

Chapter 4

REVISITING THE CHARACTERISTICS OF EFFECTIVE EDUCATION

A. A REVIEW OF TEACHING AND LEARNING THEORY

By Michael Hunter Schwartz

1. Introduction

BEST PRACTICES FOR LEGAL EDUCATION¹ drew extensively on learning and teaching theory from other disciplines when discussing teaching theory in the section “Best Practices for Delivering Instruction, Generally.”² The book gave many suggestions for improving classroom and clinical teaching. Since the book was published, many law teachers have answered the call to focus on improved teaching both in scholarship and their teaching. Indeed, the teaching principles described in BEST PRACTICES are at the heart of many attributes of the great teachers profiled in a recently published volume WHAT THE BEST LAW TEACHERS DO.³ This short section outlines key and newest principles in learning and teaching theory and summarizes the attributes of those excellent teachers.⁴

While related, teaching theory and learning theory are not synonymous. Teaching theory seeks to identify and explain the teaching behaviors and activities that teachers can adopt to help their students learn. Learning theory seeks to identify and explain the process by which students transform what a teacher tries to teach (knowledge, skills, values) into a part of what the student knows, is able to do, or values. This short section outlines the key and newest principles in both fields and explores the law school-specific recent developments. It is a best practice for teachers to deepen their understanding of learning theory and teaching theory and employ those insights to improve their teaching. Of course, teachers have many options for considering how to employ those insights.

¹ ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

² *Id.* text at notes 299–536.

³ MICHAEL HUNTER SCHWARTZ, GERALD F. HESS & SOPHIE SPARROW, WHAT THE BEST LAW TEACHERS DO (2013).

⁴ See also Chapter 5, Section A, *The Socratic Method*, below, for a thorough discussion of the “Rates of Perceived Mental Exertion” (“RPE”) of the Socratic and other teaching methods, and recommendations for how to vary levels of student exertion in order to advance learning.

2. Key Principles of Learning Theory

The goal of all teaching is learning. Robert M. Gagne, one of the leading educational thinkers of the 20th century, captures the widespread consensus definition of learning: learning is “a change in human disposition or capability which persists over time, and which is not simply ascribable to process of growth.”⁵

While it is common for educational researchers to claim that they have identified a new learning theory, most agree that learning theories fall into three core categories: behaviorism, cognitivism, and constructivism.⁶ For legal educators, the two most relevant theories are cognitivism and constructivism.⁷

Cognitive theory focuses on what occurs inside the brain during the learning process.⁸ According to cognitive theory, students cannot apply skills, values, and knowledge to real-world or simulated problems unless they have stored the skills, knowledge, and values in their brains in an organized, meaningful, and useable way.⁹ Hundreds of pieces of information reach our students’ senses every moment. The process of choosing a focus is known as “selective attention.”¹⁰ If students do focus their attention on what we are teaching, what we teach reaches their working memories.¹¹ Students’ working memories can retain only a small amount of learning and only for a limited time, but, when students do something active to store their learning in in their brains in a meaningful way, the information becomes stored in students’ long-term memory.¹²

For this reason, engaging students in active learning activities is crucial to learning.¹³ Active learning activities are those in which students cannot simply sit and listen but must mentally process the lessons teachers want them to learn. If students are writing about the lessons, discussing them with a peer, figuring out how they relate to each other and to what they already know, or using the concepts to solve a problem, students are engaged in active learning. Even if the students are merely thinking about their process of learning, they are more likely to retain them. The more deeply students work with what they are learning, the more likely they are to remember and use it.¹⁴ As readers might imagine, the storage of skills in the brain is

⁵ ROBERT M. GAGNE, *THE CONDITIONS OF LEARNING AND THEORY OF INSTRUCTION* 3 (1985).

⁶ Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 365 (2001).

⁷ Behaviorists focus on the role of instruction in strengthening the connections between a stimulus and its proper student response by reinforcing proper responses and discouraging improper responses. *Id.* at 367.

⁸ See MICHAEL HUNTER SCHWARTZ, SOPHIE SPARROW & GERALD HESS, *TEACHING LAW BY DESIGN, ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* 4-5 (2009) [hereinafter SCHWARTZ, SPARROW & HESS, *TEACHING LAW BY DESIGN*].

⁹ *Id.*

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

infinitely more complex and less understood than the storage of knowledge. The storage of skills is understood to be like an interconnected web with all the many alternative possible procedures, connections, possibilities, hypotheses, and possible outcomes linked together in multiple directions.¹⁵

One relatively new concept in the cognitivist literature, neuroplasticity, is a very exciting one for educators. Previously, the brain's capacity was understood as fixed, but recent studies have found that the brain is capable of generating new neural pathways as a result of engaging in the learning process.¹⁶ This new understanding debunks notions of intelligence as fixed and immutable and suggests that legal educators have greater opportunity to help students transform themselves.

Constructivist theory focuses on the process required for new learning to become a part of who the students are. Three crucial learning principles derive from constructivist research. First, constructivists define learning as the process of constructing an interpretation from an experience.¹⁷ When students actively engage with cases, statutes, and other materials and reflect on that process, they develop personal understandings.¹⁸ Those personal understandings, having been entirely generated within the student's mind, become a part of who the students are.¹⁹

Constructivists also champion real-world experiences, arguing that such experiences are critical to effective learning activities and assessment.²⁰ Students learn when their opportunities to construct understandings feel authentic to them.²¹

Third, constructivists believe social interaction plays a critical role in genuine learning.²² The process of engaging in negotiating meaning with their peers produces the learning.²³ Constructivists cite the hundreds of studies demonstrating the superior learning that occurs in cooperative learning groups to support this assertion.²⁴ Constructivists assert that groups are so effective because they expose students to multiple perspectives and, as a result, students develop complex approaches and understandings.²⁵

¹⁵ *Id.* at 6.

¹⁶ Jill L. Kays, Psy.D, Robin A. Hurley, M.D., & Katherine H. Taber, *The Dynamic Brain: Neuroplasticity and Mental Health*, 24-2 J. NEUROPSYCHIATRY & CLIN. NEUROSCIENCES 118, 120 (2012) ("Multiple studies have documented neuroplastic changes in healthy human brains as a result of normal processes, such as learning.").

¹⁷ SCHWARTZ, SPARROW & HESS, *TEACHING LAW BY DESIGN*, at 7.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

3. Key Principles of Teaching Theory

The term “teaching theory” is a bit of a misnomer because it suggests that the field involves academics imagining what teaching practices make a difference. In fact, in the context of teaching, practice has so influenced theory that the precepts that researchers label “teaching theory” are grounded in and have been finely refined by hundreds of studies of classrooms. This section identifies eleven core principles that have emerged from this research and links those eleven principles to the recent study of twenty-six extraordinary law teachers featured in *WHAT THE BEST LAW TEACHERS DO*.²⁶ The eleven core teaching principles are: expertise, respect, caring, expectations, passion, humility, authenticity, preparation, active learning, variety, clarity, and formative feedback.²⁷

Expertise. The best teachers know their subjects extraordinarily well. Over and over again, the students of the twenty-six teachers featured in *WHAT THE BEST LAW TEACHERS DO* report that their teachers possess “vast,” “encyclopedic,” knowledge about their subjects, about law practice, and about teaching.²⁸ Students believe their best teachers simply know more than their other teachers, know it better, and have the material better organized in their minds and in their teaching work.²⁹

Respect. The best teachers also create a classroom culture of respect, in which respect goes in every direction: teacher to student, student to teacher, student to student, teacher to other employees in the law school building, and students to other employees in the law school building.³⁰

Caring. In addition and closely related to feeling respected, students in the best law teachers’ classes are convinced that their teachers care deeply about them as individuals.³¹ The students feel safe to take risks and make mistakes in these teachers’ classes because they know their teachers’ feedback will be constructive and that their teachers want them to succeed.³²

Expectations. The best teachers have and communicate high expectations. Their students understand that their teachers expect them to perform at the level of competent, professional, and prepared practitioners.³³ Equally significantly, they express extraordinary confidence that their students can meet and even exceed those expectations.³⁴ Students respond by exceeding their own expectations of

²⁶ SCHWARTZ, HESS & SPARROW, *WHAT THE BEST LAW TEACHERS DO*.

²⁷ In addition to these suggestions, *BEST PRACTICES* suggested that teachers should use context-based instruction (text at notes 453-82), enhance learning with technology (text at notes 515-33), model professional behavior (text at notes 412-15), encourage collaboration (text at notes 358-63), and continuously strive to improve their teaching (text at notes 299-301).

²⁸ SCHWARTZ, HESS & SPARROW, *WHAT THE BEST LAW TEACHERS DO* at 66-67.

²⁹ *Id.* at 67, 181-82.

³⁰ *Id.* at 81-86.

³¹ *Id.* at 54-55.

³² *Id.* at 55.

³³ *Id.* at 127-31.

³⁴ *Id.* at 131-34.

themselves.³⁵

Passion. The best teachers are passionate about their subjects, about the joy of teaching, and about their students' learning.³⁶ The teachers frequently manifest enthusiasm for their subjects, for the law, for social justice, and for the classroom experience itself.³⁷ The passion creates a classroom environment the students experience as exciting and fun.³⁸

Humility. A core human quality common among the best law teachers is an understanding that the teaching enterprise is not about the teacher but instead about the students' learning.³⁹ The students of the best law teachers recognize their teachers' absence of ego in the enterprise, characterizing their teachers as "humble," "modest," and "unpretentious."⁴⁰ The best teachers manifest their humility by, for example, taking personal responsibility when their students do not learn and admitting when they do not know an answer to one of their students' questions.⁴¹

Authenticity. It is common for great law teachers to see teaching as an extension of their authentic selves;⁴² they believe, and their students confirm, that they are most convincing to their students when their students believe their actions are genuine.⁴³

Preparation. The success of the best law teachers is a product of their hard work. They read and re-read their materials over and over, rewrite or even re-do from scratch their teaching notes, and imagine themselves as students reading the materials for the first time.⁴⁴ Their students recognize and appreciate the effort.⁴⁵

Active learning. The best law teachers recognize that students learn best when they are doing, when they are speaking, writing, arguing, role-playing, and solving problems.⁴⁶

Variety. Nearly all the teachers studied for WHAT THE BEST LAW TEACHERS DO deliberately vary the teaching methods they use in their everyday teaching, and they do so because they want to make sure all their students learn.⁴⁷ In any given class session, you might see one of these teachers use Socratic-style questioning, lecture, small group work, visuals, and videos.⁴⁸ Their students see this effort as reflecting

³⁵ SCHWARTZ, HESS & SPARROW, WHAT THE BEST LAW TEACHERS DO at 133–35.

