

# Legal Education and *Moneyball*: The Art of Winning the Assessment Game

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## I. INTRODUCTION

Legal education is woefully deficient in the use of data to measure the quality of a law school. In the 1950s educators believed legal education had “two related objectives—the training of lawyers, and the improvement of the law.”<sup>1</sup> These men went on to write that “[t]he latter objective in particular requires not merely that poor law schools be eliminated but that the best law schools be made better.”<sup>2</sup> While those objectives remain true, legal educators are no longer calling for the closing of poor law schools. One possible reason is the legal profession is unaware which the poor law schools might be.

Measuring education, particularly legal education, is difficult. The American Bar Association (“ABA”) uses published standards, site visits and accreditation to certify which law schools pass the minimum criteria, but few agencies, if any at all, are using objective metrics to measure the quality of legal education beyond these minimums. Outcome measures and assessments are the tools educators employ to try to measure student proficiency and the quality of education provided by an institution. For example, elementary and secondary educators rely on standardized tests and course grades as a major measure of quality. Even as educators become more sophisticated in understanding educational quality, the nature of education makes objectivity a problem. Legal education has additional challenges because beyond the usual difficulty in educational assessment law students are pursuing diverse careers and require a wide range of intangible skills to achieve proficiency.

According to Professor Judith Welch Wegner, co-author of a report titled *Educating Lawyers* sponsored by the Carnegie Foundation for the Advancement of Teaching (“Carnegie Report”) and leading scholar on this topic,

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<sup>1</sup> ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 122 (1953) (citing JOSEPH A. MCCLAIN, JR. ET AL., LEGAL EDUCATION AND ADMISSIONS TO THE BAR IN CALIFORNIA 139 (1949)).

<sup>2</sup> *Id.*

*Educational quality* is an important criterion that students may be ill-situated to assess. Proxies for educational quality may include student retention and graduation rates, and performance on the bar examination. However, law schools need to do a better job of assessing the effectiveness of their educational efforts throughout the course of legal education in order to candidly respond to this consideration.<sup>3</sup>

To an outsider in an industry like finance or business, it must appear that legal education is ripe for analysis. Data can be processed and understood to make sense of patterns and probabilities in human behavior. Instead, legal education defies objective assessment. Some have attributed this defiance to neglect. For example, Robert MacCrate accused legal educators of trying to “avoid responsibility for some of the more grievous shortcomings of the profession” while at the same time adding “20,000 to 30,000 new lawyers to the bar each year.”<sup>4</sup>

This Note is not looking to point the proverbial finger at any members of the legal profession, but rather to understand the relationship between legal education and statistical analysis. The conventional wisdom within the field is that legal education defies objective measurement.<sup>5</sup> Professor Ira P. Robbins writes that “objectively determining the quality of a legal education obtained at a particular law school in comparison with other law schools is a chimerical goal.”<sup>6</sup> In response, this Note investigates whether outcome measures and institutional assessment are actually impossible or whether an objective standard to measure the quality of all law schools will be developed.

The ABA accreditation process is preparing to make learning outcomes and institutional assessment a priority focus for American law schools; the legal education community can either continue to resist the cultural momentum favoring objective data or begin to rethink objective assessment methods that can be used to measure institutional quality. On July 27, 2008 the ABA’s Section on Legal Education and Admission to the

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<sup>3</sup> Judith Welch Wegner, *Response: More Complicated Than We Think*, 59 J. LEGAL EDUC. 623, 639 (2010). The Carnegie report will be discussed further in Part I.

<sup>4</sup> Robert MacCrate, *Yesterday, Today and Tomorrow: Building the Continuum of Legal Education and Professional Development*, 10 CLINICAL L. REV. 805, 821 (2004).

<sup>5</sup> See, e.g., Susan Hanley Duncan, *The New Accreditation Standards Are Coming To A Law School Near You—What You Need To Know About Learning Outcomes & Assessment*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 605, 627 (2010).

<sup>6</sup> Ira P. Robbins, *Best Practices on “Best Practices”: Legal Education and Beyond*, 16 CLINICAL L. REV. 269, 302 (2009).

Bar published the Report of the Outcome Measures Committee.<sup>7</sup> The Outcome Measures Committee (“the Committee”) compiled a seventy-two-page report that analyzed the “current state of thought about law school pedagogy” as well as the current ABA accreditation standards governing legal education.<sup>8</sup> The report also proposed a shift to more detailed outcome measures in the ABA standards and made recommendations based on the Committee’s findings.<sup>9</sup> The ABA Standards Review Committee is reviewing ABA Standards 301–305 in preparation for changes to these Standards in 2012 and beyond. In 2010, the Standards Review Committee announced proposed changes to ABA Standards 302 and 304 requiring more robust learning outcomes and assessment of the learning outcomes as well as institutional effectiveness.<sup>10</sup> One of the main ways the ABA can exert pressure on law schools to change their behavior is the ABA accreditation criteria. Recent ABA proposals foreshadow major changes in the areas of outcome measures and assessment.<sup>11</sup>

Outcome measures are “accreditation criteria that concentrate on whether the law school has fulfilled its goals of imparting certain types of knowledge and enabling students to attain certain types of capacities, as well as achieving whatever other specific mission(s) the law school has adopted.”<sup>12</sup> In the most basic form, law schools employ outcome measures such as bar passage rates and employment rates to define the success of a graduating class. The new ABA standards will require deeper analysis of the students’ skills development on an individual level and institution-wide assessment of effectiveness across the entire student body.

“Although the devil will be in the details,” legal writing Professor Susan Hanley Duncan predicts that outcome-based Standards “will require law schools and legal writing programs to reevaluate and perhaps adjust their delivery of legal education.”<sup>13</sup> Since the delivery of legal education is directly affected in the transition to outcome-based assessment, then one would expect that as outcome measures are required, implemented, and reviewed, an agency like the ABA will begin to measure the quality of legal education in order to prove that the changes are effective. On the

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<sup>7</sup> RANDY HERTZ ET. AL., AM. BAR ASS’N, REPORT OF THE OUTCOME MEASURES COMMITTEE I (2008), available at <http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *Draft of Proposed Standards (January 8–9, 2010)*, AM. BAR ASS’N, available at [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review/meeting\\_drafts.html](http://www.americanbar.org/groups/legal_education/committees/standards_review/meeting_drafts.html).

<sup>11</sup> See *Minutes (July 9–10, 2011)*, AM. BAR ASS’N, available at [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review/meeting\\_drafts.html](http://www.americanbar.org/groups/legal_education/committees/standards_review/meeting_drafts.html).

<sup>12</sup> HERTZ ET AL., *supra* note 7, at 3.

<sup>13</sup> Duncan, *supra* note 5, at 611.

contrary, those that specialize in outcome measures and assessment are already predicting that objective measurement is impossible. As Duncan writes, “[A] uniform set of measures to assess institutional effectiveness will not be possible because effectiveness measures will be dependent on the unique mission of each law school.”<sup>14</sup> Apparently, outcome measures are built and assessed against the backdrop of each law school’s unique mission and goals thus making objective assessment impossible.

A properly designed assessment program is not meant to measure or predict the quality of lawyers produced by a law school; it is meant to measure “whether the law school is achieving its mission with respect to its students and to its other constituencies, such as the legal profession and the broader academic community.”<sup>15</sup> Presumably when a law school achieves its mission and objectives, it is providing a quality legal education. Yet, by implication, the best standard currently available to measure the quality of a legal education is a presumption based on the law school’s own assessment methods.

Because the world now operates to a much greater extent than ever before on data and information, presuming a law school’s quality is no longer satisfactory. With data comes the ability to increase understanding, discover patterns in human behavior, and apply objective measures. Until now, the legal community has largely resisted objective measures. Professors Paul L. Caron and Rafael Gely write that “such resistance is futile [because] a market that demands rankings of brain surgeons and heart-transplant programs will not accept protestations from the legal academy that what we do is simply too special to be evaluated with objective measures.”<sup>16</sup>

This is not an endorsement of commercial rankings popularized by *U.S. News & World Reports* (“The Rankings”), although those will be addressed later. Instead, Professors Caron and Gely acknowledge that calls for law schools to begin using data more effectively are growing louder.<sup>17</sup> One law school Dean observed that as the demand to attend law school and the number of ABA-accredited law schools continues to increase “law schools [will] have to do much more to justify their existence.”<sup>18</sup> Caron and Gely disagree that any attempt to rank law schools will fail and argue that it is possible to find consensus on what makes a good law school.<sup>19</sup>

Yet, according to some researchers, The Rankings “do a poor job in

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<sup>14</sup> *Id.* at 627.

<sup>15</sup> GREGORY S. MUNRO, *OUTCOMES ASSESSMENT FOR LAW SCHOOLS* 4 (2000).

<sup>16</sup> Paul L. Caron & Rafael Gely, *What Law Schools Can Learn From Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1554 (2004).

<sup>17</sup> *See id.*

<sup>18</sup> Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change is so Difficult in Law Schools*, 81 IND. L.J. 359, 364 (2006).

<sup>19</sup> *See* Caron & Gely, *supra* note 16, at 1512.

representing the characteristics of quality in law schools.”<sup>20</sup> Caron and Gely are asking for distinctions between schools based on hard data and impliedly expect to find clear distinctions. According to Professor Welch Wegner the opposite is true—these distinctions are not so clear.<sup>21</sup> In fact, one report found little distinction between schools ranked higher or lower on the list except reputation.<sup>22</sup> It seems the academy cannot agree on the characteristics of a good law school education, whether objective measurement of those characteristics is possible, and if possible, whether drawing distinctions between law school educations is achievable or useful.

Measuring the intangible is the same problem at the heart of *Moneyball*, the book written by Michael Lewis and made even more popular as an Academy Award-nominated movie starring Brad Pitt. In 2003 Lewis published *Moneyball: The Art of Winning an Unfair Game* (“*Moneyball*”).<sup>23</sup> *Moneyball* tells the true story of how a major league baseball team, the Oakland Athletics, completely changed the way they evaluated amateur talent employing the unique strategy of General Manager Billy Beane. Beane and his deputy, Paul DePodesta, applied, for the first time in the business of baseball, a new way of measuring, evaluating, and drafting future Oakland A’s baseball players.<sup>24</sup> Before Beane, major league scouts evaluated high school and college baseball players by travelling around the country watching hundreds of baseball games a year. The scouts would subjectively rate the players based on what they saw at the games and eventually the major league club would filter the results of all their scouts and try to find the best players most likely to become major leaguers.

