

## Article

# Law Students Left Behind: Law Schools' Role in Remediating the Devastating Effects of Federal Education Policy

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## INTRODUCTION

By no fault of their own, students coming to law school have underdeveloped skills such as cognitive adaptability, self-regulation, and critical thinking; making problem solving as a lawyer difficult.<sup>1</sup> Federal education policy and its ensuing statutes have

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1. See Kathy Hirsh-Pasek & Laurence Steinberg, *Beyond the Midterms: Helping Students Overcome the Impact of No Child Left Behind*, BROOKINGS INST. (Nov. 21, 2018), <https://www.brookings.edu/blog/education-plus-development/2018/11/21/beyond-the-midterms-helping-students-overcome-the-impact-of-No-Child-Left-Behind> [<https://perma.cc/JUB8-G5TU>] ("According to the most recent nationwide assessment of American high school seniors' writing

depleted those skills. Law professors and law schools can and should adapt their curriculum and their teaching methods to help their students develop the skills needed for success in the field of law. Law school teaching methods need to adapt because the education law students have received in the K–12 public<sup>2</sup> school system has not remained static due to developing federal education policy. The devastation left behind by federal educational policy, No Child Left Behind (NCLB),<sup>3</sup> and the Every Student Succeeds Act (ESSA)<sup>4</sup> can be mitigated by adapting the law school’s curriculum and its teaching methods.

Cognitive adaptability, self-regulation, and critical thinking skills are underdeveloped and essential for law student success in school and later in practice. Cognitive adaptability is defined as the ability to effectively change one’s decisions given feedback and to self-regulate one’s learning through problem solving.<sup>5</sup> The self-regulation process has three phases: forethought, performance, and self-reflection.<sup>6</sup> This process is an important one for students to develop either in high school or college because self-regulated learners critically think about their learning and are

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skills, in 2011, only one in four can construct an essay that is coherent and well-structured, with ideas presented clearly, logically, and effectively.”).

2. This Article focuses on public education in the United States because the vast majority of students in the United States attend K–12 education in the public school system. In 2021, 50.6 million children attended public school versus 5.72 million students in private K–12 education. And 1.69 million were homeschooled. Melanie Hanson, *K–12 School Enrollment & Population Statistics*, EDUC. DATA INITIATIVE, <https://educationdata.org/k12-enrollment-statistics> [<https://perma.cc/Y44H-NLKU>].

3. 20 U.S.C. § 6319 (2002); No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425. See generally Camille R. Whitney & Christopher A. Candelaria, *The Effects of No Child Left Behind on Children’s Socioemotional Outcomes*, 3 AERA OPEN 1, 1 (2017), <https://journals.sagepub.com/doi/pdf/10.1177/2332858417726324> (“Although the NCLB era officially came to a close in December 2015, the Every Student Succeeds Act (ESSA), NCLB’s replacement, continues to include consequences for schools according to standardized test scores. Unlike NCLB, ESSA allows greater flexibility in implementation and requires states to choose another measure of school quality beyond four required academic indicators.”).

4. 20 U.S.C. § 6301 (2015); Every Student Succeeds Act of 2015, Pub. L. No. 114-95, 129 Stat. 1802.

5. See Michael Haynie & Dean A. Shepherd, *A Measure of Adaptive Cognition for Entrepreneurship Research*, 33 ENTREPRENEURSHIP THEORY & PRAC. 695, 695 (2009).

6. See Barry J. Zimmerman, *Self-Regulated Learning and Academic Achievement: An Overview*, 25 EDUC. PSYCH. 3, 3–17 (1990) (studying how students implement and respond to self-regulated learning).

able to “initiate and sustain focused goal-directed activities while ignoring distractions and setbacks,” which is critically important for lawyers.<sup>7</sup> As a result of the K–12 educational focus on high-stakes testing,<sup>8</sup> educators and administrators needed to teach to the test and narrow the curriculum, resulting in many children leaving the K–12 system without the well-rounded education which was once attained by students in the past.<sup>9</sup> While the NCLB paid lip service to “research-based’ education policy,” the Act ultimately rejected that philosophy, settling instead on curricula and pedagogies that were measurable.<sup>10</sup> Additionally, with scarce funding in many districts, creative avenues,<sup>11</sup> such as the arts and music, are sorely lacking in many schools due to

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7. J. Brad Wandler & William J. Imbriale, *Promoting Undergraduate Student Self-Regulation in Online Learning Environments*, 21 ONLINE LEARNING 1, 2 (2017).

8. NCLB had the effect of encouraging memorization and narrowing the school curriculum, leaving less room for holistic education designed to help students problem solve and critically think, instead forming a skill-and-drill mentality. See Linda Darling-Hammond, *From “Separate but Equal” to “No Child Left Behind”*: *The Collision of New Standards and Old Inequalities*, in MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS 3, 15–18 (Deborah Meier & George Wood eds., 2004) (documenting how multiple states were compelled to drop their holistic learning oriented assessments to meet the NCLB’s testing requirements).

9. Hirsh-Pasek & Steinberg, *supra* note 1 (“[NCLB] promised to refashion education, with a sharp focus on reading and mathematics and little time for extras like social studies, physical education, music, or recess. And it would elevate the need for accountability by testing students regularly and publicizing schools’ performance.”).

10. Theodore R. Sizer, *Preamble: A Reminder for Americans*, in MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS, *supra* note 8, at xxi.

11. Since the passage of NCLB, public schools in the United States have cut funding to non-assessed subjects such as art, history, and music while, at the same time, increasing funding for assessed subjects such as English, reading, and math. See Jen McDonald, *Funding for Schools’ Art Programs Ending?*, KETTLE MORAINÉ SCH. DIST.: EXPRESS (May 2016), <https://www.kmsd.edu/site/default.aspx?DomainID=312&FlexDataID=3316&ModuleInstanceID=1237&PageID=383&PageType=3&RenderLoc=0&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108> [<https://perma.cc/QX82-FBL4>] (discussing the decrease in funding for dance, theatre, and visual arts classes between 1999 and 2009); see also Patricia Pederson, *What Is Measured Is Treasured: The Impact of the No Child Left Behind Act on Non-Assessed Subjects*, 80 CLEARING HOUSE 287, 287–91 (2007) (reviewing how between 2001 and 2005 states generally shifted away from assessing subjects not mandated by NCLB).

the new need to focus on NCLB testing.<sup>12</sup> The subjects where funding has been cut are the very subjects that help students form critical thinking skills, self-regulation, and cognitive adaptability, such as social studies, art, and music.<sup>13</sup>

By pushing schools into norm-based, antiquated multiple-choice tests, NCLB and ESSA forced grade schools, middle schools, and high schools to undo their progress in improving the quality of testing and delayed their movement towards criterion-referenced assessment systems that help develop important performance goals and learning.<sup>14</sup> Critical thinking is necessary for, and is defined as, “the intellectually disciplined process of actively and skillfully conceptualizing, applying, analyzing, synthesizing, and/or evaluating information gathered.”<sup>15</sup>

Instead of developing these critical skills, NCLB students became passive learners and task-oriented ‘do-ers’ rather than self-directed learners.<sup>16</sup> “[S]tudents expect[ed] answers to be handed to them, rather than learning the methods to discover

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12. NCLB’s main focus was on subjects related to financial success, such as math, reading, writing, and science. The result forced many schools to cut funding for areas not tied to the tested subjects, including history, arts, fitness, and music. Tina Beveridge, *No Child Left Behind and Fine Arts Classes*, 111 ARTS EDUC. POL’Y REV. 4, 4–7 (2010) (documenting how schools in the NCLB era responded to budget cuts by defunding non-tested subjects); Pederson, *supra* note 11 (finding that a large majority of schools cut non-tested subjects in response to NCLB); S. Paul Reville, *Stop the Narrowing of the Curriculum by ‘Right-Sizing’ School Time*, EDUC. WEEK (Oct. 22, 2007), <https://www.edweek.org/teaching-learning/opinion-stop-the-narrowing-of-the-curriculum-by-right-sizing-school-time/2007/10> [<https://perma.cc/Z5J6-XRVF>] (noting that in 2007, there was “compelling evidence” that schools were narrowing their curricula to accommodate for NCLB favored subjects).

13. Darling-Hammond, *supra* note 8, at 18 (warning that cutting programs like art and social studies will prevent schools from teaching critical thinking, research, writing, and production abilities).

14. *Id.* at 17–18.

15. *What Is Critical Thinking?*, UNIV. OF LOUISVILLE, <https://louisville.edu/ideastoaction/about/criticalthinking/what> [<https://perma.cc/JEE5-MGBW>] (citations omitted).

16. See Peter Park, *Foreword* to PAULO FREIRE, *DARING TO DREAM: TOWARD A PEDAGOGY OF THE UNFINISHED*, at xxxii–xxxiii (Ana Maria Araújo Freire ed., Alexandre K. Oliveira trans., 2007) (“The curriculum being encouraged under NCLB and other educational curricula tied to the so-called back-to-basics movement . . . creates, when pursued alone, nondreaming, docile work forces for the postindustrial order.”).

the answers for themselves.”<sup>17</sup> This creates a “plug and chug” learner where students receive information in the classroom, memorize it, repeat it on the test, and forget the information soon thereafter.<sup>18</sup> In fact, while it appears that training students to memorize answers and ways to work a problem would increase their academic prowess, the effect is exactly the opposite.<sup>19</sup> Memorization of material can have a small effect on short-term memory skills, but studies show low recall skills after nine months, and almost no transfer of those memorized items to other subjects.<sup>20</sup>

This is problematic for law schools; in fact, to succeed today, lawyers must be more innovative, forward-thinking, and more easily adaptable to the ever-changing workforce and landscape.<sup>21</sup> And lawyers have always needed to be skilled at research, writing, and critical thinking—skills passed over by the

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17. Teniell L. Trolian & Kristin S. Fouts, *No Child Left Behind: Implications for College Student Learning*, ABOUT CAMPUS, July–Aug. 2011, at 2, 4, <https://journals.sagepub.com/doi/pdf/10.1002/abc.20061>.

18. KEN BAIN, WHAT THE BEST COLLEGE TEACHERS DO 24 (2004) (“[Researchers] have discovered that some people make A’s by learning to ‘plug and chug,’ memorizing formulae, sticking numbers in the right equation or the right vocabulary into a paper, but understanding little.”).

19. John A.C. Hattie & Gregory M. Donoghue, *Learning Strategies: A Synthesis and Conceptual Model*, NATURE PARTNER J.: SCI. LEARNING RSCH. CTR., GRADUATE SCH. OF EDUC. 1, 7 (2016) (studying the efficacy of memorization based learning strategies and finding no evidence that the strategy enhances verbal ability, word decoding, or arithmetic).

20. *Id.* (“Although there were large effects in the short term, [researchers] found that these gains were not maintained at follow up (about 9 months later) . . .”).

21. See generally Deborah J. Merritt & Logan Cornett, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 3 (Dec. 2020), [https://iaals.du.edu/sites/default/files/documents/publications/building\\_a\\_better\\_bar.pdf](https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf) [<https://perma.cc/2PD7-PJ68>] (identifying twelve “building blocks” of ability that are necessary to be a minimally competent lawyer).

NCLB. Many university students<sup>22</sup> and law students “are inadequately prepared for the[se] challenges.”<sup>23</sup> Without more focused work by law schools, these students will lack the cognitive adaptability, self-regulation, and critical thinking skills necessary to be successful academically and professionally. These very skills are being demanded by legal employers, putting law students in a tenuous position of being trained to take tests, but having undeveloped professional skills.<sup>24</sup>

To help bridge this learning gap, law schools can (1) adapt their assessment plans, both inside the classroom and as an institution; (2) broaden their curriculum to incorporate student seminars; and (3) adapt their teaching methods.

First, this Article discusses and explores what skills and attributes are necessary for success in law school and as an attorney. Next, the Article delves into a background on NCLB and federal education policy, illuminating how K–12 education narrowed curriculum and arrived at high-stakes testing as an assessment tool for students. Then, the Article evaluates what types of assessments and programs help to encourage skills and attributes desired in future attorneys. Lastly, the Article makes recommendations for change to the assessment structure, new programming, and classroom environments at law schools to encourage deep learning, cognitive adaptability, and self-regulation.<sup>25</sup>

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22. There is much debate as to whether critical thinking and self-regulated learning is actually being taught at institutes of higher education, or if students are being taught to “deconstruct”—to privilege their own subjective emotions or experiences over empirical evidence in the false belief that objective truth is relative, or at least unknowable.” Rob Jenkins, *Why College Students Still Can't Think*, THE JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Mar. 23, 2017), <https://www.jamesgmartin.center/2017/03/college-graduates-still-cant-think> [<https://perma.cc/5BVC-MNKE>]. Studies show that employers report a gap in college graduates being able to think critically, among other skills. See Sue Erickson, Carmen Williams & Michael Braget, *2010 UND Employer Satisfaction Survey*, UNIV. OF N.D. (June 13, 2011), [https://web.archive.org/web/20171125214334/https://und.edu/research/institutional-research/\\_files/docs/surveys/ess-2010.pdf](https://web.archive.org/web/20171125214334/https://und.edu/research/institutional-research/_files/docs/surveys/ess-2010.pdf) [<https://perma.cc/8XCG-4EFX>] (reporting in a survey conducted by the University of North Dakota that over 900 employers identified critical thinking as an academic skill college graduates are lacking).

23. Joanne M. Russell, Chi Biak, Anna T. Ryan & Elizabeth Molloy, *Fostering Self-Regulated Learning in Higher Education: Making Self-Regulation Visible*, 23 ACTIVE LEARNING HIGHER EDUC. 97, 99 (2022).

24. Merritt & Cornett, *supra* note 21.

25. Amanda Nolen, *Student Motivation and Engagement in Online Spaces*,

### I. LAW STUDENTS NEED CRITICAL SKILL DEVELOPMENT IN LAW SCHOOL TO SUCCEED

The NCLB/ESSA learner is ill-prepared to enter college—let alone law school or the practice of law. This lack of preparation is a critical concern for law schools due to the nature of the skills needed to excel in law school, pass the Bar, and be a successful lawyer. It is not just lawyers who are calling on colleges and law schools to teach these critical skills that have been lost under the NCLB/ESSA era; studies also show that eighty-one percent of employers want universities to place stronger emphasis on developing important skills such as critical thinking.<sup>26</sup>

There is a mismatch between the learning needs of law students and the education provided to students before law school. The typical law school curriculum includes doctrinal classes, legal research and writing classes, experiential learning, and elective courses.<sup>27</sup> Most law school assessments require students to recall and understand material from the course and then apply it to a new set of facts.<sup>28</sup> Thus, the skills necessary to succeed in law school (and as a lawyer) do not line up with the “plug and chug” mode of assessment most law students grew up with under NCLB and ESSA.<sup>29</sup>

Further, most law students have not fully developed important skills such as critical thinking in their undergraduate programs, furthering the need of law schools to adapt their approach.<sup>30</sup> Many institutions of higher education are being pres-

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LAW TEACHING & LEARNING (June 10, 2021), <http://lawteaching.org/wp-content/uploads/2021/06/Plenary-1-Nolen-Student-Motivation-and-Engagement-in-Online-Learning-Environments.pdf> [<https://perma.cc/YMW4-QF7X>].

26. Herbert Nold, *Using Critical Thinking Teaching Methods to Increase Student Success: An Action Research Project*, 29 INT'L J. TEACHING & LEARNING HIGHER EDUC. 17, 17 (2017).

27. *What You Can Expect from Your Law School Experience*, LAW SCH. ADMISSION COUNCIL, <https://www.lsac.org/discover-law/what-you-can-expect-your-law-school-experience> [<https://perma.cc/YMW4-QF7X>] (describing the first-year law school curriculum).