³⁶ *Id.* at 48–49.

³⁷ *Id.* at 48–51.

³⁸ *Id.* at 50–52.

³⁹ *Id.* at 58–61.

⁴⁰ *Id.* at 58.

⁴¹ *Id.* at 59–61.

⁴² *Id.* at 47.

⁴³ *Id.* at 46–47.

⁴⁴ *Id.* at 152–55.

⁴⁵ *Id.* at 155–56.

⁴⁶ *Id.* at 211–16.

⁴⁷ *Id.* at 235–37.

⁴⁸ *Id.* at 236–37.

their teachers' commitment to their students' learning.⁴⁹

Clarity. The best law teachers are extraordinary explainers.⁵⁰ They are great at breaking down complicated concepts into digestible building blocks, and they excel at finding multiple ways to communicate challenging concepts so that every student in the class has a chance to learn.⁵¹ They use diagrams and metaphors to illustrate key concepts, and they create new ways to frame the ideas with which their students struggle, not only deepening understanding but also revealing layers of meaning their students relish.⁵²

Formative feedback. The best law teachers understand that formative feedback is essential to the learning process.⁵³ The teachers use multiple and varied approaches to providing opportunities for their students to practice the skills performances they will be graded on and obtain feedback on those practice efforts, including written and oral practice hypotheticals, group exercises, and multiple-choice questions, and they provide oral and written feedback.⁵⁴

In short, the best law teachers do what the best teachers in any educational setting do.⁵⁵

4. Conclusion

Law teachers can work to implement many of these and other ideas that they may have as they deepen their understanding of adult learning theory. And, law schools can provide incentives for doing so, including hosting workshops, providing financial rewards, and funding participation in teaching conferences.⁵⁶ This commitment may not only be a best practice, but may also be an imperative for those law schools that seek to ensure that their graduates are prepared for the practice of law.

⁴⁹ *Id.* at 211.

⁵⁰ *Id.* at 230–32.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 269–72.

⁵⁴ *Id.*

⁵⁵ See generally KEN BAIN, *WHAT THE BEST COLLEGE TEACHERS DO* (2014).

⁵⁶ See Chapter 7, Section A, *An Institutional Culture of Assessment for Student Learning*; Chapter 8, Section C, *Leadership and Curricular Change*, below.

B. AN EFFECTIVE AND WELCOMING ENVIRONMENT FOR LEARNING

1. HUMANIZING THE DELIVERY OF LEGAL EDUCATION

By Amy C. Bushaw¹

a. Introduction

Concerns about the negative effects of law school on law student mental health and well-being date back more than forty years. *BEST PRACTICES FOR LEGAL EDUCATION* recognized those concerns, reviewing the criticisms of legal education and relevant empirical research at length.² Although law students enter law school at least as healthy as the general population, significant declines in mental health occur in the first year, and these problems continue throughout law school and into the profession. Since *BEST PRACTICES* was published, new research has confirmed these concerns.

Among its key recommendations, *BEST PRACTICES* urged law schools to create and maintain healthy teaching and learning environments.³ In recent years, legal education has seen significant developments in attempts to humanize legal education (the now prevailing terminology). These efforts encompass adaptations in teaching methodology, but increasingly contemplate expansions in the content of the program of instruction as well. There is growing awareness that legal education continues to leave students ill-equipped to manage emotional and psychological challenges of practice. It is now a best practice to attend to the well-being of law students during their time in law school, but also to adjust the content of legal education to position students to thrive as professionals once they graduate.

The general recommendations of *BEST PRACTICES* remain valid. At a minimum, legal educators should seek to do no (or at least less) harm. Educators should eliminate or modify aspects of their teaching or other programs that are distressing to law students yet do not serve important pedagogical purposes. Law teachers should recognize that even important pedagogical ends may have the potential to undermine law student well-being. Law teachers should alert students to this fact so students will know what to expect and recognize how law school is affecting them. The same is true of law practice — students should enter practice aware of the occupational hazards they might face. It is not enough to simply warn students of potential adverse consequences; law teachers should help students to develop effective and realistic coping strategies for the stressful yet perhaps unavoidable aspects of law school and law practice. Ideally, law teachers should go beyond alleviating law student and lawyer distress, and should nurture attitudes, habits, and skills that correlate strongly with long-term well-being and life satisfaction.

¹ Readers for this section were Lawrence S. Krieger, Todd David Peterson, and Julie K. Sandine.

² ROY STUCKEY AND OTHERS, *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007) [hereinafter *BEST PRACTICES*], text at notes 1, 76–100.

³ *BEST PRACTICES*, text at notes 321–415.

Specific practices in this arena continue to develop, and techniques to implement them are likely to be highly context dependent. The following pages synthesize and expand on the discussion of law student well-being contained in BEST PRACTICES and review recent developments.

b. Concerns About Law Student Well-Being

BEST PRACTICES surveyed concerns about the effect of law school on the well-being of law students.⁴ Recent research confirms the continuance and prevalence of these concerns.⁵ When they enter law school, students appear to have levels of enthusiasm and engagement that mirror or exceed those of the general population. Yet as they proceed through their studies, many grow increasingly passive or cynical. Some exhibit symptoms of depression, anxiety, aggression, social alienation, and other serious forms of dysfunction.⁶ These effects may persist into practice, as lawyers may suffer higher rates of depression, alcoholism, and other substance abuse than the employed population at large.⁷ The distress law students and lawyers experience not only impedes their effectiveness,⁸ it may compromise their ability to live lives that they perceive to be of meaning and value. Tragic reports of law student and lawyer suicide underscore the potential severity of the problem.⁹

The teaching and learning environment in law school contributes to this problem but does not fully explain it. Some scholars have also examined the inherent nature of legal education and law practice, and have concluded that aspects of it, if left unexamined and unchecked, might have deleterious effects. Some of the literature is anecdotal, yet authors have also drawn insights from various disciplines including

⁴ BEST PRACTICES, text at notes 76–100.

⁵ See, e.g., Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883 (2007) [hereinafter Sheldon & Krieger, *Understanding the Negative Effects*]; Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 357 (2009) [hereinafter Peterson & Peterson, *Stemming the Tide*].

⁶ BEST PRACTICES, text at notes 76–100 and the sources cited therein. See also Sheldon & Krieger, *Understanding the Negative Effects* (comparing the results of studies conducted at two law schools); Peterson & Peterson, *Stemming the Tide* at 408-416 (describing the results of a study at The George Washington University Law School).

⁷ Comprehensive evidence on this point is understandably elusive; however, some studies have found high rates of psychological distress and substance abuse among practicing lawyers. Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531, 532 (2008) (discussing evidence of mental health and substance abuse problems among lawyers as compared to other populations).

⁸ Substance abuse, for instance, is often a factor in attorney disciplinary actions. Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265, 268 (1997).

⁹ See, e.g., Rosa Flores & Rose Marie Arce, *Why Are Lawyers Killing Themselves?*, CNN, <http://www.cnn.com/2014/01/19/us/lawyer-suicides/>, archived at <http://perma.cc/N3T6-WZ55>. A foundation created in the wake of the suicide of law graduate Dave Nee recently launched a program specifically for law students suffering mental illness or contemplating suicide. *LawLifeline*, DAVE NEE FOUNDATION, <http://www.daveneefoundation.org/programs/lawlifeline>, archived at <http://perma.cc/ZHR3-XK4D>.

anthropology,¹⁰ biology,¹¹ neuroscience,¹² and psychology¹³ to illuminate factors that contribute to law student and lawyer distress. The literature and knowledge base surrounding law student and lawyer distress is now rich and diverse. A discussion of some salient aspects follows.

BEST PRACTICES explained the educational shortcomings of an overemphasis on the narrow skill of “thinking like a lawyer” — and in particular the near exclusive reliance on case analysis to teach that skill.¹⁴ In addition to its substantive shortcomings, overemphasis on this pedagogy can undermine law student well-being. Constant assessment of risk can inculcate and reward pessimism and undercut optimism and hope.¹⁵ Advocacy on behalf of others can divorce students from their individual interests and values, and downplay ethical and social concerns.¹⁶ “Thinking like a lawyer” can habituate students to repress their own emotional reactions and desensitize them to the suffering of others.¹⁷ All of these effects can persist into practice, leading lawyers to experience a reduced sense of well-being, diminished sense of self, and damaged personal relationships.

Adversarial aspects of law study and practice can also undermine well-being. The zero-sum nature of law school grading curves can lead to unhealthy competition, to

¹⁰ See, e.g., ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL* (2007) (employing the techniques of anthropological linguistics to study the transformation law students undergo in first-year classes).

¹¹ See, e.g., Barbara A. Glesner, *Fear and Loathing in the Law Schools*, 23 *CONN. L. REV.* 627 (1991) (critiquing law school stress through the lens of biology, psychology and other sciences).

¹² See, e.g., Debra S. Austin, *Killing Them Softly: Neuroscience Reveals How Brain Cells Die from Law School Stress and How Neural Self-Hacking Can Optimize Cognitive Performance*, 59 *LOX. L. REV.* 791 (2013); Robin Wellford Slocum, *An Inconvenient Truth: The Need to Educate Emotionally Competent Lawyers*, 45 *CREIGHTON L. REV.* 827 (2012) [hereinafter Wellford Slocum, *An Inconvenient Truth*].

¹³ Perhaps the most influential scholarship in this realm is that of Larry Krieger and Ken Sheldon, some of which is cited in BEST PRACTICES at note 76 and elsewhere in this section. See also Peterson & Peterson, *Stemming the Tide* (applying strengths-based approach of positive psychology to study law student distress and well-being); Martin E.P. Seligman et al., *Why Lawyers Are Unhappy*, 23 *CARDOZO L. REV.* 33 (2001) (drawing on the principles of positive psychology to examine lawyer distress and well-being) [hereinafter Seligman et al., *Why Lawyers Are Unhappy*].