The conventional wisdom relied on two ingredients: a large helping of personal scouting and a small dash of familiar statistics like home runs, batting average, and runs batted in (RBI). An amateur baseball player must be *seen* by the naked eye in order to *divine* his true potential because baseball is *too complex* to boil down to *just* statistics, even celebrated statistics like home runs and batting average. Once a scout saw a player

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<sup>20</sup> Wegner, *supra* note 3, at 630.

<sup>21</sup> *Id.* at 631 (stating that “the rankings misrepresent the quality of law schools by creating rigid and fine-grained distinctions . . . not grounded in reality.”).

<sup>22</sup> See Rapoport, *supra* note 18, at 365; see also Robert W. Hillman, *The Hidden Costs of Lawyer Mobility: Of Law Firms, Law Schools, and the Education of Lawyers*, 91 KY. L.J. 299, 310 (2002) (claiming that in an environment that purports to celebrate diversity, law schools are similar and monotonous).

<sup>23</sup> MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003).

<sup>24</sup> In the movie version of *Moneyball*, Billy Beane is played by Brad Pitt and DePodesta is played by Jonah Hill. In 2012, the movie was nominated for six Academy Awards introducing the eccentric Beane and Oakland A’s assessment strategy to an even wider audience. *The 84<sup>th</sup> Academy Awards: Official Nominee List*, ACAD. OF MOTION PICTURE ARTS & SCI., <http://a.oscar.go.com/media/2012/pdf/nominees.pdf>.

and assessed potential, the process was complete. Beane and DePodesta, building on the theories of an amateur baseball writer named Bill James, discovered that these statistics were inaccurate and other categories were more indicative of success.

They challenged the conventional wisdom of naked eye scouting as the best way to find the highest quality players. In the end, Beane has yet to win the World Series, but he did produce a highly successful and competitive team at a fraction of the cost of other teams. Beane found a new way to measure ability, used it to predict future performance and changed the business of baseball—all by challenging conventional wisdom.

This Note seeks to challenge the conventional wisdom that law schools defy objective assessment. To accomplish that goal, this Note begins with an overview of two foundational challenges to conventional wisdom in legal education. Part I will review the influential MacCrate Report, draw from the follow-up Carnegie Report, and consider current ideas about assessment data all as they relate to measuring the quality of legal education. Part I will also identify market drivers in the legal profession “demanding” statistical data about law school performance. Part II takes a closer look at the current and proposed ABA Standards concerning outcome measures and how law schools will achieve institutional assessment. Part II also breaks down the process of assessment to try to understand the unique challenges of legal education. Part III draws conclusions about the creative, unique nature of legal education and the legal profession. Throughout each Part, this Note applies the premise of *Moneyball* by comparing educating law students to evaluating ability in major league baseball players in an attempt to glean similarities or differences in the conventional wisdom on assessment.

## II. *STRIKE ONE*: THE QUALITY OF LEGAL EDUCATION AND DEMANDS FOR CHANGES

It is impossible to write about outcome measures and measuring the quality of legal education without starting with the “MacCrate Report.” In 1992, the ABA’s Section on Legal Education and Admissions to the Bar published a task force report entitled “Legal Education and Professional Development – An Educational Continuum.”<sup>25</sup> Prominent attorney Robert MacCrate led the task force and thus the report became known as “The MacCrate Report.” The MacCrate Report isolated ten lawyering skills and four basic professional values that law students and professional lawyers

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<sup>25</sup> See AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992).

need to develop to be successful.<sup>26</sup>

Since 1992, the report has come to represent the need for law schools to focus on clinical and practice skills, with as much attention as is paid to case law. As a result, many law schools analyzed the traditional teaching methods and significantly increased opportunities for students to have clinical and interactive opportunities.<sup>27</sup> The MacCrate Report is widely credited with reconnecting the “continuum” between law schools and the legal profession.<sup>28</sup> The MacCrate Report is also frequently referenced by law school faculty and administrators during first year orientations, when promoting clinical opportunities or when defending the value of practical skills education. Because the MacCrate Report represented such a “massive attitudinal change”<sup>29</sup> within law schools, it is often given “canonical”<sup>30</sup> status within the legal education community. As a result, law schools quickly attempted to implement the MacCrate Report recommendations.

The task force recommended changes to ABA Standards 301 and 302. In 1993, ABA Standard 301(a) was amended from “A law school shall maintain an educational program that is designed to qualify its graduates for admission to the bar” to include preparing graduates “to participate effectively in the legal profession.”<sup>31</sup> Standard 302 was more significantly amended to include provisions that require “real-life practice” and opportunities for “pro bono activities,” while allowing law schools to “offer a[n optional] bar examination preparation course” for no credit.<sup>32</sup> Two things are clear: the MacCrate Report had a lasting impact on law schools’ educational offerings and it used the ABA Standards as a mechanism to make changes to the quality of legal education.

In the years following the MacCrate Report, law schools expanded clinical and practical opportunities. In fact, the MacCrate Report has been understood to stand for the proposition that law schools need to provide more “hands-on” and clinical experience to prepare graduates for the legal profession.<sup>33</sup> Yet, the MacCrate Report also emphasized the need for applicants and legal professionals to have access to greater *objective* information about law schools. The MacCrate Report stated that the

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<sup>26</sup> Wallace Loh, *Introduction: The MacCrate Report – Heuristic or Prescriptive?*, 69 WASH. L. REV. 505, 505–08 (1994).

<sup>27</sup> MacCrate, *supra* note 4, at 818–19.

<sup>28</sup> Russell Engler, *From 10 to 20: A Guide to Utilizing the MacCrate Report Over the Next Decade*, 23 PACE L. REV. 519, 519 (2003).

<sup>29</sup> Richard A. Matasar, *Skills and Values Education: Debate about the Continuum Continues*, 46 N.Y.L. SCH. L. REV. 395, 397 (2003).

<sup>30</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS 173–74 (2007).

<sup>31</sup> MacCrate, *supra* note 4, at 819.

<sup>32</sup> *Id.* at 820. These amendments were adopted and interpreted in August 1996 and 1999.

<sup>33</sup> See Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek To Narrow*, 8 CLINICAL L. REV. 109, 114 (2001).

decision to attend law school and choose a career path is one that requires “careful reflection and self-assessment based upon sufficient information.”<sup>34</sup> The MacCrate Report described sufficient information as, “[t]imely and accurate information about the legal profession and the function of law schools as the gateway to the profession helps prepare prospective applicants for a future in law...[s]uch individuals need access to *comprehensive and objective* information.”<sup>35</sup> Greater focus on the legal profession and the role law schools play in the development of lawyers laid the foundation for further analysis of legal education and questions about assessment and quality.

*A. Call to the Bullpen: A Fresh Analysis of Legal Education*

Building on the progress that followed the MacCrate Report, the Carnegie Foundation funded a study by a group of lawyers, both practitioners and scholars, to evaluate the effectiveness of law schools. The Carnegie Report represents another step in the game of assessing legal education looking specifically at the education of law students.<sup>36</sup> The Carnegie Report authors wrote, “Legal education is complex, with its different emphases of legal analysis, training for practice, and development of professional identity.”<sup>37</sup> The authors understood law school to be “the single experience that virtually all legal professionals share” and an “apprenticeship to the profession of law.”<sup>38</sup> Over fifty years earlier, Albert Harno decided,

[the] objective in legal education is to produce well-trained and capable lawyers—lawyers who are skilled in legal procedures, who are versatile in the tasks of the law, who have an understanding and a vision of the purposes and mission of the law, and who are guided by a sense of moral responsibility.<sup>39</sup>

This definition is consistent with the spirit of the MacCrate and Carnegie Reports but “education of professionals is a complex educational process.”<sup>40</sup> Indeed, trying to determine metrics for a legal education that is framed in such lofty language is more than intimidating.

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<sup>34</sup> AM. BAR ASS’N, *supra* note 25, at 227.

<sup>35</sup> *Id.* (emphasis added).

<sup>36</sup> See SULLIVAN ET AL., *supra* note 30.

<sup>37</sup> *Id.* at 13.

<sup>38</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, EXECUTIVE SUMMARY 3–4 (2007).

<sup>39</sup> HARNO, *supra* note 1, at 164.

<sup>40</sup> SULLIVAN ET AL., *supra* note 38, at 4.



Legal education is considered too complex for objective metrics, yet law schools provide largely identical coursework and study, particularly in the first year. Furthermore, the authors recognize the “extraordinary power” the first year of law school exhibits over the “formation of future professionals.”<sup>41</sup> Law schools have an incredible power to shape future lawyers and largely employ one way of teaching, yet the belief persists that law schools are too unique for a standardized assessment.<sup>42</sup> The Socratic Method and its near universal saturation in American law schools prompted the Carnegie Report to define legal pedagogy as “remarkably uniform.”<sup>43</sup> For example, the Carnegie Report’s “Observation 1” identifies a law school’s number one strength to be teaching law students the “distinctive habit” of “thinking like a lawyer.”<sup>44</sup> Fortunately, the Carnegie Report is focused on improving legal education not measuring or assessing quality,<sup>45</sup> as it is evident how difficult it would be for a law school to measure the ability to *think like a lawyer*.

The Carnegie Report gets credit for reigniting the discussion regarding the purpose and value of law school.<sup>46</sup> According to commentary about the Carnegie Report, the purpose of law school is to produce valuable, competent professionals.<sup>47</sup> The value of law school is whichever institution can best fulfill what the Carnegie Report terms the “three apprenticeships.”<sup>48</sup> The three apprenticeships are intellectual or cognitive thinking, practice-based learning, and professional identity.<sup>49</sup> Success in these three categories produces competent, well-rounded, and ethical attorneys. The Carnegie Report served at least two important functions. First, it renewed the focus on maintaining a close connection between law schools and the legal profession. Second, the Carnegie Report forced the legal profession to analyze law schools against other professional schools, like medical schools.<sup>50</sup> The Carnegie Report called for further development in the area of student and institutional assessment.<sup>51</sup> In this way, the Carnegie Report was an important step in preparing the legal

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<sup>41</sup> SULLIVAN ET AL., *supra* note 30, at 17.