28. See, e.g., Olympia Duhart, *The 'F' Word: The Top Five Complaints (and Solutions) About Formative Assessment*, 67 J. LEGAL EDUC. 531, 531–32 (2018) (proposing incorporation of more formative assessments in law school).

29. BAIN, *supra* note 18.

30. Nold, *supra* note 26, at 17–18.

sured in a way similar to NCLB/ESSA's mandates to prove students are learning through the use of standardized tests.<sup>31</sup> Unfortunately, faculty at institutions of higher learning tend to use lecture "as the primary means of communicating content and focus tasks on memorization and lower-order cognitive assignments" rather than focusing on teaching skills needed for students to be successful in the workplace.<sup>32</sup> What is more, there is a lack of coordinated effort by universities across the country to ameliorate the problem of a lack of critical skills in undergraduate students. While the effort is not coordinated among schools, undergraduate colleges do recognize the problem and are taking steps to combat it.<sup>33</sup>

Articles and studies have opined on the skills necessary to be a successful law student and lawyer—memorization is not among them. In the 1970s, studies reported that to competently practice, lawyers needed knowledge of substantive law. But the same studies noted a sharp contrast between knowledge and memorizing the legal concepts.<sup>34</sup> Other studies showed that substantive law could be learned on the job, but that skills such as research, writing, drafting, self-regulation, professionalism, critical thinking, and client interaction were more important.<sup>35</sup> The study was repeated again at the University of Kentucky College of Law and again found that memorizing concepts was of little

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31. *Id.* at 18 ("Faculties at colleges are now being required to supply documentation demonstrating that learning is taking place.")

32. *Id.*

33. Russell et al., *supra* note 23 (researching strategies employed by university professors that are designed to facilitate self-regulated learning and improve critical thinking skills).

34. See, e.g., Leonard L. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264, 274 (1977) (providing various accounts of practicing lawyers who viewed the legal research skills that they learned in law school as more important to their careers than factual course content). As the title of Baird's article indicates, his survey also probed the extent to which law schools prepared graduates to practice with these competencies. *Id.*

35. Robert A.D. Schwartz, *The Relative Importance of Skills Used by Attorneys*, 3 GOLDEN GATE U. L. REV. 321, 324 (1973) (conducting a survey of practicing attorneys who found analyzing cases, legal research, knowledge of substantive law, investigating facts of the client's case, and counseling clients to be the most important skills; "knowledge of common law subjects" and "memorizing legal concepts" were the least important). Schwartz was a member of the California Bar who conducted the survey independently. He received 634 replies, yielding a response rate of 52.8%. *Id.* at 321.



use to lawyers.<sup>36</sup> Ironically, memorizing concepts is exactly what students of NCLB schooling are trained to do,<sup>37</sup> and what the current bar exam requires of our students.<sup>38</sup>

Recent studies also confirm that memorization is of little value. In 2019 and 2020, the Institute for the Advancement of the American Legal System (IAALS) sought to understand what minimum competence meant and whether the bar exam was a good measure of it.<sup>39</sup> The study consisted of fifty focus groups to gather data about the knowledge and skill new lawyers need to practice competently.<sup>40</sup> Forty-one groups were composed of new lawyers while the remaining nine included those who supervised new lawyers.<sup>41</sup> The study concluded that new lawyers need the following interlocking abilities to be minimally competent: Lawyers need to (1) act professionally and in accordance with the rules of professional conduct; (2) understand the legal processes and sources of law; (3) understand the threshold concepts in many subjects; (4) interpret legal materials; (5) interact effectively with clients; (6) identify legal issues; (7) conduct research; (8) communicate as a lawyer; (9) see the “big picture” of client matters; (10) manage a law-related workload responsibly; (11) cope with the stresses of legal practice; and (12) pursue self-directed learning.<sup>42</sup> Accordingly, the IAALS study concluded

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36. See Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 491 (1993) (“[O]nly 30 percent of [law firm] partners expect the recent [law school] graduates to bring knowledge of substantive law, and only 28 percent expect knowledge of procedural law. Most expect the new graduates to develop those skills in practice.”). Garth and Martin were the director and assistant director of the American Bar Foundation. *Id.* at 469.

37. The skill-and-drill mode of teaching and learning was a specific criticism that President Obama tried to address in his administration’s initiative “Race to the Top,” which focused on encouraging deeper level thinking. See generally *A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act*, U.S. DEPT OF EDUC. 25–28 (Mar. 2010), <https://files.eric.ed.gov/fulltext/ED508795.pdf> [<https://perma.cc/789F-LK73>] (emphasizing the need for a well-rounded education).

38. Merritt & Cornett, *supra* note 21, at 38 (noting that the bar exam requires memorization of detailed rules).

39. *Id.* at 3.

40. *Id.*

41. *Id.*

42. *Id.*

that knowledge of specific legal principles was much less important than cognitive communication and research skills, and that memorization of those legal principles had little value.<sup>43</sup>

The IAALS participants stressed that new lawyers should never rely on any law they memorized or learned in law school; they must instead research the issue.<sup>44</sup> In fact, the “[m]emorization of detailed rules for the bar exam, notably, may have interfered with the understanding of threshold concepts.”<sup>45</sup> For example, “[l]earning the requirements for diversity jurisdiction in federal court did not help these lawyers learn the jurisdictional constraints of their state courts; on the contrary it may have distracted them from focusing on the essential meaning of jurisdiction.”<sup>46</sup> Thus, the critical thinking aspect is absent from the types of assessment used in both law school and on the bar exam.<sup>47</sup>

Once out of law school, new lawyers navigate practice areas with few opportunities to build these missing skills. To represent clients competently, they have to take control of their own learning; in other words, their self-regulation, cognitive adaptability, and critical thinking skills need to be developed and honed. “Many of the new lawyers in [the] focus groups were surprised by the lack of training and supervision they received during their first year. They had to navigate new practice areas and acquire new skills on their own, with little instruction.”<sup>48</sup> “Participants . . . often noted the stress they suffered studying for the current bar exam; some suggested that this stress prepared them for similar stresses in practice.”<sup>49</sup> Experiencing stress, however,

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43. *Id.* at 12 (“[A]lthough the methods of these studies vary, their results converge: cognitive skills like communication, research, legal analysis, and critical thinking are central to minimum competence. Knowledge of specific legal principles is much less important, and memorization of those principles has little value.”).

44. *Id.* at 24.

45. *Id.* at 38.

46. *Id.*

47. *Id.*

48. *Id.* at 61.

49. *Id.* at 96 n.409; *see also* Kellie R. Early, Joanne Kane, Mark Raymond & Danielle M. Moreau, *Testing Task Force Phase 2 Report: 2019 Practice Analysis*, NAT’L CONF. OF BAR EXAM’RS 62 (Mar. 2020), [https://nextgenbarexam.ncbex.org/wp-content/uploads/TestingTaskForce\\_Phase\\_2\\_Report\\_031020.pdf](https://nextgenbarexam.ncbex.org/wp-content/uploads/TestingTaskForce_Phase_2_Report_031020.pdf) [<https://perma.cc/CCM7-49ER>] (rating attorneys’ stress management skills below more than a dozen different skills). The California Bar did not include abilities related to stress management on its survey. Comm’n on Law. Assistance

does not demonstrate competence in coping with that stress. The legal profession suffers high rates of depression and substance abuse among licensed attorneys.<sup>50</sup> These unfortunate statistics suggest that, although all licensed attorneys experience the stress of taking the bar exam, many have not developed sufficient competence in coping with that stress or in acquiring new skills on their own with little instruction.<sup>51</sup>

Further, while it is clear that the current type of testing done in law school and on the bar exam does not prepare students to practice law, the National Council on Bar Examiners (NCBE) is considering changes based on its Testing Task Force's recommendations approved by the NCBE Board of Trustees in January of 2021.<sup>52</sup> This bar exam reform movement bolsters the conclusion that the current assessment model used in law schools does not develop the skills lawyers need.<sup>53</sup> The NCBE task force recommendations resulted from a three-year, comprehensive empirical study aimed at ensuring the competencies and skills required of new lawyers are properly assessed.<sup>54</sup> Broadly speaking, the NCBE task force recommended that fewer subjects be tested, and within the subjects tested, the tests should be less

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Programs, *Resolution 105*, A.B.A. (Feb. 2018), [https://www.americanbar.org/content/dam/aba/administrative/lawyer\\_assistance/ls\\_colap\\_2018\\_hod\\_midyear\\_105.pdf](https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_2018_hod_midyear_105.pdf) [<https://perma.cc/AVY8-FSRJ>]; see also Nat'l Task Force on Law. Well-Being, *The Path to Lawyer Well-Being: Practical Recommendations For Positive Change*, A.B.A. 26 (Aug. 14, 2017), <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf> [<https://perma.cc/7Y2H-QJFD>] (advocating for the integration of well-being initiatives into CLE programming).

50. See Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 52 (2016) (finding that attorneys struggle with alcohol use disorders and depression at much higher rates than the general population).

51. See *id.* at 51 (discussing alcohol abuse by attorneys as a coping mechanism for job-related stress).

52. Nat'l. Conf. of Bar Exam'rs Testing Task Force, *Overview of Recommendations for the Next Generation of the Bar Examination*, NAT'L CONF. OF BAR EXAM'RS 2 (2021), <https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf> [<https://perma.cc/9GW2-ND38>].

53. See *id.*

54. *Id.*

broad and less deep.<sup>55</sup> Further, similar to the findings and recommendations of IAALS, the task force recommended placing greater emphasis on “assess[ing] . . . lawyering skills [that] better reflect real-world practice and . . . activities newly licensed lawyers perform.”<sup>56</sup> To achieve this objective, the proposed bar exam will test foundational concepts<sup>57</sup> and foundational skills<sup>58</sup> through “text- or video-based scenarios” requiring students to solve the problem by “construct[ing] a written response or select[ing] the correct response.”<sup>59</sup> Thus, although a very different bar exam may be on its way in the coming years, law schools are not preparing students to succeed on this new type of exam.

Moreover, law school curricula and the bar exam fail to assess the critical skills law students need to become successful lawyers. As a result, law teaching methods must adapt. But first it is necessary to understand how K–12 education policy has failed students.

## II. EDUCATION POLICY BACKGROUND

While current law students are a product of NCLB and its progeny, it is instructive to understand how federal education policy developed to better understand the skill deficits experienced by current law students and prepare the students who come after them. To get to that understanding, this Article will first discuss the federal government’s early involvement in educational reform, moving then to the passage of NCLB and the rise of standardized testing, and then the problems created by these policies. Lastly, this section examines the ESSA and the modern era of federal education policy.

### A. THE FEDERAL GOVERNMENT’S INVOLVEMENT IN EDUCATION REFORM

The NCLB was passed in 2001 and reflected a history of the federal government’s attempt to be involved in education reform dating back to the 1940s.<sup>60</sup> One of the earliest attempts of the

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55. *Id.* (“[T]he bar exam should test fewer subjects and should test less broadly and deeply within the subjects covered . . .”).

56. *Id.*

57. *Id.* at 4.

58. *Id.*

59. *Id.*

60. Liz Hollingworth, *Unintended Educational and Social Consequences of the No Child Left Behind Act*, 12 J. GENDER, RACE & JUST. 311, 312–13 (2009)

U.S. government to affect education policy was the GI Bill,<sup>61</sup> which increased college attendance and reflected the belief that advanced education leads to upward mobility.<sup>62</sup> Beyond NCLB and ESSA,<sup>63</sup> the idea of the federal government dipping into local education dates to the 1960s with President Lyndon Johnson's War on Poverty and the passage of the Elementary and Secondary Education Act of 1965 (ESEA), which was reauthorized by the Improving America's Schools Act of 1994 (IASA).<sup>64</sup> Like the GI Bill, the ESEA was premised on education being the key to upward mobility, but unlike the GI Bill, it also purported to help disadvantaged children.<sup>65</sup> Interestingly, the ESEA was the first time the federal government demonstrated a willingness to provide federal money to improve public education.<sup>66</sup> ESEA established Title I schools aimed at improving basic skills education for children in impoverished areas.<sup>67</sup> While requiring schools to educate all students, not just disadvantaged children, IASA later set up an accountability system for schools that would expose which schools were not helping all students perform well on assessments.<sup>68</sup> The ESEA also allowed state and local governments flexibility to design their own federally-funded program in an effort to raise achievement levels of all students.<sup>69</sup>

By 2000, most states and jurisdictions had approved some type of standardized testing system under the IASA, but no system was in place to gather and use the information gained from

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(discussing early federal educational reform programs like the GI Bill and the Elementary and Secondary Education Act of 1965).

61. 38 U.S.C. § 3701; Reginald Wilson, *The G.I. Bill and the Transformation of America*, 75 NAT'L F. 20, 21 (1995) (stating that in 1947, veterans accounted for forty-nine percent of college enrollment).

62. Hollingworth, *supra* note 60, at 313–14 (documenting the GI Bill's effects on college enrollment).

63. 20 U.S.C. § 6301; Every Student Succeeds Act of 2015, Pub. L. No. 114-95, 129 Stat. 1802.

64. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27; Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518. *See generally* MARGARET A. JORGENSEN & JENNY HOFFMAN, ASSESSMENT REPORT: HISTORY OF THE NO CHILD LEFT BEHIND ACT OF 2001 (NCLB) 4 (2003) (providing historical background on federal education policy).

65. Hollingworth, *supra* note 60, at 314.

66. *Id.* at 315.

67. JORGENSEN & HOFFMAN, *supra* note 64.

68. *Id.*

69. *Id.*

those tests to change instruction in the United States.<sup>70</sup> Further, the federal government became more invested in ensuring efficient use of tax dollars as public education was increasingly funded at the federal level, leading to the use of school “accountability” as a metric.<sup>71</sup> Thus, school accountability at the federal level is a recent occurrence; even though the ESEA was passed in 1965, it was not until the Hawkins-Stafford Amendments of 1988 that federal aid for schools was directly tied to performance standards of students in the school district that received the funding.<sup>72</sup> In response to the pressure, by 2000, thirty-nine states had policies regarding school-level accountability,<sup>73</sup> which focused on student performance and the individual school rather than the districts where the schools were housed.<sup>74</sup>

#### B. NCLB’S BACKGROUND AND THE RISE OF STANDARDIZED TESTS AND SCHOOL ACCOUNTABILITY

While the NCLB Act is sweeping and complicated, it is founded on a simple premise: if the government holds schools accountable, they will produce better outcomes for students.<sup>75</sup> This premise rose out of a report in 1983 from the National Commission on Excellence in Education (Commission).<sup>76</sup> The Commission was created by President Ronald Reagan to address widespread public opinion that something was seriously wrong with the U.S. educational system, fueled in part by the Soviet

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70. *Id.* at 5.

71. PATRICK J. MCGUINN, *NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY 1965–2005*, at 128 (2006).

72. *See, e.g.*, ADAM R. NELSON, *THE ELUSIVE IDEAL: EQUAL EDUCATIONAL OPPORTUNITY AND THE FEDERAL ROLE IN BOSTON’S PUBLIC SCHOOLS 1950–1985*, at 242–43 (2005) (providing background on the Hawkins-Stafford Amendments and the condition that aid would be tied to documentation of measurable gains in achievement).

73. *See generally* Eric A. Hanushek & Margaret E. Raymond, *Lessons About the Design of State Accountability Systems*, in *NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* (Paul Peterson & Martin West eds., 2003).

74. Sara Goldrick-Rab & Christopher Mazzeo, *What No Child Left Behind Means for College Access*, 29 *REV. RSCH. EDUC.* 107, 110 (2005).

75. *Id.* at 110–11.

76. Nat’l Comm’n on Excellence in Educ., *A Nation at Risk: The Imperative for Educational Reform*, *CTR. FOR EDUC. REFORM* (Apr. 1983), [https://edreform.com/wp-content/uploads/2013/02/A\\_Nation\\_At\\_Risk\\_1983.pdf](https://edreform.com/wp-content/uploads/2013/02/A_Nation_At_Risk_1983.pdf) [<https://perma.cc/QWE5-GNH7>]. This report was chartered by 20 U.S.C. § 1233(a). JORGENSEN & HOFFMAN, *supra* note 64, at 2.

