

Law School Assessment in the Context of Accreditation: Critical Questions, What We Know and Don't Know, and What We Should Do Next

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This symposium appears at a good time for legal educators who have begun seriously to grapple with the implications of new American Bar Association Standards for Approval of Law Schools (“ABA standards”). These revised standards were adopted in 2014 and implemented in full for accreditation visits occurring in 2016-2017.¹ Although clinical faculty, among others, were actively engaged in the developing the new standards,² most rank-and-file faculty are first confronting the significance of these standards as individual schools are reviewed under the revised requirements.

Faculty members also need to appreciate the additional accreditation changes that continue to be considered by the ABA, including several that may have very significant consequences for law schools. In particular, the Council of the ABA Section of Legal Education and Admissions to the Bar (“council”), under pressure to retain its accreditation powers,³ has continued

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1. The current ABA standards and the guidance memoranda on implementing the 2014 changes are available on the website of the American Bar Association’s Section on Legal Education and Admissions to the Bar. See *Standards*, AM. BAR ASS’N, https://www.americanbar.org/groups/legal_education/resources/standards.html (last visited Nov. 13, 2017).
2. The Clinical Legal Education Association was particularly active in submitting comments. See *Advocacy*, CLINICAL LEGAL EDUC. ASS’N, <http://www.cleaweb.org/advocacy> (last visited Nov. 13, 2017).
3. The federal commission that oversees accreditation agencies, the National Advisory Committee on Institutional Quality and Integrity (NACIQI), has periodically been quite critical of the ABA’s accreditation practices. See Andrew Kreighbaum, *ABA Tightens Up*,

to propose blockbuster changes. Since 2014, proposed major changes have included allowing externship students to receive both academic credit and pay,⁴ forcing accredited schools to demonstrate a seventy-five percent threshold bar passage rate for graduates within two years of graduation,⁵ considering the possibility that law schools could use admissions tests other than the LSAT under some circumstances,⁶ and setting permissible nontransfer attrition rates

INSIDE HIGHER ED (Aug. 31, 2016), <https://www.insidehighered.com/news/2016/08/31/aba-taken-task-feds-and-critics-law-school-student-outcomes>; Paul Fain, *Accreditor on Life Support*, INSIDE HIGHER ED, (June 24, 2016), <https://www.insidehighered.com/news/2016/06/24/federal-panel-votes-terminate-acics-and-tightens-screws-other-accreditors> (June 24, 2016). See also *Staff Report to the Senior Department Official on Recognition Compliance Issues*, U.S. DEPT OF EDUC. (June 2016), <https://opeweb.ed.gov/aslweb/finalStaffReports.cfm?aID=6&mid=68> (NACIQI staff report on the ABA's continued recognition as an accrediting agency).

4. The ABA House of Delegates concurred on this change in August 2016. See *Section of Legal Education and Admissions to the Bar*, in AM. BAR ASS'N RESOLUTIONS WITH REPORTS TO THE HOUSE OF DELEGATES 100 (2016), https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2016_hod_annual_meeting_electronic_report_book.authcheckdam.pdf (eliminating Interpretation 305-2, which had prohibited concurrent award of credit and pay, and moving regulation of field placements to Standard 304).

5. See Memorandum from Rebecca White Berch, Council Chairperson & Barry A. Currier, Managing Dir. Of Accreditation & Legal Educ., Am. Bar Ass'n Section of Legal Educ. & Admissions to the Bar, ABA Standards for Approval of Law Schools Matters for Notice and Comment (Mar. 25, 2016), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20160325_notice_and_comment_memo.authcheckdam.pdf (proposal of council to adopt flat seventy-five percent bar passage rate requirements); Am. Bar Ass'n Section of Legal Educ. & Admissions to the Bar, *Summary of Council Actions Related to Standards at its October 2016 Meeting*, AM. BAR ASS'N (2016), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/October2016CouncilMaterials/2016_october_council_summary_of_actions.authcheckdam.pdf (reporting on the council's agreement to the proposal at October 2016 meeting); Stephanie Francis Ward, *ABA House Rejects Proposal to Tighten Bar-Pass Standards for Law Schools*, A.B.A. J. (Feb. 6, 2017),

http://www.abajournal.com/news/article/aba_house_rejects_proposal_to_tighten_bar_pass_standards_for_law_schools (reporting on decision of House of Delegates to send proposal back to council rather than to adopt proposed flat requirement of seventy-five percent pass rate in two years); Minutes, Am. Bar Ass'n Section of Legal Educ. & Admissions to the Bar (June 2, 2017), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/August2017OpenSessionMaterials/17_june_open_session_minutes.authcheckdam.pdf (June 2017 decision by council that more information on bar passage would be requested before resubmitting the seventy-five percent passage proposal to the House of Delegates).

6. See Memorandum from Pamela Lysaght, Chair, Standards Review Comm., to Greg Murphy, Chair, Council of the Section of Legal Educ. & Admissions to the Bar (Feb. 24, 2017), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/March2017CouncilOpenSessionMaterials/2017_march_src_memo_to_council.authcheckdam.pdf (recommending further limiting discretion of individual law schools in using admissions tests other than the LSAT and providing that the council itself, and not schools, would determine whether other tests were "valid and reliable," and that no variances would be permitted from this requirement). In the meantime, a growing number of law

as a measure of acceptable admissions policies.⁷ The ABA council has also championed the adoption of the Uniform Bar Examination, a national licensing test that has now been adopted in twenty-eight jurisdictions.⁸ It is also currently considering changes that would allow much more widespread use of non-full-time faculty outside the first year of law school.⁹

Although the revised accreditation standards have brought about a number of changes in law schools, this essay focuses closely on only one dimension of those changes: namely, the introduction of *assessment* in multiple ways into the law school context and into the conversation about ways to improve legal education. It accordingly distinguishes between *assessment* as defined below and *accreditation* in general (that is, the system by which institutions engage with a national system involving institutional review in order to be certified as providing sufficiently “high-quality” instructional programs to warrant extending certain opportunities to their students and graduates). Currently in the United States, law students attending “accredited institutions” are eligible to apply for federal financial aid and, if accredited by the American Bar Association’s Section of Legal Education and Admission to the Bar, to seek licensure in other jurisdictions by sitting for those states’ bar examinations. The term *assessment* suggests something slightly different—that is, it refers to *measurement or evaluation—for present purposes, measurement or evaluation of student learning*.¹⁰

schools have expressed their intention to accept alternative tests. See Elizabeth Olson, *More Law Schools Begin Accepting GRE Test Results*, N.Y. TIMES, Aug. 10, 2017, <https://www.nytimes.com/2017/08/10/business/dealbook/law-school-gre.html> (reporting on announcements by University of Arizona, Harvard, Northwestern, and Georgetown).

7. See Memorandum from Barry A. Currier, Managing Dir. Of Accreditation & Legal Educ. Section of Legal Educ. & Admissions to the Bar, Adoption and Implementation of Revised ABA Standards and Rules of Procedure for Approval of Law Schools (Feb. 23, 2017), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/March2017CouncilOpenSessionMaterials/2017_february%20notice_revisions_to_standards_rules.authcheckdam.pdf (giving notice of approved changes to an interpretation of Standard 501 that creates a rebuttable presumption that a nontransfer attrition rate of more than twenty percent suggests that a law school is out of compliance with the standard).
8. *Jurisdictions That Have Adopted the UBE*, NAT’L CONF. OF B. EXAMINERS, <http://www.ncbex.org/exams/ube/> (last visited Nov. 1, 2017) (noting twenty six states, plus the District of Columbia and the U.S. Virgin Islands). The ABA House of Delegates adopted two resolutions in 2016 relating to the Uniform Bar Exam. Resolution 109 (stating that the ABA urges the bar admission authorities to adopt expeditiously the UBE) was supported by law students and was adopted. See <https://www.americanbar.org/content/dam/aba/images/abanews/2016mymres/109.pdf>. Related resolution 117 was also adopted urging bar admission authorities to consider the impact of the UBE on minority candidates and recommending inclusion of non-UBE subjects such as Indian law on bar examinations. See <https://www.americanbar.org/content/dam/aba/images/abanews/2016mymres/117.pdf>
9. See Memorandum from Pamela Lysaght, *supra* note 6 (recommending modification of Standard 403(a) to require that the only first third of a student’s legal education be substantially provided by full-time faculty).
10. In contrast, the term “*law school accreditation*,” as used earlier, will continue to be used to refer to the full set of requirements applicable to law schools seeking to gain and maintain ABA

Thus, *accreditation* standards have historically been used to refer to a variety of factors, including the adequacy of law school facilities, funding, library resources, and numbers and status of faculty members. *Assessment*, on the other hand, refers more particularly and directly to demonstrable “*outputs*” in student learning, rather than to institutional “*inputs*.”

This essay focuses narrowly on assessment because the emphasis on *assessment* is one of the most important and distinctive features of the ABA’s new accreditation requirements. “Assessment” is also a relatively novel topic within the legal academy, one that, if casually used, can lead to misapprehensions. Assessment is also particularly powerful concept, and the introduction of focused attention on assessment within educational institutions can have many important byproducts. Consider, for example, the many adverse effects on the educational culture and institutional decisions that have emerged as a result of the introduction of *U.S. News & World Report* “rankings.”¹¹ Educational experts, particularly those in medicine, have been known to observe that “assessment drives learning.”¹² The “assessments” of law school programs conducted yearly by *U.S. News* are deeply flawed.¹³ Nonetheless, this form of assessment

approval in order to qualify for their students to receive federal financial aid and to sit for the bar outside their home jurisdiction. “*Accreditation*” is also used in certain contexts to refer to the requirements and practices of regional accreditors responsible for approving colleges and universities as providers of educational programming, and for the requirements and practices of other specialized accreditors, which, like the ABA, serve to approve programs in particular professional or quasi-professional fields for various purposes.

