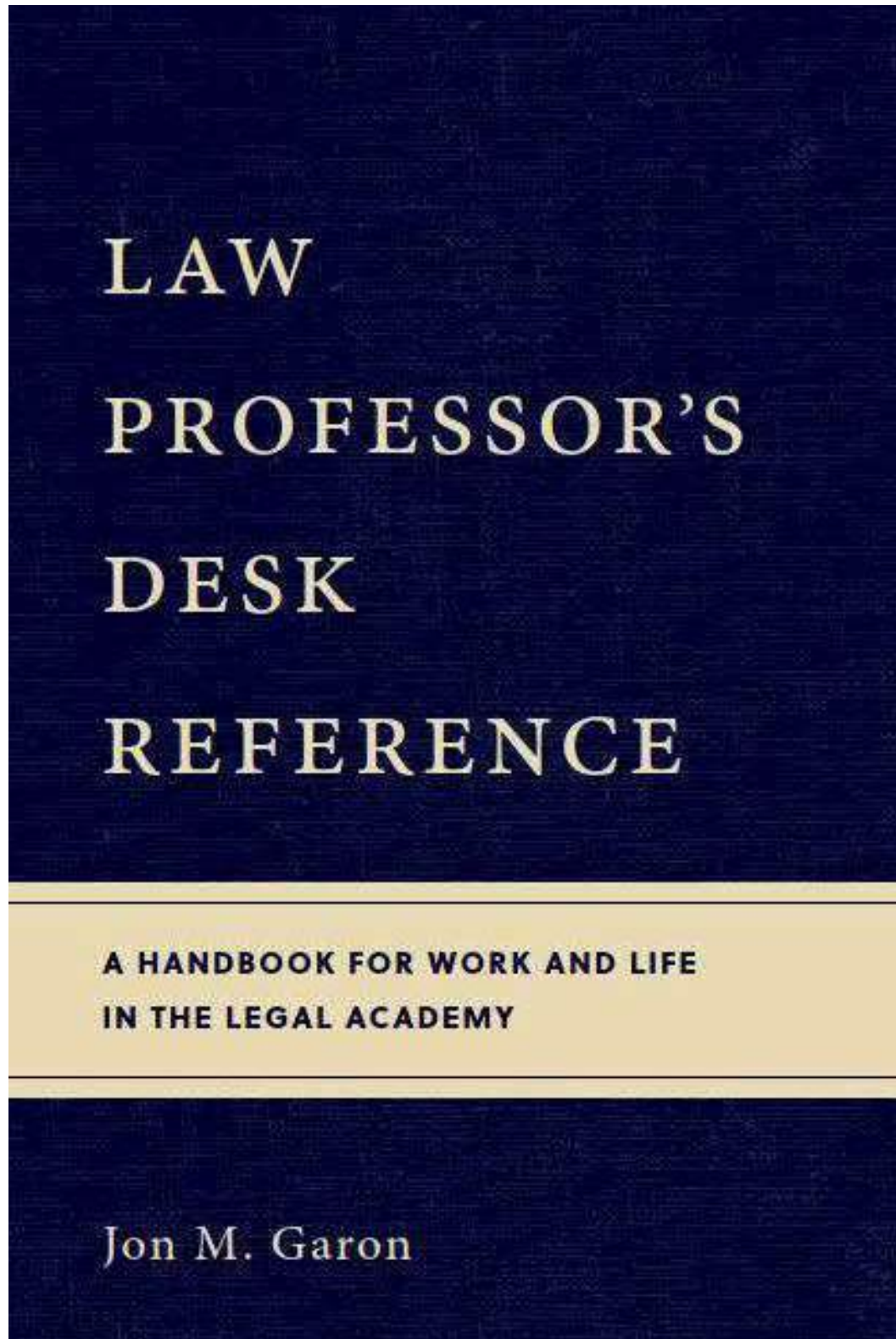


DEI in the Classroom: Selections from the Law
Professor's Desk Reference



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Law Professor's Desk Reference

A Handbook for Work and Life
in the Legal Academy

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PART I

Teaching

Part I begins with the practice of law and the bar exam rather than with the instructor and the classroom. The book does so to highlight the law school focus on preparing attorneys to enter the profession. Those lawyers, of course, will continue to mature and develop, refining their knowledge, skills, and values to become leaders across every segment of society. Roughly 25 percent of lawyers do not practice law, so law schools also have an obligation to make their education valuable for those who never seek to become licensed and for those who spend most of their careers outside the legal profession.

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Effective Teaching and Learning in the Classroom

A. Utilizing Learning Research

Higher education scholarship suggests the role of the faculty member should no longer be a “sage on the stage” and instead become a “guide on the side.” At least theoretically, this should not have been a change in legal education, since the leader of the Socratic dialogue does not provide answers, merely structure. Nonetheless, most law faculty members are prized for their scholarly and insightful knowledge of their subjects, meaning that they do frequently share their wisdom from the podium.

Studies of higher education also reinforce the lesson that the effectiveness of the faculty matters deeply to the students. Law school faculty have tended to play a role that might be labeled “meddlers in the middle” or more fairly described as “neither student-centered nor teacher-centered but something more active, dynamic and in-between.”³⁵

The faculty-centric model is largely built around the lessons of behavioral sciences. Behaviorists like Skinner established that many behaviors are learned through association. Pavlov famously trained his dogs to salivate at the sound of a bell because he associated the sound of the bell with the introduction of food for the dog. Since Pavlov developed the technique to collect the saliva, it was a very effective tool to get the desired result. It is not generally favored as a pedagogical approach, however, because it is overly simplistic (and takes too much food). Conditioning students is not the primary method of teaching today. Nonetheless, conditioning occurs throughout the law school experience, and faculty members must be very careful not to introduce unintended conditioning through negative consequences.

35. LYNNE HUNT & DENISE CHALMERS, *TEACHING IN FOCUS 1* (2013).

If a faculty member uses pop quizzes as a punishment for unprepared students, for example, the students will quickly begin to associate quizzes with this negative behavior. Rather than viewing the quizzes as useful exercises to gauge their improvement, they will become conditioned to treat assessments as punishments, undermining their self-directed learning. Another example of Pavlovian conditioning comes from the method used by faculty members to call on students in class. If a faculty member tends to call on any group of students — such as the first row, the fastest, a particular gender or race — then the other students will quickly stop raising their hands. Even a small, unintentional bias towards a subset of the class will subconsciously shape how the remaining students respond.

There are many aspects of the structure in legal education that can become associated with negative outcomes. To counter this, faculty members must be very careful to associate the positive knowledge, skills, and values needed for successful law students with positive associations to create a healthy, productive atmosphere.

B.F. Skinner pioneered much of the behaviorist approach to education. Skinner established that complex behaviors could be learned through shaping and reinforcing behaviors using reward and reinforcement. The feedback loop for educating students is, in fact, an example of reinforcement. By letting students know what skills are working as they are positively demonstrating those skills, the feedback reinforces the students' continued use of those skills.

Principles and associated pedagogies arising from behaviorist research highlight the role of the teaching in designing and controlling the learning environment. These principles and pedagogies include:

- The use of practice and repetition to reinforce skills and memory associations
- An emphasis on systematic routine and organized activities
- An emphasis on the teacher specifying the structure, content and delivery of learning activities
- A focus on clear and accessible learning objectives and target outcomes
- The use of instructional designs and facilitate step-by-step attainment of increasingly complex competencies and skills
- An emphasis on feedback to direct learners' behaviour towards target outcomes

- Use of incentives, rewards, penalties and disciplining strategies
- Individualized programs that allow students to work at their own pace.³⁶

As a practical matter, much of the law school model of education is rooted deeply in the behaviorist approach to learning. While behaviorism has many critics, most acknowledged that it provides a very useful way for students to gain the knowledge and skills required.

One of the leading criticisms in the educational community of behaviorist educational models is that the approach treats the “mind as a blank slate.” This criticism of behaviorists, of course, is not significantly different from the critique that legal education treats the entering law student as having a “mind full of mush.” In reality, however, Skinner’s behaviorism is based on shaping preexisting knowledge and skills by reinforcing those aspects important to the new behavior. Unlike an assumption that a student starts with a mind full of mush, a behavioral approach starts with the assumption that the student has pre-existing knowledge, skills, and values that provide the starting point from which to expand and prioritize.

Entering law students start law school with a wide range of knowledge, skills, and values that are important to their development as law students and lawyers. Faculty members who recognize and engage their students’ preexisting understanding and perspectives engender a positive learning relationship with their students.

Research into neuroscience and cognition have not disproved the lessons from a behavioral approach to learning. Instead, these efforts have expanded on it to help understand how the human brain develops in response to new knowledge and training.

Arguably the most important of these discoveries, which has since been supported through neuroscientific studies, is the understanding by Swedish psychologist Jean Piaget that the process of learning involves active construction and, accordingly, learning should itself be active.³⁷ Studies based on this insight illustrate that “[l]earning and retrieval is made easier if existing schemata are activated prior to presenting new information through, say, reminders, revision, or reading. . . . Retrieval is also stronger when information is

36. Mary Steward, *Understanding Learning Theories and Critique*, in HUNT & CHAMBERS, *supra* note 35, at 5.

37. *Id.* at 8 (internal citations omitted).

associated with meaning.”³⁸ Piaget’s criticism of behaviorist research focused on the need for the learner to “invent” knowledge using a process of “active construction.”³⁹ A student’s effort at rote memorization does not have the same impact as does the student’s use of new knowledge to explore and implement that knowledge with new answers.

Pedagogies arising from cognitivist research focus on schemata development, catering for individual differences in cognitive style and teaching that supports how the brain processes information. They include:

- Emphasizing not just new knowledge but assimilation with prior understanding building on previous learning and exploring relationships
- Activities that prevent cognitive [over]loading by creating space for note-taking or discussion and by breaking teaching sessions into manageable chunks
- Activating prior learning through use of summaries, reading prompts, or questioning
- Strategies such as discussion, note-building and questioning, which relate new information to existing information to aid assimilation, encoding and memorization
- Using variety and mixed media in teaching to accommodate sensory preferences
- Presenting concepts in varied ways, for example in constituent parts and holistically, to cater for different cognitive styles
- “Externalizing” thinking, for example through the use of lists, concept maps or flow diagrams to explore relationships between concepts
- Using analogies or metaphors to help attach meaning and assimilate new learning
- Using novelty, surprise and emotional engagement to capture the mind’s attention and help memorization

38. *Id.*

39. *Id.* at 7 (quoting Piaget (1970)).

Pedagogies arising from constructivist studies emphasize student-centered, active learning and the role of the teacher as facilitator, including:

- An emphasis on students being active in constructing their understanding of knowledge
- A focus on discovery, exploration, experimentation and developing and testing hypotheses
- Project work, research-based learning, problem- and enquiry-based learning methods
- The role of the teacher as a guide, providing “scaffolding” to learning — that is, to ensure the student has the requisite knowledge, skills and support to negotiate a piece of learning — and prompting the student through questioning or modeling.⁴⁰

Scientific and educational studies reinforce the elements of the lesson plan that embed an introduction to serve as the reminder, revision, and retrieval step. The use of active experiences during the lesson to develop the understanding of the new material, and the emphasis of the key elements to help the students focus and prioritize their efforts.

Constructivism builds upon the Cognitivist learning theories of Piaget, which state that “learning occurs when the student reorganizes information, either by finding new explanations or adapting old ones.”⁴¹ Constructivism focuses on the schema development at the individual level. “Constructivism is based on the premise that we construct learning new ideas based on our own prior knowledge and experiences. Learning, therefore, is unique to the individual learner. Students adapt their models of understanding either by reflecting on prior theories or resolving misconceptions.”⁴²

“Although Constructivism has become popular only recently, the origins of constructivism are believed to date back to the time of Socrates, who claimed that teachers and learners should talk with each other and interpret and construct the hidden knowledge by asking questions.”⁴³ Whether the law school Socratic Dialogue is more Constructivist or Cognitivist may depend on the

40. *Id.*

41. Paul Stevens-Fulbrook, *15 Learning Theories in Education (A Complete Summary)*, TEACHEROFSCI (Apr. 18, 2019), <https://teacherofsci.com/learning-theories-in-education/>

42. *Id.*

43. Patricia Armstrong, *Bloom's Taxonomy*, VANDERBILT UNIVERSITY CENTER FOR TEACHING, <https://cft.vanderbilt.edu/guides-sub-pages/blooms-taxonomy/> (last visited May 30, 2020).

extent to which the Socratic process involves the pre-existing knowledge of the individual student.

Another model often used in legal education is Bloom's Taxonomy. The model was first introduced by Benjamin Bloom with collaborators Max Englehart, Edward Furst, Walter Hill, and David Krathwohl in 1956. Significantly revised in 2001, Bloom's Taxonomy views learning as a process of increasingly complex steps. These steps are typically used throughout education as the labels to describe learning objectives:

Remember — Recognizing; Recalling

Understand — Interpreting; Exemplifying; Classifying; Summarizing; Inferring; Comparing; Explaining

Apply — Executing; Implementing;

Analyze — Differentiating; Organizing; Attributing

Evaluate — Checking; Critiquing

Create — Generating; Planning; Producing⁴⁴

These are not the only learning approaches. Psychologist Carl Rogers and psychologist Abraham Maslow each separately focused on the emotional motivations of students and learning. Maslow developed the hierarchy of needs, which starts with the basic physiological needs, followed by simple safety and security. It then increases in complexity through three additional stages: belong, intimacy, and friendship; esteem needs of prestige and feelings of accomplishment; and finally, self-actualization. Rogers builds on this, demonstrating that people learn as part of the process to achieve self-actualization. This approach emphasizes the importance of the process of learning and the need for students to be self-directed and encouraged in their learning process.

Research into humanistic studies emphasize student identity. Work in adult learning theory prioritizes the role of the student as an active participant in the student's own learning, with a focus on meta-cognition, reflection, and self-awareness of the student's learning process. "Humanistic and self-theories have demonstrated that if we wish to encourage self-directed learning we

44. *Id.*

should create the supportive climate [which] requires the teacher to step back and focus on the students' personal growth."⁴⁵

Perhaps the cognitive theory most relevant to the practice of law, however, comes from adaptive expertise. Adaptive expertise can be understood in comparison to routine expertise, which is "characterized by the mastery of procedures within a given domain, such as performing an appendectomy or landing an airplane. Under predictable conditions, such procedures maximize efficiency and lead to consistent outcomes."⁴⁶

Adaptive expertise, in contrast, balances efficiency with innovation, where the mastery of procedures is coupled with the capacity to question, modify, and invent ways of addressing multifaceted and non-routine problems. Adaptive expertise is particularly salient in domains where there is a great deal of complexity, such as classrooms, which can make routine procedures insufficient for addressing emerging conditions or demands.⁴⁷

Just as adaptive expertise is best understood where routine procedures are insufficient to address the complexities of the problem solving, the practice of law and the simulation of legal practice reflects the highly complex, ever-changing operational environments.