¹⁴ BEST PRACTICES, text at notes 183–89 (discussing overemphasis on narrow conceptions of “thinking like a lawyer”), text at notes 420–454 (discussing overreliance on the case method in the context of Socratic dialogue). Cf. MERTZ, *THE LANGUAGE OF LAW SCHOOL* (examining and critiquing the language teachers use while employing the Socratic method and other conventional legal pedagogies).

¹⁵ See, e.g., Allison D. Martin & Kevin L. Rand, *The Future’s So Bright, I Gotta Wear Shades: Law School Through the Lens of Hope*, 48 *DUQ. L. REV.* 203 (2010) (discussing the results of a study on optimism and hope among law students). Cf. Martin E.P. Seligman et al., *Why Lawyers Are Unhappy* at 39–41 (2001) (discussing pessimism among law students and lawyers and its potential effects on effectiveness and well-being, and noting that the results of a study at the University of Virginia indicated that a pessimistic explanatory style correlated with law school success).

¹⁶ MERTZ, *THE LANGUAGE OF LAW SCHOOL* at 4, 95 (concluding that law teaching and texts tend to focus on form, authority, and legal-linguistic contexts rather than content, morality, and social contexts).

¹⁷ *Id.* See also Peter H. Huang, *Tiger Cub Strikes Back: Memoirs of an Ex-Child Prodigy about Legal Education and Parenting*, 1 *BRIT. J. AM. LEGAL STUD.* 297, 306 (2012) (concluding non-clinical legal education generally teaches that lawyering is about logical analysis not feelings); Melissa L. Nelken, *Negotiation and Psychoanalysis: If I’d Wanted to Learn about Feelings, I Wouldn’t Have Gone to Law School*, 46 *J. LEGAL EDUC.* 420, 422 (1996).

“us-versus-them” thinking, and to anxiety and other forms of psychological distress. The real or perceived significance of grades in the selection process for judicial clerks and law firm associates may exacerbate these effects. The maladaptive strategies students develop to cope with adversarialism and competition in law school may leave them ill-prepared to cope with analogous stresses of practice.¹⁸

As noted in the upcoming subsections, students can take measures to inoculate themselves against some of the pernicious aspects of legal education and law practice. In the absence of express guidance from law teachers and staff, however, students may not have the knowledge or resources to take those steps. Further, students may perceive that the demands of legal education and law practice leave little room for self-care, interpersonal relationships, or outside interests. Extreme time demands are not unique to law school or law practice. The “time famine” many students and lawyers experience, however, may impair their capacity to recognize distress or develop strategies to alleviate it. This is particularly true if students learn to marginalize their feelings and come to believe that that safeguarding their own well-being is unimportant in relation to other law school priorities.

c. Factors that Support Law Student and Lawyer Well-Being

Scientific findings provide helpful insight into the factors that support law student and lawyer well-being. In recent decades, scholars and practitioners in medicine, neuroscience, and psychology have broadened their focus from disease, dysfunction, and distress to include a study of largely healthy populations. Recent work examines factors that contribute to positive mood, to short-term happiness, and to long-term feelings of satisfaction, meaning, and value. Although the research is multifaceted and not entirely in accord, it is now possible to say that there is an emerging science of happiness.¹⁹

It is clear that genetics, early experiences, and circumstances all contribute to an individual’s propensity for well-being.²⁰ Nevertheless, there are some attitudes, habits, and skills people can cultivate as adults that are likely to contribute to enduring feelings of well-being. Importantly for educators, it is possible to support the development of these qualities in others. Psychology researchers, for instance, have identified autonomy, the prominence of intrinsic values and motivations, feelings of competence, and experiences of “relatedness” as being particularly important to well-being.²¹ Although they are interrelated, the remainder of this subsection intro-

¹⁸ See, e.g., Seligman et al., *Why Lawyers Are Unhappy* at 41–42, 46–51 (discussing the zero-sum nature of law practice as well as the potential effects of high pressure and low decision latitude on lawyer well-being).

¹⁹ NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER* 18–48 (2010) (explaining and summarizing various aspects of the emerging science of happiness).

²⁰ SONIA LYBOMIRSKY, *THE HOW OF HAPPINESS* 20–21 (2008) (stating that well-being is determined 50% by genetics, 10% by circumstances, and 40% by things within an individual’s control).

²¹ Lawrence S. Krieger, *The Most Ethical of People, the Least Ethical of People: Proposing Self-Determination Theory to Measure Professional Character Formation*, 8 U. ST. THOMAS L.J. 168, 170–171 (2011) (summarizing self-determination theory and relevant psychological research). This is by necessity a summary and incomplete list of the factors researchers have identified. See, e.g., Peterson & Peterson,

duces each of these aspects of well-being in turn. The factors that contribute to well-being are not static; some practices tend to undermine them, while others nurture them. The following subsection suggests specific practices to support these aspects of well-being in law students.

Autonomy correlates very strongly with subjective feelings of well-being. Roughly speaking, autonomy refers to the sense that an individual has the flexibility and the power to devote energy and time to ends he chooses, consonant with that individual's sense of self and values. The exercise of choice to engage in activities that are intrinsically valuable — activities that the individual enjoys or perceives to further important personal values — proves especially important. If an individual regularly feels that he does not have ability to choose — he feels someone is dictating what he must do — well-being is likely to suffer. Likewise, if extrinsic motivations drive an individual to act — for instance, if she is engaging in demanding activities solely to please others, to gain power, or to achieve recognition — she is less likely to feel that the activity has intrinsic meaning or value, and this may undercut her sense of well-being.

Some evidence suggests that over the course of their law school careers, many students' values and motivations shift from intrinsic to more extrinsic ones.²² Students may enter law school with a generalized desire to help people or serve society, yet leave motivated to achieve power, prestige, or prosperity. It is not entirely clear what causes this shift. An overemphasis on external markers of success such as grades, law review membership, or other competitive measures could well contribute. So may increasing anxiety about a difficult and uncertain job environment. Psychological research suggests that, if permanent, this shift is likely to undermine the students' long-term well-being.

A felt sense of competence or efficacy also correlates strongly with long-term well-being. Law students and lawyers are more likely to feel engaged, energetic, and satisfied if they believe they have or can reasonably develop the tools necessary to complete the job at hand. Tasks that are not sufficiently challenging may lead to boredom; tasks for which the individual feels ill-prepared may loom as overwhelming and result in anxiety, procrastination, disengagement, or sense of failure.

Another factor that correlates highly with long-term well-being is a strong sense of relatedness to others. Individuals who experience relatedness have meaningful, appropriate, and mutually supportive relationships with colleagues, clients, family, and friends. They may work in isolation from time to time, but generally they believe they are not in it alone.

Stemming the Tide at 385–408 (examining learned optimism, the “broaden-and-build” theory of positive emotions and strengths theory in the context of law student well-being).

²² See, e.g., Lawrence S. Krieger, *Institutional Denial about the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 122 (2002); Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261 (2004); Sheldon & Krieger, *Understanding the Negative Effects*.

d. Best Practices to Promote Law Student and Lawyer Well-Being

BEST PRACTICES articulated a number of recommendations that bear a direct relationship to law student well-being.²³ In line with these recommendations, there is a growing recognition of the need to humanize the delivery of legal education. In 2007, the Association of American Law Schools approved a new section dedicated to the development of research and teaching methods to promote law student and lawyer well-being.²⁴ The Section on Balance in Legal Education has sponsored publications, conducted programs, and gathered other resources related to law student and lawyer distress and well-being, and on methods to humanize the delivery of legal education. Many of these resources are available through the Section's website.²⁵ During the same period, a number of law schools, teachers, and staff have taken steps to alleviate the potentially toxic effects of law school and to prepare students better for the emotional and psychological rigors of law practice. Student services and academic support personnel have launched broad-based programs for students. Law teachers have adapted the content and delivery of their courses to address law student distress and well-being.

At many law schools, however, issues of law student distress remain the exclusive domain of overworked staff. Students may not recognize the deterioration in their well-being until they experience academic difficulties, and then may not understand the sources of it or the avenues for obtaining help. Coordinated and proactive efforts to nurture law student well-being may be nascent or absent altogether. Until law student well-being receives widespread institutional attention and support, students who experience distress are likely to feel marginalized and alienated. Those who do not experience distress may develop attitudes and habits which, unchecked, will impair their long-term well-being once they enter practice. Human happiness is a complex dynamic, and many factors appear to contribute to it. Nonetheless, psychology suggests educators can and should take steps to support attitudes, habits, and skills that correlate strongly with well-being.

²³ See, e.g., BEST PRACTICES, text at notes 236, 263–67 (discussing nurturing quality of life), text at note 254 (articulating the connection between personal integrity and well-being), text at notes 321–415 (recommending that law teachers create and maintain healthy learning environments), text at notes 630–31 (discouraging the use of Socratic dialogue as a tool to humiliate or embarrass students). BEST PRACTICES also couched a number of highly relevant goals, practices, and recommendations in terms of their effect on law student and lawyer effectiveness. See, e.g., BEST PRACTICES, text at notes 190–97 (discussing self-efficacy), text at notes 554–56 (discussing the development of interpersonal skills in the context of experiential courses). As a sense of competence correlates strongly with well-being, these discussions are interrelated.

²⁴ The Section on Balance in Legal Education gained provisional approval in 2007 and permanent status in 2009. For a history on the humanism movement in law and the formation of the Section on Balance in Legal Education, see Marjorie A. Silver, *Symposium Introduction: Humanism Goes to Law School*, 28 *TOURO L. REV.* 1141, 1142–45 (2012) [hereinafter Silver, *Humanism Goes to Law School*]; Bruce J. Winick, *Foreword: What Does Balance in Legal Education Mean?*, 60 *J. LEGAL EDUC.* 107 (2010).