<sup>42</sup> See Duncan, *supra* note 5, at 612 (advocating the position that law school’s avoid a “one size fits all approach”) (internal citation omitted).

<sup>43</sup> SULLIVAN ET AL., *supra* note 38, at 5.

<sup>44</sup> *Id.* at 5.

<sup>45</sup> See Roy Stuckey, “Best Practices” or Not, *It Is Time to Re-Think Legal Education*, 16 CLINICAL L. REV. 307, 310 (2009).

<sup>46</sup> Drew Coursin, *Acting Like Lawyers*, 2010 WISC. L. REV. 1461, 1471 (2010).

<sup>47</sup> See Denise Platfoot Lacey, *Embedding Professionalism into Legal Education*, 18 J.L. BUS. & ETHICS 41, 44 (2012); See also Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073 (2009); Robbins, *supra* note 6, at 274; Coursin, *supra* note 46.

<sup>48</sup> SULLIVAN ET AL., *supra* note 30, at 27–29.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 182. (“Medical schools have become increasingly responsive to the public, as well as professional and governmental, concerns.”).

<sup>51</sup> *Id.* at 182, 184.

profession for the introduction of data analysis and objective metrics at some future time. That time is now.

Similarly, the timing was right for the MacCrate Report to direct the attention of American law schools to a deficiency in practical, legal skills. More than fifteen years later, the Carnegie Report advanced the study of legal education again by comparing law schools to other professional schools and reconnecting legal education to the legal profession. Professor Stephen R. Alton recognizes that the time is right for another advancement,

Given the recommendations of the Carnegie Report, reiterating and amplifying much of what the MacCrate Report had suggested years earlier, the time does seem ripe for a pronounced shift in American legal education—a shift that will put even greater emphasis on teaching our students the professional skills and values required in the practice of law.<sup>52</sup>

While the MacCrate Report motivated changes in law school curriculum, the Carnegie Report refocused legal educators on the way forward. Shifting attitudes regarding data analysis and objective assessment may spark the next step forward in reforming legal education.

*B. Change-Up: How Will We Know if it's Working?*

By the early part of the twenty-first century most academics and professionals have agreed that law schools need a curriculum that cuts across case law, clinical experience, and ethical development. The Carnegie Report warned that a one-dimensional curriculum that teaches first year students through cold, legal analysis leads to an inferior education that introduces moral concerns “only haphazardly.”<sup>53</sup> It is clear the authors support reforming legal education toward more real world and practice applications of the law and the role of the lawyer. This model has few critics.

Still, what is not clear is how law schools will be able to measure whether these reforms are effective. Many scholars have echoed the concerns of New York Law School's Karen Gross who, in 2004, explained that clients come to lawyers with stories that cross over substantive topics but we do not learn to combine substantive areas of law or legal analysis in law school.<sup>54</sup> She believes that, “[a]t best, the result is a legal education

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<sup>52</sup> Stephen R. Alton, *Roll Over Langdell, Tell Llewellyn the News: A Brief History of American Legal Education*, 35 OKLA. CITY U. L. REV. 339, 361 (2010).

<sup>53</sup> SULLIVAN ET AL., *supra* note 38, at 6.

<sup>54</sup> See Karen Gross, *Process Reengineering and Legal Education: An Essay on Daring to Think Differently*, 49 N.Y.L. SCH. L. REV. 435, 443–44 (2004).

that is incomplete; at worst, the result is lawyers whom we have inadequately trained.”<sup>55</sup> The question is, how do we measure whether this assertion is true or false?

Without offering any other assessment tools, the Carnegie Report cites the high stakes summative assessments—Law School Admissions Test (“LSAT”), first year essay exams, and the bar examination—as underdeveloped.<sup>56</sup> The Carnegie Report’s “Observation 4” recognizes that these three high stakes tests are useful devices to protect the public because they “ensure basic levels of competence.”<sup>57</sup> Yet, they tell us precious little about professional, or for that matter institutional, value.

According to the principles identified in *Moneyball*, baseball suffered from a similar problem. Statistics could provide a serviceable yet incomplete measure of the value of a baseball player. Bill James is the man who understood the conventional wisdom that subjective analysis and a few basic statistics dominated the perception of value in baseball. He embarked on a personal mission to find better measures. It was James whose statistical analysis of baseball player performance is credited with launching an entire industry called “sabermetrics” and laying the foundation for the strategy around which Billy Beane would eventually build the Oakland A’s.

James was working as a night security guard in the early 1980s when he began writing about baseball. Over the next ten years or so, James placed advertisements in *The Sporting News* attempting to sell his *Baseball Abstract* a compilation of statistics collected daily from the newspaper’s box scores. James compiled stats in an effort to prove the inefficiencies he believed he observed in the modern game. For example, since the late 1800s a batter who drew a walk was not credited for the walk and was not charged with an at-bat; thus a walk had no impact on the batter’s statistics whatsoever. Yet, in James’ mind, the walk was both helpful to the team by adding a base runner and incredibly valuable as the more base runners a team collected, the more likely scoring runs became. As a result, James argued that on-base percentage (“OBP”) was not properly accounted for in baseball’s statistical hierarchy. James calculated a new statistic called “runs created” hoping to not only balance out the discrepancy in modern batting statistics but also predict the number of runs a team could score.<sup>58</sup>

James challenged the conventional wisdom hopeful that baseball’s undervalued players would be appreciated and simply to better explain a game he loved. James toiled in obscurity and eventually stopped

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<sup>55</sup> *Id.*

<sup>56</sup> SULLIVAN ET AL., *supra* note 38, at 7. Summative assessments will be discussed further in Part II.

<sup>57</sup> *Id.*

<sup>58</sup> LEWIS, *supra* note 23, at 77.

publishing his abstract out of frustration that major league baseball seemed content to rely on naked eye scouting and inadequate statistics.<sup>59</sup> In the face of baseball records and statistical claims, James said, “Prove it.”<sup>60</sup> Even though it took more than fifteen years after James stopped publishing his ideas for anyone within major league baseball to take notice, his belief that players could be measured more precisely was ultimately vindicated.

In much the same way, the MacCrate Report challenged the static case method teaching style popular in law schools and encouraged broader understanding of the potential value of legal education. The MacCrate Report challenged conventional wisdom by proposing wider use of practical experiences. After the MacCrate Report a quality legal education could not be measured simply by admission standards and faculty expertise, a quality education needed to also include practical, ethical, and real world experiences. As with any developments in academia or industry, MacCrate led to other studies, like the Carnegie Report, that continued the development of legal education. Now is the time to take another step forward in the evolution of legal education. Legal education’s *Moneyball* moment is here.

### C. Curveball: When Objective Measures Seem Impossible

*Moneyball* stands for the proposition that challenging the conventional wisdom may result in a better way of doing business and being successful. Beane (and the author of this Note) do not support change for change’s sake. Baseball’s conventional wisdom used subjectivity and irrationality to measure ability; Beane applied science and reason to gain an advantage over his competition.<sup>61</sup> Legal education’s conventional wisdom believes that legal pedagogy is too unique and complex to apply an objective assessment tool that will distinguish quality between law schools. First, the conventional wisdom among legal educators does not support the idea that the quality of a legal education can be objectively measured or compared between law schools. Second, the conventional wisdom among prospective law students and employers is not using the right metrics to measure or “rank” law schools.

James faced the same obstacles when he assessed major league hitters. First, major league organizations used the so-called “Triple Crown” statistics of home runs, RBI, and batting average.<sup>62</sup> The Triple Crown is a rare title bestowed on a player who can lead the league in the three *most important* statistical categories. Second, the baseball establishment

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<sup>59</sup> *Id.* at 94–96.

<sup>60</sup> *Id.* at 75 (citing Bill James’s third *Baseball Abstract*) (citations omitted).

<sup>61</sup> *Id.* at 16.

<sup>62</sup> Caron & Gely, *supra* note 16, at 1487.

believed a player's potential and intangibles could only be assessed by watching them play. James believed he could prove conventional wisdom wrong given the correct data. James complained about the access and quality of data available on baseball players. Major League Baseball through its subcontractor, the Elias Sports Bureau, did not release statistics without charging large sums of money.<sup>63</sup> Once data became more widely available—albeit almost twenty years later—Billy Beane decided to put the Jamesian theory to the test.

This is one big difference between the challenge facing Bill James and eventually Billy Beane, and the challenge facing legal education. Baseball has mountains of data. Granted, prior to the Internet and the development of sabermetrics, it was difficult to access or find the data. Nevertheless, legal education has precious little. The data we do have—bar passage rates and job placement statistics—is not necessarily even the right data to measure a law school's effectiveness.

A possible source of “the right data” is the data likely to be produced as law schools implement outcome measures and assessment tools. Professor Gregory Munro, author of *Outcome Assessment for Law Schools*, provides an assessment blueprint that allows law schools (and presumably the ABA) to determine how well each law school is instituting its mission statement and institutional objectives.<sup>64</sup> Professor Munro recognizes that “[t]he need for effective assessment in law schools is masked by a set of unchallenged presumptions about the success of law school teaching and institutional effectiveness.”<sup>65</sup> Munro acknowledges the conventional wisdom but questions current attempts to measure quality,

Ironically, the entire analysis and assessment for ranking are done without reference to data on student outcomes or institutional outcomes, which are not available because law schools have failed to formulate them. Instead of data on institutional outcomes, law schools *substitute assumptions that lack adequate foundation*.<sup>66</sup>

Questioning current understandings of quality is a good start but ultimately does not answer the question of whether law schools might be objectively compared. Institutional assessment is a measure of whether a law school is achieving its own mission and objectives not how effective it is as compared to other institutions. Yet, student and institutional assessments may pave the way for an objective measure of educational

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<sup>63</sup> LEWIS, *supra* note 23, at 82.

<sup>64</sup> MUNRO, *supra* note 15, at 5.

<sup>65</sup> *Id.* at 33.

<sup>66</sup> *Id.* at 41 (emphasis added).

quality—the type Bill James found in baseball—thereby enabling law schools to better understand and improve legal education.

The ability to objectively measure law schools not only leads to improvements in legal education, but other stakeholders such as employers and applicants are able to make better decisions when hiring a recent graduate or choosing a law school. Technological advances in gathering and processing data have elevated the expectations of corporations, professionals, and consumers alike. Law students and employers have a shared stake and interest in whether a certain institution is producing capable, valuable lawyers.

