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TRUMPETING CHANGE:  
REPLACING TRADITION WITH ENGAGED  
LEGAL EDUCATION

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ABSTRACT

*Education is not the filling of a pail, but the lighting of a fire.*

—William Butler Yeats

I. INTRODUCTION

Several significant groups in recent years<sup>1</sup> have trumpeted calls for change in the delivery of American legal education. The calls for change have reached legal education's core traditions, such as the emphasis on the coverage of substantive law in appellate cases, the use of the Socratic Method, and the teaching of students to "think like a lawyer."<sup>2</sup> The earlier MacCrate Report called for the teaching of more skills, and the more recent Carnegie Foundation Report, *Educating Lawyers*,<sup>3</sup> viewed legal education as too narrowly focused on cognitive learning. The *Best Practices*<sup>4</sup> book advocated a more methodical scaffolding of educational practices.

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<sup>1</sup> See, e.g., SECTION OF LEGAL ED. AND ADMISSION TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT, AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, (1992) (widely known as the MacCrate Report).

<sup>2</sup> The "Langdellian Core" has been a survivor and a symbol. Its focus is emblematic of the importance of critical thought to legal education.

<sup>3</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (commonly referred to as the Carnegie Foundation Report).

<sup>4</sup> ROY STUCKEY & OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

Individual professors have weighed in as well. Noted one teacher about his first year of law school:

I truly enjoyed most aspects of my first year of law school, especially the intellectual challenge and the camaraderie with my classmates. But viewing my law school classes through a teacher's eyes, I could not help but question the wisdom of certain first-year law school practices. The Socratic method, for example, seemed calculated to produce student anxiety rather than to teach law. Also, large classes, often with more than one hundred students, discouraged student participation. But no first-year law school practice perplexed me more than the nearly exclusive use of a single end-of-course exam to measure student performance. Having one test determine a student's entire course grade flew in the face of everything I had learned as a teacher about designing valid, reliable, and pedagogically useful assessments.<sup>5</sup>

Modifications of the traditional format were mostly incremental or implemented in the latter years<sup>6</sup> of school.<sup>7</sup> Law professors often had little institutional incentive<sup>8</sup> to experiment.<sup>9</sup>

Recently, however, strong external economic pressures have adversely affected the job market for lawyers and globalization has brought renewed competition. Together, these external influences have given greater weight to the reform conversation.

This paper adds to the trumpet calls, advocating a new legal education design and delivery system organized around what has been labeled "engaged learning" in other contexts. This new orientation likely would improve the educational process for students in the short-term and position legal education for sustained success in the long-term.

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<sup>5</sup> Ron M. Aizen, *Four Ways to Better 1L Assessments*, 54 DUKE L.J. 765, 765-66 (2004).

<sup>6</sup> For example, Washington & Lee transformed its third year of law school into an apprenticeship system. Most schools that have tried significant transpositions, however, have not had many other schools adopting their iterations.

<sup>7</sup> City University of New York Law School, which dedicated itself to the public interest, has a strong orientation toward integrating law practice with academic theory.

<sup>8</sup> Whether the traditional approach succeeded, offered a valid yet unanswered question. There were no clearly defined outcomes against which psychometricians could measure success or failure. Instead, the traditional process was self-generating—turning out people who obtained jobs and then business and political success. Syllogistically, it seems that success could be attributed to the education. See generally John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303 (2007).

<sup>9</sup> For individual professors at tradition-laden institutions, transforming longstanding law school structures proved to be a Herculean task.

The engaged education<sup>10</sup> approach<sup>11</sup> is not really “new”, since it has been utilized in a wide range of educational domains, including business and medical schools.<sup>12</sup> It rests on a different framework, requiring engagement on student, faculty and institutional levels.<sup>13</sup> Engagement for students and faculty is defined in several ways. It promotes active and directed learning, using more local, fact-based situations than abstractions<sup>14</sup>. A major goal is to achieve outcomes consistent with real world demands.<sup>15</sup>

The engagement protocol is not just about the substantive component of the education; aiming to provide students with a more visible learning process,<sup>16</sup> as well as less student distress along the way.<sup>17</sup> The effort to reduce high levels of law student distress has become an increasingly important part of the educational calculus.<sup>18</sup>

<sup>10</sup> Defining engaged learning is difficult, insofar as many people “know it when they see it,” but cannot articulate a clearly defined process. Yet, engaged learning is easy to throw around as a principle, noting that it is valuable as an end in and of itself and instrumentally, as a means to an end.

<sup>11</sup> Engaged learning can appear to be a malleable tool. Over the years, “engaged learning” has been an amalgam, a loosely defined methodology with generally positive associations. Yet, despite the blurring of descriptive boundaries, engaged learning can be defined and set-off from other forms of learning.

<sup>12</sup> N.Y.U. Medical School’s new program, in which students meet and observe interaction with a patient in the first week, is one example. See Anemona Hartocollis, *In Medical School, Seeing Patients on Day 1 to Put a Face on Disease*, N.Y. TIMES, Sept. 2, 2010, at A15, available at <http://www.nytimes.com/2010/09/03/nyregion/03medschool.html>.

<sup>13</sup> To succeed, any new model must have the full support of both faculty and the university, as well as effective implementation.

<sup>14</sup> CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 15 (3d ed. 2000).

<sup>15</sup> This idea of deliverables is consistent with the American Bar Association’s move toward developing a focus on outcomes as part of its concept of good practices.

<sup>16</sup> See Visible Knowledge Project, <https://digitalcommons.georgetown.edu/blogs/vkp/>, a national research project on learning in the humanities; See also Randy Bass, *New Media Technologies and the Scholarship of Teaching and Learning: A Brief Introduction to this Issue of Academic Commons*, <http://www.academiccommons.org/issue/january-2009>.

<sup>17</sup> See, e.g., Nancy J. Soonpaa, *Stress in Law Students: A Comparative Study of First-Year, Second-Year, and Third-Year Students*, 36 CONN. L. REV. 353 (2004); Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883 (2007); Todd D. Peterson & Elizabeth W. Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 2 YALE J. HEALTH POL., LAW & ETHICS 9 (2009); Lawrence S. Krieger, *What We’re Not Telling Law Students – and Lawyers – That They Really Need to Know: Some Thoughts-In-Action Toward Revitalizing the Profession from Its Roots*, 13 J. L. & HEALTH 1 (1998-99).

<sup>18</sup> This notion is consonant with the Law Student Survey of Student Engagement (LSSSE). This survey, with 164 law school participants, is described as being based on

Another big shift involves the use of multiple benchmarks within each course, to create a formative system of evaluation and feedback.<sup>19</sup> Unlike the traditional iteration, which generally uses one summative exam at the conclusion of a class, measurements would include how well students understand legal processes, skills,<sup>20</sup> and values,<sup>21</sup> often within the lawyering context,<sup>22</sup> as well as their knowledge of legal rules and principles.<sup>23</sup>

Overall, this alternative vision incorporates some of the larger questions surrounding legal education today. These questions include, “What are the purposes of the education?” and, “What will enhance student motivation?”<sup>24</sup>

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the following premise: “LSSSE asks students about their law school experience - how they spend their time, what they feel they’ve gained from their classes, their assessment of the quality of interactions with faculty and friends, and about important activities. Extensive research indicates that good educational practices in the classroom and interactions with others, such as faculty and peers, are directly related to high-quality student outcomes. LSSSE focuses on these practices by assessing student engagement in key areas.” Trustees of Indiana University Law Student Survey of Student Engagement, <http://lssse.iub.edu/about.cfm> (last visited Feb. 23, 2011).

<sup>19</sup> See, e.g., for a description of a wide variety of outcomes in legal education, GREGORY S. MUNRO, *OUTCOMES ASSESSMENT FOR LAW SCHOOLS* (Institute for Law School Teaching 2000).

<sup>20</sup> With the current process, the emphasis on one skill, namely cognitive thinking, leaves out or deemphasizes a wide array of important skills, such as negotiation, interviewing and collaborative competencies. Further, the singular and linear arrangement of teacher as expert in a Socratic classroom diminishes the effectiveness of a classroom in which a variety of pedagogies are employed. In addition, the evidence also shows that the traditional education adversely impacts students’ mental health, with unusually high levels of student distress.

<sup>21</sup> As the Nobel laureate Joseph Stiglitz observed, what we inspect and, perhaps more importantly, what we measure is what we aim to achieve.

<sup>22</sup> See Wayne S. Hyatt, *A Lawyer’s Lament: Law Schools and the Profession of Law*, 60 *VAND. L. REV.* 385 (2007).

<sup>23</sup> Of course, the question remains, “preparedness for what?” The answers are both lofty and pedantic, from answering the central question, “What is the purpose of law school?” to the narrower question, “What is the purpose of looking at the facts of a case from the 1880s in a first year contracts class?”

<sup>24</sup> The traditional legal education pays attention to student participation at certain times, when students respond to questioning during class and to their answers on final examinations. But this is the attention that illuminates in a systematic way whether engaged learning is occurring because of the instruction. Paying attention, or the lack thereof, is an important issue in today’s interconnected era. The real question, though, is not paying attention, but to *what* the attention is paid. What we pay attention to in legal education matters.

Because the first year of law school involves the greatest molding and imprinting of law students, the first year program provides the launching point of this revised approach, with engagement beginning on day one of school. A transformative model should commence with its signature qualifications immediately in order to set the tenor and create the culture for the education.<sup>25</sup>

This article first describes the traditional Langdellian orthodoxy and explores the epistemology of engaged education in greater detail. It then offers a modest outline of a legal education with an engaged learning scaffolding at its core. The article proceeds to evaluate the utility of the proposed changes and then offers a conclusion.

## II. BACKGROUND

### A. *Tradition and the Langdellian Core*

Traditional Langdellian legal education is deeply rooted.<sup>26</sup> It is predicated on the notion that law is a science<sup>27</sup> that can be taught within the academy and replicated in schools everywhere.<sup>28</sup> As Christopher Columbus Langdell stated in the preface to his seminal Contracts book, “Law, considered as a science, consists of certain principles or doctrines . . . the growth [of which] is to be traced in the main through a series of cases.”<sup>29</sup> The Langdellian education had a certain and pervasive hierarchy, with an expert instructor dispensing information to students in a substantive law-based course, emphasizing a single skill,

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<sup>25</sup> The engagement would be pervasive, but blended in a reasonable manner to meet countervailing interests.