²⁵ *AALS Section on Balance in Legal Education*, http://www.law.fsu.edu/academic_programs/humanizing_lawschool/, archived at <http://perma.cc/978F-GG2D>.

i. Institutional Efforts to Promote Law Student Well-Being

Some law schools have instituted broad-based programs, informed by the principles of psychology and other fields of science, to alleviate law student distress and promote long-term well-being.²⁶ Other schools dedicate elective courses to law student or lawyer well-being.²⁷ Yet others offer optional non-credit programs to encourage law student well-being.²⁸ Although the number of such programs and courses appears to be increasing, as of this writing they remain relatively rare. Anecdotally, however, the number of law teachers who seek to humanize the delivery of their own, more traditional courses is on the rise.

ii. Practices Every Law Teacher Should Consider to Enhance Law Student Well-Being

A short (and necessarily incomplete) list of practices every law teacher should consider follows, along with specific examples of each.

- *Expressly Acknowledge the Importance of Well-Being And Conditions that Undermine or Promote Well-Being*

Law students who suffer may do so in silence. As a result, the fact that their law students are in distress may be invisible to law teachers (or, for that matter, to the students themselves). Law teachers should pay attention to signs of distress or, conversely, well-being among their students. Certainly, if an individual student's

²⁶ For example, George Washington University Law School has instituted an Inns of Court program. Each member of the incoming class joins an Inn, led by an advisory team of faculty, administrators, staff, and students. Students remain in their Inns throughout their law school careers. The purpose of the program is not merely the delivery of information or the exposure to skills. The Inn structure helps to provide a community for each student. Other schools include well-being components in legal writing courses, professionalism courses, or other parts of the required curriculum. For instance, Mercer University School of Law includes a course on professionalism in its required first-year curriculum. The course incorporates exposure to issues of law student and lawyer well-being and satisfaction. Some schools have introduced elective courses into the first-year to allow students earlier opportunities to exercise autonomy and explore their passions and strengths.

²⁷ Examples include *Well-Being and the Practice of Law* (Duke Law School), *The Quest for a Satisfying Career in Law* (UMKC School of Law), and *Legal Careers and Life Satisfaction* (University of Virginia School of Law). Although not expressly denominated as such, other courses may be designed to foster law student and lawyer well-being, for instance *Lawyers in Society* at Lewis & Clark Law School (designed to encourage students to reflect on the profession they are about to enter and to shape the life they plan to lead). A number of law teachers also dedicate courses to specific non-analytical aspects of practicing law. Some of these courses are mentioned in the upcoming discussion of specific practices to help students develop a sense of competence in a broad range of skills, below.

²⁸ For instance, during the fall semester, Vanderbilt Law School's *Professionalism in Practice* program (a recipient of the ABA Gambrell Professionalism Award) offers weekly sessions to first-year students. Topics include, among other things, professional values, positive psychology, and emotional intelligence. The Dean of Students' Office organizes a series of activities in collaboration with student groups to complement the program. For a general description of the program and other initiatives at Vanderbilt Law, see Silver, *Humanism Goes to Law School* at 1145–1151. See also *HLS Wellness*, <http://hls.harvard.edu/dept/dos/wellness/>, archived at <http://perma.cc/4M5Y-34UN> (describing wellness programming offered through the Dean of Students' Office at Harvard Law School).

mental health seems severely compromised, and, in particular, if a student appears violent or suicidal, a law teacher should involve appropriate mental health professionals. More routinely, law teachers should remain alert to the non-analytical aspects of classroom dynamics, and use that awareness to inform their teaching.²⁹ Ultimately, if the teacher notices that the students are in distress, the teacher might speculate about the possible causes and aim to eliminate or counter those that are not pedagogically necessary. The mere act of noticing, without judgment, classroom dynamics may go a long way toward helping a law teacher adjust his or her teaching to better support the well-being of the students.

Law teachers should speak openly about the importance of law student well-being. They should clarify that it is an appropriate topic for candid and respectful discussion, and is not the exclusive domain of student services or academic support personnel. It is helpful to educate students about some of the aspects of legal education and law practice that have the potential to undermine well-being.³⁰ Law teachers should acknowledge that law student and lawyer distress is common and worthy of attention. They should avoid implying that distress is limited to students who are struggling academically or a sign the student experiencing the distress will not be able to “cut it” in practice. Instead, they could illuminate practices and attitudes that help alleviate distress. They might emphasize that nurturing well-being leads to success, not the other way around.³¹

Some law teachers provide structured opportunities for students to pay attention to the conditions that affect their own well-being. Some law teachers offer instruction in meditation or other contemplative practices.³² Others build in opportunities for students to reflect on their experiences in journals, reflection papers, or other forms of written work.³³ Yet others simply pause at appropriate moments in class to note

²⁹ Some law teachers, for instance, use a checklist to reflect on how each class went as soon as the class is over. A law teacher who uses this technique might add a prompt to consider what the energy was like in the room, what themes seemed to resonate with which students, and, in particular, whether the students had any visible emotional reactions to the materials or the conduct of the class.

³⁰ Larry Krieger has developed and regularly updates two widely-used booklets that are particularly helpful in this regard: LAWRENCE S. KRIEGER, *A DEEPER UNDERSTANDING OF YOUR CAREER CHOICES* (2014) and LAWRENCE S. KRIEGER, *THE HIDDEN SOURCES OF LAW SCHOOL STRESS* (2014). Both contain clear and evidenced-based discussions of law student and lawyer well-being, and contain specific and practical advice for students.

³¹ SHAWN ANCHOR, *THE HAPPINESS ADVANTAGE* 41–43 (2010) (explaining that happiness contributes to success and achievement, while quests for success and achievement for their own sakes often lead to dissatisfaction).

³² Examples of courses dedicated to mindfulness or contemplative practices include *Contemplative Practice: An Exploration of Mindfulness and Social Justice Lawyering* (CUNY School of Law), *Contemplative Lawyering* (University of Connecticut School of Law), *Mindfulness in Law* (University of Miami School of Law), and *Contemplative Lawyering* (University of San Francisco School of Law). See generally Rhonda V. Magee, *Contemplative Practices and the Renewal of Legal Education*, *NEW DIRECTIONS FOR TEACHING AND LEARNING*, Summer 2013, at 31.

³³ BEST PRACTICES stressed the importance of self-reflection to facilitate life-long learning. BEST PRACTICES, text at notes 169–73, notes 406–11, notes 544–45. Reflection is also a powerful tool to promote well-being. See generally Gretchen Duhaime, *Practicing on Purpose: Promoting Personal Wellness and Professional Values in Legal Education*, 28 *TOURO L. REV.* (2012) (discussing the value of reflection in legal education and describing various initiatives to incorporate reflection into law teaching).

possible interests, passions, or values at stake, or to acknowledge particularly strong emotions that may be at play. Some encourage students to discover their individual strengths and provide differing opportunities for students to contribute accordingly. All law teachers should seek “teaching moments” in the ordinary course of instruction where they can encourage students to discuss the effects that law school and law practice might have on their own subjective well-being.

- ***Support Student Autonomy and Nurture Intrinsic Values***

BEST PRACTICES stressed the importance of autonomy support in legal education.³⁴ A number of authors have further elaborated techniques law teachers can use to support the autonomy of their students.³⁵ Generally, law teachers should seek to provide choices or control to students where pedagogically appropriate. To the extent students have the flexibility to mold their education to be more enjoyable or to further their intrinsic values, law teachers can expect the students to experience greater feelings of well-being. Where pedagogical goals or other objectives make such flexibility inappropriate, the law teacher should explain why a more directive approach furthers the students’ interests.

Law teachers should help students to discover and develop intrinsic values.³⁶ All law teachers should be sensitive to the language they use and the techniques they employ to motivate and encourage students. Generally, law teachers should strive to motivate students by reference to learning objectives and a discussion of how those objectives will contribute to the students’ professional goals, rather than speaking solely in terms of grades or other external markers of success. On occasion, law teachers might encourage students to engage in activities for the sheer joy of doing them.

When students experience disappointments or failure, law teachers should encourage resiliency and urge students to keep their intrinsic values in mind. In many classes, students can put in their best efforts and still receive disappointing grades. Likewise, in legal practice, lawyers can put in their best efforts yet still lose clients, fail to negotiate favorable transactions, suffer losses in litigation, or find themselves unemployed. In the moment, it may be difficult for students to put disappointments

³⁴ See, e.g., BEST PRACTICES, text at notes 330–337 (discussing autonomy support generally), text at notes 614–15 (addressing the challenges of balancing student autonomy with client protection in the context of in-house clinical programs), text at notes 631–32 (suggesting that law teachers allow students to exercise control in Socratic dialogue).

³⁵ See, e.g., Lawrence S. Krieger, *Human Nature as a New Guiding Philosophy for Legal Education and the Profession*, 47 WASHBURN L.J. 247 (2008) (describing measures to broaden autonomy support); Carol L. Wallinger, *Autonomy Support 101: How Using Proven Autonomy Support Techniques Can Increase Law Student Autonomy, Engender Hope, and Improve Outcomes*, 48 DUQ. L. REV. 385 (2010). See generally Candace R. Stefanou et al., *Supporting Autonomy in the Classroom: Ways Teachers Encourage Student Decision Making and Ownership*, 39 EDUC. PSYCHOLOGIST 97 (2004).

³⁶ For instance, a law teacher may encourage students to discuss the positive societal values served by particular areas of practice. Law teachers who have practice experience might relate how they found (or didn’t find) satisfaction in the pursuit of values that were important to them. Students may discover deeply held values when these discussions resonate with their own interests and passions. Students who have not yet internalized or prioritized desirable professional values may do so after being exposed to them.

into perspective. Yet doing so is itself an important skill and is worthy of educators' attention.³⁷

• ***Help Students Develop a Sense of Competence in a Broad Range of Skills***

Law teachers who are concerned with law student and lawyer well-being should seek to instill a broad sense of competence.³⁸ Even if students are developing the skills they need to become effective lawyers, they may not recognize their own progress. Law teachers should provide regular formative assessment, and do so in a way that supports students' feelings of competence.³⁹ Ambitious students may expect to be good at things right away, and view overly negative feedback as a reflection on their abilities and potential. A lack of feedback allows natural feelings of insecurity to fester or, alternatively, overconfidence to persist. Ideally, during their time in law school, law students should also gain skills in soliciting effective feedback from supervisors, clients and others who are in a position to help them develop confidence in their professional skills.

