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Achieving the American Bar Association's Pedagogy Mandate: Empowerment in the Midst of a "Perfect Storm"

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I. INTRODUCTION

The ongoing crisis[1] in legal education has prompted calls for fundamental reform.[2] The American Bar Association's Section of Legal Education and Admissions to the Bar has responded by adopting a

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[1] The American legal system faces considerable pressure because of the price many students pay for their education, the large amount of student debt, consecutive years of sharply falling applications, and dramatic changes, possibly structural, in the market for jobs available for law graduates. These factors have resulted in great financial stress on law schools, damage to career and economic prospects of many recent graduates, and diminished public confidence in the system of legal education. A.BA. TASK FORCE ON THE FUTURE OF LEGAL EDUC., REPORT AND RECOMMENDATIONS, 1 (2014), *available at* http://perma.cc/3JAG-NP7W [hereinafter ABA TASK FORCE REPORT].

[2] The A.B.A. is calling for change and has taken a comprehensive approach to its review of the crisis. The A.B.A.'s Section of Legal Education and Admissions to the Bar has just completed comprehensive review of the Standards for Approval of Law Schools. *See infra* pp. 143–46. The A.B.A. also appointed a Task Force on the Future of Legal Education in 2012, *Task Force on the Future of Legal Education*, A.B.A., http://perma.cc/FNW6-B2C5 (last visited Aug. 4, 2014), and a Task Force on the Financing of Legal Education in 2014. *Task Force on the Financing of Legal Education*, A.B.A., http://perma.cc/4PVG-2NC5 (last visited Aug. 4, 2014). Others call for a reform of the A.B.A. and the law school accreditation process. "Because the A.B.A. has repeatedly signaled its unwillingness to adapt to this changing reality, the federal government should consider taking steps to stop the rapid flow of attorneys into a marketplace that cannot sustain them." The U.S. Department of Education should strip the A.B.A. of its accreditor status and give the authority to an organization that is free of conflicts of interest, such as the Assn. of American Law Schools or a new group. Mark Greenbaum, *No More Room at the Bench*, L.A. TIMES (Jan. 8, 2010), http://perma.cc/2Z2D-JJ6D; *see also* Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. TIMES (Feb. 10, 2013), http://perma.cc/ANU9-JC4G.

pedagogy mandate[3] that marks a "quantum shift" in legal education,[4] moving its center from teaching to learning[5] and from curriculum to outcomes[6] (i.e., "from what is delivered to students to what students take away from their educational experience").[7]

Of all the potential reform measures,[8] the pedagogy mandate is the one most directly linked to preparing graduates to succeed in the evolving legal employment market. In this way, it can also be a protective measure for law schools.[9] Ironically, successful implementation remains an open question, in part because of the traditional nature of the academy and its resistance to change,[10] and in part because law schools may be ill-equipped to respond to the crisis.[11]

This article seeks to change the dynamic. Part II puts the 2014 revisions to Chapter Three of the Standards into historical context and explains their impact on legal education. Part III urges law schools to embrace the mandate by identifying and addressing implementation barriers. At the same time, the article seeks to empower law professors to focus on pedagogical innovation at the course level (i.e., teaching methods and course design).

Despite some more recent advances in teaching, "assessment still marks a fundamental shift in educational philosophy. It relies on [identifying], and if necessary, changing teaching methods and inputs to ensure student success in meeting learning objectives. It replaces the

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[3] A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REVISED STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (Aug. 2014), *available at* http://perma.cc/SVQ6-5KG2 [hereinafter A.B.A. STANDARDS AND RULES 2014–2015];

[4] A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE OUTCOME MEASURES COMMITTEE, 61 (July 27, 2008), *available at* http://perma.cc/UX2M-E9T5 [hereinafter OUTCOME MEASURES REPORT].

[5] 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 J. LEGAL WRITING INST. 605, 609 (2010) (citing James P. White, *History of the Administration of the American Bar Association Administrative Process*, 51 J. LEGAL EDUC. 438, 439 (2001)).

[6] OUTCOME MEASURES REPORT, *supra* note 4, at 6.

[7] Janet W. Fisher, *Putting Students at the Center of Legal Education: How An Emphasis on Outcome Measures in the A.B.A. Standards for Approved Law Schools Might Transform the Educational Experience of Law Students*, 35 S. ILL. U. L.J. 225, 228 (2010).

[8] Another educational approach used by some law schools is to teach students "'to look for entrepreneurial opportunities by finding 'gaps in the law or gaps in the delivery of services,' and to gain specialized knowledge that can help them counsel entrepreneurs." John Schwartz, *This is Law School? Socrates Takes a Back Seat to Business and Tech*, N.Y. TIMES (Aug. 1, 2014), http://perma.cc/G5DX-UU9C (quoting Vice Dean Catherine L. Carpenter, Southwestern Law School). For example, Michigan State "is pushing its students to understand business and technology so that they can advise entrepreneurs in coming fields. The school wants [its students] to think of themselves as potential founders of start-ups as well, and to operate fluidly in a legal environment that is being transformed by technology." *Id.*

[9] *See infra* pp. 148–50.

[10] "[W]hile there are many current problems relating to legal education, some of the most profound are not susceptible to any quick fix. Two are the *price* of legal education and the *culture* of law schools." A.B.A. TASK FORCE REPORT, *supra* note 1, at 4; *see infra* pp. 150–54.

[11] *See* A.B.A. TASK FORCE REPORT, *supra* note 1; *see infra* pp. 154–56.

mystique of Kingsfield's Socratic approach[12] with transparency about learning objectives and teaching methods."[13]   Under this new approach, "the role of the professor is not to deliver information but to design effective learning experiences so that students achieve the course outcomes and to monitor student learning in order to continuously improve their experiences."[14]

To assist law professors in this regard, the author introduces a teaching effectiveness framework that was created by experts in education from the National Research Council of the National Academies ("NRC")[15] and adapts it for use in legal education.[16] The legal community has relied on the NRC's expertise for decades, in a wide range of fields,[17] but this is the first time NRC expertise is known to have been brought to bear in this context. The NRC is credited for its ability to bring the legal and scientific communities together and to make scientific theories accessible.[18]   In this way, the framework is a useful tool for law professors, especially those who are trained attorneys rather than certified educators, and improves the current state of our pedagogy scholarship by placing existing assessment and learning outcomes work in the broader context of modern learning theory and instructional design.

II. THE PEDAGOGY MANDATE

A. The Standards for Approval of Law Schools—History and the Standards Review Process

The Section of Legal Education and Admissions to the Bar ("Section") is one of the oldest bodies within the ABA.[19] The Section is charged with

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[12] This reference is to the legendary Professor Kingsfield of the classic law school movie, *The Paper Chase. See* THE PAPER CHASE (Thompson-Paul Productions & Twentieth Century Fox Film Corporation 1973).

[13] Ruth Jones, *Assessment and Legal Education: What Is Assessment, and What the *# Does It Have to Do with the Challenges Facing Legal Education?*, 45 MCGEORGE L. REV. 85, 103 (2014) (footnotes omitted).

[14] Fisher, *supra* note 7, at 237.

[15] NAT'L RESEARCH COUNCIL, HOW STUDENTS LEARN: HISTORY, MATHEMATICS, AND SCIENCE IN THE CLASSROOM (M. Suzanne Donovan & John D. Bransford eds., 2005) [hereinafter NAT'L RESEARCH COUNCIL].

[16] The original work covers teaching history, mathematics, and science to K–12 students, and it has thus been adapted by the author for use in legal education. In particular, the author has placed the Framework discussion in the context of modern and adult learning theories and has provided multiple examples of how the Framework can be implemented through teaching exercises and approaches designed for especially for law students.

[17] *See infra* pp. 157–58 (discussing the NRC's assistance to the federal government and the U.S. Supreme Court's use of NRC expert reports).

[18] *See infra* p. 158 (discussing the NRC's "immense prestige" and ability to make scientific information accessible).

[19] The A.B.A. was founded in 1878, and created the Section's predecessor, the Standing Committee on Legal Education and Admissions to the Bar, as one of its first committees. The committee's name was changed to its current iteration in 1893, when the A.B.A. established its first "Section." A.B.A. STANDARDS AND RULES 2014–2015, *supra* note 3, at vii; White, *supra* note 5.

determining, in consultation with state admitting agencies, the legal education requirements for admission to the practice,[20] and, since 1952, the U.S. Department of Education ("DOE") has recognized the Section's Council as the national accreditation agency for *juris doctor* programs.[21] As a result, the Council is responsible for the adoption of the Standards for Approval of Law Schools, Interpretations of those Standards, and Rules of Procedure that govern the accreditation process.[22]

The first Standards were published in 1921, along with a list of law schools in compliance with those Standards,[23] with the aim of improving the competence of those entering the profession.[24]   Historically, the accreditation Standards evaluated the sufficiency of a law school's program of legal education according to "input" measures (i.e., the resources law schools devote toward the program) and "output" measures (i.e., bar passage rates and job placement statistics).[25]

In accordance with DOE regulations,[26] the Council, with support from its Standards Review Committee, "regularly reviews and revises the Standards and Interpretations to ensure that they are appropriate requirements for current legal education programs and that they focus on matters that are central to the provision of quality legal education."[27] After the Council approves revisions to the Standards, the revisions are referred to the ABA House of Delegates ("House") for its concurrence.   If the House does not concur, it may refer the revisions back to the Council for further consideration.[28]   The Council may choose to adjust its position, in light of the House's recommendations, but the House does not have the authority to override the Council, and the Council's revisions become final after a second referral from the House.[29]

B. *2014 Revisions to Chapter Three of the Standards for Approval of Law Schools*

In October 2007, the Council created an Outcome Measures Committee with the express charge of determining "whether and how we

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[20] Duncan, *supra* note 5, at 605.

[21] A.B.A. STANDARDS AND RULES 2014–2015, *supra* note 3, at vii; Duncan, *supra* note 5, at 605.

[22] A.B.A. STANDARDS AND RULES 2014–2015, *supra* note 3, at ix.

[23] *Id.* at v.

[24] Duncan, *supra* note 5, at 605.

[25] Fisher, *supra* note 7, at 226–27.

[26] The DOE mandates that all accreditation agencies under its purview "maintain a systematic program of review that demonstrates that its standards are adequate to evaluate the quality of the education or training provided by the institutions and programs it accredits and relevant to the educational or training needs of students." 34 C.F.R. § 602.21(a) (2013).   The review must be comprehensive; occur regularly; consider each standard as well as the standards as a whole; involve all relevant constituents; and provide those constituents with a meaningful opportunity to participate in the review. *Id.* at § 602.21(b).

[27] A.B.A. STANDARDS AND RULES 2014–2015, *supra* note 3, at viii.

[28] *Id.*

[29] *Id.*

can use output measures, other than bar passage and job placement, in the

accreditation process."[30]   In July 2008, the Committee issued its final report.

> The report recommends that the Section re-examine the current ABA Accreditation Standards **and reframe** them, as needed, **to reduce their reliance on input measures** and **instead adopt a greater and more overt reliance on outcome measures**. As the report shows, such a shift towards outcome measures is consistent with the latest and best thinking of U.S. legal educators and legal educators in other countries and is also consistent with insights gleaned from legal practice and from accreditors in other fields of professional education.[31]

In September 2008, the Council, with the support of the Standards Review Committee and the Student Learning Outcomes Subcommittee, began its comprehensive review of the Standards. Finally, in March and June 2014, the Council approved the 2014 Revised Standards for Approval of Law School,[32] and they received House concurrence in August 2014, which made them effective immediately.[33]

The Chapter Three revisions shift the focus of legal education "from what is delivered to students to what students take away from their educational experience"[34] and are rooted in the 'first principles' of assessment.   More specifically, the assessment cycle has three stages, which are captured by the revisions: setting goals for student learning (outcomes); [35] gathering information about how well students are achieving those goals; and considering that information and adjusting the legal education program, or its delivery, accordingly.[36]   Put another way, assessment involves "the systematic collection, review, and use of information about educational programs undertaken for the purpose of improving student learning and development."[37] Moreover, to be effective, the assessment cycle should occur at four different levels within a school:[38]

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[30] OUTCOME MEASURES REPORT, *supra* note 4, at 1.

