method falls in the low- to mid-level of the [skills] taxonomy [a]nd . . . evaluates only the student called on.”<sup>161</sup> Yet it can still be effectively deployed in the classroom; faculty should just be mindful of what the Socratic method does and does not accomplish.<sup>162</sup>

### III. ASSESSING A PROGRAM OF LEGAL EDUCATION

In addition to assessing individual students for competencies, the educational program, as a whole, needs to be periodically assessed,<sup>163</sup> whether or not the institution is participating in a modern diploma privilege licensure framework.<sup>164</sup> This inquiry asks whether the educational program generally is teaching what it purports to. The institution-wide review should consider whether the students as a group are generally meeting the institution’s expectations, as opposed to measuring the competency of individual students.<sup>165</sup> Institutional review can also consider whether the institutional goals are still appropriate or whether they need to be adjusted. Put another way, institutional assessment asks whether the educational program is meeting the needs of the public, whether or not a modern diploma privilege is in place: is the educational program ensuring graduates have the competencies required of newly-licensed attorneys?<sup>166</sup>

In assessing the entire program of legal education, law schools can ask themselves tough questions about what knowledge and

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<sup>161</sup> Larson, *supra* note 17, at 21.

<sup>162</sup> *Id.* at 21-22 (exhorting faculty to “be honest” with themselves about the strengths and weaknesses of the Socratic method).

<sup>163</sup> VanZandt, *supra* note 48, at 320 (“[I]nstitutional or programmatic assessment looks at what an institution offers as a whole . . .”). For advice on undertaking this process, see generally SHAW & VANZANDT, *supra* note 73.

<sup>164</sup> See Christopher, *supra* note 2, at 2826.

<sup>165</sup> See WALVOORD, *supra* note 42, at 4.

<sup>166</sup> See Allison Korn & Laila L. Hlass, *Assessing the Experiential (R)Evolution*, 65 VILL. L. REV. 713, 761 (2020) (asking whether an educational program is meeting the community’s needs).

skills the curriculum imparts to students.<sup>167</sup> These decisions will be reflected in the school's program-wide learning outcomes.<sup>168</sup> For example, one of Texas Tech University School of Law's program-wide student learning outcomes is:

**“Legal Analysis, Reasoning and Problem-Solving.”**

. . . Graduates will demonstrate competent skills in legal analysis, reasoning, and problem-solving, including the following skills:

- (1) accurately identify the material facts, procedural history, issues on appeal, rules of law, reasoning, holding, and policy in appellate court opinions;
- (2) identify and describe legal issues implicated by a factual scenario;
- (3) identify and describe relevant legal authority applicable to identified legal issues;
- (4) identify and describe key rules and reasoning contained within applicable authority;
- (5) effectively synthesize and reconcile multiple legal authorities when applicable;
- (6) effectively analogize and distinguish precedent, and

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<sup>167</sup> See generally Rebecca Lutkenhaus & Karen Wallace, *Assessing the Effectiveness of Single-Session Legal Research Skill Instruction Through Pre- and Post-Testing: A Case Study*, 107 L. LIBR. J. 57 (2015) (describing how law librarians assessed the value of a workshop given to law students on how to find journal articles and use the online catalog to locate books).

<sup>168</sup> Program learning outcomes should be developed for the entire law school institution. “Unlike performance criteria for course learning outcomes, statements pertaining to program level outcomes should be drafted *broadly*, but with enough specificity to identify exactly how the knowledge, skill, or value at issue will be demonstrated.” Hamm et al., *supra* note 59, at 377. One process for developing those program learning outcomes suggests: “1. Agree on goals and objectives for learning. 2. Design and implement a thoughtful approach to assessment planning. 3. Involve [stakeholders]. 4. Select or design and implement data collection approaches. 5. Examine, share, and act on assessment findings. 6. Regularly reexamine the assessment process.” *Id.* at 370 (alteration in original) (quoting TRUDY W. BANTA & CATHERINE A. PALOMBA, *ASSESSMENT ESSENTIALS: PLANNING, IMPLEMENTING, AND IMPROVING ASSESSMENT IN HIGHER EDUCATION* 15 (2d ed. 2015)).