Union launching Sputnik<sup>77</sup> before the United States launched a similar space craft.<sup>78</sup> The Commission was charged with reviewing the data and literature involving the quality of teaching and learning in U.S. schools (grade school, middle school, high school, colleges, and universities), paying special attention to the educational experience of teenagers.<sup>79</sup> The report issued by the Commission stated that all children should be able to attain success in education by their own efforts and with significant guidance from school.<sup>80</sup> The report reflected the indicators of risk of children in U.S. schools and made some recommendations, marking the beginning of the evolution in achievement testing and standards-based education reform.<sup>81</sup> The report also noted the reverberating effect of at-risk youth as the military noted their recruits could not understand safety instructions written at the ninth-grade reading level.<sup>82</sup>

The Commission promised reform by demanding “the best effort and performance from all students, whether they are gifted or less able, affluent or disadvantaged, whether destined

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77. The launch of the Soviet Sputnik was the beginning of the “Space Age.” Sputnik was the world’s first artificial satellite developed by the Soviet Union in 1957. The United States had not yet developed its own space traveling technology. The Soviet Union’s advancement with Sputnik spurred the “space race,” which led the United States to successfully send a human being to the moon. *Sputnik Launched*, HISTORY (Oct. 13, 2021), <https://www.history.com/this-day-in-history/sputnik-launched> [<https://perma.cc/VTA5-LXRW>].

78. Hollingworth, *supra* note 60, at 315–16.

79. JORGENSEN & HOFFMAN, *supra* note 64, at 2.

80. *Id.* at 2–3; Nat’l Comm’n on Excellence in Educ., *supra* note 76.

81. The 1983 Report found indicators of risk, such as: thirteen percent of seventeen year-olds in the United States were functionally illiterate; scores on the SAT were declining in verbal, mathematics, physics, and English; forty percent of seventeen year-olds could not draw inferences from written material; only one-fifth could write a persuasive essay; only one-third could solve a several-step math problem; and colleges increased remedial math classes by seventy-two percent. JORGENSEN & HOFFMAN, *supra* note 64, at 2. Further, the Report made recommendations covering four parts of the educational process: content, expectations, time, and teaching. *Id.* at 3. For instance, the 1983 Report found there needed to be tougher high school graduation requirements in English, mathematics, science, social studies, and computer science; it defined expectations in the level of knowledge, skills, and abilities of students; it recommended longer school days, longer school years, and more effective use of the school day; and finally, it found that the field of teaching was not attracting talented people to the field. *Id.*

82. Hollingworth, *supra* note 60, at 316.

for college, the farm, or industry.”<sup>83</sup> This demand set off an evolution in achievement testing as an educational reform.<sup>84</sup> The Commission’s report was a watershed moment in further enforcing, in the public’s mind, the notion that individual achievement scores were accurate measures of the effectiveness of the U.S. educational system, even though teachers and school administrators insisted to the contrary.<sup>85</sup> Basing the effectiveness of schools on individual test scores, the Commission removed “undemanding” high school offerings and returned to the “classic” curriculum.<sup>86</sup>

This education reform and the notion that something was amiss in the U.S. education system continued in the 1980s and ’90s under both President George H.W. Bush and President Bill Clinton. In 1988, President George H.W. Bush ran on an education platform based on the Republican idea that, if parents are dissatisfied with their neighborhood school, they can use government money to choose a different school.<sup>87</sup> The next election brought education to the forefront of public discourse—President Clinton won with the help of the National Education Association, paving the way for the passage of the 1994 Educate America Act.<sup>88</sup> The above acts and policies set the stage for major reform of NCLB and, eventually, the ESSA.

### C. THE PASSAGE OF NCLB AND RESULTING PROBLEMS

NCLB grew out of this combination of the public’s perception that the U.S. education system is lacking, the belief that individual test scores reflect on the school and the education system, and the concept of tying federal funding to performance of schools. After its passage on January 8, 2002,<sup>89</sup> NCLB ushered

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83. JORGENSEN & HOFFMAN, *supra* note 64, at 3.

84. *Id.*

85. Hollingworth, *supra* note 60, at 316.

86. *Id.* at 316–17.

87. MCGUINN, *supra* note 71, at 54–55. Democrats opposed the Republican platform, believing the ability to use government money in choosing a new school would disenfranchise children. *Id.* at 126–27.

88. Goals 2000: Educate America Act, H.R. 1804, Pub. L. No. 103-227, 108 Stat. 125 (1994); Hollingworth, *supra* note 60, at 317 (noting the Educate America Act was a largely voluntary act that only three states adopted).

89. NCLB was signed by President George W. Bush on January 8, 2002. See 20 U.S.C. § 6319; No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425. While beyond the scope of this Article, NCLB did have laudable goals, such as seeking to end poverty, closing the gap between white students



in the era of using high-stakes achievement testing in the K–12 system to create an accountability system which held schools solely responsible for its students' tests scores.

NCLB reauthorized the ESEA, bringing dramatic clarity to the “value, use, and importance of achievement testing of students in kindergarten through high school.”<sup>90</sup> The NCLB Act was specifically created based on the concept of the “new accountability.”<sup>91</sup> The implicit understanding was that if children are not performing on achievement tests, then they are not learning and the school is responsible.<sup>92</sup> It goes far beyond the other acts by attaching school performance to sanctions, including allowing parents to move their children to a higher performing school, changing the curriculum, restructuring, and even closing the school.<sup>93</sup> The NCLB initiative made clear that the most effective way to promote student learning is to penalize or reward students, districts, teachers, schools, and administrators based solely on student test results.<sup>94</sup> NCLB sought to improve student performance by identifying struggling schools, building capacity, and imposing sanctions.<sup>95</sup> The creators of the Act assumed that if a school was going to be identified as underperforming, it would shame them into improving their test scores.<sup>96</sup> The NCLB then took money away from poorer schools, leaving many minority students with inferior education.<sup>97</sup>

Although the NCLB requires schools to translate their scores into improvements, it does not provide schools with the resources to build that capacity, leaving it up to the states and the school districts to figure it out.<sup>98</sup> Ultimately, NCLB took the

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and students of color, and creating school equity. But NCLB failed to close the achievement gap. While Black student scores improved, so did white student scores. Bianca A. White, *The Invisible Victims of the School-to-Prison Pipeline: Understanding Black Girls, School Push-Out, and the Impact of Every Student Succeeds Act*, 24 WM. & MARY J. WOMEN & L. 641, 643 (2018).

90. JORGENSEN & HOFFMAN, *supra* note 64, at 6.

91. Goldrick-Rab & Mazzeo, *supra* note 74.

92. JORGENSEN & HOFFMAN, *supra* note 64, at 6.

93. Goldrick-Rab & Mazzeo, *supra* note 74.

94. Ingrid Rodriguez, *Shape Up or Ship Out: The Effect of No Child Left Behind on Teachers' Methods of Teaching*, ALEPH (July 27, 2015), <http://aleph.humanities.ucla.edu/2015/07/27/shape-up-or-ship-out-the-effect-of-no-child-left-behind-on-teachers-methods-of-teaching> [<https://perma.cc/K7TQ-CHTJ>].

95. Goldrick-Rab & Mazzeo, *supra* note 74, at 111.

96. *Id.*

97. White, *supra* note 89.

98. Goldrick-Rab & Mazzeo, *supra* note 74, at 111.

responsibility of learning out of students' hands and placed it on the teachers and the schools,<sup>99</sup> incentivizing teachers, districts, and administrators to do whatever was necessary to raise their students' test scores, even if it was to the detriment of actual learning.

Perhaps most devastating, the requirements of NCLB were difficult to reach, requiring school districts to ensure that 100% of the elementary students in grades three through twelve would achieve proficiency (full mastery of the subject matter in that grade) in the tested areas by 2014.<sup>100</sup> This mandate created immense pressure on teachers and administrators, causing them to "game the system" so they would show testing gains even if they were unrelated to student learning.<sup>101</sup> This gaming of the system included "teaching to the test" and narrowing the curriculum.<sup>102</sup> "Teaching to the test" forces classroom instruction to move from exploratory learning to "drill and kill" methods.<sup>103</sup> Teachers who are being evaluated on how well their students do on a standardized test naturally start to spend a disproportionate amount of time on subjects that will be on the test, even if those subjects and concepts are not related to critical thinking and other higher level concepts.<sup>104</sup> Teachers may choose to forgo teaching deeper critical writing skills and focus on the "five-paragraph" essay writing that is heavily tested in NCLB-type tests.<sup>105</sup> Under pressure to raise test scores, teachers have students "spend hours memorizing facts, learning test-taking strategies, bubbling score sheets accurately, eliminating unlikely distractor responses, making educated guesses, and using multiple-choice answers to solve mathematical problems backwards."<sup>106</sup>

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99. *Id.* at 113.

100. Robert L. Linn, Eva L. Baker & Damian W. Betebenner, *Accountability Systems: Implications of Requirements of the No Child Left Behind Act of 2001*, 31 EDUC. RESEARCHER 3, 4 (2002).

101. Audrey Amrein-Beardsley, *The Unintended, Pernicious Consequences of "Staying the Course" on the United States' No Child Left Behind Policy*, 4 INT'L J. EDUC. POL'Y & LEADERSHIP 1, 3 (2009).

102. Craig D. Jerald, *Teach to the Test? Just Say No*, CTR. FOR COMPREHENSIVE SCH. REFORM & IMPROVEMENT 1, 3 (July 2006), <https://files.eric.ed.gov/fulltext/ED494086.pdf> [<https://perma.cc/F2HZ-W9CN>].

103. Theoni Soublis Smyth, *Who Is No Child Left Behind Leaving Behind?*, 81 CLEARING HOUSE 133, 134 (2008).

104. Amrein-Beardsley, *supra* note 101.

105. *Id.*

106. *Id.*

Another strategy to game the system of NCLB accountability testing was to narrow high school and grade school curricula.<sup>107</sup> This occurred when teachers or school administrators chose to forego subjects entirely, or concepts within a subject, because they would not be tested on the accountability tests; this was true even if the concept is foundational to learning.<sup>108</sup> It was also common for school administrators to cut arts, recess, and non-tested subjects months prior to the test so that students could focus on the tested subjects of math, reading, and English.<sup>109</sup> Reportedly, teachers pulled all the “fun time” out of the curriculum to make room for sample tests and test-taking skills.<sup>110</sup> The so-called fun parts of the curriculum and school day help to develop students’ creativity and problem solving skills.<sup>111</sup> While it is true that rational and well-intentioned teachers and school administrators felt the need to use practices not centered on student learning in order to meet NCLB’s criteria, these practices worked against the theory on which the law was based.<sup>112</sup> Educators felt compelled to make modifications to the curriculum to accommodate these standardized tests.<sup>113</sup> Given the high demands placed on educators to prepare students to take standardized tests, students lost the important skills of applied learning and critical thinking.<sup>114</sup> Students then lack the ability to self-direct their learning, expecting answers rather than embracing the importance of the discovery process.<sup>115</sup>

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107. *Id.* at 3–4.

108. *See id.* (listing subjects that would get set aside).

109. *Id.*

110. Trolan & Fouts, *supra* note 17.

111. *See id.* (quoting teachers that felt there was no time for art, P.E., or for students to use their imagination); Jerald, *supra* note 102, at 3–4 (noting that getting students to apply imagination, logic, and “the basics” to problems more successfully mimics adult job tasks).

112. Amrein-Beardsley, *supra* note 101, at 8. It should be noted that not all teachers and administrators resorted to the practices mentioned above, and the ones that did felt they had their hands tied. High-stakes, high-stress tests do not conform with safe learning environments geared toward developing a student’s critical thinking skills and helping students love learning. *Id.*

113. Trolan & Fouts, *supra* note 17.

114. *Id.* at 5.

115. *Id.* at 4.

## D. THE ESSA AND THE MODERN ERA

In 2015, Congress sought to replace NCLB rather than reauthorize it,<sup>116</sup> passing the ESSA and keeping the reliance on standardized tests but changing the purpose behind the NCLB.<sup>117</sup> While the ESSA departs from NCLB by purporting to return more control to the states, there is no change in the reliance on standardized testing to measure success.<sup>118</sup> The ESSA still requires state officials to use standardized tests to measure achievement of “not less than 95 percent of all students, and 95 percent of all students in each subgroup enrolled in public schools.”<sup>119</sup> Notably, the ESSA does allow high schools to replace the standardized tests with those standardized tests run by private organizations such as the American College Test (ACT) and the Scholastic Aptitude Test (SAT).<sup>120</sup> Obviously, however, those two tests are still standardized tests with many problems.<sup>121</sup> ESSA’s website says that “although ESSA retained the annual standardized testing requirements from NCLB, the law moved the federal accountability aspect to the States.”<sup>122</sup> While the use of testing remains the same, the ESSA changed the purpose of the NCLB, the accountability for failing schools, what academic progress means, what groups of students must be included in the

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116. Every Student Succeeds Act, Pub. L. No. 114-95, § 8544, 129 Stat. 1802, 2119 (2015). The ESSA was signed into law by President Obama on Dec. 10, 2015. Although beyond the scope of this Article, legal scholars point to NCLB’s heavy reliance on standardized tests, the aggressive use of waivers by schools in exchange for adopting the Common Core Curriculum, and the legislative inattention to education as the reasons for the ESSA’s enactment. Michael Heise, *From No Child Left Behind to Every Student Succeeds: Back to a Future for Education Federalism*, 117 COLUM. L. REV. 1859, 1872 (2017).

117. See EVERY STUDENT SUCCEEDS ACT (ESSA) (internal quotations omitted), <https://www.everystudentsucceedsact.org> [<https://perma.cc/L9SJ-CTDK>] (“The purpose of this title is to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.”).

118. *Id.*

119. 20 U.S.C. § 6311(c)(4)(E)(i).

120. *Id.* § 6311(b)(2)(H)(i).

121. The problems with the standardized tests SAT and ACT are beyond the scope of this Article. For more information on the issues with these standardized tests, see Valerie Strauss, *Is It Finally Time to Get Rid of the SAT and ACT College Admissions Tests?*, WASH. POST (Mar. 19, 2019), <https://www.washingtonpost.com/education/2019/03/19/is-it-finally-time-get-rid-sat-act-college-admissions-tests> [<https://perma.cc/4LN8-KTFB>].

122. EVERY STUDENT SUCCEEDS ACT (ESSA), *supra* note 117.

reporting, the comprehensive support and improvement standards, the teacher and paraprofessional qualifications, the eligibility of school attendance areas, and schoolwide programs in different areas, including parent and family engagement.<sup>123</sup>

Whereas NCLB required mandatory testing in grades three through eight and once in high school, the ESSA granted states the flexibility in how to administer those tests.<sup>124</sup> The ESSA, however, does still require the administration of standardized tests. In fact, the ESSA still requires students in grades three through eight, and one grade in high school, to take standardized tests in mathematics, reading, or language arts.<sup>125</sup> As to science, the ESSA requires students to be tested not less than once during grades three through five, six through nine, and ten through twelve.<sup>126</sup> Whether and when to test other subjects is up to the states.<sup>127</sup>

Other than granting states flexibility on when to test its students, it is obvious ESSA still heavily relies on standardized testing,<sup>128</sup> which does little to alleviate the problems for students' growth and development of critical thinking, deep learning, and self-regulation as outlined above.<sup>129</sup> Standardized testing makes students ill-prepared for the rigors of higher education, including law school. This next section details efforts institutes of higher education can employ to encourage critical skill development, such as through carefully designed assessment plans and modeling of critical skills by the professor. These institutions can

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123. *ESSA - NCLB Comparison Table*, METRO. EDUC. RSCH. CONSORTIUM, <https://merc.soe.vcu.edu/projects/the-essa-project/essa---nclb-comparison-table> [https://perma.cc/4JE7-P3SB].