[31] *Id* (emphasis added).

[32] A.B.A. STANDARDS AND RULES 2014–2015, *supra* note 3, at ix.

[33] H.D. Res. 103A (2014), *available at* http://perma.cc/6SZM-RKK5; *Explanation of Changes,* A.B.A. Sec. of Legal Educ. & Admissions to the Bar (Apr. 2014), http://perma.cc/GBR3-FJGA.

[34] Fisher, *supra* note 7, at 228.

[35] Goals for student learning are referred to as "outcomes." Fisher, *supra* note 7, at 227 (citing BARBARA E. WALVOORD, ASSESSMENT CLEAR AND SIMPLE 3 (2d ed. 2010)).

[36] Fisher, *supra* note 7, at 228–29.   ·

[37] Jones, *supra* note 13, at 87 (citing TRUDY W. BANTA & CATHERINE A. PALOMBA, ASSESSMENT ESSENTIALS: PLANNING, IMPLEMENTING, AND IMPROVING ASSESSMENT IN HIGHER EDUCATION 4 (1999)).

[38] Fisher, *supra* note 7, at 226; Jones, *supra* note 13, at 88.

institutional assessment,[39] curriculum/program assessment,[40] course assessment,[41] and student assessment.[42] This point is also reflected in the revisions.

As a threshold matter, Revised Standard 301(a) confirms a new goal for legal education: To prepare students, *upon graduation*, for admission to the Bar and for the practice of law. This obligation may appear to be self-evident; [43] however, "[i]n the history of legal education in the United States, there is no record of any concerted effort to consider what new lawyers should know or be able to do on their first day of practice or to design a program of instruction to achieve those goals."[44] Instead, it had been the role of law schools to teach students to think like lawyers and to leave practical training to the employers. Revised Standard 301(a) adds the words "upon graduation" to make the shift clear.

Revised Standard 301(b) requires law schools, for the first time, to "establish and publish learning outcomes designed to achieve these objectives"[45] (i.e., the objectives of 301(a)). Specific learning outcomes are then detailed in Revised Standard 302.[46] At the same time, Revised

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[39] Institutional assessment involves the establishment of educational outcomes for the school as a whole, based on the school's mission and the A.B.A. Standards. Fisher, *supra* note 7, at 229. With the involvement of the bench and bar and alumni, the school should identify the substantive and procedural law, skills, and values its graduates should possess. *Id.* at 230 (citing ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION 43 (2007)); ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION 43 (2007).

[40] Once the institutional objectives have been identified, a law school should assess its educational program to align it with those objectives. "The curriculum should be structured to build students toward mastery of the outcomes, so law schools [should] revise their curricula in order to develop the educational outcomes progressively." Fisher, *supra* note 7, at 231 (citing STUCKEY, *supra* note 39; GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 97 (2000)). The idea is to create congruence among schools' missions, educational outcomes, curricula, and courses. STUCKEY, *supra* note 39. Program assessment also could be conducted by the individual programs within a school (e.g., legal writing programs or clinical programs). *See* Fisher, *supra* note 7, at 235 (citing WALVOORD, *supra* note 36, at 59).

[41] Course-based assessment focuses on "how well individual students are mastering the educational outcomes of a course." Fisher, *supra* note 7, at 236.

[42] *See infra* pp. 34–38 (discussing various forms of student assessment).

[43] "If a law school is to be effective as an educational institution, it needs to be guided by student outcomes—a statement of the knowledge, abilities, and attributes its students should derive from their legal education." MUNRO, *supra* note 40, at 50.

[44] STUCKEY, *supra* note 39, at 2.

[45] *Revised Standards for Approval of Law Schools* § 301(b), A.B.A. STANDARDS AND RULES 2014–2015, *supra* note 3, at 15.

[46] *Revised Standard* 302 states:

A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

(a) Knowledge and understanding of substantive and procedural law;

(b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;

(c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and

(d) Other professional skills needed for competent and ethical participation as a member of the legal profession.

Revised Standards for Approval of Law Schools § 302, A.B.A. STANDARDS AND RULES

Standard 303 outlines the curricular changes that must occur in order to bring these "practice-ready" Standards to fruition. Revised Standard 303(a)(3) now includes a mandated six credit hours of experiential learning, with multiple opportunities for performance[47] and opportunities for self-evaluation.[48] Revised Standard 303(b) requires law schools to provide substantial opportunities for students to participate in law clinics, field placements, and pro bono activities.

While Revised Standards 301, 302, and 303 cover the identification of learning outcomes and the creation of institutional and curricular measures designed to support those outcomes,[49] Revised Standards 314 and 315 focus on assessing whether or how effectively the objectives are being met. Revised Standard 314 focuses on assessment of student learning, mandating law schools to use "both formative and summative assessment methods in [their] curriculum to measure and improve student learning and provide meaningful feedback to students."[50] Finally, Revised Standard 315 addresses institutional effectiveness and requires the dean and the law school to "conduct ongoing evaluation of the law school's program of legal education, learning outcomes, and assessment methods; and [to] use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum."[51]

III. ACHIEVING THE MANDATE

The 2014 Revised Standards are now the measure by which law schools obtain or retain accreditation.[52] Technical compliance may be tempting, especially given the ongoing legal education crisis, but this is the time for law schools to embrace rather than avoid the mandate.[53] It should be remembered that the Standards set a minimum threshold (i.e., a floor

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2014–2015, *supra* note 3, at 15.

[47] *Revised Standards for Approval of Law Schools* § 303(a)(3)(iii), A.B.A. STANDARDS AND RULES 2014–2015, *supra* note 3, at 16.

[48] *Revised Standards for Approval of Law Schools* § 303(a)(3)(iv), A.B.A. STANDARDS AND RULES 2014–2015, *supra* note 3, at 16.

[49] *See also* Revised Standard 304 (simulation courses and clinics), Revised Standards 305 and 307 (field placements and other study outside the classroom), and Revised Standard 306 (distance education). A.B.A. STANDARDS AND RULES 2014–2015, supra note 3.

[50] *See* A.B.A. STANDARDS AND RULES 2014–2015, *supra* note 3. Some have criticized the final version of this Standard because it does not expressly require the assessments to be valid or reliable. *See infra* note 85. It is true that these words were proposed and later eliminated in the revision process; however, one could argue that the final version's requirement that the assessments provide "meaningful feedback" to students implies that the assessments are valid and reliable.

[51] *See* A.B.A. STANDARDS AND RULES 2014–2015, supra note 3 at 24.

[52] *See* A.B.A. STANDARDS AND RULES 2014–2015, supra note 3 at ix.

[53] "'You have got to be in a lot of pain' before a school will change something as tradition-bound as legal training . . . but pain is everywhere at the moment, and 'that's kind of our opening.'" Schwartz, *supra* note 8 (quoting Professor William D. Henderson, Indiana University School of Law).

rather than a ceiling).[54] Moreover, while it may seem counter-intuitive, the Revised Standards also can serve as a protective measure for law schools and law students alike.

A. The Benefits of Achieving the Mandate

1. The Mandate Promotes Graduate Success

Increasing the use of assessment is apt to make students better learners. One example relates to the Self-regulated Learning Theory, which is an assessment cycle students employ.[55] Self-regulated learners develop the ability to regulate their learning with the goal of transferring learned skills and material to new situations,[56] which is seen as a fundamental goal of education.[57]

Simply put, self-regulated learners are more likely to transfer information from one assignment to another, from one class to another, and from law school to the practice of law, which is critical to developing a deep understanding of material, but also to managing the realities of law practice.

"Law school graduates will continue learning for the rest of their professional careers. After graduation, however, students will not always be able to depend on others to provide critique and feedback. For this reason, law schools must produce graduates who possess excellent self-directed learning skills."[58] They must become lifelong learners.[59]

The benefits of hiring a law school graduate with this skill set seem obvious. Given the shrinking employment market and the increased expectations placed on law graduates, teaching students to become proficient self-regulated learners might be one of the most important tasks of today's law professors.[60] The same point can be made with respect to other learning theories and how their use promotes student success.[61]

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[54] The Preamble to the Standards notes that the Standards are "founded primarily on the fact that law schools are the gateway to the legal profession. They are minimum requirements designed, developed, and implemented for the purpose of advancing the basic goal of providing a sound program of legal education." A.B.A. STANDARDS AND RULES 20134–20145, *supra* note 3, at ix.

[55] *See infra* pp. 163–64 (discussing the three phases of self-regulated learning, which mirror the three phases of assessment).

[56] Anthony Niedwiecki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students Through More Effective Formative Assessment Techniques*, 40 CAP. U. L. REV. 149, 156 (2012); "Broadly defined, *transfer* involves prior learning affecting new learning or performance." Anthony Marini & Randy Genereux, *The Challenge of Teaching for Transfer*, in TEACHING FOR TRANSFER: FOSTERING GENERALIZATION IN LEARNING 1, 2 (Anne McKeough et al., eds., 1995).

[57] Marini & Genereux, *supra* note 56, at 1.

[58] STUCKEY, *supra* note 39, at 93–94.

[59] Jones, *supra* note 13, at 110.

[60] STUCKEY, *supra* note 39, at 94; Niedwiecki, *supra* note 56, at 153.

[61] Whether it is encoded information in the brain's schema (Cognitive Learning Theory), constructed knowledge derived from personal experience (Constructivist and Adult Learning Theories), or a well-designed "tool belt" achieved from self-regulation, the idea is that a law student's acquired knowledge remains with the student, and it is organized in such a way that the student will be in a

2. The Mandate Protects Programs of Legal Education

a. The Risk of Implementing Cost-saving Measures in the Absence of Increased Teaching Effectiveness

Increased teaching effectiveness may ward against proposed initiatives that decrease the amount of time students spend in school or the qualifications they have when they enter law school. It has been suggested that "college juniors should be encouraged to go directly to law school, the bar exam should be simplified, accreditation standards should be relaxed to allow for more experiential learning,[62] and states should establish training for the legal equivalent of nurse practitioners."[63] President Obama has weighed in on the "cost-cutting" debate, stating:

> I believe, for example, that law schools would probably be wise to think about being two years instead of three years — because by the third year — in the first two years young people are learning in the classroom. The third year they'd be better off clerking or practicing in a firm, even if they weren't getting paid that much. But that step alone would reduce the cost for the student.[64]

In addition, the 2014 revisions eliminate former Standard 304(f), which means that there will no longer be a restriction on the number of hours a full-time student can be employed during the course of a semester.[65] While this proposal might give students more time to work in law–related jobs and earn extra experience, given the shrinking market, finding such positions may not always be an option. And, in any event, more time at work means less time to devote to studies.

Finally, although not incorporated in the 2014 Revised Standards,[66] the Task Force on the Future of Legal Education[67] also recommended changes

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position to call upon that knowledge as he moves through law school and the practice of law. The ultimate result is a deeper understanding of the law and legal skills.

[62] *Revised Standards for Approval of Law Schools* § 303(a)(3), A.B.A. STANDARDS AND RULES 2014–2015, supra note 3 at 16 (calling for an increase to at least six credit hours in experiential learning). Experiential learning is not a "cost-cutting" measure like the other proposals noted in this section. It may, however, reduce the number of doctrinal credit hours available to a student. Without entering the debate as to whether this is a positive shift, the author simply notes that improved teaching effectiveness in the doctrinal courses may counteract any reduction in available time.

[63] Bronner, *supra* note 2.

[64] Dylan Matthews, *Obama Thinks Law School Should Be Two Years. British Think It Should Be One*, WASH. POST (Aug. 27, 2013), http://perma.cc/P6T9-94RC.

[65] A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REVISED STANDARDS—REDLINE COPY, *available at* http://perma.cc/5Z2W-UA6A [hereinafter REVISED STANDARDS--REDLINE COPY].

[66] *See* A.B.A. STANDARDS AND RULES 2014–2015, *supra* note 3.