(7) propose reasonable resolutions to legal problems.<sup>169</sup>

Student learning outcomes articulated for each class should align with the program learning outcomes designed for the educational experience as a whole.<sup>170</sup> This can be accomplished by developing a master rubric for the program, then adapting that master rubric for each class, even drilling down to individual assignments in the classes.<sup>171</sup>

Lacking a master rubric, assignment rubrics can explicitly assess competencies articulated in the course's and the program's learning outcomes. For example, Texas Tech Law expects graduates to be able to "identify and describe relevant legal authority applicable to identified legal issues," which my rubric assesses in the "Explanation" section: the rubric describes "proficient" work in which "precedent cases are relevant, with enough cases to give full picture of legal issues;" "cases are summarized succinctly but with enough context;" and the "summaries focus on the legal issue(s) to be discussed in Application section."<sup>172</sup> Likewise, Texas Tech Law's expectation that graduates be able to "identify and describe key rules and reasoning contained within applicable authority" and "effectively

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<sup>169</sup> TEX. TECH UNIV. OFF. OF PLAN. & ASSESSMENT, School of Law Program Assessment Plan (Jul. 12, 2021, 11:16 AM), <https://www.depts.ttu.edu/opa/studentsparents/law.php> [https://perma.cc/X6EN-SK6D] (emphasis added).

<sup>170</sup> Korn & Hlass, *supra* note 166, at 761 ("[C]onsider reviewing and assessing experiential course syllabi, learning outcomes . . . and teaching methods amidst larger institutional and programmatic objectives."). Barry offers a description of Vermont Law School's process of developing program learning outcomes and mapping where those outcomes are taught and assessed in the existing curriculum. Barry, *supra* note 45, at 148-50. During this process, the faculty noted the importance of curricular sequencing, so that students learned, then did, demonstrating competencies. *Id.* at 150-51.

<sup>171</sup> Hamm et al., *supra* note 59, at 390. Curcio proposes "a relatively simple and low-cost model to measure institutional learning outcomes [per the ABA Standards requirement] that does not require any initial changes or disruption to individual faculty members' pedagogical and assessment methods." Curcio, *supra* note 60, at 489. This five-step process includes "develop[ing] a rubric," "decid[ing] which courses will employ the rubric," "grad[ing] as usual and then complet[ing] the rubric," "[d]ecid[ing] [w]hether to [u]se the [r]ubrics for [f]ormative [a]ssessment and [deciding] [h]ow [t]o [d]o [d]ata [e]ntry," and finally, "[a]nalyz[ing] and [u]s[ing] the [d]ata to [i]mprove [s]tudent [l]earning." *Id.* at 493-509. If the assessment is being used formatively, the rubric would be shown to students. *Id.* at 507.

<sup>172</sup> Editor's Note: See Appendix starting on page 1177.

synthesize and reconcile multiple legal authorities when applicable” is assessed in my rubric under the “Rules” section: the rubric describes “proficient” work as that which “synthesizes relevant sources into one coherent rule framework;” “rules presented in appropriate hierarchy/scaffold;” and “Rules are effectively objective/persuasive for document’s purpose.”<sup>173</sup> As another example, Texas Tech Law’s expectation that graduates be able to “effectively analogize and distinguish precedent” is assessed in my rubric under “Analysis,” where the rubric describes proficient work as that in which “specific facts [are] identified, explaining legal significance, with explicit reference to rules” and where the work product “illuminates factual and legal similarities to precedent cases.”<sup>174</sup>

Institutions should also periodically review alignment between course-level learning outcomes, program-wide learning outcomes, and the competencies desired for practice.<sup>175</sup> Importantly, this review need not be a frantic, constant concern: “processes that are patient and iterative are more likely to lead to change.”<sup>176</sup>

While it is undoubtedly the responsibility of students to develop competencies, it is the responsibility of law schools to develop a competency-based curriculum.<sup>177</sup> In order to provide the best experiential legal education they can, law schools should build on recent innovations regarding strategic planning, evaluating learning outcomes, utilizing tenured faculty as well as practitioners, and the profession’s interest in access to justice.<sup>178</sup>

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<sup>173</sup> Editor’s Note: *See* Appendix starting on page 1177.