For example, if an institution is particularly adept at gathering the smartest and most capable students through its admission process, employers currently (and correctly) assume its graduates are likely to be smart, clever, and capable employees. Yet, the implication for legal education is that these are smart students who merely spent three years reading cases together. If that implication is true, law school quality is currently measured by who one's classmates are and not whether the institution has been responsible for any training.<sup>67</sup> On the other hand, perhaps an institution takes applicants traditionally not competitive at the country's top tier law schools and turns them into competitive, or even exceptional, lawyers? The entire legal profession would benefit from being able to distinguish one school from the other. The Rankings may currently do this, but, again, there is no objective way to confirm those assertions.

#### *D. Fastball: The Pressure to Analyze Objective Data is Mounting*

Since 2008, when the economy began to falter and slow, the legal profession has begun to reevaluate entry-level associates and law school graduates.<sup>68</sup> Traditionally, law firms accepted the task of training entry level associates and mobility was such that once trained, associates stayed with a firm for many years, if not their entire career.<sup>69</sup> As law firms began to downsize in 2009, competition for entry-level jobs increased dramatically and experience (also known as a proven track record) became a currency in and of itself. Firms no longer needed to train first year associates and could get experienced attorneys for the same or lower cost. Graduates turned to law school administrators and career services offices

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<sup>67</sup> See Rapoport, *supra* note 18, at 364, 368 (2006) (arguing that the one metric within the Rankings that could not be addressed by law schools was “reputation” which depends on employers perceptions of a law school's continued success admitting only the highest quality applicants).

<sup>68</sup> See David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html>.

<sup>69</sup> Hillman, *supra* note 22, at 299.

demanding proof of their training and in some cases filed lawsuits alleging fraud.<sup>70</sup> The graduates claimed that their law school had used misleading job placement statistics during the application process. If institutional assessments and objective metrics existed, then or now, the defendant law school could have countered the fraud claim with proof of educational quality or used quality metrics in the first place and avoided the entire mess.

Constrained resources are also forcing law firms and law schools to reevaluate candidates and graduates in a new fiscal reality. Law schools looking for a way to demonstrate their graduates' value could turn to learning outcomes based on measurable data as added proof to employers interested in lowering the risk of a new hire. While it is unclear how law schools might choose to provide these assessments to the market, some schools, like University of California-Irvine School of Law ("UCI Law"), have used assessments to support their candidates' applications for jobs such as federal clerkships.<sup>71</sup> It stands to reason that law schools, like businesses, searching for new ways to demonstrate the capability of graduates will turn to measurable data as validation.

Just as the economic downturn of the last few years has affected the legal profession, financial constraints of the self-imposed kind forced the Oakland A's to change their strategy when signing amateur players. In 1995 when the Oakland A's long-time owner, Walter Haas, died, two real estate developers purchased the team. Haas had run the A's like a public trust believing that winning was second to providing the public with an honorable, competitive representative of Oakland. The new owners saw the Oakland A's as a business investment and their desire to run the team on a tighter budget gave Billy Beane the justification to implement his new, objective assessment method in the name of practicality despite believing it to be superior anyway.<sup>72</sup> Changes in the Oakland A's financial strategy mirrored those across Major League Baseball. Organizations began to treat teams like businesses controlling budgets, outputs, and

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<sup>70</sup> See generally Dareh Gregorian, *Students File Suit Against New York Law School Claiming 'Systematic, Ongoing Fraud,'* N.Y. POST, Aug. 10, 2011, [http://www.nypost.com/p/news/local/manhattan/new\\_york\\_law\\_school\\_file\\_fraud\\_lawsuit\\_xo11DM15nJ1dkG6IL8jNbN](http://www.nypost.com/p/news/local/manhattan/new_york_law_school_file_fraud_lawsuit_xo11DM15nJ1dkG6IL8jNbN). See also LST, *Breaking: 15 More ABA-approved law schools to be sued*, LAW SCHOOL TRANSPARENCY (Oct. 5, 2011, 11:30 AM) <http://www.lawchooltransparency.com/2011/10/15-more-aba-approved-law-schools-to-be-sued/>; David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, <http://www.nytimes.com/2011/01/09/business/09law.html>.

<sup>71</sup> Debra Cassens Weiss, *Upstart UC Irvine Law School Competes with the Big Boys in Clerkship Race*, A.B.A. J. (Dec. 12, 2011, 10:50 AM CDT) [http://www.abajournal.com/news/article/upstart\\_uc\\_ Irvine\\_law\\_school\\_competes\\_with\\_the\\_big\\_boys\\_in\\_clerkship\\_race/](http://www.abajournal.com/news/article/upstart_uc_ Irvine_law_school_competes_with_the_big_boys_in_clerkship_race/). UC-Irvine's Law School will be discussed in more depth in Part II.

<sup>72</sup> LEWIS, *supra* note 23, at 58.

contributions.<sup>73</sup> In both baseball and legal education, tightening budgets “created a market demand for accountability, transparency, and more information about organizational performance.”<sup>74</sup> At the same time, technology made the demands realistic.

“The computer revolution dramatically reduced the cost of compiling and analyzing vast amounts of baseball data, and the boom in baseball salaries dramatically raised the benefits of having such knowledge.”<sup>75</sup> In *Moneyball*, Lewis profiles owners like Florida’s John Henry (now an owner of the Boston Red Sox) and executives like Sandy Alderson who brought the analytics of the financial markets to bear on major league baseball.<sup>76</sup> Wall Street perfected processing massive amounts of data in an effort to find inefficiencies in human affairs and understand the social and political patterns of human behavior.<sup>77</sup> Data analysis requires access to the information but also knowing what to do with it. The same mindset that drove Wall Street brokers in the derivative market was beginning to influence baseball—sloppy data caused inefficiencies which could be exploited.<sup>78</sup> The resulting sabermetrics craze in baseball has led to new understandings of baseball statistics and complete organizational change in valuing players.

The legal profession appears to be just beginning the struggle with the demand for data. As more data becomes available, legal education is likely to follow a similar pattern to the financial industry and major league baseball. More data leads to better analysis and a new understanding of quality and success. Complexity will no longer be an acceptable excuse for a failure to validate the quality of a legal education.<sup>79</sup> Whether prompted to do so like the other professional baseball teams who wanted to compete with the Oakland A’s or driven to do so by outside influences such as the ABA or applicants, law schools will be moving toward institutional assessment.

### III. BALL FOUR: ABA STANDARDS AND UNDERSTANDING LAW SCHOOL ASSESSMENT

The new ABA Standards requiring both outcome measures and institutional assessment are coming. Legal education has evolved like “a river wander[ing in its course with] many tributaries.”<sup>80</sup> The MacCrate

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<sup>73</sup> Caron & Gely, *supra* note 16, at 1514.

<sup>74</sup> *Id.* at 1514–15.

<sup>75</sup> *Id.* at 1492.

<sup>76</sup> LEWIS, *supra* note 23, at 56, 90–91.

<sup>77</sup> *Id.* at 129–30.

<sup>78</sup> *Id.*

<sup>79</sup> See *id.* at 131–32 (noting that baseball is a complex game that struggled for years with the failure of statistics and improper measures of success).

<sup>80</sup> HARNO, *supra* note 1, at 3.



Report and Carnegie Report were a bend in the river that increased practical skills and focused on law students' ethical and professional obligations. The question remains whether institutional assessment is a change in the course of the river or simply a tributary ultimately leading nowhere. Professor Albert Harno notes, "law schools should not attempt to do what some other agency can do better than they, at the expense of training which the schools can do better than any other agency."<sup>81</sup> In applying the ABA Standards, law schools will be required to develop methods of measuring the unique mission and objectives set forth by the law school administrators and faculty.<sup>82</sup> The new institutional assessment requirement will shift the external factors that constrain legal education.

Current incentives encourage law schools to teach to external measures such as the bar examination, The Rankings, and hiring practices of big firms.<sup>83</sup> The issue is whether those standards are a sufficient measure of the quality of a legal education. Over fifty years ago, Professor Harno wrote of a law school inspector who said, "Of the nine schools I inspected, six showed no impact of the modern world, whatsoever."<sup>84</sup> Today, a claim of law school ineffectiveness should be able to be validated by some standard. By shifting the incentive toward outcome measures and institutional assessment, the ABA and law schools work together to balance external factors with a quality education benefitting students preparing for any role in the legal profession. In this way, legal education is best analogized to undergraduate education. Students are all studying at the same institution but major courses of study vary between students as widely as law students' projected employment fields. Yet, the analogy to undergraduate study is unsatisfactory for a discipline of rich academic tradition and high professional standards. Here again, conventional wisdom is confronted with the "best schools are the ones with the smartest students" problem.

If employers are merely looking to hire the smartest students, the schools with the strictest admission criteria fair best in the "smart student measurement scale." The implication is that these schools collect the smartest students, teach them to read case law for three years and then watch as top employers compete to hire them. This scenario does not support the vision of a rigorous professional school refining the leaders of tomorrow. If true, legal education can be boiled down to smart students who know how to read case law. More is required of a profession referred

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<sup>81</sup> *Id.* at 176.

<sup>82</sup> Accreditation Comm. Standards Rev. Comm., *2011-2012 Standards and Rules of Procedure for Approval of Law Schools*, A.B.A., 12 (2012) [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2011\\_2012\\_aba\\_standards\\_chapter3.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_aba_standards_chapter3.pdf).

<sup>83</sup> SULLIVAN ET. AL., *supra* note 30, at 33.

<sup>84</sup> HARNO, *supra* note 1, at 163.

to as “a dynamic force in society.”<sup>85</sup> As such, law schools have a responsibility to mold the smartest students into well-rounded, ethical, and capable professionals. The only problem is that measuring competent professionalism is complex and difficult.

It is also necessary. As mentioned in Part I, law schools are now being asked to “pick up the slack” because firms can no longer spend time and resources training young lawyers.<sup>86</sup> Seeing this change, the ABA created the aforementioned Task Force to review the topic and has proposed changes to the Standards governing learning outcomes and institutional assessment. Before examining the proposed changes to the Standards, it is necessary to understand the current ABA Standards 301, 302 and 304.<sup>87</sup>

#### Standard 301. OBJECTIVES

(a) A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.<sup>88</sup>

The language of the ABA Standards is necessarily a broad language of minimum compliance.