[67] In the summer of 2012, the A.B.A. formed the Task Force stating, "The need for the Task Force, and for recommendations as to action, results from rapid and substantial changes in the legal profession, legal services, the national and global economy, and markets affecting legal education." *Task Force on the Future of Legal Education, supra* note 2.

that would reduce the amount of time a student attends law school.[68]

These models have the potential to negatively impact student success if they are not accompanied by an improvement in teaching effectiveness. They demand that professors impart more information in a shorter period of time (i.e., a two-year curriculum model). At the same time, professors are asked to accomplish this task while teaching students with less educational experience (i.e., a three-year undergraduate course of study or those whose law studies are somehow truncated, such that they are qualified to work as something other than a fully licensed attorney) and less time to devote to law studies (i.e., those working an unregulated number of hours while a full-time student). In this context, improved pedagogy is critical. In short, it can help professors do more with less.

b. The Mandate Supports Academic Success & the Evolving Needs of Students

A final thought is that an increase in teaching effectiveness addresses the reality that today's law students may need more support than their predecessors. Specifically, the decline in the number of law school applicants has not been matched by a commensurate reduction in the number of admitted students. For example, according to The Law School Admissions Council's *Volume Summary*, from 2004-2013, there has been a 32% reduction in the number of applicants but only a 16% reduction in the number of admitted students.[69] Moreover, there are reports that it is the most qualified students who are choosing *not* to apply to law school.[70] In other words, there are fewer applicants in general, and those who are applying tend to be less qualified. If this equates to a reduction in learning ability, law schools are obliged to employ improved methodologies to enable these students to succeed.

This also implicates Revised Standard 309(b), formerly Interpretation 303-3,[71] which requires law schools to provide academic support that provides students with a reasonable opportunity to succeed. The word "reasonable" is a relative term, and schools must prepare the students they admit to succeed in the crisis.

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[68] The Task Force recommended that the Council "eliminate or substantially moderate" Standard 304(b) that requires students to complete a specific number of minutes in order to graduate and Standard 304(c) that requires the J.D. program to be completed no earlier than twenty-four months. A.B.A. TASK FORCE REPORT, *supra* note 1, at 31–32.

[69] For example, the total number of A.B.A. applicants from 2004 to 2012 has a range of 32.100, with a high of 100,600 in 2004, and a low of 67,900 in 2012. However, the range of admitted students is only 9,800, with a high of 60,400 in 2010, and a low of 50,600 in 2012. *End of Year Summary 2003–Present*, LAW SCHOOL ADMISSIONS COUNCIL (2014), http://perma.cc/8ANJ-RFEC (2013) [hereinafter *LSAC Volume Summary*].

[70] Jordan Weissmann, *The Wrong People Have Stopped Applying to Law School*, THE ATLANTIC (Apr. 10, 2012, 10:37 AM), http://perma.cc/TP9W-5NPE.

[71] REVISED STANDARDS—REDLINE COPY, *supra* note 66.

B. Overcoming Institutional Barriers

Achieving, rather than just complying with, the mandate involves overcoming historical and cultural barriers to pedagogical innovation.

1. The Traditional Nature of the Academy

The first series of barriers relates to the traditional nature of the academy and its resistance to change.[72] (For example, the 1921 Standards were not substantially revised for more than fifty years.[73]) "Legal education has historically evolved slowly, rarely moving far afield of the three-year, large-class Socratic method model of education."[74] It "has been stronger on tradition than innovation."[75]

This certainly can be said about American legal education's approach to learning outcomes and assessment. The assessment movement in higher education began in 1973,[76] and by 1995, an estimated 94% of undergraduate institutions were using some form of assessment.[77] Other professional schools[78] and law schools outside of the United States, most notably England, Wales, Scotland, Australia, and Japan,[79] have been involved in assessment for some time.

American legal education is arriving much more than fashionably late to the party. While the Standards' Preamble, which was developed in 1995, "articulates a vision of law school accreditation that is conceptualized in outcome-based terms,"[80] a corresponding Standards review process did not begin until 2007, with the creation of the Outcome Measures Committee, and even then the Committee's requests for input and comment generated very little response.[81] After the Committee issued its report in July 2008, the Council began its comprehensive review of the Standards in September 2008, with the support of the Standards Review Committee and the Student Learning Outcomes Subcommittee. At that

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[72] "[W]hile there are many current problems relating to legal education, some of the most profound are not susceptible to any quick fix. Two are the *price* of legal education and the *culture* of law schools." A.B.A. TASK FORCE REPORT, *supra* note 1, at 4.

[73] A.B.A. STANDARDS AND RULES 2014–2015, supra note 3 at viii.

[74] Jones, *supra* note 13, at 86–87.

[75] Schwartz, *supra* note 8 (quoting Dean Joan W. Howarth, Michigan State University College of Law).

[76] Fisher, *supra* note 7, at 227.

[77] *Id.* at 228 (citing CATHERINE A. PALOMBA & TRUDY W. BANTA, ASSESSMENT ESSENTIALS: PLANNING, IMPLEMENTING, AND IMPROVING ASSESSMENT IN HIGHER EDUCATION 3 (1999).

[78] OUTCOME MEASURES REPORT, *supra* note 4, at 20 (reviewing accreditation standards for allopathic and osteopathic medicine, dentistry, veterinary medicine, pharmacy, psychology, teaching, engineering, accounting, and architecture, all of which include outcome measures); Memorandum from Richard K. Neumann, Jr., Professor of Law, Maurice A. Dean School of Law at Hofstra Univ., to Council of the A.B.A. Section of Legal Education and Admissions to the Bar, *Chapter 3 notice and comment [for] Proposed Standards 302, 303, and 314* 2–6 (Jan. 31, 2014) [hereinafter Neumann Memo].

[79] OUTCOME MEASURES REPORT, *supra* note 4, at 11–13.

[80] *Id.* at 2.

[81] *Id.* at 4–5.

time, it was anticipated that the review process would take two academic[82] or three calendar years.[83] Instead, it has taken six, and some criticize the revisions for not going far enough.[84]

The slower-than-expected process may relate to perennial objections in the higher education assessment debate that assessment mandates are "threatening, insulting, intrusive, and wrongheaded."[85] Other objections relate to academic freedom or unfairly making faculty responsible or accountable for student behavior.[86] The measures also can place financial and resource burdens on law schools,[87] which they may be ill-equipped to bear.[88] Addressing these attitudes and concerns may help ensure that revision delays do not translate into implementation delays.

An additional barrier related to the traditional nature of law schools involves training and culture. Law professors are trained attorneys rather than certified educators.[89] "'Instead of directly addressing learning to teach well, we often erroneously assume law teachers know how to teach because they were students.'"[90] As a result, professors tend to teach the way they were trained,[91] using more traditional (and sometimes less effective) methods.[92] What's more, "[m]ost law professors sincerely want to be good teachers, and many are, but too few study and practice effective educational philosophies and techniques."[93]

The ABA Task Force on the Future of Legal Education noted this phenomenon, as it not only encouraged innovation in the programs that

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[82] *See Standards Review Committee, supra* note 34.

[83] Duncan, *supra* note 5, at 607.

[84] For example, one scholar notes the assessment requirement articulated in Revised Standard 314 has been diluted through various amendments and interpretations to the point that law schools might be able to maintain the status quo yet still claim compliance with the new Standards. *See* Neumann Memo, *supra* note 79, at 10. "A Standard that requires no one to change is worse than no Standard at all. It would create a misleading appearance of improved education even though everybody can continue doing what they're doing now." *Id.* at 11.

[85] Duncan, *supra* note 5, at 609 (citing MARY J. ALLEN, ASSESSING ACADEMIC PROGRAMS IN HIGHER EDUCATION 13 (2004)).

[86] *Id.* (citing BARBARA E. WALVOORD, ASSESSMENT CLEAR AND SIMPLE 8–9 (2004)).

[87] Jones, *supra* note 13, at n.4.

[88] *See infra* pp. 152–53.

[89] E. ALLEN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 30–31 (1996) ("American law teachers . . . serve no formal apprenticeship before their appointment, and . . . they are often drawn from the practicing bar. . . . Although graduate law study or a period as a teaching fellow is not uncommon as preparation for a teaching career in law, neither is essential nor even usual."); Duncan, *supra* note 5, at 612.

[90] STUCKEY, *supra* note 39, at 79 (footnote omitted).

[91] FARNSWORTH, *supra* note 90, at 15 ("The development of the American legal system has been influenced by the kind of education that lawyers have received[.]").

[92] It has been suggested that law professors "use a limited range of teaching methods that are not always carefully chosen for their effectiveness." STUCKEY, *supra* note 39, at 96. For example, some courses have only one examination; however, "no research finds that giving one exam at the end of the semester will adequately assess a student's knowledge." Duncan, *supra* note 5, at 624. *See* OUTCOME MEASURES REPORT, *supra* note 4, at 9–10; Christie A. Linskens Christie, *What Critiques Have Been Made of the Socratic Method in Legal Education? The Socratic Method in Legal Education: Use, Abuses and Beyond,* 12 EUR. J. LAW REFORM 340, 347–50 (2010).

[93] STUCKEY, *supra* note 39, at 79.

deliver legal education, but it also called on the academy to consider the "wealth of knowledge and experience from other disciplines and fields."[94] For example, the first discussion item for its December 2012 meeting was, "Law Schools and Others in Legal Education Should Promote Innovation in Pedagogy."[95] The Task Force further noted, "Law schools and law faculties should make use of knowledge and experience from other disciplines to support innovation in teaching methodologies."[96]

At the same time, the current tenure and promotion system, which rewards scholarship more so than the development of teaching methodologies, provides a disincentive to faculty pursuing improved pedagogy. "Tellingly, hiring and promotion decisions in law schools are almost exclusively based on scholarship, and 'most schools make no adverse decisions on the basis of teaching.'"[97] The Task Force also noted, "[p]revailing law faculty culture, and the prevailing faculty structure in a law school, reflect the model of a law school as primarily an academic enterprise . . . . This entrenched culture and structure has promoted declining classroom teaching loads and a high level of focus on traditional scholarship."[98]

Perhaps because of this phenomenon, Deborah Rhode went so far as to suggest in 2000, that legal academics have not "shown much interest in building on broader educational research about how students learn."[99] Indeed,

> [F]ew law schools provide more than cursory assistance to help new faculty develop their teaching skills. As Deborah Rhode observed, "[w]e do not effectively educate legal educators. Most law professors get no formal training in teaching. . . ." Some law schools organize sessions for their faculty where learning theory and teaching techniques are discussed, but these are generally minimal in scope and non-mandatory.[100]

The Task Force also ventured into this thorny issue and recommended "constructive change" in faculty culture and faculty work, stating:

> Some, perhaps many, law schools will continue to operate under the current model. But for law schools that choose to pursue other models, faculty culture and faculty role may have to change to support them. These changes

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[94] A.B.A. TASK FORCE REPORT, *supra* note 1, at 27.

[95] A.B.A. TASK FORCE ON THE FUTURE OF LEGAL EDUC., *Discussion Items on Delivery and Regulation* (2012), *available at* http://perma.cc/AHP2-M7K8.

[96] *Id.*

[97] STUCKEY, *supra* note 39, at 79 (footnote omitted).

[98] A.B.A. TASK FORCE REPORT, *supra* note 1, at 27–28.

[99] STUCKEY, *supra* note 39, at 78 (footnote omitted).

[100] *Id.* at 78 (footnote omitted).

may relate to: accountability for outcomes . . . [and]
responsibilities for teaching . . . .

The Task Force recommends that universities and law
faculties move to reconfigure the faculty role and promote
change in faculty culture, so as to support whatever choices
law schools make to adapt to the changing environment in
legal education.[101]

2. Law Schools May Be Ill Equipped to Successfully Implement the Mandate

Adjusting programs of legal education at the macro and micro levels
and collecting and evaluating assessment data will take considerable time
and energy.[102] In 2008, the Outcome Measures Committee noted that law
schools were in a better-than-anticipated position to implement what it
called this "quantum shift"[103] because of the work some schools had
already accomplished with respect to outcome measures.[104] The forecast
looks much different now in the context of the ongoing crisis.   A fair
question is whether law schools operating under significant financial
constraints are still so favorably positioned.[105]

Devastating storms, called "Nor'easters" in the Atlantic states,
sometimes develop in the fall, when weather is in rapid transition: cold
Canadian air meets warmer air over the Atlantic Ocean, which is slow to
lose its residual summer heat.[106] On rare occasions, these forces combine
in deadly fashion to create a "Perfect Storm."[107] The legal academy is in
the midst of just such a storm.