11. Wendy Nelson Espeland and Michael Sauder, *Engines of Anxiety: Academic Rankings, Reputation, and Accountability* (2016) (hereinafter cited as Espeland and Sauder). This extensive study relied on extensive interviews of various constituencies as well as analysis of U.S. News data. In particular, it discusses accountability, how prospective students use rankings, implications for admissions practices and law schools more generally. The study concludes that rankings have altered relations of power and authority, organizational practices within and among organizations, and the distribution of opportunities and status in legal education. *Id.* at 172-81.
12. The notion that assessment drives learning has been widely held within medical education. The seminal article asserting this view is David I. Newble & Kerry Jaeger, *The effects of assessments and examinations on the learning of medical students*, 17 *Medical Education* 1983; 17: 165-71 (1983), discussed as one of the most influential articles of the last 50 years in David I Newble, *Revisiting “The effects of assessments and examinations on the learning of medical students,”* *Medical Education* 2016; 50: 498-501. Since the publication of the seminal article, others in medical education have explored more nuances associated with the basic proposition. *See, e.g.*, John C. McLauchlan, *The Relationship Between Assessment and Learning*, *Medical Education* 2006; 40: 716-17 (probing the relationship between assessment and learning by posing a number of provocative related propositions, including the following: “assessment drives learning for assessment (rather than learning per se);” “students only identify ‘learning’ as what is done for assessment;” “superficial assessment only drives superficial not deep learning;” “different students are driven by different things;” and “assessment does not drive learning [although it can].” *See also* Espeland and Sauder, note 11, *supra*, at 26-28 (discussing how rankings effect change by resulting in cognitive shifts that understand rankings as descriptive, to controlling, and accordingly triggering reactions).
13. For an annotated bibliography of scholarship relating to U.S. News Rankings through 2010, see

has driven many law schools to conduct their business in questionable ways, such as spending money on marketing campaigns rather than on student scholarships, shifting to merit-based aid to the detriment of those with more financial need, selecting students “by the numbers” rather than on a more holistic basis, and distorting information about employment outcomes.¹⁴ The essay seeks to illuminate the concept of assessment and the multiple respects in which that concept is incorporated into the revised ABA standards, with an eye to helping faculty members and law schools understand assessment and implement high-quality assessment practices rather than fall prey to erroneous assumptions or problematic practices. It is structured to pose critical questions about assessment in a variety of arenas and to consider what we know, what we don’t know, and what we should do next.

Dora R. Bertram, Annotated Bibliography: Ranking of Law Schools by U.S. News and World Report, available at: <http://ssrn.com/abstract=1658653>. Among the sources cited by Bertram is a study by Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Report Law School Rankings* (Feb. 18, 1998), the conclusions to which are included in the Bertram article:

There are many serious problems with the U.S. News system for evaluating law schools. These problems include concerns about: (1) important aspects of law school quality that are not assessed by U.S. News; (2) the accuracy of the data U.S. News used to create the index values (such as obvious errors in the computation of bar passage rate and failure to control for regional cost of living differences); (3) the effects of chance, multiple interpretations, and systematic biases on survey responses (such as whether respondents are representative of those sent surveys and whether strategic ratings led to some schools receiving a higher or lower rank than they deserved); (4) the methods U.S. News used to handle missing data; and (5) the use of variables that could lead to inappropriate school practices (such as schools raising their “rejection rate” index by encouraging applications from students who have virtually no chance of being admitted).

There also are problems with how the 12 factors are weighted because they do not really carry the weights U.S. News says they carry. Moreover, no rationale is provided for these weights. However, weighting only matters to the few schools that are near an important cut point, such as being in the top 10, 25, or 50. This is so because about 90% of the overall differences in ranks among schools can be explained solely by the median LSAT score of their entering classes and essentially all of the differences can be explained by the combination of LSAT and Academic reputation ratings. Consequently, all of the other 10 factors U.S. News measures (such as placement of graduates) have virtually no effect on the overall ranks and because of measurement problems, what little influence they do have may lead to reducing rather than increasing the validity of the results.

For additional leading critiques of U.S. News rankings, see Jeffrey R. Stake, *The Interplay between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229 (2006); Andrew P. Morriss & William D. Henderson, *Measuring Outcomes: Post-Graduate Measures of Success in the U.S. News & (and) World Report Law School Rankings*, 83 IND. L.J. 791 (2008).

14. For a discussion of these adverse effects of U.S. News rankings, see Espeland & Sauder, note 11, *supra*, at 60-99 (discussing changing admissions practices, greater emphasis on LSAT scores, declining diversity, and increase redeployment of funds to merit-based scholarships in order to drop top students); 119-21 (discussing marketing efforts); at 142-48 (discussing manipulation of employment information).

The essay proceeds in several parts. Part I provides important background about student learners now in law school or in the pipeline to attend law school in coming years. Since the focus of assessment is on student learning, it is crucial to understand the individuals whose learning is being assessed. Applying assessment practices historically developed for learners with different characteristics can result in mistaken judgments or missed opportunities for understanding and shaping the learning occurring today.

Part II considers assessment practices increasingly associated with academic support programs introduced into legal education in the past quarter-century. Many faculty members were not exposed to academic support programming during their time in law school, because they sailed through their law school careers with little difficulty and thus did not experience some of the challenges that many in more recent generations of law students know all too well. Some faculty members may indeed regard academic support programming as remedial, assuming that those involved in this instructional area lack scholarly insights or exist in a world apart. Contrary to these assumptions, however, those engaged in academic support instruction are typically deeply knowledgeable about cognitive sciences and learning theory. They are among law schools' best resources for guiding the implementation of the new ABA requirements on assessment, and faculty colleagues need to understand the scholarly insights emerging in this new field.

Part III considers assessment processes increasingly being introduced by innovative faculty members who are experimenting with diverse forms of "formative assessment"—that is, introducing new types of educational practices into their courses and testing the extent to which such practices improve student learning. "Formative assessments" differ from "summative assessments" typically used to award grades at the end of a course. "Formative assessments" simply provide students with educational tasks and some sort of feedback to help them become more aware of what they do or do not know, and to help build "scaffolds" for subsequent learning. The new ABA standards direct law schools to incorporate more opportunities for "formative assessment" in their instructional programs, while being clear that such techniques need not be employed in every class. Nonetheless, faculty colleagues who wish to experiment with such innovations need to know what types of formative assessment strategies are being developed by colleagues around the country, and may wish to learn how colleagues are themselves assessing whether such innovations actually make a difference in student learning.

Part IV turns to "institutional assessment," and the ways that law schools as institutions can approach new ABA requirements that mandate them to identify and assess their students' learning through certain lenses or with an eye to certain "competences" that are needed by legal professionals and that may increasingly be embedded in evolving bar examination practices or considered by prospective employers when recruiting students or evaluating associates early in their careers. "Institutional assessment" practices typically necessitate collaborative efforts among faculty colleagues and between faculty

and professional staff in order to determine the critical dimensions of learning to be assessed, across a number of courses and over the several years that students are enrolled. These critical dimensions are increasingly referred to as “programmatic learning outcomes.” Once programmatic learning outcomes have been identified and adopted, additional challenges arise. How can a school and its faculty and professional staff collectively determine whether the desired outcomes have been achieved by their student bodies as a whole? Part IV accordingly proceeds in two major subparts, first considering learning outcomes and related questions, and then considering potential assessment techniques. Institutional assessment is by no means easy, and most faculty members, deans, and associate deans are unfamiliar with core concepts and methods. This part accordingly endeavors to help law schools and their faculties to get up to speed as they embark on this new journey.

In concluding, Part V engages in a modest thought experiment, suggesting that legal education’s specialized accreditor, the ABA’s Council on Legal Education, should engage more seriously in the kind of sound assessment practices that it has now mandated for law schools and their faculties. It references good practices used in other professional fields as a means of testing collective judgments about and updating appropriate accreditation practices, and suggests that the ABA would do well to practice what it preaches—or, indeed, demands.

I. Understanding Changing Students: A Predicate for Sound Assessment Practices

At one time, admissions decisions for many law schools seemed relatively easy. Before the 2008 economic downturn, many thousands of prospective law students lined up to take the LSAT and apply to law schools around the country.¹⁵ Law schools generally did studies to calibrate the predictive value of undergraduate GPAs and LSATs, and used these objective indicators as a first-tier sorting mechanism to admit a significant proportion of students.¹⁶

15. Data from the Law School Admission Council evidence the following trends: End-of year totals for LSATs administered have ranged from 151,400 (2008-2009) to 171,500 (2009-2010), 101,700 (2014-2015), and 109,400 (2016-2017). Credential assembly service registrations have ranged from 79,200 (2008-2009) to 85,400 (2009-2010), 48,800 (2014-2015), and 51,100 (2016-2017). *LSAC End-of-Year Summary: LSATs Administered & Credential Assembly Service Registrations*, LSAC, <https://www.lsac.org/lscresources/data/lscac-eoy> (last visited Oct. 13, 2017). Notably, the number of applicants taking the June 2017 LSAT administration increased significantly, building on slight increases earlier in 2016. See *Total LSATs Administered—Counts & Percent Increases By Admin & Year*, LSAC, <https://www.lsac.org/lscresources/data/lscats-administered> (last visited Oct. 13, 2017) (increase of 19.8% in applicants taking LSAT in June with from 2016 to 2017). Hypotheses vary on the reason for the increase, including greater interest in civil rights in the current era. See Doug Lederman, *Number of Students Taking the LSAT Jumps*, INSIDE HIGHER ED (July 14, 2017), <https://www.insidehighered.com/quicktakes/2017/07/14/number-students-taking-lsat-jumps> (citing comments by Law School Admission Council President Kellye Testy suggesting students may have increasing interest in the “rule of law” in the current political era).

16. For a discussion of correlation studies conducted by the Law School Admission Council,

Additional “holistic” factors such as applicant essays and recommendations were considered, but often only to a limited extent.¹⁷

Then came the Great Recession, major restructuring of “Big Law” firms,¹⁸ and editorializing about high debt loads for law graduates and limited job prospects.¹⁹ Although job prospects for those with bachelor’s degrees²⁰ or those pursuing Ph.D.s²¹ were also relatively bleak, the message typically was not one about comparative opportunities, but rather one that focused on high tuition, dubious marketing practices, high loan debt, and poor job prospects for J.D. graduates who were, in effect, being called upon to mortgage their futures.²²

see LISA C. ANTHONY, ET AL., PREDICTIVE VALIDITY OF THE LSAT: A NATIONAL SUMMARY OF THE 2013 AND 2014 LSAT CORRELATION STUDIES (Law School Admission Council, LSAT Technical Report 16-101, 2016), [https://www.lsac.org/docs/default-source/research-\(lsac-resources\)/tr-16-01.pdf](https://www.lsac.org/docs/default-source/research-(lsac-resources)/tr-16-01.pdf) (concluding that combined LSAT and undergraduate grade point average proved a better predictor than either alone in terms of predicting first-year law school average, with predictive coefficient measured at 0.47 and 0.48 for 2013 and 2014, respectively). LSAC studies of this sort provide a benchmark against which individual law schools can compare individual school-based correlation studies through which they determine how best to weigh LSAT and undergraduate GPAs to predict law school performance. *Id.* at 1.