Students may be fearful about exposing their weaknesses, and may have an unreasonable fear of making mistakes. Even good lawyers make mistakes; law teachers should emphasize this fact. Law teachers should allow room for experimentation, and take steps to diffuse the power of mistakes to undermine confidence. To build students' practice skills, for instance, a law teacher might model effective methods to acknowledge mistakes and (if appropriate) repair the damage they cause. More generally, law teachers could work with students to acknowledge, preserve, and develop "grit" in the face of difficult circumstances.⁴⁰

Much of this book discusses the broad range of skills that contribute to law student and lawyer effectiveness, and best practices for developing those skills in students. Some skills and practices, only sporadically emphasized at many law schools, are particularly relevant to law student and lawyer well-being. Notable examples include time management skills, relationship skills and practices of self-care.

The time demands of law study and practice are a significant stressor for many

³⁷ For instance, law teachers might offer relevant examples of lawyers who have recovered from seemingly serious setbacks. When counseling students in specific situations, law teachers might urge students to reexamine the energy, preparation, and skills they brought to the task at hand, rather than focusing on the disappointing outcome itself. To motivate improvement, law teachers might emphasize how such improvement would contribute to the students' ability to further important intrinsic values. Students should find it encouraging that factors such as autonomy, intrinsic value motivation, and relatedness are highly correlated to satisfaction among practicing lawyers, while factors such as law school grades and law review membership are not. See Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. (forthcoming 2015).

³⁸ See generally, DOUGLAS O. LINDER & NANCY LEVIT, *THE GOOD LAWYER* (2014) (discussing, among other things, the importance of empathy, courage, integrity, intuition, deliberative thinking, and other non-analytical traits and skills in the practice of law).

³⁹ For a discussion of the type of feedback that supports a growth mindset in law students, see Corie Rosen Felder, *The Accidental Optimist*, 21 VA. J. SOC. POL'Y & L. 63 (2014).

⁴⁰ The ABA Section on Women in the Profession has recently launched "The Grit Project" to nurture resilience in women attorneys, and has developed an on-line toolkit for use by schools and organizations. *The Grit Project: True Grit and a Growth Mindset*, ABA, http://www.americanbar.org/groups/women/initiatives_awards/grit.html, archived at <http://perma.cc/94DW-5ECV>.

students and lawyers. To appropriately manage this stress, students would benefit from training in project management, including goal and priority setting, identification and scheduling of tasks, delegation, and workload management. All law teachers could model effective time management practices in the requirements of their individual courses.⁴¹

Relationship skills are not only critical to the effective practice of law, but they are essential to long-term feelings of well-being. Broader notions of legal competence should include facility in those relationship skills. In particular, law students sometimes receive the message that their emotions are irrelevant to legal practice and they should learn to ignore or repress them. It would be more constructive for students to practice methods of managing their own emotions and recognizing the effects of emotions on the perceptions, judgment, and behavior of others.⁴² More specifically, law teachers concerned with law student and lawyer well-being may wish to instruct students on the skills necessary to handle some of the more emotionally charged situations found in legal practice. Those who will work with clients in crisis may benefit from a discussion of vicarious trauma and strategies to deal with it, but this is not the only context where emotions can run high.⁴³ Most law students and lawyers would benefit from training in conducting difficult conversations and operating in the face of acrimony.⁴⁴

Finally, and perhaps most controversially, self-care is itself critical not only to well-being, but to law student and lawyer effectiveness. Athletes understand that overtraining may lead to injury and diminished performance. Law teachers, law students, and lawyers all too often glorify the sacrifices of overwork, and all too seldom recognize the degree to which a lack of self-care may compromise effectiveness. Law teachers concerned with law student well-being should be careful about the messages they consciously or inadvertently convey, and should attempt to create an educational environment that allows opportunities for students to rest, guard their physical health, and pursue outside relationships and interests.

- ***Encourage Community and Healthy Relationships***

Law schools, teachers, and staff should seek opportunities to create inclusive learning communities. There is much that law teachers and staff can do to foster a sense of community among students and to foster healthy relationships within that community.⁴⁵

⁴¹ See, e.g., Christine P. Bartholomew, *Time: An Empirical Analysis of Law Student Time Management Deficiencies*, 81 U. CIN. L. REV. 897 (2013) (studying law students' time use and providing specific examples of how to incorporate time management instruction into regular coursework).

⁴² Slocum, *An Inconvenient Truth*, at 827. See generally MARJORIE SILVER ET AL., *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION* (2006) (addressing emotional and other non-analytical aspects of law practice).

⁴³ See, e.g., Peter H. Huang, *Diverse Conceptions of Emotions in Risk Regulation*, 156 U. PA. L. REV. 435 (2008) (exploring the complex role of emotions in the regulation of risk in the business context).

⁴⁴ Harvard Law School's Program on Negotiation, for instance, provides training and has developed materials on conducting difficult conversations and dealing with difficult people. *Harvard Law School Program on Negotiation*, <http://www.pon.harvard.edu/>, archived at <http://perma.cc/6YUV-T8XU>.

⁴⁵ For instance, a law teacher who teaches a large group of students might divide the class into small law

As noted previously, aspects of legal education and law practice may be destructive to the development and maintenance of healthy relationships. At a minimum, to diminish these destructive effects, law teachers and staff could emphasize that legal analysis and advocacy skills are just that — skills appropriate for a given context. Students should be cautious about applying those skills in every situation; sometimes open communication, empathetic listening or gentle humor might be more appropriate. Some law schools and teachers are more proactive, and offer courses in emotional intelligence, communication, or other relationship skills directly as part of the curriculum.⁴⁶

e. Conclusion

Ideally, law schools should develop coordinated and proactive efforts to guard and nurture law student well-being. Even in the absence of broader institutional initiatives, there is much individual law teachers and staff can do. Best practices are those that alleviate unnecessary distress and allow students to flourish while in school and beyond.

firms, and regularly set aside class time for the law firms to consult on issues, strategies, or perspectives. Law teachers and staff should actively mentor and advise students outside of class, and encourage senior students to mentor and advise those who are new to the law school. Inclusive social activities can help to provide a sense of community within a law school population.

⁴⁶ Examples of courses dedicated to such topics include *Skills of Exceptional Lawyers — Social Intelligence and The Human Dimension* (Berkeley Law), *Emotional Intelligence in Law* (University of Missouri School of Law), *Emotional Intelligence* (University of Miami School of Law), and *Negotiation, Mediation & Client Counseling: Interpersonal Dynamics for Attorneys* (University of San Francisco School of Law). Most courses could incorporate relationship skills to some degree.

2. USING INTERCULTURALLY AWARE TEACHING METHODS

By Steven K. Homer

a. Introduction

Teaching interculturality was not addressed in BEST PRACTICES FOR LEGAL EDUCATION.¹ Legal scholars have studied how legal pedagogy both reflects the values and approaches of dominant groups within legal academia (i.e., privileged white men), and also how these approaches to teaching can alienate students — such as women, students of color,² and gender and sexually diverse³ students, among others — who do not share all of the dominant group's traits. However, more research is required to help law teachers fully understand the extent to which the structures of legal education affect non-dominant groups and how legal education may be changed to address such impact.

This section explores why the use of interculturality aware teaching methods is a best practice for law teachers, and provides general suggestions for how to do so. The section below on intercultural effectiveness for lawyers⁴ and the preceding section on humanizing legal education⁵ provide more detailed suggestions relevant to using interculturality aware teaching methods.

Three main aspects of legal education contribute to disparate impacts on non-dominant groups. First, the presence (or lack) of faculty diversity, and the concomitant effect on the ability of faculty to serve as role models and mentors for students; second, course materials that either elide the experience of women and students of color directly by omitting them as actors with legal issues, or the failure of faculty to present problems in a way that is fully accessible to all students; and third, the ways in which faculty do (and do not) interact with female students and students of color, both in and out of the classroom. It is a best practice to address each of these issues.

¹ ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (2007) [hereinafter BEST PRACTICES].

² See, e.g., Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 J. GENDER, SOCIAL POLICY & THE LAW 511 (2005) (studying Harvard Law School); Celestial S.D. Cassman & Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 U.C. DAVIS L. REV. 1209 (2005) (studying University of California — Davis Martin Luther King Jr. School of Law); Allison L. Bowers, *Women at the University of Texas School of Law: A Call for Action*, 9 TEX. J. WOMEN & L. 117 (2000) (studying the University of Texas School of Law).

³ Gender and sexual diversity (GSD) refers to all people who identify as one or more of the following: lesbian, gay, bisexual, transgender, queer, questioning, intersex, and asexual, with the acronym LGBTQIA. The shorter term LGBT is usually used colloquially but arguably does not reflect the fully inclusive range of gender and sexually diverse people.

⁴ See Chapter 6, Section E, *Intercultural Effectiveness*, below.

⁵ See Chapter 4, Section B, Subsection 1, *Humanizing the Delivery of Legal Education*, above.

b. Why Interculturally Aware Methods Are Needed

Faculty diversity is a challenge for many law schools. Law schools have made some strides in diversifying their faculties,⁶ and the presence of female and LGBTQQIA faculty, and faculty of color, at the front of the classroom, of itself, helps minimize the alienation of similar students.⁷ It seems that diverse faculty members are more likely to develop materials and approaches that foster an atmosphere of inclusion and to use teaching methods that help students feel connected to the subject matter.⁸ Equally importantly, having a diverse faculty allows diverse students to visualize themselves in positions of authority within the law.⁹ It also shapes the views of non-diverse students by allowing them to imagine a broader role for minority lawyers, and a different relationship between themselves and women, LGBTQQIA people, and people of color.¹⁰ This has a spill-over effect to their own interactions with clients and deepens their learning in the classroom itself.¹¹

It is a best practice to use teaching materials that include women, LGBTQQIA people, and people of color as participants in the full range of legal transactions, and not simply to include them only when the legal issues directly implicate them (for example, a course that uses no people of color in its problems and hypotheticals except when there is an issue of racial discrimination). Additionally, where possible and appropriate, teachers should initiate discussion of the racial, gender, or sexual orientation issues the material presents, without shifting to diverse students the burden to raise such issues.¹² Doing otherwise may generate feelings of alienation among diverse students because it sends a message that they are outside of, or do not

⁶ 2008–2009 AALS Statistical Report on Law Faculty, Ass’n of Am. Law Sch. (2009), <http://aalsfar.com/statistics/2009dlt/gender.html>, archived at <http://perma.cc/LX65-CVAJ> (62.2% of law faculty identify as male); <http://aalsfar.com/statistics/2009dlt/race.html>, archived at <http://perma.cc/X8GG-PLYK> (71.5% of law faculty identify as white).