With respect to the *"rapid and substantial* changes in the legal
profession, legal services, the national and global economy, and markets
affecting legal education,"[108] the National Bureau of Labor Statistics
predicts that there will be strong competition for legal jobs because there

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[101] A.B.A. TASK FORCE REPORT, *supra* note 1, at 28.

[102] See Jones, *supra* note 13, at 108.

[103] OUTCOME MEASURES REPORT, *supra* note 4, at 61.

[104] *Id.* at 63. The Committee also noted the work that had been accomplished by the Carnegie Foundation's report in terms of identifying potential models to emulate. *Id.* at 62.

[105] These challenges may explain why some Proposed Standards have been revised, which has drawn sharp criticism that the new Standards do not go far enough. *See* Neumann Memo, *supra* note 79, at 10–11.

[106] *The Perfect Storm*, NAT'L CLIMATIC DATA CTR., NAT'L OCEANIC & ATMOSPHERIC ADMIN., (last updated Aug. 20, 2008) http://perma.cc/FU5Z-5NL7.

[107]*Id.* (detailing "The Perfect Storm" that was the subject of the best-selling novel and George Clooney movie of the same name).

[108]*Task Force on the Future of Legal Education, supra* note 2 (emphasis added). *See also* A.B.A. TASK FORCE REPORT, *supra* note 1, at 13–14 (explaining structural changes in the legal employment market, misdistribution of legal services, and the delivery of law-related services by persons without a J.D.).

are more graduating lawyers each year than there are legal positions.[109] Moreover, "growth in demand for lawyers will be constrained as businesses increasingly use large accounting firms and paralegals to do some of the same tasks that lawyers do."[110]

As noted above, law schools are slow to change, like the Atlantic Ocean clinging to the residual heat of summer. This combination of rapid change and slow response forms the initial "Perfect Storm" in legal education. There is also, however, an exacerbating force that brings the storm to its pitch: the decline in the number of law school applicants,[111] which hobbles law schools' efforts to address the crisis. Law school enrollment is at a forty-year low, with a 24.4% decline in just the past 3 years.[112] Schools have various responses to consider. They could voluntarily reduce the size of their classes and rely on endowments. Others not so favorably situated may have to lay off faculty or staff, reduce their admissions standards, or explore alternative, non-JD programs in order to attract new streams of applicants. These options impact a law school's ability to achieve the mandate to the extent it is placed in the conundrum of doing more with less—less money, fewer professors, fewer staff, sometimes less qualified students, and less time devoted to traditional J.D. offerings and programs.

C. Taking Action

A first step is for law schools to begin or continue to develop learning outcomes and assessments, for which there are valuable sources of assistance.[113] However, this work cannot occur in a vacuum. It follows naturally from the mandate that these outcomes and assessments will be developed in accordance with modern learning and instructional design

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[109] *BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR Occupational Outlook Handbook* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR (2014), http://perma.cc/T88J-ZV9G.

[110] *Job Outlook for: Lawyers*, CAREER PLANNER.COM, (Nov. 17, 2014, 4:48 PM), http://perma.cc/5XCU-YF39; *See* William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 461 (2013) ("At the vast majority of A.B.A.-accredited law schools, graduates are not obtaining full-time, permanent employment as practicing lawyers. This situation is partially driven by lawyer overproduction.").

[111] According to the Law School Admission Council's *End of Year Summary*, which covers law school admissions data from 2004 to 2013, the number of American Bar Association applicants decreased 10% in 2011, another 13.7% in 2012, and 12.3% in 2013. *LSAC Volume Summary, supra* note 69.

[112] Peter Schworm, *Waning Ranks at Law Schools*, BOSTON GLOBE, July 6, 2014, http://perma.cc/22U5-XVZJ.

[113] MUNRO, *supra* note 40, at 50; OUTCOME MEASURES REPORT, *supra* note 4; STUCKEY, *supra* note 39; TRUDY W. BANTA & CATHERINE A. PALOMBA, ASSESSMENT ESSENTIALS: PLANNING, IMPLEMENTING, AND IMPROVING ASSESSMENT IN HIGHER EDUCATION 4 (1999); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); Duncan, *supra* note 5; Fisher, *supra* note 7; Jones, *supra* note 14; Lori A. Roberts, *Assessing Ourselves: Confirming Assumptions and Improving Student Learning by Efficiently and Fearlessly Assessing Student Learning Outcomes*, 3 DREXEL L. REV. 457 (2011); Mary Crossley & Lu-in Wang, *Learning by Doing: An Experience with Outcomes Assessment*, 41 U. TOL. L. REV. 269 (2010).

theories. Indeed, these theories are critical to the successful implementation of the Revised Standards.

Fundamentally, one must recognize that effective teaching involves thought about how people learn. This information can be used, in turn, to inform professors' course and individual class-design decisions, with the aim of providing meaningful learning and assessment opportunities for students. Learning theories also can be used as diagnostic tools to identify why learning outcomes are not being achieved. The theories can help professors identify where there are gaps in learning and how to make meaningful adjustments. Finally, developing an understanding of these theories can help professors make informed decisions about learning outcomes. For example, with respect to the suggestion that students should be trained explicitly to develop the skill of self-regulated learning, understanding this theory then, would be an important first step in identifying learning outcomes related to this goal. The Empowerment Teaching Framework, which has been developed by experts in education and adapted by the author for use in legal education, addresses this need and is the subject of remainder of this article.

1. The Empowerment Teaching Framework Promotes Pedagogical Innovation

Addressing the attitudes and culture of the academy will take time and continued effort; however, one immediate step that can be taken is to empower the willing. The Empowerment Teaching Framework ("Framework") is such a vehicle. It provides professors with a system to engage in pedagogical innovation. It synthesizes various learning theories in a straightforward yet meaningful way and promotes their incorporation into law school teaching by novice and expert professors alike. To understand the Framework's value, one should appreciate the expertise of its authors—The National Research Council of the National Academies.

a. The National Research Council—History & Expertise

During the American Civil War, Congress incorporated the National Academy of Sciences.[114] Its Congressional Charter mandates that "the Academy shall, whenever called upon by any department of the Government, investigate, examine, experiment, and report upon any subject of science or art."[115] Its employees are not government employees, but it "has acted since the time of its establishment as an official adviser of the Government on a wide variety of questions."[116]

In 1916, President Woodrow Wilson requested that the Academy of Sciences create a National Research Council in order to "associate the

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[114] An Act to Incorporate the National Academy of Sciences, Ch. 111, 12 Stat. 806 (1863).
[115] *Id.; see* 36 U.S.C. § 150303 (2012).
[116] NAT'L. RESEARCH COUNCIL, ORGANIZATION AND MEMBERS 3 (1919).

broad community of science and technology with the Academy's purpose of furthering knowledge and advising the federal government[,]"[117] particularly during World War I.[118] In 1918, the president ordered the perpetuation of the NRC.[119] Today the NRC, the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine comprise "The National Academies."[120]

The NRC is the principal operating agency for the National Academy of Sciences and the National Academy of Engineering.[121] For example, when the National Academy of Sciences is asked to undertake a study, the NRC will create a committee of experts to conduct the study and publish findings; oversee the study; and otherwise support the committee using resources from the Academies.[122] "Because of the immense prestige of the Academies, [its] studies can draw upon any personnel resources that it feels are needed."[123]

The NRC has assisted the legal community for decades, on a wide range of topics, for example, a search of U.S. Supreme Court cases reveals that the Court has relied upon NRC expert reports when evaluating adolescent sexuality in the context of Minnesota's parental notification/abortion laws;[124] when evaluating the use of "tool marks" and other forensic testimony in a capital punishment case;[125] when reviewing maritime cargo transportation in the context of a Longshoremen's and Harbor Workers' Compensation Act claim;[126] when reviewing highway access in the context of a government Takings case;[127] and when evaluating the use of polygraphs and voiceprints.[128]

These few examples demonstrate how the NRC connects the legal community "with the scientific community in evaluating a wide range of scientific techniques."[129] Now, for apparently the first time, the NRC's expertise is being used in legal education. It is a natural and appropriate step to connect law schools implementing the pedagogy mandate with experts in pedagogy.

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[117] NAT'L. RESEARCH COUNCIL, *supra* note 15, at iii.

[118] *Id.* at 4.

[119] Exec. Order No. 2859, as amended by Exec. Order No. 10,668, 21 Fed. Reg. 3155–01 (May 12, 1956); Exec. Order No. 12,832, 58 Fed. Reg. 5905 (Jan. 22, 1993).

[120] Thomas L. Bohan, *Scientific Evidence and Forensic Science Since Daubert: Maine Decides to Sit Out the Dance,* 56 ME. L. REV. 101, 121 (2004).

[121] NAT'L RESEARCH COUNCIL, *supra* note 15, at iii.

[122] Bohan, *supra* note 121, at 121.

[123] *Id.*

[124] Hodgson v. Minnesota, 497 U.S. 417, 478 n.9 (1990) (Marshall, J., concurring in part, dissenting in part).

[125] Hinton v. Alabama, 134 S. Ct. 1081, 1084 (2014) (per curiam).

[126] Victory Carriers v. Law, 404 U.S. 202, 215 n.15 (1971).

[127] *See* Martin v. Creasy, 360 U.S. 219, 225 n.5 (1959).

[128] Bohan, *supra* note 121, at 123.

[129] *Id.* at 120.

The Empowerment Teaching Framework suggested today has its genesis in work performed by the NRC's Committee on Developments in the Science of Learning.[130] "That [committee's] report presented an illuminating review of research in a variety of fields that has advanced understanding of human learning. The report also made an important attempt to draw from that body of knowledge implications for teaching."[131] A second committee followed, which explored what research and development would need to be done to accomplish the goals of the first committee and communicate these findings to the teaching community.[132] These committee reports were then combined into an expanded report.[133]

The NRC's Committee on How People Learn then took these reports to the next level by inviting "[d]istinguished researchers who have extensive experience in teaching"[134] to produce chapters that "provide examples of how the principles and findings on learning can be used to guide . . . teaching[.]"[135]

b. The Framework and Its Theoretical Foundations

The NRC recommends that teachers center their classrooms and their teaching techniques on four principles, which the author refers to as the Empowerment Teaching Framework.[136]

Principle 1: Focus on Knowledge

Identify what is to be taught, why it is taught, the relationship between the learning goals and teaching methods, and what mastery looks like.

Principle 2: Focus on the Learner

Encourage attention to preconceptions and begin instruction with what learners think and know.

Principle 3: Focus on Assessment

Provide frequent opportunities to make students' thinking and learning visible guides both for the teacher and for the learner, [*and promote self-regulation of learning*].

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[130] *See* NATIONAL RESEARCH COUNCIL, HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL (John D. Bransford et al. eds., 1999).

[131] NAT'L RESEARCH COUNCIL, *supra* note 15, at vii.

[132] *Id.* (citing NATIONAL RESEARCH COUNCIL, HOW PEOPLE LEARN: BRIDGING RESEARCH AND PRACTICE (M. Suzanne Donovan et al. eds., 1999)).

[133] *Id.* (citing NATIONAL RESEARCH COUNCIL, HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL: EXPANDED EDITION (John D. Bransford et al. eds., 2000)).

[134] *Id.*

[135] *Id.*

[136] NAT'L RESEARCH COUNCIL, *supra* note 15, at 13.