<sup>26</sup> One of the first law schools was the private Litchfield Law School, founded in Connecticut in 1784. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* 3 (The University of North Carolina Press 1983). The modern law school was readily built and replicated after Christopher Columbus Langdell created the casebook. See C. C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* vi (1871).

<sup>27</sup> This was the vision of Christopher Columbus Langdell, the Harvard professor credited with arranging one of the first casebooks in the 1870s.

<sup>28</sup> See Christopher C. Langdell, Address Before the Newly Formed Alumni Association at “Law Day:” Teaching Law as a Science (1886), *in* HARVARD UNIVERSITY 1636-1886: A RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1886 ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE (John Wilson and Son 1887), *reprinted in* 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 514 (Steve Sheppard ed., 1999).

<sup>29</sup> See LANGDELL, *supra* note 26.

cognitive legal analysis, in a mostly linear fashion.<sup>30</sup> The cognitive-oriented study of appellate cases through a “Socratic Method”<sup>31</sup> of questions and responses,<sup>32</sup> created a resemblance and connection to other graduate education programs, but a disconnect with its prior apprentice-oriented, engaged learning education.

In courses defined by substantive law, such as Torts, Contracts and Property, coverage of material often became a determinative factor in the course construction. The depth and nature of the coverage depended on the individual professor, including how much time was allotted for material<sup>33</sup> and the type and nature of the analysis.<sup>34</sup>

No professional training was required for law professors.<sup>35</sup> Instead, professors were selected mostly because of their academic performance in law school or their skill as practitioners.<sup>36</sup> A professor’s role and conduct as a teacher thus was at least in part, likely based on the professor’s own law school experience. The process within a particular course was determined entirely by the professor, who had sole dominion and control over the instructional methodology, class time, course structure, in-course requirements, learning context (within limits of the room assignment) and, without question, assessment.

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<sup>30</sup> The coverage of substantive material, collected in casebooks, was part of a coordinate objective of teaching students to “think like a lawyer.” This classic structure emanated from the development of the casebook in the 1870s by Langdell.

<sup>31</sup> The Socratic Method often means different things to different people. See Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725, 728 (1989).

<sup>32</sup> This talisman itself is difficult to define and has been used to justify and legitimize legal education’s traditional iteration without great empirical support or connectivity to performative lawyering tasks. Whatever traditional legal education does, it is not easy to discern, because its outcomes are not listed, measured, or dissected.

<sup>33</sup> The individual professor often was guided by what authors chose to include in their casebooks.

<sup>34</sup> Curricular issues concerning how many credits a particular substantive course merits are on-going. In some schools, for example, Property Law is taught as a one-semester course in either the first or second semester of law school. In other schools, the course is divided over two semesters in the first year, with varying credit allocations.

<sup>35</sup> In recent decades, the American Association of Law Teachers has offered an optional two-day summer conference for new law teachers. This conference is usually offered in June and consists of one day about teaching and one day focused on scholarship. It is not required for new law teachers but many attend.

<sup>36</sup> Most law professors were selected from an elite group of schools, further narrowing the range of experience and, ultimately, diversity of teaching methods and applications.

With generally only a final examination in a course,<sup>37</sup> or sometimes a mid-term, law students were unencumbered by specific on-going deliverables. Students were expected to read<sup>38</sup> and be prepared to participate in class if called on to do so.<sup>39</sup>

Perhaps because the system appeared to work, the overall institutional structures, from curricula to incentives for career advancement, generally remained highly traditional.<sup>40</sup> The Langdell era, still intact, has survived for more than a century.

### B. *Engaged Education*

*“Tell me and I forget, show me and I remember, involve me and I understand.”— Ancient proverb<sup>41</sup>*

According to the seminal work of Jones, Valdez, Nowakowski and Rasmussen,<sup>42</sup> engaged learners<sup>43</sup> are the most successful type of learners. As one commentator noted, “[i]n recent years, researchers have formed a strong consensus on the importance of engaged learning in

<sup>37</sup> The call of essay questions could be a simple directive to “discuss,” or a more specific question.

<sup>38</sup> What counted as competent reading was generally not defined.

<sup>39</sup> Those students who performed particularly well on final examinations often rose to reap its rewards, with positions waiting in large law firms, government and academia. Thus, the system often was self-replicating, in that those who did well within its four walls not only benefited, but also were tasked with the responsibility of reproducing the system for future generations of lawyers to come.

<sup>40</sup> This widespread resemblance of law schools is indicative of a universalist approach to legal education in its dominant iteration. Universalism is more than just a style or approach, but really a form of interpretative culture, a text that is shared by American law schools. As a culture, it has common themes and methodologies and has been transmitted from one generation to the next. Generations of students have benefited from this cultural orthodoxy. *See, e.g.*, JOEL SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL* 42-44 (1978).

<sup>41</sup> This idea has been applied before to legal education. *See, e.g.*, Judith B. Tracy, *“I See and I Remember; I Do and I Understand”: Teaching Fundamental Structure Through the Use of Samples*, 21 *TOURO L. REV.* 297 (2005).

<sup>42</sup> BEAU FLY JONES, GILBERT VALDEZ, JERI NOWAKOWSKI & CLAUDETTE RASMUSSEN, *DESIGNING LEARNING AND TECHNOLOGY FOR EDUCATIONAL REFORM*, 11-12 (1994) [hereinafter *DESIGNING LEARNING*]; *See also* BEAU FLY JONES, GILBERT VALDEZ, JERI NOWAKOWSKI, & CLAUDETTE RASMUSSEN, *PLUGGING IN: CHOOSING AND USING EDUCATIONAL TECHNOLOGY 1* (1995) [hereinafter *PLUGGING IN*] (asserting that classroom technology is only effective when used to support student’s engaged learning). Note that as of 2005, the related group, NCREL (North Central Regional Technology in Education Consortium) was no longer in operation.

<sup>43</sup> Stephen Bowen, *Engaged Learning: Are We All on the Same Page?*, 7 *PEER REV.* 4, 4 (Winter 2005) (defining ways to conceptualizing engaged learners).

schools and classrooms.”<sup>44</sup> Even basic content-learning is enhanced through the use of engaged learning processes.<sup>45</sup>

While students have different learning preferences,<sup>46</sup> engagement ought to occur on all levels, ranging from students, to faculty, to institutions.<sup>47</sup> This engagement can be defined for students and faculty as active, strategic learning,<sup>48</sup> tasking students to reach certain outcomes. It is often self-regulated, meaning the student has some decision-making responsibility. This idea in and of itself distinguishes it from the power structure in the law school Socratic dialogue, as well as in other linear forms of educational decision-making.

Engaged learning can be characterized by the eight indicators assembled by Jones, Valdez, Nowakowski and Rasmussen.<sup>49</sup> These indicators serve as a compass of whether, and to what extent, engaged learning is occurring. The eight indicators are: vision;<sup>50</sup> tasks;<sup>51</sup> assess-

<sup>44</sup> *Meaningful, Engaged Learning*, <http://www.ncrel.org/sdrs/engaged.htm> (2010) [hereinafter North Central Regional Educational Laboratory].

<sup>45</sup> Videotape: *But How Do I Teach with Those Laptops*, (Muir, M., Maine Center for Meaningful Engaged Learning 2001) (on file with author); *See, e.g.*, Margaret Honey, Katherine McMillan Culp, and Robert Spielvogel, “Critical Issue: Using Technology to Improve Student Achievement,” Center for Children and Technology, adapted by North Central Regional Laboratory, Technology in Education Consortium, 1999, <http://www.ncrel.org/sdrs/areas/issues/methods/technlgy/te800.htm>.

<sup>46</sup> These learning styles include visual learning, auditory learning, kinesthetic learning and tactile learning. Kinesthetic has been described as “experiential learning” and tactile as “hands-on,” such as building or experimentation. *See* Joy M. Reid, *The Learning Style Preferences of ESL Students*, 21 TESOL QUARTERLY 87, 89 (1987).

<sup>47</sup> There are many definitions of engaged learning. Most involve active, collaborative learning that is task-oriented. *See, e.g.*, Univ. of Me. at Presque Isle, *Definition of Engaged Learning*, <http://www.umpi.edu/academics/engaged-learning/definition> (last visited Feb. 27, 2011).

<sup>48</sup> “Students become engaged in learning when they actively participate in their own education.” Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law Schools*, 52 J. LEGAL EDUC. 75, 101 (2002).

<sup>49</sup> *See* DESIGNING LEARNING, *supra* note 42, at 10.

<sup>50</sup> “What does engaged learning look like? Successful, engaged learners are responsible for their own learning . . . [T]heir joy of learning leads to a lifelong passion for solving problems, understanding, and taking the next step in their thinking.” North Central Regional Educational Laboratory, *supra* note 44.

<sup>51</sup> “In order to have engaged learning, tasks need to be challenging, authentic, and multidisciplinary. Such tasks are typically complex and involve sustained amounts of time.” *Id.*

ment;<sup>52</sup> instructional models;<sup>53</sup> learning context;<sup>54</sup> grouping;<sup>55</sup> teacher roles;<sup>56</sup> and student roles.<sup>57</sup> These factors<sup>58</sup> promote self-regulated, collaborative learning with significant student responsibility and challenging deliverables that are assessed and reviewed for maximum student improvement.<sup>59</sup> The parameters of their engaged education protocol are described in greater detail below.

## 1. Engaged Education Indicators

### *Vision*

Engaged education<sup>60</sup> includes an overall vision that is outcome-oriented, focusing on developing competencies and skills. Students assume some of the responsibility for their learning,<sup>61</sup> working with teachers to define objectives and assessments, develop task timelines and monitor their own progress.<sup>62</sup>

<sup>52</sup> “Assessment of engaged learning involves presenting students with an authentic task, project, or investigation, and then observing, interviewing, and examining their presentations and artifacts to assess what they actually know and can do. *Id.*”

<sup>53</sup> “The most powerful models of instruction are interactive . . . Students teach others interactively and interact generatively with their teacher and peers. This allows for co-construction of knowledge, which promotes engaged learning that is problem-, project-, and goal-based.” *Id.* See also Sharon Gatz & Stephen Meehan, *Investigating Engaged Learning and Best Use of Technology*, LINC ONLINE, July 19, 2006, [http://ed.fnal.gov/lincon/el\\_invest.shtml](http://ed.fnal.gov/lincon/el_invest.shtml).