<sup>174</sup> *Id.*

<sup>175</sup> *See* Wegner, *supra* note 81, at 449-58 (posing questions and offering guidance for institutional self-assessment, including how to develop, track, and interrogate school-wide learning outcomes; assess whether learning outcomes are being achieved; and track achievement). Relatedly, Wegner suggests that institutions should examine the efficacy of academic support interventions, both those offered early in legal education and later/during bar prep. *Id.* at 433-39. Wegner also attempts a review of what student learning outcomes schools are adopting while acknowledging that it was unknowable at the time of writing “[h]ow well . . . learning outcomes [are] being employed to guide law schools’ curriculum and other programming.” *Id.* at 448.

<sup>176</sup> Bahls, *supra* note 40, at 405. Curcio recommends assessing the institution on a multi-year cycle. *See* Curcio, *supra* note 60, at 512-13.

<sup>177</sup> *See* Hamilton, *supra* note 54, at 26-30.

<sup>178</sup> *See* Krantz & Millemann, *supra* note 30, at 41-57.

Assessing the program need not require reviewing each individual student's competencies; a representative sample may be taken.<sup>179</sup> Schools should delineate a percentage of individuals who demonstrate competence that would be considered satisfactory, such as seventy-five percent.<sup>180</sup> This would be the benchmark to determine whether the program of legal education is teaching what it purports to.

The same validity, reliability, and fairness concerns apply to institutional assessment as to individual student assessment.<sup>181</sup> In this regard, reliability can be tricky; "variability in raters' assessments of the same student work leads to potential reliability problems with the data."<sup>182</sup> For this reason, consistency in individual assessment is important. Of course, perfect consistency may be unattainable, as some level of judgment must be exercised by the rater, but "[w]e are not caught between 'objectivity' . . . and 'subjectivity'. . . . Between those two poles stands informed judgment of work in our fields."<sup>183</sup> Rather, the challenge as educators is to acknowledge our fallibility while working as hard as possible to eliminate it.<sup>184</sup> Raters may differ in terms of what they focus on and how they score, which may be influenced by the raters' own backgrounds, training, experiences, behaviors, and decision-

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<sup>179</sup> See Curcio, *supra* note 60, at 502 n.53 (first citing SHAW & VANZANDT, *supra* note 73, at 114-15; and then citing FUNK, *supra* note 86, at 37).

<sup>180</sup> Hamm et al., *supra* note 59, at 385. "[U]sing a rubric for program assessment is different than using one to grade student work. . . . [T]he ultimate objective is to capture a sufficient set or sampling of data, and use the aggregated scores to determine the average skill level" of the cohort. *Id.* at 375. Program learning outcomes should be assessed using "criterion-referenced" benchmarking rather than norm-referenced or value-added/longitudinal. *Id.* at 383-84.

<sup>181</sup> See *supra* text accompanying notes 96-98.

<sup>182</sup> Curcio, *supra* note 60, at 510.

<sup>183</sup> Sparrow, *supra* note 37, at 570 (quoting WALVOORD, *supra* note 42, at 6-7).

<sup>184</sup> Balsam et al., *supra* note 148, at 67 ("Our deep belief is that assessment of any work that requires critical thinking is inherently and fundamentally subjective. If we accept that premise, then the question becomes, how we can work with any given assessment to maximize clarity, transparency, coherence, and accountability?").

making.<sup>185</sup> (Though such “rater effects” may exist, they do not always result in different scores as between raters).<sup>186</sup>

Just as the instructors are not the be-all and end-all of assessing student competencies, they need not be the exclusive arbiters in assessing the program’s effectiveness. For example, students could assess the program’s effectiveness,<sup>187</sup> as could alumni, employers, local practitioners, clients, and community members.<sup>188</sup> Third parties, such as the Law School Survey of Student Engagement project, may also be able to provide actionable feedback.<sup>189</sup>

Furthermore, just as with student assessment, institutional assessment must “close the loop”: data on program efficacy should not simply be collected but should be analyzed, and the results of the analysis should be shared with stakeholders, particularly faculty.<sup>190</sup> If the results are favorable, the law school can keep doing what it’s doing; if results are less than favorable, adjustments should be made.<sup>191</sup> Pilot programs can be employed to test small-scale revisions to educational programs.<sup>192</sup>

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<sup>185</sup> Qie Han, *Rater Cognition in L2 Speaking Assessment: A Review of the Literature*, 16 TCHRS. COLL., COLUM. UNIV. WORKING PAPERS TESOL & APPLIED LINGUISTICS, 1, 4 (2015) (surveying assessment of the speaking skills of second-language learners). This is obviously very different than assessing experiential legal education.