Principle 4: Focus on Community

Create a classroom environment that encourages questioning, respect, and risk taking.[137]

The Framework also can be understood as a Venn diagram, with focus on knowledge, focus on the learner, and focus on assessment, all underscored by the need to build a community within which students are empowered to embrace learning.[138]
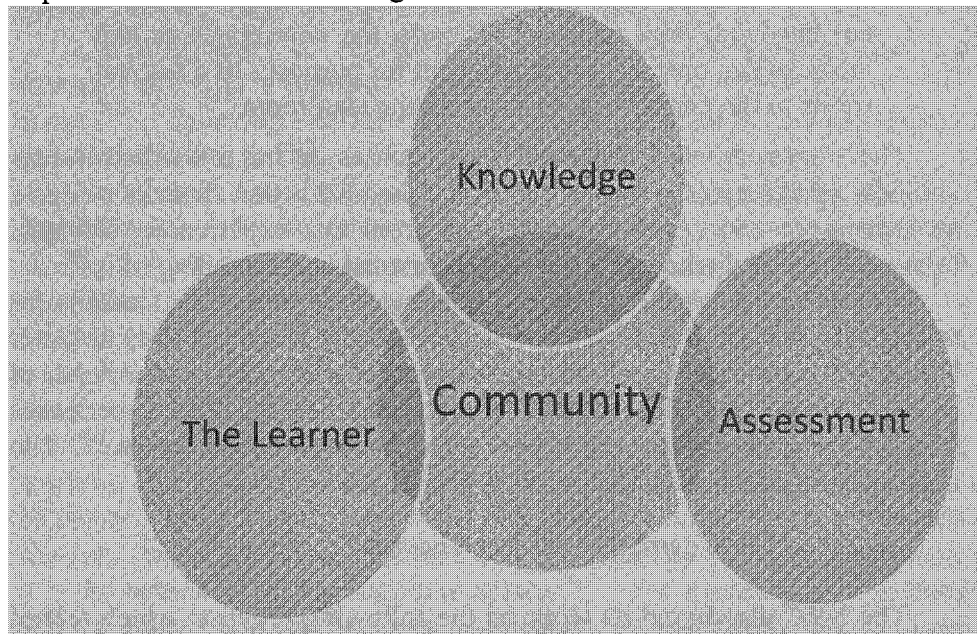
The Framework was intended to serve as a lens for educators to evaluate teaching and learning effectiveness.[139] The NRC rooted this Framework in modern learning theory, as evidenced by the premises upon which its work is based. Key aspects of these theories are important to note,[140] even for experienced professors, so that the value of the

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[137] NAT'L RESEARCH COUNCIL, *supra* note 15, at 13 (emphasis added).

[138] *Id.*

[139] *Id.* at 12.

[140] The purpose of this section is to note the hallmarks of the various learning theories rather than to begin a new a discussion of them. For additional information, consult the following sources that have been written in the legal education context: MICHAEL HUNTER SCHWARTZ, EXPERT LEARNING FOR LAW STUDENTS (2008); MICHAEL HUNTER SCHWARTZ ET AL., TEACHING LAW SCHOOL BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM (2009); Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ASS'N LEGAL WRITING DIRECTORS 73 (2004). For learning-theory sources written for educators, *see generally* DAVID MOSELEY ET AL., FRAMEWORKS FOR THINKING: A HANDBOOK FOR TEACHING AND LEARNING (2005); DUANE F. SHELL ET AL., THE UNIFIED LEARNING MODEL: HOW MOTIVATION, COGNITIVE, AND NEUROLOGICAL SCIENCES INFORM BEST TEACHING PRACTICES (2010); THE IMPORTANCE OF LEARNING STYLES: UNDERSTANDING THE IMPLICATIONS FOR LEARNING, COURSE DESIGN, AND EDUCATION (Ronald R. Sims & Serbrenia J. Sims eds., 1995).

Empowerment Teaching principles might be discussed meaningfully.

i. Constructivist and Adult Learning Theories[141]

The NRC based its work on the following premise, which relates to Adult and Constructivist Learning Theories:

> Students come to the classroom with preconceptions about how the world works. If their initial understanding is not engaged, they may fail to grasp the new concepts and information, or they may learn them for purposes of a test but revert to the preconceptions outside the classroom.[142]

The Constructivist Learning Theory focuses on the individual learner and how he experiences new material.[143] The idea is that students evaluate an experience and construct knowledge from that experience. Students learn new material when they develop a personal understanding of it.[144]

The Adult Learning Theory raises related points for law students for whom law will be a second career.[145] Like the constructivist, an adult learner builds knowledge from experiences; however, given the depth of prior experience, an adult learner is motivated to engage in experiences that are important to him and his personal and professional needs.[146] The adult learner also seeks to be in control of his learning process.[147]

ii. Cognitive Learning Theory[148]

The NRC also based its work on the following premise, which relates to the Cognitive Learning Theory.

> To develop competence in an area of inquiry, students must (a) have a deep foundation of factual knowledge; (b) understand facts and ideas in the context of a conceptual framework; and (c) cognize knowledge in ways that facilitate

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[141] For additional information about Constructivist and Adult Learning Theories, *see* C.A. BOWERS, THE FALSE PROMISES OF CONSTRUCTIVIST THEORIES OF LEARNING: A GLOBAL AND ECOLOGICAL CRITIQUE (2005); SOCIAL INTERACTION IN LEARNING AND INSTRUCTION: THE MEANING OF DISCOURSE FOR THE CONSTRUCTION OF KNOWLEDGE (Helen Cowie & Geerdina van der Aalsvoort eds., 2000); and REFLECTION: TURNING EXPERIENCE INTO LEARNING (David Boud et al. eds., 1985).

[142] NAT'L RESEARCH COUNCIL, *supra* note 15, at 1.

[143] SCHWARTZ ET AL., *supra* note 140, at 7; Lysaght & Lockwood, *supra* note 140, at 90–92.

[144] SCHWARTZ ET AL., *supra* note 140, at 7.

[145] *Id.* at 8.

[146] *Id.*

[147] *Id.* at 9.

[148] For additional information related specifically to the Cognitive Learning Theory, *see generally* JOHN T. BRUER, SCHOOLS FOR THOUGHT (1993); CLASSROOM LESSONS: INTEGRATING COGNITIVE THEORY AND CLASSROOM PRACTICE (Kate McGilly ed., 1994); Niedwiecki, *supra* note 56; Anthony S. Niedwiecki, *Lawyers and Learning: A Metacognitive Approach to Legal Education*, 13 WIDENER L. REV. 33 (2006); and sources cited *supra* note 140.

retrieval and application.[149]

A much-used analogy regarding the Cognitive Learning Theory is to think of the brain as a computer.[150] Professors deliver material to the learner with the aim of the material being "encoded" in the learner's long-term memory and later retrieved and applied to future situations. There are four significant aspects of the cognitive learning process: (1) selective attention, (2) computing/working memory, (3) encoding/long-term memory storage, and (4) retrieval/working-memory use.[151]

The first aspect of cognition—selective attention—occurs when the learner's attention is captured. If a student is not engaged, no learning will occur.[152] *"Teaching and instruction, therefore, are about getting students to 'attend' to things."*[153]

The second stage of cognition involves the brain's working memory. Psychologists define the term "working memory" or "short-term memory" as the "cognitive resources we use to execute mental operations and to remember the results of those operations for short periods of time"[154] In other words, "working memory is the part of our cognitive architecture where mental computations actually take place; in this respect it is much like a computer's central processing unit."[155]

Once the learner shifts focus to the class material, the learner's working memory is engaged, to the exclusion of other material.[156] However, the concentration is limited in scope and time. "Working-memory capacity is a limiting factor in our ability to process information. It is the bottleneck in our cognitive system."[157] For example, it is believed that the brain's working memory can manage approximately five to seven "chunks"[158] of information at any given time.

Having learners work actively with the material promotes encoding (i.e., the transfer of material from the working memory to the long-term memory), which is the third stage of cognition.[159] "It is fundamentally true to say that what is stored in long-term memory is what working memory

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[149] NAT'L RESEARCH COUNCIL, *supra* note 15, at 1.

[150] BRUER, *supra* note 148, at 1–2 ("The basic point of view inhabiting our work . . . has been that the programmed computer and human problem solver are both species belonging to the genus IPS [information-processing system]") (citing ALLEN NEWELL & HERBERT A. SIMON, HUMAN PROBLEM SOLVING 870 (1972)); MOSELEY ET AL., *supra* note 140, at 15.

[151] SCHWARTZ ET AL., *supra* note 140, at 4.

[152] SHELL ET AL., *supra* note 140, at 14.

[153] *Id.*

[154] BRUER, *supra* note 148, at 28 (citing A. Baddeley, *Working Memory*, 255 SCIENCE 556, 556–59 (1992)).

[155] *Id.* at 24.

[156] SHELL ET AL., *supra* note 140, at 21.

[157] BRUER, *supra* note 148, at 29.

[158] *Id.* at 9–10 (citing George A. Miller, *Human Memory and the Storage of Information*, IEEE TRANSACTIONS ON INFORMATION THEORY, Sept. 1956, at 129, 129–37); Lysaght & Lockwood, *supra* note 140, at 85.

[159] SCHWARTZ ET AL., *supra* note 140, at 4–5.

was attending to."[160] It may be helpful to compare the "encoding" process to storing a document on a computer's hard drive.[161] In other words, "knowledge exists if it has been stored."[162] The same is true with encoding new information. The brain organizes information in schemata, which are "coherent knowledge structures that are stored in memory."[163] The key for professors is to help students determine in which existing schema, or folder, to file the new information (i.e., assimilation)[164] or how to expand or alter an existing schema (or create a new schema) to incorporate the new material (i.e., accommodation).[165]

The final stage of the cognitive learning process is retrieval and working memory. To the extent material is encoded and appropriately filed into the brain's schema, the expectation is that the learner will retrieve the material and use it in future situations. As with a computer, the care with which one names the file and organizes it in the folder is related directly to the ease with which one will later retrieve the file. The repeated retrieval and application of encoded material leads to "automaticity,"[166] and the amount of repetition is related directly to the speed of retrieval.[167]

iii. Self-regulated Learning Theory and Metacognition[168]

The Framework is also connected to the Self-regulated Learning Theory, as reflected in another one of the NRC's premises:

> A "metacognitive" approach to instruction can help students learn to take control of their own learning by defining learning goals and monitoring their progress in

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[160] SHELL ET AL., *supra* note 140, at 14.

[161] BRUER, *supra* note 148, at 24–25.

[162] SHELL ET AL., *supra* note 140, at 34.

[163] Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*, 34 SEATTLE U. L. REV. 51, 72 (2010).

[164] Lysaght & Lockwood, *supra* note 140, at 87.

[165] *Id.*

[166] SCHWARTZ ET AL., *supra* note 140, at 5. An example is the use of an IRAC structure to organize a legal analysis. Experienced lawyers are very familiar with the idea of presenting a legal analysis by stating the issue, stating the relevant law, applying the law to the facts, and stating the conclusion. While first-year law students may have to remind themselves of the structure, a seasoned attorney is more likely to structure the analysis in this way (or in some variation) automatically.

[167] SHELL ET AL., *supra* note 140, at 47.

[168] For additional information regarding self-regulated learning and metacognition, *see* RONALD J. AREGLADO ET AL., LEARNING FOR LIFE: CREATING CLASSROOMS FOR SELF-DIRECTED LEARNING (1996); JANET DONALD, LEARNING TO THINK: DISCIPLINARY PERSPECTIVES (2002); MARY JAMES ET AL., IMPROVING LEARNING HOW TO LEARN: CLASSROOMS, SCHOOLS, AND NETWORKS (2007); ELLEN J. LANGER THE POWER OF MINDFUL LEARNING (1997); METACOGNITION, STRATEGY USE, AND INSTRUCTION (Harriet S. Waters & Wolfgang Schneider eds., 2010); John M. DiPippa & Martha M. Peters, *The Lawyering Process: An Example of Metacognition at its Best*, 10 CLINICAL L. REV. 311 (2003); Niedwiecki, *supra* note 56; Niedwiecki, *supra* note 148; Michael Hunter Schwartz, *Teaching Law Students to Be Self-Regulated Learners*, 2003 MICH. ST. D.C.L. L. REV. 447 (2003); and *see* sources cited *supra* note 140.

achieving them.[169]

The foundation of this article rests on the idea that professors should understand and use various learning theories in their everyday teaching. The need to actively and explicitly teach these theories to students is less obvious, with the exception of the Self-regulated Learning Theory. The aim of this theory is to teach students to "take control over their own learning."[170]

Metaphorically, the self-regulated learner creates a tool belt, filled with legal skills and legal information. The self-regulated learner goes to this tool belt, time and time again, purposefully pulling particular pieces from the belt as they are needed. Self-regulated learners also are proficient at implementing appropriate strategies when they become aware of their own lack of capacity.[171] In other words, when the learner goes to the tool belt and determines there is nothing there that will be of assistance, he knows how to make an effective plan to address the deficiency.