Adaptive expertise is characterized by traits highly consistent with the effective practice of law, including the following:

- Case sensitivity, in which the practitioners hold their knowledge of a domain at a distance resisting applying known procedures, as they consider whether the contextual features may demand adaptation.... Case sensitivity acknowledges that contextual features are critical to tailoring or even rejecting a routine response to achieve the desired outcome.
- Adaptive expertise also involves the consideration of multiple hypotheses for interpreting a situation or problem space, or cognitive flexibility.... [A]daptive experts develop tentative hypotheses which they test and then choose to modify or discard given data that does not fit the hypothesis or in light of new information.

45. *Id.*

46. Erin Baldinger & Jen Munson, *Developing Adaptive Expertise in the Wake of Rehearsals: An Emergent Model of the Debrief Discussions of Non-Rehearsing Teachers*, 95 TEACHING & TCHR. EDUC. 2 (2020).

47. *Id.*

- The hallmark of cognitive flexibility is the propensity to revise one's thinking, as one remains open to new, inconsistent, or nuanced information, [which] might entail entertaining multiple ways of interpreting [information] and asking questions that test these hypotheses before committing to a single, perhaps more nuanced, interpretation.
- Finally, adaptive expertise is characterized by data-driven forward reasoning, in which individuals begin with the data they have available and develop hypotheses based on and tested by that data to reason and make decisions about a particular situation. Such reasoning sits in contrast to patterns of more routine experts, who may attempt to make data fit into a predetermined response or interpretation. As with cognitive flexibility, data-driven forward reasoning includes opportunities for revision and encompasses case sensitivity by considering contextual features to be an element of the data.⁴⁸

Law school faculty members understand that the practice of law is a highly adaptive expertise. Professors who use extended hypotheticals in their classroom discussions often add additional facts or change contexts to help law students see the need for cognitive flexibility in their thinking. Like each of the other learning theory approaches, by having a more complete understanding of the learning theory underlying the intuitive teaching approaches used, the professor can shift from modeling behavior to making that behavior explicit and part of the metacognitive training provided to the students.

“One important finding is that experts notice features of situations and problems that escape the attention of novices.”⁴⁹ Experts are more adept at noticing features and recognizing patterns than novices. Given the same amount of time, novices will not see the features essential to answering a question, because the novice does not recognize the range of potential patterns that can be used to resolve a situation. “Research indicates that experts’ knowledge is not simply a list of disconnected facts—it is connected and organized around important ideas of their disciplines, and includes information about the appropriate conditions for applying key concepts and procedures.”⁵⁰ Training for adaptive expertise reinforces these conditions, concepts, and procedures.

48. *Id.* (internal citations omitted and formatting added).

49. R. KEITH SAWYER, *THE CAMBRIDGE HANDBOOK OF THE LEARNING SCIENCES* 25 (2005).

50. *Id.*

One of the skills involved in adaptive expertise is patience, waiting until sufficient information has been gathered before creating initial, tentative resolutions. The classic law school answer, “it depends,” reflects this need to be patient when gathering facts and context in order to have a sufficiently complete understanding before providing an initial resolution. It also requires the ability to test and revisit that cognitive solution. Students novices, in contrast, tend to grasp on the first solution that fits any aspect of the information available. They tend to resist demonstrating cognitive flexibility because they do not want to appear wrong in front of their professors or their peers. The expert can easily shift positions based on shifting facts, but the novice will tend to dig in. Recognizing the need to encourage cognitive flexibility, the professor can recognize and reward the shifts in position as the fact or context demands, encouraging students to think like lawyers rather than students.

B. Learning Theory in Practice

The educational and neuroscience models for learning highlight that certain practices benefit the learning environment. These steps will generally result in deeper knowledge acquisition for the students and a more successful course. These suggestions describe how to create an optimal learning environment while recognizing that just as the learning theorists emphasize different aspects of the cognitive process, faculty will differ significantly in what steps and techniques they find most useful.

Some faculty members find that classroom management and certain disciplinary training is an essential component of their approach while others find their students are sufficiently self-directed and motivated that this is not necessary. Behaviorist strategies often reward student engagement and discourage distracting behaviors. Faculty members know they are competing for the time and attention of their students against other members of the faculty, outside co-curricular activities, students’ work obligations, and students’ personal lives.

The most effective learning, however, is focused on the self-actualization goals of engaging motivated students. This requires, at a minimum, a faculty member’s respect for the students. Even without the benefits to student learning, all faculty members expect to be treated with respect by the students, and respect should always be reciprocated. In the classroom setting, respect is demonstrated through a number of specific activities:

- Student Respect
 - Respecting the Students' Time—Starting and ending the class on time; not fumbling with the classroom technology; not using the time of the entire class to have a private conversation with a single student regarding a performance or behavior issue.
 - Respecting the Students' Attention—The minutes spent in class are limited and valuable for the students as much as for the faculty member. Stories that provide context and meaning to the materials help engage the student and provide multiple methods of learning the material; stories about old cases, former students, research projects, hobbies, children or TV episodes should not be told to the students while they are captive audiences during the class.
 - Respecting the Students' Engagement—Knowing the names of each student is often considered the starting point for student respect. Many faculty are very good at this while others are not. For the latter, the use of seating charts and name tents provide some ability to bridge the gap.
 - Respect for the Students' Struggle—Learning new material is hard. The Socratic method can challenge students, which is a healthy part of the learning process, but it can also interfere with the goal of learning and should never devolve into an act of hazing a particular student. A faculty member who occasionally hazes students through the Socratic dialogue will operantly condition the entire class to recognize Socratic discourse—and law school—as a punitive exercise in power and control. Humor is often considered a useful tool in the classroom, but it should be used to create a positive environment. It should never be used to embarrass a struggling student.

Student respect is a prerequisite to student engagement, but it is not sufficient without more. There are a number of other approaches that will improve the faculty member's effectiveness:

- Careful Planning
 - Lesson Plans—The lesson plan will provide the faculty member with a detailed street map for each class session. Preplanning the lesson plans will provide the faculty member with a larger roadmap that connects the individual sessions into a unified process.

- Climbing Bloom's Taxonomy— Building lessons and units within the course to deepen knowledge from mere memory and understanding to application, analysis, evaluation, and creation will help students actively engage with the content and recreate the skills and knowledge as components of their increasingly expanded schema of legal knowledge and applications.
- Toolbox of Techniques— Students learn best through a combination of modalities, so the faculty member should mix up the methods used to teach the course, trying to avoid letting sessions fall into ruts of patterns. Examples to fill the toolbox are discussed in Chap. 6 on formative assessment.
- Expert Knowledge
 - Model Sage— Faculty members should be the subject matter experts in the room, which they demonstrate through their ability to answer students' questions, when appropriate. When students have demonstrated success on learning specific knowledge or skill, the faculty should reinforce that success. Occasionally, faculty will provide context for the lesson by sharing how the information studied fits into a larger picture.
 - Model Ignorance— At the same time, a knowledgeable faculty member will never know the answer to every question. Candor and accuracy are much more important than trying to answer questions. Students can catch a faculty member trying to bluff almost every time. The students will lose trust in the professor as well as learn the incorrect lesson that bluffing is an acceptable approach to legal analysis.
 - Build Scaffolds— Ensure students have the requisite knowledge, skills and support to move into the next component. Faculty can aid students by being explicit in walking them through the scaffolding process of adding to their existing knowledge and skills with new information and techniques.
- Shared Expectations
 - High, Realistic Goals— Students reach for the goals set by their faculty members, so students will achieve more if they are presented with high expectations and the *bona fide* belief that they can attain those goals.

- Encourage Student Planning and Participation — Law students can be taught to be engaged in their own legal education. Faculty members should help the students be active in constructing their understanding of the skills and knowledge being developed.
- Student Engagement
 - Actively Engage the Students — Focus on discovery, exploration, experimentation in the readings, assignments and assessments
 - Use More than One Method to Engage — Socratic dialogue and problems can be integrated into project work, research, reflections, and other learning tools. Students will engage with these provided they see them a respectful of the students' time and directly related to the students' learning.

In most law school courses, the faculty member is usually in the front of the room or actively observing the student behavior. In online settings, the faculty member has adopted a learning management system (LMS) and set the parameters for the course. The most effective faculty members balance their roles thoughtfully in building a helpful learning environment for their students.

One of the areas in which law faculty can help their students is in making the transition from the coping strategies that worked for their students in other educational, professional, and work settings to the strategies that help students learn the very large body of knowledge, the new skills, and the intended values of the legal profession. Some of the brightest students struggle with law school simply because they hold on to their old study habits and coping strategies rather than adjusting to the law school environment.

Faculty members can speed this acculturation process by being explicit regarding the need to study like a law student, with an emphasis on active learning and multiple modalities for student success.

- Use practice and repetition to reinforce key memory associations and skills.
- Reward systematic routine and organized activities. In the first year, this might require, and then later shift to reward the written case brief, the components of the student-written course outline, handwritten flash cards, or other strategies.

- Use assessments that emphasize spaced-learning and repetition so that the materials covered are always part of the ongoing assessments and highlighting that students should review materials out of order to deepen their recall and engagement.
- Provide the students roadmaps, flow charts, mnemonics, and other devices to help them “offload” the chunks of information into larger structures and encourage students to build their own chunking tools.
- Demonstrate to the students how their systematic, step-by-step development of certain skills and knowledge are building their capacity; invite them to create their own models to attain increasingly complex competencies and skills.
- Provide active feedback.
- Use incentives and rewards to help students recognize their achievements and milestones.

When a faculty member walks into class with a smile, jots the lesson plan on the whiteboard, calls on students by name to summarize the class, and engages all of them in a respectful, student-driven discussion regarding the assigned materials before recapping quickly and ending on time, the faculty member has taught a very successful class. The faculty member who keeps the environment stimulating by chunking the time into smaller units, using a variety of techniques, and affording students an opportunity to keep up to consolidate their learning does even better. The faculty members who combine these efforts with useful assessments that provide the students feedback and direction often win the teacher of the year awards.

C. Sequencing and Scaffolding Learning

The first-year law school course often takes a chronological approach to teaching material, often starting somewhere in feudal Europe and moving through the U.S. law of the nineteenth century. Other courses will move up to the modern age, but they may still emphasize the common law rather than the statutory process. This model highlights the role of courts in “finding the law,” though it sometimes has the unfortunate side-effect of overemphasizing the importance of rules and doctrine that are no longer central to the upper division courses, bar examination, or practice of law.

From a learning development standpoint, a chronological approach is one of the common approaches to sequencing course material. This approach allows students to understand the order and sequence of the information and is very helpful when the subject matter will be used based on its chronological structure, such as a history course.

A similar model is the course organized around a sequence of events. A trial practice course, for example, is often arranged to represent each of the steps involved in a civil or criminal matter, replicating the judicial process and the legal work that is needed as a case develops from initial client contact through trial. The sequential model is particularly useful to reinforce how choices and decisions made earlier in the process have consequences in the latter stages.

For sequences that focus on student learning and development, there are two primary structures, which may be used separately or combined. These are the process of moving from the simple to the complex and the process of moving from the known to the unknown. Moving from the known to the unknown has the benefit of building on the existing knowledge of the students. A second-year course can often be structured to start with the learning objectives of the first-year prerequisite and then build upon the earlier knowledge to become more complex. A course in lease drafting, for example, can build upon contracts, real property, and legal research and writing to build on the skills and knowledge to move to increasingly complex material.

Where faculty members designing a course cannot assume common foundational knowledge among the students, moving from the simple to the complex is likely the most effective sequencing approach. Asking students to use a simple set of facts and simple rules, the faculty member can demonstrate the legal process of fact application. The fact application can become increasingly complex. The process builds from simple examples and information into increasingly complex issues over time, moving forward as the students demonstrate competence on the tasks.

D. Reinforcing Deeper Learning through Spaced Repetition, Consolidation, and Reflection

The efforts to improve student learning should not be confused with simplifying the task at hand. A few years after graduating law school, graduates will face a bar exam and a practice of law that have grown in their complexity and in the information that must be handled. Each call for improvements in legal education adds additional skills to be learned, and each area of law grows in complexity and scope year after year.

To handle the complexity of the legal profession, law students must be actively engaged in their learning and trained to undertake the difficult steps to work through complex, challenging concepts and skills. One strategy to do this is to help students learn to engage in deep thinking. “[C]onditions that make learning more challenging—such as generating words instead of passively reading them, varying conditions of practice, transferring knowledge to new situations, or learning to solve multiple types of... problems at once—might slow down performance. However, there is a yield in long-term retention.”⁵¹

This approach works within the brain to “create multiple retrieval paths, a desirable difficulty makes the information more accessible.”⁵² As noted throughout the materials, active learning techniques such as quizzing, role play, Socratic discussion, group projects, and other events help create this desirable difficulty in ways that reading assignments do not.

One of the key successful strategies is spaced practice sessions or spaced repetition of material. Whether this is through the use of flashcards and flash-card apps, quizzes, or other procedures, the reinforcement over time leads to much stronger retention and improved organization of the information.

A secondary component of spaced repetition is interleaving the information. Students should be working with new material and old material together. This creates one of the desirably difficult situations where the brain engages more deeply to understand and retain the information, leading to longer-term retention and usefulness, although, in the immediate activity, the student may feel the work is being made harder.

Because the information is harder to process, the professor should allow for time to process the information or answers. Rather than calling on a single student or asking for hands, the faculty member may ask the entire class to answer a question by writing out their notes. Only after the students have had time to process an answer does the professor call on students to share their thoughts and reflect on the suggested answer and the analysis that helped arrive at that possible solution.

Deep learning requires the student to work harder. Faculty members will achieve greater success with their students if the students are expressly invited to understand their thinking process and to push themselves to seek out deep thinking approaches. To achieve this, faculty members should emphasize consolidation and reflection approaches.

51. DIANE CUMMINGS PERSELLIN & MARY BLYTHE DANIELS, *A CONCISE GUIDE TO IMPROVING STUDENT LEARNING: SIX EVIDENCE-BASED PRINCIPLES AND HOW TO APPLY THEM* 6 (2015).