124. *Infographic: No Child Left Behind v. The Every Student Succeeds Act*, EDUCATORS FOR EXCELLENCE (Oct. 4, 2016), <https://e4e.org/blog-news/blog/infographic-no-child-left-behind-v-every-student-succeeds-act> [https://perma.cc/AJ3N-4B2L].

125. 20 U.S.C. § 6311(b)(2)(B).

126. *Id.*

127. *Id.*

128. See Charles J. Russo, *The Every Student Succeeds Act: The More Things Change, the More They Stay the Same?*, 2016 EDUC. L.J. 95, 97 (highlighting ESSA's test requirements).

129. Although beyond the scope of this Article, the ESSA did aim to benefit and serve impoverished neighborhoods by providing affordable early childhood educational opportunities, holding states accountable for equitable distribution of resources to schools, and providing support for educators as well as offering opportunities for schools to dismantle school "push-out" (which is a mix of policies and mindsets that result in certain students being targeted for discipline and excluded from the general classroom). White, *supra* note 89, at 644.

also intentionally change the curriculum by adding skills to podium courses and adding courses to help students transition to law school.<sup>130</sup>

### III. CRITICAL SKILL DEVELOPMENT THROUGH TEACHING METHODS AND CHANGES IN THE CURRICULUM

Undergraduate institutions are making significant efforts in encouraging critical skill development. Even though efforts are being made at the undergraduate level, those efforts are not coordinated among undergraduate institutions. Still, there has been a marked effort by these institutions in the last ten years to bolster skills of students entering college.<sup>131</sup> While there is consensus surrounding the need for students to develop self-regulated skills, there is very little research discussing how professors can help students develop self-regulation skills.<sup>132</sup> Undergraduate institutions increasingly find students who come to college knowing how to take a standardized test and follow a rubric, but not how to critically analyze material, evaluate what is happening in the world, or self-direct and self-regulate their learning.<sup>133</sup> Further, students tend to “plug and chug” the information with very little deep learning or understanding; in other words, they memorize the formulas or the concepts and plug them into the exam but do not retain learning or understanding of the subject.<sup>134</sup> Not only do these students “plug and chug,” but they also lack basic self-regulation skills necessary for academic achievement and success in the outside world.<sup>135</sup> Undergraduate institutions are taking steps to combat this lack of essential skill development in their students; scholars at institutions of higher learning have called for changes in teaching methods, and institutions have changed their curriculum by adding freshman seminars and other first year experiences, small group learning activities, and various formative assessments to foster an appreciation of diverse points of view, ability to manage conflict,

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130. Trolan & Fouts, *supra* note 17.

131. Interview with Dr. Yolanda Gallardo, Dean of Gonzaga Univ. Sch. of Educ. (July 1, 2021) (notes on file with author). Dr. Gallardo has a Ph.D. in Curriculum and Instruction from Kansas State University.

132. Russell et al., *supra* note 23.

133. Interview with Dr. Yolanda Gallardo, *supra* note 131.

134. BAIN, *supra* note 18.

135. *Id.*; Russell et al., *supra* note 23.

and self-directed learning.<sup>136</sup> Law schools must continue this work.

Even if undergraduate institutions start to make inroads in developing critical thinking skills, law schools must continue the work to fully prepare law students to take the bar exam and succeed in practice. Intrinsic motivation and the ability to pursue self-directed learning is key to a new lawyer's success.<sup>137</sup> New lawyers have very little supervision in their first few years of practice.<sup>138</sup> To represent clients, new lawyers need to take control of their learning and learn so they can help the client, not to pass a test.<sup>139</sup> Self-directed learning is a skill, requiring a student to recognize what he or she does not know and seek the answers.<sup>140</sup> Supervisors look for associates that show initiative, have intellectual curiosity, seek advice in problem-solving, and are resourceful.<sup>141</sup> Law school curriculum and assessments, by and large, do not do enough to develop these skills,<sup>142</sup> and students were not afforded an adequate opportunity to develop them beforehand due to NCLB. The time has come to employ teaching methods known to develop skills in students.

#### A. TEACHING METHODS DESIGNED TO INCREASE COGNITIVE ADAPTABILITY THROUGH DEVELOPING SELF-REGULATION AND CRITICAL THINKING

Key to the success of students in the professional world is cognitive adaptability, or the ability to self-regulate and change one's thought process and problem solving in response to feedback. To arrive at cognitive adaptability, a student must (1) self-

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136. Trolan & Fouts, *supra* note 17, at 6.

137. Merritt & Cornett, *supra* note 21, at 61–62.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Cf.* Roberto L. Corrada, *Formative Assessment in Doctrinal Classes: Rethinking Grade Appeals*, 63 J. LEGAL EDUC. 318, 328 (2013) (noting grade appeals as a good way of developing skills in law school); Duhart, *supra* note 28, at 533 (discussing the flaws of summative assessments).

regulate<sup>143</sup> and (2) think critically.<sup>144</sup> Law professors can help students develop cognitive adaptability by: modeling self-regulating behaviors, encouraging students to engage in self-reflection, teaching students to break down large projects into manageable pieces, encouraging students to critically review their exams, and using rubrics to set students up for success. In addition, law professors can encourage critical thinking by developing discussion forums and incorporating methods such as team-based learning.

### 1. Teaching Methods to Develop Self-Regulation Skills

Law students should learn to hone their self-regulation skills to be successful academically and professionally.<sup>145</sup> Self-regulation can be gained through the maturation process,<sup>146</sup> but higher education can ensure that learning happens through professors modeling self-regulation and carefully designed assessment modules. Self-regulated learning “is an umbrella term used to describe the processes of learner autonomy and control of their learning approaches and outcomes.”<sup>147</sup> Students who are self-regulated are actively engaged in learning by planning and goal setting, managing time, reflecting on what works for them and what does not, and, perhaps most important, adapting their strategy to be more successful in their learning.<sup>148</sup> With good self-regulation skills, students consciously develop their own metacognition and intrinsic motivation; this only happens when students learn to proactively regulate, monitor, and control their

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143. Self-regulation is critical for success in academic life and increases success in intrinsic motivation, critical thinking, problem solving, and task interest. Jeltsen Peeter, Free De Backer, Veronique Romero Reina, Ankelien Kindkens, Tine Buffel & Koen Lombaerts, *The Role of Teachers' Self-Regulatory Capacities in the Implementation of Self-Regulated Learning Practices*, 116 *PROCEDIA* 1963, 1963 (2014).

144. Taren Wellman, *Developing Critical Thinking Through the Study of Law*, INST. FOR L. TEACHING & LEARNING, <http://lawteaching.org/2020/09/11/developing-critical-thinking-through-the-study-of-law> [https://perma.cc/V4W3-PNHY].

145. See generally Russell et al., *supra* note 23 (noting the importance of self-regulation).

146. *Id.* at 99.

147. *Id.* at 97.

148. *Id.*



own thoughts and behaviors in order to accomplish goals.<sup>149</sup> Such skills are essential to the practice of law.<sup>150</sup>

*a. Definition and Explanation of Self-Regulation*

The self-regulation process has three phases: forethought, performance, and self-reflection.<sup>151</sup> This process is an important one for students to develop either in high school or college because self-regulated learners critically think about their learning and are able to initiate and sustain focused goal-oriented activities while ignoring distractions and setbacks.<sup>152</sup> The forethought phase consists of self-motivation beliefs such as self-efficacy, outcome expectations, task interest, and value.<sup>153</sup> Teaching students to set goals relating to the upcoming task can help cement the student's knowledge and high performance.<sup>154</sup> Additionally, the performance phase consists of self-control processes such as task strategies, self-instruction, environmental structuring (classroom and teaching methods), willingness to seek help, incentives (grades), self-consequences or rewards, and metacognitive monitoring and observing.<sup>155</sup> Before the performance is completed, learning is increased if the student has a model of what is expected with clear expectations laid out by the professor through uses of sample answers or rubrics.<sup>156</sup> Further, in the self-reflection phase, students must self-evaluate, understand causal connections to success and failure, and self-reflect, being willing to adapt their process in the future.<sup>157</sup> This meta-analysis, if done by students, is a strong predictor of success beyond formal education and into professional life.<sup>158</sup> Allowing the students to collaborate with the professor to set the standards for self-judgment deepens their learning and self-regulation skills.<sup>159</sup>

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149. Peeter et al., *supra* note 143, at 1964.

150. Merritt & Cornett, *supra* note 21, at 61–62.

151. Wandler & Imbriale, *supra* note 7.

152. *Id.*

153. *Id.* at 3–4.

154. Hattie & Donoghue, *supra* note 19, at 6.

155. Wandler & Imbriale, *supra* note 7, at 4–5.

156. *Id.* at 11.

157. *Id.* at 5.

158. Cf. Dale H. Schunk, *Commentary on Self-Regulation in School Contexts*, 15 LEARNING & INSTRUCTION 173, 177 (2005) (“[S]elf-regulation [is] critical for lifelong learning . . .”).

159. Hattie & Donoghue, *supra* note 19, at 6–7.

*b. The Professor's Role in Developing Self-Regulation Skills in Students*

Teaching self-regulation skills is being done in higher education and can be done in the law school setting as well by (1) modeling self-regulation, (2) using specific assessment strategies, (3) using reflection methods, (4) creating proper scaffolding for assignments, and (5) creating rubrics which make expectations clear. First, to teach self-regulation, the professor must be a self-regulated teacher and must be transparent as to their process.<sup>160</sup> The professor can model self-regulation by setting goals for instructional strategies, monitoring progress, evaluating outcomes, and visibly adapting and revising their educational processes.<sup>161</sup> A professor's own self-regulation skills allow that professor to better recognize obstacles and difficulties that students face in gaining self-regulation.<sup>162</sup> Not only can the professor recognize and help students solve their self-regulation issues, the professor's willingness to show intellectual vulnerability and candor can go a long way in helping students be vulnerable themselves, which is a key to self-regulation.<sup>163</sup> Professors can model professional skills on the first day of class.<sup>164</sup> Rather than going over the rules and the assessments on the first day, professors should talk about the course, the questions it will answer, why the course is important to the practice of law, and what skills the course will help them develop.<sup>165</sup>

Law professors can also model self-regulating behavior by being transparent about their own processing. This can be accomplished by publishing the professor's educational goals for the class and discussing with the students how those goals are carried out during every class period. Further, the professors can assess the students' attainment or understanding of classroom

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160. Peeter et al., *supra* note 143, at 1964.

161. *Id.* at 1965.

162. *Id.*

163. Russell et al., *supra* note 23 (discussing the benefits of "reciprocal vulnerability").

164. Emily Grant, *Beyond Best Practices: Lessons from Tina Stark About the First Day of Class*, 95 OR. L. REV. 397, 416 (2017) ("The professor also implicitly models . . . professionalism by demonstrating meticulous preparation, . . . dressing sharply, and addressing the students in a respectful way.").

165. BAIN, *supra* note 18, at 36–37 (articulating how the routine professors follow on the first day of class can have a significant impact on how students learn). In my own class I continue to connect these questions, goals, and skills to every class session I teach. I show the students this connection by writing them on the board.

goals. An easy way to assess students' understanding of the goals in a large classroom is to ask questions of students, such as by having them fill out their answers on index cards or on a forum on the classroom's webpage. The professor can quickly look at those answers after class to determine if students are moving towards or understanding the classroom goals.<sup>166</sup> The key to success is for the professor to be transparent about how the class performed and how the professor will alter instruction to assist students in developing the assessed skill.

Second, professors can encourage self-regulation skills in their students by allowing for students to self-reflect. If students do not perform well on exams, quizzes, or other assessments, they should be encouraged to focus not on the final grade, but on what they learned and what they will change to improve next time.<sup>167</sup> Students will be more comfortable self-reflecting if the professors visibly self-reflect on their own behavior. A professor can simply discuss how they review their teaching and how they change their instruction based on that self-reflection.<sup>168</sup> This

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166. An example of this can be seen in my civil procedure classroom. After studying a new case that came down in March of 2021, I asked the students to write the new synthesized rule from the case on their index cards. I had sixty-three students. It took me about one hour to read all the rule statements. I separated them into three piles: correct, almost correct, and off the mark. After separating into piles, I could quickly see where the class was on rule developing/crafting. Then, I took examples off some of the cards and put them on the next class PowerPoint. I then led a discussion on what is different about each rule.

167. Rachel J. Ebner, *Tips for Fostering Students' Self-Regulated Learning in Asynchronous Online Learning Environments*, FAC. FOCUS (Sept. 2, 2020), <https://www.facultyfocus.com/articles/online-education/online-course-delivery-and-instruction/tips-for-fostering-students-self-regulated-learning-in-asynchronous-online-learning-environments> [https://perma.cc/5EQ5-4ZQB] (highlighting how focusing on improvement is an essential component of self-reflection); see also, e.g., DAVID A. KOLB, EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT 26 (1984); Alice Y. Kolb & David A. Kolb, *Learning Styles and Learning Spaces: Enhancing Experiential Learning in Higher Education*, 4 ACAD. MGMT. LEARNING & EDUC. 193, 194 (2005) ("Learning is best conceived as a process, not in terms of outcomes."); Regina M. Robson, "Fewer" Business Students Left Behind: Using Kolb's Model of Learning Preferences in an Undergraduate Law Course, 31 N.E. J. LEGAL STUD. 110, 122 (2014) (discussing why it is important for professors to emphasize that every student's learning style is different and will yield different results).

168. During the COVID-19 lockdown of the 2020–2021 academic year, I needed to record every class and post it on our Learning Management System

self-reflection and adaptability can be encouraged and modeled by the professor.<sup>169</sup>

Beyond modeling of self-evaluation methods, the professor can encourage self-reflection by explaining ways for students to plan and monitor their learning, such as through cues for learners to engage in self-regulation like writing prompts and self-guided reflections.<sup>170</sup> A concrete example of these cues is to encourage students to keep study logs<sup>171</sup> reflecting on the effort put forth in the course.<sup>172</sup> Keeping a study log is a skill which not only assists in law students reflecting on how much effort they are expending for each class, it also provides practice for law students in billing their time, which they will have to do as an attorney. Other prompts a professor can use are: “Am I concentrating on learning the material?”; “Do I understand the key points?”; “Are my study strategies helping me learn the material?”; and “Am I setting goals to ensure that I have a good understanding of the course material?”<sup>173</sup> Even in large doctrinal classrooms, a law professor can ask these types of questions as entrance tasks or quick-writes which take one to two minutes to complete. The law professor will only need about sixty minutes after class to review all of them. It is not necessary to comment

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(LMS) platform. As a part of this process, I made it a habit to watch every recorded class and self-reflect on what went well and what needed work. I would let the students know the next class period what needed further instruction based on review of the last class. This allowed my students to see my vulnerability in teaching and model how to change strategies.

169. It should be noted that the professor’s beliefs about learning as a life-long journey is pivotal to helping students self-regulate their own learning. Russell et al., *supra* note 23, at 108. It should also be noted that college professors struggle to develop these skills in students when they are required to teach a certain amount of content. *Id.* (“[A] considerable barrier to educator agency in teaching for self-regulated learning related to the amount of content [they] were expected to teach . . .”).

170. Russell et al., *supra* note 23, at 105.

171. Traci Sitzmann & Katherine Ely, *Sometimes You Need a Reminder: The Effects of Prompting Self-Regulation on Regulatory Processes, Learning, and Attrition*, 95 J. APPLIED PSYCH. 132, 140–41 (2010) (analyzing the results of a study conducted to determine whether the timing and implementation of self-regulatory academic processes, such as study logs, had positive impacts on student learning).

172. Wandler & Imbriale, *supra* note 7, at 7 (“Logged information may help students to self-reflect on the efforts they have put into the course and how they can adjust their efforts if they are not meeting their academic goals.”).