The Self-regulated Learning Theory is rooted in the concept of metacognition or "thinking about thinking."[172] Metacognition is defined as, "one's knowledge concerning one's own cognitive processes and products...."[173] There are two main aspects of metacognition: "an awareness of one's own cognitive functioning (metacognitive knowledge) and [the] application of one's cognitive resources for learning or problem-solving . . . ."[174] This latter stage is further divided into two categories: "metacognitive monitoring and metacognitive regulation."[175]

It may be helpful to perceive metacognition in the context of our own behavior. For example, one engages in metacognitive thought by identifying in advance what steps will have to be taken to accomplish a project. Another example is monitoring reading comprehension while working through a document, recognizing a lack of comprehension, and re-reading. Yet another example is failing at a task, evaluating the experience, and identifying how to adjust the approach in the future in order to succeed the next time a similar task is confronted. These three examples mirror the three steps in the self-regulated learning process: The Planning Phase, the Implementation Phase, and the Reflective/Attribution

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[169] NAT'L RESEARCH COUNCIL, *supra* note 15, at 2.

[170] *See* SCHWARTZ ET AL., *supra* note 140, at 3.

[171] Niedwiecki, *supra* note 56, at 155.

[172] *Id.* at 156.

[173] John H. Flavell, *Metacognitive Aspects of Problem Solving, in* THE NATURE OF INTELLIGENCE 232 (Lauren B. Resnick ed., 1976).

[174] MOSELEY ET AL., *supra* note 140, at 13 (citations omitted); *see also* KATE MCGILLY, *Cognitive Science and Educational Practice: An Introduction, in* CLASSROOM LESSONS: INTEGRATING COGNITIVE THEORY AND CLASSROOM PRACTICE (Kate McGilly ed., 1994).

[175] MOSELEY ET AL., *supra* note 140, at 13 (citing D.J. Hacker, *Definitions and Empirical Foundations, in* METACOGNITION IN EDUCATIONAL THEORY AND PRACTICE 11 (D.J. Hacker et al. eds., 1998)).

Phase.[176]

(a) The Planning Phase of Self-Regulated Learning

The Planning Phase has four critical steps: (1) Self-regulated learners decide what it is they will learn; (2) set a mastery goal; (3) predict their success at achieving the goal; and (4) plan how, when, and where the learning will occur.[177]

Understanding the concept of mastery is critical to students' ability to regulate their own learning. For example, some common student questions include: What will be on the exam? How many hours will it take to complete this assignment? These questions are clues to the professor that students are not setting mastery goals, because, if they were, the students would understand it is not about passing one exam or the number of hours spent on a project that marks when an assignment is completed. It is the recognition that one understands the material that marks when the students' work, for the time being, is completed. Discussing mastery goals also telegraphs to students the high expectations their professors have of them, which is another teaching aim.[178]

(b) The Implementation Phase of Self-Regulated Learning

The second stage of the self-regulated learning process is the Implementation Phase. It is during this stage that the learner performs the work as planned. The most significant note here is the need to monitor the effectiveness of the plan and to adjust as necessary. In other words, if the plan called for reading twenty pages, the learner should begin reading and evaluate his comprehension while doing so. If the learner comprehends the material, he should continue. If he does not comprehend the material, he should stop, evaluate, and adjust the plan accordingly. This highlights why setting a mastery goal at the first stage, before one even begins the actual work, rather than a performance goal, is an important step in the process. A person satisfies the performance goal by simply completing the twenty pages whereas the mastery goal is achieved when the material is comprehended.

(c) The Reflection & Attribution Phase of Self-Regulated Learning

The final stage is the Reflection and Attribution Phase.[179] Given the

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[176] SCHWARTZ ET AL., *supra* note 140, at 10.

[177] *Id.*

[178] STUCKEY, *supra* note 39, at 85 ("The premise behind this principle is that we tend to get what we expect from students. Our expectations become self-fulfilling prophecies.").

[179] SCHWARTZ ET AL., *supra* note 140, at 10, 12.

law school structure, this may be the area where the students spend the least amount of time, and yet it is a critical step to prepare for the transfer of material from one situation to the next. During this phase, the student evaluates his results, identifies what aspects of the plan led to positive results and what aspects led to negative results. The student then creates a plan for how he will move forward when he is asked to complete a similar exercise in the future.[180]

2. Adapting the Empowerment Teaching Framework for Legal Education

The Empowerment Teaching Framework synthesizes these learning theories into an accessible model to assess teaching effectiveness. Specifically, professors should evaluate current courses or design new courses that focus equally on the four principles that form the Framework: knowledge, the learner, assessment, and community. This section provides concrete examples meant to illustrate how one achieves this result. Note that the examples are by no means exhaustive or exclusionary. These ideas have been developed over the years, with the advice of colleagues and their scholarship.[181]

a. Focus on Knowledge

This principle asks professors to "[identify] what is to be taught, why it is taught, and what mastery looks like."[182] The intention is to answer these questions as the professor, to plan the course, a class, or an assessment accordingly, and to be explicit with students about your plans. The explicit nature of the knowledge-centered environment feeds directly into all of the learning theories described above. It enables learners to identify appropriate knowledge bases, adjust existing knowledge bases accordingly, set mastery goals, and monitor and regulate their achievement.

i. Plan for the Environment—Identify Outcomes

One way to achieve this environment is to plan for it. In short, effective teaching requires planning. When planning a course, a unit of material, an assignment, or an individual class session, professors might ask themselves the following questions:[183]

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[180] *Id.*

[181] For additional ideas, *see* Am. Bar Ass'n, *Sourcebook on Legal Writing Programs Bibliography*, A.B.A. SEC. ON LEG. ED. & ADMISSION TO THE BAR, http://perma.cc/99LS-EWA7; CUNY Sch. of Law, *Selected Bibliography on Legal Writing Pedagogy*, CUNY SCHOOL OF LAW, http://perma.cc/VFC8-PGWW; Thurgood Marshall Sch. of Law at Tex. S. Univ. *Scholarship and Research Bibliography*, CENTER FOR LEGAL PEDAGOGY, http://perma.cc/3923-82JZ.

[182] NAT'L RESEARCH COUNCIL, *supra* note 15, at 13.

[183] *Id.* at 14–15. *See* SCHWARTZ ET AL., *supra* note 140, at chs. 3 & 4.

What is it important for students to know and to be able to do? What are the core concepts that organize our understanding of this subject matter, and what concrete cases and detailed knowledge will allow students to master those concepts effectively? How will we know when students achieve mastery?[184]

Once these initial questions have been answered, educators should identify specific ways to introduce students to detailed knowledge, concepts, and skills, keeping in mind that the goal is to create a progression (novice to mastery) and repeated application with feedback. "[S]tudents must be supported to develop expertise over time; it is not sufficient to simply provide them with expert models and expect them to learn."[185]

ii. Be Explicit

Professors should be explicit.[186] They should state why it is important to learn the material and in what context it will be applied. Educators should discuss the relationship between the learning goal and the means chosen to achieve the goal. In this way, the students will be motivated to make connections because they understand the value of the information. Being explicit also can help them identify the appropriate base upon which to place the new information. In addition, connecting the learning goal to the method chosen to impart the information helps students self-regulate. As they work through the experience, they can better understand their performance and how they perform a similar assignment in the future.

To help students understand the structure of a course or the purpose of various assignments, one might draft a "Frequently Asked Questions" document or a semester summary that explains what will be covered and why it will be covered.[187] Including these details in the course syllabus is another option.[188]

Professors can take a related approach when working through a series of classes that form a unit. They could introduce what will be covered and draw connections or distinguish between concepts from previous material. They could also identify the goals of the chapter or the assignment and ask students whether they agree or disagree with these goals. Finally, they could ask students to answer these questions again after completion of the

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[184] *See* NAT'L RESEARCH COUNCIL, *supra* note 15, at 15.
[185] *Id.*
[186] *See* SCHWARTZ ET AL., *supra* note 140, at 32–33; NAT'L RESEARCH COUNCIL, *supra* note 15, at 10–12; Duncan, *supra* note 5, at 616.
[187] Make the materials assigned reading (or give an extra credit quiz on it) and refer back to the materials throughout the term (foreshadowing and reinforcement). *See also* SCHWARTZ ET AL., *supra* note 140, at 28.
[188] Fisher, *supra* note 7, at 242.

chapter or assignment.[189]

With respect to individual assignments, a professor could distribute a legal question and give students the "answer." Students can then work backward to develop the legal rules and analysis that support the answer and discuss alternative theories and their value. Or in the context of writing assignments, create (either as the professor or as a class) a checklist for the assignment that reinforces the legal writing principles and skills that will be evaluated in the assignment. The educator may use the checklist to guide subsequent classes, peer review sessions, and conferences. Furthermore they may use the checklist to assess submissions and return the completed checklist with the graded assignment.[190]

iii. Teach Concepts and Build Students' Ability to Conceptualize Material

Professors facilitate learning by teaching factual knowledge and conceptual frameworks.[191] The National Research Council refers to this idea as, "learning [for] understanding."[192] "The concept of learning [for] understanding has two parts: (1) factual knowledge . . . must be placed in a conceptual framework...to be well understood; and (2) concepts are given meaning by multiple representations that are rich in factual detail."[193] In other words, students are more likely to understand what they learn and recall it if the material is part of a conceptual framework.[194] "To understand something as a specific instance of a more general case—which is what understanding a more fundamental structure means—is to have learned not only a specific thing but also a model for understanding other things like it that one may encounter."[195]

For example, students can use the table of contents in their text books

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[189]ERIC JENSEN & LEANN NICKELSEN, DEEPER LEARNING: 7 POWERFUL STRATEGIES FOR IN-DEPTH AND LONGER-LASTING LEARNING 2, 19 (2008).

[190] Checklists can be "designed to help all students experience feelings of autonomy and competence. By learning to identify the characteristics of quality essays, students can gain control over the evaluation and quality of their own writing." JAMES P. RAFFINI, 150 WAYS TO INCREASE INTRINSIC MOTIVATION IN THE CLASSROOM 29 (1996). Beyond the use of the checklist for a particular assignment, modeling the creation of the checklist itself is a learning opportunity, which can be designed to develop the students' understanding of how to review critically and comprehensively their own work, which is a skill they can transfer to future assignments. Professors also may consider asking students to identify one or two areas of the checklist where they would like the professor to focus their review. For example, if the student struggles in a particular area, the student can share this information with the professor. The professor can then focus his review and suggestions on the area most needed by the student. *Id.* at 33–34. This makes the assessment more focused on the student's needs. The exchange of information also builds a sense of community and respect. The professor indicates his interest in knowing the student's weakness, and the student is taught to trust his professor for guidance.

[191] NAT'L RESEARCH COUNCIL, *supra* note 15, at 6.

[192] *Id.*

[193] *Id.*

[194] *Id.* at 7.

[195] *Id.* at 15.

to structure course material. This review can help them see how discrete points relate to one another and form a body of law. Professors then should supplement this work. "[T]extbooks sometimes focus primarily on facts and details and neglect organizing principles, creating a knowledge-centered [environment] will often require that a teacher go beyond the textbook to help students see a structure to the knowledge, mainly by introducing them to essential concepts." [196]

There are a variety of ways to achieve this result. For example, one could identify how individual judicial opinions create a body of law. In class, teachers could identify inaccurate statements about material that has been covered previously; ask students to identify what portions are missing or inaccurate; and have them provide the corrections, which will build basic knowledge of the material Then professors should ask students to identify how the statements relate to each other.