17. See Alexia Brunet Marks & Scott A. Moss, *What Predicts Law Student Success? A Longitudinal Study Correlating Law Student Applicant Data and Law School Outcomes*, 13 J. EMPIRICAL LEGAL STUD. 205 (2016) (identifying a variety of factors that influence student performance).
18. See Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749 (2010).
19. See David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES (July 16, 2011), <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html> (critiquing the law school business model); SANDY BAUM, A FRAMEWORK FOR THINKING ABOUT LAW SCHOOL AFFORDABILITY (2015), <https://www.accesslex.org/a-framework-for-thinking-about-law-school-affordability>.
20. For a study of recent college graduates’ employment experiences during and after the Great Recession, see Thomas Luke Spreen, *Recent College Graduates in the U.S. Labor Force: Data from the Current Population Survey, Monthly Labor Review* (February 2013), at 8 (tracking total unemployment rate of recent college graduates with bachelor’s degrees that ranged from 9.0% (2007), to 17.6% (in 2010) and 13.5% (in 2011); the unemployment rate for men with bachelor’s degrees exceeded that of women, ranging from 11.4% (2007) to 26.6% (2010) and 16.1% (in 2011).
21. Full-time jobs for graduates with Ph.D.’s particularly in the humanities became ever more scarce during the last decade, in part because colleges and universities have turned to part-time adjuncts in an effort to save money. Trends in history and literature have been dismal. See, e.g., Allen Mikaelian, *The Academic Job Market’s Jagged Line: Number of Ads Placed Drops for Second Year*, Perspectives on History (American Historical Society, September 2014) (reviewing history of job ads placed in history and showing very steep decline beginning in 2008-09); Audrey Williams June, *Literature Scholars Face Steepest Drop in Jobs in Decades*, CHRON. HIGHER EDUC. (December 18, 2008) (noting a drop of more than 22% in job openings for those in literature compared to the prior year).
22. One example of a law school charged with such inappropriate conduct is the for-profit Charlotte School of Law, which was put on probation by the ABA and lost its federal student aid as a result of alleged misrepresentations to students and others. See ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COUNCIL DECISION: NOTICE OF PROBATION AND SPECIFIC REMEDIAL ACTION: CHARLOTTE SCHOOL OF LAW (2016), <https://www.americanbar.org>.

In the wake of the Great Recession, some important variables have changed. Law school applications declined significantly at least until what may be an emerging modest rise.²³ The number of candidates who might have traditionally scored at the high end of the LSAT distribution appears to have declined disproportionately (or changing student experiences may have resulted in poorer performance on standardized tests).²⁴ Also in decline is the certainty about how applicants to law schools will respond to offers and whether they will actually choose to enroll.²⁵ Even when highly credentialed students enroll in a given school for the first year, a significant number transfer to higher-ranked schools following successful performance during the first year.²⁶

org/groups/legal_education.html (follow first link under “November 2016”); Emily Olson, *For-Profit Charlotte School of Law Closes*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/business/dealbook/for-profit-charlotte-school-of-law-closes.html>. The school may now be under criminal investigation. Michael Gordon, *Feds have launched criminal investigation of Charlotte School of Law, documents say*, CHARLOTTE OBSERVER (Aug. 28, 2017), <http://www.charlotteobserver.com/news/local/crime/article169880252.html>.

23. See Law School Admissions Council data for the period 2000-2015 showed a peak in applicants in fall 2004 (100,600 applicants), a total of 87,900 in fall 2010, and a total of 54,500 in fall 2015. <https://www.lsac.org/lisacresources/data/ethnicity-sex-applicants/archive-3> (these data were for fall semester only and included deferrals). LSAC began using a different methodology (looking to applicants for the full academic year and not including deferrals), when total applicants (using the new protocol) numbered 56,500. <https://www.lsac.org/lisacresources/data/ethnicity-sex-applicants>. The LSAC reports that for the 2018 academic year (beginning in fall 2018), there has been an increase of 11.8% in applicants compared to fall 2017 as of December 8, 2017. <https://www.lsac.org/lisacresources/data/three-year-volume>
24. For a discussion of patterns in LSAT scores, see Paul L. Caron & Kellye Y. Testy, *The Quantity and Quality of Law School Applicants*, TAXPROF BLOG (July 10, 2017), http://taxprof.typepad.com/taxprof_blog/2017/07/caron-testycorrected-data-the-quantity-and-quality-of-law-school-applicants.html (reporting on decline of applicants with LSAT scores in the highest score band, 160-180, and explaining that the proportion of applicants in this band declined from twenty-nine percent in 2010-2011 to twenty-six percent in 2016-2017). The number of applicants with scores in the highest band declined from 26,392 in 2010-2011 to 14,548 in 2016-2017, an overall decline of forty-five percent. *Id.*
25. See ACCESSLEX INSTITUTE, LEGAL EDUCATION DATA DECK: KEY TRENDS ON ACCESS, AFFORDABILITY AND VALUE 2 (2017), <https://www.accesslex.org/legal-education-data-deck> (projecting that for all terms in 2016, 56,500 students applied to ABA-accredited law schools, 42,800 were admitted, and 37,106 matriculated) (citing LSAC data). These data do not provide an explanation for the gap between admittees and matriculants.
26. Professor Jerry Organ of the University of St. Thomas, Minnesota has carefully reviewed transfer data. See Jerry Organ, *Revisiting the Market for Transfer Students Based upon the 2016 Standard 509 Reports*, LEGAL WHITEBOARD (Mar. 18, 2017), <http://lawprofessors.typepad.com/legalwhiteboard/2017/03/this-blog-posting-updates-my-blog-postings-of-december-2014-and-december-2015-regarding-what-we-know-about-the-transfer-marke.html>. Organ demonstrates that the proportion of transfers to matriculated students has ranged from 4.6% (in 2011 and 2016) to 5.6% (in 2013). Transfers appear to be concentrated in top-tier schools and in regional marketplaces where transfer may possible without the necessity for students to move. *Id.*

Demographic profiles are also important. Male and female enrollment is now nearly equal (at slightly below 60,000 each for all students enrolled in 2016).²⁷ Proportions of applicants by race/ethnicity have remained relatively stable from 2012 through the 2016 year, when 61% of the pool was Caucasian, 15% African-American, 13% Hispanic/Latino, 10% Asian, 3% Puerto Rican, 2% American Indian, and 0.4% Pacific Islander.²⁸ Admission rates for 2016 were 83% for Caucasians, 75% for Asians, 68% for Hispanics/Latinos, 72% for Puerto Ricans, 68% for Pacific Islanders, and only 54% for African-Americans.²⁹ Strikingly, minority students make up only 30% of full-time law students, but 38% of those attending part time.³⁰ As of 2015-2016, the proportion of J.D. degrees awarded to racial and ethnic minorities was 29.1%, as compared with 8.6% in 1983-1984.³¹

Data from the 2011-2012 academic year (significantly trailing current events) indicates that only 9% of law students had a parent with less than a high school diploma, 14% with some college, 23% with a bachelor's degree, 26% with a master's degree, 21% with a professional (doctoral) degree, and 7% with a doctoral research degree.³² Notably, data from 2011-2012 reveal that only 24% of law students received Pell grants as undergraduates, compared with 41% of those seeking a master's in education, 47% of those seeking a master's in public administration, and 54% of those seeking a master's in social work.³³ Data also demonstrate that as of 2012, most law students came from disproportionately wealthy families (35% with family incomes of \$130,000 or more, 31% with incomes between \$90,000 and \$130,000, 14% with incomes \$50,000-\$90,000, and 20% with incomes of \$50,000 or less).³⁴ Perhaps not surprisingly, given increasing concerns about debt loads, 48% of law graduates who had earned a bachelor's degree in the 2007-2008 academic year said in 2012 that their graduate degree was not worth the cost (as compared with 28% expressing that view about all graduate degrees).³⁵

Patterns of undergraduate majors have changed significantly, undoubtedly for altogether different reasons. Nonetheless, some "traditional" feeder majors such as English, history, philosophy, and political science have declined as a share of undergraduate majors, while other majors in such fields as criminal

27. ACCESSLEX INSTITUTE, *supra* note 25, at 5 (citing ABA data).

28. *Id.* at 6 (citing LSAC data).

29. *Id.* at 7 (citing LSAC data).

30. *Id.* at 9 (citing ABA data).

31. *Id.* at 15 (citing ABA data).

32. *Id.* at 10 (citing U.S. Department of Education data).

33. *Id.* at 11 (citing ABA data).

34. *Id.* at 12 (citing U.S. Department of Education data). These numbers can be compared with all American household incomes as of that date: 14% with incomes of \$130,000 or more, 14% with incomes of \$90,000-\$130,000, 48% of \$50,000-\$90,000, and 44% at \$50,000 or below.

35. *Id.* at 31-32 (citing U.S. Department of Education data).

justice, business, economics, psychology, and communications have increased substantially in numbers of bachelors' degree holders in recent years.³⁶ While law schools may continue to admit students based in part on undergraduate GPAs, the expertise that those students bring, their writing skills, and their appreciation for intellectual history will undoubtedly vary from the skills and intellectual background of their predecessors. Because these trends have been documented relatively recently, admissions officers and faculty members may not yet be prepared to reckon with such changes.

Today's students also seem to be different learners from those of generations past.³⁷ They came of age during a time of rapid change, be it in educational philosophies (think "No Child Left Behind"), technology (think iPhones and the Internet), or the economy (think the "Great Recession"). These changes have affected incoming law students' assumptions about what should be learned and who is responsible for learning.³⁸ They have also affected how leisure time is spent. Based on 2015 data from the American Time Use Survey, on weekends, Americans now spend approximately twenty-one minutes per day reading, compared with thirty minutes a day using computers for leisure and games and three hours and seventeen minutes watching television.³⁹ In 2015, those under age twenty-four spent less than ten minutes per day of weekend time reading, compared with those fifty-five to sixty-four (who spent about twenty-three minutes per weekend day), those sixty-five to seventy-four (who spent approximately forty-five minutes per weekend day), and those over seventy-five (who spent approximately sixty-five minutes per weekend, down from more than eighty in 2005).⁴⁰ Those with bachelor's degrees or higher