<sup>54</sup> “For engaged learning to happen, the classroom must be conceived of as a knowledge-building learning community.” North Central Regional Educational Laboratory, *supra* note 44.

<sup>55</sup> “Collaborative work that is learning-centered often involves small groups or teams of two or more students within a classroom or across classroom boundaries.” *Id.*

<sup>56</sup> “The role of the teacher in the classroom has shifted from the primary role of information giver to that of facilitator . . . The teacher also is required to act as a guide—a role that incorporates mediation, modeling, and coaching.” *Id.*

<sup>57</sup> Students interact with the physical world and with other people to discover concepts and apply skills. “Students are then encouraged to reflect upon their discoveries. . . .” *Id.*

<sup>58</sup> These factors or indicators have been assembled and elaborated on by others. See, e.g., REGIE STITES, *ASSESSING LIFELONG LEARNING TECHNOLOGY (ALL-TECH): A GUIDE FOR CHOOSING AND USING TECHNOLOGY FOR ADULT LEARNING* 8 (1998).

<sup>59</sup> North Central Regional Educational Laboratory, *supra* note 44.

<sup>60</sup> The concept of education as a guided process involving the transfer of knowledge sets the stage for creating an engaged type of education.

<sup>61</sup> “The learning is affective as well as cognitive – students enjoy the process and take pride in what they have accomplished.” *Id.*

<sup>62</sup> “They define learning goals and problems that are meaningful to them and understand how specific activities relate to these goals.” North Central Regional Education Laboratory, *Indicators of Engaged Learning* (1997), <http://www.ncrtec.org/capacity/profile/profwww.htm> [hereinafter *Indicators of Engaged Learning*].

### Tasks

The outcome-orientation is applied through multiple assignments. Students complete challenging tasks to achieve specific goals.<sup>63</sup> The tasks are pluralistic, especially in length, nature and objective. They include research, writing, interviewing, and problem solving. Problems should not be simplistic but rather are nuanced, complex, and take time for a proper resolution.<sup>64</sup>

### Assessments

Assessments play a central role in this process. Assessment is used to measure progress in skill sets, not only signaling whether progress is satisfactory, but also how to take corrective action to facilitate improvement. Unlike traditional legal education, assessments are not a one-time snapshot of a narrow band of skill, such as that revealed on a single issue-spotter essay examination, but rather are performance-based, on-going and generative.<sup>65</sup> On-going assessments mean they are diagnostic, formative, and summative, creating benchmarks throughout the journey of a course. Generative assessments mean students assist in creating evaluation criteria and parameters for the assessment, limited by a professor's supervision and standards. A performance-based assessment involves a skill or competency aligned with an associated action, such as a presentation, journal, or some other project. The assessments should be meaningful for the students and provide clear indicia of progress.<sup>66</sup> These indicia can be provided by rubrics. A rubric can be defined as "a rating system by which teachers can determine at what level of proficiency a student is able to perform a task or display knowledge of a concept."<sup>67</sup>

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<sup>63</sup> The American Bar Association and various commentators are exploring this outcomes-orientation. See, e.g., Roy Stuckey, *Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses*, 13 CLINICAL L. REV. 807 (2007).

<sup>64</sup> *Id.*

<sup>65</sup> See Shelly Ratelle, *PDK Couples Web Resources with Peer Interaction*, FOCUS ON BASICS 19 (June 2002) (quarterly publication of the National Center for the Study of Learning and Literacy).

<sup>66</sup> *Id.*

<sup>67</sup> Amy Brualdi, *Implementing Performance Assessment in the Classroom*, PRACTICAL ASSESSMENT, RESEARCH & EVALUATION 6(2) at 3 (1998), available at <http://pareonline.net/getvn.asp?v=6&n=2>.

*Instructional Methods*

Instructional methods vary, given that the research shows students learn differently from each other.<sup>68</sup> Variations are designed to be interactive, multidisciplinary, strategic, and aimed at particular goals.<sup>69</sup> The methods incorporate both individual and group perspectives and promote student creativity.<sup>70</sup> Students are given the opportunity to choose some projects and assignments with a high level of communication about the meaningfulness of their activities.<sup>71</sup>

*Learning Context*

An engaged learning context is intentionally filled with local knowledge,<sup>72</sup> meaning relevant socio-cultural threads peculiar to a particular “learning community.”<sup>73</sup> These threads can involve the culture of the school, student or geographic area. The school’s culture, for example, might be one of service. The students might be more mature and older, having had previous careers, and students in rural areas might have different needs, or at least different commutes, than stu-

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<sup>68</sup> These learning styles include visual learning, auditory learning, kinesthetic learning and tactile learning. Kinesthetic has been described as “experiential learning” and tactile as “hands-on,” such as building or experimentation. *See Reid, supra* note 46, at 89.

<sup>69</sup> *See Ratelle, supra* note 65.

<sup>70</sup> *Id.* Student creativity often is lost in the law school context, where students, at least in the early stages of the process, are intending to divine “the answer.” Students soon learn that the best answer is, “it depends,” and that there are differing routes to achieve a competent response – or competent preparation in reaching such a response. Unfortunately, law school assessments often do not value or reward creativity.

<sup>71</sup> *Id.*

<sup>72</sup> Clifford Geertz, the cultural anthropologist, described knowledge pertaining to community and group customs and cultures as “local knowledge.” *GEERTZ, supra* note 14, at 15.

<sup>73</sup> Clifford Geertz is instructive when describing a fact-law comparison in general as an interpretive study of culture, indicating that there are distinctive differences when viewing “things in lawyers’ terms and looking at them in anthropologists’ terms.” *See GEERTZ, supra* note 14. His observations could just as well have been about legal education: “Between law as a structure of normative ideas and law as a set of decision procedures; between pervading sensibilities and instant cases; between legal traditions as autonomous systems and legal traditions as contending ideologies. . . .” Using this same comparative tacking, engaged education would refocus attention from the universal text of highly edited appellate cases to the more grainy contexts of unedited facts, also sometimes called “local” knowledge, move the existing stasis from little feedback to regular generative feedback, from a spotlight on the teacher to student accountability, from coverage of substantive material to the outcomes of substantive knowledge, process, skills and values, and from a classroom to other relevant locations, such as the courtroom or practitioner’s office.

dents in cities. To promote a community, and not a mass of faceless, individual learners, a mix of individual and collaborative work is adopted, as well as a high valuation of achievement, diversity and a marketplace of ideas. Tasks, outcomes and the various roles of teachers and students are well-defined to promote efficiency and time on task. Sharing, feedback and improvement of skill-sets are high priorities.<sup>74</sup>

### *Grouping*

Groups are important to engaged education. Groups are used to illustrate real-world parallels, promote additional productivity and enhance the enjoyment of team-based cooperation. The literature of team-based learning provides a framework for setting up groups that will be the most effective.<sup>75</sup> Flexibility is the lynch-pin of groupings, depending on factors such as the task in question, the objectives, and the utility of such alignments.<sup>76</sup> Thus, groups might have a finite duration, defined roles, regular switches, and frequent rearrangement.<sup>77</sup> The group process is utilized with success in other educational forums, such as business schools and the performance arts.

### *Teacher Roles*

Teachers intentionally engage students as guides, rather than solely as information dispensers. While teachers ought to serve in both capacities, the role of coach is taken seriously and aligns with student improvement and assessments. Teachers are tasked with assisting students in the construction and chunking of knowledge for precise organization and long-term retention.<sup>78</sup> Teachers also can act as a model for students in acquiring, organizing, and analyzing knowledge, but students must share the work as co-investigators.<sup>79</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> See, e.g., LARRY K. MICHAELSEN ET AL., *TEAM-BASED LEARNING: A TRANSFORMATIVE USE OF SMALL GROUPS IN COLLEGE TEACHING* (Stylus Pub. 2004).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Experts “chunk” knowledge in easily accessible forms. This idea of chunking is really about the structure and framework of the learning process, and indicates highly organized knowledge for the long-term. See, e.g., John E. Laird, Paul S. Rosenbloom & Allen Newell, *Toward Chunking as a General Learning Mechanism*, in *PROCEEDINGS OF THE FOURTH NATIONAL CONFERENCE ON ARTIFICIAL INTELLIGENCE 188-92* (Morgan Kaufmann ed. 1984).

<sup>79</sup> Engaged learning is not evident in a classroom dominated by a teacher who serves as an expert information dispenser, with students playing the primary role of trans-

*Student Roles*

Students play a variety of roles, from inquisitor, to detective, to teacher, to producer. Students actively construct, organize and share their knowledge in many different ways. Students have both responsibility and accountability, creating and implementing processes to solve difficult problems and satisfy rigorous standards.<sup>80</sup>

*2. Engaged Education in Other Venues*

Engaged education has been adopted and touted by educational enterprises from grade school through medical school. At Furman University in South Carolina, for example, the school advertises that, “[w]hile still grounded in the humanities, arts and sciences, the university has earned a national reputation for its program of engaged learning, a problem-solving, project-oriented, experience-based approach to the liberal arts.”<sup>81</sup> At New York University Medical School, students now experience a meeting with a patient on the very first day of their education and do not simply put on a white coat to feel what a physician might feel like without the patient part of the equation present. A very different message is being sent with the presence of a live patient serving as an integral part of the first-day experience.<sup>82</sup>

That is not to say that engaged learning has been adopted everywhere or seamlessly. For example, in medical schools, the focus remains on hard science and the implementation of diagnostic tools, not on student cultivation of communication skills.<sup>83</sup> These skills are often relegated to a secondary status and described as “soft.”<sup>84</sup> This parallels the general experience of law schools, where “hard” critical analysis skills still dominate and the coverage of substantive material drives most courses.

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cribers. The fact that the teacher dispenses information through different media also does not make the learning engaged.

<sup>80</sup> See Indicators of Engaged Learning, *supra* note 62.

<sup>81</sup> Advertisement for Position of Assistant Vice President for Human Resources at Furman University, [www2.furman.edu/sites/HR/availablepositions/Pages/default.aspx](http://www2.furman.edu/sites/HR/availablepositions/Pages/default.aspx) (last visited Nov. 12, 2010).