Professors can teach the skill of editing and conceptualizing common writing issues by critiquing, as a class, a sample that contains several variations of the same flaw. It may help to have students identify each individual flaw then ask them to categorize the flaws into a concept (e.g., lack of analysis or undeveloped rule). A variation is to identify a broad legal writing concept (e.g., the importance of effective topic sentences). Educators could ask students to think about the purpose of topic sentences and ask them to evaluate specific paragraph examples that include bad, average, good, and no topic sentences. The teacher might then ask students to identify the importance of topic sentences, when they will be used in future assignments, how to create a writing process that encourages the use of topic sentences, etc. [197]

A professor also can use his own grading as a model for students. A professor could include specific margin comments when grading and categorize the specific comments on a separate comment sheet or on the cover page of the assignment. The idea is to "model" behavior and to teach students to connect specific suggestions to broader concepts. For example, a professor could make margin notations with respect to lack of transitions (i.e., "Help me understand where you are trying to take the reader.") The related end-of-paper comment then could note the need to include transitions and refer to the specific margin references as examples.

b. Focus on the Learner

A learner-centered classroom is one that "encourages attention to preconceptions, and begins instruction with what students think and

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[196] *Id.* at 16.

[197] Another variation is to distribute a section of a graded essay or paper with margin comments. Ask students to categorize the specific comments into broader concepts and create a strategy to address each challenge.

know."[198]   Simply put, "learning is about connections."[199]   The aim is to connect new information to pre-existing knowledge[200] and to promote the development of the learner's personal understanding of the material; therefore, it is important to identify what personal understandings the learner already has developed.

This principle is connected to the constructivist and adult learning theories described above, as the aim of creating personal understanding is linked directly to what pre-existing knowledge students bring to the classroom. This principle also is connected to cognitive and self-regulated learning. Under a cognitive theory approach, the professor would help the learner identify and manipulate pre-existing schema to make connections between new and previously learned material. Likewise, the self-regulated learner's first task is to identify pre-existing "tools in the tool belt."

There are a variety of ways to create the learner-centered environment. One might accomplish this environment through the use of pre-assessment questions.[201]   For example, when shifting to a new topic, students can be asked to think before the introduction of the new material what they already know about the new topic. What questions do they have about it? Why do they need to learn this material? How does knowing this material help the student now and in the future? How does this material relate to what the student has already learned?[202]   Relevant pre-assessment questions for skills-based courses might ask students to identify the skills to be taught, to rank their level of interest and proficiency with each skill, and to develop goals for the acquisition of each skill.[203]

Another opportunity when shifting from one topic to another is to help students identify an appropriate knowledge base upon which to place new information and find connections between concepts. For example, after students are introduced to a new topic, the professor can ask them to identify any topics that might relate to the new topic and to discuss how the topics are the same or different.[204]

Professors also create the learner-centered environment by connecting legal material to other real-world experiences. For example, when shifting

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[198] NAT'L RESEARCH COUNCIL, *supra* note 15, at 13.

[199] SHELL ET AL., *supra* note 140, at 136.

[200] SCHWARTZ ET AL., *supra* note 140, at 8; NAT'L RESEARCH COUNCIL, *supra* note 15, at 4.

[201] JENSEN & NICKELSEN, *supra* note 189, at 75.

[202] Students can be asked to come to the class period with notes that reflect their answers to these questions. The written paper can be their "ticket" into class. In addition to the questions above, students might be asked to explain an experience they have had with respect to this topic, or they can share a relevant URL and explain what information about the topic was learned from the web page.

[203] JENSEN & NICKELSEN, *supra* note 189, at 60.

[204] One might start with the similarities between the two concepts, which might help students better understand the new material to the extent it shares similar features to what is already familiar. The discussion should then shift to the differences, which is equally important. (Remember, as important as it is to connect new information to a pre-existing knowledge base, it is equally important to find the *appropriate* knowledge base.) Discussing differences and differentiating between concepts helps in this regard.

from predictive to persuasive writing, students might be asked to think about how or what persuades them.[205] Alternatively, students can be asked to think about a time when they tried to persuade someone. Were they successful? Why? Once these initial discussions have occurred, students can be introduced to Aristotle's theories on rhetoric and a class discussion can proceed on the relationship between Aristotle's theories and the students' own life experiences. Students can then continue to develop their knowledge of the art of persuasion by evaluating the persuasive value of television commercials, study-group or classroom discussions, op-ed articles, news broadcasts, etc.

The key is to build effectively on what students bring to the classroom and to model and reinforce the need to make connections between acquired and new learning.[206] The questions noted above help students make connections. Their use also models the first stage in self-regulated learning. There could be a wide variance in the extent students have been encouraged to "observe, think about, or talk about" previous experiences, in general, or as a means to guide new learning.[207] Regularly engaging in this task, and being explicit about its use, will help students develop this skill themselves.

c. Focus on Assessment

This principle asks the professor to "provide frequent opportunities to make students' thinking and learning visible as a guide both for the teacher and for the student."[208] The author also adds to this section the importance of teaching self-regulated learning. The recognition that assessment is a critical step in learning might lead to one of the most significant additions or modifications to modern legal education.

There are two forms of student assessment: formative and summative.[209] Formative assessment occurs when students have opportunities to practice and receive feedback. The aim is to provide a cyclical performance and corrective feedback to help students learn or complete a task.[210] Formative assessments inform instructors' decisions "to reinforce or alter future lesson plans to help students meet learning objectives prior to the final evaluation"[211] and help students gauge whether

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[205] These ideas are discussed at length (along with ideas for the other principles in this paper) in Cara Cunningham & Michelle Streicher, *The Methodology of Persuasion: A Process-Based Approach to Persuasive Writing*, 13 J. LEGAL WRITING INST. 159 (2007).

[206] NAT'L RESEARCH COUNCIL, *supra* note 15, at 14.

[207] *Id.*

[208] *Id.* at 13.

[209] Duncan, *supra* note 5, at 622–23; Fisher, *supra* note 7, at 238; Jones, *supra* note 13, at 107–08; Niedwiecki, *supra* note 56, at 170.

[210] Niedwiecki, *supra* note 56, at 171; SCHWARTZ ET AL., *supra* note 140, at 137.

[211] Jones, *supra* note 13, at 107 (citing Richard Johnstone et al., *Improving Criteria and Feedback in Student Assessment in Law*, 7 LEGAL EDUC. REVIEW 267, 269 (1996).

they are meeting course objectives.[212]

"Grading, or summative assessment, . . . focuses on evaluation rather than practice."[213] Generally, the intention is to evaluate "whether a student has satisfied the learning outcomes of a course."[214]

i. Increase Use of Formative Assessments

The relationship between learning and formative assessment is obvious. First, it is an opportunity for the student to work actively with the material, which promotes cognition and the construction of personal experiences. Moreover, a student's ability to evaluate the effectiveness of his study approaches is linked directly to the opportunities he has to apply the material and receive corrective feedback.

Providing students with an opportunity to work actively with material and receive feedback does not mean a professor cannot or should not lecture. The key is to introduce new material in manageable portions and in short blocks of time. Some suggest that learners cannot and will not process information, no matter how enthralling the topic, for more than ten to twenty minutes.[215] This theory may relate to selective attention (i.e., people will focus exclusively on one item or one activity for a finite period of time) and to the capacity of working memory (i.e., people will maintain a finite number of pieces of information). Therefore professors should limit lecture to roughly ten or fifteen minutes, then provide students an opportunity to work actively with the material.[216] The professor can then shift back to lecture and repeat the cycle throughout the class.[217]

An additional point is preparing students to engage in a lecture. Professors should engage the "pre-working memory selection mechanisms . . . that influence what does or does not get into the available [] four slots in working memory."[218] Novelty and salience appear to be important triggers.[219] Appreciating the importance of this first step should alter a professor's approach. For example, how might one start a class session to engage the audience? What might one do to identify students who place their attention elsewhere?[220]

After students have been engaged and the professor gives a mini-

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[212] Jones, *supra* note 13, at 107.

[213] SCHWARTZ ET AL., *supra* note 140, at 135.

[214] Jones, *supra* note 13, at 108; Niedwiecki, *supra* note 56, at 171.

[215] SCHWARTZ ET AL., *supra* note 140, at 119; STUCKEY, *supra* note 39, at 173.

[216] STUCKEY, *supra* note 39, at 171 ("One of the most common mistakes by lecturers is to use the lecture method at all.").

[217] SCHWARTZ ET AL., *supra* note 140, at 119.

[218] SHELL ET AL., *supra* note 140, at 20.

[219] *Id.*

[220] One might argue that it is the individual student's responsibility to motivate himself and to pay attention. This article will not debate the point, but, instead, simply recognize that not all students are self-motivated or engaged. *See infra* pp. 173–74 (offering suggestions regarding student motivation).

lecture, students can then work actively with the material by resolving a set of hypothetical problems related to the mini-lecture content, reading a list of concepts covered in the mini-lecture and identifying which are true or false, writing a short paragraph summarizing the lecture, or recapping the "take aways" from the mini-lecture. For example, with respect to "take aways," ask students to identify the key details they should have gleaned from the material. This helps students develop their note-taking and study skills, while at the same time ensuring they are focusing appropriately. Then, at the end of each week or each chapter, test the students' knowledge of these "take aways." One assessment option is to form small groups and have students explain the material to each other. If they are unable to do so, this telegraphs a gap in their knowledge. If there are differences of opinion, this can spark a class discussion of the correct answer. Another feedback mechanism is to create short TWEN quizzes, graded or ungraded.

Oral presentations also can serve as a valuable form of feedback, while at the same time building students' lawyering skill set. The key is to provide students with an opportunity to verbalize their understanding of material. For example, students can work in small groups to resolve problems and present resolutions to the class. Or students can be assigned to give a three- to five-minute presentation during class on a particular topic. Students also can debate each side of an issue in class.

Another form of oral reporting is "Report to Senior Partner" sessions where students report their progress on an assignment or their understanding of material as they will do in the "real world." Before the session discuss what a senior partner expect. How does one meet those expectations? What are the mechanics of the reporting session? How does one prepare? Students should then be informed after the session whether they met these expectations and how to move forward. The sessions do not have to be longer than three to five minutes. The important feature is to provide students an opportunity to verbalize material and to receive corrective feedback. A side benefit is they are learning how to prepare and to interact with legal employers.

Another way to provide feedback is to use peer review for writing assignments. The author uses peer-review exercises[221] to reinforce material for the peer reviewer and to give the author feedback on his or her work. Peer review comments can be graded, and peer review can be conducted outside of class.

The main thing to consider when creating any of these learning opportunities is to make them authentic, "real-world" experiences.[222] The

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[221] For a detailed description of the particular peer-review exercises and techniques, *see* Cunningham & Streicher, *supra* note 206. *See* Kirsten K. Davis, *Designing and Using Peer Review in a First-year Legal Research and Writing Course*, 9 J. LEGAL WRITING INST. 1 (2003).

[222] The experiences can be authentic or simulated. The point is that they mirror a real-world experience.

more authentic the experience, the more likely students are to engage in the experience and to reflect upon it.[223]

ii. Promote Self-Regulation with Summative Assessments

Both before and after returning a graded exam or assignment, it is critical to reinforce metacognition and self-regulated learning, principles by stating that receiving the score or written feedback is not the end of the learning process. In fact, receiving the grade is somewhere in the middle of the process. The next step is to evaluate one's process, attribute the results, and plan for future assignments. Ask students to evaluate your feedback to determine what material remains unclear. Students should ask themselves if they would know how to complete an assignment of this type in the future. If so, what steps would they take? If not, where are the gaps in knowledge, and how does one acquire the missing information?

An exam recap is one way to promote the idea that learning occurs even after a mark is assigned. When returning an exam, give students a few minutes to read the questions and consider their responses. Go through each question and discuss the answer and the rationale. Ask students to evaluate their answers. For those answers that are correct, did the student really understand the material, or did the student get "lucky"? For each incorrect answer, the student should determine whether he selected the wrong answer because of the pressures of test-taking or due to a substantive issue (i.e., gap in knowledge). Identify in class or in individual meetings how the student can address the issues he identified.