36. TIFFANE COCHRAN & INDIA HECKSTALL, FROM THE BACHELOR'S TO THE BAR: USING COLLEGE COMPLETION DATA TO ASSESS THE LAW SCHOOL PIPELINE (2016), <https://www.accesslex.org/bachelors-bar>, at 4.
37. More is understood today about cognitive science and learning than ever before. For an excellent discussion of the mismatch between some teaching techniques and methods needed for enhanced learning, see Elizabeth Adamo Usman, *Making Legal Education Stick: Using Cognitive Science to Foster Long-Term Learning in the Legal Writing Classroom*, 29 GEO. J. LEGAL ETHICS 355 (2016) (emphasizing need for students to engage with difficulty, build structures, engage in spaced practice, and embrace a growth mindset). This prescription for effective learning is at odds with students' experiences before law school. See Patricia Grande Montana, *Bridging the Reading Gap in the Law School Classroom*, 45 CAP. U. L. REV. 433 (2017) (discussing student underpreparation, grade inflation, the implications of technology, and other factors); Rebecca Flanagan, *The Kids Aren't Alright: Rethinking the Law Student Skills Deficit*, 2015 BYU EDUC. & L.J. 135 (2015) (examining changes in undergraduate education and identifying resulting challenges for legal education); Ruth Vance & Susan Stuart, *Of Moby Dick and Tartar Sauce: The Academically Underprepared Law Student and the Curse of Overconfidence*, 53 DUQ. L. REV. 133 (2015) (discussing issues of overconfidence).
38. See Cassandra L. Hill, *The Elephant in the Law School Assessment Room: The Role of Student Responsibility and Motivating Our Students to Learn*, 56 HOW. L.J. 447 (2013) (discussing the need for students to take responsibility in partnership with faculty instructors).
39. *Time Spent Reading*, HUMANITIES INDICATORS (Sept. 2016), <http://www.humanitiesindicators.org/content/indicatorDoc.aspx?i=11094>.
40. *Id.*

averaged spent thirty-two minutes of reading per weekend day in 2015, down from forty-five minutes per weekend day in 2005.⁴¹ Verbal and critical reading skills, as measured by the SAT, fell significantly from 1967 to 2015, according to the American Academy of Arts and Sciences. The academy reported that verbal scores for college-bound seniors in high school fell from approximately 543 in 1967 to approximately 495 in 2015.⁴² Writing skills fell from 497 to 484 in the period from 2005 to 2015.⁴³

Reading skills are particularly important to law students and lawyers. International comparisons of reading skills are available at the Organisation for Economic Co-operation and Development (OECD).⁴⁴ Data for 2009 used reading subscales on which 15-year old American students scored relatively near the OECD average (with regard to access and retrieval, and interpretation and integration), and somewhat above the average on reflection and evaluation, but far below top scorers like students from Shanghai on each of these counts.⁴⁵ Subsequent test administrations used different protocols rather than these same subscales.⁴⁶ For 2015, American students remained at approximately the average OECD level for reading overall, with a composite score of 497, compared to Singapore's 535.⁴⁷ While comparative statistics do not convey the level of American students' reading abilities in an absolute sense, they do suggest that reading skills of American 15-year-olds lack sophistication based

41. *Id.*

42. *Mean SAT Verbal/Critical Reading Score of College-Bound Seniors Compared with Mean Math and Writing Scores, 1967-2015*, HUMANITIES INDICATORS (2017), <https://www.humanitiesindicators.org/content/indicatoroc.aspx?i=152>.

43. *Id.*

44. The OECD comprises 35 nations from North and South America, Europe, and Asia. For a list of member countries see *Members and partners*, OECD, <http://www.oecd.org/about/membersandpartners/> (last visited Oct. 17, 2017).

45. On access and retrieval, American students scored 491.8, compared with the average OECD score of 494.1, and the high score of Shanghai. On interpretation and integration, the United States again fell well below Shanghai (495.0 versus 558.1) and just above the OECD average (493.4). On reflection and evaluation, Shanghai scored 556.6 compared with the American average of 512.1 and OECD average of 494.5. PISA 2009 Results, What Students Know and Can Do: Student Performance in Reading, Mathematics, and Science, Vol. 1, available at <https://www.oecd.org/pisa/pisaproducts/48852548.pdf> (at 62, 65, 69). PISA refers to "Programme for International Students Assessment".

46. For discussion of assessment framework, see PISA 2015 Assessment and Analytical Framework: Science, Reading, Mathematic, Financial Literacy and Collaborative Problem Solving (revised edition), available at <http://www.oecd-ilibrary.org/docserver/download/9817041e.pdf?expires=1513290013&id=id&accname=guest&checksum=728825FD1974C457F54CDCA8CB675Foo> at 49-65.

47. Data for the 2015 PISA administration is included in OECD, *Reading performance among 15-year-olds*, in PISA 2015 RESULTS (VOLUME I): EXCELLENCE AND EQUITY IN EDUCATION (2016), <http://dx.doi.org/10.1787/9789264266490-8-en>, available at http://www.oecd-ilibrary.org/education/pisa-2015-results-volume-i/reading-performance-among-15-year-olds_9789264266490-8-en. For specifics on country scores see page 149. The United States is in the quadrant in which performance deteriorated since 2009. *Id.* at 158.

on the levels of performance assessed under the protocols employed by the OECD.

Thoughtful legal educators have posited other problems afflicting current entering classes. Professor Rebecca Flanagan, for example, has cited the decline in the quality of liberal arts education, less time spent on study by high school and college students, a growing consumer orientation among students, grade inflation, and teacher evaluation practices as influencing the growing level of unpreparedness seen in many law school applicants and enrolled students.⁴⁸ Taking all these factors into account, it is hard to be sure whether the decline in the number of test takers with high LSAT scores within the current law school applicant pool reflects only a decline in the number of analytically gifted students applying to law school, or rather a change in student characteristics such that the current pool of applicants lack the critical-thinking and -reading skills possessed by prior generations.⁴⁹

Law schools around the country have in many cases reduced their entering class sizes in order to maintain their standing in *U.S. News & World Report* rankings.⁵⁰ In some instances, they have compensated by adding one-year master's in legal studies programs or international LL.Ms or other non-J.D. programs. At this juncture, approximately ten percent of students enrolling in law schools are enrolled in non-J.D. programs, but very little is known about those students and how their enrollment may affect the overall educational program of the schools in which they enroll.⁵¹ The American Bar Association's accreditation authority does not generally extend to non-J.D. students, and accreditation of such programs instead likely falls within the jurisdiction of regional accreditors.⁵²

48. See Flanagan, *supra* note 37.

49. For information on the decline in applicants with high LSAT scores, see note 21, *supra*.

50. See ABA Section of Legal Education and Admissions to the Bar, *Comparison of 2011-2016 Matriculants*, AM. BAR ASS'N, [HTTPS://WWW.AMERICANBAR.ORG/GROUPS/LEGAL_EDUCATION/RESOURCES/STATISTICS.HTML](https://www.americanbar.org/groups/legal_education/resources/statistics.html) (last visited Oct. 15, 2017). With a handful of exceptions, nearly all law schools have reduced the size of their entering classes. For discussion about the role of U.S. News rankings in stimulating this trend, see Wendy Nelson Espepland & Michael Sauder, note 11 at 88-89 (discussing reducing class size to game U.S. News rankings).

51. From 2006 to 2016, the proportion of non-J.D. students enrolled in ABA law schools has risen from six percent to ten percent. ACCESSLEX INSTITUTE, *supra* note 25, at 13.

52. The ABA Council is authorized to review and accredit J.D. programs. See https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2016_accreditation_brochure_final.authcheckdam.pdf (its powers derive from the authority of state supreme courts and its recognition as a specialized accreditor by the federal governor with regard to J.D. programs). It reviews masters programs only in a more limited way. See AM. BAR ASS'N, *Standard 313: Degree Programs in Addition to J.D.*, in STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2017-2018 23 (2017) [hereinafter ABA STANDARDS], https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABASStandardsforApprovalofLawSchools/2017_2018_aba_standards_rules_approval_law_schools_final.authcheckdam.pdf. That standard states: A law school may not offer a degree program other than its J.D. degree program unless:

It is possible that many law schools have not stepped back to consider how these significant change vectors might or should affect their admissions practices. The linkage between admission and financial aid practices is also currently relatively ill-defined. As is true with many undergraduate programs, recent years have witnessed a growing emphasis on tuition discounting, more often as a tool to gather funds to recruit “high-merit” students with strong credentials by offering merit scholarships, while at the same time putting a greater burden on first-generation students to pay full freight and subsidize their economically better-off “high-merit” classmates.⁵³ Thus, those students from less privileged backgrounds who enter law school with lesser educational credentials (from K-12 and college) often end up with greater debt and face greater pressures related to job prospects.⁵⁴

- (a) the law school is fully approved;
- (b) the Council has granted acquiescence in the program; and
- (c) the degree program will not interfere with the ability of the law school to operate in compliance with the Standards and to carry out its program of legal education.

Interpretation 313-1. Acquiescence in a degree program other than the J.D. degree is not an approval of the program itself and, therefore, a school may not announce that the program is approved by the Council.

Regional accreditors also play a role in review of non-J.D. programs. For law schools associated with parent universities, regional accreditors have jurisdiction to review all programs (including master’s programs), and the parent university’s accreditation extends to a law school-based master’s degree. Freestanding law schools wishing to create master’s degrees based at their institution must secure regional accreditation for master’s students to qualify for federal financial aid.

- 53. Tuition discounting has become an issue of increasing concern, since in many instances it means that students with the highest credentials (who often have had privileged educations and are relatively wealthy) receive tuition subsidies paid for by those with the weakest credentials (who are often minority or first-generation college graduates). The issue of tuition discounting was raised in 2014 by the American Bar Association’s Task Force on the Future of Legal Education, which discussed the perils of tuition discounting in its report. See AM. BAR ASS’N, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS 22 (2014), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf (observing that “[a] result of such practice is that students whose credentials are the weakest incur large debt to subsidize higher-credentialed students and make the school budget whole.”).
- 54. The AccessLex Institute provides extensive information about student debt loads. See ACCESSLEX INSTITUTE, *supra* note 25, at 18 (45% of law students in 2011-2012 had outstanding undergraduate debt, with a median debt load of \$18,000); *Id.* at 19 (fifty-eight percent of law students reported working while in law school in 2012); *Id.* at 29 (median salary of recent law graduate in 2015 was \$100,000, down from \$144,000 in 2010); *Id.* at 30 (median salary for law graduates lower in 2015 than in 2007). See also GALLUP & ACCESSLEX INSTITUTE, LIFE AFTER LAW SCHOOL (2017), <https://www.accesslex.org/life-after-law-school>. The Law School Survey of Student Engagement (LSSSE) has documented that nonwhite, non-Asian law school graduates assume a greater debt load than others. See Deborah J. Merritt, *Race, Debt, and Opportunity*, LAW SCH. CAFE (Mar. 10, 2016), <https://www.lawschoolcafe.org/2016/03/10/race-debt-and-opportunity/>; LSSSE, *LSSSE Annual Results 2016: Scholarships and Debt (Part 4)* (Sept. 1, 2017), <http://lssse.indiana.edu/blog/lssse-annual-results-2016-scholarships->

Taken together, these factors clearly demonstrate that the current era creates significant dilemmas and uncertainty for admissions officers and faculty admissions committees. Add to those uncertainties the fact that a growing number of heavily tuition-dependent law schools face what may well be a conflict of interest. Some such schools embrace an “access” mission through which they hope to diversify the legal profession and give first-generation, minority, and economically disadvantaged students an opportunity for a legal education. At the same time, they are increasingly at risk of going under if they fail to enroll students in sufficient numbers to cover their costs of operation or to enroll and graduate students who can pass state bar examinations as required by ABA accreditation standards.⁵⁵

The American Bar Association’s response to these challenges has been to increase pressure on law schools to set more demanding and effective admissions standards. The ABA council’s approach has included the following:

and-debt-part-4/ (outlining student expectations regarding debt loads versus scholarship support). See generally AARON N. TAYLOR & CHAD CHRISTENSEN, *LSSSE, LAW SCHOOL SCHOLARSHIP POLICIES: ENGINES OF INEQUITY* (LSSSE Annual Results 2016), <http://lssse.indiana.edu/wp-content/uploads/2015/12/LSSSE-2016-Annual-Report-1.pdf>.