For example, *Interpretation 301-3* states, “Among the factors to be considered in assessing the extent to which a law school complies with this Standard are the rigor of its academic program, including its assessment of student performance, and the bar passage rates of its graduates.”<sup>89</sup> Law schools are being measured not by the ABA’s assessment criteria but by whether the law schools’ own assessment is rigorous. Moreover, according to *Interpretation 301-6*, a law school must demonstrate only 75% bar passage rate for first-time test takers for compliance.<sup>90</sup> Here, the analogy to *Moneyball* is clear. The ABA is using statistics like bar passage rate even though bar passage rate does not measure aptitude and merely establishes the minimum acceptable standard. No one has determined a metric to measure whether a law school is producing quality lawyers.

In professional baseball, the Oakland A’s developed a system that reverse engineered how a baseball game was won – scoring more runs than the opponent – and valued how runs were most effectively produced. Paul DePodesta and the Oakland A’s developed the “expected run value” that calculated the value of events occurring during the course of a baseball

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<sup>85</sup> *Id.* at 140.

<sup>86</sup> Hillman, *supra* note 22, at 310.

<sup>87</sup> See generally Accreditation Comm. Standards Rev. Comm., *supra* note 82, at 19–26.

<sup>88</sup> *Id.* at 19.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 19–20.

game.<sup>91</sup> Coupling on-base percentage and slugging percentage with “expected run value,” the Oakland A’s had a better picture of a player’s value than any other team. As Lewis writes, by rethinking baseball, the Oakland A’s were playing a different game.<sup>92</sup> Oakland exploited inefficiencies in the conventional wisdom to gain a competitive edge. According to Cass R. Sunstein and Richard H. Thaler, if the other professional baseball teams were capable of dramatic miscalculation then professional misjudgments are possible anytime human behavior is measured,

Like most people, including experts, [baseball executives] tend to rely on simple rules of thumb, on traditions, on habits, on what other experts seem to believe. Even when the stakes are high, *rational behavior does not always emerge*. It takes time and effort to switch from simple intuitions to a careful assessment of the evidence.<sup>93</sup>

In legal education, a competitive edge, while useful and certainly desired, is not the top priority of a law school. Law schools are attempting to produce graduates capable of passing the bar exam and practicing law ethically, professors whose scholarly contributions appear in articles and books; and, in the case of most law schools, they are attempting to maintain a professional school as part of a larger, parent institution.

Yet, this information is not sufficient when trying to make finer distinctions about value and quality. To begin the process toward finer distinctions, the Standards Review Committee within the ABA’s Section of Legal Education and Admissions to the Bar has proposed major changes to Standard 301 that set the tone for the changes coming to the ABA Standards. Proposed Standard 301 reads,

Standard 301. OBJECTIVES

A law school shall maintain rigorous educational program that prepares its students for (1) admission to the bar and (2) effective, ethical and responsible participation in the legal profession.<sup>94</sup>

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<sup>91</sup> LEWIS, *supra* note 23, at 133–34.

<sup>92</sup> *Id.* at Preface pp. XIII–XIV.

<sup>93</sup> Cass R. Sunstein & Richard H. Thaler, *Who’s on First*, THE NEW REPUBLIC 5 (Sept. 1, 2003) available at <http://ssrn.com/abstract=1935614> (emphasis added).

<sup>94</sup> ABA Standards Rev. Comm., *Student Learning Outcomes & Assessment*. (“Proposed Standards”) 1 (July 9–10, 2011), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/july2011meeting/20110621\\_ch\\_3\\_program\\_of\\_legal\\_education\\_redlined\\_to\\_standards.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july2011meeting/20110621_ch_3_program_of_legal_education_redlined_to_standards.authcheckdam.pdf).

This is the language of assessment. As Proposed Standards 302, 304 and 305 demonstrate, measuring and assessing the quality of legal education at a given law school may be complex but the ABA is taking the right step in moving schools toward identifiable metrics. The motivation behind these changes is the same motivation that prompted Bill James to write his *Baseball Abstracts* and Billy Beane to question his scouts' assessments of amateur baseball players—there must be a better way to validate our industry.

The shift in language between Standard 301 and Proposed Standard 301 is also evident in Proposed Standards 302, 304 and 305 and represents a shift in theory as well. “Assessment shifts the focus from what is delivered to students to what students take away from their educational experience, but it is not merely about measuring the end results.”<sup>95</sup> Up until this shift began, it had been written, “One of the weaknesses in legal education and in the standards of admission to the bar is that the quality criterion has not been adequately stressed.”<sup>96</sup> A clear example of exactly how comprehensive the changes in the ABA Standards will be is Standard 302. Currently Standard 302 appears as follows,

Standard 302. CURRICULUM

(a) A law school shall require that each student receive *substantial instruction* in:

- (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
- (2) legal analysis and reasoning, legal research, problem solving, and oral communication;
- (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
- (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
- (5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.

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<sup>95</sup> Janet W. Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Schools Might Transform the Educational Experience of Law Students*, 35 S. ILL. U. L.J. 225, 228 (2011).

<sup>96</sup> HARNO, *supra* note 1, at 165.

- (b) A law school shall offer *substantial* opportunities for:
- (1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence;
  - (2) student participation in pro bono activities; and
  - (3) small group work through seminars, directed research, small classes, or collaborative work.<sup>97</sup>

According to the January 8-9, 2010 Meeting, the Standards Review Committee proposed changes to Standard 302. The changes remove the "substantial instruction" and "substantial opportunities" language replacing it with specific language involving learning outcomes and assessment.<sup>98</sup> The July 9-10, 2011 Meeting of the Standards Review Committee made further changes to the new learning outcomes standards.

#### Standard 302. LEARNING OUTCOMES

- (a) A law school shall identify, define, and disseminate each of the learning outcomes it seeks for its graduating students and for its program of legal education.
- (b) The learning outcomes shall include competency as an entry-level practitioner in the following areas:
- (1) knowledge and understanding of the substantive law, legal theory and procedure;
  - (2) the professional skills of:
    - i. legal analysis and reasoning, critical thinking, legal research, problem solving, written and oral communication in a legal context; and
    - ii. the exercise of professional judgment consistent with the values of the legal profession and professional duties to society, including recognizing and resolving ethical and other professional dilemmas.
  - (3) a depth in and breadth of other professional skills sufficient for effective, responsible and ethical participation in the legal profession;

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<sup>97</sup> Accreditation Comm. Standards Rev. Comm., *supra* note 82, at 20-21. (emphasis added.).

<sup>98</sup> ABA Comm. On Standards Rev., *Student Learning Outcomes & Assessment*, 1-2 (January 8-9, 2010) available at: [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review/previous\\_meeting\\_drafts.html](http://www.americanbar.org/groups/legal_education/committees/standards_review/previous_meeting_drafts.html).

- (4) knowledge, understanding and appreciation of the following values:
  - i. ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;
  - ii. the legal profession's values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law; and
  - iii. responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them.
- (5) any other learning outcomes the school identifies as necessary or important to meet the needs of its students and to accomplish the school's mission and goals.<sup>99</sup>

These changes mark a significant shift in the measurement and assessment of legal education. First, these Proposed Standards require law schools to be sensitive to their own objectives and create their own assessment tools. Proposed Standard 302(a) requires identification, articulation, and publication of specific competencies. "Once educational outcomes have been articulated that derive from both the mission and the ABA Standards, the law school would seek to align the overall educational program with the outcomes."<sup>100</sup> The ABA accreditation process will not be measuring the quality of legal education offered but will actually be measuring how well a school defines and measures itself. The conventional wisdom seems to establish that "[t]he types of assessment conducted by each school will vary since assessments must be designed to assess the unique missions and learning objectives of that institution."<sup>101</sup> This process puts an incredible amount of pressure on the law school mission statement and the committees that draft and revise such statements. Even without an objective assessment tool, this shift remains a valuable step toward quality assessment.

Second, the Proposed Standards require this self-assessment but do not provide the method or tool. This creates a problem for law schools preparing to measure "competency." The complexity of measuring legal education is evident in thinking about how a law school could prove competency. What criteria, metrics or standards establish competency? Again, this is a minimum standard expected of ABA-approved law

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<sup>99</sup> Accreditation Comm. Standards Rev. Comm., *supra* note 82, at 2–3.

<sup>100</sup> Fisher, *supra* note 95, at 231.

<sup>101</sup> Duncan, *supra* note 5, at 622.

schools. This raises a secondary question—what measurement, if any, is possible beyond the minimum threshold? At least baseball has the Triple Crown statistics however flawed they may be. Legal education is still searching for ways to measure the *competency*-metric.

On the other hand, the Proposed Standards will drive law schools to self analyze and may create new ways to validate success. For example, Proposed Standards 304 and 305 require student and institutional assessment. This is perhaps a first step toward identifying the law school version of “expected run value.”

Standard 304. ASSESSMENT OF STUDENT  
LEARNING

A law school shall apply a variety of formative and summative assessment methods across the curriculum to provide meaningful feedback to students

Standard 305. INSTITUTIONAL EFFECTIVENESS

In measuring its institutional effectiveness pursuant to Standards 202 and the rigor of its education program pursuant to Standard 301, the dean and faculty of a law school shall:

(a) conduct regular, ongoing assessment of whether its learning outcomes, curriculum and delivery, assessment methods and the degree of student attainment of competency in the learning outcomes are sufficient to ensure that its students are prepared to participate effectively, ethically, and responsibly as entry level practitioners in the legal profession; and

(b) use the results of this review to improve its curriculum and its delivery with the goal that all students attain competency in the learning outcomes.<sup>102</sup>

Proposed Standards 304 and 305 model the dichotomy between student and institutional assessment. Student assessment is simply a miniature version of the type of assessment that must occur at the institutional level. When student learning and effectiveness are aligned and supported through the law school as a whole, “the institution provides a coherent educational experience with many of the features of a well-designed course writ

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<sup>102</sup> ABA Standards Rev. Comm., *supra* note 94, at 6.

large.”<sup>103</sup> Even though student outcomes can be “clearly stated and explained [and] measurable,”<sup>104</sup> the best we can do as far as objective institutional standards or tools are “guiding principles.”<sup>105</sup> The conventional wisdom supports this notion.