<sup>82</sup> Hartocollis, *supra* note 12, at A15.

<sup>83</sup> Claudia Kalb, *Do No Harm: Medical Errors Kill Some 100,000 Americans Every Year. How We Can Reverse the Trend*, NEWSWEEK, Oct. 4, 2010, at 48, 49.

<sup>84</sup> But med-school curricula are jammed full with the minutia of science and the latest technology; the cultivation of social and emotional sensitivity and teamwork is lacking. That’s deemed to be “the soft stuff,” says Denise Murphy, vice president for quality and patient safety at Main Line Health System in suburban Philadelphia. *Id.*

### III. AN ENGAGED LEARNING PROTOCOL FOR LEGAL EDUCATION “Law is a distinctive way of imagining the real.” — Clifford Geertz

#### A. *Why Adopt a Call to Change?*

Law schools have found themselves recently subject to multiple critiques from different sources. The Carnegie Report, *Educating Lawyers: Preparation for the Profession of Law*,<sup>85</sup> for example, observed that the narrow frame of traditional legal education should give way to a more pluralistic education integrating a broader panoply of skills. The *Best Practices for Legal Education*<sup>86</sup> further advocated broad changes through the adoption of pedagogical best practices.<sup>87</sup> Meanwhile, law firms and other legal organizations found themselves less able to take the time and resources to train recent graduates to be practice-ready, a common situation for law students.<sup>88</sup> The fiscal crisis has made law students sit-up and question the process as well. These students, some with crushing debt, are recognizing that they can ill-afford to enter a highly competitive workplace at a disadvantage.<sup>89</sup> All of these pressures align to suggest that change in the traditional process is needed.

#### B. *A Revamped Engaged Law School Education*

An engaged education protocol (EEP)<sup>90</sup> should be adapted to legal education to provide a rigorous and effective experience. This conceptualization is supported by the Law School Survey of Student Engagement, (LSSSE), which is predicated on engagement as a posi-

<sup>85</sup> SULLIVAN, *supra* note 3.

<sup>86</sup> See STUCKEY, *supra* note 4.

<sup>87</sup> A single summative examination generally offers an insufficient basis on which to evaluate students. See, e.g., GERALD F. HESS & STEVEN FRIEDLAND, *TECHNIQUES FOR TEACHING LAW* (Carolina Academic Press 1999); LLOYD BOND, *TOWARD INFORMATIVE ASSESSMENT AND A CULTURE OF EVIDENCE* (The Carnegie Foundation for the Advancement of Teaching 2009).

<sup>88</sup> Part of the reason involves the new economy. Clients have sought different fees and fee structures in an increasingly competitive economic environment. See, e.g., James Flanigan, *In the New Economy, Use New Strategies to Hire Law Firms*, N.Y. TIMES, Dec. 30, 2010, at B6.

<sup>89</sup> See, e.g., Roland Smith, *The Five Mistakes You're Making With Top Talent*, WALL ST. J., Apr. 18, 2010, <http://online.wsj.com/article/SB10001424052702303695604575182172745155334.html>; Roland B. Smith, *The Struggles of Lawyer-Leaders and What They Need to Know*, 81 N.Y. Sr. B.A. J. 38 (2009).

<sup>90</sup> Note that this EEP can just as easily be referred to as an Engaged Learning Protocol. The notion of education simply provides a greater inference of intentionality about the results.

tive feature of legal education.<sup>91</sup> As noted on the LSSSE Web-site, “Research shows that engagement, the time and energy students devote to educationally purposeful activities, is the best single predictor of their learning and personal development. Certain law school practices lead to higher levels of student engagement.”<sup>92</sup>

### 1. *An Articulated Vision of EEP Preparedness*

Instead of focusing on coverage of substantive material and the cognitive skill of legal analysis, the engaged law school would encourage an articulation of outcomes, such as competencies, by course and year. The attention paid to determining how outcomes ought to be achieved and packaged alone would reorient the education, especially in the traditional first year, currently parsed mostly by subject matter.<sup>93</sup>

#### a. *Broader Goals*

The focus on outcomes would both broaden and refine course and year-long goals. These goals would move from substantive knowledge to process knowledge, such as how to navigate processes such as filing a complaint or creating a trust account. The goals also would include functional skills, such as interviewing a client to obtain facts or providing advice to a small business owner client, and values, such as how a professional lawyer safeguards client monies or deals with opposing counsel. The expansion of goals would mean an incorporation of lawyering skills and professional identity development in the core program,<sup>94</sup> and not simply its periphery.

The breadth of an engaged program would be signaled by engagement in the first year of school as part of basic courses, as well as ex-

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<sup>91</sup> This survey, through Indiana University, now has 164 participating law schools. Thus, schools have begun to show an interest in student engagement as an indicator of institutional success. Trustees of Indiana University, *supra* note 18.

<sup>92</sup> *Id.*

<sup>93</sup> While professors have advocated organizing curriculum around active-learning and the use of particular lawyering competencies as learning outcomes, *see, e.g.*, the University of Montana School of Law in the late 1990s, such a scheme was a tremendous leap from the dominant template, with many ambiguities and potential pitfalls. *See* Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS'N LEGAL WRITING DIRECTORS 118 (2008).

<sup>94</sup> The core program refers to the first year required courses and succeeding required or recommended basic courses in the traditional iteration, such as Business Associations, Taxation, or Evidence.

pansive objectives. For example, students in Criminal Law<sup>95</sup> might be required to observe part of a criminal case and then conduct a mock plea negotiation. Students in a Contracts course<sup>96</sup> might observe a simulation of a lawyer advising a client about creating a contract, and then be asked to create a part of the same contract. Students in Property Law<sup>97</sup> could meet with a client seeking an easement and then draw up a proposed easement given the client's wishes. Each basic course would have a simulation or experiential component, not only offering broader goals, but more varied approaches to understanding and applying rules and principles as professionals. Moreover, the lexicon used to describe engagement ought to articulate its purpose, such as creating bridges to law practice or to professionals in action.

Overall goals by year should be charted as a rubric as well, syncing with the grading curve. For example, a student who meets the top levels of performance should receive an equivalent grade. First year goals could include writing a basic complaint, emphasizing the allegation of jurisdiction and the merits of a claim; understanding how to use the components of a case, from its issue, to its rationale, holding, and dicta; using a case as precedent, as inapposite or as instructive; using a concurrence and dissent of a case; creating a policy argument; understanding and creating an argument based on statutory construction; and understanding a doctrine that requires several steps in its analysis (e.g., procedural Due Process).<sup>98</sup> First year students also should be able to accurately state the elements of legal rules, explanations for the rules, and examples of the rules, and be able to compare the rules and elements to other rules. This comparative or analogous reasoning is evidence of deeper understanding of the rules and principles. Furthermore, these understandings can be demonstrated orally,

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<sup>95</sup> Criminal Law courses are taught as a basic course at most law schools. In some schools, the substantive Criminal Law issues, involving crimes, are combined with Criminal Procedure issues. In other schools, Criminal Procedure is taught as a free-standing course.

<sup>96</sup> Contract Law is a core first year course, occurring in almost all schools in the first semester. Sometimes the course extends to the second semester as well.

<sup>97</sup> Property Law is generally a first year required course, sometimes required completely in either semester or sometimes stretched over two semesters. The subject matter of Property Law is tested on the Multistate Bar Examination, administered in almost all states.

<sup>98</sup> There are many competencies and outcomes that could be included in the calculus of outcomes. Simply having a conversation about what a school should strive for is worthwhile and creates bridges between faculty members teaching in distinct areas, or even those teaching different sections of the same course.

through questions and answers, or, more likely, through writing, in objective and persuasive problem solving.

Upper level core courses can continue these goals with more advanced nuances. The goals would be demonstrated again through written or oral examination and the completion of significant projects.

b. *Measurable Outcomes*

The broader goals should be both measurable and measured on a regular basis, both during and at the end of a course. This can occur if many of the goals are wrapped around tasks that students deliver during courses, such as the writing assignments or Web posts. The advantage of Web posting is that it creates a continuous and permanent record of the student performance, allowing for tracking and a more reliable analysis, instead of simply intermittent performance on infrequent final examinations given by different professors in different courses.<sup>99</sup>

c. *Coordination*

The teaching in isolation “silo” approach by professors, which separates professors almost completely on the educational assembly line like a group of independent contractors,<sup>100</sup> would be replaced by explicit goals that are a product of express cooperation. These goals could be as abstract and as general as needed to maintain academic freedom and flexibility. The mere effort of articulating some goals, such as what topics should be covered in a course or what the main objectives are, alone provides greater transparency and express commitment to learning objectives.

d. *Focus of Attention*

The traditional focus of attention on what the professor does in covering substantive material, rather than on what the students actually receive and use, is anathema to an EEP focus on outcomes. The outcome orientation is consonant with an applied use theory of accom-

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<sup>99</sup> Online education has become commonplace and is part of the curriculum at many schools, including Cornell University and Harvard University. Some of the online features, including regular posting of directed assignments, can be readily adapted in synchronous, “live” courses.

<sup>100</sup> In a “silo” orientation, even professors teaching different sections of the same course might not discuss or coordinate what each is teaching or how they are teaching it.

plishment. This focuses on how students are able to and actually do use material for the short-term of a course and the long-term of their post-school lives. The conceptualization consequently shifts an assessment of teaching from professor input to student productivity, particularly as an on-going process<sup>101</sup> – suggesting the student evaluation of teaching ought to shift as well, emphasizing or at least legitimizing student productivity. Moreover, the attention on students as learners does not simply track learning, but allows students play a participatory role in the construction phase of knowledge acquisition.<sup>102</sup> This participation gives them a better understanding of what the process entails.<sup>103</sup>

e. *Changed Vocabulary*

A changed vocabulary is an integral by-product of a reorganized educational process. Reframed goals will no longer be characterized by “coverage of cases,” and “thinking like a lawyer” or false dichotomies such as “theory versus practice” or “legal analysis versus skills.” Similarly, courses would no longer be structured around the contents of casebooks.<sup>104</sup> Instead, a new lexicon would be installed to promote the revised protocol, including terms such as “task-based deliverables,” “preparedness,” “direct encounters with legal phenomena,” “performative assessments,” “outcomes,” “time on task,” and “performance tracking.” Performance-tracking, for example, illustrates the importance of monitoring performance as it occurs and as if the educational process was part of a systematic training regime.