55. For statistics on 2016 bar passage, see http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2017%2FBE-860117-2016-Statistics.pdf. The following states had overall passing scores that dropped by 10% or more between 2007 and 2016: Alabama (64% to 53%); Arizona (70% to 51%); Arkansas (70% to 51%); Connecticut (77% to 67%); Florida (66% to 54%); Georgia (75% to 62%); Illinois (82% to 69%); Indiana (76% to 61%); Iowa (83% to 68%); Kansas (87% to 72%); Maine (80% to 68%); Massachusetts (77% to 65%); Michigan (76% to 65%); Minnesota (88% to 71%); Mississippi (81% to 69%); Montana (89% to 74%); New Jersey (73% to 58%); New Mexico (78% to 66%); North Carolina (65% to 52%); North Dakota (69% to 58%); Oklahoma (85% to 68%); Oregon (74% to 58%); Rhode Island (75% to 58%); South Carolina (79% to 63%); South Dakota (85% to 50%); Tennessee (71% to 59%); Texas (76% to 66%); Utah (81% to 71%); Washington (77% to 67%); Wisconsin (89% to 61%). First-time pass rates fell by 10% or more in the following states during this period: Alaska (82% to 71%); Arizona (78% to 63%); Arkansas (80% to 69%); California (66% to 54%); Florida (78% to 66%); Georgia (85% to 71%); Illinois (89% to 77%); Indiana (84% to 70%); Iowa (89% to 74%); Kansas (91% to 77%); Kentucky (87% to 74%); Maine (84% to 76%); Massachusetts (86% to 76%); Michigan (86% to 75%); Minnesota (93% to 79%); Mississippi (89% to 75%); Nevada (74% to 60%); New Hampshire (84% to 72%); New Jersey (82% to 67%); New Mexico (83% to 73%); North Carolina (76% to 62%); Ohio (86% to 75%); Oklahoma (91% to 77%); Oregon (81% to 64%); Rhode Island (79% to 65%); South Carolina (82% to 71%); South Dakota (89% to 55%); and Wisconsin (92% to 70%). California has long been known for having a particularly difficult exam or high passing standard. For 2016, the California bar pass rate was 40% (compared to 49% in 2007).

Strikingly, there are a number of states in which bar pass rates have remained relatively steady or improved slightly from 2007-2016, for example, Alaska (60% v. 61%); Colorado (69% v. 69%); Delaware (62% v. 66%); District of Columbia (54% v. 57%); Hawaii (70% v. 71%); Idaho (76% v. 72%); Louisiana (61% v. 65%); Vermont (66% v. 65%); West Virginia (63% v. 63%). 2017 bar passage data remains incomplete.

- Requiring that law schools use the LSAT as an admissions test, even though an increasing number of law schools have opted to allow students to submit the GRE instead.⁵⁶
- Imposing requirements on cumulative nontransfer attrition rates, by interpreting relevant standards to create a rebuttable presumption that a nontransfer attrition rate of more than twenty percent reflects a failure to comply with minimum admissions standards.⁵⁷

How law schools are responding to the challenges posed by changing student backgrounds and increased pressure from the ABA is the subject of the sections that follow.

II. New Assessment Strategies to Foster Student Learning: The Emergence of Academic Support

A. *Background.*

The development of academic support programs (ASP) in nearly all American law schools⁵⁸ is among the most important developments in legal

56. Accreditors in other fields don't usually regulate admissions tests, but instead leave such judgments to individual schools. See Marc L. Miller et al., *Standard 503 Comments 1* (June 28, 2017), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/20170628_comment_s503_deans_miller_chemerinsky_rodriguez_morant_guzman_farnsworth.authcheckdam.pdf (comments on proposed Standard 503 from several law school deans making this point). The ABA's most recent proposal to limit law schools' discretion in use of admissions tests other than the LSAT is the proposed revision to Standard 503, stating in part:

"A law school shall not use an admission test other than the Law School Admission Test sponsored by the Law School Admission Council unless the test has been determined by the Council to be a valid and reliable test, pursuant to a process that the Council shall adopt and publish, and to which it shall adhere. The process adopted by the Council shall be the only method through which admission tests shall be determined to be valid and reliable and variances may not be sought by law schools under Rule 33 that are inconsistent with this Standard." Memorandum from Gregory G. Murphy, Council Chairperson & Barry A. Currier, Managing Dir. of Legal Accreditation and Legal Educ., Am. Bar Ass'n Section of Legal Educ. and Admissions to the Bar 6, ABA Standards for Approval of Law Schools Matters for Notice and Comment (March 24, 2017), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20170324_notice_and_comment_memo.authcheckdam.pdf.

57. Memorandum from Barry A. Currier, *supra* note 7, at 5.

58. Catherine L. Carpenter, *Recent Trends in Law School Curricula: Findings from the 2010 ABA Curriculum Survey*, B. EXAMINER, June 2012, at 6, 9 (reporting on 2010 ABA curriculum survey that concluded that at that time ninety-seven percent of law schools had academic support programs and forty-nine percent offered bar preparation courses for credit). The author wishes to express thanks for the inspiration and leadership in this field provided by two former University of North Carolina law colleagues, Professor Charles Daye and Professor Ruth Ann McKinney. She also wishes to thank Professors O.J. Salinas and Louis Schulze for the visionary leadership efforts in the field of academic success and support, and for their assistance in tracking down citations to well-known but poorly documented facts addressed

education to have occurred in the past fifty years. “Academic support programs” can take many forms, including preorientation programs, informal workshops on study skills, optional or required courses beyond the first semester that may be geared to those students with relatively poor performance, individual counseling, team building, emotional support initiatives, deployment of teaching assistants, and various sorts of bar preparation programs.⁵⁹ Often academic support programs foster the creation of “learning communities” that can help students gain social as well as intellectual and emotional support.⁶⁰ Many colleges also employ academic support strategies and began to develop such programs in some instances before the widespread adoption of academic support programming in law schools.⁶¹

Academic support programs in law schools initially arose somewhat episodically in individual law schools during the 1970s and 1980s.⁶² In the

in some of the following footnotes.

59. For a survey of academic support programs as they existed in 2000, see Richard Cabrera & Stephanie Zeman, *Law School Academic Support Programs—A Survey of Available Academic Support Programs for the New Century*, 26 WM. MITCHELL L. REV. 205 (2000). For important earlier discussions of academic support program design, see, e.g., Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F. L. REV. 839 (1997) (discussing evolving characteristics of academic support programs in the late twentieth century); Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157 (1995) (providing empirical analysis of UCLA School of Law academic support program); Paul T. Wangerin, *Law School Academic Support Programs*, 40 HASTINGS L.J. 771 (1989) (discussing undergraduate and law school academic support programs); Charles L. Finke, *Affirmative Action in Law School Academic Support Programs*, 39 J. LEGAL EDUC. 55 (1989) (discussing affirmative action rationale for law school academic support programs and design of early academic support program developed at the University of Oregon in 1980); Adam G. Todd, *Academic Support Programs: Effective Support Through a Systemic Approach*, 38 GONZ. L. REV. 187 (2002) (discussing general design strategies as well as specific design of University of Northern Kentucky’s Salmon P. Chase College of Law academic support program). For discussion of some of the methodological challenges of evaluating academic support programs, see Kevin H. Smith, *Program Evaluation: Defining and Measuring “Success” in Academic Support Programs*, 2003 L. REV. MICH. ST. U. DET. C.L. 177 (2003) (considering the challenges of defining success).
60. Academic support programs have become increasingly sophisticated in their objectives and design. For important recent scholarship on the objectives of academic support programs, see Louis N. Schulze, Jr., *Alternative Justifications for Law School Academic Support Programs: Self-Determination Theory, Autonomy Support, and Humanizing the Law School*, 5 CHARLESTON L. REV. 269 (2011); Louis N. Schulze, Jr., *Alternative Justifications for Academic Support II: How “Academic Support Across the Curriculum” Helps Meet the Goals of the Carnegie Report and Best Practices*, 40 CAP. U. L. REV. 1 (2012); Louis N. Schulze, Jr. & A. Adam Ding, *Alternative Justifications for Academic Support III: An Empirical Analysis of the Impact of Academic Support on Perceived Autonomy Support and Humanizing Law Schools*, 38 OHIO N.U. L. REV. 999 (2012).
61. See Wangerin, *supra* note 59, at 773-94 (discussing undergraduate academic support programs developed in the 1980s). See also Paul T. Wangerin, *A Little Assistance Regarding Academic Assistance Programs: An Introduction to Academic Assistance Programs*, 21 J. CONTEMP. L. 169, 182-88 (1995) (reviewing LAW SCH. ADMISSION COUNCIL, AN INTRODUCTION TO ACADEMIC ASSISTANCE PROGRAMS (1992) and including additional background on nonlaw programs).
62. See sources cited *supra* note 59 for examples. The Council on Legal Education Opportunity

1990s the Law School Admission Council began concerted efforts to foster development of academic support programs and to provide professional development programming for ASP professionals.⁶³

Pioneering ASP professors have written about important aspects of this history.⁶⁴ There appears to be general agreement that at least at the outset, ASP efforts were commonly motivated by the desire to help foster diversity within the profession by providing support for minority students.⁶⁵ Ultimately, ASP programming broadened to include a wider range of at-risk students, including those with limited economic means, who were seen to have other risk factors (such as being single parents, military veterans, or older students with prior careers in other fields), and first-generation college or law students.⁶⁶ As ASP programs matured, they also developed strategies for addressing the challenging question of stigma.⁶⁷ Initially, programs often targeted students whose credentials or histories suggested that they might be at risk of academic underperformance or might particularly benefit from academic support.⁶⁸ Subsequently, many programs found ways to open their doors

was one of the early leaders during the 1960s in encouraging innovative initiatives designed to encourage African-American enrollment in law schools, in particular by pioneering the creation of intensive summer programs designed to encourage performance-based admission of students from historically black colleges and universities. *About*, CLEO, <https://cleoinc.org/about/> (last visited October 20, 2017).