Professors also can distribute a list of questions that address the key points that students should have learned from the tested material (e.g., what are the elements of assault?) Ask students to answer the questions individually or in groups. Encourage students to answer the questions without reference to their notes. (Note: Students can work in class or outside of class, as time permits.) Review the answers in class and have students identify which questions they answered correctly and incorrectly on a separate sheet of paper. The professor and students can use the results to identify gaps in students' knowledge. Use the question-review period to lecture and reinforce key points. The students also can use the question and answer document as a study aid for future assignments. Next class, distribute a breakdown of responses (i.e., Question 2--80% correct). This serves as a guide to students as to their level of understanding compared to their peers.

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[223] STUCKEY, *supra* note 39, at 81 ("The environment is 'natural' because students encounter skills, habits, attitudes, and information they are trying to learn embedded in questions and tasks they find fascinating—authentic tasks that arouse curiosity and become intrinsically interesting."). *See* SCHWARTZ ET AL., *supra* note 140, at 7.

d. Focus on Community

Under this principle, the professor creates a classroom environment that "encourages a culture of questioning, respect, and risk taking."[224] *Best Practices for Legal Education* specifically recommends fostering a supportive environment, encouraging collaboration, and making students feel welcomed and included.[225]

> The learning environment in the best teachers' classrooms provide "challenging yet supportive conditions in which learners feel a sense of control over their education; work collaboratively with others; believe that their work will be considered fairly and honestly; and try, fail, and receive feedback from expert learners in advance of and separate from any summative judgment of their effort."[226]

This is no easy task. Indeed, "cohesion, however, is not a natural or inevitable result [of sharing class time]. Its development requires an interdependence between group members and the employment of social interaction skills that support each member of the group."[227] An obvious starting point in this environment is to remain mindful of the various types of learners in the classroom and to organize class time to reach all students.[228] Several additional examples follow.

i. Develop Communities of Practice

There is an important dialogue concerning the development of "Communities of Practice" within a classroom.[229] These communities are "groups of people who share a concern, a set of problems, or a passion about a topic, and who deepen their knowledge and expertise in this area by interacting on an ongoing basis."[230] Communities have three elements: *domain,* which is "an area of interest that should inspire participation and

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[224] NAT'L RESEARCH COUNCIL, *supra* note 15, at 13.

[225] STUCKEY, *supra* note 39, at 87–89. The source also notes the significant contributions to this field that have been made by Gerald Hess. *Id.* at 80–81 (citing Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School,* 52 J. LEGAL EDUC. 75, 87 (2002)).

[226] STUCKEY, *supra* note 39, at 81 (quoting KEN BAIN, WHAT THE BEST COLLEGE TEACHERS DO 18 (2004)).

[227] RAFFINI, *supra* note 190, at 121.

[228] Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles,* 62 ALB. L. REV. 213 (1998). *See* MARTHA M. PETERS & DON PETERS, JURIS TYPES: LEARNING LAW THROUGH SELF-UNDERSTANDING (2007) (discussing sixteen psychological types, indicated by the Myers-Briggs Type indicator, and ways students can succeed in law school).

[229] Cristina D. Lockwood, *Improving Learning in the Law School Classroom by Encouraging Students to Form Communities of Practice,* 20 CLINICAL L. REV. 95 (2013).

[230] *Id.* at 111 (quoting ETIENNE WEGNER ET AL., CULTIVATING COMMUNITIES OF PRACTICE: A GUIDE TO MANAGING KNOWLEDGE 4 (2002)).

guide what information will be developed within the community;"[231] *community*, which is the interaction between participants that fosters learning; and *practices*.[232] Professors should consider the development of such communities.

ii. Motivate Students

Promoting autonomy promotes motivation. "Law schools that value the opinions and priorities of their students give students as much autonomy as possible and explain why students do not have autonomy in some things."[233] "Students' need for a sense of autonomy or self-determination significantly influences their intrinsic motivation to learn in the classroom. Whatever their [age], students want the freedom to decide for themselves what activities to undertake and what behaviors to adopt. This need to control the decisions that affect one's life lies at the foundation of intrinsic motivation."[234]

iii. Promote Participation

Another community-building practice is to use mechanisms that promote student participation. If students ask questions, there is real potential for learning—the proverbial "teaching moment." It demonstrates students are processing information. It also assists the professor in terms of identifying gaps in student learning. Receiving student questions also suggests the professor has created an environment where students are willing to take risks, which, again, is when learning can occur.

One theory suggests that the method by which professors ask for questions inhibits students' abilities to formulate questions.[235] It is a common teaching experience to ask for student questions and to receive blank stares or perhaps one or two questions in class, but then to have a line of students with pertinent or interesting questions lined up at the podium after class. It has been suggested that the in-class questions were asked because the students already were considering the questions when the professor called for them. In fact, research shows that students need time to shift from note taking and processing to question formation.[236] The key is not to ask immediately if students have questions. Instead ask students to review their notes (or notes on the board) for thirty seconds. Or ask students to consider the particular aim of the class and take one or two

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[231] *Id.* at 112.

[232] *Id.* at 112–13.

[233] STUCKEY, *supra* note 39, at 83.

[234] RAFFINI, *supra* note 190, at 17.

[235] RICHARD HOWELL ALLEN, IMPACT TEACHING: IDEAS AND STRATEGIES FOR TEACHERS TO MAXIMIZE STUDENT LEARNING 150–52 (2002).

[236] *Id.*

minutes to explain the concept to their neighbors. Once students have had the opportunity to "shift gears," ask if they would like clarification on any item or what questions they have.

Many professors may already evaluate the type of questions posed to ensure they are not closed questions that suggest there is only one right answer. Instead ask open questions that invite student participation.[237] For example, instead of asking what is the interpretation from a legal opinion, ask what are some potential interpretations of the legal opinion. Or, rather than asking what steps one must follow to complete a writing assignment, ask students to recall a previous assignment they completed and to identify what steps they used to complete it.

Professors also may already use the "Yes and . . . Approach," which is a related technique that can be used to acknowledge student contributions in a productive way. This also is an opportunity to "define and model respect in the classroom."[238] For example, even if a student's answer is wildly off the mark, be sure your response signals to students that all opinions are valued. The "Yes and . . . Approach" involves an affirmation of the effort, an attempt to connect the student response to a more helpful idea, and, ultimately, redirection.

Enrolling questions are also helpful. For example, the author used enrolling questions when beginning a discussion about the importance of using a specific process to guide research. Students were asked to think about a prior experience where using a process was important. One intimidated first-year student described the process he used to prepare his equipment as a volunteer firefighter, noting the process was necessary to protect his own life and to enable him to protect others. Another student described the process she used as a professional singer to warm up her vocal cords before a performance. She noted that a failure to use the process could lead to injury or embarrassment. Recalling their own prior accomplishments built their confidence, and it also built respect between students. The recollections also then allowed us to discuss the dangerous results for a client, and embarrassing results for a lawyer, that could follow from not utilizing a research process.

The key is to design questions that will identify participants' expertise in an area or experiences that are related to those that are the subject of the lecture.[239] This will help students feel connected to material, as well as empowered, to the extent previous experience is recalled (and perhaps even admired).

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[237] *Id.* at 158–60.

[238] STUCKEY, *supra* note 39, at 85. Indeed, a "fundamental feature of effective facilitation [of learning] is to make participants feel that they are valued as separate, unique individuals deserving of respect." *Id.* at 84. *See also* SCHWARTZ ET AL., *supra* note 140, at 123.

[239] ALLEN, *supra* note 235, at 147.

iv. Give Students a Voice in the Classroom

Another way to achieve the community environment is to give students a voice in the classroom. With respect to syllabus planning, professors can add "Student Directed" class periods toward the end of a unit of material. Professors can ask students to submit a list of specific topics or areas of concern they would like addressed a few days before the particular class session. Then professors can identify reading material, develop exercises, or lecture on the topics that are of most concern to students. The result is that teaching becomes more effective because it is targeted to address identified needs. The added benefit is that student needs are heard, respected, and addressed in a respectful way, while at the same time they have built their self-regulated learning skills by identifying where they had a lack of knowledge and creating a plan to achieve it.

Directed peer review is another way to achieve this result. The use of peer review shows students that that they have something to share, that they are capable of reviewing another's work, and that their opinions matter. Developing this skill also has practical implications for their ability to contribute to their employer and the work of their peers.

v. Help Individuals Self Regulate

Another aspect of self-regulated learning focuses on helping the individual student work through the self-regulated learning process. Helping students in this area promotes community, in the sense that you are helping students develop their strengths (and therefore their ability to contribute to the community), and the individualized attention demonstrates your care for them.

With respect to the first phase of self-regulation—the planning phase—students tend to decide what they will learn and move directly to the execution stage, skipping entirely the steps of setting a mastery goal and planning how they will work. Professors should add elements to courses that encourage students to engage in the missing steps. For example, the concept of mastery learning should be explained to students.[240] If you ask students to identify their learning goals, a typical response might be, "I will read for class so I don't embarrass myself." Another response might be, "I am learning the material so I can pass the upcoming exam." While these are honest answers that identify appropriate short-term goals, they do not reflect the true aim of learning: mastery.[241]

Helping students to be mindful about the "who, where, and how" aspects of their work is also important. There is a significant body of work

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[240] Lysaght & Lockwood, *supra* note 140, at 81–83.

[241] Schwartz separates these aims as performance and mastery goals. SCHWARTZ ET AL., *supra* note 140, at 11.

regarding the importance of individualized learning preferences and appropriate learning environments.[242] Students should be mindful of how they work best (i.e., time of day, type of seating, nature of study (e.g., group or individual)), and create a learning plan that takes these preferences and needs into account.

vi. Consider Your Role as a Coach

A final point relates to the professor's role, which is empowering students to develop a personal understanding of the material. The professor needs to be respectful of the learners' past and preconceived knowledge.[243] A professor can and should ask a student to change his preconceived thoughts, but the professor should be mindful of differences and respect that students come to law school with an individual story or interpretation.[244] This will go far with all learners, but with adult learners in particular.

The professor might consider his role akin to that of a coach.[245] It is the student, not the professor, who has to complete the course. Therefore, the professor guides the learner along that path, in the same way a coach guides a player to a championship game. The professor plans sessions, organizes opportunities for the learner to practice, provides timely and corrective feedback, and encourages learners to continue to develop skills or understanding.[246]

IV. CONCLUSION

The new ABA Accreditation Standards invoke a wide range of responses: confusion about the ABA's expectations of law schools; concern over new academic and administrative burdens; skepticism about whether these changes are worth the time and effort; and, at least for this author, hope that change will come. Of all reform measures, the pedagogy mandate may be one of the best chances law schools and their graduates have in the face of the "Perform Storm" raging in legal education. There

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[242] Boyle & Dunn, *supra* note 228, at 224–25 (citing RITA DUNN & KENNETH DUNN, TEACHING SECONDARY STUDENTS THROUGH THEIR INDIVIDUAL LEARNING STYLES: PRACTICAL APPROACHES FOR GRADES 7–12 3, 5 (1993)) (There are five stimuli identified in the Learning-Style Method that impact student learning: Physiological factors (time-of-day, energy, food and drink, mobility needs); emotional factors (e.g., motivation, persistence); environmental factors (e.g., sound, light, furniture); sociological factors (e.g., group vs. individual study sessions); and psychological factors (global vs. analytical processing)).

[243] STUCKEY, *supra* note 39, at 84 ("A fundamental feature of effective facilitation [of learning] is to make participants feel that they are valued as separate, unique individuals deserving of respect.") (quoting Stephen D. Brookfield, *Adult Learners: Motives for Learning and Implication for Practice, in* TEACHING AND LEARNING IN THE COLLEGE CLASSROOM 137, 143 (Kenneth A. Feldman & Michael B. Paulsen eds., 1993)).

[244] SCHWARTZ ET AL., *supra* note 140, at 9.

[245] *Id.* at 110–11.

[246] *Id.*

are, no doubt, countless miles ahead of us, but it is time to begin the journey. A first step is for the academy to consider and move to overcome our resistance to change. Embracing rather than battling the pedagogy mandate can be a protective measure used to move us forward beyond this storm.