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<sup>101</sup> While law school can be analogized to a marathon race, I am told by students that each course can be viewed as a series of sprints—prepare for several days in a furious way for a final examination, expending all stored knowledge on the test, only to dump the knowledge soon afterwards.

<sup>102</sup> “They define learning goals and problems that are meaningful to them and understand how specific activities relate to these goals.” See *Indicators of Engaged Learning*, *supra* note 62.

<sup>103</sup> In competitive events, participants understand the goal is to win. Winning in education is not as clear. Often times a default position is used, namely grades. Yet, how to achieve higher grades, or reach alternative higher goals, is not part of the traditional course description.

<sup>104</sup> The use of a textbook to determine course structure is convenient for both teachers and students. Teachers can have a ready goal of marching through material. Students can “get their money’s worth” by seeing that a book is largely covered, regardless of how that connects to larger practice, professional goals, or real world contexts.

## 2. Task-Based Learning

Task-based learning plays an important role in the new protocol. It focuses on the kind of student participation needed to reach outcomes, giving greater direction than reading material as preparation for a class discussion and subsequent examination. Courses would be organized as much around active task-oriented deliverables from students—like presentations, becoming experts on a particular point, or leading discussions—as around the substantive law studied.<sup>105</sup> For example, a syllabus could divide up a course into task-based components, not simply present a chronological progression of reading material and subject matter. The tasks would have differing lengths and purposes and would take various forms both during and outside classes. A task outside class might involve a discussion post on a Web-based platform, to be reviewed and discussed at a later time. Teachers would provide standards for participation and a process orientation about how tasks can be completed, not just how tasks should look at the termination point. For example, a deliverable might be for students in a Property Law class to take a photograph of an easement, or for students in a Business Associations course to find documents relating to incorporation on the Web.<sup>106</sup>

The centrality of tasks allows for varying course configurations. Civil Procedure could be “Civil Litigation,” conceived of in terms of the stages in a lawsuit. Alternatively, Civil Procedure could be conceived of as “Transactional and Business Litigation,” with a section of business counseling, detailing what must be considered in lawsuit avoidance strategies or how to defend against a suit that likely will occur.<sup>107</sup> A course in Evidence is particularly suited for students participating in a piece of or an entire trial, including motions *in limine* and other evidentiary arguments. Criminal Law could involve a prescribed direct encounter with a court, jail, prosecutors’ office, or public defenders’ office. Joint projects in different courses would be appropriate as well. The professor of Tort Law could join with the professor of Civil Procedure in creating pleadings for a lawsuit, or with Constitutional Law in arguing defamation or other substantive law overlaps.

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<sup>105</sup> See generally Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111 HARV. L. REV. 2027 *passim* (1998) (discussing the value of active learning).

<sup>106</sup> The Web also could be used to store student posts. These posts could be about how students are preparing, problem-solving, issue identification, or student experiences as part of the course.

<sup>107</sup> Similar contexts can be added to accommodate tasks in the other basic courses.

Task-oriented education emphasizes judgment and creativity in reaching solutions. While some argue judgment cannot be taught, offering students choices in projects, in roads to completion of tasks, and even in ways to prepare, gives them experience and practice in selecting from differing paths. Students can be asked directly, “What are the better outcomes and why?” or “What are the better processes and why?”<sup>108</sup>

### 3. Local Contexts

In comparison with the universality of appellate cases, local contexts (meaning the local history, economics, moral sensibility, background facts and more that defines the area) would receive more attention at all levels of legal education. This idea refutes of the sufficiency of grand legal theory. As the cultural anthropologist, Clifford Geertz, explains it: “To turn from trying to explain social phenomena by weaving them into grand textures of cause and effect to trying to explain them by placing them in local frames of awareness is to exchange a set of well-charted difficulties for a set of largely uncharted ones.”<sup>109</sup>

This idea of local culture ratchets up relationships with the surrounding legal and general community and emphasizes “raw” facts. It organizes problems from the ground up, not just in a neatly packaged manner by a judge in a written opinion. Students would grapple with a problem from its inception, sorting facts, creating legal strategies, and, importantly, determining which issues to emphasize in advocating a position or evaluating the merits of a legal argument. Instead of treating students as students, they would more often be intentionally treated as lawyers, policy-makers, judges, legislators, and teachers within a course for substantial amounts of time. Students would be engaged in individual and collaborative projects, problem-solving, and competitions. These activities promote experiences, from oral argument, to client advising, and other active tasks, such as judging and interviewing, for sustained periods of time.

### 4. Assessments that are a Part of the Learning Process

*“What We Measure Affects Our Behavior. More generally, information affects behavior. What we gather our information about, and how we describe success,*

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<sup>108</sup> Keith H. Hirokawa, *Critical Enculturation: Using Problems to Teach Law*, 2 DREXEL L. REV. 1 *passim* (2009).

<sup>109</sup> See GEERTZ, *supra* note 14, at 6.

*affects what we strive for.*"<sup>110</sup> – Nobel Prize winning economist Joseph Stiglitz

a. *Continual Assessment*

Rather than stay on the periphery of the educational process, assessments in the EEP move to its core. The forms of assessment would vary in the proposed learning process,<sup>111</sup> but would be continual, with the goal of facilitating improvement in individual students. If nothing else, regular and significant assessments will create intentionality in their use. This contrasts with traditional legal education. As one commentator noted with obvious irony:

“Studies have shown that the best way to learn is to have frequent exams on small amounts of material and to receive lots of feedback from the teacher. Consequently, law school does none of this.”<sup>112</sup>

b. *Multiple Assessments*

The premise for multiple assessments is that effective feedback is an integral component of improvement and that feedback is the primary product of these assessments. If there is only one grade, that means evaluation of all skills, processes and doctrinal understanding are being lumped into a single item, which is not helpful and perhaps even misleading. Further, a second premise is that it is more effective if feedback is dispersed at all points of performance, not just summatively at the end of a course. Thus, there can be pre-performance diag-

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<sup>110</sup> See, e.g., Joseph E. Stiglitz, *GDP Fetishism*, PROJECT SYNDICATE, Sept. 7, 2009, available at <http://project-syndicate.org/commentary/stiglitz116/English>; see also JOSEPH E. STIGLITZ, AMARTYA SEN & JEAN-PAUL FITOUSSI, COMM'N ON THE MEASUREMENT OF ECON. PERFORMANCE AND PROGRESS, REPORT 7 (2009) (“What we measure affects what we do; and if our measurements are flawed, decisions may be distorted. Choices between promoting GDP and protecting the environment may be false choices, once environmental degradation is appropriately included in our measurement of economic performance”), available at [http://www.stiglitz-sen-fitoussi.fr/documents/rapport\\_anglais.pdf](http://www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf).

<sup>111</sup> Even oral assessments could be used to great advantage. See Steven Friedland, *Towards the Legitimacy of Oral Examinations in American Legal Education*, 39 SYRACUSE L. REV. 627 (1988).

<sup>112</sup> See Aizen, *supra* note 5, at 765-66.

nostic feedback,<sup>113</sup> formative assessment during performance, and summative review after performance is complete.<sup>114</sup>

This means that students can be given a test question, some form of self-assessment, or a continuing problem at the beginning of a unit, during a unit and following its conclusion. It also means that projects can be assessed during performance, as well as after their completion. The assessment can take the form of a verbal dialogue, a written critique or even a variety of self-assessments, either directly or indirectly, by asking students to compare their performance with an expert or novice. This emphasis allows for various permutations in the assessment process. One such application utilizes a final exam during the course and includes a class following the exam to review the test and use it as a stepping-stone to future learning. For example, this approach has been very successful in an advanced writing techniques course at Elon University School of Law that encourages post-exam learning and teacher-student interaction.<sup>115</sup>

The Web provides platforms for asynchronous interactions and readily serves as a backdrop for assessments, from discussion threads, to digital drop boxes, to the ready capacity to correspond through course email. Web postings have several evaluation advantages. The posts have potential permanence, a digital after-life, so they can be viewed in other than real time and then reviewed again and again in a known and easily accessible location throughout the course, and they provide the opportunity for student and teacher reflection, as compared to time-pressed interactions in class.

### *c. Alternative Assessments – Boundary-Jumping Tools*

Learning and assessment often are seen as disjunctives in traditional legal education. Instead, an engaged learning approach blurs

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<sup>113</sup> For example, third-year students can be given a diagnostic test concerning first-year subjects, indicating what they remember, and how the professor can best proceed without having to make significant assumptions without any data.

<sup>114</sup> Alverno College has been one of the pioneers in creating on-going diagnostic, formative and summative assessments, which track and monitor the progress of students in a way that a mere list of a student's grades cannot.

<sup>115</sup> Advanced Problem Solving Techniques, a third-year elective at Elon, requires weekly postings for essay answers and knowledge demonstration. These postings are reviewed and given general feedback each week, with some students given individualized feedback as well.

the lines between teaching and assessment to maximum advantage,<sup>116</sup> underscoring the complementary formative nature of assessment and learning, with assessment becoming an integral educational tool for improvement.<sup>117</sup> One boundary-jumping tool is the oral evaluation<sup>118</sup> used in many graduate school programs.<sup>119</sup> In legal education, oral responses comprise a primary form of communication, yet are excluded from assessment.<sup>120</sup> Why not use oral evaluations in smaller classes? Why not use these tools as non-graded sources of immediate and constructive feedback? Oral evaluations could be based on a written instrument and a series of set questions.<sup>121</sup> One formulation can ask directly about meta-cognition – what are students learning well or struggling with in the course?

Regular assessments would provide regular feedback, promoting improvement. It would also document the paths, strengths and weaknesses of each student, so self-assessment could be more effective.

One important addition to the continual and interactive features is to have assessments generated partly by students. This participation would be checked by professorial oversight, require good faith, and rigor. If student participation is permitted, it would send an important message that students participate in creating essential course structures and have can have more of an investment in their own education.<sup>122</sup> Further, their participation would provide greater visibility and transparency in the objectives of the learning process and how to im-

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<sup>116</sup> This conceptualization comports with the ideas advanced by Clifford Geertz, in that it reimagines assessment as an essential part of the learning enterprise, not as a separate entity.