52. *Id.*

Consolidation is an essential component in the design of effective learning environments. At its best, consolidation moves beyond asking students to 'Tell me how much you know' to 'Show me the evidence of what you have learned, how you learned it, how well you think you have learned it and what would have helped you learn it better. Tell me areas where you think you could improve your learning and how you could go about it.' Consolidation can happen at any point, not just at the end of semester. For example, the use of frequent informal small quizzes embedded in lectures, tutorials and workshops, through to formal assessment that requires students to demonstrate understanding or skills, can all effectively contribute to consolidation of their understanding and provide them opportunities to reflect on the quality of their learning. Marking assessments is also a key element in consolidation of students' learning....⁵³

The consolidation process allows students to reflect on their learning beyond the question of whether they can answer the test, and instead, consider how well they are developing as legal problem solvers. These recommendations are reinforced by education and neuroscience research that repeatedly reinforce these approaches:

1. *Repeating and rehearsing new information* — Instructors can aid students with the process of remembering by showing them connections between new information and what they already know to help make the material relevant.
2. *Establishing meaningful patterns to organize learning* — People tend to remember patterns and meaning before remembering specific details.
3. *Allowing students time to process information* — Processing is a critical component to integrating new information into long-term memory structures.
4. *Finding relevance in the learning* — When a new topic is relevant to learners, they are better able to anchor it in their long-term memory.⁵⁴

By returning to these features in the active learning exercises used throughout the semester, the students can maximize their deep learning and lengthen their retention of the materials. The work will be more challenging, and the

53. HUNT & CHALMERS, *supra* note 35, at 35.

54. PERSELLIN & DANIELS, *supra* note 51, at 3.

students will struggle more during the semester, but they will be able to get more out of their work and retain it much longer as a result.

E. Cognitive and Implicit bias

The process of teaching and learning is a constant flurry of rapid decision-making. Both faculty and students are selecting materials on which to focus, questions to ask, points to make, data to research, people to consult, and novel situations to address. Like all others, faculty and students use their decision-making strategies to undertake this process.

Unfortunately, humans are not objectively neutral. They come to decision-making with a complex set of cognitive biases and implicit biases that influence how they understand the information they are provided and how they evaluate the information and options available to them. These are preconditions that a person can overcome through conscious decision-making, but they tend to strongly influence individual and group behavior. These cognitive and implicit biases also threaten to undermine the design of courses and lesson plans. Psychologists recognize a number of well-studied examples:

- Affinity Bias — A tendency to favor people we perceive as like ourselves.
- Priming Bias — A tendency to let prior information, such as the first speaker in a group, influence and frame the subsequent decision-making process.
- Confirmation Bias — A tendency to overvalue that information that supports the position a person wishes to hold and, conversely, a tendency to discredit contrary information.
- Self-serving Bias — A tendency to overvalue one's role, take responsibility for successes while avoiding responsibility for failure, and overvalue one's position.

In addition to these common informational biases, there is a significant body of research demonstrating the problems created by “implicit social cognition” or “implicit bias.”⁵⁵ Racial and gender stereotypes profoundly influence how individuals value and process the information and skills they learn. The research ably demonstrates strong implicit racial bias against black and dark-

55. See Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 *PSY. REV.* 4, 19 (1995).

skinned minorities.⁵⁶ In contrast, there is what has been described as a “halo effect” for attractive women and tall men.⁵⁷ Research recognizing these national tendencies is complemented by studies showing “pre-interview” bias against job applicants with “African-American” names.⁵⁸

Faculty have an obligation to monitor and correct for cognitive and implicit bias. They also owe a duty to their students to ensure the course design and the classroom operations eliminate these various biases wherever possible. While bias is universal, and although it takes many forms, faculty members who are cognizant of their own biases and the cultural biases among their students can be intentional in adjusting for them.

One important area in which faculty must adjust to recognize implicit bias is in the area of inclusion, to be sure the design of the class does not incorporate any bias regarding race, gender, ethnicity, age, or disability, or other factors. The need to be cognizant of this concern relates to the materials assigned, the assessments used, and conduct of the course.

Faculty members do best when they are mindful that the expectations for their students are universal. Implicit bias and unintended patterns can manifest in many parts of a course design or classroom session. Faculty members must take this into account when creating the names of parties for hypotheticals, establishing the economic assumptions built into fact patterns, designing red herrings on exams, and influencing the course in other ways. Faculty members must be mindful not to select facts and circumstances to instruct the class that create a cultural comfort for some students while excluding others.

The cognitive and implicit biases also shape the faculty member's perception of each year's new class. For example, an often overlooked step in designing a law school course is the process of evaluating the incoming students' knowledge, skills, and values. Faculty members instructing students in the second and third years have the benefit of designing courses built around the learning objectives of the foundational first-year curriculum. This may not match the actual skill levels for the rising students, but it is a start.

Faculty members instructing students in the first-year curriculum tend to rely on their prior experience from earlier years. For new faculty members,

56. See generally Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427 (2007).

57. Greenwald & Banaji, *supra* note 55, at 9–10.

58. Thomas E. Ford et al., *The Role of Accountability in Suppressing Managers' Preinterview Bias Against African-American Sales Job Applicants*, 24 J. PERS. SELLING & SALES MGMT. 113 (2004).

this step in the process is often quite challenging. New faculty tend to look to the expectations of their peers and use this information to make assumptions regarding the pre-existing competencies of the students. There is not an opportunity to conduct empirical pre-testing before the course starts, and law school has a strong tradition that students come to the very first class session having attempted to read their assignments and prepared to work.

Often, adjunct practitioners struggle with this aspect of teaching. Adjuncts' expectations of the students' pre-course knowledge, skills, and values are based on the skill set of inexperienced practicing attorneys rather than on law students. These populations are very different from each other, and as a result, practitioners tend to expect much more work from students than is typical in an upper-division law school course. Some adjuncts also tend to ignore the competing demands on the students from their other courses, co-curricular obligations, outside employment, and other commitments.

Another implicit bias held by some faculty members is that the students all tend to be just like that faculty member was when he or she was a student. This assumption ignores the statistical reality that the majority of law faculty graduated from the upper part of their class and from a law school often highly competitive in its admissions. As a community, law school faculty largely consist of high-performing graduates from elite institutions. Add the socialization that comes from a significant number of faculty members holding Ph.Ds. and many others having had federal clerkships, and the comparison between the faculty and their students reflects a very wide gap. As a result, faculty members may tend to underestimate the difficulty in adjusting to the analytical thinking process and other skills that are often innate for those who gravitate towards becoming law professors.

Other faculty members make the opposite assumption, relying on the implicit bias from "The Paper Chase" that entering students have "minds of mush." This approach assumes incoming 1L students have no relevant experiences appropriate for the 1L law school discourse. This assumption is reinforced through the selection of readings to begin the semester's Socratic dialogue by determining who owns the fox (from *Pierson v. Post*, 3 Caines 175 (1805)) or whether a drink-fueled bar session gave rise to an enforceable contract to sell a farm (*Lucy v. Zehmer*, 196 Va. 493 (1954)). There are many pedagogical reasons for choosing these and cases like them, but they also serve to alienate and distance incoming law students from their own experience. Given concerns regarding the documented level of stress and the negative mental health consequences of law school on its students, the bias towards the belief that students

begin with minds of mush should be assessed carefully and empirically before using it to design a law school course.

F. Negative Impact of Cold Calls in the Socratic Dialogue

Although the Socratic method of first-year law school instruction is a deeply rooted tradition within law schools, receiving praise from the Carnegie study, the process of cold-calling on students may have negative consequences that outweigh its benefit as a motivator to keep up with the reading or to prepare students to speak before a hostile judge, as its advocates sometimes promote.

While the process is intimidating for all students, women and minorities tend to feel most alienated from law school as a result of the first-year experience.

For example, many students reported feeling anxious and threatened by the Socratic Method. Because professors are not only representatives of the institutional culture, but also sources of authority and potential academic validation, performing poorly under the academic spotlight significantly contributed to feelings of alienation.... Many students also reported feeling significant pressure to appear intelligent to peers, who may be seen as validators of one's intellectual merit.... Much of the pressure may be derived from the culture of competition and performance, which may place the spotlight on intelligence rather than on collaboration and intellectual growth and challenge....

Although these concerns about competence and intellectual merit can plague any law student, it is plausible, given the extensive literature on stereotypes and academic achievement, that members of traditionally marginalized groups might be more impacted by these negative academic experiences.

Students reported events related to their social identities (e.g., ethnicity and gender) as having negative implications for their confidence in law school and for their feelings of fit and belonging, suggesting a strong link between marginalized status and feelings of inclusion.⁵⁹

59. Bonita London, Vanessa Anderson & Geraldine Downey, *Studying Institutional Engagement: Utilizing Social Psychology Research Methodologies to Study Law Student Engagement*, 30 HARV. J.L. & GENDER 389, 402 (2007).

Student engagement in law school and active learning techniques are essential for effective learning. As the research tends to reflect, however, the process of cold-calling students to drive the Socratic dialogue is often counter-productive regarding the goals of learning in law school. At a minimum, there is little learning that occurs when unprepared students are forced to demonstrate their lack of preparation to the entire class. Allowing students to pass without penalty may diminish some of the motivation of the cold-calling practice, but it will also increase the respect and support shown to students.

The cold-calling process is often considered potentially threatening by students, very opaque regarding the content in the discussions, chauvinistically competitive, and prone to segregate the class into players and observers. Over the course of the semester, a small cadre of students typically becomes adept at understanding the professor's question style while the remaining students shrink away from the engagement. No research has empirically demonstrated that the large classroom cold-calling used in first-year law school courses is a particularly effective learning method. In contrast, there is growing evidence that it has significant harmful attributes that can be replaced with more effective teaching modalities.

At the same time, faculty members may find that dropping the cold-calling approach has its own negative consequences. Law students are socialized into expecting the cold-calling Socratic classroom environment as normal, resulting in their characterization of courses that do not use it as less rigorous and demanding. Not only do the students lose the motivation of fear from the cold-calling, but some may also diminish their respect for the course. As a result, students may reallocate their efforts away from the very classes that are being redesigned to be more student focused, frustrating efforts to revise law school pedagogy. Faculty members sometimes view these efforts as akin to unilateral disarmament, with the unfortunate results that the progressive teaching experiments are insufficient in scope to change institutional teaching expectations or even garner student support.

6

Progress Monitoring aka Formative Assessment

A. Formative Assessment in Legal Education

Legal education prides itself on providing ongoing feedback to law students and an informationally robust student-teacher relationship. The Socratic dialogue requires students to be challenged by their peers and by their instructor, to receive feedback on their arguments, and to learn from the engagement of the process. Students usually know when they have done a good job in class and when they have struggled to present their case or answer the questions presented. The feedback is immediate and visceral.

The process of providing helpful feedback to students is variously described as coaching, feedback, progress monitoring, or formative assessment. At its heart, formative assessment is a structured method of checking in with students as they are developing their knowledge and skills to let them know where they stand and help them focus on what they should improve. Formal formative assessment may differ from coaching and feedback because it provides information to the professor as well as to the student about what should come next.

A test or other system of information gathering would be considered a formative assessment if it meets two criteria. First, a formative assessment is administered midstream, in the course of some unit of instruction. In addition, the primary purpose of formative assessment is one or more of the following: to identify the student's strengths and weaknesses; to assist educators in the planning of subsequent instruction; to aid students in guiding their own learning, revising their work, and gaining self-evaluation skills; and to foster increased autonomy and responsibility.⁶⁰

60. HEIDI ANDRADE AND GREGORY J. CIZEK, *HANDBOOK OF FORMATIVE ASSESSMENT* 4 (2009).

Faculty are generally supportive of the need to give students feedback on improvements to their performance. A study conducted at the University of Minnesota demonstrated that individualized student feedback had a statistically significant impact on performance for the students who received the feedback. The results demonstrated that “individualized feedback in a single first-year doctrinal class can improve the quality of students’ exams in all other traditional law school classes during the first year of law school.”⁶¹ These results are consistent with educational research across all other disciplines tested.

The evidence also highlights that the feedback has its greatest impact on the students below the median in their academic performance.

The evidence that individualized feedback appears to have a stronger effect on below-median students also has important implications. In particular, it indicates that individualized feedback can disproportionately benefit the subset of students who incur the largest costs to attend law school and who are most at risk of failing the bar exam or being unable to land desirable postgraduate employment.⁶²

At the same time, there has been a widespread reluctance to adopt more formal formative assessment techniques. One point of tension is the extent to which faculty equate formative assessment with “spoon feeding” students answers rather than promoting the student-driven process of finding the law. Students and other critics of this model instead think of it as “hiding the ball.”

A second point of tension is the amount of time and effort that a professor must expend to provide meaningful, timely feedback. A requirement of daily written exercises would mean a requirement for daily grading of written exercises. The selection of poorly designed feedback techniques can generate a great deal of additional work, which may not be particularly impactful.

Reflecting the widespread reluctance to adopt more formal formative assessment techniques, the ABA has moved slowly in its efforts to require formative assessment. ABA Standard 314 requires a law school “to utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.”⁶³ Yet Interpretation 314-2 makes clear the ABA will not regulate or evaluate

61. Daniel Schwarcz & Dion Farganis, *The Impact of Individualized Feedback on Law Student Performance*, 67 J. LEGAL EDUC. 139, 143 (2017).

62. *Id.* at 143.

63. Standard 314.

the adoption of formative assessments. The Interpretation explains that “[a] law school need not apply multiple assessment methods in any particular course.... Law schools are not required by Standard 314 to use any particular assessment method.”⁶⁴ Unlike Standard 315, which provides some suggested evaluative tools that might be helpful to evaluate the program of legal education, Standard 314 offers no guidance or advice other than the recognition that “[a]ssessment methods are likely to be different from school to school.”⁶⁵

At the heart of this tension has been the importance of the end-of-semester bluebook exam and the role of the Socratic, Langdellian pedagogy. The high-stakes final exam is a summative evaluation, while the feedback provided in doctrinal courses and clinics offers varying degrees of progress monitoring.

Avoiding graded outcomes until the end of the semester or the end of the year also has the benefit of giving students longer to build the skill and knowledge base before their performance could negatively impact their law school standing. In many ways, then, the classroom practices of the prior century were good enough that work on formative assessment could be viewed as retrograde or officious rather than focused on actually improving student outcomes.