One practitioner writes, “law school[s] must develop a system to assess how well . . . students are achieving the educational outcomes and use that information to inform decisions at every level. . . .”<sup>106</sup> This is as specific as the language of assessment is willing to get regarding the how-to of institutional assessment. Before the assessment community begins to address the correct *statistic* or metric to use, institutional assessment must first become more standardized.

The experts, much like the scouts in professional baseball, are still addressing institutional assessment in a professional culture that predates the use of technology, data, and statistical patterns. Two leading experts on educational quality write that “[a]ssessment is intimately linked to an institution’s mission and learning goals. Thus, the definition of assessment used on any particular campus may not work well on other campuses.”<sup>107</sup> The industry belief that institutional assessment can only be conducted subjectively is not unlike the Oakland A’s scouts who discounted a player’s high school or college statistics instead relying only on their visual impression of the player.<sup>108</sup>

Professional scouts believed so strongly in naked eye assessment that they often measured a player’s talent by looking at his face.<sup>109</sup> The “good face” is a scout’s belief that the structure of a young man’s face reveals his character and his potential in professional baseball.<sup>110</sup> This subjective evaluation persisted for generations in major league baseball, but *Moneyball* asks the larger question, if the value of a baseball player could be so mistaken in front of 30,000 people, “what about other lines of work?”<sup>111</sup> For example, this Note addresses law school evaluation or assessment. Professors Paul Caron and Rafael Gely had a similar thought after Michael Lewis’s book was published and they wrote *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*. Caron and Gely thought about a law school as the Oakland A’s, law school deans as Billy Beane and law school faculty as the players.<sup>112</sup> As should already

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<sup>103</sup> SULLIVAN ET. AL., *supra* note 30, at 180.

<sup>104</sup> Duncan, *supra* note 5, at 614.

<sup>105</sup> *Id.* at 622.

<sup>106</sup> Fisher, *supra* note 95, at 232 (internal quotations omitted).

<sup>107</sup> CATHERINE PALOMBA & TRUDY BANTA, ASSESSMENT ESSENTIALS: PLANNING, IMPLEMENTING, AND IMPROVING ASSESSMENT IN HIGHER EDUCATION 3 (Jossey-Bass, 1999).

<sup>108</sup> LEWIS, *supra* note 23, at 23–27, 34–36.

<sup>109</sup> *Id.* at 7.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 72.

<sup>112</sup> See Caron & Gely, *supra* note 16, at 1499–02.



be clear, this Note is looking at law schools as the players.

Here, legal education is major league baseball and Billy Beane is anyone who wants to know more about the quality of a law school education – prospective applicants, current students, professors, graduates and, most importantly, employers. Caron and Gely write that, “in many ways, legal education is teeming with more inefficiencies than those Billy Beane uncovered in baseball.”<sup>113</sup> While their article focused on the inefficiencies of measuring a faculty’s scholarly production and a dean’s job performance, the same principle is true of law school quality. Caron and Gely recognized that baseball’s “inefficiencies derived from [its] reliance on subjective evaluation of players by scouts, as well as objective evaluation using conventional Triple Crown statistics, to measure players’ contributions to a team’s success.”<sup>114</sup> Similarly, learning outcomes are seen as subjectively tied to a law school’s own method and criteria and objective evaluation of law schools as virtually impossible.<sup>115</sup> In *Moneyball*, Bill James and Billy Beane found that applying objectivity revealed illusions on the field. Once traditional wisdom was challenged, current statistics were shown to be misleading and better measurements were discovered.<sup>116</sup> Technology improved access to data and lead to new analyses, which created different uses and understandings of an industry—major league baseball. It can do the same for legal education.

#### A. Rounding First: Understanding Assessment

Understanding assessment is as much about understanding the distinctions between categories as it is about implementation. For example, student-learning “outcomes should outline what the school’s graduates should know (cognitive), the skills they should have (behavioral) and the values/principles with which they should act (affective/attitudinal).”<sup>117</sup> Similarly, programmatic or course assessment draws upon the students’ outcomes to provide information about “the overall learning, growth, and development of groups of students as a result of all of their educational experiences.”<sup>118</sup> According to assessment experts like Catherine Palomba and Trudy Banta, “[a]ssessment plays an important role in establishing and improving quality and in building

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<sup>113</sup> *Id.* at 1485.

<sup>114</sup> *Id.* at 1491.

<sup>115</sup> In preparing this paper, I had several professors and educators, independently of one another, comment that this paper topic was “arrogant” because I was claiming to know the *right* way to conduct legal education. In reality, I’m just asking the question: are we sure there’s no way to validate these practices?

<sup>116</sup> LEWIS, *supra* note 23, at 67 (“The statistics were not merely inadequate; they lied”).

<sup>117</sup> Fisher, *supra* note 95, at 230.

<sup>118</sup> PALOMBA & BANTA, *supra* note 107, at 107.

[public] trust.”<sup>119</sup> Improving quality and building public trust is especially important for law schools because the ABA and the legal profession have entrusted law schools to certify graduates as professionals.

Law schools have various stakeholders such as current students, graduates, employers, and faculty members, who all have a stake in the quality of a school’s legal education. The legal education community needs individual schools to consider the views of administrators, faculty, influential alumni, and representatives of the bar, bench, and general public when developing educational programs, goals, and objectives.<sup>120</sup> The need for external feedback is not only important to gain a perspective outside the walls of the institution but also because alumni and employers are repeat players who interact with many different graduates from a variety of classes.<sup>121</sup> If learning objectives are “specific behaviors students should exhibit,” an institution must combine its goals with employer needs when developing objectives.<sup>122</sup>

Ultimately the process involves identifying outcomes, offering curriculum to achieve the outcomes, assessing outcomes, and assessing the assessment.<sup>123</sup> The ABA Section of Legal Education and Admissions to the Bar appointed Outcome Measures Committee identified outcome-oriented assessment as measuring “the students’ learning to ensure that the requisite learning has taken place.”<sup>124</sup> How a law school decides to conduct this assessment and what measures are used turns out to be the challenge (and perhaps the only differentiator available).

The challenge is both how to identify outcomes and, once identified, how to measure outcomes. For example, Current Standard 301 defines, in its first clause, the first priority outcome for a law school legal education program: preparation for admission to the bar.<sup>125</sup> Necessarily then, bar exam passage rates became an important statistic by which all law schools were judged. As law schools focused greater resources and attention on improving bar passage rates, a law school Triple Crown began to form. The law school Triple Crown consists of bar passage rate, job placement statistics and The Rankings.<sup>126</sup> Any law school “winning” those three categories is likely to be considered the *best* law school in the country.

Just as Billy Beane found major league baseball’s Triple Crown

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<sup>119</sup> *Id.* at 18.

<sup>120</sup> SULLIVAN ET. AL., *supra* note 30, at 181–82.

<sup>121</sup> See ROY STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 272 (2007); PALOMBA & BANTA, *supra* note 107, at 213, 217.

<sup>122</sup> Duncan, *supra* note 5, at 615, n.39.

<sup>123</sup> *Id.* at 611 (using language like “assess the assessment,” while accurate, is one reason the assessment community has had difficulty finding traction with law school faculties).

<sup>124</sup> HERTZ ET. AL., *supra* note 7, at 19.

<sup>125</sup> Accreditation Comm. Standards Rev. Comm., *supra* note 82, at 19.

<sup>126</sup> See Duncan, *supra* note 5, at 629 (law schools often present bar passage rates and job placement figures as evidence of institutional effectiveness.)

categories to mistakenly overvalue certain attributes like power hitting, law school's Triple Crown statistics skew heavily in favor of The Rankings. The Carnegie Foundation report recognized a "high stakes assessment" problem when evaluating the current measures of success from a student perspective. The Carnegie Report's "Observation 4" declares "Assessment of Student Learning Remains Underdeveloped" highlighting three major assessment points prior to joining the legal profession—the LSAT, first year written exams (often 100 percent of a student's grade) and the bar examination.<sup>127</sup> In law school, as in major league baseball, these statistics are deceptive. While each category does create distinctions relative to quality, these assessments are not sufficient for a true picture of a law school's quality or a student's potential.

In major league baseball statistics, Bill James encountered a similar problem measuring the quality of the base-on-balls, or "walk." Because there was no such thing as a walk in cricket, the first baseball statistician did not categorize a walk in favor of the batter.<sup>128</sup> Currently, major league baseball's official scorer still does not even count a walk as an at-bat when calculating a hitter's batting average. This phenomenon persists today. Therefore, the incentive against walks is incredibly strong because a major measure of a batter's performance is batting average. Yet Beane and DePodesta found that a team's success is based on the likelihood of scoring runs which improves dramatically when hitters reach base, including from a walk. Major league baseball had been discounting a statistic for over a hundred years that the Oakland A's found is the one attribute most critical to the success of a baseball team.<sup>129</sup> The *Moneyball* approach used by the Oakland A's underscores the importance of incentivizing the correct outcomes.<sup>130</sup>

Once the correct outcomes have been identified, measuring can begin. There are a variety of methods used to assess student learning. The two important distinctions are formative/summative and direct/indirect assessments. Formative assessment is defined as "[a]ssessments focusing on improving a student's learning or improving a professor's teaching. . . ."<sup>131</sup> Summative assessment is "giving a grade."<sup>132</sup> Direct assessments include standardized tests, embedded coursework, competence interviews, portfolios, and collective portfolios.<sup>133</sup> Indirect assessments are more complex and difficult to obtain, including surveys, interviews, focus

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<sup>127</sup> SULLIVAN ET. AL., *supra* note 38, at 7.

<sup>128</sup> LEWIS, *supra* note 23, at 70.

<sup>129</sup> *Id.* at 129.

<sup>130</sup> It also underscores the difficulty attacking conventional wisdom and years of cultural bias.

<sup>131</sup> Duncan, *supra* note 5, at 622–23.

<sup>132</sup> *Id.* at 623.