<sup>117</sup> This option has been used on occasion in legal education. Professor Robert Spector of the University of Oklahoma College of Law at one time offered students in his Evidence course the option of taking an oral final examination instead of a written one. Telephone Interview with Robert Spector (June 25, 1986).

<sup>118</sup> See Friedland, *supra* note 111, at 627.

<sup>119</sup> Medical training utilizes oral examinations on a widespread basis, including medical specialty certification tests. See, e.g., Littlefield, Harrington, Anthracite & Garman, *A Description and Four-Year Analysis of a Clinical Clerkship Evaluation System*, 56 J. MED. EDUC. 334 (1981); see also Foster, Abrahamson, Lass, Girard & Garris, *Analysis of an Oral Examination Used in Specialty Board Certification*, 44 J. MED. EDUC. 951 (1969).

<sup>120</sup> See Friedland, *supra* note 111, at 627, 638-39.

<sup>121</sup> Such a construct has been found to maintain validity of oral questioning as a testing instrument. See Friedland, *supra* note 111, at 627, 638-39; see also Yang & Laube, *Improvement of the Reliability of an Oral Examination by a Structured Evaluation Instrument*, 58 J. MED. EDUC. 864 (1983).

<sup>122</sup> As an analogue the students are not just hotel guests, but hotel builders.

prove on existing skill sets. The assessments are part of the body of the course and are used by students to improve.

The assessments need not be graded. Their utility depends on whether they are difficult to complete and whether an evaluation provides communicative information for the recipients. The nature of the evaluation is important, though, as well as whether students have input into the form or format. Evaluations can be holistic, without specific components getting part credit, or they can be done on a point-system, or through rubrics, setting off major features within each category. This idea of rubrics and different outcome levels comports with the differential nature of engagement.<sup>123</sup> For example, there are different levels of tasks, student responsibilities, and assessment generativity in a course, all of which could be tracked and dealt with not only transparently but with student interaction.

#### d. *Assessment Portfolios*

While assessments tend to be cumulative but separate evaluation incidents, they can be linked together in a concerted effort to understand a student's strengths and weaknesses. This idea creates a "cradle-to-grave" assessment portfolio to track and monitor progress across courses and years of education. While law schools and most universities have transcripts that provide at most some generalized and shallow feedback, few have performance tracking that is cross-course and year. At Alverno College in Wisconsin, a personal Assessment Portfolio is maintained for each student, covering his or her entire college career.<sup>124</sup> This cradle-to-grave perspective offers additional useful information, including self-assessments as well as assessments by others.<sup>125</sup> As noted by the Chair of the Alverno College Council for Student Assessment, Professor Georgine Loacker: "We have found that a student can learn to understand and evaluate her own performance, see its relationship to her own knowledge and abilities in all their complexity,

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<sup>123</sup> It also comports with the effort to provide feedback and notice to students, as well as to rank and order students in a hierarchy of performance.

<sup>124</sup> Alverno College has its own assessment center and sophisticated assessment structures.

<sup>125</sup> GEORGINE LOAKER, SELF ASSESSMENT AT ALVERNO COLLEGE (2000) ("Students are adept at articulating, in their own words, the purpose of self assessment as they have experienced it: *It helps you improve your performance. . .to grow. . .to learn. . .to better yourself. . .*").

and take charge of the improvement of her learning in an informed way.”<sup>126</sup>

e. *Rubrics*

Perhaps the best way to provide effective feedback is through the use of rubrics.<sup>127</sup> The idea of a rubric or checklist is to define each level of proficiency and to distinguish it from other levels through criteria, promoting transparency and simplicity.<sup>128</sup> Rubrics would provide gradations or performance levels for professors and show students how they can perform at higher levels with greater degrees of success.<sup>129</sup>

A wide variety of rubrics could be created. These rubrics could assess a student’s relative strengths, provide strategies and tactics for improvement, assess the collaborative abilities of a student, provide a meaningful opportunity for students to self-assess, and offer alternative and useful ways to communicate between teachers and students. The rubrics could be strategically placed for maximum use, such as in the syllabus and on-line so students could see them from the start of the process on through the end.

## 5. Student and Teacher Roles

The new model reorients the student-teacher power relationship with teachers ceding their sole position as authority figures for a more cooperative pluralism.<sup>130</sup> The spotlight would no longer be on the teacher or the teacher’s coverage of substantive material. Teachers would have a mentoring conception for some of the course activities and would assist the collaborative process as much as dispense information.<sup>131</sup> The advising role would be built into a course, suggesting the utility of individual meetings and even oral exams. Teachers as

<sup>126</sup> *Id.*

<sup>127</sup> See Sophie Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics—Explicit Grading Criteria*, 2004 MICH. ST. L. REV. 1 (2004) (Professor Sparrow recommends the use of rubrics to improve student learning).

<sup>128</sup> *Id.*

<sup>129</sup> See generally Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561, 583-84 (1997) (advancing the use of models and checklists to promote progress in legal writing).

<sup>130</sup> Teachers serve as guides as much as expert information dispensers, facilitating greater affective benefits and learning.

<sup>131</sup> Teachers coach students, offering observations and judgments.

facilitators transform the classroom, giving more responsibility and control to the students for their learning.<sup>132</sup>

This approach also results in a coalescence of theory and practice on a continuum. It blends traditional categories, as noted in the vocabulary discussion above, such as the separation between cognitive “legal analysis” and applied lawyering practice.

The concept of deliverables within each class and across the curriculum propels change in accountability. Students would not show up in class defining “prepared” in a subjective fashion, but would use the reading and other preparation to participate, more like business school than law school, where participation is directed and expected.

This reconfiguration would change the default position for good teaching. The focus on outcomes would mean that a good teacher assists students in reaching measurable outcomes, minimizing focus on whether students perceive that they have learned something in general from the class. The operative question shifts, from, “What am I teaching or covering?” to “What are they learning because of this class and why?” The traditional normative student evaluation of teaching, occurring often before any course assessment of students and their performance, and without any particular standards or metrics for students to use to limit unbridled discretion, would be abandoned, replaced by guided discretion in assessing the teacher’s role was in designing, assisting and facilitating outcomes.<sup>133</sup>

As teacher roles would change, so too would student roles. Students would have greater involvement in the learning enterprise, rather than as vessels receiving the gift of knowledge. Students would be expected to make mistakes and learn from them as self-regulated

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<sup>132</sup> This idea of teacher facilitation should be extended to cooperative activities between teachers, where teachers work together and observe each other to improve. While some think that good teaching is innate, watching good teachers ply their craft has been shown to be helpful to the teaching enterprise. See, e.g., Emily Hanford, *Watch and Learn*, L.A. TIMES, Oct. 17, 2010, at A32.

<sup>133</sup> This approach calls for a redesign of student evaluation of teaching forms, particularly the reliance on questions about whether the student thought the teacher was effective or whether the student would take the teacher for a course again. These types of questions are ambiguous and do not assist in assessing factors relating to teacher competency if particular types of learning are paramount.

learners.<sup>134</sup> As two professors commented regarding the activity of drafting:

To fully realize the benefits of their own errors and to become self-directed adult learners, students need a framework that allows them to discover what aspects of their own work need the most attention, to apply that knowledge before facing grade consequences, and – here is the challenge – to understand that errors are a necessary and even desirable part of the drafting and learning process.<sup>135</sup>

Consequently, students would have stronger structural engagement, treated as participants, not observers, as lawyers, not student note-takers. A central feature would be to change student perspectives — especially in the first semester and first year of school when imprinting is the greatest. The engagement would involve moot court, interdisciplinary service of others, and law-related experiences.<sup>136</sup>

## 6. Satisfying Employment

One objective of the re-imagined process is to promote more positive student affinity with the process,<sup>137</sup> meaning happier, more contented students.<sup>138</sup> While this is a fine objective in and of itself, there is another associated benefit. In a profession beset by external criticism and significant unhappiness,<sup>139</sup> it is important to promote helpful job paths for students, not just a better education, leaving perhaps the same unhappy results once students enter practice.<sup>140</sup> This idea of the

<sup>134</sup> See, e.g., Michael Hunter Schwartz, *Teaching Law Students to be Self-Regulated Learners*, 2003 MICH. ST. L. REV. 447 (2003).

<sup>135</sup> Susan E. Provenzano & Lesley S. Kagan, *Teaching in Reverse: A Positive Approach to Analytical Errors in 1L Writing* 11 (BePress Working Paper Series, 2006), available at [http://works.bepress.com/lesley\\_kagan/1](http://works.bepress.com/lesley_kagan/1).

<sup>136</sup> Students would share responsibility for challenging educational objectives.

<sup>137</sup> See, e.g., LAWRENCE S. KRIEGER, *THE HIDDEN SOURCES OF LAW SCHOOL STRESS: AVOIDING THE MISTAKES THAT CREATE UNHAPPY AND UNPROFESSIONAL LAWYERS* 16-17 (2005) (advising law school students to confront their sources of stress and control them because “the result will be an enjoyable, meaningful, and healthful life, both in law school and throughout your career.”).

<sup>138</sup> See, e.g., Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524, 524-25 (1998) (discussing how law schools “might produce healthier law students and lawyers and, perhaps, a more functional legal system.”).

<sup>139</sup> See, e.g., Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 872 (1999) (warning a hypothetical law student that the legal profession “is one of the most unhappy and unhealthy on the face of the earth – and, in the view of many, one of the most unethical.”).

<sup>140</sup> See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1414 (1997) (observing that

“happy job” varies from person to person, but forsakes initial status or power for long-term happiness. The engaged education protocol promotes transparency, positive education experiences and a bridge to fulfilling employment.

#### IV. A BRIEF CURRICULAR REMAPPING BASED ON ENGAGED LEGAL EDUCATION

With the adoption of an engaged learning program, the curriculum would be revised to reflect the changed objectives, emphases and tasks. A brief and modest framework of a re-imagined curriculum follows.

##### 1. Orientation

The Orientation Program would be a launching point of the engaged program and not simply an unattached prequel. With the program beginning in Orientation, students would experience practice classes and assessments to observe the entire process and be given several small tasks to fulfill. Mentoring and small group meetings would commence and continue into the academic year to provide differing alignments. Students would be tasked to perform in small groups and assessed on their group interaction as well as individual performance throughout the first semester. The Orientation would create expectations and set standards for behavior, from attending on time, to participating, to what kind of writing, interactive and thinking skills are expected at the law school.