Despite these concerns, educational research provides robust support for the need to engage students by active faculty to promote active learning through progress monitoring and formative assessment. “[I]t is essential to have visible teaching and visible learning.... [H]ighly structured learning or direct teaching, which emphasizes testing and feedback, again emerges as the most effective teaching form.”⁶⁶

Engaging students through highly visible teaching to promote active learning also tends to require at least some modification of the all-stakes final examination. Given the competing demands placed on students, students often fail to offer deep engagement on tasks that “don’t count.” Low stakes rewards and graded components are often needed to ensure that the students do not ignore valuable learning experiences because they are responding to other classes where the low stakes assessments are graded and responding to job obligations where the stakes can be higher.

Not all progress monitoring needs to be graded. Many of the exercises are short and will not require any graded component. For structured formative

64. *Id.*

65. *Id.*

66. JOHN HATTIE, *VISIBLE LEARNING: A SYNTHESIS OF OVER 800 META-ANALYSES RELATING TO ACHIEVEMENT* 37 (2008) (internal quotations and citations omitted).

assessments that require significant time and effort by the student, however, a modest graded component improves performance. In addition, there is also a testing bias that generally results in students having better retention of those items which have been tested over those items which have not been part of a structured test. Taking a test or quiz is itself a learning exercise, and the grading component adds a cognitive and emotional aspect to the work that deepens the retention and retrieval strategies used by the brain.

B. Lessons from Legal Research and Writing

The exception to the Langdellian model is the required Legal Research and Writing (LRW) courses. Unlike the doctrinal courses, students in Legal Research and Writing are expected to turn in various writing projects on a regular basis. The faculty typically provide students with small projects that reflect aspects of memo or brief writing. The courses use these smaller projects to create the scaffolding for the larger legal writing project, and in parallel, use these smaller tasks to build the cognitive scaffolding to think and write like a lawyer.

Precisely because LRW often gives students their first graded feedback, the course is often a flashpoint for student angst. Students sometimes report to their faculty members, "I'm doing fine in all my other courses," to which the professor asks, "What grades have you received in those courses?" Since there have been no graded assignments other than in the Legal Research and Writing course, students have no way of evaluating their performance against the expectations of the professor or their standing among their peers.

LRW requires that the students' work be primarily writing assignments. These projects receive feedback through a wide variety of techniques.

Students typically receive formative assessment on LRW assignments such as memoranda and client communications. Formative assessments are designed to create a "learning loop": "a professor facilitates a student's active learning, the student performs, the student and professor assess the performance, and the professor provides feedback on how the student's learning and performance can be improved." Formative assessment is more time-consuming and intense than summative assessment and is thus more challenging to manage.⁶⁷

67. Mary B. Trevor, *The Care and Feeding of the Twenty-First-Century Developing Legal Writer: A Primer for the Supervising Practitioner*, 12 *LEGAL COMM. & RHETORIC* 219, 230 (2015) (quoting

Professor Victoria VanZandt illustrates that this work is widespread:

Most LRW faculty already have learning outcomes, stated or unstated, for their courses. By merely articulating these learning outcomes and placing them into a formalized assessment plan, much of the heavy lifting is done. LRW faculty can and should continue to use multiple formative assessments in their courses. Now, instead of just using the results of those assessments for grading purposes, they can use the results to assess the achievement of their stated learning outcomes.⁶⁸

Professor VanZandt demonstrates how she puts this approach into practice, using pre-tests, writing feedback, and post-test evaluations. “All students will receive formative assessments on their written work throughout the semester . . . Subsequently, all students will be assessed using a post-test at the end of the semester.”⁶⁹ By incorporating the formative assessments with the learning objectives in the course, Professor VanZandt has created a virtuous loop of feedback and improvement both for the students and for her course design.

C. Building Learning Competence

A critical component of formative assessment is the role it plays in helping students develop their own learning competence. The self-assessment loop reflects the metacognitive understanding students need to become self-directed, independent learners, researchers, and problem solvers. “Metacognition is the ability of learners to ‘predict their performance on various tasks . . . and to monitor their current levels of mastery and understanding.’”⁷⁰

Building metacognitive skills is an essential component of the law school learning experience. The body of legal knowledge continues to grow at an accelerating rate, and the range of skills needed to be an effective lawyer, as well as the range of roles played by lawyers in the profession and in soci-

Heather Zuber, *A Fresh Look at Assessing Students’ Work Product: What Is Assessment, Why We Assess, and How to Do So Effectively and Efficiently*, 19 PERSPS. 20, 21 (2010)).

68. Victoria L. VanZandt, *Creating Assessment Plans for Introductory Legal Research and Writing Courses*, 16 LEGAL WRITING 313, 360 (2010).

69. *Id.* at 358.

70. DOUG FISHER & NANCY FREY, CHECKING FOR UNDERSTANDING: FORMATIVE ASSESSMENT TECHNIQUES FOR YOUR CLASSROOM, ASSOCIATION FOR SUPERVISION & CURRICULUM DEVELOPMENT, 135 (2007) (*quoting* JOHN D. BRANSFORD, HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL 12 (John D. Bransford, Ann Brown, & Rodney R. Cocking eds., 2000)).

ety continues to expand. Without strong metacognitive skills, a lawyer will struggle to keep pace with the profession, growing increasingly less competent as the years out of law school stretch on. In contrast, lawyers with strong self-direction and self-regulated learning mature and become more valuable to their clients and society.

For many, the leap from student to lawyer is mediated through the bar examination preparation. Although many law schools have added bar preparation courses for third-year law students in recent years, much of the bar study requires the law students to be highly self-motivated and self-regulated. Preparing law students to manage their own study is essential for those students to later succeed. “There are many metacognitive skills that everyone employs in the learning process: monitoring one’s reading comprehension, evaluating one’s process of learning, understanding the influence of outside stimuli on one’s learning, and knowing when one lacks motivation, just to name a few.”⁷¹

Law school is particularly reliant on strong metacognitive skills. “When tasks are more complex for a pupil, the quality of metacognitive skills rather than intellectual ability is the main determinant of learning outcomes.”⁷² This suggests that efforts in the first year of law school should emphasize the metacognitive aspects of learning, which, in turn, highlights the importance of formative assessment. It emphasizes the need for the progress development to include both the faculty member’s attention to the student learning and the students’ attention to their learning.

Before jumping into formal formative assessment, it is also helpful to build relationships between student and faculty.

[K]nowing the students allows the teacher to make better judgments about when to push each student and when to back off. Second, when students trust the teacher, they are more likely to accept the feedback and act on it. Ultimately, the only effective feedback is that which is acted upon, so that feedback should be more work for the recipient than the donor.⁷³

71. 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) (internal citations omitted).

72. JOHN HATTIE, *Visible Learning* 30 (2009), in SHIRLEY CLARKE, *OUTSTANDING FORMATIVE ASSESSMENT: CULTURE AND PRACTICE*, HODDER EDUCATION GROUP 33 (2014).

73. Dylan Wiliam, *Assessment: The Bridge Between Teaching and Learning*, VOICES FROM THE MIDDLE (NATIONAL COUNCIL OF TEACHERS OF ENGLISH), (Dec. 2013) at 18.

Although formative assessment may seem very student-oriented, there is evidence of significant student push back from these best practices. “This effort to help students ‘learn how to learn’ may feel uncomfortable to students because it can be in tension with students’ increasingly consumer-like mentalities that focus more on correct answers and grades than on the ‘process of learning.’”⁷⁴ The resistance can be diminished by reinforcing the value of self-assessment, by treating it as an essential part of the course rather than an additional burden for the professor, and by introducing it at low-stakes stages in the course.

Early in law school, a great many of the students feel lost. The amount of reading is overwhelming, the concepts are alien to most students, and the demands to be an active learner in Socratic classes is daunting. Asking students to self-assess their learning can be tantamount to asking the students to admit they are failing. In the early stages of the first-year experience, the metacognitive focus should be on identifying the best strategies students are using to make progress. Asking students to share a strategy or two that they have found helpful will start the reflection on the learning process while emphasizing the positive. It also helps students understand that they are not alone in the struggles during the first weeks or months of law school. As students move out of the novice category, their metacognitive skills will also start to emerge.

D. Formative Assessment in Practice

There is a very wide range of formative assessment options, from those that require very little change like the traditional Socratic classroom to courses that are wholly flipped and problem-based. Different strategies work better for particular courses depending on its subject matter and the professor’s preferred style of teaching, so there is no prescriptive list of required formative assessment models.

There are many lists of assessment suggestions, many overlap with active learning exercises. As noted above, Socratic dialogue is a form of active learning with a bit of formative assessment. Faculty generally recognize a strong performance when speaking with a student, and their silence (or commentary) regarding the other students may provide some level of feedback. Faculty of-

74. Heather Field, *A Tax Professor’s Guide to Formative Assessment*, 22 FLA. TAX REV. 363 (2019) (quoting Karen McDonald Henning & Julia Belian, *If You Give a Mouse a Cookie: Increasing Assessments and Individualized Feedback in Law School Classes*, 95 U. DET. MERCY L. REV. 35, 43–44 (2017)).

ten make the distribution of the Socratic engagements somewhat structured by calling on students using the roll sheet to ensure that the students called upon are evenly distributed. Others use index cards with the students' names written on them. Each student is represented by two cards in the deck. Faculty members shuffle the deck and call on the unused cards each session, ensuring that the students are called upon in random order.

The Socratic interactions can be made more metacognitive if students who were called upon were required to later submit a short self-assessment regarding their own perception of how well they did, where they should follow-up, and what questions their participation raised for them. In addition to class dialogue, law school faculty have often used midterm essay examinations, writing projects, seminar papers, and other assignments of various lengths to help evaluate the students. As long as the student receives constructive, timely feedback on these exercises to help the student improve performance and help the faculty member focus attention on the learning of the class, each of these techniques reflects a very practical form of formative assessment.

Another very popular technique is the use of multiple-choice tests, given either online or during the class sessions. Professor Heather M. Field has published an extensive guide for formative assessment strategies.⁷⁵ She offers extensive guidance on multiple-choice questions, a favorite tool for formative assessment in law school.

Many tax classes use the problem method, at least to some degree, and this provides an excellent segue into using multiple choice questions for formative assessment. Specifically, an assigned problem can be turned into a multiple choice question relatively easily by posing the question from the book and offering answer choices reflecting the correct answer and the most common wrong answers. Then all students can vote. Thus, rather than calling on one or two students to answer the question through a Socratic dialogue, a professor can use the multiple choice question to gauge the understanding of the entire class.⁷⁶

Quiz questions can be administrated to serve as a reinforcement and review of the prior session, to assess understanding during a lesson, to offer written variations of the facts for a case and how those changing facts impact the outcome of a decision, or to evaluate the students outside the classroom.

75. *See id.*

76. *Id.* at 394–95.

In addition to multiple-choice, there are many other forms of quiz questions, including true/false; short answer; all that apply; and matching. Faculty sometimes create crossword puzzles or other games as well.

In addition to the use of various quiz questions as warm-ups to remind students about the prior class session, as discussion prompts, and as progress monitors, there are other tools and techniques. Where the suggestion is an active learning procedure, the work product can be collected and evaluated to make it an opportunity for progress monitoring or formative feedback.

- **Checklists** — Checklists provide very neat methods of organizing legal rules and concepts. They can also be expanded to include process issues relating to clients and parties as well as procedural matters to tie into Civil Procedure and Evidence.
- **Venn Diagrams** — These simple graphics provide students an ability to compare and contrast different topics. They can be used to help students engage in transference between similar topics across the curriculum such as the similarities and differences between criminal and civil liability.
- **Outlines** — The student's individual work organizing and restating the content of a course through the development of an outline provides a very useful active learning experience. Faculty who provide evaluation of student-generated outlines can promote this active learning exercise and encourage the student's own development of outlines rather than the passive use of commercial outlines.
- **Flash Cards** — Students who create their own flash cards are also developing an organization of the material, particularly if the flash cards go beyond definitions to larger concepts. Faculty can reinforce these efforts by providing students who turn in their flashcards with suggested vocabulary and concept lists, or simply provide those vocabulary lists and concept lists on an ongoing basis to the class.
- **CALI and Publisher Exercises** — Faculty can assign multiple choice and other forms of quizzes and assessments provided through CALI or through materials provided by the academic publishers and bar review publishers. Although these materials are not secure due to the lack of control over access, they provide very useful resources for the faculty and helpful feedback for the students.
- **Discussion Boards** — Whether a course is taught online, blended, or face-to-face, faculty members can post discussion questions that require the

students to post thoughtful analysis of the questions posed. Discussion board posts can be fashioned much like exam essays, prompt students to complete independent research, or reflect on their understanding of the session topics. Discussion boards generally work most effectively if the expected depth of a post answer is established at the beginning of the semester, the faculty member offers feedback by to each posting student, and the faculty member requires the students provide meaningful feedback and follow-up on two or three of the other posts in the discussion.

- **Response Cards** — Many faculty members take polls or votes in their classrooms. Asking students to raise their hands works very well to get a general sense of the class. A single note card can be turned into a very versatile response card. The front is labeled “YES” and the back is labeled “NO.” Rather than simply raising hands, the card makes the decision to answer more concrete. In addition, each side of the card can be split in two with a “1” and “2” written depending on whether the card is up or down. The back can have the “3” and “4.” In this way, the cards can be used for multiple choice group questions as well as yes/no or true/false questions.
- **Anonymous Voting Mechanisms** — The high-tech alternative to response cards are classroom response systems such as TurningPoint Clickers, Poll Everywhere, or LMS systems used in the classroom such as Canvas and Blackboard. These have the benefit of allowing the student to participate without showing that participation to the other students. When integrated into the LMS system, they can also record votes for later assessment and follow-up. These can even be used to take attendance.
- **Exit Cards and One-Minute Essays** — Students are invited to write the answer to a specific question at the end of the session or to summarize the day's lesson. Faculty members can vary whether to make these anonymous or named. The cards or essays are collected at the end of the session and used to gauge the extent to which the students understand the materials. If the students provide names, the submissions can also help the faculty member identify those students who need additional feedback.
- **Correcting and Evaluating** — Students often can see others' mistakes much more easily than they can see their own. Most authors struggle to edit their own writing, so the same challenge is likely true of student work products. Instead of trying to improve their own work, students

can be called upon to correct and evaluate other work products. This can be another classmate's work in a sharing exercise, or an intentionally defective sample provided by the professor to the students. When a faculty-supplied defective sample is used, the technique avoids the concerns about anonymity or other interpersonal dynamics among students.