⁷ Chris Chambers Goodman & Sarah E. Redfield, *A Teacher Who Looks Like Me*, 27 J. CIV. RTS. & ECON. DEV. 105, 116–19 (2013).

⁸ *Id.* at 129; Luz E. Herrera, *Challenging a Tradition of Exclusion: The History of an Unheard Story at Harvard Law School*, 5 HARV. LATINO L. REV., 51, 118–19 (2002).

⁹ See Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2297–99 (2000).

¹⁰ Nisha C. Gottfredson, A.T. Panter, Charles E. Daye, Walter F. Allen & Linda F. Wightman, *The Effects of Educational Diversity in a National Sample of Law Students: Fitting Multilevel Latent Variable Models in Data With Categorical Indicators*, 44 MULTIVARIATE BEHAV. RES. 305, 319 (2009) (concluding that “racial diversity increases intergroup contact . . . and that intergroup contact increases perceived diversity of ideas . . . and decreases prejudiced attitudes.”).

¹¹ *E.g.*, Antoinette Sedillo López, *Beyond Best Practices for Legal Education: Reflections on Cultural Awareness — Exploring the Issues in Creating a Law School and Classroom Culture*, 38 WM. MITCHELL L. REV. 1176, 1178, 1180–81 (2011–2012); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 38–48 (2001).

¹² Meera E. Deo, Maria Woodruff & Rican Vue, *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 CHICANO/A-LATINO/A L. REV. 1, 18–24 (2010); see also Margaret E. Montoya, *Máscaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN’S L.J. 185, 201–06 (1994).

belong in, the world of people involved in the legal profession.¹³

Finally, classroom teaching techniques and modes of interaction in office hours may send negative messages to all students about the value of diverse students' input and messages to diverse students themselves about how much they "belong" in law school and, by extension, in the legal profession itself.¹⁴ Evidence suggests that some teachers misuse the Socratic Method in a way that favors white students and male students, and white male students in particular.¹⁵ If used too aggressively, it will favor students for whom this is a comfortable mode of discourse. Research suggests that those students are more likely to be white males.¹⁶ This problem is not inherent in the Socratic Method if it is used in accordance with the practices of good teaching generally and Socratic teaching specifically, as described in this book.¹⁷

Even when the Socratic Method is implemented well, faculty must be alert to call on students in ways that are gender and race neutral. Studies show that in higher education generally, teachers interact with males and females in ways that tend to reinforce women's invisibility and silence in the classroom¹⁸ and similar patterns have been documented in the law school classroom. It is likely that this is also true for other categories of diverse students.¹⁹

¹³ Cruz Reynoso & Cory Amron, *Diversity in Legal Education: A Broader View, a Deeper Commitment*, 52 J. LEGAL EDUC. 491, 496 (2002).

¹⁴ Kevin R. Johnson, *Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549, 1557 (2011).

¹⁵ Nancy E. Dowd, Kenneth B. Nunn & Jane E. Pendergast, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J. L. & PUB. POL. 11, 37 (2003) [hereinafter Dowd et al., *Diversity Matters*].

¹⁶ Male students may be more willing to "take up space" and speak, even when they are not certain of the answer or are not on topic. See Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147, 151 (1988).

¹⁷ See, e.g., Chapter 5, Section A, *The Socratic Method*, below.

¹⁸ These phenomena have been documented in higher education generally, e.g., Mary Frank Fox, *Women and Higher Education: Sex Differentials in the Status of Students and Scholars*, in WOMEN: A FEMINIST PERSPECTIVE 238–55 (3d ed., Jo Freeman ed. 1984):

In faculty interaction with students, a "subtle and silent language" differentiates males and females. . . . Studies indicate that, in their interactions with students, faculty encourage male compared to female students by making more eye contact with the men, nodding and gesturing in response to questions, assuming a position of attentiveness when men speak, and taking a location near male students. . . . Observers frequently note that in classroom discussions, even the brightest female students tend to remain silent, while their male counterparts dominate. . . . Faculty members promote and reinforce the invisibility of female students by subtle practices such as calling directly on males but not females, addressing men by name more often than women, giving men more time to answer a question before going on to another student, interrupting women more frequently or allowing them to be interrupted, and crediting the contributions of male more often than female students.

Id. at 244 (quoted in Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147, 147 n. 1 (1988)).

¹⁹ Sari Bashad & Maryana Iskander, *Why Legal Education is Failing Women*, 18 YALE J.L. & FEMINISM 389, 403 (2006); see, e.g., Morrison Torrey, Jennifer Ries & Elaine Spiliopoulos, *What Every First-Year Female Law Student Should Know*, 7 COLUM. J. GENDER & L. 267 (1998).

It is a best practice for both institutions and individual teachers to ensure that all teaching methods are used equally and fairly for the benefit of all students.

Whatever teaching methods are employed, they should reflect eight characteristics of good teaching: respect, expectation, support, collaboration, inclusion, engagement, delight, and feedback.²⁰ The general approach to the material, if it is to create an inclusive environment, “cannot revolve solely around white men. Nor should [it] predominantly address the legal concerns of the wealthy, to the exclusion of the interests of middle class Americans or the poor.”²¹

Different approaches might be effective in creating a more inclusive environment. One is to provide more context for students’ learning to help them understand the material within their own frames of reference. Doing so “reduced feelings of alienation because they helped students relate the new material to their prior experiences, allowed students to express their perspectives, and showed students how to use the new material on exam questions and in situations they will face when they are attorneys.”²² Three ways to provide context are relating the information to students’ lives and backgrounds, helping students “own” the material, and, from those, helping students translate the material into their own lives.²³ Three teaching strategies for providing more context are experiential learning exercises, writing exercises, and collaborative learning exercises.²⁴ All of these methods should be paired with formative feedback, to ensure that all students are learning what is being taught.

Collaborative learning, in particular, is a commonly referenced method of creating an inclusive environment. “Participatory, cooperative, collaborative methods that actively involve students in the learning process appear to be particularly critical, both to benefit from diversity in the classroom and to ensure equal learning opportunities and outcomes.”²⁵ These methods, which address *who* speaks in the classroom, should be paired with methods that address *who* is spoken *about*: “[t]o the extent legal education focuses on the study of American law, the legal accomplishments of women and people of color should be explicitly included in the curriculum.”²⁶ In addition, “strategies for changing [law school] culture may [include] ‘little’ things like the pictures on the wall that convey the images of who belongs.”²⁷

²⁰ Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, J. L. EDUC. 75, 87–110 (2002).

²¹ Dowd et al., *Diversity Matters*, at 41.

²² Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. LEGAL EDUC. 402, 404 (1998).

²³ *Id.* at 405.

²⁴ *Id.* at 412–14.

²⁵ Dowd et al., *Diversity Matters*, at 39.

²⁶ *Id.* at 41.

²⁷ *Id.* at 37.

c. Conclusion

While it is a best practice to consider the impact of pedagogy on all students in the classroom, many approaches are available for creating an inclusive, equitable, and welcoming environment. As the “humanizing legal education” movement has suggested, legal education does not have to be an alienating, hostile, unpleasant experience in order to effectively prepare lawyers for the practice of law. The ways in which that can be accomplished are varied. In addition to the strategies described here, more ideas will develop as legal educators give more thought to the topic and as institutions place more value on this goal.

C. TRANSFER OF LEARNING

By Deborah Maranville¹

1. Introduction

A key characteristic of effective education is that students are able to retain and build on the information, skills, and values they learn in their work in later courses and in the world. Doing so is known as transfer of learning. Ultimately, for law students, that means they are able to transfer what they learn into the work they do as professionals. BEST PRACTICES FOR LEGAL EDUCATION did not delve deeply into the educational literature on transfer of learning. Underlying its preparation for practice theme,² however, was an implicit recognition that both individual law teachers and law schools as institutions must educate students in a manner that facilitates transfer.³

Law teachers know all too well the challenges of achieving transfer: students often deny having encountered a legal doctrine that was unquestionably covered in another class session or course. While this phenomenon raises other important questions, such as to what extent and for how long do students retain information conveyed in the classroom, it also potentially raises the question of transfer of learning. Even if students remember the information in its initial context, can they draw on it in a new one?

Transfer is a core issue for effective teaching and learning, especially in the context of professional education where students are expected to be able to use their skills — even if the skills in question are solely the analytical ones supposedly taught in the conventional law school classroom⁴ — when they encounter new problems. Yet, until recently, how to create conditions that will lead to transfer has been a neglected question in legal education.

Transfer of learning is critical if law schools intend to educate skilled professionals, but the research suggests that achieving transfer is neither easy nor automatic.⁵

¹ Readers for this section were Laurel Currie Oates and Judith Welch Wegner.

² ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) [hereinafter BEST PRACTICES], text at notes 103 and 104. The heading for the first goal of the program of instruction was “Be Committed to Preparing Students for Practice.”

³ The term “transfer” appears at least five times in BEST PRACTICES, all in quotations from other sources. The first reference noted the value of “curricular and co-curricular mapping” for ensuring that students have “ample opportunities to reflect on and practice desired outcomes” in order to transfer learning. *Id.*, text at note 269. A second suggested that attention to the overall curriculum could improve “knowledge transfer.” *Id.*, text at note 272. A third touted cooperative learning as improving transfer. *Id.*, text at note 367. A fourth emphasized the importance of context for transferring learning from classroom to practice. *Id.*, text at note 455. The final one noted the importance of debriefing simulations in order to “achieve a transfer of the acquired knowledge for reality.” *Id.*, text at note 589.