##### 2. One L Year

Courses in the first year, however labeled, would have some combined performative tasks that overlap the courses. For example, a complaint written in a Civil Procedure course could have a Tort or Contract cause of action. This would require a modicum of coordination between courses. In addition, students would have at least minimal tasks in each course that take them outside of the classroom and place them in the courthouse, in a lawyer’s office, or some other real world setting. Finally, there would be a practicum attached to one course each semester that required at least several days of observation and action in a real world context. This practicum could include at-

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problems related with unhappiness “seem to begin in law school, as law school appears to foster abnormal levels of psychiatric distress among law students. This distress appears to continue on into law practice.”).

tending a hearing or trial for Civil Procedure, participating in mootings an attorney who will be participating in oral argument on appeal for any first year course, visiting a city commission hearing on a land use or zoning issue for Property Law, or visiting the jail and interviewing prosecutors and public defenders for Criminal Law.

Legal writing would be extended across the curriculum, and not simply organized around a distinct first year course. While the import of writing is recognized implicitly in examinations and academic papers, writing is extremely versatile. It also could be used to examine substantive knowledge, skills such as critical analysis, as well as self-assessment, advocacy, and creativity. Further, if conversations about writing are connected to the writing process, this would blend oral discourse, make reasoning even more visible and allow students a different way to understand structure, process, and the finer points of writing competencies.<sup>141</sup> The combination of writing and oral discourse also illustrates the bridges between skills that can be incorporated into the process and the attention that can be paid to the transfer of knowledge from verbal to written context and vice versa, instead of the general separation of oral and writing skills that occurs in the traditional courses.<sup>142</sup>

In the basic core courses, for example, field studies, role-playing, and guest speakers would become interactive segments of the learning process, joining a particular hypothetical or role-play and not merely as an addendum. For example, if a guest speaker is presenting, students could be assigned to interview the speaker to find out particular information or the speaker could offer a problem to be resolved by students with the speaker's assistance.<sup>143</sup> These tasks could be built into the course and suitably publicized in the syllabi as something covered and assessed, symbolizing its significance. Of course, to legitimize the role, students should be accountable for their learning in these exercises in the assessment process.

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<sup>141</sup> Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 DUQ. L. REV. 489, 507 (2002) ("A lawyer's life consists of talking about written analysis, in conferences with supervisors, in meetings with clients, in settlement and mediation conferences, in oral argument.").

<sup>142</sup> For example, in most core classes, oral discourse dominates. However, writing occurs, almost exclusively on final examinations. The only evaluation, then, is for the written word and writing competency. Sometimes, upper level seminars evaluate presentations as well as written papers, thus combining the two skills.

<sup>143</sup> See Sarah Ricks, *Maximizing Student Learning From Guest Speakers*, in TECHNIQUES FOR TEACHING LAW 175 (forthcoming 2011).

To promote ethical reflection, tasks could include concomitant ethical issues. To utilize a practice context, the issues could include billing matters, collaborative law firm policy, or functional matters, like creating trust accounts. Most students do not know what a trust account is until they graduate, and even if they know what such an account is, students do not know how to create or maintain one. This type of creative exercise combines functionality and theory.<sup>144</sup>

Utilizing a local law school context, students could be connected to professionalism issues<sup>145</sup> early in the first year through an exercise in examining their existing honor code and potential interpretations or in creating their own interpretive regulations.<sup>146</sup> Students could determine what kind of professionalism oath should be added to an honor code, if any, for law school.<sup>147</sup> These oaths and plans could be an explicit manifestation of how students will act during a course, from being on time to preparing for class, to cooperating with others, as well as agreeing to standards of behavior during examinations. Having student participation makes the issues relevant, brings all students in contact with statutory creation, and distinguishes law school from prior studies where the educational code was most likely predetermined.

Students also would be placed in varying work alignments, as individuals and groups. When in groups, students would be given specific roles to play, as well as credit for their work on teams. This collaborative, team-based focus would emphasize that many lawyers work in groups and that leading and working with others are important components of prepared lawyers.

Assessments would be developed mostly by the faculty, but students would be given some input on task design. This initial effort at sharing responsibility would be aimed to promote student judgment and other related skills early on in the process. Students would be evaluated for posted tasks, projects and other deliverables associated with a course, as well as a final examination. Final examinations would emphasize agreed-on outcomes that students would be working toward over a significant part of the semester, such as understanding how to

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<sup>144</sup> *Id.* at ch. 2.

<sup>145</sup> See Daicoff, *supra* note 140.

<sup>146</sup> While uniformity could be maintained with a set code, the students could be asked to develop the precise wording for carrying the code out, especially with local nuances or aspirational components that do not have the force of law.

<sup>147</sup> See Michael Hunter Schwartz, *Professional Development Obligation*, in *TECHNIQUES FOR TEACHING LAW 212* (forthcoming 2011).

spot and then apply negligence issues as a plaintiff's or defendant's attorney. Further, there would be a single final examination that combined some of the most important issues in the courses, given the artificiality of course separation, such as Property, Torts, Civil Procedure, and Contracts.<sup>148</sup> The test would elicit issue spotting ability across courses, much like the bar examination, not just spotting within each course.

### 3. Two L Year

The second year of law school would expand the concept of differential learning, allowing some self-pacing, condensed courses, and distance-learning, with individualized outcomes in mind. Each student would have an assessment portfolio used to track their progress. Students would be offered courses with a variety of challenging projects and each course would have some form of engaged learning component, from field exercises to simulations to group task. The nature and scope of the tasks would be left to the individual professor. Some courses would overlap, with group projects, group teaching and other kinds of integration.

The second year of school also presents the opportunity to explore advanced skill sets in depth, such as becoming a lawyer-citizen-leader within a particular community or cause. Students can observe first-hand subjects of lawsuits or legal issues. These might include food banks, charitable organizations, community groups such as the Red Cross, homeless shelters or particular legal issues faced by a community, such as New Orleans after Hurricane Katrina<sup>149</sup> or the Gulf after the BP Horizon oil spill.<sup>150</sup> It entails using legal issues faced by local community organizations, like zoning, contracts, and other business matters as illustrations and learning opportunities. Students can interview community leaders as well, especially those who went to law school, to understand how the background has served them.

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<sup>148</sup> Even within traditional courses, there are doctrinal topics that could fit within several courses, such as Nuisance, which is sometimes placed in Torts and sometimes in Property Law. Defamation, for example, can be discussed in different ways in Torts, Constitutional Law and Evidence.

<sup>149</sup> Hurricane Katrina was a category 4 hurricane that devastated New Orleans in 2005, overwhelming existing levees and causing devastating floods.

<sup>150</sup> The BP Horizon oil spill occurred in the Spring of 2010. Thousands of gallons of oil spilled into the Gulf of Mexico until the well was capped.

Tasks could be used to connect students with a justice context, from assisting the public defender's or prosecutor's office, to observing a police DUI checkpoint, to participating in the Innocence Project, an organization using students and other volunteers to pursue DNA testing to exonerate persons convicted of crimes who could be found innocent by such testing.<sup>151</sup> Outside of the Criminal Law, students could become familiar with how a local government organization deals with environmental law matters, such as landfills and waste disposal, and track issues related to ownership of a local shopping center. Tasks also can be used to teach students about self-management or cooperative competencies, particularly with local government initiatives such as creating bicycle lanes or local "greenways" and parks for residents.

#### 4. Three L Year

The third year of law school would permit and encourage students to develop an in-depth focus in the form of a required capstone project that lasts the entire year. This project would have several dimensions. It should be challenging enough to last an entire year, should have an academic writing component meeting advanced writing requirements, and involve a field aspect as well, from interviewing attorneys, observing attorneys in action, gathering data, or more. In addition, the project should have a vertical structure, including a faculty supervisor/mentor, and a first or second year student who plays a modest supporting role. These projects should originate with the students, encouraging their creativity and moving them towards a better understanding of what skills they want or need to develop.

#### 5. Graduation

Graduation should not be the final contact with the educational enterprise. Students should be asked aspirationally – but not required – to provide some assistance with the progress of current students in some form, even if only as an email partner from a distance. This mentoring idea preserves continuity and promotes the idea of group interactivity and community.

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<sup>151</sup> The Innocence Project, founded by two professors from Cardozo Law School, now boasts of having helped exonerate more than 200 persons wrongly incarcerated for crimes, including some persons on death row.

## V. SOME COSTS AND BENEFITS OF ADOPTING AN EEP IN LAW SCHOOL

### A. *Costs*

#### 1. Reconfigured Capitalization—Space and Support at All Levels

For an engaged learning protocol to have the chance to succeed in a law school environment, one predicate is institutional support through capitalization. This means sufficient resources and attention must be given to the new system to make sure it is working properly. Capitalization includes financial resources, if any are needed for training, field trips, or experiential learning and, more importantly, appropriate dispensation<sup>152</sup> for teachers working to develop such an approach.<sup>153</sup> It is certainly easier and economical in the short-run to maintain the cognitive orientation of traditional legal education because of its continuity and minimal requirements of classrooms and books. Without a school's institutional attention and backing, however, faculty members would have little incentive to expend the time and effort required to change enduring habits to retool and reallocate their time into task-oriented learning and regular assessments – which, especially at first, will be time-intensive. It is the revisions of enduring habits that will require time and money.

#### 2. Training

If any training occurs, this will prove costly in terms of time and resources. Some teachers will reject training as superfluous. Other teachers will stay within long-standing habits. Still others will view training as interfering with time spent on scholarship. The idea of “scholarship first” is a deeply engrained one that will be tested by greater investment in the teaching process. While benefits would undoubtedly accrue with training, it would require up-front expenditures.

#### 3. Coverage of Substantive Material

One of the age-old legal education conundrums is presented as a zero-sum dichotomy, a choice between coverage of material and alternative uses of course time for active learning tasks and experiences. Using an engaged learning platform would certainly limit the coverage

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<sup>152</sup> If schools do not give some form of credit to teachers who take up the challenge to change, few if any will do so.