<sup>133</sup> See generally MARY J. ALLEN, ASSESSING ACADEMIC PROGRAMS IN HIGHER EDUCATION (2004).

groups, and reflective essays.<sup>134</sup> As is probably obvious, direct and indirect assessments offer unique and potentially expensive challenges to the legal education community. In addition, Professor Duncan writes, “[n]o matter which assessments are chosen, legal educators should design several assessments and vary them.”<sup>135</sup>

Participants in markets, like batters or law schools, will eventually shift attention and resources to whatever certain metric is shown to provide an advantage or value. In the case of the Oakland A’s, change took time and an organizational willingness to risk failure. Sandy Alderson, Beane’s predecessor, instituted an organizational focus incentivizing the minor league players to make on-base percentage not batting average their priority. Alderson saw success at every level but could not influence the major league club. Tony LaRussa, the then A’s manager, as well as veteran players refused to believe Alderson and Beane’s message. As a result, it was not until LaRussa (and incidentally Alderson) had left that Beane was able to make the change organization-wide.<sup>136</sup>

The ABA is in the process of making an industry-wide change. Just like the MacCrate Report and Carnegie Report prompted law schools to re-examine curriculum requirements and institute changes, the coming overhaul of the ABA Standards has the potential to prompt another round of improvements. Shifting incentives to outcome-based measures rather than relying on high stakes assessments will also open up new opportunities to understand and measure quality. Competition between law schools will always be fierce, but as objective assessments are applied to legal education, the legal profession will be better informed as to which schools may contain underappreciated value.

#### *B. Advance Scouting: Is UC-Irvine School of Law Winning the Game?*

Though still in the early stages of development, it is worth mentioning that UCI Law has transformed the first year curriculum in an attempt to change the way legal education is provided. Professors Ann Southworth and Catherine Fisk have written about UCI Law’s new approach to the first year of law school and specifically legal profession course as more of a transition from school to work.<sup>137</sup> The course is not only outcome-based but also career focused. Students are encouraged to “chart successful, rewarding, and responsible careers in law” in the first year when much of

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<sup>134</sup> *Id.* at 103.

<sup>135</sup> Duncan, *supra* note 5, at 624.

<sup>136</sup> LEWIS, *supra* note 23 at 60–61.

<sup>137</sup> Ann Southworth & Catherine L. Fisk, *Our Institutional Commitment to Teach About the Legal Profession* 74 (U.C. Irvine Sch. of Law, Legal Studies Research Paper Series No. 2011–21, 2011), available at <http://ssrn.com/abstract=1851862>.

the socialization into the legal field occurs.<sup>138</sup> UCI Law is implementing this new curriculum built on a foundation of objectives like improving the students' legal research skills while presenting them with scenarios common to lawyering in an environment that can be successfully assessed.

For example, UCI Law utilizes "multiple forms of assessment" within the generally accepted standards of a legal profession class.<sup>139</sup> These assessments include a paper about a practicing lawyer, approximately a dozen simulations or role-playing exercises, and grades that divide the weight between a fall exam (25 percent), spring exam (25 percent), simulations/participation (20 percent) and writing assignments (30 percent).<sup>140</sup> Throughout the course, UCI Law faculty focuses on actual practice and ethical dilemmas that highlight issues like professional judgments, ethics, and consequences for third parties and the public.<sup>141</sup>

The course is not without challenges. First, there are pedagogical challenges. UCI Law faculty must try to accomplish a variety of objectives while providing a logical and coherent course giving appropriate time legal and multi-discipline topics.<sup>142</sup> Second, there are long-term resource constraints. Staffing, time commitments and teaching materials make this type of course expensive. Even if it is successful in the short term, questions persist about the viability of an in-depth course in the long term. According to Southworth and Fisk, students rated the course highly noting the "course's utility," range of practice areas introduced and the "practical, ethical, and moral challenges" addressed.<sup>143</sup> In this assessment, the students valued the course. Does this mean that UCI Law's legal profession course is of a higher quality than others? If so, how do we know?

Another form of institutional assessment is UCI Law's clerkship placement rates. In a recent Reuters' article, UCI Law claims to have placed nearly a fifth of its graduates in federal clerkships for the upcoming term.<sup>144</sup> Though the class of 2012 has only fifty-eight members,<sup>145</sup> this is still an impressive feat.

In 2011, the ABA granted UCI Law provisional accreditation with full

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

<sup>139</sup> *Id.* at 89.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 77–78.

<sup>142</sup> *Id.* at 91–92.

<sup>143</sup> Southworth & Fisk, *supra* note 137, at 89.

<sup>144</sup> Moira Herbst, *Yale, Harvard, Stanford ... UC Irvine?*, REUTERS, (Dec. 9, 2011), [http://newsandinsight.thomsonreuters.com/New\\_York/News/2011/12\\_-\\_December/Yale,\\_Harvard,\\_Stanford\\_UC\\_Irvine/](http://newsandinsight.thomsonreuters.com/New_York/News/2011/12_-_December/Yale,_Harvard,_Stanford_UC_Irvine/).

<sup>145</sup> *Id.*

accreditation possible in 2014.<sup>146</sup> As a result, UCI Law remains unranked by *US News & World Report*, yet because this year's class had so much success with the job placement statistics, the school has become a heavy hitter. At this time, UCI Law's success in placing federal clerks begs the question—does this metric tell us anything about the quality of a UCI Law education? Certainly the perspective graduates must have impressive resumes, internship experience, and interview skills, yet these graduates are largely untested and the school has not formed a track record with the legal profession. UCI Law supports the notion that law schools are difficult to assess objectively but given the opportunity to assess several years of data following the same students from the first year legal profession courses through employment, a quality-metric does not seem impossible. Every law school teaches some variant on a legal profession course; with several types of assessment and given the ability to track students more easily in the digital age, legal education may be closer than ever toward taking the next step to industry-wide quality standards.

The ABA has proposed dramatic changes to the Standards that provide law schools notice of the new outcome-based assessments soon to be required. The Proposed Standards redirect law school incentives and are motivated by a desire to improve the quality of legal education. Yet, the ABA Standards are still *minimum* standards to achieve accreditation. Objective measures of quality, on the other hand, are intended to compare law schools more directly to one another and establish competition for the highest possible bar of excellence.

“Designing a curriculum that achieves the learning outcomes and an assessment program requires a significant amount of time of the faculty” but if law schools are intent on providing serious instruction, it “is a necessary prerequisite to student learning.”<sup>147</sup> Some argue that “[t]he professoriate has become increasingly homogeneous and has very little training in educational effectiveness or assessment principles.”<sup>148</sup> While in some cases faculty scholarship may overshadow classroom skills, law schools still claim to provide a valuable education.<sup>149</sup> Legal education is responsible for imparting more than the Socratic Method because law schools are about learning to become “organized, precise and articulate”<sup>150</sup>

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<sup>146</sup> Press Release, University of California-Irvine School of Law, UC Irvine School of Law Granted Provisional Accreditation by American Bar Association (June 14, 2011) *available at* [http://www.law.uci.edu/press\\_releases/06-14-11.html](http://www.law.uci.edu/press_releases/06-14-11.html).

<sup>147</sup> Duncan, *supra* note 5, at 619.

<sup>148</sup> Judith Welch Wegner, *Reframing Legal Education's "Wicked Problems"*, 61 RUTGERS L. REV. 867, 874 (2009).

<sup>149</sup> For example, University of Connecticut School of Law claims to provide “a comprehensive and progressive education in which students are exposed to both theoretical and practical aspects of the legal profession.” *Admissions*, UNIV. OF CONN. SCH. OF LAW (1:38 PM, March 22, 2012), <http://law.uconn.edu/admissions>.

<sup>150</sup> Wegner, *supra* note 148, at 908.

as much or more than about the substance of law.

Law schools are expected to impart a high level of preparation that encompasses interpersonal skills one day and black letter law the next. The pressure on law schools to produce effective professionals is matched only by the expectations on law students to contribute to a profession which Professor Harno described as like “no other profession, no other calling, [because it] requires of its votaries so high a degree of versatility, insight, and imagination as is demanded of lawyers.”<sup>151</sup> Just as major league baseball went for years utilizing the wrong statistics and inadequately measuring success, legal education is now starting to examine its own statistics and assessment to begin asking the same questions that Bill James and Billy Beane asked of their industry.

#### IV. *BALL GAME*: LAW SCHOOLS SHOULD START PLAYING THE STATISTICS GAME

In his book on legal education, Professor Harno quotes Justice Holmes, “the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”<sup>152</sup> Thanks, in part, to *Moneyball*’s popularity as a best-selling book and blockbuster movie Billy Beane is known as the man of statistics in professional baseball. Legal education is still waiting for its Billy Beane.

One possible reason the legal profession lags behind other industries in utilizing data and objective analysis is cultural. Take, for example, the legal principle of *stare decisis*. Here, *stare decisis* represents the legal profession’s connection to tradition, reputation, and organization. Unless a major change or cultural shift comes along, what was true will remain true for lawyers, professors, and law students alike. The industry culture in the legal profession, as in baseball, creates a pressure to conform and play by *the rules*.

The rules in major league baseball dictated that scouts saw amateur players with their own eyes, assessed their potential against all the other young players the scout had ever seen, and draw conclusions accordingly.<sup>153</sup> Once a player was part of a major league club, the rules required the player’s offensive value be based on home runs, RBI, batting average and, for non-power hitters, hits. Billy Beane insisted on using “data rather than professional intuitions.”<sup>154</sup> Lewis notes three reasons why professional intuition in baseball created problems:

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<sup>151</sup> HARNO, *supra* note 1, at 124.

<sup>152</sup> *Id.* at 143.

<sup>153</sup> LEWIS, *supra* note 23, at 37.

<sup>154</sup> Sunstein & Thaler, *supra* note 93.

There was, for starters, the tendency of everyone who actually played the game to *generalize wildly* from his own experience. People always thought their own experience was typical when it wasn't. There was also a tendency to be overly influenced by a guy's most *recent performance*: what he did last was not necessarily what he would do next. Thirdly—but not lastly—there was the *bias* toward what people saw with their own eyes, or thought they had seen.<sup>155</sup>

Beane said it takes a “certain . . . lack of pride” to know that other organizations are laughing at an Oakland A's draft pick or starting lineup.<sup>156</sup> A strong professional culture like the one found in the legal profession reinforces long held assumptions about *the rules*.