- **Fist of Five**— Ask your students a question and have them respond by showing you their level of understanding. Students hold up one finger if they are still unsure of a topic and need to be provided with more information. If they are on their way to fully understanding, they might hold up three or four fingers. Students who have mastered the unit and are able to demonstrate their knowledge and understanding would hold up five fingers. A glance around the classroom provides you with information about student learning and allows you to adapt your instruction accordingly.⁷⁷
- **Metacognition Sheet**— Pinpoint trouble spots and knowledge gaps before a summative assessment by having students answer specific questions about the given topic. This starts by distributing sheets of paper with the following questions: (a) “Can you summarize the topic?,” (b) “How can you apply the topic?” and (c) “What questions do you still have about the topic?” Encouraging detailed answers should help you identify which students are struggling, and what their specific struggles are.⁷⁸
- **Teach a Friend**— A good strategy for determining if students understand a concept or process is to have them teach it to a friend. Students need to think about the knowledge and skills needed for understanding and include that information in their teaching. Pair students up and have them “teach” their partner about the concept or process.⁷⁹
- **Think-Pair-Share**— The think-pair-share strategy is a great way to gather information about the level of understanding of your students. It is a quick and easy strategy that can be used a number of times throughout a unit of study. Ask students questions such as, “What did you learn during today's lesson?” or “What connections can you make to your own

77. Natalie Regier, *Improving Student Learning in the CTE Classroom Through Formative Assessments: Adapted from 60 Formative Assessments Strategies* 11 (2012), <https://1.cdn.edl.io/SMr2qJk2AGiVvUuTLMGhN02CY9DN774AogEBmti2GcbMeEmu.pdf>.

78. Marcus Guido, *20 Formative Assessment Examples to Try*, PRODIGY (Mar. 5, 2018), <https://www.prodigygame.com/blog/formative-assessment-examples/>.

79. Regier, *supra* note 77, at 17.

life based on what you have learned so far?” Give students a few minutes to think about these questions. Pair students up with partners. Students share their thoughts with each other and then join a larger group or the whole class. Randomly call on students to share their ideas. By going through this process, students are able to solidify and refine their thinking before having to share their answers. Circulate throughout the class as students are sharing their thoughts and ideas to assess the overall depth of understanding.⁸⁰

- **Four Corners**—A great way to get students out of their desks and moving is the four corners strategy. Some students learn better when they are moving, so this strategy appeals to their learning preference. In each corner of the room, provide a label. Label one corner, “Strongly Agree,” one corner, “Agree,” the third corner, “Disagree,” and the final corner, “Strongly Disagree.” Call out a fact or statement about the current unit of study. Students go and stand in the corner that matches their response. Encourage students to share their reasons for choosing the response. Have one or two students from each corner share their answers with the rest of the class.⁸¹

E. Rubrics

As demonstrated from the brief prior list of formative assessment techniques, formative assessments vary significantly. Some are simple check-ins, while others provide fairly detailed and structured information for the student. One of the most significant tools available to help students become self-directed in their evaluation of their own work is through the use of rubrics. “A rubric is a coherent set of criteria for students’ work that includes descriptions of levels of performance quality on the criteria. . . . rubrics have two major aspects: coherent sets of criteria and descriptions of levels of performance for these criteria.”⁸²

The first (usually vertical) axis for the rubric grid represents evaluation criteria. The evaluation criteria should be based upon the learning objectives of the course and the lesson. The criteria can be generalized much in the manner of the learning objectives, highly specific as they relate to particular tasks and

80. *Id.*

81. *Id.* at 11.

82. SUSAN M. BROOKHART, HOW TO CREATE AND USE RUBRICS FOR FORMATIVE ASSESSMENT AND GRADING 1 (2013).

assessments, or somewhere in between. When faculty use more general criteria, the rubrics can apply more generally and be re-used across multiple tasks and assessments. When the criteria become too specific, the rubrics devolve into an answer keys or grading checklists. The highly detailed answer keys and checklists cannot be shared, in advance, with the students because these provide the answers to the questions on which the students are being assessed.

Both answer keys and rubrics are very helpful to the faculty member. Both improve grading consistency, speed up the grading process, and if shared, provide useful feedback to the students. In the context of formative assessment, however, the more general rubric allows the faculty member to share the criteria with the student and help coach the student on the application of the criteria both in advance of the students' efforts and immediately after the students have made their attempt on the assessment. By telling the students very explicitly the criteria on which their progress is being assessed and monitored, the students can focus their attention on those efforts.

The second (usually horizontal) axis for the rubric grid represents the levels of performance for each criterion. These are the benchmarks for student performance. "More specific than letter grades or raw numbers, rubrics describe how a student performed in a number of areas.... When using a rubric, professors specifically show students how they earned their grades."⁸³ Take, for example, the criterion of use of primary authority. At the simplest, a rubric can provide that the student "always uses primary authority," "often uses primary authority," "occasionally uses primary authority," "seldom uses primary authority," or "never uses primary authority." This five-point scale ranging from always to never can be replicated for each criterion upon which the student will be evaluated. Instead of a letter grade that blurs the student's progress on each of the evaluation criteria, students receive a more detailed range of strengths and weaknesses. Another common scale uses the terms "meets/exceeds expectations," "approaches expectations," or "needs improvement."

The five-point scale from always demonstrates to never demonstrates can be further developed by adding more detailed explains regarding what constitutes mastery of a particular criterion and what evidences that the student is still developing the particular criterion.

Properly designed rubrics help students understand the knowledge and performance upon which they will be assessed, and rubrics help faculty members

83. Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics — Explicit Grading Criteria*, 2004 MICH. ST. L. REV. 1 8–9 (2004).

improve consistency from one student's evaluation to the next. Where multiple evaluators are used, rubrics are very helpful to improve inter-rater reliability as well.

In K–12 education, where rubrics are ubiquitous, there have been several studies in which the students participated in the drafting of the rubrics used in the classes. When asked to develop rubrics for a “good project,” . . . students, in grades 1 and 2, were able to define criteria for group projects By the end of the year, about half the criteria students chose were about process and half were about product.”⁸⁴ The 1st and 2nd graders demonstrated their ability to understand their project goals and learning processes. “This study shows us that students need to learn how to focus on learning—and, more important, that they can begin to do this as early as 1st grade.”⁸⁵

The greatest challenge to faculty in crafting successful rubrics is the effort required to understand the specific skills being sought in the evaluation. Rubrics communicate very strongly to students regarding the skills being evaluated and the skills being ignored by the evaluation. For example, the rubric for a research project will likely include criteria on citations and sources. A rubric for an exam essay will not typically include any expectations of proper citation.

There are other criteria where the expectations may vary more considerably among faculty members. Some professors expect first-year law students to restate rules of law accurately in their essay answers, while others focus exclusively on the analysis portion. Certainly, analysis can only be accurate if the student applies the correct rule, but recitation is a different skill than accurate recall. Accurate rubrics would reveal these differences and help the students prepare for their assessments with a clearer understanding of their expectations.

Faculty members can also highlight particular criteria to emphasize their priorities. Some faculty highlight the importance of a thesis sentence on research papers, organization of research, and breadth of primary and secondary sources in addition to factual analysis, writing quality, grammar, completeness of research, and citations. In addition, faculty members can weight the criteria separately to ensure that the most important criteria are reflected in the grade. This avoids giving too high/low a score based on the citation and mechanics of a research paper when the bulk of the grade should be based on the analysis. Not all criteria deserve the same weight for summative grades, but this is an-

84. BROOKHART, *supra* note 82.

85. *Id.*

other area where the faculty member can adjust the tool to achieve the desired result.

By incorporating rubrics into the course based on the learning objectives and using them consistently throughout the semester, the professor helps ensure that the learning objectives become embedded in the course and the learning objectives of the students. Through repeated usage, the learning outcome and evaluative criteria used in the rubrics will shape the students' understanding of the expectations to succeed as a law student and lawyer.

8

Engaging Students in Teaching and Learning

A. The Framework for Considering Engagement

A great deal of educational research has demonstrated the simple truth that the more a student is engaged in a particular project or experience, the more the student will learn and the more the student will retain. When students are passionate and committed, they can learn more. This requires a community of engaged learners.

We do not teach brains on sticks. We teach human beings who are inspired by wonder, driven toward community, beset by fears and anxieties, and influenced in countless other ways by aspects of their lives beyond the purely cognitive. For both you and your students, those emotions will be at a peak on the first day of the semester, and they can have a significant influence on what happens in your classroom.¹⁰⁹

The community created by the individual class and by the experience for the students in their schedule of classes will shape their attitudes, behavior, and commitment to engage in the law school experience.

The National Survey on Student Engagement (NSSE) defines engagement as “the frequency with which students participate in activities that represent effective educational practices, and conceive of it as a pattern of involvement in a variety of activities and interactions both in and out of the classroom and throughout a student’s college career.”¹¹⁰ More simply, engagement equates to time on task. More deeply engaged students put more time into their studies

109. James M. Lang, *How to Teach a Good First Day of Class, Advice Guide*, CHRON. HIGHER EDUC. (Jan. 4, 2019), <https://www.chronicle.com/article/how-to-teach-a-good-first-day-of-class/>.

110. ELIZABETH F. BARKLEY, STUDENT ENGAGEMENT TECHNIQUES: A HANDBOOK FOR COLLEGE FACULTY 4–5 (2009).

both inside and outside the classroom. Successful engagement adds the motivational element that students are investing the extra time and effort because they are committed to their work on the subject.

Students who participate at the top levels of the national moot court, trial court, and other competitions will spend countless hours writing briefs and refining their arguments. Much of that work is done for little or no academic credit. Yet those same students will push back against a two-credit course that has reading assignments better suited for a three-credit course. The difference between the two investments in time and effort comes down to engagement. The students on the competition teams are part of a sub-community in the law school that values the effort and reinforces the commitment to participation.

For most students, the amount of time they spend on a particular subject is a function of the minimum amount of time needed to get through the assignment plus the additional amount of time and effort they are willing to invest in that assignment. The minimum time is defined by the student, based on the student's personal definition of the minimum. For some students, the minimum is the least work needed to get an A, to be the best in the class, or to master the material — all high-achieving goals that are based on some balance of internal and external motivators. For other students, the minimum is at least the score needed not to fail or have to redo the assignment.

The additional commitment component is the extra effort students are willing to put in beyond their normal level of minimum engagement because of some additional connection to the assignment. The additional connection can vary significantly from student to student and situation to situation.

- Students will usually work harder for a faculty member who is motivating and caring, rather than one who is critical and dismissive.
- Students will work harder for actual clients than simulations or exercises, because the consequences of success and failure are real.
- Students will work harder when they can see the benefit of the work making a difference in their own progress.
- Students will often work harder in group projects to meet the expectations of their classmates, but at other times students might become free riders in group projects, undermining the group's motivation.
- Students will spend more time on graded assignments than ungraded assignments.

- Students will spend more time on materials that will be tested than on knowledge and skills that might have a long-term benefit but not be used immediately in class.

Many of the articles on student engagement focus on students who “want to learn,” who “exceed expectations and go beyond what is required” or bring “passion and excitement” to their studies.¹¹¹ For law students, the minimum requirement for engagement is already extremely high. Student engagement plays a role in motivating the student to add the additional bump in effort and commitment. Student engagement also plays an important role in letting the student perceive the minimum requirement for success as driven by the extra motivators, rather than being foisted on the student because of unreasonably high expectations.

The bar exam, for example, demands a tremendous time commitment from every aspiring lawyer to memorize sufficient data and to perfect a particular exam writing style to ensure that the student receives a minimum passing score and becomes eligible to be sworn in as an attorney. It is a pass/fail test. Students are driven by the tremendous opportunity to complete their studies and become lawyers. They are also motivated to score higher than the minimum by the economic and emotional consequences of failure. Students may be motivated to pass but they are not positively engaged. Most, instead, deeply resent the wasted time and effort spent on an exam that will not prepare them for their next phase as professionals.

While some law school classes use external rewards and the fear of failure to motivate the students, the best law school courses and programs focus on those emotional rewards and practical benefits to engage the students. Such programs make the students want to invest their precious time in the course or project.

B. Personality Preferences

One of the key components of engagement and motivation is the relationship between the student and the professor. While the relationship between an individual student and a particular professor will depend on many factors, the aggregate relationship between a professor and the class will tend to be driven by the personality of the professor and the professor’s teaching style.

111. *Id.* at 5.

A teaching personality is typically considered on the continuum of introversion and extroversion. These terms have a myriad of definitions and qualifiers, but they began with Carl Jung's description in his 1921 book *PSYCHOLOGICAL TYPES*. "Introverts are drawn to the inner world of thought and feeling, said Jung, extroverts to the external life of people and activities. Introverts focus on the meaning they make of the events swirling around them; extroverts plunge into the events themselves."¹¹²

The common academic stereotype suggests that the introvert's role in academia is as an individual researcher and scholar, while the extrovert becomes the popular teacher and institutional figurehead. The stereotype is not particularly accurate as a predictor of success, but it likely to be more accurate as a reflection of how hiring committees view candidates, resulting in considerable selection bias within the academy. In addition, the range of introversion and extroversion is a continuum and often contextual. A person may be quite extroverted in the classroom but have difficulty socializing among colleagues. Another person might be brilliant at fundraising but uncomfortable in other social settings. Different students want different attributes from their faculty members at different times and in different contexts.

Extroverted teachers rely on their outgoing personalities and ease with people and situations to engage students. Effective extroverted teachers create very strong connections with their students and create a very positive, interactive relationship with their students. Extroverted teachers tend to be more popular and more motivating as a result of their gregarious nature.

Extroverted teachers risk becoming very ineffective law faculty by relying on their own performances rather than student engagement to carry a class. This group of socially likeable, highly engaging professors tend to treat their students more like an audience. There may be a great deal of back-and-forth with the students, but the demands on the students are akin to the demands of an audience at a rock concert. The audience knows the chorus of the songs sung and will raise their lighters (or cell phone lights) to create beautiful, motivating imagery. When students become an audience, they are not really expected to give deep consideration or be held accountable for complex problem-solving in the group. Extroverted performance-artist faculty are particularly troubling because neither the faculty member nor the students will recognize how empty and superficial the experience has been.

112. Susan Cain, *Quiet: The Power of Introverts in a World That Can't Stop Talking* 10 (2010) (discussing CARL JUNG, *PSYCHOLOGICAL TYPES* (1921)).