<sup>153</sup> While capitalization often means the allocation of money, in this context it also means recognition of what teachers are doing, and the making of space within which to do it.

of material in some ways, since alternative uses of time will deprive teachers of additional coverage. Many professors will refuse to contemplate alternative teaching methods because of its alleged interference with the coverage of material,<sup>154</sup> although variations of coverage could still occur.<sup>155</sup>

#### 4. Academic Freedom

For professors used to traditional teaching roles, an alternative such as engaged education could be perceived as an encroachment on academic freedom. Under this view, a professor has complete authority over what occurs within the four walls of a classroom and it is up to the professor in determining how to communicate the material covered, and what should be covered within the boundaries of a course. This view has coincided with the Langdellian view of the teacher as sole authority figure, but diminishes somewhat with the inclusion of specific, transparent outcomes and courses revolving around measurable tasks.

#### 5. “Thinking Like a Lawyer”

One major casualty of the adoption of an EEP model is the emphasis on cognitive analysis, namely the goal of teaching students to “think like a lawyer.” This emphasis would now be distributed across a continuum, including a variety of skill sets, values and institutional processes that would more closely resemble acting as a lawyer. In essence, instead of focusing on the thinking component, the student would be tasked with activities that required a chain of mental steps, judgments or acts. This distribution would diminish the time spent on learning cognitive analysis through the Socratic Method and review of appellate case reports.

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<sup>154</sup> While this is a valid assertion, if examined more closely, new questions emerge – What of the professor’s coverage is reaching students? What kind of coverage, in terms of presentation and depth, reaches students the best? When do students tune-out and simply become the note-taking equivalent of court-reporters? Should nuanced and context-based assumptions govern after answering these questions?

<sup>155</sup> For example, the professor could direct the students to cover particular areas with self-assessment quizzes, or lecture on a topic, or compare the topic covered with other subject matter, thereby covering the comparison topic as well.

## 6. Demystifying Legal Education

One aspect of legal education that has led to it being chronicled in books, such as Scott Turow's *One L*,<sup>156</sup> films such as *The Paper Chase*<sup>157</sup> and television shows and other media is the mystification associated with the Socratic Method and focus on legal analysis. From the mythological Kingsfield, to actual law professors steeped in the mystifying process, first year law students must claw their ways through classes to figure out the process – and what they should be learning. The engaged education approach preaches transparency in the learning process, diminishing the mystification and minimizes “hiding the ball.” While this result might promote learning, it would have an adverse impact on the attraction many have to the mystery and obfuscation of the legal education process.

## 7. Teacher Power

An engaged education would reorganize the power structure of a law school course. The model of education advanced by the mythological Professor Kingsfield in *The Paper Chase*, the all-powerful expert professor who, through intimidation and authority motivated students to learn, would be diminished, if not forsaken. The professor's control over a course would be limited under an EEP model, which focuses more on outcomes than on the professor. The outcomes and tasks would obviate a move away from teacher as expert, and towards a teacher as guide toward favored outcomes and completed tasks. Students would be encouraged to learn on their own and use their mistakes to improve, giving students more responsibility – and power – for their learning.

In addition, ambiguity and unfamiliarity with a new structure would further destabilize the traditional teacher's role. The teacher would have to start over in some respects – no matter how many years in teaching. The “same old way” might have to be examined and reworked.

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<sup>156</sup> SCOTT TUROW, *ONE L: THE TURBULENT TRUE STORY OF A FIRST YEAR AT HARVARD LAW SCHOOL* (Grand Central Publishing 1997) (1977).

<sup>157</sup> Even the film *LEGALLY BLONDE* (MGM 2001) used the mystification of the educational process as one of its story-lines.

### C. *Benefits*

#### 1. Teacher Training

If nothing else, the inclusion of training adds attention to the teaching process, promoting teaching advances in incremental and large measures. By paying attention, and expending institutional currency, it also adds legitimacy to the teaching enterprise. A lack of training feeds a culture of teaching illegitimacy, or at least a culture in which teaching is lower on a hierarchy of advancement and status than scholarship. Without accountability for student learning, it is easy to believe that teaching well is easy; after all, the prevailing assumption is that if teachers are teaching, students must be learning. This identity is far from true, but until teachers are held responsible for what students are learning because of the teaching, and not in spite of it, the system will proceed without accountability. Training embodies the idea of engagement – if teachers are engaged directly with the art and science of teaching, learning about measures that can be taken to improve the quantity and quality of learning in a course, there will be more respect for the craft and more effective results.

Systematic teacher training would result in a variety of benefits. Studies show that systematic, standardized training is more beneficial than experiential, anecdotal knowledge. Teachers are trained in every level of education except in universities and graduate programs. There is no reason to believe that training would be superfluous or incidental to teacher success, given its role elsewhere. To the contrary, training likely would ratchet-up the quality of the education.

#### 2. Preparedness and Other Outcomes

Preparedness offers a tactical vision for law students and practitioners alike, connecting the education from novice 1Ls to graduating students who are more practice-ready and able to participate in the larger socio-economic community. While coverage of substantive material is still a predicate to the application of knowledge, the use of coverage as an unmeasured or subjectively measured goal by the professor on a single summative examination would now be subject to inspection and observation by all.<sup>158</sup> Further, a professor's declaratory use of "coverage" to justify not only course content, but the way con-

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<sup>158</sup> Coverage means different things to different professors, and the faster that a topic is "covered" does not mean it has been communicated clearly or properly digested for application purposes by students.

tent is covered, would not stand alone anymore, but would have to connect to some specific outcomes or target other than what the professor was doing. The greater scrutiny of outcomes would force professors to articulate purposes in a more inclusive way, moving from teacher to students to specific competencies.

With preparedness, the rite of passage of legal education would become more holistic. This means legal education would become a test of whether a person could perform in a competent manner in a variety of contexts – individually, collaboratively, as a problem-solver, advice-giver, write, or oral communicator<sup>159</sup> – and not just as critical thinker. This consequence would be preferable in increasingly difficult economic times and in an educational program that often has a negative affective impact on students.<sup>160</sup>

The objective of preparedness also promotes visibility of the learning process and accountability for results. The homage paid to the coverage of substantive material obscures results by assuming that students are learning the rules, can understand them, and can apply them to different factual situations as a result of the teacher. There is no confirmation about whether this assumption is occurring as a result of the teaching – or in spite of it — in the traditional model, with only a single summative examination after the course has concluded. Such a single-event assessment is not sound psychometrically, is not useful for feedback purposes, and might be unreliable in the hands of an untrained grader, who is implementing generally unannounced and unseen standards.

### 3. Relevancy

The use of experiential and task-oriented learning will promote relevancy for law students, as they are better able to observe bridges to law practice and the real world. Students would confront lawyering outside the classroom from the very beginning stages of legal education. This would enhance their understanding of how cognitive training will be used and how additional skills manifest themselves in the real world.<sup>161</sup>

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<sup>159</sup> Barbara Glesner-Fines, *The Impact of Expectations on Teaching and Learning*, 38 GONZAGA L. REV. 89 (2002-03).

<sup>160</sup> See Krieger, *supra* note 137, at 1.

<sup>161</sup> Thus, the professor would not engage in “hiding the ball,” instead revealing the structure and goals of the classroom interactions more expressly than under the traditional system.

The conceptualization of training law students as future community leaders depends on a predicate of lawyering as a profession that is part of the public trust; that lawyers have a contract to uphold rules for the public good and not simply to advance their own clients' interests at any cost. This notion of lawyering as part of the public enterprise means lawyers reasonably can be expected to be leaders of a community and servers of the public good. The experiential and service components of the new system would align with this conceptualization and teach students that giving to others, and not merely learning for employment and security purposes, are larger parts of the legal education process.

#### 4. Empowering Students

A significant benefit of active learning is affective in nature – students will be more positive about the process.<sup>162</sup> Studies have shown that the traditional model often negatively impacts students. This redesigned model emphasizes context and outcomes to promote enjoyment of learning, especially in the long-term. Psychosocial advantages include poise in dealing with real-world issues, confidence in skills in new contexts based on practice, and more realistic assessments of strengths and weaknesses.

#### 5. Assessment and Feedback

Multiple, continual and generative assessments offer some of the most significant benefits of a new system, particularly in terms of feedback to both teachers and students. Assessment would be used in an EEP program as a powerful teaching tool, with students taking corrective measures during a course with the professor's assistance, and not merely after a course or based on an ad hoc visit to a professor during office hours. This idea of corrective action, with improvement expected and fostered, adds an important dimension to the learning process, reducing the dependency on grades for feedback or validation. Instead, built-in reflective observation of what students are doing, judgment about the relative merits of their activity and time-sensitive feedback would promote learning, not just teaching.

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<sup>162</sup> See, e.g., Gerald F. Hess, *Seven Principles for Good Practice in Legal Education: Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 403 (1999).

### 6. Efficacy: Minimizing Triangulation

Experiences and active learning promotes efficiency by minimizing the “triangulation” that occurs between law school learning, bar exam learning, and lawyering. While the learning processes of these three enterprises overlap, all three have significant differences, with legal education mostly case and course oriented, using assessment as an appendage; the bar exam entirely multiple-course assessment-oriented, with no teacher and a lengthy, blended examination; and lawyering involving specific projects or tasks, often with “wins” and “losses” as feedback, and significant use of so-called “soft-skills,” such as cooperation, advising and negotiation. These distinctions are sufficient to make it very difficult to transition smoothly from one type of learning to the next, unless integrated engaged learning occurs earlier, during law school, to ensure transparency, preparation and transfer of knowledge throughout legal education.

## VI. CONCLUSION

With increasing calls to reconfigure the traditional Langdellian iteration of American legal education in light of the economic and educational demands of the 21st Century, the utilization of an engaged education protocol (EEP) should be seriously considered. This protocol offers numerous advantages. An EEP would move the focus of attention from text to context, from little feedback to regular feedback at all stages of the process, from universalism to local knowledge, from a spotlight on teachers to an emphasis on student accountability, and from a focus on the classroom to the periodic inclusion of other relevant locations, such as the courtroom or the practitioner’s office.<sup>163</sup> With measurable competencies and tasked outcomes, students would be better prepared for engaging the real world, whether as private practitioners, government or non-governmental organization practitioners, or even persons employed in non-lawyering capacities. Perhaps most importantly, the EEP offers the potential for a more effective learning process and a greater appreciation for that process by students.

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<sup>163</sup> See Hyatt, *supra* note 22, at 390.