173. *Id.* at 9.

on each of them—the professor can take general notes and discuss the responses the next day in class.<sup>174</sup>

Third, professors can encourage self-regulation and self-reflection in their students by scaffolding. Professors can break large projects up into smaller chunks so that students learn how to manage their time.<sup>175</sup> While this may seem obvious, law students may come to law school not understanding how to manage their time and not knowing how to break up a project. To assist students in learning these skills, law professors can begin the semester by discussing outlining and synthesizing the cases studied in the class. In this way, the professor can encourage students to set goals to start working on their outlines, can offer to review outlines, and can dedicate class time to showing students how the cases relate to each other. This scaffolding models self-regulating behavior and improves law students' skills.<sup>176</sup>

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174. In my large civil procedure class I allow the students to respond anonymously or with a name. If the student puts their name on the card, I will respond personally to the student. Typically, about twenty percent of the students will put their name on their response. It takes me approximately sixty minutes to send out a quick email to each student.

175. Wandler & Imbriale, *supra* note 7, at 11 (outlining how professors who break up assignments into sub-assignments can encourage students to complete work throughout the week instead of all in one sitting). For a further discussion of scaffolding and the use of breaking down a large project for use in the law school classroom, see David Wood, Jerome S. Bruner & Gail Ross, *The Role of Tutoring in Problem Solving*, 17 J. CHILD PSYCH. & PSYCHIATRY 89, 98 (1976). Scaffolding enables a learner to understand concepts otherwise outside their scope of comprehension. The steps involved in scaffolding outlined by Wood, Bruner, & Ross are: (1) recruitment, (2) reduction in degrees of freedom, (3) direction maintenance, (4) marking critical features, (5) frustration control, and (6) demonstration. See Charlotte D. Schneider, *Using Scaffolding Techniques for Legal Research Instruction*, 2 LEGAL INFO. REV. 61, 63 (2017) (defining “scaffolding” as a concept and tracing its history of usage in academia). For further discussion of scaffolding and the role of the “zone of proximal development,” see L.S. VYGOTSKY, *MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES* 84–91 (Michael Cole, Vera Jolm-Steiner, Sylvia Scribner & Ellen Souberman eds., 1978).

176. In my civil procedure class, I am transparent about showing the students exactly how the cases relate to each other and how the cases relate to the statute we are studying. It cannot be assumed that students come to law school understanding this concept. For example, I asked my students to write on their index card how the cases we were studying related to 28 U.S.C. § 1332(a)(1), which requires the parties to be citizens of different states and for the amount in controversy to exceed \$75,000. The cases we studied define terms of that jurisdictional rule such as “citizen” and “diversity.” Over seventy percent of the students had not connected the cases to defining the terms of the rule. After

Fourth, self-regulation can be taught by encouraging students to review their graded mid-term exams. Some scholars go so far as to encourage students to appeal the results of an exam in writing to the professor using a guided appeal rubric.<sup>177</sup> Professor Roberto Corrada from University of Denver, Sturm College of Law instituted this method of allowing students to “appeal the midterm grade” in a one page letter to the professor.<sup>178</sup> Professor Corrada found this appeal process encouraged self-reflection and helped students gain a deeper understanding of the subject.<sup>179</sup> In other words, it helped move students out of “box-checking” mode and into deeper learning and reflection.<sup>180</sup> This type of deep learning that involves feedback and self-reflection helps students proceed from beginners to experts in their field.<sup>181</sup>

Lastly, teaching self-regulation includes assessing whether students can understand the expectations of the assignment, exam, or assessment. This can be easily accomplished if the professor provides past student work accompanied by a grading rubric.<sup>182</sup> To truly help students understand the expectations, the past student work should be annotated in the margins showing the students why the student’s work exemplified the expectations enumerated on the rubric. In this way, the students do not have to try to guess what part of the student work satisfies the

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that, I was transparent about laying out how the cases relate to the statute. This scaffolding provided practice for the students. Two weeks later, I asked the students to relate another set of cases to the venue statute of 28 U.S.C. § 1391(b). Fifty percent of the students could accurately reflect this relationship.

177. Corrada, *supra* note 142.

178. *Id.* at 320.

179. *Id.* at 322.

180. *Id.* In fact, seventy percent of students appealed their grades with supporting points. This process gave the professor the added bonus of helping him see if students understood what they were doing.

181. JOHN D. BRANSFORD, ANN L. BROWN & RODNEY C. COCKING, HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE AND SCHOOL 244–47 (2000) (conducting this as a deep dive into the importance of assessment and feedback to support student learning).

182. Nada Dabbagh & Anastasia Kitsantas, *Supporting Self-Regulation in Student-Centered Web-Based Learning Environments*, 3 INT’L J. E-LEARNING 40, 41 (2004).

professor's rubric.<sup>183</sup> This method puts the work more in the students' hands, encouraging self-regulation. If a student is only told what is wrong, it is difficult to see how feedback furthers a student's self-regulation and higher-level thinking. Students need to be involved in monitoring and regulating their own progress, actively constructing their own understanding of what improvements need to be made.<sup>184</sup> To make feedback formative and to help develop self-regulation in law students, the professor should: (1) clarify what good performance is (rubric); (2) facilitate self-assessment (suggestions above); (3) deliver high quality feedback in some form;<sup>185</sup> (4) encourage dialogue between the

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183. In my legal writing class, I assign a two-issue memorandum. I require the students to bring a full draft of that memorandum to class. I provide the students with a rubric for one of the issues and ask them to self-assess and peer assess the work by annotating in the margin of the draft where the rubric essentials are met. For example, tell me where the rule is, where the definitions are, where the policy is, etc. Then, after class, I provide them with an example of the second issue, which is fully annotated. They are to self-reflect how their draft measured up or fell short of what is required by the rubric and exemplified on the sample. Students are to rewrite the first issue based on what they have learned from the sample. This self-reflection and example model allows students to model their writing. A similar exercise can be done with practice exams in a doctrinal class.

184. David J. Nicol & Debra Macfarlane-Dick, *Formative Assessment and Self-Regulated Learning: A Model and Seven Principles of Good Feedback Practice*, 31 *STUD. HIGHER EDUC.* 199, 200–05 (2006) (examining formative assessment practices). Formative assessment measures how a student is learning during a course of study, whereas summative assessment is designed to measure what a student has learned after a course of study has reached completion. *Id.* at 212. In other words, formative assessment is assessment *for* learning and summative assessment is assessment *of* learning. The research on the use of formative assessment and feedback in the classroom shows the use formative assessment techniques can help students own their own learning and become self-regulated learners. *Id.* at 205. Higher education students can learn to be proactive with feedback rather than reactive, thereby owning their learning. *See id.*

185. While there is no consensus on what this means, it is best to ensure that feedback is provided in a timely manner, that it focuses not just on the student's strengths and weaknesses, but also on offering corrective advice that directs the learner to higher learning goals, and that it involves some praise with the criticism. Generally, feedback is information that helps students understand their own performance and self-correct. *Id.* at 208.

teacher and the student;<sup>186</sup> (5) encourage positive motivation<sup>187</sup> and self-esteem;<sup>188</sup> (6) provide opportunities to close the learning gap (rewrites, retests, etc.); and (7) use feedback to improve teaching. If the professor can use these principles, the students will be encouraged to self-regulate.

Further, a student's achievement in the class and motivation to learn is linked to their belief that their professor is focused on student learning rather than covering content. By contrast, sparing students' feelings denies them the opportunity to learn that critical feedback can be construed in terms that encourage them to progress while providing needed information about work quality and potential strategies. Students must be allowed to act on that feedback by resubmitting the same work; transfer of skills to a new project is difficult.<sup>189</sup> What is more, if the professor can provide feedback on the students' developing skills by treating mistakes as learning opportunities, the students will be more intrinsically motivated to learn and be lifelong learners,<sup>190</sup> which are skills of good lawyers. Formative assessment requires careful cultivation but can create excellent practitioners if done well.<sup>191</sup>

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186. This may be difficult in large classrooms. The professor can use small group feedback discussions in class. *Id.* at 210. Or, the professor can use in-class multiple choice tests with clickers. See Maria R. Barefoot, *Student Research and Intrinsic Motivation: Effects of Formative Assessment and the Two-Session Model of Information Literacy Instruction*, 5 PA. LIBRS. RSCH. & PRAC. 13, 14 (2017).

187. Students tend to compare themselves to others more than they focus on their own strengths and weaknesses, so the professor should set learning goals and focus on the student's gains towards those goals to keep the students positive. Nicol & Macfarlane-Dick, *supra* note 184, at 212.

188. In this area, I have found it most helpful to prioritize what I am assessing. The student may struggle in editing their work, but the argument is cogent and well-thought out. I then must determine what my goal is for this student. Editing is important, yes, but it may not be important for this assignment. Thus, prioritizing what I am trying to emphasize helps the student not feel so demoralized with the feedback.

189. Susan Bobbitt Nolen, *The Role of Educational Systems in the Link Between Formative Assessment and Motivation*, 50 THEORY INTO PRAC. 319, 322 (2011) (suggesting methods for revising and resubmitting work that can improve student learning).

190. Kathleen M. Cauley & James H. McMillan, *Formative Assessment Techniques to Support Student Motivation and Achievement*, 83 CLEARING HOUSE 1, 3 (2010).

191. Formative feedback is accepted and utilized very differently depending on if the student feels competent and as if they belong in class or law school.



To fully become a student who is self-directed and self-regulated, the student must be able to assess the demands of the task, know their own current knowledge and skill, lay out their approach, monitor their process,<sup>192</sup> and adjust their methods as necessary.<sup>193</sup> The above methods can help students develop each of these steps. Professors play a crucial role in helping students develop self-regulation skills.

## 2. Teaching Methods to Develop Critical Thinking Skills

Critical thinking skills are necessary to developing successful lawyers.<sup>194</sup> As undergraduate schools are noting a lack of critical thinking skills, Polk State College took steps to help their students develop critical thinking skills by modifying three business courses.<sup>195</sup> In the Polk State College study, three business classes were selected, and the instructor redesigned the course to incorporate methods for developing critical thinking skills such as: two written assignments with detailed feedback from the instructor (including challenging unsubstantiated claims or unfounded statements), weekly discussion forums that encouraged research beyond the textbook (students had to respond to the original online post and to two other student's posts with a response that was supported by credible sources outside the text), modified classroom sessions to increase debate and asking "why" numerous times to get to the bottom of the problem, and class presentations.<sup>196</sup> Law school classrooms can similarly be modified by setting up discussion forums encouraging students

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Students who are questioning if they belong or deserve to be there will take feedback as further proof that they don't deserve to be there. Normalize the feedback. Still give the individual feedback but also discuss in class or in a video what the common mistakes were. This allows students to feel that they belong and can use the feedback.

192. Ebner, *supra* note 167. One way to encourage this is to have the professor structure a think-aloud method involving continuously thinking about one's learning goals and the effectiveness of each action in attaining those goals. *Id.* ("[A] structured think-aloud approach . . . improv[es] learning outcomes with college students."). If their goals are not being achieved, students will need to learn to be flexible with their strategies. Another method suggested by Dr. Ebner is to have students create a checklist of their learning goals and record their actions and the effectiveness of those actions. *Id.*

193. SUSAN A. AMBROSE, MICHAEL W. BRIDGES, MICHELE DIPIETRO, MARSHA C. LOVETT & MARI K. NORMAN, *HOW LEARNING WORKS: SEVEN RESEARCH-BASED PRINCIPLES FOR SMART TEACHING* 110 (2010).

194. Merritt & Cornett, *supra* note 21, at 12.

195. Nold, *supra* note 26, at 17–26.

196. *Id.* at 20.

to think critically about the law, its policy, and how to apply it. The professor can ask students to reflect on why the law is a helpful one, or why we would want a rule like this. Questions such as this encourage students to critically analyze what they are reading. What is more, even discussing rule synthesis develops critical thinking for students.<sup>197</sup>

Team-based learning can also help develop students' critical thinking skills. With the right training and implementation, team-based learning can help students improve their own individual skills while learning essential skills working with others.<sup>198</sup> Law professors at the University of Arkansas at Little Rock, William H. Bowen School of Law, have successfully integrated team-based learning in podium classes and assigned individual grades for group work.<sup>199</sup> This learning and teaching modality is particularly good at improving students' "critical, practical, and creative skills."<sup>200</sup> Not only has team-based learning been proven to improve critical thinking skills,<sup>201</sup> synthesis skills, problem solving skills, and classroom engagement, it also has been shown to foster deeper understanding of the concepts and skills being taught.<sup>202</sup> Also, although a bit more complicated than other teaching modalities, team-based learning is a form of small-group learning.<sup>203</sup> Practitioners can refer to numerous other articles regarding the benefits of team-based learning and its use in law school classrooms.<sup>204</sup>

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197. In my civil procedure class, I purposely discuss rule synthesis by showing how rules, such as personal jurisdiction over non-resident defendants, have changed through subsequent cases. It seems obvious, but the professor should specifically explain it to model critical thinking behavior.

198. Lindsey P. Gustafson, *Reflections on Five Years of Team-Based Learning in First Year Property*, 66 S.D. L. REV. 29, 30 (2021).

199. *Id.*

200. *Id.* at 29.

201. Sophie M. Sparrow & Margaret Sova McCabe, *Team-Based Learning in Law*, 18 LEGAL WRITING: J. LEGAL WRITING INST. 153, 166 (2012).

202. Gustafson, *supra* note 198.

203. Susan W. Dana, *Implementing Team-Based Learning in an Introduction to Law Course*, 24 J. LEGAL STUD. EDUC. 59, 65–66 (2007) (outlining the goals in an Introduction to Law Course, such as improving critical thinking skills, improving creative thinking skills, being confident in communication skills, and enjoying rigorous thinking).

204. *E.g.*, Sparrow & McCabe, *supra* note 201; Melissa H. Weresh, *Uncommon Results: The Power of Team-Based Learning in the Legal Writing Classroom*, 19 LEGAL WRITING: J. LEGAL WRITING INST. 49 (2014); Anne E. Mullins, *Team-Based Learning: Innovative Pedagogy in Legal Writing*, 49 U.S.F. L. REV. 53 (2015).

In short, the professor's role in team-based learning is to design the class and construct the assessments. But during class, the professor guides the students in their learning, rather than being the center of the students' attention.<sup>205</sup> Thus, the lion's share of the "teaching" happens in the preparation stage, as the classroom time is spent problem-solving in teams.<sup>206</sup> To maximize team learning, four principles must be utilized:<sup>207</sup> "(1) teams must be properly formed and managed; (2) students must be made accountable for their individual and teamwork; (3) team assignments must promote both learning and team development; and (4) students must have timely and frequent feedback."<sup>208</sup> With proper training, planning, and set up, team-based learning can help students develop deep learning and cognitive adaptability, better preparing students for practice because they need to use professional judgment and discuss that judgment with their team.<sup>209</sup>

The professor does not have to sacrifice coverage in order to also teach skills, as team-based learning instills the responsibility for learning the foundational material in the student rather than the professor,<sup>210</sup> allowing classroom time to be spent with problem solving and critical thinking skills development.<sup>211</sup> Skill development is inherent in this teaching modality. While students are applying substantive knowledge to solve the problem at hand, they are using valuable communication skills as well as cooperation, both essential to being a legal professional.<sup>212</sup> This teaching modality, then, is a comprehensive teaching strategy

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205. Sparrow & McCabe, *supra* note 201, at 154.

206. *Id.* at 157.