Extroverted faculty can avoid these risks by focusing on the quality and depth of the student interaction rather than on superficial aspects of engagement. The extroverted professor needs to speak less and listen more to gauge the true level of student engagement. Since students will also accept the dynamism of the faculty member as a substitute for an engaged learning environment, the effective extroverted faculty member should emphasize small groups, out of classroom exercises, and flipped classrooms to deflect attention on the professor's performance and reflect the attention back onto the students.

Introverted teachers tend to be quieter and more introspective as faculty. Extroverted students will sometimes look down on introverted teachers and equate their quiet demeanor with weakness. Weakness, in turn, sometimes draws out bad behavior in bullies and students with domineering personalities. As a result, introverted teachers need to take additional steps to retain control of their classrooms and connect with their students.

One common theme of teaching advice is that introverts need to learn how to "fake it" as extroverts to succeed in the classroom. This is likely unhelpful advice for a variety of reasons. There is nothing wrong with being introverted and prone to reflection. Students want faculty to be honest reflections of themselves (to a point). In addition, a person cannot truly fake having a different personality; their real personality will come forward. Finally, acting like someone other than oneself is quite draining and will create a great deal of strain on the faculty member.

Instead of faking one's personality, a professor who tends to be introverted can look at particular teaching skills and strategies to maximize student engagement. First, the introverted faculty member should use teaching methods that take advantage of the professor's preferred style. If the professor prefers to listen rather than to command, the classes can emphasize student presentations, group work, and more structured methods of calling upon students. Introverted faculty members may prefer flipped classes, with problems written on the board or on slides in advance of the lesson. A successful, introverted professor is highly prepared, deeply engaged in the student's content, and in full command of the course through the use of carefully planned student activities.

Introverted teachers risk becoming ineffective law faculty by presenting as timid, shy, or unable to control their classrooms. Students can rightfully complain that a professor who is quiet in demeanor becomes hard to hear in the classroom. Students will also tend to deflect class discussions from time to time in order to avoid more difficult assigned materials. A professor who allows

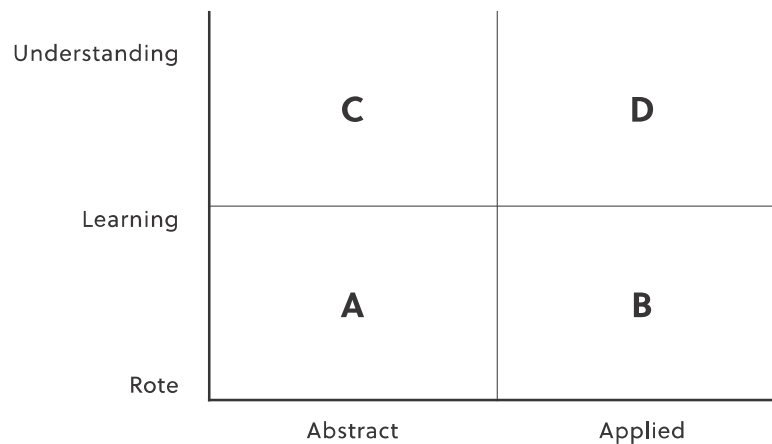
sidetracked discussions to continue unchecked will lose the time management of the course and the respect of the students.

Faculty on all parts of the introverted/extroverted spectrum can be effective or ineffective, but their methods for success and their risks of struggle differ. By knowing one's personality, a faculty member can improve their strategies for offering effective class sessions.

C. Teaching Styles

In addition to personality, another significant driver of class design is the teaching style adopted by the professor for a particular class. These range from very personality driven lists to very outcome-based modalities.

For example, one teaching style structure was developed by the Center for Occupational Research and Development (CORD). It created a teaching goal grid. One axis focused on the preferred teaching goals of the professor while the other axis focused on the teaching methods of the professor. The teaching goals represented a continuum from rote memorization at the bottom of the continuum to logical comprehension and understanding at the top of the axis, essentially reflecting a variation on Bloom's Taxonomy. The other axis ranges from book knowledge or abstract knowledge to applied, real-world knowledge.¹¹³



113. Menekşe Eskici & Seher Çetinkayab, *Analysis of Teaching Styles of Teachers Regarding Various Variables*, 8 BARTIN UNIV. J. OF FAC. OF EDUC., 138, 139 (2019).

Using this approach, rote knowledge based on abstract book concepts represented the lowest level of teaching style, while the application and synthesis of knowledge in an applied setting represented the most effective teaching style. The CORD model is more accurately described as a learning goal, but the focus is on the goal of the faculty member to achieve that goal. The faculty member who strives for this style of teaching “aims to teach through comprehension and practical knowledge (practical teaching). This style focuses on practical, concrete knowledge that supports logical learning. Productivity and performance are essential. For example, students are presented with problems that they can formulate from the real world.”¹¹⁴

The CORD model helps faculty members think about the learning outcomes from the standpoint of their methodologies. If the goal is to get students to be able to apply the knowledge in practical, legal settings, then the exercises should include practical settings, not just abstract examples. At the same time, the CORD model does not reflect how the professor manages the class.

Other studies of teaching styles focus more directly on the professor. One of the most heavily referenced comes from Dr. Anthony Grasha. He posits a continuum of five teaching styles: “expert, formal authority, personal model, facilitator, and delegator.”¹¹⁵ The five approaches are not discrete approaches. Grasha found that “all teachers possessed each of the qualities . . . to varying degrees. In effect, each individual style was like a different color on an artist’s palette. Like those colors, they could be blended together.”¹¹⁶

The choice of style tends to be determined by the preexisting preference of the faculty member and the teaching environment of the course. Each of the five approaches can be characterized through its core belief:

- Expert: “Facts, concepts, and principles are the most important things that students can acquire.”
- Formal Authority: “I set high standards in this class.”
- Personal Model: “What I say and do models appropriate ways for students to think about content issues.”
- Facilitator: “Small group discussions are employed to help students develop their ability to think critically.”

114. *Id.* at 140.

115. Anthony F. Grasha, *A Matter of Style: The Teacher As Expert, Formal Authority, Personal Model, Facilitator, and Delegator*, 42 COLL. TEACHING 142 (1994).

116. *Id.* at 142–43.

- Delegator: "Students in this course engage in self-initiated, self-directed learning experiences."¹¹⁷

When Professor Grasha surveyed faculty over the factors that determined their choice of teaching style, these were the most common responses:

- The nature of the course (required/not required; major/nonmajor)
- Size of the class
- The subject matter (hard sciences versus humanities)
- Level of the students (freshmen, seniors, graduate)
- How much they liked the class
- Time pressure
- Need to prepare students for standard exams
- Information about alternative ways to teach
- Willingness to take risks
- Not wanting to deviate from department and college norms for teaching

The combination of the teaching preferences informed the faculty members' decisions on how to approach the constraints of the course. Faculty who rely on formal authority and view themselves as experts tend to rely on those approaches in all their classes. They may find it more challenging to teach as a facilitator and delegator even in a seminar setting. In contrast, the faculty members who tend to teach as facilitators and personal models will seek opportunities to recast large courses as collections of smaller groupings to maximize opportunities to facilitate the student learning.

Understanding one's teaching style will help the professor evaluate the teaching methods and formative assessment tools available. Grasha points to a combination of expert/facilitative/delegative, preferred by a cohort of faculty in the study, explaining that the faculty "must be willing to give up some control over tasks." He continues —

After all, an independent study or collaborative project would be less interesting if the teacher planned every little detail for participants. Consequently, the combination of the expert/facilitative/delegative styles demands that teachers empower students and that faculty show some concern for building

117. *Id.*

relationships. The teacher must be viewed as approachable in order to consult effectively with students. In turn, students must learn how to improve their interactions with each other to work effectively together.¹¹⁸

Grasha's studies also pointed out that changing from one's existing practice to another set of teaching styles was a difficult task. Faculty are predisposed to control environments, trust students, and engage with others in particular manners regarding their authority.

D. The Mechanics of Effective Engagement

As noted throughout the text, students want to be respected in their educational experience. More than any other field, law students are only a few years — or weeks — away from becoming peer professionals with their faculty. The law school experience is rather brief. After that, the students become the very professionals that control the legal system.

Taking a peer mindset is particularly helpful for those faculty who have a teaching style of expert and formal authority. After all, as experts in practice, lawyers often find themselves educating judges and senior leadership. Being an expert and being an authority does not mean that those benefitting from the professor's instruction are not also experts in their own fields with a high degree of leadership.

Law students are often professionals returning to education after having had very successful professional careers elsewhere. Keeping the attitude of respect for students and a presumption — until proven wrong — that each student is a professional goes a long way to create a culture of shared respect, promoting engagement.

Respect for one's peers and students manifests in a number of behaviors that promote engagement. These include timeliness, attention to detail, responsive feedback, actionable advice, and empathy.

- **Timeliness** — Students are expected to be on time to all classes to show respect for their professors and to develop the behaviors expected of practicing attorneys who will appear in court. While some faculty members are more flexible, the norm across legal education is that timeliness matters. It is a standard question in reports by the ABA when visiting law school classes as part of the reaccreditation process. Being on time

118. *Id.*

becomes a point of mutual respect for the students. Students are often offended by faculty members who are habitually late to class. Even if the habitually late faculty member does not exacerbate the situation by punishing students who are tardy, the message undermines the importance placed on timeliness throughout the rest of the school.

The same situation applies outside of the start of class. Students will often feel disrespected if kept waiting outside a faculty member's office if the faculty member is late for office hours or because the faculty member allows some student meeting sessions to run over time. Students will become even more upset if a faculty member never shows up for class and fails to ask the administration to post an official notice of cancellation. Students understand that emergency situations arise. If a faculty member serves as a clinician and has an emergency hearing in court, the students will be very flexible and understanding. But if the faculty member does not show students respect about the professor's own absences, then the tension will mount, and the students will not be engaged.

Faculty members should make every effort to be on time and prepared for class. If an emergency arises, the faculty member should be sure to alert the administration in order to notify the students. The notification should be official, through the administration rather than through one or two students with whom the professor has a closer relationship. Students will not know whether they can rely on that information, and some of the students may resent that a professor has a closer relationship with a subset of students within the class.

- **Attention to detail** — Students are reminded throughout law school that being an effective lawyer means paying close attention to detail. Students struggle to develop this skill, and they receive feedback from faculty members throughout their entire law school experience reminding them how important the small details are for their work. As a result, the students are very impatient with faculty members who do not show the same attention to detail in their own work, particularly when it comes to graded assignments. Students complain of re-used exams, incorrect dates on assignments, references to prior editions of books, and many examples of faculty members who have recycled materials without the required updating of the content.

This is not to suggest that the time and effort put into a set of handouts should be wasted and not reused for additional semesters. But faculty

members should pay particular attention to the dates on all handouts and slides, references to dated materials, broken urls, and similar signs that material has potentially gone stale. In many cases, the professor knows that those are trivial errors and that the content of the materials remains accurate, valid, and helpful. Nonetheless, the students see the errors and begin to distrust the content. If it occurs often, the students will begin to distrust the professor.

- **Evenhandedness** — Evaluations require even more attention to detail. High-stakes evaluations should never be re-used unless there are exacting procedures to guarantee that a prior test has never become available to the students. Formative assessments and low-stakes evaluations can be recycled, but only if steps are made to ensure that all students have equal access to the available content. For example, if a faculty member decides to reuse a quiz essay, then the essay should be posted for all the students on the course LMS. The faculty member may wish to post 3–5 possible essay questions and let the students know that the essay will come from among the group of questions posted in order to be sure that all the students had the same opportunity to review the question in advance.

Giving all the students access to a question is just as equitable as giving no students access to the exam question. Both strategies avoid the inequitable situation when only students with special access to old materials will benefit from the faculty member's reuse of the content. Creating a quiz bank that provides study materials for all the students has many benefits of promoting the student's engagement with the materials and demonstrating the faculty member's interest in the student success. So long as the materials are provided equally, the strategy can work very effectively.

The need to be evenhanded comes up in many contexts. Faculty may get to know a group of students within a class because the faculty member serves as advisor to a co-curricular team or extracurricular group. Students who know the professor outside of class may feel more comfortable and act more familiar with the faculty member inside the classroom. The familiarity is natural given the additional collaboration between the faculty member and the student. But the familiarity should not impact how students are called upon in class, graded, or assigned projects. Faculty members may need to make an extra effort to encourage students not in their advisor section or their extracurricular club to attend office hours or take practice exams.

- **Sticks and Carrots**— Faculty members set a tone of engagement with their syllabi, their choice of reading material, and their motivational levers. Some faculty members prefer carrots while others prefer sticks. As lawyers, law professors tend to use a lot of regulations to ensure clarity and equity. Unfortunately, such policies come across as sticks. Professor Peter Filene describes the challenges of rule-bound consequences:

It's tempting to rely on the power of the grade as the solution, but I urge you to spurn the temptation. You may degrade the environment you're trying to foster. Grades exert surprisingly little effect on learning, and punitive policies tend to have negative effects. Let's start with the negative. The threat of low grades may prod some students to work harder. But it may just as likely cause others to manufacture excuses, cheat, become demoralized, or give up. "Pop" quizzes may enforce reading attendance but will also arouse resentment. Penalties for turning in papers late or for missing class may coerce compliance but don't teach a sense of responsibility. In other words, if you use grades as a pedagogical whip, you'll be reinforcing the working-to-get-a-grade mentality rather than a genuine learning environment. Carrots work better than whips.¹¹⁹

At the same time, the professor wants assignments turned in on time, students to attend regularly, and be actively engaged. Some faculty members use extra credit to promote positive behavior. Others use treats before class to reward early attendance or use the time before class for extra question and answer sessions. Even when the policies are clear, the language should be neutral in tone or explanatory of purposes underlying the behavior. The policies should avoid language that is disrespectful or negative.

- **Responsive feedback**— Active learning and helpful progress monitoring are essential components of effecting learning environments, which are discussed throughout the book. For faculty seeking to be effective in their student engagement, the mechanics of feedback matters.