⁴ The term “supposedly” is intentional, given research that casts doubt on the extent to which law students’ analytical skills in fact improve during law school. See Todd E. Pettys, *The Analytic Classroom: Loosening the Langdellian Link: Toward a Renaissance in Legal Education*, SOCIAL SCIENCE RESEARCH NETWORK http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2139432, archived at <http://perma.cc/TAQ2-CN2U>.

⁵ See generally HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL (John D. Bransford et al., eds.,

Thus, for both the individual teacher and law schools responding to the call to either improve or truncate legal education, it is a best practice to attend to educational strategies to improve transfer of learning, both from individual courses and the curriculum as a whole.

2. Teaching for Transfer: What, Why, and How

An extensive literature from brain science and educational theory addresses teaching for transfer.⁶ Only in the last decade, however, has the challenge of teaching for transfer of learning captured the attention of legal educators or been addressed in any depth in the law school literature, as a small number of legal writing,⁷ academic support,⁸ and clinical teachers⁹ converged on the subject.

One 2010 article addresses transfer in detail, providing a teaching framework the author described as “offer[ing] legal educators a comprehensive approach to the transfer of learning across the entire curriculum.”¹⁰ The article reviews the extensive literature from other disciplines and traces the disciplinary divides. It briefly “connects [legal education’s history] to the prevailing transfer theories of the time,”¹¹ arguing that modern transfer theory “can be used to support both traditional and innovative law teaching”¹² and can bridge current divides between doctrinal and experiential learning.¹³ It highlights current common defects in curricular design, and sets out the author’s own teaching materials that are designed to facilitate transfer of students’ learning.

The author does not, however, consider in detail the question of transfer from a broader curriculum design perspective, beyond saying generally that law schools:

- provide “little to no discussion of common themes across the law school experience,”

2000) [hereinafter BRANSFORD, ET AL., HOW PEOPLE LEARN].

⁶ *Id.*

⁷ Laurel Currie Oates, *I Know that I Taught Them How to Do That*, 7 LEGAL WRITING: J. LEGAL WRITING INST. 1 (2001); Susan E. Provenzano & Lesley S. Kagan, *Teaching in Reverse: A Positive Approach to Analytical Errors in 1L Writing*, 39 LOY. U. CHI. L.J. 123, 158–59, 173–75 (2007).

⁸ Michael Hunter Schwartz, *Teaching Law by Design: How Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 366 (2001).

⁹ Paul Bergman, *Reflections on U.S. Clinical Education*, 10 INT’L J. LEGAL PROF. 109 (2003) (proposing that clinics should be organized around discrete types of lawyering skills to ensure transfer of learning, rather than around discrete types of legal problems); David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191, 198 (2003); David A. Binder, Albert J. Moore & Paul Bergman, *A Depositions Course: Tackling the Challenge of Teaching for Professional Skills Transfer*, 13 CLINICAL L. REV. 871, 872, 882–88, 896–98 (2007).

¹⁰ Tonya Kowalski, *True North: Navigating the Transfer of Learning in Legal Education*, 34 SEATTLE U. L. REV. 51, 53 (2010).

¹¹ *Id.* at 77.

¹² *Id.* at 83.

¹³ *See id.* at 82–85.

- fail to “even disclose to their students that law schools want them to learn to generalize knowledge,”
- typically do not present “law school problems . . . [in] a community-oriented context . . . [connected to students’] life experience” in a way that best promotes learner motivation, and
- often fail to reach out to students not from the dominant culture.¹⁴

Research into the best methods for achieving transfer of learning is ongoing, and final answers are not yet available. Tentative answers from the research, however, suggest the following:

1. Students need a broad and deep fund of knowledge about their discipline to most effectively transfer learning and need to organize their knowledge around conceptual frameworks in ways that facilitate retrieval and application.¹⁵
2. Educators should identify the foundational concepts needed to understand more advanced concepts and ensure that students have an opportunity to master them.
3. Teaching metacognitive skills — awareness of one’s own learning process — can assist learning:¹⁶ “[L]earning is most effective when people engage in ‘deliberate practice’ that includes active monitoring of one’s learning experience . . . [with] attempts to seek and use feedback.”¹⁷
4. Students are more likely to retain knowledge if they understand the conditions in which it is used, the connections among different contexts, and how knowledge is likely to recur in other contexts.¹⁸
5. Students are more motivated to learn when “they can use . . . information to do something that has an impact on others — especially their local community”¹⁹ and are more likely to transfer knowledge if they have an opportunity to apply it.²⁰

Based on these research findings, the best practices for effective ways to achieve transfer in legal education are likely to include the following:

1. Individual teachers should be explicit that transfer is one of their goals and identify how learning in a course may transfer to other contexts.²¹ A teacher might refer forward to upcoming units in the course, to other classes the students are currently taking, or are likely to take, and to how the knowledge, skills, or values are encountered in practice.

¹⁴ *Id.* at 84.

¹⁵ See BRANSFORD, ET AL., *HOW PEOPLE LEARN*, at 16–17, 53–55, 136–139.

¹⁶ *Id.* at 21.

¹⁷ *Id.* at 58–59.

¹⁸ *Id.* at 42–46, 55–60, 62–63.

¹⁹ *Id.* at 61.

²⁰ *Id.* at 42–46, 55–60, 62–63.

²¹ *Id.* at 60.

2. Individual teachers, with law school support, should ensure that students are absorbing the necessary disciplinary knowledge by providing conceptual frameworks, engaging in outcomes assessment,²² and making effective use of technology, where applicable.²³
3. Teachers and law schools should provide opportunities for students to apply their knowledge and do so in a variety of contexts, emphasizing service to the community.²⁴

Accordingly, law schools should emphasize experiential education,²⁵ as it provides opportunities to apply knowledge in a variety of contexts; make clinical legal education²⁶ widely available to students, especially in forms that provide service to the community and the law school, and offer strong pro bono programs.²⁷ Throughout those experiences, students should be encouraged and guided to reflect on their experiences and what lessons to draw from them.

4. Law schools should include transfer as a goal and facilitate it through thoughtful integration and sequencing of the currently disparate parts of the law school curriculum. Numerous ideas on how to integrate and sequence the curriculum are discussed elsewhere in this volume.²⁸

3. Conclusion

In order for students to master skills and knowledge, they must be able to transfer concepts they learn and apply them to new situations. Transfer of learning is a critical component of effective legal education. While more research must be done, some best practices have emerged. Ways for teaching law students for transfer include providing students with multiple opportunities for application of learning, and emphasizing service to the community and experiential education.

²² See Chapter 4, Section D, *Outcomes Assessment for Student Learning*, below.

²³ See Chapter 5, Section C, *Use of Technology in Teaching*, below.

²⁴ BRANSFORD, ET AL., *HOW PEOPLE LEARN*, at 61–63.

²⁵ This volume uses the term “experiential education” broadly to encompass “both simulated practice experiences, in which students assume the role of a lawyer in a simulated setting, and supervised real practice experiences, in which students assume the role of a lawyer.” See Chapter 5, Section F, Subsection 1, *Incorporating Experiential Education Throughout the Curriculum*, below.

²⁶ This volume uses “clinical legal education” to encompass the full range of supervised practice experiences, including what are commonly known as law clinics and externships, and variations on those forms. *Id.*

²⁷ See Chapter 6, Section B, *Pro Bono as a Professional Value*, below.

²⁸ See, e.g., Chapter 3, Section B, *Pathways, Integration, and Sequencing the Curriculum*, above.

D. OUTCOMES ASSESSMENT FOR IMPROVING STUDENT LEARNING

By Barbara Glesner Fines

1. Introduction

Students learn more and better when they know what teachers want them to learn,¹ when they are given opportunities to practice what they are learning,² and when they receive feedback on their learning.³ Law teachers learn more, too, when they are able to see what and how their students are learning and then use that information to improve teaching materials and methods. Chapter 7 of *BEST PRACTICES FOR LEGAL EDUCATION* identified best practices for assessing student learning, and identified the shortcomings of assessment practices in the United States. Since *BEST PRACTICES* was published, implementing best practices for student assessment remains a challenge for many law teachers, and the academy has not yet achieved the work needed to improve assessment in law schools. This section aims to build on the best practices articulated in 2007 by providing guidance for law teachers in developing outcomes assessment at the course level.

2. Understanding Assessment

All good teachers regularly try to discover whether and how much their students are learning in order to improve their teaching, though they may not name the process as assessment. However, assumptions may confuse and distort the real meaning of this otherwise familiar practice of all good instructors. Part of the problem is that the language of assessment did not originate in legal education.

Probably the single greatest confusion in vocabulary is that which equates *assessment* with *grading*. It is easy to confuse the language of assessment and the language of grading and to presume that, because a law teacher grades, he is assessing to improve student learning. Grading and assessment are different in critical ways. First the purposes differ: grading is evaluative — designed to sort and classify students, to confer distinction or channel students; assessment is ameliorative — designed to improve student learning and faculty teaching. Second, grades rarely provide teachers or students the kind of information that can lead to that improvement, because grades do not explicitly reference any clear criteria.⁴

¹ Okianer Christian Dark, *Statement of Good Practices in Legal Education: Principle 6: Good Practice Communicates High Expectations*, 49 J. LEGAL EDUC. 401 (1999); Barbara Glesner Fines, *The Impact of Expectations on Teaching and Learning*, 38 GONZ. L. REV. 89 (2002).

² Gerald F. Hess, *Statement of Good Practices in Legal Education: Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401 (1999); Lawrence Dessem, *Statement of Good Practices in Legal Education: Principle 4: Good Practice Emphasizes Time on Task*, 49 J. LEGAL EDUC. 401 (1999).

³ Terri LeClercq, *Statement of Good Practices in Legal Education: Principle 4: Good Practice Gives Prompt Feedback*, 49 J. LEGAL EDUC. 401 (1999).

⁴ ROY STUCKEY AND OTHERS, *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007) [hereinafter *BEST PRACTICES*] emphasized this point in suggesting that grading be criterion referenced. *BEST PRACTICES*, text at notes 718–30.