<sup>186</sup> *Id.* at 2. The author notes that, in the context of assessing the speaking skills of second language learners, “automated scoring systems are gaining potential.” *Id.*

<sup>187</sup> See Susan L. Brooks, Cynthia Adcock, Stephen Ellmann, Robert L. Jones, Jr., Christine Cimini & Margaret Barry, *Experience in the Future: Papers from the Second National Symposium on Experiential Education in Law: Alliance for Experiential Learning in Law*, 7 ELON L. REV. 1, 12 (2015).

<sup>188</sup> Data collection and analysis may raise ethical concerns; institutions should consult with their Institutional Review Boards to address any ethical issues. See VanZandt, *supra* note 48, at 356 (“In addition to being reliable, valid, and fair, assessment must also be ethical.”). See also TEX. TECH UNIV. HUM. RSCH. PROT. PROGRAM, *Does Your Project Need an IRB?* (Mar. 8, 2023, 11:54 AM), <https://www.depts.ttu.edu/research/irb/does-project-need-approval.php> [<https://perma.cc/XTH5-GW5V>].

<sup>189</sup> See generally Law School Survey of Student Engagement – Understanding Legal Education, <https://lssse.indiana.edu/who-we-are/> [<https://perma.cc/49AG-3EK2>] (“Through our research functions, we are a source of macro-level, empirical information about the law student experience.”).

<sup>190</sup> Hamm et al., *supra* note 59, at 386.

<sup>191</sup> See Sparrow, *supra* note 37, at 572.

<sup>192</sup> See Hamm et al., *supra* note 59, at 388.



Importantly, institutions should have the confidence to undertake this kind of self-assessment without feeling the threat of accreditors such as the ABA looking unfavorably upon them: “accrediting bodies are much more likely to be impressed by an institution that identifies areas of improvement and modifies its program to address such areas. Accrediting bodies can be rightly skeptical of an institution whose results suggest it need no improvements.”<sup>193</sup> Likewise, the ABA should publicly demonstrate support and flexibility for law schools’ efforts to assess and revise their curricula.<sup>194</sup>

### CONCLUSION

Experiential legal education goes beyond teaching students what the law *is* to instead help them learn what to *do* with that law in practice. This Article describes the value of experiential legal education and discusses how to assess individual student competencies, particularly by reframing assessment as a teaching process rather than a grading one. This Article also discusses how to effectively assess institution-wide educational programs, so all stakeholders—including the public—can be assured that law students graduate with the competencies they need to begin the practice of law.

Assessing skills is more nuanced than assessing knowledge: asking whether a student can recite the factors that courts consider in making child custody determinations is not nearly as complex as assessing whether a student can effectively counsel a client about whether they are likely to retain custody of their children. It is precisely because experiential education is so crucial that law schools must think critically about how to assess the skills and values taught.

Although this Article has attempted to incorporate interdisciplinary assessment research and apply it to the narrower issue of experiential legal education, this Article is by no means

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<sup>193</sup> *Id.* at 391. Curcio recommends law schools decide what success looks like, but also focus on analyzing data, developing a plan of improvement, and implementing that plan. Curcio, *supra* note 60, at 513.