119. PETER FILENE, *THE JOY OF TEACHING: A PRACTICAL GUIDE FOR NEW COLLEGE INSTRUCTORS* 98–99 (2005).

- The closer in time the student receives the feedback, the more likely the student will be able to recall the decisions that went into the response. Once the student has forgotten how the answers were developed, the feedback loses much of its meaning. Computer assisted response feedback is very effective at helping students understand the wrong choices on a multiple-choice question and the reasoning that makes the correct choice accurate.
- The professor should always remember that the feedback is on the student's work, not the student. Care should be taken to be sure the instruction always focuses on the particular paper, exam, or assignment and not on the student.
- Feedback should include the positive, where possible. Students need encouragement and to be able to learn from their mistakes. Faculty members should provide concrete steps and examples to help the student understand how to improve.
- Mistakes are often a source of strong memories, and the learning that comes with that association becomes deeply embedded in memory. Faculty members should emphasize the next steps and opportunities to be successful rather than the criticism itself.
- **Actionable advice** — Grades provide only ranking information to the student, but they offer no information on how to improve. Rubrics provide feedback that is more structured, but it still makes it difficult for most students to understand what they must change to improve. Law students improve most rapidly when they are focused on how to make their work better with specific, concrete suggestions. This requires the professor to break down the exercise more narrowly to help the student understand the differences between the student's performance and the performance sought.

Follow-up exercises may also help the student understand where their work needs to improve. For example, a professor may encourage students to write a comparison between their midterm essay and the model answer. If the midterm was graded, then the written follow-up project can let participating students improve their point scores. If the midterm was ungraded, then the same motivation that encouraged students to sit for the midterm should motivate them to take the next step in their exam-writing training.

- **Empathy** — Being an empathetic listener, supporter, and guide for the students is perhaps the most important of the recommendations on effective engagement. If the faculty member can truly appreciate the mindset of the student seeking advice and counsel, then the faculty member can find the starting point with that student to help develop a path towards mastery of law school, preparation to become a lawyer, and support to address the myriad of personal challenges that law students face. Particularly when the student has done something seriously wrong, starting the conversation by listening carefully and understanding the student's perspective can diffuse the tension surrounding the conversation and help the student understand the consequences of the student's conduct. When the conversation with the student is less fraught with conflict, being empathetic and supportive will help the student find solutions and listen to the faculty member's suggestions.

Engaging Students Outside the Classroom

A. Understanding the Student Financial Concerns — Tuition, Discounts, and Earnings

New law students come to law school very excited to learn the law, to make a difference in society, and to become successful through their wealth and public influence. Once enrolled, however, students quickly learn that their debt will grow much faster than their earnings, creating an atmosphere of stress and anxiety for many law students.

For at least the last decade, a debate has continued whether law school is a good investment for recent college graduates. The answer to that question depends on a number of factors. Law school remains a very good investment for those in the upper quartile of their class, but it has a very different economic outlook for those in the bottom quartile and those who struggle to succeed.

Law school remains an excellent investment for those who seek a professional life of service dedicated to the public good embodied in the practice of law. Since legal education is both a public good and a private good, the portion of the answer that relates to the public good is an unequivocal yes. Society needs conscientious, hard-working, ethical lawyers to promote access to justice, implement the rule of law, and help members of the public solve their individual problems. In addition, since law is a public good, that aspect of the calling may help balance the economic disincentives for law school attendance among the other applicants who consider this aspect of their career along with its financial return.

Law school also remains a good investment for students who manage their debt loads and attend schools where the alumni have earnings near the average for professional attorneys. The financial value, however, is a long-term benefit that should be gauged against the overall earnings for the lawyer. In the first few years after law school, the economics remain quite challenging.

For potential applicants looking at law school solely as a private good, the numbers paint a different picture. The costs of a legal education have risen dramatically in comparison to its financial reward. “In 1985, the average private school tuition was \$7,526 (1985 dollars), which would have cost a student \$17,871 in 2019. Instead, average tuition was \$49,312 (2019 dollars). In other words, private law school was 2.76 times as expensive in 2019 as it was in 1985 after adjusting for inflation.”¹²⁰ During the same period, tuition at public law schools increased 5.92 times the inflation rate. Public law school tuition increased from an inflation-adjusted \$4,763 in 1985 (2019 dollars) to an average \$28,186 (2019 dollars).¹²¹

The numbers are averages, but the cost for legal education is not evenly distributed. Roughly a quarter of the law students attending law school pay the published cost of law school. Since most law schools use merit-based scholarships to boost the LSAT and UGPA characteristics of their class, the students who are paying the entire cost of their legal education are predicted to be in the bottom quartile of their law school's student population and least likely to obtain high-salaried positions or even pass the bar on the first administration. More than 90 percent of the students will ultimately pass the bar, but the effort to sit for the bar more than once will trigger additional costs and lost earnings revenues.

In 2018, three quarters of students took out financial loans to attend law school, down from the 85 percent who borrowed in 2010. Even with the merit financial discounts, for 2018, the average debt among borrowers was over \$130,000. This amount does not include undergraduate or other loans. Moreover, as noted by Law School Transparency (LST), “[s]tudents who pay full price or close to it are more likely to come from lower socioeconomic backgrounds or be underrepresented racial minorities.... As with scholarships, underrepresented racial minorities — not to mention women — borrow more on average for law school.”¹²²

The one area of good news is that legal pay has also exceeded the rate of inflation, though not at the same levels as tuition. The Bureau of Labor Statistics

120. National Tuition Report, LAW SCHOOL TRANSPARENCY DATA DASHBOARD, <https://data.lawschooltransparency.com/costs/tuition/?y1=1985&y2=2019> (last visited July 22, 2020); School Tuition Report, LAW SCHOOL TRANSPARENCY DATA DASHBOARD, <https://data.lawschooltransparency.com/costs/tuition/?y1=2015&y2=2019&scope=schools> (last visited July 22, 2020).

121. *Id.*

122. LST's 2025 VISION, 5 LAW SCHOOL TRANSPARENCY, <https://www.lawschooltransparency.com/progress/LST2025Vision.pdf> (last visited July 21, 2020).

(BLS) puts the median lawyer salary at \$122,960 and a mean of \$145,000.¹²³ According to the BLS, this places the long-term value of legal education behind only doctors and petroleum engineers in terms of earning potential. For a small number of law graduates joining the largest national law firms, they will earn in the upper half of this range as soon as they leave law school. For many, however, starting salaries may be less than \$50,000, putting tremendous financial pressure on those students in the first years following graduation.

Students further struggle to compare the relative information about the true cost of tuition and fees at each law school and how this compares with the median earnings of the law school's alumni. The top 14 law schools have very nearly universal law firm placement for their law students who desire such positions, with many going into the top paying national law firms. Starting salaries at some of these firms now exceeds \$190,000. Outside of the top law schools and the major legal hub cities, starting salaries may be in the \$45,000–\$65,000 range.

Law school applicants may also struggle to understand what portion of their financial package represents tuition discounts that will last throughout law school and which are only for the first year. Students also sometimes find the disclosures difficult to differentiate the student loan offers from the scholarship offers. The assumption is that if students fully understood the true cost of law school and the true earnings power of the alumni from that particular law school, they might make different choices regarding their debt load and choice of law school, or even the choice to attend law school.

As lawyers continue to progress in their careers, most are able to manage the debt load and increase their earnings to make the long-term benefit of legal education provide a solid financial reward. For those who do not complete law school, those who do not pass the bar, or those who struggle to launch their legal careers, however, the debt load and the loss of the long-term earning potential can be nearly insurmountable. As a result, while the rewards for legal education remain a financially sound choice for many, there are significant risks along the way and applicants need to be provided that information both before and during law school. For law school applicants, the financial considerations are only one of many criteria, but the law schools and the legal institutions need to continue improving the information about lawyer earnings to make the picture clearer.

123. Occupational Employment and Wages, May 2019, 23-1011 Lawyers, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/oes/current/oes231011.htm> (last visited July 22, 2020).

B. Addressing Mental Health and Effective Learning through Collaboration, Peer-Education, and the Importance of Classmates in Success

Students often struggle with many aspects of the law school environment. These include the costs and often inequitable distribution of student loans discussed in the prior section, the uniquely difficult material covered in law school, and new methods of instruction that many students find alienating. Some students bristle at the highly competitive nature of the law school environment and the continuous competition for moot court teams, journal editorial positions, and job opportunities. Others find that cold-calling and the threat of being put on the spot increase their overall anxiety. Courses designed with a single final exam and no ongoing feedback also lead to high anxiety for many students.¹²⁴

These pressures add up. “Studies have found that psychological distress in law students significantly outpaces not only the general population, but other graduate student populations, including medical students.”¹²⁵ Decades of research continue to document the painful experiences law students suffer in their first year of law school, but the model remains largely unchanged.

In the ABA report, *Creating a Moment to Improve Well-Being in the Legal Profession*, the ABA's National Task Force on Lawyer Well-Being identified “a continuous process in which lawyers strive for thriving in each dimension of their lives,”¹²⁶ comprised of the following elements, which is largely applicable to law students as well:

- Developing a sense of connection, belonging, and a well-developed support network while also contributing to our groups and communities.
- Cultivating personal satisfaction, growth, and enrichment in work; financial stability.

124. Rogelio A. Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 BARRY L. REV. 73, 79 (2010) (“In most law school courses, particularly in the critical first year, the only assessment most students experience is a three or four hour end-of-the-semester final exam.”). See Debra S. Austin, *Positive Legal Education: Flourishing Law Students and Thriving Law Schools*, 77 MD. L. REV. 649 (2018); Abigail A. Patthoff, *This Is Your Brain on Law School: The Impact of Fear-Based Narratives on Law Students*, 2015 UTAH L. REV. 391 (2015).

125. ANDREW J. MCCLURG, *1L OF A RIDE: A WELL-TRAVELED PROFESSOR'S ROADMAP TO SUCCESS IN THE FIRST YEAR OF LAW SCHOOL*, VIDEO TRANSCRIPT (2017).

126. NAT'L TASK FORCE ON LAW. WELL-BEING, *THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE 1* (2017), <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf>.

- Engaging in continuous learning and the pursuit of creative or intellectually challenging activities that foster ongoing development; monitoring cognitive wellness.
- Developing a sense of meaningfulness and purpose in all aspects of life.
- Striving for regular physical activity, proper diet and nutrition, sufficient sleep, and recovery; minimizing the use of addictive substances. Seeking help for physical health when needed.
- Recognizing the importance of emotions. Developing the ability to identify and manage our own emotions to support mental health, achieve goals, and inform decision-making. Seeking help for mental health when needed.¹²⁷

As a practical matter, the law school experience often is built to accomplish precisely the opposite of these goals: Legal education creates financial anxiety; isolates students; sets them in competition with each other; focuses on materials that are often quite divorced from real-world concerns (particular in first-year casebooks); demands long hours that discourages sleep, exercise, and proper nutrition; and often sends a message that students should “tough it out” instead of seeking counseling and support.

If legal education wants to address the health of the law students, then each of its cultural assumptions need to be reexamined. The Carnegie Report discusses the importance of the Hidden Curriculum, emphasizing the law school culture of competition, isolation, and embarrassment as a hindrance to law student success. Many of the triggers for stress and anxiety go to the pedagogy and the competitiveness of the overall law school experience, but there are steps that can be taken in each classroom as well.

Faculty members may be surprised to learn that there is often another Hidden Curriculum within many law schools, an unanticipated bonding experience among the law students that occurs as they struggle against the inequities of the first-year law school experience. Against the backdrop of the harsh 1L conditions, many law student sections often bond much like military units in boot camp, supporting and defending one another from the arbitrary and inexplicable experiences foisted on them by their faculty and administrators (at least to them). Those students who make themselves part of the law school

127. *Id.* at 9.

community thrive, while those who become isolated from their peers' struggle throughout the term.

"Isolation is the worst possible counselor," wrote [Miguel de Unamuno,] an early 20th century writer and those timeless words are particularly apt in modern legal education. The generic first-year law student experience — described by at least two authors as "the dark night of the soul" — leaves many first-year law students isolated and very alienated. Much of the literature has discussed the psychological effects of isolation (e.g., alienation, withdrawal, and hostility); however, too little attention has been paid to the important academic effects of isolation.

There should be an increased awareness that the "distress" many law students experience is not limited to how students feel. Isolation has important academic and institutional repercussions as well. Institutionally, this isolation results in uneven testing and a potentially inaccurate, skewed grade distribution for all students. Additionally, isolation can especially burden minority and other non-traditional students, causing them further prejudice.¹²⁸

The better practice is for the faculty member to address the problems of isolation and the other triggers of mental health challenges intentionally. There may be many different methods of achieving this goal, but one simple approach is to encourage collaborative small group teams within the 1L course design. Various ungraded exercises, low-stakes projects, and team-based (or "firm" based) formative assessments can start with group work rather than individual work, providing students a much smaller environment in which to experiment. Rather than being embarrassed when corrected by the faculty member in a cold-calling exercise, the student can work collaboratively to identify solutions. They can support each other and minimize moments of embarrassment or stress.

The peer-teaching and mentoring process has additional benefits. "Working in small groups gives students a chance to practice the higher-order thinking skills that instructors love to teach. Students who do small group work generally learn more of the material and retain their knowledge longer than students

128. Roach, *supra* note 27, at 667–68 (1994) (quoting Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 878 (1985) (internal citations omitted)).

who don't.”¹²⁹ Small group exercises and blended strategies offer mechanisms for effective formative assessment while reducing the faculty grading burden — which makes it a practical solution to the time pressure improved pedagogy demands of faculty. The small groups promote both collegiality and shared responsibility, important attributes for attorneys.

The Oxbridge tutorial model of education does away with the classroom, replacing it with small group learning.¹³⁰ In blended learning modalities and online education, there may be opportunities to do so. “Small group work can range from short, informal exercises to formalized problem sets that make up the majority of class. Contrary to popular belief, instructors can incorporate small group work into large lectures as well as seminars and discussion sections.” During the 2020 pandemic, for example, the social isolation triggered by stay-at-home orders was mitigated to a small degree by those faculty members who emphasized group activities and social interaction.

The Oxbridge experience provides some insights into the benefits of small group instruction, which applies equally to using these exercises as part of a blended model of law school coursework:

- The flexible and reflexive nature of small group teaching means that teachers can tailor their approach to instruction in order to meet the individual needs of students.
- Differentiation (that is, varying one's approach to teaching in order to meet the academic and social needs of individual students) allows teachers to hone in on the specific knowledge and skills that students need to develop. When done effectively, this individualised or personalised approach to teaching and learning will allow students to develop not only detailed subject knowledge but also higher intellectual/academic skills such as critical thinking and analysis.
- Ideally, close personal interaction with an academic in their field will also allow students to develop an emergent sense of academic and/or disciplinary identity, which will in turn foster engagement in the substantive

129. Nicole Tuttle, *Suggestions for Using Small Groups in the Classroom*, CHI. CTR. FOR TEACHING, THE U. OF CHI., <https://teaching.uchicago.edu/resources/teaching-strategies/small-group-work/> (last visited July 22, 2020).