207. For readers seeking to implement Team-Based Learning, see generally TEAM-BASED LEARNING COLLABORATIVE, TEAM-BASED LEARNING: A TRANSFORMATIVE USE OF SMALL GROUPS IN COLLEGE TEACHING (Larry K. Michaelsen, Arletta B. Knight & L.D. Fink eds., 2004); TEAM-BASED LEARNING COLLABORATIVE, TEAM BASED LEARNING: SMALL-GROUP LEARNING'S NEXT BIG STEP (Larry K. Michaelsen, Michael Sweet & Dean X. Parmelee eds., 2008); *Getting Started with TBL*, TEAM-BASED LEARNING COLLABORATIVE, <https://teambasedlearning.site-ym.com/page/started> [<https://perma.cc/HRB9-Z56Z>].

208. Gustafson, *supra* note 198, at 32.

209. Sparrow & McCabe, *supra* note 201, at 169.

210. Dana, *supra* note 203, at 83 (finding that students are "capable of learning the foundational material on their own with a good textbook if properly motivated to do so," with that motivation provided by team pressure).

211. Sparrow & McCabe, *supra* note 201, at 171.

212. *Id.* at 172.

requiring the professor to carefully design the courses, assignments, and exams so that deeper learning and improved interpersonal and professional skills will result.<sup>213</sup> Team-based learning also has the added bonus of increasing student satisfaction with the course.<sup>214</sup>

Thus, teaching methods can be employed to help law students develop critical thinking skills. To support law professors' use of team-based learning and discussion forums to develop critical thinking skills, law schools can alter curriculum offerings. Although professors provide the primary route for learning, adding companion classes and seminars deepens the development of critical thinking and self-regulation skills in law students.

#### B. CREATION OF SEMINARS OR COMPANION CLASSES DESIGNED TO HELP LAW STUDENTS DEVELOP SKILLS

Law schools can continue the work of the undergraduate schools by creating small seminars for first-year students and companion courses to develop professional skills. These seminars and companion courses utilize team-based and small group learning to improve their success.

##### 1. Undergraduate Programs

Recognizing that students were coming to college without the necessary skills to be successful academically, colleges and universities had to make changes to their teaching approach. Between 1988 and 2012, the institutions that offered some type of first-year seminar grew in total undergraduate population from 68.5% to 89.7%,<sup>215</sup> dropping to 73.5% in 2017.<sup>216</sup> A study from

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213. *Id.* at 207 (concluding that “[i]n the end, students achieve more together than they could alone,” and that “[t]his is better student learning”).

214. Dana, *supra* note 203, at 80.

215. Dallin G. Young, Assistant Dir. & Jessica Hopp, Graduate Assistant, Nat'l Res. Ctr. for the First-Year Experience & Students in Transition, Presentation at the Annual Conference on the First-Year Experience: Surveying the National Landscape of First-Year Seminars, a High-Impact Practice (2014), [https://sc.edu/nrc/system/pub\\_files/1532532711\\_0.pdf](https://sc.edu/nrc/system/pub_files/1532532711_0.pdf) [<https://perma.cc/L47Y-3RAH>].

216. Dallin G. Young, Assistant Dir., Nat'l Res. Ctr. for the First-Year Experience & Students in Transition, Presentation at the American College Personnel Annual Conference: Presenting Data from the 2017 National Survey of First-Year Experiences (Mar. 2018), [https://sc.edu/nrc/system/pub\\_files/1538845727\\_0.pdf](https://sc.edu/nrc/system/pub_files/1538845727_0.pdf) [<https://perma.cc/LP4Z-2H3S>].

2013 showed that these programs produced gains in deep learning, general education, practical competence, and social development.<sup>217</sup> The most recent survey of college first-year seminars was conducted in 2017 and confirmed that eighty percent of the schools with freshman seminars teach academic success strategies, writing skills, and ways to promote student-faculty interaction in the seminars.<sup>218</sup> What is more, 49.2% of the schools focused on analytical, critical-thinking, and problem-solving skills.<sup>219</sup> Additionally, along with offering a freshman seminar, other common first-year programs included developmental or remedial education designed to elevate a student's skill level to that which is necessary for academic success in college.<sup>220</sup>

Effective first-year experience programs depend on campus-wide coordination and cooperation, rather than on having a course merely appended to the core institutional mission.<sup>221</sup> This can be done by having a department dedicated to the first-year seminar, with a diverse committee made of up stakeholders who consult with the program coordinator.<sup>222</sup> These first-year learning programs recognize that helping students gain learning skills to transition into undergraduate-level learning is separate from learning a subject matter; thereby these first-year programs remove an obstacle so that students can get on with the real learning.<sup>223</sup> The effectiveness of these learning communities has been well-documented.<sup>224</sup>

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217. Ashley Finley & Tia McNair, *Assessing Underserved Students' Engagement in High-Impact Practices*, ASS'N OF AM. COLLS. & UNIVS. 15–18 (2013), <https://files.eric.ed.gov/fulltext/ED582014.pdf> [https://perma.cc/7MK7-6YBT]. It should be noted that these gains are most pronounced in first-generation college students. *See id.* at 7–20.

218. Young, *supra* note 216.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. Randall E. Jedele, *A Faculty 'C' Change: Inspired by Learning Communities*, THOUGHT & ACTION 107, 107–14 (2010); Betsy O. Barefoot, Betsy Q. Griffin & Andrew K. Koch, *Enhancing Student Success and Retention Throughout Undergraduate Education: A National Survey*, JOHN N. GARDNER INST. FOR EXCELLENCE IN UNDERGRADUATE EDUC. (2012), [https://static1.squarespace.com/static/59b0c486d2b857fc86d09aee/t/59bad33412abd988ad84d697/1505415990531/JNGInational\\_survey\\_web.pdf](https://static1.squarespace.com/static/59b0c486d2b857fc86d09aee/t/59bad33412abd988ad84d697/1505415990531/JNGInational_survey_web.pdf) [https://perma.cc/YC6D-8UNC].

One type of freshman seminar is called Targeted Learning Communities (TLC),<sup>225</sup> which helps students change their study skills, stay in the science, technology, engineering, and math (STEM) fields, and learn academic success strategies.<sup>226</sup> These TLCs<sup>227</sup> were inspired by students who were lost in a large section of science courses, thus forced to rely on their insufficient high-school study skills, and they struggled as a result.<sup>228</sup> The course included topics such as addressing life skills, strategies for academic success, and foundations for global learning. These seminars also centered on a common theme involving integrative assignments.<sup>229</sup> In this way, TLCs serve as a companion class to an introductory course (often a STEM course), providing holistic support for students who are unprepared for many aspects of college—including its academic rigor.<sup>230</sup>

TLCs can be team-taught by a subject matter professor and a professor who is an expert in teaching skills.<sup>231</sup> This pairing enhances the “students’ metacognition [and] significantly impact[s] their problem solving ability, a major hurdle for many students in the General Chemistry course . . . . [T]he critical thinking skills that are associated with metacognition must be developed within the context of the subject area in which they will be used, since [the] transfer of universal critical thinking skills is generally rare and infective.”<sup>232</sup>

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225. TLCs are recognized as a high-impact practice designed to help students transition to college successfully and stay in college. George D. Kuh, *High-Impact Educational Practices: What They Are, Who Has Access to Them, and Why They Matter*, ASS’N FOR AM. COLLS. & UNIVS. 17–19 (2008), <https://provost.tufts.edu/celt/files/High-Impact-Ed-Practices1.pdf> [<https://perma.cc/5ZD3-M462>] (containing charts demonstrating that TLCs improve first-year college GPAs and increase a student’s chances of returning to college).

226. Hillary H. Steiner, Michael L. Dean, Stephanie M. Foote & Ruth A. Goldfine, *Applying TLC (a Targeted Learning Community) to Transform Teaching and Learning in Science*, 1 LEARNING CMTYS. RSCH. & PRAC. 1, 1 (2013); Joel Ledford, Susan Keen, Meryl Motika & Xinyi Hou, *Companion Classes as a Support Model in Introductory Biology and Chemistry*, 32 J. FIRST-YEAR EXPERIENCE & STUDENTS TRANSITION 59, 60 (2018).

227. It should be noted that other programs refer to these programs with different names, such as companion courses or First Year Seminars, but to simplify, this Article will continue to refer to them as TLCs.

228. Steiner et al., *supra* note 226.

229. *Id.* at 2.

230. Ledford et al., *supra* note 226.

231. *Id.* (describing the set-up of team-taught courses).

232. Steiner et al., *supra* note 226, at 2.

To set up its TLC, the professors at Kennesaw University first established focus groups, gathering knowledge from students who had taken the General Chemistry course before and focusing on what strategies were employed by the students to gain success in the course, then used those methods to shape the design and sequencing of the TLC and the activities used.<sup>233</sup> Leaders of the TLC at Kennesaw University also added a peer component to help students succeed: one was a successful chemistry student and one was a student who struggled in chemistry who could provide emotional support.<sup>234</sup> To make the TLC work, the chemistry professor had to devote less time to content and could spend more time teaching and modeling self-regulation and self-reflection with her students.<sup>235</sup>

Similarly, the University of California-Davis created a companion course to accompany its chemistry and biology courses. Its TLC (or “co-class”) provided three hours of support weekly, which included two hours of content support and one hour of advising or professional skill support.<sup>236</sup> The program helped develop self-efficacy and fostered metacognition and reflection by guiding students without evaluating them academically.<sup>237</sup> Notably, the advising portion of the week centered on goal setting, planning, time management, imposter syndrome, grit, self-care, university life navigation, and academic confidence.<sup>238</sup> One of the keys to the success of the program was the integration and coordination of the key players; lesson plans and course materials were developed in coordination with faculty, advisors, and graduate teaching assistants.<sup>239</sup> No grades were assigned to the co-class portion; instead, students received either a pass or no pass grade.<sup>240</sup>

According to the literature, these companion classes and seminars are most successful when their content is based on

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233. *Id.*

234. *Id.*

235. *Id.*

236. Ledford et al., *supra* note 226, at 61.

237. *Id.* at 61–62.

238. *Id.* at 62.

239. *Id.*

240. *See id.* (basing the passing grade on attendance and participation).

learning psychology in small sections, which is better for community building.<sup>241</sup> Most success is seen in seminars that are attached to a parent course, and are based on theories of goal setting, information processing, and motivational theories.<sup>242</sup> Also key to the success of these programs is coordination and training of the instructors and the faculty of the parent course.<sup>243</sup>

## 2. Suggestions for Law Schools

Like at the undergraduate level, teaching critical professional skills in a law school classroom cannot be accomplished by a single teacher. Rather, professional skill development should be incorporated into other courses through stated outcome goals.<sup>244</sup> One way to accomplish this coordinated effort is to create a co-class course that is attached to a podium course, such as civil procedure, torts, criminal law, constitutional law, contracts, or property. The attachment to a podium first-year course will lend legitimacy to the course and its content. If, for example, a civil procedure course is normally a four-credit course, then it could become a six or seven-credit course to add the skills content that students are deficient in. Adding two-to-three credits to the civil procedure course will allow the content to be covered at the same time the professional skills are covered. This process could encourage students to self-regulate their learning by aiming the assignments at that skill. In the same way, this course could also contain course goals in motivation, critical thinking, problem solving, metacognition, and self-regulation.

For the collaboration, the podium professor could team up with a professor who is experienced in developing skills in law students, such as the director of student success. The two professors can work together to create active learning strategies, team-based learning projects, and problem-solving exercises. Critically important, however, is that the two professors encourage and require students to engage in metacognition about their own

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241. See Christopher J. Ward, Kaitlin Ohde, Jason S. Rose, Claire Critchlow, Jiyoung Park & Angela Vaughan, *First-Year Seminars: Supporting STEM College Student Academic Success and Persistence*, 32 *J. FIRST-YEAR EXPERIENCE & STUDENTS TRANSITION* 45, 50 (2020) (describing a program that was small-group oriented and supplemental to other rigorous academic work).

242. *Id.* (listing topics based in the educational psychology discipline).

243. *Id.* (“Ongoing and concurrent training [is] essential to ensuring similar delivery of course content to all students.”).

244. See, e.g., Peeter et al., *supra* note 143, at 1968 (outlining a school wide approach to self-regulated learning).



learning. In this way, the students will continue to develop skills while being steeped in the podium-course content.

#### IV. ADDITIONAL SOLUTIONS LAW SCHOOLS CAN EMPLOY TO DEVELOP PROFESSIONAL SKILLS

Teaching methods and curricular changes aimed at the students' professional skill development is important and helpful, but those methods alone will not produce the skill development needed. Law schools should also encourage professional training, engage in active learning practices, employ and assess their high-impact practices,<sup>245</sup> and develop assessment practices to help law students be more self-regulated, critical thinkers.<sup>246</sup>

##### A. PROFESSIONAL TRAINING AND INSTITUTIONAL SUPPORT

Law professors' training and interest in learning new teaching methods aimed at honing cognitive adaptability, intrinsic motivation, self-regulation, and critical thinking is integral to creating a classroom where these skills are taught to law students.<sup>247</sup> Professors in higher education often are not trained in teaching methodology, nor do they typically have degrees in teaching or education.<sup>248</sup> Institutions of higher learning should prioritize teaching and training law professors on teaching methods that foster the skills needed for law students to become successful lawyers. One way to accomplish this is for a law school administration to create an environment and structure where teachers are encouraged and empowered to reflect on their own learning (metacognition) and to take responsibility for their own

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245. "High-impact practices" are defined as an investment of time and energy over an extended period of time that has positive effects on student engagement in education. *See generally* Kuh, *supra* note 225 (describing the benefit that high-impact practices have on a student's cumulative learning).

246. *See generally* Wellman, *supra* note 144 (advocating for educators to play a role in helping students to develop critical-thinking skills).

247. *See generally* Duhart, *supra* note 28, at 536 (discussing the value of formative assessment for students and the need for law professors to buy-in).

248. For more information on law professor training, see J. Gordon Hylton, *What Should Be the Prerequisites for Becoming a Law Professor?*, MARQ. UNIV. L. SCH. (Sept. 8, 2011), <https://law.marquette.edu/facultyblog/2011/09/what-should-be-the-prerequisites-for-becoming-a-law-professor> [<https://perma.cc/JMS3-7SGP>] (providing an overview of the types of degrees that law professors generally have).

learning and professional teaching development (self-regulation).<sup>249</sup>

What is more, law schools can become places where professors are encouraged to develop unique ways to hone these professional skills, are empowered to make mistakes and reflect on those mistakes, and are supported in their teaching methods aimed at developing students' professional skills.<sup>250</sup> Visible professor self-regulation fosters student self-regulated learning and, therefore, law schools can support the professors who seek to foster student self-regulated learning.<sup>251</sup> Professors ought to model self-regulated learning strategies to teach those skills to students and to correctly recognize issues and problems their students are having with these important skills.<sup>252</sup> To accomplish this, law school administration and faculty will have to add encouraging professors' self-regulation and reflection as one of the institutional goals or outcomes, committing financial resources to it. More training opportunities are needed for professors to develop their own skills in this area; self-regulation skill development can be enhanced in law students if the professor in charge of the classroom also has highly honed self-regulation skills.<sup>253</sup>

A law professor's own learning process affects teaching and students' reactions to their own learning processes.<sup>254</sup> Professors can seek out, and law schools can provide, education opportunities for professors to experience the effectiveness of self-regulation skills, incorporating them into lesson plans, course design, goal setting, problem solving, promotion of deep learning, and classroom performance.<sup>255</sup> Law school administration can not only promote it with outcomes, but it could support the further

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249. See Peeter et al., *supra* note 143, at 1968 ("If teachers self-regulate their learning and teaching, [self-regulated learning] becomes more generally integrated in the entire school practice.").

250. See *id.* at 1967 ("Teacher empowerment is a key element in educational change.").

251. See Russell et al., *supra* note 23, at 109 ("[S]imply making educator self-regulation more visible to students is likely to promote student self-regulated learning.").

252. See Peeter et al., *supra* note 143, at 1966 (emphasizing the need for teachers modeling self-regulation strategies).

253. *Id.*

254. *Cf. id.* (making the point that teachers should experience self-regulating strategies themselves so that they are more inclined to use it in their own teaching style).