63. The Law School Admission Council was also a leader in encouraging the development of academic support programs. See LAW SCH. ADMISSION COUNCIL, A PRACTICAL GUIDE FOR LAW SCHOOL ACADEMIC ASSISTANCE PROGRAMS (2000); LAW SCH. ADMISSION COUNCIL, *supra* note 61.
64. See Lustbader, *supra* note 59 (discussing early steps in establishment of academic support programs, including work by the LSAC and early academic support program leaders). See also other articles referenced *supra* note 59.
65. See Finke, *supra* note 59, at 56-59.
66. Cynthia Schmidt & Ann L. Iijima, *A Compass for Success: A New Direction for Academic Support Programs*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 651, 652 n.9 (2006) (discussing changes in William Mitchell's program to incorporate mandatory participation, and providing detailed empirical evaluation); Kathy L. Cerminara, *Remembering Arthur: Some Suggestions for Law School Academic Support Programs*, 21 T. MARSHALL L. REV. 249, 262-67 (1996) (discussing options for design, including which students should be targets for inclusion). In 2011, the Law School Academic Success Project conducted a survey of academic support programs, drawing responses from 157 law schools. Law School Academic Success Project, Summary of the 2011 National Law School ASP Survey, available from <http://www.lawschoolasp.org/index.php> (last visited December 15, 2017) (copy on file with author). This survey evidences the wide range of services available even in 2011. *Id.* at 11-13 (providing data on summer orientation programs, tutoring, academic and bar support programs among others), 20 (more extensive programming for first year students). (hereinafter referred to as "LSASP 2011 Survey").
67. See Chris K. Iijima, *Separating Support from Betrayal: Examining the Intersections of Racialized Legal Pedagogy, Academic Support, and Subordination*, 33 IND. L. REV. 737, 772-78 (2000).
68. Schmidt & Iijima, *supra* note 66, at 652 n.9. See also LSASP 2011 Survey, note 66 *supra*, at 16 (chart identifying goals of academic success programs, including focus on identified demographic groups, at risk students, all students and alumni; most widely shared goal at that time seen as maximizing academic excellence for all students [90%], for at risk students

to all interested students and thus to reduce perceptions that participation stigmatized participants.⁶⁹

As ASP programs matured, they were also able to attract more educated and highly credentialed teachers. At the outset, at least some law schools treated ASP professionals as staff, rather than as educators whose work lay at the heart of the enterprise.⁷⁰ At least anecdotally, it appears that most schools have at least one member of their academic support faculty with not only a law degree but also a masters-level degree in education or counseling.⁷¹ Thus, ASP faculty often have greater expertise in educational theory and practice, and perhaps in research methodologies, than their higher-status “podium faculty” colleagues. Unfortunately, given the “siloe” nature of many law school faculties, podium faculty members may have littler understanding the work of ASP programs or the expertise of the faculty members teaching in this area. One of the best things law schools could do, going forward, is to bridge these gaps.

[50%], and for identified demographic groups [20%]. See also Louis Schulze, Jr., *Alternative Justifications for Law School Academic Support Programs: Self-Determination Theory, Autonomy Support, and Humanizing the Law School*, 5 CHARLESTON L. REV. 269, 280 (2011) (“First-year academic support methods are myriad. Some programs focus initially on students with academic indicators showing a potential for the need for assistance. Other programs focus primarily on minority or non-traditional law students. Still other programs take a different approach, remaining open to all students and slowly narrowing in on students whose law school performance indicates the need for support” [footnotes omitted]).

69. See, e.g., Jacquelyn H. Slotkin, *An Institutional Commitment to Minorities and Diversity: The Evolution of a Law School Academic Support Program*, 12 T.M. COOLEY L. REV. 559 (1995) (discussing evolution of California Western’s academic support program). See also Leah M. Christensen, *Enhancing Law School Success: A Study of Goal Orientations, Academic Achievement and the Declining Self-Efficacy of Our Law Students*, 33 L. & PSYCHOL. REV. 57 (2009) (exploring the broader psychological needs to be addressed as part of academic support programming). See also Academic Support Comparative Table (survey by ASP professionals, on file with author, outlining range of academic support programs available from various schools as of 2015).
70. This observation is based on the author’s experience in visiting a number of law schools during the 1990s and early to mid-2000s. For a powerful discussion of the need for integrated efforts relating to academic support both by academic support faculty and podium faculty, see Melissa J. Marlow, *It Takes a Village to Solve the Problems in Legal Education: Every Faculty Member’s Role in Academic Support*, 30 U. ARK. LITTLE ROCK L. REV. 489 (2008). For information about staffing patterns in 2011, see LSASP 2011 Survey, note 66 *supra*, at 17 (showing distribution across a range of roles including tenured faculty, legal writing faculty, clinical faculty, student services professionals, adjuncts and others).
71. At least anecdotally, a growing number of law schools have hired, or are seeking to hire academic support professionals with both law degrees and degrees in education, higher education, counseling, or similar fields. This observation has been confirmed by experts in the field through personal communications (e.g. email from O.J. Salinas, UNC School of Law, who maintains major website for academic support professionals at <http://www.lawschoolasp.org>, dated December 13, 2017). Unfortunately, the AALS Directory of Law Teachers does not have a separate category for academic support professionals. and there is no established survey that documents the educational backgrounds of academic support professionals who are in some schools classified as faculty and in others as professional staff as described *supra* in note 70.

B. *ABA Accreditation Requirements.*

Despite the significance of ASP programming, ABA standards have taken some time to catch up with the importance of these developments. The most recent major ABA accreditation changes, dating from 2014, referenced ASP programming for the first time in ABA standards (approximately thirty years after ASP programming began to take the legal education world by storm).

Section 309(b) of the accreditation standards imposes a mandatory obligation on law schools to provide for academic support programming:

(b) A law school shall provide academic support designed to afford students a reasonable opportunity to complete the program of legal education, graduate, and become members of the legal profession.⁷²

This new standard replaces a more timid earlier interpretation that was eliminated during the 2014 revisions:

Interpretation 303-3:

*A law school shall provide the academic support necessary to assure each student a satisfactory opportunity to complete the program, graduate, and become a member of the legal profession. This obligation may require a school to create and maintain a formal academic support program.*⁷³

Academic support programming is also further addressed by changes in accreditation standards and interpretations adopted in 2008 that effectively eliminated earlier language prohibiting law schools from offering for-credit bar preparation courses.⁷⁴

The ABA standards also address academic support programming in connection with bar passage standards, a topic that remains under review by the ABA Section Council. More specifically, the ABA Standard on bar passage adopted in 2014 reads as follows:

72. AM. BAR ASS'N, *Standard 309: Academic Advising and Support*, in ABA STANDARDS, *supra* note 52, at 21.
73. AM. BAR ASS'N, *Interpretation 303-3*, in STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2013-2014 24 (2013), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.authcheckdam.pdf.
74. For an explanation of these convoluted changes, see Mario W. Mainero, *We Should Not Rely on Commercial Bar Reviews to Do Our Job: Why Labor-Intensive Comprehensive Bar Examination Preparation Can and Should Be a Part of the Law School Mission*, 19 CHAP. L. REV. 545, 563 (2016). For other discussions of bar preparation programs that are part of academic support portfolios, see Aleatra P. Williams, *The Role of Bar Preparation Programs in the Current Legal Education Crisis*, 59 WAYNE L. REV. 383 (2013) (reviewing practices prior to ABA changes); Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams*, 45 BRANDEIS L.J. 269 (2007); Linda Jellum & Emmeline Paulette Reeves, *Cool Data on a Hot Issue: Empirical Evidence that a Law School Bar Support Program Enhances Bar Performance*, 5 NEV. L.J. 646 (2005) (discussing importance of bar passage and strategies for bar support).

Standard 316 (c). A school found out of compliance under paragraph (b) and that has not been able to come into compliance within the two-year period specified in Rule 14(b) of the Rules of Procedure for Approval of Law Schools, may seek to demonstrate good cause for extending the period the law school has to demonstrate compliance by submitting evidence of:

(3) Actions by the law school to address bar passage, particularly the law school's academic rigor and the demonstrated value and effectiveness of its academic support and bar preparation programs: value-added, effective, sustained and pervasive actions to address bar passage problems will be considered in the law school's favor; ineffective or only marginally effective programs or limited action by the law school against it.⁷⁵

While the 2014 standards appear to treat ASP programming as important, and to treat the efficacy of law schools' efforts to adopt effective academic success programming as a mitigating factor in determining law schools' satisfaction of related standards, some level of schizophrenia seems to be at work in the ABA's approach. As noted earlier,⁷⁶ the ABA council has also recently promulgated a proposed interpretation that holds the feet of academic support professionals to the fire: "Interpretation 501-3: A law school having a cumulative non-transfer attrition rate above 20 percent for a class creates a rebuttable presumption that the law school is not in compliance with the Standard."⁷⁷ [Proposed new language is underlined.]"

The effect of this interpretation is to put the squeeze on admissions personnel deciding which students should be admitted, and most particularly on academic support professionals who work with first-year students to produce academic success within relatively short order.

C. *Questions Worth Asking.*

1. *Admissions decisions with impacts on instructional strategies: Who will succeed?*

The question of predicting academic success in law school for students with mixed indicators at the time of application is not an easy one. Not all law schools link conversations between admissions professionals and academic support professionals to consider these questions. A national research effort to determine the relationship between admissions indicators and academic support practices might significantly enhance the pipeline of diverse students and future lawyers.

Many legal educators and professional staff have few opportunities to tap growing research about what strategies might be used to predict academic success among nontraditional undergraduates, and what intervention strategies

75. AM. BAR ASS'N, *Standard 316: Bar Passage*, in ABA STANDARDS, *supra* note 52, at 24-25.

76. See *supra* note 57 and accompanying text.

77. Memorandum from Barry A. Currier, *supra* note 7, at 5.

are proving most effective.⁷⁸ Significantly, too, those in legal education lack convenient venues through which to explore what is known about academic success for disadvantaged or first-generation students in college.⁷⁹ It will be important to build bridges across such chasms in order to answer crucial questions regarding admissions and support.