Outcomes Assessment is simply the process by which law teachers:

- Decide what they want students to learn to know, do, or value (outcomes)⁵ and how well (proficiencies);
- Gather information about whether and to what extent students have achieved the targeted knowledge, skills, and values (assessment measures);
- Stop to make those observations before they begin teaching (diagnostic) or in the middle (formative), or at the end (summative); and, then,
- Use the insights gained to improve their teaching and their students' learning.⁶

While outcomes assessment might use the very same methods (tests, essays, papers, performances) as those used to assign grades, assessment requires more analysis of the components of those grades. For grades to be used as assessment for student learning, the teacher must make explicit the components of learning that went into that grade: describing performance at varying levels of competence on each defined subset of knowledge, skills, or values (this would be referred to as a *rubric* in educational literature). Law teachers can then gather information about student learning to use in the future to improve overall learning.

3. Developing Outcomes Assessment at the Course Level

Initially, teachers approaching the task of defining learning outcomes may be inclined to simply inventory the topics they will cover in a course. *Coverage* is not a student-centered learning outcome. In a coverage-focused course, the attention is on the teacher and a march through topics without any unifying themes. In an outcomes-focused course, the attention is on the student's learning. Research at many different levels of education has reinforced this essential understanding: more content does not necessarily translate into more learning.⁷

For deep and transferable learning, for developing collaborative and independent learners, law schools must aim for high levels of proficiency, which requires thoughtful choices about the knowledge and skills for which they desire that proficiency. Law teachers must collectively and individually identify and prioritize learning outcomes and concentrate on the outcomes that result in deep learning.⁸

⁵ See BEST PRACTICES, text at notes 103–267.

⁶ *Id.*, text at notes 681–791.

⁷ See generally Barbara Glesner Fines, *Out of the Shadows: What Legal Research Instruction Reveals about Incorporating Skills throughout the Curriculum*, 2013 J. DISP. RESOL. 159, 183–84 (2013).

⁸ *Id.*

4. Identify Learning Outcomes

In a backward design⁹ approach to instruction and assessment, the first step is to identify learning outcomes. BEST PRACTICES focused on this process, providing numerous examples of learning goals for law schools¹⁰ and suggesting that best practice demands that law schools require each law teacher to identify the learning outcomes for his or her courses.¹¹ Guiding law teachers through this process begins with reflection. Experienced teachers do not generally start from scratch to articulate their learning outcomes, but begin with reflecting on their practice. Every law teacher has outcomes for her classes already: even if she has not articulated them concretely or explicitly (or even consciously). These outcomes can be clarified by reflecting on the materials assigned, the syllabus, and the exams, papers, simulations, or representations that are used to assign grades.

In developing outcomes assessment, a teacher should reflect on questions about the course. For example, if an outsider were to observe the teaching and learning over a semester of this course, clinic, or externship, what would he conclude about the learning objectives? Why were one set of learning materials (*e.g.*, books, chapters, supplements) or activities (exams, papers, client groups, etc.) chosen over other available options? What questions or themes repeat themselves over the course of the semester? Reflecting on the emotions associated with teaching the course can often provide key insights as well. What classes are most exciting or rewarding to teach? Why? What failure of learning among students causes the most frustration? Why?

This reflection can reveal basic themes of knowledge, skills, or values that are central to a course. If these outcomes are indeed what a law teacher desires students to learn, the next step is to turn these themes into student-centered learning outcomes framed in terms of what students will be able to do at the end of the course. Even knowledge outcomes should describe what students should be able to do with the knowledge acquired. Understanding the vocabulary for describing outcomes can help guide this process. In particular, paying close attention to the verbs¹² chosen to describe an outcome will reveal the level of proficiency desired: if students will be expected to “describe” or “recognize,” that is not as challenging an outcome as if they will be expected to “analyze” or “evaluate.”

For student learning outcomes to be valuable as a basis for designing assessments of student learning, they must be measurable. This concept of measureable learning outcomes does not require statistical precision — good, better, and best are forms of measurement that, so long as the rater applies the same criteria consistently, can

⁹ “Backward design” is a term coined by authors Grant P. Wiggins and Jay McTighe to describe an instructional design process that begins with outcomes, designs assessments, and only then builds learning materials and activities. GRANT P. WIGGINS & JAY MCTIGHE, *UNDERSTANDING BY DESIGN* (Pearson 2d ed. 2005).

¹⁰ BEST PRACTICES, text at notes 131–267.

¹¹ *Id.*, text at notes 143–49.

¹² One can find examples of verb lists at university teaching and learning centers. An excellent example can be found at *Effective Use of Performance Objectives for Learning and Assessment*, RUTGERS UNIVERSITY, <http://ccoe.rbhs.rutgers.edu/forms/EffectiveUseofLearningObjectives.pdf>, archived at <http://perma.cc/A5QC-UP32>.

provide plenty of information about student learning and permit comparisons across time or classes. Sometimes a teacher may want only to define a minimum standard, making the task of measurement even easier.

5. Design and Administer Assessments

Having selected and described learning outcomes, the next step for law teachers is to inventory resources for assessment of those outcomes. BEST PRACTICES provided a catalogue of some of these resources¹³ and this text provides others. Many law teachers presume that assessment requires devising standardized “objective” tests or undertaking additional graded activities. However, neither tests nor grades are necessary for gathering data about student learning. Rather, important data can be gathered from the activities teachers already require of students. Assessments can measure student learning directly through instruments such as tests and quizzes; papers of various lengths and formats; oral presentations or performance of lawyering skills such as arguments, interviews, or negotiations; portfolios of work product; and reflections on experience. When faculty see these familiar assignments as a tool to measure student learning, they may find new approaches to designing these activities.

The key to turning these assignments and activities into assessments is to go beyond general impressions and deliberately choose to gather concrete data. For example, collecting data out of a particular set of bluebooks may reveal that 85% of the students demonstrated competency in the recognition of legal issues from a fact pattern, while only 25% demonstrated competency in crafting a rule to address a matter of first impression. If the teacher uses this insight to investigate ways to teach students to construct legal rules more effectively, she can achieve improved learning.

6. Use Assessment to Improve Learning

Finally, the purpose of all of this assessment activity is to improve student learning. This begins by analyzing assessment data. The teacher must first analyze whether the students’ performance on the examination, simulation, or practice actually demonstrates their skill on the targeted outcome. Where data indicates that a significant percentage of student performance was deficient, law teachers should begin by re-examining the assessment activity, its placement in the semester, the time allocated, and any other possible factors that could explain poor performance apart from student learning. If the assessment appears to have truly measured student learning of the outcome, teachers must diagnose the learning conditions that led to the poor student performance, looking for patterns in the student errors or misconceptions. They should review learning materials and activities that may have led to these errors and consider additional or different activities to address these errors. Truly difficult concepts or skills require multiple iterations in different contexts to cement new understandings or abilities. To improve student learning in areas that have presented difficulties for students, law teachers should consider not only improving teaching materials or methods related to that area, but also

¹³ BEST PRACTICES, text at notes 726–79.

incorporating more formative assessments during the term to identify earlier and more clearly any learning deficiencies.

Assessment takes time: time to understand assessment, to write learning outcomes for the program as a whole and for individual courses, to revise or devise assessment tools to gather data about student learning, to examine the results of those assessments, and to use that process to improve learning. Assessment also requires patience. Immediate and dramatic improvements are less common than incremental gains.

On the other hand, not everything has to be assessed, and not everything can be assessed perfectly. First, a teacher need not assess every student's individual performance in order to gain insights into how well the class as a whole is learning. Indeed, the Socratic dialogue method of teaching can be viewed as simply a series of assessments that sample student learning. The problem with this method is sample size, as it is difficult in a class period to engage a sufficient number of students in dialogue in order to be able to gain a clear view of the overall learning progress of the class.¹⁴

Second, law teachers need not do all the work of assessment. Technology can permit formative assessment without hours of grading activity: clickers, online quizzes, CALI lessons,¹⁵ and the like can all provide sufficient data to make conclusions about overall understanding. These techniques are especially efficient when the goal is purely assessment for learning, rather than for grading. Likewise, students can assess their own learning and the learning of their peers. If faculty provide clear learning outcomes and the criteria by which students can measure their progress, students will readily use that information to improve their own performance.

Third, not every outcome need be assessed. Assessment is always a work in progress, and the best way to begin is to choose the most important, or difficult, or assessable student learning outcome and target that outcome for assessment. Often the best outcome to target is one that is already being assessed. Reviewing current assignments and other devices used to assign grades to students may uncover the learning outcome that is regularly being assessed.

¹⁴ See Chapter 5, Section A, *The Socratic Method*, below, for suggestions on this point.

¹⁵ The Center for Computer Assisted Legal Instruction (CALI) is a non-profit organization of law schools and other institutional members. Nearly all law schools are members. Among other products, CALI produces interactive lessons on a wide variety of subjects. Because CALI lessons are interactive, students can use them to self-assess their mastery of doctrinal content. The "lesson link" feature of CALI can be especially helpful for gathering data for purposes of assessing student learning. This function allows law teachers to create a unique URL to send to students to run a particular CALI lesson and, more importantly, allows law teachers to then see which students have completed the lesson, how long they spent on the lesson, and the scores they received. See *Frequently Asked Questions*, CENTER FOR COMPUTER ASSISTED LEGAL INSTRUCTION, <http://www.cali.org/faq/15757>, archived at <http://perma.cc/57W7-VAD6>. (Of course, students still must be registered at CALI — if they need help, each school member has someone who can help. *Contacts*, CENTER FOR COMPUTER ASSISTED LEGAL INSTRUCTION, <http://www.cali.org/contacts>, archived at <http://perma.cc/CL5M-PE9E>).

Finally, assessment does not require re-inventing the wheel. The simple expediency of identifying one or two outcomes for regular measurement — whether that is simply tallying responses from the random sample generated through dialogue in the classroom or using observation logs for gathering data on clinic observations — would add an assessment dimension to what law teachers already do.

7. Conclusion

Law teachers must transform their view of their role from one of an independent expert transmitting knowledge to one of an expert on facilitating student learning. They must bring the same scholarly tools to bear on improving student learning as they do to improving the law and legal institutions. Law teachers may find that assessment transforms all aspects of their approach to their courses when they deliberately select concrete and observable learning outcomes for their students, communicate those outcomes to their students, assess student performance of those outcomes, and then use the results of those assessments to improve their teaching and the students' learning.