<sup>194</sup> Thies, *supra* note 57, at 599 (“[T]he [ABA] Section [should] adjust its accreditation standards so that schools have more freedom to incorporate adjunct faculty into their educational programs.”). For further discussion, see *id.* at 618-22.

comprehensive. For example, future research should consider assessment of law school instructors,<sup>195</sup> including full-time law school instructors, part-time instructors such as adjunct faculty, and practitioners who supervise law students in externship scenarios.<sup>196</sup> Because practitioners are well-positioned to teach and assess experiential legal education, they should be trained quickly to conduct effective assessment. Future research should consider best practices to train and assess experiential law teaching as efficiently as possible.<sup>197</sup> Additional research may also be warranted in the assessment of online or distance learning, whether synchronous or asynchronous.<sup>198</sup>

Although assessing student competencies is an integral part of my modern diploma privilege proposal, valuable experiential education is essential for every law student's success, regardless of their pathway to licensure. In asking whether a law student possesses certain competencies, and whether an institution's program of legal education is properly preparing students generally for the practice of law, assessment is key. This Article has explained what should be assessed, who can do that assessment, and how best that assessment can be conducted.

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<sup>195</sup> See, e.g., TERRY et al., *supra* note 61, at 177-244. The entire third section of this book is devoted to the assessment of teaching, both formative and summative. *Id.* See also Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 44 (1996) (concluding that the high number of responses to a survey on teaching methods indicates that professors care deeply about teaching, or "[a]t the very least, it seems that law professors are asking more questions about the broader educational context of the training program, and not just about the substance of the courses").

<sup>196</sup> See Korn & Hlass, *supra* note 166, at 761 (noting the need for "training and professional development for adjunct faculty on experiential pedagogy and methodologies, as well as regular assessment of their teaching and coaching, where necessary and possible").

<sup>197</sup> This may be particularly true for a busy practitioner. Some have already recognized the imperative to distill information efficiently for adjuncts. For example, Schwartz, Sparrow, and Hess have a page book for law professors called *Teaching Law by Design*. See generally MICHAEL H. SCHWARTZ ET AL., *ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* (2nd ed. 2017). The same authors have a book called *Teaching Law by Design for Adjuncts*. See generally SOPHIE M. SPARROW ET AL., *TEACHING LAW BY DESIGN FOR ADJUNCTS* (2010).

<sup>198</sup> See WALVOORD, *supra* note 42, at 4.

## APPENDIX

Component	Proficient (100%)	Adequate (75%)	Approaching (50%)	Novice (25%)
<b>Introduction/ Statement of the Case (10 pts)</b>	Introduces legal standard, salient facts, states or implies conclusion  Details are carefully selected Framed persuasively	Rules and facts recited, legal conclusion is evident (stated or implied), but presented objectively rather than persuasively  Accurate but wordy/overlong; too many details included	Rules, facts, and conclusion are present but too vague to be compelling	Legal conclusion asserted without support or explanation  Facts presented are absent or not compelling Rules are absent, inaccurate, or irrelevant
<b>Statement of Facts (20 pts)</b>	All legally relevant facts included, organized so as to be easy to read, tells a story that generates empathy for the client	All legally relevant facts included, organized so as to be easy to read, but does not generate emotional resonance for any individuals  Overly melodramatic	Most legally relevant facts included, but not well-organized; story is disjointed and no characters stand out as being sympathetic	Story is bare-bones with significant facts missing  Disorganized, difficult to follow
<b>Headline (5 pts)</b>	Issue or Conclusion clear and precise	Precise but difficult to read	Issue identified too generally Conclusion stated without explanation or context	Issue is not the one assigned No headline present
<b>Rules (10 pts)</b>	Synthesizes relevant sources into one	Rules recited accurately but	Rules recited accurately but	Rules stated inaccurately

	<p>coherent rule framework</p> <p>Rules presented in appropriate hierarchy/scaffold</p> <p>Rules are effectively objective/persuasive for document's purpose</p>	<p>connections not explained</p> <p>Narrow rules presented accurately but without context</p> <p>Rules are presented objectively when they should be persuasive (or vice versa)</p> <p>Too many (accurate) rules in a single paragraph</p> <p>Emphasis on persuasive sources, not mandatory</p>	<p>without citation to authority</p> <p>Rules recited accurately but not in appropriate hierarchy/scaffold</p> <p>Includes accurate but irrelevant rules</p> <p>New (accurate) rules introduced in Application section</p> <p>Extensive, unnecessary quotations</p>	<p>Rules not presented at outset of analysis</p> <p>Rules referenced in Analysis but not recited in standalone sentences/paragraph</p>
<b>Explanation (15 pts)</b>	<p>Precedent cases are relevant, with enough cases to give full picture of legal issues</p> <p>Cases are summarized succinctly but with enough context</p>	<p>Precedent cases described accurately but in too much detail and/or summarizing legal issues not relevant to Application section</p> <p>Cases are summarized accurately but multiple cases make duplicative point</p>	<p>Precedent cases present but described in confusing order/terms, or are summarized so generally that the court's reasoning is not clear</p> <p>Not enough cases: examples do not provide full picture of legal issues</p>	<p>Precedent cases described incorrectly or so vaguely the legal issue, conclusion, or analysis not evident</p>