255. *Id.*

education of its professors through financial support for teachers to learn skills such as team-based learning, active teaching and learning, and metacognition focus.

#### B. TRAINING AND ENCOURAGING ACTIVE LEARNING MODALITIES

Additionally, law schools should train professors on different teaching modalities and encourage active learning. Active learning trainings should be essential as this modality develops the essential skills of self-regulation,<sup>256</sup> critical thinking, and cognitive adaptability.<sup>257</sup> Learning is not a spectator sport,<sup>258</sup> yet law schools institutionally treat it as such. Students do not learn by listening to a lecture; they need to interact with their learning and apply it to their daily lives.<sup>259</sup> Although some law classrooms currently use active-learning techniques such as written work, discussion, collaboration, and group work, active learning is more than just keeping the class active and avoiding lectures. Training for professors is needed to implement these learning methods, as many barriers exist to changing methodology. These barriers include the risk of failure, the need to educate students so their expectations are realistic, the ever-present need to cover content, the concern for adequate preparation time, and the difficulty of implementing active methods in a large classroom.<sup>260</sup> Additionally, active learning in law school may be new to some students because the lecture format continues to be the dominant form of instruction in higher education.<sup>261</sup> Nonetheless, lecture is not the most efficient way to teach content.<sup>262</sup> Active learning methods will encourage deeper learning.

Professors can utilize four key active learning techniques to teach students how to synthesize large amounts of information.

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256. See, e.g., Mystica M. Alexander, *The Flipped Classroom: Engaging the Student in Active Learning*, 35 J. LEGAL STUD. EDUC. 277, 279 (2018) (“[Active learning] techniques highlight the importance of self-regulation, autonomy, and control.”).

257. See Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 402 (1999) (touting active learning methods as effective in teaching “higher-level” cognitive skills).

258. *Id.* at 401 (quoting Arthur W. Chickering & Zelda F. Gamson, *Seven Principles for Good Practice in Undergraduate Education*, AM. ASS’N HIGHER EDUC. BULL., Mar. 1987, at 3, 5).

259. *Id.*

260. See *id.* at 404–06 (discussing a variety of barriers to active learning).

261. See Alexander, *supra* note 256, at 278.

262. See *id.* at 279 (“[T]he active learning approach ‘is the best way to get information into the minds of students.’”).

First, the professor can help students prepare for class by alerting them to the key questions, problems, or hypotheticals that will be covered in class.<sup>263</sup> After posing a question to an individual student before class,<sup>264</sup> the professor can then involve all students in the Socratic dialogue—rather than just a single student—through discussing as a group, polling, or having students write their answers on large sticky notes posted around the room. Also, the professor can ask all the students to write out their answers to the questions posed, and then share their response with another person. After several minutes, ask students to raise their hand if the paper they are reading expressed a cogent issue statement.<sup>265</sup>

The second method to use is large-group discussion. It is critically important that the professor engage in class discussions rather than lecture, encouraging students to question what they are learning rather than passively accept the material.<sup>266</sup> It is apparent that the quality of the interaction with the professor is critical to developing student skills such as critical thinking and deepened learning.<sup>267</sup> To accomplish this active learning technique, the professor should plan for the discussion by identifying the goals, the format, and the questions.<sup>268</sup> To make classroom discussions successful, the professor can be trained in effective classroom-management techniques to ensure students feel safe to participate.<sup>269</sup> Some of those techniques include the professor maintaining eye contact with the speaker.<sup>270</sup> Additionally, the professor should handle bad answers tactfully by correcting the error kindly.<sup>271</sup> Professors also can support the students and develop their critical thinking skills by the use of

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263. See Hess, *supra* note 257, at 406 (suggesting that providing the reading list with the syllabus helps the students begin to identify the themes and content).

264. In my civil procedure class, I post the PowerPoints before class. Those slides contain only questions and hypotheticals. This helps students understand what to focus on while reading and preparing for class.

265. See Hess, *supra* note 257, at 407 (identifying ways to involve all students in class dialogue).

266. See Nold, *supra* note 26, at 19 (“[C]ritical thinking programs using . . . questioning that promotes deeper thinking . . . effectively help[s] students develop critical thinking skills.”).

267. See *id.*

268. See Hess, *supra* note 257, at 407.

269. Cf. *id.* (discussing the need to create an atmosphere of mutual respect).

270. See *id.* at 408.

271. *Id.*

“thinking routines,” which lead students into areas needing further exploration by asking how and why.<sup>272</sup> If the professor combines these methods with a planned-out discussion, students will gain critical thinking skills and motivation to learn the subject.<sup>273</sup>

Third, in addition to large-group discussion, active learning can be encouraged by requiring writing, both in and out of the classroom. This writing can take many forms: papers, briefs, complaints, documents, responses to questions, outlines, timelines, flowcharts, and class reviews.<sup>274</sup> Writing need not consist of major assignments that take a large percentage of the professor’s time. The professor can require small assignments, designed to allow for feedback, in light of the number of students in the course.<sup>275</sup>

The last active learning method to note here is the “flipped classroom.”<sup>276</sup> A professor employing the flipped classroom model moves basic content delivery to outside the classroom, which frees up class time for students to practice problem-solving, self-regulation, and critical thinking.<sup>277</sup> To successfully create a flipped classroom,<sup>278</sup> the professor identifies what they

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272. See Nold, *supra* note 26, at 19.

273. Cf. Hess, *supra* note 257, at 407 (“Good discussions prompt students to use higher-level thinking skills.”).

274. See *id.* at 409 (listing different examples of writing assignments).

275. In my civil procedure class, I ask my students to make timelines of various concepts. They are not hard to grade but they encourage deep learning and help students with problem solving.

276. See Alexander, *supra* note 256, at 280.

277. Cf. *id.* (explaining the benefits of a flipped classroom).

278. There are excellent articles providing information on how to successfully prepare and execute the flipped classroom model. See Alexander, *supra* note 256, at 278–82; Matt Hlinak, *Flipping and Moocing Your Class or: How I Learned to Stop Worrying and Love the MOOC*, 33 J. LEGAL STUD. EDUC. 23, 24 (2016); Manuela Engel, Matthias Heinz & Ralph Sonntag, *Flexibilizing and Customizing Education Using Inverted Classroom Model*, 34 INFO. SYS. MGMT. 378, 379 (2017); Patricia V. Roehling, Lindsey M. Root Luna, Fallon J. Richie & John J. Shaughnessy, *The Benefits, Drawbacks, and Challenges of Using the Flipped Classroom in an Introduction to Psychology Course*, 44 TEACHING PSYCH. 183, 184 (2017); James Boyle, Nathaniel Quail, Xiu Ying Loo & Aileen Linn, *Flipping the Classroom: Is It Worth the Bother?*, 14 CLINICAL TCHR. 137, 137–38 (2016); see also Bernard F. Harris, Janetta Harris, Lora Reed & Maya Zelihic, *Flipped Classroom: Another Tool for Your Pedagogy Tool Box*, 43 DEV. BUS. SIMULATION & EXPERIENTIAL LEARNING 325, 328–31 (2016) (listing best practices for flipped classrooms). *But see* Diane Kenwright, Wei Dai, Emma Osborne, Tehmina Gladman, Peter Gallagher & Rebecca Grainger, “Just Tell Me

want the students to know, understand, and value from the lesson (which should be true with all modalities of teaching). Next, the professor carefully chooses background and informational reading to assign. Once the students have completed the reading, they review an instructor-led voice-over PowerPoint or other video outside of the classroom.<sup>279</sup> It is better for student learning, comprehension, and retention to require students to have some sort of deliverable after they complete the prework for the flipped class, such as a questionnaire, quiz, or study sheet.<sup>280</sup> Once the students are prepared, the professor can then use the classroom time to develop the students' higher level skills such as critical thinking, problem solving, cognitive adaptability, and synthesis. To do this, the options for classroom time are varied: problem sets solved in groups, debates, simulations, group discussions, team teaching, and presentations. Allowing law students to fully prepare for class ahead of time requires self-regulation; having them problem solve in class helps develop critical thinking; and active learning helps students be intrinsically motivated for learning. To add to the intrinsic motivation to learn and develop critical thinking, the law school should invest in high-impact practices across the curriculum.

### C. MAINTAINING AND ASSESSING HIGH-IMPACT PRACTICES ACROSS THE LAW SCHOOL

High-impact practices include community service, collaborative learning groups, and study abroad programs.<sup>281</sup> These practices have been helpful in the undergraduate setting for developing students' skills in critical thinking, problem solving, cognitive adaptability, meta-cognition, and intrinsic motivation.<sup>282</sup> They also can be helpful at the law school level, but

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*What I Need to Know to Pass the Exam!?" Can Active Flipped Learning Overcome Passivity?*, 2 ASIA PAC. SCHOLAR 1, 4 (2017) (noting that students perceive flipped classrooms as inefficient and unpredictable).

279. For my civil procedure class, I use Adobe Presenter and make it available with an MP3 file on The West Education Network (TWEN), but there are many platforms a professor can use. For other options beyond a voice-over PowerPoint see Alexander, *supra* note 256, at 284–85 (listing options such as: Techsmith Camtasia, YouTube, Kaltura Capture Space, Voice Thread, etc.).

280. *See id.* at 286.

281. *See* Kuh, *supra* note 225, at 9–11.

282. *Cf.* Ashley Finley, *A Comprehensive Approach to Assessment of High-Impact Practices*, NAT'L INST. FOR LEARNING OUTCOMES ASSESSMENT 5 (Nov. 2019), <https://www.learningoutcomesassessment.org/wp-content/uploads/2019/>

schools should assess those practices to see if they are producing the skill improvement for which the law school is aiming.<sup>283</sup> Some examples of high-impact practices at the law school level are students giving back to the community; having meaningful engagement with faculty; working in collaborative-learning communities; engaging in field work, capstone projects, internships, and service-learning courses; and studying abroad.<sup>284</sup> The more times a student is involved in these activities, the more likely the student is to report gains in practical competence<sup>285</sup> and to see personal and social development.<sup>286</sup>

While law schools may already have some of these practices, law schools can be intentional about assessing and tracking the effect these practices have on students. Schools should also allow time in the content curriculum for students to engage in these types of practices, and should encourage professors to engage with students fully and meaningfully. As found in undergraduate institutions, the practices and their stated outcome goals for skill development need to be aligned with what employers want to see in their new lawyers (i.e., critical thinking, problem solving, and cognitive adaptability).<sup>287</sup> The law school should then assess this alignment through student focus groups and by asking specific questions as to critical thinking skills. For example, if the law school is looking to increase critical thinking skills through engagement in community service activities, those activities should be restricted to volunteer lawyer projects with an

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11/Occasional-Paper-41.pdf [<https://perma.cc/2K2E-QLRP>] (discussing the idea that “experiences might be scaffolded to encourage learning and development over time”).

283. Though beyond the scope of this Article, assessment of high-impact practices should be done. For those law schools interested in this approach, see generally *id.*

284. *Cf.* Kuh, *supra* note 225. Opportunities in law school can be similar to the types of opportunities Kuh describes.

285. Though beyond the scope of this Article, student engagement in high-impact practices increases retention in the undergraduate programs, increases test scores in underserved communities, and increases self-confidence across all communities of learners. *See* Finley & McNair, *supra* note 217, at 18–20 (demonstrating the way that “high-impact practices can influence students’ perceptions of their learning”).

286. *Id.*

287. *See id.* at 30 (noting that educational institutions should be aligned with the skills that matter to students and employees).

outcome of students improving their critical thinking skills by assisting local attorneys with volunteer lawyer projects.<sup>288</sup>

These high-impact practices need not be successful all the time; assessing the practices and continually improving them is a way to keep engaging law students in their education. If students are involved in helping to improve practices, it also teaches them—through the institutional example—self-regulation and metacognition. It is valuable to teach students how to think about the practices of the organization and to think of ways to improve those practices. After all, “[d]esigning and sustaining an educational environment that results in high-quality learning experiences and equity in student achievement requires a genuine commitment of time and effort, an exploration of the student experience, institutional assessment and data analysis, and the ability and courage to implement change.”<sup>289</sup> Also, to accomplish these goals, law schools do not need to have elaborate or expensive high-impact practices, but instead should focus on promoting student engagement through research projects, meaningful connections with professors, study abroad programs (even if it is through another law school),<sup>290</sup> and participation in community service.

#### D. ASSESSMENT AIMED AT DEVELOPING COGNITIVE ADAPTABILITY AND PROFESSIONAL SKILLS

Assessment has the power to invoke different types of learning and to deepen cognitive engagement,<sup>291</sup> increasing critical thinking and self-regulation. However, the bar exam and other

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288. An easy example of this is a personal one. I do legal work for the volunteer lawyers’ project in Spokane County, Washington. I often have students volunteer to help me with research and client meetings. The students spend 1–3 hours on intake work, but have client contact and practice with research in a real-world context.

289. Finley & McNair, *supra* note 217, at 34.

290. Students report that many skip study abroad experiences because they are not encouraged by their school, or it is just another thing the student has to figure out on their own. *See id.* at 29.

291. Cognitive engagement is necessary to engage the students in deep learning and help the students retain and achieve the desired classroom and institutional outcomes. *Cf.* Amanda Nolen, *Student Motivation and Engagement in Online Spaces*, INST. L. TEACHING & LEARNING (June 10, 2021), <http://lawteaching.org/wp-content/uploads/2021/06/Plenary-1-Nolen-Student-Motivation-and-Engagement-in-Online-Learning-Environments.pdf> [<https://perma.cc/8CM5-6TQB>] (showing cognitive student engagement as necessary in process for persistence, retention, and achievement).



assessment practices used in law schools do not encourage the skills that lawyers need to be successful.<sup>292</sup> Moreover, closed-book exams offer a poor measure of minimum competence to practice law.<sup>293</sup> Time constraints on exams similarly distort assessment of minimum competence, and most multiple-choice questions bear little resemblance to the cognitive skills lawyers use.<sup>294</sup> Further, time-pressured exams do not prepare lawyers for practice.<sup>295</sup> Rather, time-pressure exams measure who can read and type fast, not who has competence in the subject area.<sup>296</sup> By contrast, the practice of law requires time to investigate, reflect, research, and write.<sup>297</sup>

Changing law school assessments can help students develop cognitive adaptability, critical thinking, and self-regulation skills. To get there, it is helpful to understand how students learn. There are three common approaches to learning: deep, surface, and achieving.<sup>298</sup> First, deep learning encourages students to develop an understanding and make sense of what they are learning, and create meaning and make ideas their own.<sup>299</sup> Deep learners focus on the meaning of what they are learning and focus on relating one idea to another, seeing those connections.<sup>300</sup> Deep learners also ask themselves questions about the material, discussing their ideas with others.<sup>301</sup> Questions asked by students and professors play an essential role in the deep-

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292. See Merritt & Cornett, *supra* note 21, at 63. The question the Institute for the Advancement of the American Legal System study looked at was whether the bar exam assesses the competencies necessary to be a competent practicing attorney. *Id.* at 3. The conclusions regarding the types of assessments used in the Bar exam, and their effectiveness of testing whether those can/do assess competencies needed for a practicing lawyer, are also instructive to this Article. *Id.* This is because it helps us understand what types of assessments help professors determine if students are competent in the areas that are important to their profession.

293. *Id.* at 63–64.

294. *Id.* at 64.

295. *Id.*

296. See *id.* at 64 (“In the real world of practice . . . a lawyer who is thorough will ‘chew up and spit out’ one who relies on speed.”).

297. *Id.* at 63.

298. See Hattie & Donoghue, *supra* note 19, at 2 (discussing a model of motivation that is similar but not identical to their own).