Technology, fiscal crisis, and competition may be a dramatic enough jolt to professional intuition to spark the discovery of law school's “on-base percentage.” Until now legal education has avoided both individual and institutional assessment. With the proposed ABA Standards driving law schools to develop and institute learning outcomes, it is only a matter of time before institutional assessment can be harnessed to reveal a better understanding of quality. Indeed, the river of legal education is shifting once again and law schools “like other professional schools, have recurrently found themselves sites of conflict about how knowledge and values are to be understood and related in the academic preparation of lawyers.”<sup>157</sup> Measuring how to teach *thinking like a lawyer* is as difficult as measuring how to *think like a lawyer*. Yet, this complexity and difficulty, once an accepted excuse, will not be able to stop the demand on legal educators for greater data and analysis currently expected in other industries.

Not surprisingly, law schools are not the only professional schools dealing with assessing complex skills. The authors of the Carnegie Report believe “[t]he mark of professional expertise is the ability to both act and think well in uncertain situations.”<sup>158</sup> Medical schools continue to assess students beyond their classroom years and throughout residency training. A “bold contrast with legal education,” medical school assessment begins early in medical school and assesses all aspects of education such as substantive knowledge, clinical skills, patient care, and professionalism.<sup>159</sup> The ABA Outcome Measures Committee came to a similar conclusion

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<sup>155</sup> LEWIS, *supra* note 23, at 18 (emphasis added).

<sup>156</sup> *Id.* at 39.

<sup>157</sup> SULLIVAN ET. AL., *supra* note 30, at 7.

<sup>158</sup> *Id.* at 9.

<sup>159</sup> *Id.* at 175.



when comparing legal education to allopathic medicine, architecture, osteopathic medicine, and engineering.

The Committee found that other professional schools require a connection between learning outcomes and a school's mission or objectives.<sup>160</sup> In addition, the four professional schools evaluated also assessed a wide range of types of student learning. Allopathic medicine divided these student skills into two categories; "musts" and "shoulds."<sup>161</sup> The "musts" included consistent assessment of faculty, ongoing assessment throughout schooling, formative assessment, and summative assessment.<sup>162</sup> The "shoulds" included educational objectives tied to professional expectations, using measurable achievement tied to national norms, and work with faculty on skills, timeliness, and remediation.<sup>163</sup> Osteopathic medicine included eight assessment metrics like clinical exams with patients, portfolios, written exams, and chart simulated oral exams.<sup>164</sup> These assessments are time consuming and heavily reliant on faculty and supervising professionals.

The Committee's findings aligned with conventional wisdom in concluding that professional schools have (and need) latitude to set criteria and employ measurements to prove achievement.<sup>165</sup> Once again, conventional wisdom says law schools cannot be held to objective measures instead being assessed based on their own ability to identify and assess outcomes. In effect, the Committee recommends the ABA not hold law schools, or any professional school, to objective measures of quality but instead assess the school's assessment process.<sup>166</sup> Dismissing objective measures as impossible implies that legal education defies objective comparison, which is the same rationale that existed on Wall Street before data analytics and in major league baseball before Billy Beane and Paul DePodesta.

In *Moneyball*, Beane and DePodesta implement a rational, data-driven approach to measuring value. The data showed that having runners on base was the single, most valuable commodity in baseball. They built their organization around maximizing this occurrence even at the detriment of other areas of the game, like fielding.<sup>167</sup> If all Oakland A's players are approaching the game in a consistent way, A's management assumes,

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<sup>160</sup> Hertz et. al., *supra* note 7, at 20.

<sup>161</sup> *Id.* at 32. (The attributes a student *must* have to graduate and the attributes a student *should* have before they graduate).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 32–34.

<sup>164</sup> *Id.* at 39–41.

<sup>165</sup> *Id.* at 46.

<sup>166</sup> Hertz et. al., *supra* note 7, at 56.

<sup>167</sup> LEWIS, *supra* note 23, at 142.

correctly in this case, that the outcomes will reflect success.<sup>168</sup> Perhaps this is the best resolution of the conflict between the conventional wisdom that law schools elude objective assessment and the *Moneyball* premise that the demand for statistical measures will increase and are important to determining law school quality. The ABA will assess process and leave the outcomes to the schools.

Unfortunately, this still does not tell law student consumers or employers much about a law school's quality. Kevin Carey, writing about undergraduate institutions, recognized the same deficiency and noted that "colleges are far less focused on student learning than they should be, and consumers haven't a clue what to do and have come to believe, mistakenly, that the most expensive colleges are also the best."<sup>169</sup> Throughout *Moneyball*, Beane assesses value via his system regardless of, and actually in spite of, the conventional wisdom. Assessing value through the collection and analysis of the right data was both needed and successful on Wall Street and in Major League Baseball; those two industries do not have so much in common that law school can be distinguished as *too unique* to undergo a similar examination.

On the other hand, legal education is complex, unique, and difficult to measure. Given external pressures like the economy, technological advances, and consumer expectations, "the law does not have the luxury of remaining inarticulate, even when articulation is maddeningly difficult."<sup>170</sup> While the level of granularity achieved by Wall Street in its analysis of derivatives, for example, or by the Oakland A's for the run production of a middle infielder might not be possible for law schools, greater granularity than bar passage rates and employment statistics must be possible. In *Moneyball*, Lewis describes the process Wall Street analysts used to breakdown the futures and options market into measurable pieces called derivatives. Similarly, DePodesta and a company called AVM systems did the same thing for baseball.<sup>171</sup> The AVM model "carved up what happened in every baseball play into countless tiny, meaningful fragments. Derivatives."<sup>172</sup> Law schools do not need a proprietary system to carve up legal education into derivatives. Derivatives already exist in the form of law students – countless tiny, meaningful participants. Now, the goal is to

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<sup>168</sup> For example, Billy Beane acquired a player named Scott Hatteberg who was an injured catcher that no other team wanted. Hatteberg was highly rated in the statistical categories the A's cared about like pitches seen during an at-bat, on-based percentage, and walks. Hatteberg did exactly what Beane and Paul DePodesta had hoped. After the 2002 season, DePodesta calculated that if the A's had nine Hattebergs batting every game for an entire season, by DePodesta's calculation, it would be the most productive offense in all major league baseball. *Id.* at 186–87.

<sup>169</sup> Kevin Carey, *That Old College Lie*, DEMOCRACY: A J. OF IDEAS (March 23, 2012), <http://www.democracyjournal.org/15/6722.php?page=all>.

<sup>170</sup> Brett G. Scharf's, *Law as Craft*, 54 VAND. L. REV. 2245, 2287 (2001).

<sup>171</sup> LEWIS, *supra* note 23, at 132–33.

<sup>172</sup> *Id.* at 132.

find a way to assign them value.

It is insufficient to conclude that the law is too special and too individual an exercise to be objectively evaluated. Law is not art. At the same time, law is not a science. The Carnegie Report authors agreed writing that “law is not simply science in the making, nor is it a set of general techniques for managing social relationships; law is a tradition of social practice that includes particular habits of mind, as well as a distinctive ethical engagement with the world.”<sup>173</sup> Complexity abounds. Quantifying, measuring, and evaluating complexity is a challenge but a challenge worth undertaking.

Harvard Law School Dean Christopher Columbus Langdell decided that law could be taught as a science bringing with it the Socratic Method. At the time, the standard model was reading, attending lectures, and practicing in legal aid. Langdell’s contribution created a differentiation between schools, essentially making Harvard Law School a different “product” in the market.<sup>174</sup> Eventually all law schools copied Langdell’s model and differentiation lessened significantly. A law school looking for differentiation would be wise to challenge the conventional wisdom and develop publishable metrics of quality. UCI Law is a law school intent on differentiation but, as of the writing of this Note, has only one way of validating it – one class of clerkship candidates. Differentiation does not need to be as subjective as The Rankings. Objective measures are waiting to be discovered.

In *Moneyball*, Michael Lewis compares pitchers to writers: “To say all pitchers should pitch like Nolan Ryan was as absurd as insisting that all writers should write like John Updike.”<sup>175</sup> The same is true of law schools. Not all law schools are alike, nor should they be. The ABA recognizes this fact by tying outcome measures to a law school’s mission.<sup>176</sup> Should the law school have a unique or interesting mission, the process for developing objectives and measuring outcomes will also be unique. While true, this belief should not stop objective assessments of quality. As technology improves and other industries improve their mastery of analytics, an increased demand for data to measure quality and value is inevitable. In this way, aspects of the law are as much science as art.<sup>177</sup> It is also a dynamic business with varied stakeholders who all have high expectations. Regarding *Moneyball*’s impact on the law, Cass Sunstein and Richard Thaler concluded,

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<sup>173</sup> SULLIVAN ET. AL., *supra* note 30, at 8.

<sup>174</sup> See Caron & Gely, *supra* note 16, at 1504.

<sup>175</sup> LEWIS, *supra* note 23, at 222.

<sup>176</sup> ABA Standards Rev. Comm., *supra* note 94, at 1, 2.

<sup>177</sup> See Scharf’s, *supra* note 170, at 2247.

[T]hat countless areas, both private and governmental, would benefit from their own Billy Beanes and Paul DePodestas, challenging widespread intuitions, or what everyone knows, with statistical information about what works and what doesn't, and with performance measures that more accurately reflect the true contribution to organizational success.<sup>178</sup>

The only remaining question is: who is legal education's Billy Beane?

#### V. CONCLUSION

Change comes slowly to the legal profession but with market drivers like the recent fiscal crisis, improved technology, and increased competition at all levels, change is inevitable. Demands for validating a law school's reputation of producing quality lawyers are also inevitable. The ABA Proposed Standards are a positive step to focus law schools' attention on outcome measures and quality. Assessment of legal education will be difficult and messy, especially at first, but the schools with the best process will experience a competitive advantage just like the Oakland A's did for several seasons. In *Moneyball*, Beane and DePodesta, through Lewis, make the case that even an industry like professional baseball with reasonably successful conventional wisdom and an overabundance of statistics could be wrongly valuing its core asset.

By challenging the conventional wisdom and professional intuitions, the Oakland A's found a more accurate and efficient way to be successful. In the process, the A's were able to capitalize on previously undervalued players and compete with more talented and wealthy teams. By challenging the conventional wisdom and intuitions of legal education, a law school could differentiate itself from the competition and provide the legal profession with a greater measurement of quality. In the process, graduates, employers, and prospective clients will have a clearer picture of quality and therefore of the law.

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<sup>178</sup> Sunstein & Thaler, *supra* note 93.