2. *Efficacy of academic support programs in the early stages of legal education.*

Existing research suggests the difficulty in developing meaningful protocols for assessing the efficacy of academic support programs in the first year of legal education.⁸⁰ No one has yet created a framework for engaging in a wide-ranging assessment of related issues that might more clearly identify the precise challenges facing entering students with mixed credentials or articulate the key variables affecting academic performance and how academic support programs might effectively intervene. However desirable it might be to create a “gold standard” assessment of academic support programming, such an effort may be difficult to accomplish given the differences among the populations of students at diverse law schools, the range of teaching and assessment strategies used by diverse faculty members, and other factors that would make some sort of standardized research protocol difficult to describe and employ.

Increasingly sophisticated design, documentation, and evaluation of academic support programs offer significant promise in providing national models of inquiry and perhaps even national models for success if emulated and tested across diverse law school populations.⁸¹ Take, for example, an

78. For a fascinating recent study conducted by the National Academies of Sciences, Engineering, and Medicine regarding undergraduate success strategies, see SUPPORTING STUDENTS’ COLLEGE SUCCESS: THE ROLE OF ASSESSMENT OF INTRAPERSONAL AND INTERPERSONAL COMPETENCIES (Joan Herman & Margaret Hilton eds., 2017), <https://doi.org/10.17226/24697>.
79. In comparison, many studies of research questions regarding college student support and retention are published in specialty journals such as the JOURNAL OF COLLEGE STUDENT RETENTION: RESEARCH, THEORY & PRACTICE.
80. Since academic support programs are necessarily designed with an eye to law schools’ particular characteristics (students, backgrounds, curricula, instructional strategies, and more), it is difficult to design a generic system for evaluation of their efficacy. Nonetheless, it is important for individual programs to review methods developed by others, see note 82 *infra*, and to work toward developing more systematic strategies for assessing the efficacy of such programs in individual schools in order to develop a better understanding of factors affecting the efficacy of teaching and learning.
81. This article has been structured to address academic support programs focusing on the early stages of law school and those that focus on bar preparation, because that is the historical progression in which such programming developed and because there are distinct conceptual issues that may bear on these two distinct aspects of such programming. As is evident from the discussion here, schools have increasingly committed to developing both types of programming, and have in recent years worked to coordinate and connect such programming. Assessment of efficacy of these two types of initiatives may be either simpler or more difficult as a result. Some schools have begun to undertake assessments focusing on the spectrum of offerings related to academic support (in order to tease out the implications

outstanding recent article by Professor Louis Schulze discussing the design and effectiveness of Florida International University College of Law's academic support program.⁸² The program deliberately teaches students about the insights provided by cognitive science and educational psychology and is designed to help them practice related principles in their own approach to learning. In particular, the program emphasizes building students' capacity for metacognition and self-regulated learning (by learning to recognize what one does and does not know), using "forced recall" practice (including multiple practice tests), "cognitive schema theory" (by rethinking how and when to outline), and "spaced repetition" (by taking practice tests at frequent intervals to strengthen and build upon knowledge and facilitate knowledge transfer).⁸³ Contemporaneously with the deliberate, incremental changes in the school's academic support program, the bar examination performance improved from 2012 (when the school stood seventh in the state in terms of bar passage), until 2016 (when it stood first in the state for bar passage, exceeding the state's bar pass average by approximately 20%).⁸⁴ These insights and the accomplishments of Florida International's students on the state bar exam are ground breaking. Ideally several other law schools would adopt approaches modeled on those developed at FIU to see if it is possible to replicate these significant improvements in student learning and bar passage.⁸⁵

for bar passage when students do or do not participate in earlier programming, for example). Others have continued to try to assess the efficacy of distinct parts of their overall programs. Subparts B and C of this section highlight literature that considers efficacy of academic support either when focused on one or the other of these parts of the spectrum, or when focused on a spectrum of initiatives.

82. See Louis N. Schulze, Jr., *Using Science to Build Better Learners: One School's Successful Efforts to Raise Its Bar Passage Rates in an Era of Decline*, 12 FLA. INT'L U. L. REV. (forthcoming 2017), <https://ssrn.com/abstract=2960192>. This article assesses the design of the school's overall program of academic support and its ultimate implications for bar passage of graduates. Part III of the article addresses the overall design, and Part IV focuses more specifically on the pre-bar exam component. The overall program is discussed here, while notes to Subpart C, *infra*, reference more specifics about bar exam preparation.
83. *Id.* (manuscript at 3-4, 7-18).
84. Schulze, *supra* note 82 (manuscript at 6 & n.17). This accomplishment is even more remarkable if admissions data for FIU compared with other leading law schools in Florida are taken into account. See *State Report: Florida*, L. SCH. TRANSPARENCY, <https://www.lstreports.com/state/FL/admissions/> (last visited October 20, 2017) (comparing LSAT, GPA, attrition and tuition data for entering classes of Florida law schools).
85. Some of the insights about metacognition as a focus have been echoed by others in the academic support community. See, e.g., Michael Hunter Schwartz, *Teaching Law Students to Be Self-Regulated Learners*, 2003 MICH. ST. DCL L. REV. 447 (2003); Elizabeth M. Bloom, *Teaching Law Students to Teach Themselves: Using Lessons from Educational Psychology to Shape Self-Regulated Learners*, 59 WAYNE L. REV. 311 (2013); Cheryl B. Preston, Penée Wood Stewart & Louise R. Moulding, *Teaching "Thinking Like a Lawyer": Metacognition and Law Students*, 2014 BYU L. REV.

3. *Efficacy of late-stage academic support programs in preparation for the bar.*

Evaluating bar preparation support programs is also not easy. Some of the complex variables work considering include: initial student indicators, institutional climate, student motivation, student burdens (such as work or family obligations), the implications of stereotype threat, student engagement in support programs throughout law school and specifically in their final year, design of student support programs and much more. Evaluating the efficacy of such programs is indeed a “wicked problem” that is not easily solved.⁸⁶

Developing a meaningful research strategy about bar performance and related support programs necessitates careful analysis of related questions concerning the factors that affect success earlier in law schools and the considerations that shape performance in preparation for the bar and on the bar examination. An initial set of considerations relates to what factors may bear on law students’ bar examination performance. One hypothesis might be factors that affect performance throughout law school are the same factors that affect bar performance. Current law students do not have the same experience as those from prior generations in reading texts closely, developing metacognition strategies, and navigating the law school learning environment, which is in many ways quite different from learning environments experienced in their earlier lives. This hypothesis would suggest that law schools should focus on identifying students who lack requisite skills as early as possible (some before entry, others after the first semester, yet others after the first year) and intervene as necessary to build those skills. Many law schools’ original academic support models took forms that reflected this hypothesis.

Another set of considerations relates to timing and tailoring. For example, it might be hypothesized that students most at risk on the bar exam are

1053 (2014).

86. For an overview of the early range of bar preparation initiatives, see Comm. on Bar Admissions and Lawyer Performance & Richard A. White, *AALS Survey of Law Schools on Programs and Courses Designed to Enhance Bar Examination Performance*, 52 J. LEGAL EDUC. 453 (2002) (reporting on survey of law schools conducted in 1999-2000 with 59.3% response rate, in which approximately one-third of respondents indicated that they had developed some sort of bar passage support for students). For a more recent discussion of bar preparation programs in general, see Williams, *supra* note 74 (focusing on certain schools where bar performance exceeded predictors). Other scholars have addressed in detail the experiences of particular schools with various bar preparation initiatives. See, e.g., Mainero, *supra* note 74 (discussing experience of Fowler School of Law, Chapman University); Derek Alphan, Tanya Washington & Vincent Eagan, *Yes We Can, Pass the Bar. University of the District of Columbia, David A. Clarke School of Law Bar Passage Initiatives and Bar Pass Rates—From the Titanic to the Queen Mary* 14 U.D.C. L. REV. 9 (2011) (discussing initiatives at University of District of Columbia David A. Clarke School of Law); Ben Bratman, *For-Credit Bar Exam Preparation: A Legal Writing Model*, B. EXAMINER, Nov. 2007, at 26 (discussing experience at University of Pittsburgh School of Law); Jellum & Reeves, *supra* note 74 (discussing experience at University of Richmond). For additional recent analyses of the efficacy of bar preparation programs, see, e.g., Scott Johns, *Empirical Reflections: A Statistical Evaluation of Bar Exam Program Interventions*, 54 U. LOUISVILLE L. REV. 35 (2016) (discussing implications of University of Denver Sturm College of Law bar preparation and academic support programs on bar passage) (discussed *infra* at text accompanying note 91).

not all alike and really comprise multiple subsets. Those who perform in the bottom of the class in law school are most certainly at risk.⁸⁷ But others may likewise be at risk for other distinctive reasons—for example, because of emotional challenges (they have disengaged from law school and are fearful that they will not pass the bar and fail to commit to serious study), financial reasons (they are trying to work to stay afloat or to take on less loan debt), or study-skill deficits (intensive preparation for the bar in the last semester of law school and before the bar exam requires high levels of self-discipline and organization). A growing number of law schools have expanded their academic support offerings and have dedicated personnel who collaborate but often take independent responsibility for early-stage academic support and for the most intensive work in helping prepare students for the bar exam.⁸⁸

A further set of considerations relates to the forms of intervention employed in working with students at risk of failing the bar exam. The ABA has in recent years allowed law schools to give credit for enrollment in bar preparation courses.⁸⁹ A growing array of such courses have been developed in law schools across the country, including some that give more emphasis on content review, others that focus on practicing exam-taking, and still others

87. See LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY at 38 (1998), <http://www.unc.edu/edp/pdf/NLBPS.pdf> (“The highest correlations are between law school grades and [bar exam] pass/fail”); Douglas K. Rush & Hisako Matsuo, *Does Law School Curriculum Affect Bar Examination Passage? An Empirical Analysis of Factors Related to Bar Examination Passage During the Years 2001 Through 2006 at a Midwestern Law School*, 57 J. LEGAL EDUC. 224, 233 (2007) (in study of bar takers from among St. Louis University School of Law, finding that graduates ranking in bottom quartile and particularly in bottom ten percent of class were at high risk of failing the Missouri bar exam); Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 105-06 (2007) (discussing result of empirical study at University of Colorado School of Law that found that students in the lowest ten percent of the class were particularly vulnerable to bar examination failure); Keith A. Kaufman, V. Holland LaSalle-Ricci, Carol R. Glass & Diane B. Arnkoff, *Passing the Bar Exam: Psychological, Educational, and Demographic Predictors of Success*, 57 J. LEGAL EDUC. 205, 214-16 (2007) (in study of bar performance among graduates of urban religiously affiliated law school, finding law school grade point average to be significantly correlated with bar passage, but also finding that test anxiety was correlated with lower law school grade point average); Stephen P. Klein & Roger Bolus, *The Size and Source of Differences in Bar Exam Passing Rates Among Racial and Ethnic Groups*, B. EXAMINER, Nov. 1997, at 8, 13 (in study involving four law schools, concluding: “LSAT scores explained an average of 15% of the variance in ‘total’ (essay plus MBE) bar exam scores at these schools. Thus, LSAT scores predict LGPAs to about the same degree as they predict bar scores. In contrast, LGPAs explain almost 50% of the variance in bar scores. Consequently, LGPAs are about a three times better predictor of bar exam scores than are LSAT scores.”); Katherine A. Austin, Catherine Martin Christopher & Darby Dickerson, *Will I Pass the Bar Exam?: Predicting Student Success Using LSAT Scores and Law School Performance*, 45 HOFSTRA L. REV. 753, 762 (2017) (in study of Texas Tech law graduates’ performance on Texas bar exam, finding those in the bottom quartile in class rank were disproportionately at risk of failing).