	Summaries focus on the legal issue(s) to be discussed in Application section	Cases summarized concisely but without helpful takeaway	Disjointed, does not present logical flow of analysis	
<b>Analysis (40 pts)</b>	Specific facts identified, explaining legal significance, with explicit reference to rules	Similarities to precedent are referenced but not articulated/discussed	Facts referenced only generally, with attempt to demonstrate legal significance	Conclusory: conclusion asserted without explaining which facts have what legal significance and why the conclusion is correct
	Illuminates factual and legal similarities to precedent cases Demonstrates critical thinking and appropriate weighing of legal significance	Numerous significant facts are recited but not analyzed; no legal significance demonstrated	A few significant facts are recited but not analyzed; no legal significance demonstrated	Extensive analysis of legal issue not in dispute
		Over-analysis of simple issues Skips threshold issue, but discusses underlying issue(s) well	Under-analysis of more complex issues	Few facts recited and legal conclusion reached with no "because" explaining connection
			Analysis paragraphs end with discussion of precedent instead of instant case	No compare/contrast to precedent
			Minimal compare/contrast to precedent Compare/contrast is attempted but is confusing/inapt	Missed issue(s): important legal question(s) unaddressed

<p><b>Counter-argument</b> (15 pts)</p>	<p>Acknowledges facts/arguments that go against the legal conclusion and explains why they do not change the outcome</p> <p>Describes, but does not <i>make</i>, opposing argument</p>	<p>Acknowledges facts/arguments that go against the legal conclusion but fails to demonstrate comprehensively why they are not successful; emphasis on counterargument is too effective</p> <p>Analysis is logical but does not incorporate sufficient precedent</p>	<p>Attempts to address counterarguments, but avoids strongest ones</p>	<p>Does not acknowledge any counterarguments or admit to any facts that go against the conclusion</p>
<p><b>Conclusion</b> (5 pts)</p>	<p>Summarizes legal argument thoroughly yet concisely persuasive</p>	<p>Accurate summary but overlong</p>	<p>Summary is attempted but does not accurately capture the order and balance of the argument</p>	<p>Conclusion is boilerplate, inaccurate, or absent</p>
<p><b>Organization &amp; Writing</b> (15 pts)</p>	<p>Logical paragraphing: one topic per paragraph with helpful topic sentences</p> <p>Words used precisely and accurately 0 to 1 spelling, grammar, or punctuation error (typos)</p>	<p>Logical paragraphing: one topic per paragraph with some helpful topic sentences Topic sentences objective when they should be persuasive (or vice versa)</p> <p>Paragraphs are organized but overlong; rather duplicative /redundant</p>	<p>Logical paragraphing: one topic per paragraph but no helpful topic sentences</p> <p>Multiple/consistent inaccurate/ imprecise word uses</p> <p>Multiple/</p>	<p>Multiple topics combined in a single paragraph, no topic sentences to guide understanding</p> <p>Very distracting inaccurate/ imprecise word uses</p> <p>Very distracting spelling,</p>

		1 or 2 inaccurate/ imprecise word uses (typos) 2-4 spelling, grammar, or punctuation errors (typos)	consistent spelling, grammar, or punctuation errors  Extremely duplicative/ redundant  Headings confusing	grammar, or punctuation errors
<b>Citations (15 pts)</b>	0 to 1 major errors (mistakes that prevent the reader from finding the source)  0 to 5 minor errors (stylistic mistakes that do not prevent the reader from finding the source)	2 to 4 major errors  6 to 10 minor errors	5 to 8 major errors  11 to 15 minor errors	9 or more major errors  16 or more minor errors