130. David Mills & Patrick Alexander, *Small Group Teaching: A Toolkit for Learning*, THE HIGHER EDUCATION ACADEMY 23 (Mar. 2013), https://www.heacademy.ac.uk/system/files/resources/Small_group_teaching_1.pdf.

activities taking place. In turn, the small group teacher may also learn directly from students, and improve his or her teaching practice as a result.

- In terms of assessment, the high level of interactivity in small group teaching means that teachers can provide formative (or ongoing) assessment of progress (also known as assessment for learning), rather than simply focusing on summative or end-of-course/exam-type forms of assessment. Being assessed in this way allows students to actively engage in making cumulative progress during the process of teaching and learning, rather than seeing assessment as a product of the learning experience, even where final/modular examinations dictate formal results.
- Encouraging the active participation of students in the learning process demands responsibility and organization on the part of students (and teachers), and in this respect small group teaching fosters an independent approach to learning. Emphasising the learning that takes place independently outside of contact hours can encourage students to recognise the active part that they play in the educative processes of small group teaching.
- At the same time, close interaction with other group members can generate a sense of community within the small group and/or a sense of shared disciplinary identity; and, quite simply, social interaction can make learning more interactive and fun. This may be particularly important for less confident students who may not participate as much in larger groups, or for those who for whatever reason seem reluctant to learn.
- Part of what makes small group teaching enjoyable and effective is the flexibility that comes with teaching in a small group. Small group teaching is sometimes more flexible temporally (i.e. in terms of when the teaching takes place) and spatially (i.e. where the teaching takes place, and how this space is organized in terms of seating arrangements, resources, appropriateness for activities, etc.).
- Students can be encouraged to develop a sense of ownership through helping to define these spatial and temporal boundaries.¹³¹

The Oxbridge tutorial model stresses the importance of both student and faculty preparation prior to the tutorial session as well as the common experience to direct the discussions. This is not unlike the experience of many

131. *Id.* at 14 (internal citations omitted and formatting altered).

faculty members who use break-out groups and find themselves interjecting to correct misconceptions to keep students on track. Despite these management requirements, small group interactivity provides an essential counterpoint to the hidden curriculum within law school and can provide students an engaging method of developing skills and knowledge critical for law school success.

C. Mentoring and Advising

In addition to the support that students get from peer interactions, they also seek this support from their faculty and administration. Everyone working in the law school should be prepared to serve as a mentor to help the law students address their professional needs, obtain the necessary academic advising, and receive the emotional support they need to succeed in law school. At the same time, the role of mentoring and academic advising is not synonymous with mental health counseling for the law students. The mental health counseling should be provided by professionals trained in their discipline. Faculty and staff should be aware of the resources available to the students, and they should encourage students to get the support they need, as the situation arises.

In law schools, mentoring programs can mean many things. These often include having faculty assigned to a certain number of law students in each class who serve as the faculty advisor to that cohort of students. It may also include less formal mentoring relations that develop between faculty members and the students who participate in the student organizations those faculty members supervise.

In many law schools, the Career Services office or the Alumni office will operate a professional mentoring program between the law students and the attorneys in the community. These community-based mentoring programs might also include participation of students in chapters of Inns of Court, a professional mentoring network for lawyers and judges that often includes students in its mentoring structure.

A few law schools also offer formal peer-mentoring programs, matching first-year law students with upper division law students. Where there is not a formal program for peer-mentoring, the law students will often organize similar relationships through the student organizations or through more informal interactions.

Each of these three mentoring relationships can play an important role for the law student, particularly to keep the law student connected and engaged in the communal aspects of the law school and legal culture. Moreover, in re-

search done in the context of professional mentoring, studies “indicate[] that mentors report that their relationships offer them benefits such as improved job performance, career success and revitalization, recognition by others, a loyal base of support from their protégés, and a sense of personal fulfillment and satisfaction.”¹³²

Mentoring plays a number of different roles for the mentee, and different researchers apply different levels of specificity to the mentoring terminology. At a minimum, instrumental benefits of mentoring “includes coaching, sponsorship, exposure, and opportunities for challenging assignments. ‘Psychosocial help’ includes role modeling, empathizing, and counseling.”¹³³ In the context of empirical graduate study research, a study found three distinct components of mentoring, “networking help, instrumental help, and psychosocial help.”¹³⁴ As the researchers noted regarding their findings, “[s]ocioemotional mentoring increases student satisfaction, whereas instrumental help increases student productivity.”¹³⁵

At a minimum, the role of the faculty and staff advisors should be sure to provide the correct instrumental help to the students to whom they are assigned. Faculty and staff advisors should be sure to be up to date on the practical questions that students ask. Law students often ask about which electives to take and how to be successful navigating the graduation requirements of the law school. Every faculty member should know the basic requirements for graduation at their institution.

Beyond the mechanics of the law school, faculty members and staff advisors should facilitate the students’ ability to obtain work experience and academic assistance to help students master their studies and prepare for the bar. For students interested in competition teams or journals, the faculty advisors can play a helpful role to support the students with these goals.

In the same way, faculty members can provide important socioemotional support, helping students work through the decisions that make life while in law school challenging. This mentoring work is consistent with the roles played in mentoring programs studied across disciplines and does not steer into mental health counseling or other areas beyond the mentor’s area of expertise. But

132. BELLE ROSE RAGINS & KATHY E. KRAM, *THE HANDBOOK OF MENTORING AT WORK: THEORY, RESEARCH, AND PRACTICE* 8 (2008).

133. Harriet R. Tenenbaum, Faye J. Crosby & Melissa D. Gliner, *Mentoring Relationships in Graduate School*, 59 J. VOCATIONAL BEHAV. 326, 327 (2001).

134. *Id.* at 337.

135. *Id.* at 338.

even reminders from the ABA report, *Creating a Moment to Improve Well-Being in the Legal Profession*, listed earlier in the chapter, can provide faculty members and staff guidance to encourage healthy eating, exercise, sufficient sleep, moderation in alcohol, and other healthy life choices that will help students when they need to put down the books and take care of themselves. These connections are likely even more important in periods of high stress, such as those experienced during the COVID-19 health crisis.

The suggested mentoring steps are not limited to faculty members and law school staff. Law schools may consider formalizing the mentoring relationships with the attorneys in the community and the upper-division law students to train the trainers and improve the effectiveness of the mentoring programs. This work should also recognize that the mentoring literature acknowledges that not all mentoring relationships work. As a result, mentoring programs should take care to empower the mentees to seek out mentors who are helpful for that individual rather than impose mentors and potentially undermine the goals of the mentoring program.

Successful mentoring programs for alumni and peer-mentoring programs for students-mentors invest both time and effort to train the mentors on the instrumental roles the mentors can play and the types of psychosocial help that the mentors can provide as role models, empathetic ears, and their very modest role as counselors. Law schools that run these programs are most successful when they work regularly with both the mentor and the mentee to ensure that both remain satisfied with the quality of the relationship. As a result, these mentoring programs are significant commitments on the part of the law schools that offer them, but they have positive rewards for the students and for the mentors when run well.

D. Addressing Cultural Competence and Proficiency

The faculty must be mindful of their influence on the culture of the law school and the experience for the students. This is true in all situations, but it is particularly important inside the classroom, a space controlled and defined by the law professor at the head of the room. Unlike K–12 educators who receive mandatory teacher training, and many Ph.D. candidates who received some level of teacher-training while in their programs, the J.D. program generally provides no teacher training, and most law school faculty members have no teacher training before becoming adjuncts or full-time law professors. While this is true across all aspects of legal education, the distinction may be most concrete in the area of cultural proficiency. “[M]ost state education agencies

explicitly require that teachers meet certain criteria on cultural competencies before receiving licensure or certification. However, many teachers need professional development to build cultural competencies—the skills and awareness related to issues such as culture, language, race, and ethnicity.”¹³⁶ In legal education, there are no baseline requirements at all.

The teachers’ guide on cultural competency and proficiency by Dr. Elise Trumbull and Dr. Maria Pacheco define cultural competence as “the ability to recognize differences based on culture, language, race, ethnicity, and other aspects of individual identity and to respond to those differences positively and constructively.”¹³⁷ The authors suggest that that “[t]he first step for teachers in developing cultural competencies is recognizing how their own perspectives and knowledge of the world are rooted in a particular cultural, racial, and ethnic identity and history.”¹³⁸

For law faculty, this is sometimes challenging to do. The law is, itself, a cultural milieu and as law faculty, professors become so immersed in this professional culture that it helps shield faculty members from the cultural, racial, gender, sexual identity, ethnic and other cultural interests at play within and surrounding the legal academy.

Moreover, there tends to be a strong imperative to prepare law students for a particular professional experience following graduation. To maximize the opportunities for law students across the entire legal hierarchy, the vast majority of law schools look to the On-Campus-Interview experience, the judicial clerkship, and the national law firm job offer as the paradigm for success against which the rest of the professional employment is compared.

There are many faculty members who would privately counsel students to stay away from national firms and focus on the institutional culture of the law firm instead. These national law firm critics point to unreasonable working hours, the dearth of institutional leaders who are women or minorities, the low chances of partnership or membership, the lack of mentoring, the lack of meaningful experience in the first five years, and the toxic cultures of conformity as strong reasons for avoiding large firm offers.

136. ELISE TRUMBULL & MARIA PACHECO, *LEADING WITH DIVERSITY: CULTURAL COMPETENCIES FOR TEACHER PREPARATION AND PROFESSIONAL DEVELOPMENT 1* (2005) (funded by Institute of Education Sciences (IES), U.S. Department of Education).

137. *Id.* at 4.

138. *Id.* at 3.

The monochrome or homogenization process at law schools is well known and documented. For example, a research project at the University of Pennsylvania Law School highlighted the impact on female law students:

A disproportionate number of the women we studied enter law school with commitments to public interest law, ready to fight for social justice. But their third-year female counterparts leave law school with corporate ambitions and some indications of mental health distress....

Our data suggest that many women do not “engage” pedagogically with a methodology that makes them feel strange, alienated, and “delegitimated.” These women describe a dynamic in which they feel that their voices were “stolen” from them during the first year. Some complain that they can no longer recognize their former selves, which have become submerged inside what one author has called an alienated “social male.”¹³⁹

More than a decade after the study at University of Pennsylvania, another research project was conducted at “an urban, elite law school.”¹⁴⁰ The findings remained quite consistent:

[W]hile women and ethnic minority group members did not begin law school feeling any less included or comfortable than their white and male counterparts, by the end of their first semester, differences began to emerge, perhaps as a result of exposure to institutional or situational cues of bias, threat, or marginalization. Nonwhite students reported feeling less visible and more isolated and alienated than their white peers. These students also began to doubt their academic competence and abilities, reporting significantly lower satisfaction with their academic progress and a lower frequency of volunteering in class. These findings provide some evidence that as traditionally marginalized students enter elite law institutions, they begin to feel alienated and excluded from the educational institution, and begin to doubt their competence.¹⁴¹

In contrast to the monolithic nature of law school experience, teachers who are culturally competent are expected to be “knowledgeable about and sensitive to the dynamics of culture in general and their students’ cultures in

139. Lani Guinier et al, *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. PENN. L. REV. 1 (1994) (internal citations omitted).

140. London, *supra* note 59, at 400.

141. *Id.* at 401.

particular, which enables them to understand their students and to structure a successful academic experience for them.”¹⁴² These faculty are expected to “establish a caring, inclusive, safe, . . . and culturally rich community of learning where students take intellectual risks and work both independently and collaboratively.”¹⁴³

In the college and law school settings, there have been efforts to expand diversity and improve cultural competency. These also include institutions that support social justice goals. A large body of educational research at the college level calls upon universities to do much more.

[T]here are a number of common strategies that have been used within programs to support social justice goals. These include the requirement of courses or parts of courses in programs that go beyond a celebration of diversity and focus explicitly on social justice issues and the development of teaching practices that promote equitable educational outcomes. There is some evidence that the study of multicultural and social justice oriented concepts and practices is more effective when it is integrated throughout a coherent . . . program than when it is restricted to specific courses or seen as the responsibility of only some faculty

This inclusion can be achieved through: reading, writing, and discussing autobiographies, including personal autobiographies; reading and discussing other literature, reviewing case studies, film, and dialogue journals; and engaging in action research.¹⁴⁴

If a law school is committed to social justice goals, then its faculty should be individually, as well as collectively, committed to cultural proficiency. Although some of the suggestions in the preceding quote point to curricular-level engagement, the most important engagement is between the faculty members and the students. By engaging in social justice studies as part of the broader engagement strategy by all faculty with all students, the law school can begin to reflect upon its legal culture and enhance that culture with additional multicultural components.

142. TRUMBULL & PACHECO, *supra* note 136 at 6.

143. *Id.*

144. KENNETH M. ZEICHNER, *TEACHER EDUCATION AND THE STRUGGLE FOR SOCIAL JUSTICE* 29 (2009) (internal citations omitted).

Basics and Mechanics: Syllabi, Attendance, Tardiness, and Classroom Decorum

A. Building Blocks for Effective Course Design

The structural design of a course matters to the students a great deal. “When you ask students about good teaching, their responses typically fall into two general categories: human and design characteristics . . . Students correctly perceive that they learn more when [the professor has] designed the activities and sequence carefully and . . . clearly marked the path for their success.”¹⁴⁵

The minimum components essential for good course design have been developed in the preceding chapters. An effective course has clear learning objectives which let the students know what content and skills will be learned during the term; scheduled formative and summative assessments that give students useful feedback to help them guide their own learning and time management; rubrics to help students understand the priorities; and expectations of the evaluations.

These structural elements of a good course are essential for creating a class of engaged, committed students. At the same time, however, they are only the beginning. “Well-organized courses encourage student motivation, performance, and persistence When a course is designed so that the learning goals align with activities and assessments, it can help students develop conceptual awareness, learn to synthesize ideas, and begin constructing their own knowledge.”¹⁴⁶

In “Teaching Law by Design,” Dean Michael Schwartz, Professor Sophie Sparrow, and Professor Gerald Hess provide a detailed description regarding

145. JOSÉ ANTONIO BOWEN ET AL., *TEACHING NAKED TECHNIQUES: A PRACTICAL GUIDE TO DESIGNING BETTER CLASSES* 203 (2017).

146. *Organizing Your Course to Facilitate Student Learning*, YALE POORVU CTR. FOR TEACHING AND LEARNING, <https://poorvucenter.yale.edu/OrganizingYourCourse> (last visited June 5, 2020).