299. *Id.*

300. See *id.*

301. *Id.*

learning process.<sup>302</sup> Asking the right questions helps students construct their knowledge, see the holes in their understanding, and index the information in a way that is most helpful to solve problems.<sup>303</sup> These deep learners are self-regulated and intrinsically motivated.<sup>304</sup> Second, surface-level learners aim to reproduce information and learn the facts and ideas, but they see little connection between ideas.<sup>305</sup> Surface learning is necessary for the acquisition of deep learning.<sup>306</sup>

Lastly, achieving-strategy students focus their maximum efforts on passing the test, following directions, and meeting the desired goal.<sup>307</sup> This is done with little regard to what is being learned, and achieving-strategy learners are less self-regulated and less intrinsically motivated.<sup>308</sup> The achieving strategy is most related to the K–12 teaching strategy.<sup>309</sup> What is most devastating about the achieving-strategy students is that learning and effort stops or greatly declines for these students when the extrinsic pressure (grades) is removed and the student no longer has the motivation to learn the subject.<sup>310</sup> Without the reward or punishment of the grade, achieving-strategy students do not perform.<sup>311</sup>

While both surface learning and deep learning are necessary and valuable for student learning, achieving learning is neither

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302. See BAIN, *supra* note 18, at 31 (explaining why questions are crucial to helping to construct knowledge).

303. See *id.*

304. See Ian Clark, *Formative Assessment: Assessment Is for Self-Regulated Learning*, 24 EDUC. PSYCH. REV. 205, 238–39 (2012).

305. See Hattie & Donoghue, *supra* note 19, at 2.

306. *Id.* at 3.

307. *Id.* (describing this as the strategy that utilizes minimum amount of effort for maximum return).

308. Eunbae Lee & Michael J. Hannafin, *A Design Framework for Enhancing Engagement in Student-Centered Learning: Own It, Learn It, and Share It*, 64 EDUC. TECH. RSCH. & DEV. 707, 709 (2016) (explaining that “externally directed learning” can be characterized as “emphasizing compliant understanding, expecting and receiving explicit directions from instructors, and documenting concordance with external expectations”) (citations omitted).

309. Cf. Hattie & Donoghue, *supra* note 19, at 2 (noting that this strategy seems most related to “school outcomes”).

310. See BAIN, *supra* note 18, at 34–35 (“[Students] will often carefully calculate how much they need to achieve to win the proper praise and do no more than that . . .”).

311. *Id.* at 35.

necessary nor helpful to students.<sup>312</sup> Just having performance motivation—learning just to pass the test—is not conducive to maximizing learning.<sup>313</sup> A law professor’s assessments can encourage students to transfer their surface learning of one topic to another topic for deeper learning.<sup>314</sup> Professors can also design their assessment plan to bridge the gap by helping students see patterns, relate and extend ideas, check for differences and similarities, examine arguments, and become actively interested in course content.<sup>315</sup> To encourage students to become actively interested and to maximize learning, the professor can teach students to have goals relating to their upcoming work, encouraging students to have specific intentions to achieve these goals.<sup>316</sup> Thus, goal setting and the right assessments can develop the helpful types of deeper learning which enable critical thinking and self-regulation skills.<sup>317</sup>

### 1. Types of Assessments

Different types of assessments can encourage development of deep, surface, and achieving learning. Assessment types that help students acquire surface learning are taking notes, doing multiple-choice quizzes,<sup>318</sup> performing highlighting exercises, outlining the course material, organizing course notes, and memorizing concepts.<sup>319</sup> Also helpful to obtaining surface-level skills are in-class clicker questions, in-class quick writes, and

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312. See Hattie & Donoghue, *supra* note 19, at 3, 6 (emphasizing that while both surface and deep learning are critical, being motivated by performance is not successful).

313. *Id.* at 6.

314. See *id.* at 3 (“Extended abstract interventions aim at far transfer (transfer between contexts that, initially, appear remote to one another) . . .”).

315. *Id.*

316. See *id.* at 6.

317. *Id.* at 6–7.

318. Although beyond the scope of this Article, readers should be aware of the implicit bias present in multiple-choice exams. See John Rosales & Tim Walker, *The Racist Beginnings of Standardized Testing*, NAT’L EDUC. ASS’N (Mar. 20, 2021), <https://www.nea.org/advocating-for-change/new-from-nea/racist-beginnings-standardized-testing> [<https://perma.cc/P2GG-C3NK>] (“Since their inception a century ago, standardized tests have been instruments of racism and a biased system.”).

319. See Hattie & Donoghue, *supra* note 19, at 3.

quick-response questions.<sup>320</sup> This type of learning and assessment should continue in the classroom, as surface-level learning is a necessary step that allows students to move into deeper learning.<sup>321</sup> However, these types of assessments should be used sparingly as, in general, multiple-choice assessments<sup>322</sup> encourage recall and do not develop a student's deep learning.<sup>323</sup> Thus, multiple-choice tests<sup>324</sup> negatively impact a student's ability to critically analyze and think.<sup>325</sup>

Assessments to help students acquire deep learning on a subject require the students to practice self-regulation, meaning the assessment must clearly articulate what success on the task looks like.<sup>326</sup> These assessments expect students to set goals for their learning and regulate their motivation.<sup>327</sup> Assignments that are beneficial for the development of critical thinking and

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320. See Barefoot, *supra* note 186 (describing these as “simple, end-of-class synthesis tests”).

321. Hattie & Donoghue, *supra* note 19, at 3. Although beyond the scope of this Article, the importance of acquiring surface-level learning before moving to deep learning is like Bloom's “Taxonomy of Learning.” BENJAMIN S. BLOOM, MAX D. ENGELHART, EDWARD J. FURST, WALKER H. HILL & DAVID R. KRATHWOHL, TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS 15 (1956) (“We proceeded to divide the cognitive objectives into subdivisions from the simplest behavior to the most complex.”). In Bloom's “Taxonomy of Learning,” recall and understanding precede the higher-level learning of applying, evaluating, and creating. See Patricia Armstrong, *Bloom's Taxonomy*, VAND. UNIV. (2010), <https://cft.vanderbilt.edu/guides-sub-pages/blooms-taxonomy> [<https://perma.cc/AFW2-2LGQ>]. The student must master each level before moving on to the next level. *Id.* (“[K]nowledge was the necessary precondition for putting [subsequent categories] into practice.”).

322. It is simplistic to say “all” multiple choice tests do not develop deep learning, but, unless carefully crafted, most multiple-choice tests are recall-driven. See BAIN, *supra* note 18, at 29; Hattie & Donoghue, *supra* note 19, at 6 (discussing why performance oriented goals are not conducive to maximum learning given their goal is to pass tests).

323. See BAIN, *supra* note 18, at 29.

324. This is a generalized statement as some professors have been trained or have trained themselves to write multiple-choice questions which engage students in more than surface-level learning.

325. *Cf.* Nold, *supra* note 26, at 18 (“[F]aculty at institutions of higher learning tend to . . . focus tasks on memorization and lower-order cognitive assignments.”) (citation omitted).

326. See, e.g., Hattie & Donoghue, *supra* note 19, at 2–3 (“[S]uccess criteria need[s] to be as clear and specific as possible . . .”).

327. *Id.*

deep learning include making presentations in class, self-assessing their own work, and assessing peer work.<sup>328</sup> Self-reflection assessments in which students are given the opportunity to explain what their knowledge and skills mean to the world and to the practice of law deepens their learning by going beyond simply explaining the knowledge and skills they have acquired.<sup>329</sup> Further, to deepen a student's knowledge, the law professor can explore ways to assess whether students implicate and reflect real-world contexts.<sup>330</sup> If the law professor lacks recent practice experience, the professor should consult a practicing lawyer to understand the types of tasks and challenges lawyers currently face. By doing so, the professor can design an assessment to better reflect the industry standard.<sup>331</sup> For instance, if lawyers are no longer writing long memoranda, then perhaps shorter email assignments are more appropriate.<sup>332</sup> The point is to contextualize the assessment, making it more practice-oriented which will, in turn, deepen the students' learning.<sup>333</sup>

## 2. The Importance of Feedback and Formative Assessments

Perhaps most importantly, law professors should provide detailed feedback on student work when possible.<sup>334</sup> Such feedback is foundational to developing skills critical for a law student's growth.<sup>335</sup> This type of assessment gives the students time

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328. See Nold, *supra* note 26, at 18.

329. See ANNITA NUGENT, JASON M. LODGE, ANNEMAREE CARROLL, RUPERT BAGRAITH, STEPHANIE MACMAHON, KELLY E. MATTHEWS & PANKAJ SAH, HIGHER EDUCATION LEARNING FRAMEWORK: AN EVIDENCE-INFORMED MODEL FOR UNIVERSITY LEARNING 7 (2019).

330. *Id.* (making the proposition to professors that contextualizing assessments is important).

331. See *id.* at 13.

332. Whereas I believe a lawyer must write out the discussion section of a memorandum to hash out the problem in the lawyer's head, it may no longer be necessary to do an entire memorandum with Legal Research and Writing (LRW) students. Perhaps LRW professors should be focusing on the reason for the discussion section (a broad-based, iterative process), rather than the memorandum itself.

333. See NUGENT ET AL., *supra* note 329, at 13 (noting that utilizing real-contextualization can enhance assessment).

334. *Cf.* Nold, *supra* note 26, at 19 (discussing the positive impact of faculty feedback for the development of a student's critical-thinking skills).

335. See, e.g., *id.*

to practice, fail, and improve in a way that high-stakes final exams do not.<sup>336</sup> Formative assessments are defined as “all those activities undertaken by teachers, and[] by their students [in assessing themselves], which provide information to be used as feedback to modify the teaching and learning activities in which they are engaged.”<sup>337</sup> Expecting law students to perform well on an end-of-the-semester exam without any practice is like expecting a sixteen-year-old child to pass a driver’s test without ever getting behind the wheel of a vehicle to practice.<sup>338</sup> Not only does American Bar Association (ABA) Standard 314<sup>339</sup> require law schools to use both summative and formative assessment modalities, formative assessment serves the best interest of law students as it helps build their deficient skills of self-regulation, critical thinking, and problem solving, making students more competent and responsible lawyers.<sup>340</sup>

Formative assessment falls in two camps: assessment *for* learning and assessment *as* learning.<sup>341</sup> Assessment *for* learning is to “monitor the progress of the learner toward a desired goal, seeking to close the gap between a learner’s current status and the desired outcome.”<sup>342</sup> Assessment *as* learning “refers to the collaborative and individual reflection on evidence of learning” in a process where the student and the professor set the learning goals, share the learning intentions and success criteria, and evaluate learning through dialogue, self-reflection, and peer reflection.<sup>343</sup> The objective of formative feedback should be deep in-

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336. See Duhart, *supra* note 28, at 531.

337. Paul Black & Dylan William, *Assessment and Classroom Learning*, 5 ASSESSMENT EDUC.: PRINCIPLES, POL’Y, & PRAC. 7, 7–8 (1998).

338. See Duhart, *supra* note 28.

339. See *ABA Standards and Rules of Procedure for Approval of Law Schools 2020–2021*, A.B.A. (2020), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf) [https://perma.cc/5MZN-HVF4].

340. See WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 171–73 (2007) (discussing the importance and success of formative feedback on training in settings of practice rather than academic settings).

341. See Clark, *supra* note 304, at 208.

342. *Id.*

343. See *id.*

volvement of students in metacognition strategies such as personal goal planning, monitoring, and reflection.<sup>344</sup> This gives the learner the power to oversee and steer one's own learning so that one can become a more committed, responsible, and effective learner. Further, promoting an "it is up to us to learn" thought develops intrinsically motivated learners.<sup>345</sup> Assessment for learning "rests on the understanding that students are data-based instructional decisionmakers."<sup>346</sup> As they watch themselves grow, feeling in control of their success, and believing that continued success is within their reach if they keep trying, students have more confidence and drive to succeed. This, in turn, allows them to become interested in competency rather than in beating others to the top.<sup>347</sup> When formative assessment is done frequently, schools see achievement gains of "one-half to two standard deviations on high-stakes test[ing], and the largest gains made are by low achievers."<sup>348</sup>

While formative assessment is necessary for developing student skills, many professors feel they do not have enough time to give feedback on every student's work. This is easily alleviated by supplying the students with specific guided rubrics and sample answers that are annotated with the professor's comments as to what is good or bad about the sample.<sup>349</sup> While it is true that students often do not recognize from a rubric if they have met the standard or not, they can recognize their successes and failures from an annotated sample answer.<sup>350</sup>

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344. *Id.* at 207 (showing what strategies students will move towards with formative assessment).

345. See Janet Looney, Cosimo Laneve & Maria Teresa Moscato, *Italy: A System in Transition*, in *FORMATIVE ASSESSMENT: IMPROVING LEARNING IN SECONDARY CLASSROOMS* 163, 169 (2005).

346. Rick Stiggins, *From Formative Assessment to Assessment FOR Learning: A Path to Success in Standards-Based Schools*, 87 *PHI DELTA KAPPA INT'L* 324, 328 (2005).

347. See *id.* at 326.

348. *Id.* at 328.

349. When assessing student work in both my civil procedure class and my real estate transactions class, I will provide the students with examples (which I create). I comment on what is good and bad about the examples *and why*. This helps the students self-regulate their performance.

350. I base this opinion on my student conferences with students. When I assign a writing assignment, I provide a rubric and an annotated sample answer. I require the students to review it before meeting with me. With some minor exceptions most students recognize that they met or did not meet the standard by looking at the annotated answer.

Formative assessment that gives detailed feedback to the students need not be just on papers or sample exams. It can take the form of multiple-choice tests that provide the test-taker with the correct answer and the reason why each answer is right or wrong. Most teaching platforms allow professors to create multiple choice quizzes that can accommodate the reason each answer is right or wrong. The professor should spend a considerable amount of time crafting the explanation section so the students can spend time with the explanation, thereby learning why they chose the right or wrong answer. The professor can dedicate office hours or class time to going over the quiz to give further feedback.<sup>351</sup> The professor will also learn from the students in these exchanges.

### CONCLUSION

A storm is brewing for law schools as its students, who are the product of decades of educational policy failures, are now entering graduate education without the necessary skills of self-regulation, intrinsic motivation, and critical thinking.<sup>352</sup> These skills are not being taught due to the misplaced emphasis on memorization and high-stakes standardized testing at the K–12 level. But creative thinking<sup>353</sup> and self-regulation skills are key to law students developing cognitive adaptability, which is necessary for student success in law school and as a practicing attorney.<sup>354</sup>

Undergraduate institutions are making some progress in teaching and developing professional skills. This endeavor cannot be done just at the undergraduate level; law schools must be involved as well. It is the law school's job to prepare students to succeed in law school, to pass the Bar, and be a successful lawyer. What is more, the bar exam is likely to change in the coming

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351. For my civil procedure class, I created a series of quizzes for each unit and a review quiz for the final. The students take these quizzes on TWEN and then can review their answers and my explanations. If the student is still confused, they can make an appointment with me to review the quiz. Many students do meet with me. It is not only a good learning opportunity for them but also a good learning opportunity for me; I often see the problem with my questions while talking to students. This feedback from students through formative assessment is invaluable to me.

352. See Jenkins, *supra* note 22, and accompanying text.

353. The “back-to-the-basics” curriculum encouraged under NCLB discourages creative thinking. See Park, *supra* note 16.

354. See Merritt & Cornett, *supra* note 21, at 6.



years to test both skills and doctrine.<sup>355</sup> It is urgent, then, that law schools begin to adapt their teaching methods and curriculum to prepare law students for this change. To do this, law schools can develop assessment plans, both inside the classroom and as an institution, which are aimed at encouraging deep learning and intrinsic motivation. Schools can also broaden their curriculum to incorporate student seminars to help develop critical thinking skills and self-directed learning. Although law schools cannot reverse the damage of federal policy on education and its focus on high-stakes, standardized testing, it can serve as a harbor in the storm.

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355. See generally Nat'l Conf. of Bar Examiners Testing Task Force, *supra* note 52.