88. See sources cited *supra* note 86.

89. See sources cited *supra* note 74, explaining the ABA council’s removal of a prior prohibition against law schools offering for-credit bar preparation courses.

that emphasize counseling and moral support.⁹⁰ A recent empirical study of bar preparation programming at the University of Denver Sturm College of Law by Professor Scott Johns provides a helpful exploration of related issues, based on evidence relating to graduates taking summer bar examinations in 2008, 2009 and 2010.⁹¹ The study described the school's approach to academic and bar passage support, including three program components that focused on second-year students with weak first-year performance, third-year students, and a post-graduation bar preparation program.⁹² It also analyzed four cohorts of students (those with first-year law grade point averages of 2.6 or below, between 2.6 and 2.9, between 2.9 and 3.5, and 3.5 or above), their participation in the various program components, and their performance on the Colorado bar exam. It found that the overwhelming majority of students with grade point averages of 2.6 or below who enrolled *before* the "Intermediate Legal Analysis" course ("ILA," the initial component of the Denver program) became mandatory, and thus did not participate in the ILA, did the worst on the bar examination.⁹³ Using a model that takes into account a variety of factors, the study concluded that graduating law school grade point average had the most significant impact on bar success, but that participation in the third-year and post-graduation bar preparation program also played a statistically significant role.⁹⁴

Professor Louis Schulze's exploration of Florida International University's academic and bar support programs provides additional insight about how bar preparation programs might be structured.⁹⁵ Although Schulze stresses the many nuanced strategies employed in various bar preparation programs, he offers three crucial conceptual insights. First, he stresses that early and repeated, spaced practice with multiple-choice questions is important in the run-up to the bar examination, but notes that students must use such practice as an opportunity to engage in metacognition in order to realize what they haven't mastered.⁹⁶ Second, he recommends "mixed practice" (integrating

90. See sources cited *supra* note 86.

91. See Johns, *supra* note 86, at 45. Professor Johns' analysis is based on student performance on the Colorado bar examination before the Uniform Bar Examination was adopted in 2011 and the cut score set at one of the highest in the country. For information on the Uniform Bar Examination, adopting jurisdictions and cut scores, see information on the National Conference of Bar Examiners' website, <http://www.ncbex.org/exams/ube/score-portability/minimum-scores/> (highest cut score for Alaska set at 280, followed by Colorado and Maine at 276).

92. *Id.* at 36-43.

93. *Id.* at 52-53.

94. *Id.* at 63.

95. See Schulze, *supra* note 82 (manuscript at 7-18).

96. *Id.* (manuscript at 24-25). Significantly, he observes, students may mistake the nature of the exercise in question, thinking that they are receiving formative feedback, when in fact they are in the final throes of preparing for a summative assessment and must recognize their weak spots and achieve mastery to succeed.

coverage of more than one topic during practice exercises) in order to gain experience with “desirable difficulties”—that is, fostering a “growth mindset” using “harder learning” to enhance the depth of learning and avoid false judgments about mastery.⁹⁷ Finally, he argues that students must practice self-regulated learning, rather than reverting to the assumption that they should just memorize content delivered by external experts.⁹⁸

Law schools face challenges in evaluating causes of student performance on the bar exam. Some state bar examiners provide information about graduates’ pass/fail and subject matter performance, while others do not, just as some jurisdictions provide ready access to prior examination questions while others do not.⁹⁹ The practice of “backward design” is well-documented in the higher education literature as a strategy for helping students attain desired learning outcomes.¹⁰⁰ Now that the ABA has effectively mandated that law schools incorporate academic support programming and allowed schools to offer instruction to support students’ bar preparation, it is more crucial than ever for professors and schools to have access to the tools they need to analyze student shortcomings and to prepare them more effectively.

Legal educators have begun to try to tease out the extent to which diverse factors affect student performance in law school, and those that affect bar

97. *Id.* (manuscript at 25-26). See also Elizabeth M. Bloom, *Creating Desirable Difficulties: Strategies for Reshaping Teaching and Learning in the Law School Classroom*, 95 *UNIV. OF DETROIT MERCY L. REV.* (forthcoming), <https://ssrn.com/abstract=2951961>.
98. Schulze, *supra* note 82 (manuscript at 27-27).
99. Some states provide detailed information to law schools about graduates’ performance. See, e.g., Katherine A. Austin, Catherine Martin Christopher & Darby Dickerson, *Will I Pass the Bar Exam? Predicting Student Success Using LSAT Scores and Law School Performance*, 45 *HOFSTRA L. REV.* 753, 754 n. 7 (2017) (describing Texas’ practice of making information about bar passage including success or failure and performance in individual subject matter available to Texas law schools). Other states limit access to such information so that law schools need to collect it, if possible, from their graduates. The Conference of Chief Justices as early as 2008 passed a resolution calling on state chief justices to urge bar examiners to cooperate with the American Bar Association section on legal education and the Law School Admission Council in order to allow easier gathering and analysis of bar passage information by law schools. See Resolution 3, “Encouraging Cooperation in Creating an Efficient System for Tracking Bar Examination Passage Rates for all Law School Graduates” (January 30, 2008), available at <http://ccj.ncsc.org/-/media/Microsites/Files/CCJ/Resolutions/01302008-Encouraging-Efficient-System-Tracking-Bar-Examination-Passage-Rates-Law-Graduates.ashx> (last visited December 15, 2017). Divergent practices in making prior examination questions available for student study or for law school analysis are also evident. The California State Bar routinely makes old examination questions available. See <http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/Past-Exams#examquestions> (last visited December 15, 2017). However, the National Conference of Bar Examiners, who oversee questions on the Uniform Bar Examination increasingly required by many states, offers a much more limited number of “study aids” and old exam practice sets for a price. See <http://store.ncbex.org/all-online-practice-exams/> (last visited December 15, 2017).
100. See, e.g., GRANT WIGGINS & JAY MCTIGHE, *UNDERSTANDING BY DESIGN* (2d ed, 2005) (arguing that academic courses should be designed starting with desired outcomes and then building instructional strategies designed to meet those outcomes).

examination performance, in order to develop educational interventions to help students succeed. Those in the field are tapping crucially important insights from cognitive science and educational psychology, and using these to help students become better learners both early in law school and in the run-up to the bar exam. The intensive efforts being undertaken by those in academic support roles suggest that they will emerge as leaders in law school efforts to deal with a variety of ABA assessment mandates.

III. Formative Assessment in Individual Classes: Developing and Testing Fresh Ideas

A. *Background.*

In its 2014 effort to update its accreditation standards to reflect more modern educational thinking, the ABA incorporated a new Standard 314, relating to “assessment of student learning.” The new standard reads as follows:

Standard 314. Assessment of Student Learning. A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.¹⁰¹

For those unfamiliar with this educational jargon, “formative assessment” in effect refers to feedback to students to help them confirm and enhance their learning, while “summative assessment” refers to ultimate judgments on student performance, typically at the end of a course, leading to a course grade.¹⁰²

The ABA also issued two formal interpretations, reading as follows:

Interpretation 314-1. Formative assessment methods are measurements at different points during a particular course or at different points over the span of a student’s education that provide meaningful feedback to improve student learning. Summative assessment methods are measurements at the culmination of a particular course or at the culmination of any part of a student’s legal education that measure the degree of student learning.

101. See ABA Standards, Standard 314 available at https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABASStandardsforApprovalofLawSchools/2017_2018_standards_chapter3.authcheckdam.pdf.
102. Although many law faculty members historically have not been familiar with this terminology and related concepts, an increasing literature has emerged documenting faculty experimentation with diverse methods of formative assessment. For discussions of formative assessment generally, see Herbert N. Ramy, *Moving Students from Hearing and Forgetting to Doing and Understanding: A Manual for Assessment in Law School*, 41 CAP. U. L. REV. 837 (2013); Olympia Duhart, “It’s Not for a Grade”: *The Rewards and Risks of Low-Risk Assessment in the High-Stakes Law School Classroom*, 7 ELON L. REV. 491 (2015). For discussion of particular contexts in which formative assessment techniques can be used, see Anthony Niedwiecki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students Through More Effective Formative Assessment Techniques*, 40 CAP. U. L. REV. 149 (2012); Neil Hamilton, *Off-the-Shelf Formative Assessments to Help Each Student Develop Toward a Professional Formation/Ethical Professional Identity Learning Outcome of an Internalized Commitment to the Student’s Own Professional Development*, 68 MERCER L. REV. 687 (2017).

Interpretation 314-2. A law school need not apply multiple assessment methods in any particular course. Assessment methods are likely to be different from school to school. Law schools are not required by Standard 314 to use any particular assessment method.

These interpretations seem to have positioned the ABA's council in a relatively congenial stance: telling schools they must more fully embrace formative assessments, but leaving space for schools to embrace this change through the voluntary efforts of only some of their faculty members.

B. *Questions Worth Asking.*

1. *What are possible formative assessment strategies?*

A growing number of innovative faculty members have written about formative assessment regimes that they have adopted in a diverse range of classes.¹⁰³ This rich pool of scholarship indicates that many options for formative assessment may be possible.

Strikingly, too, publishers of casebooks and other educational materials for law schools have increasingly incorporated formative assessment options as part of their educational materials.¹⁰⁴ These materials accordingly supplement those that have long been available through such sources as the Center for Computer-Assisted Legal Instruction.¹⁰⁵ CALI also provides instructors with a tool for audience-based polling, one of several means for engaging students and testing their understanding.¹⁰⁶

103. For examples of scholarship on formative assessment in individual classes, see Judy Rosenbaum, Carol Morgan & Carol Newman, *Assessment of Learning Outcomes in Transactional Skills Courses*, 18 *TRANSACTIONS: TENN. J. BUS. L.* 593 (2016) (discussing assessment in transactional skills-based courses); Rebecca Lutkenhaus & Karen Wallace, *Assessing the Effectiveness of Single-Session Legal Research Skill Instruction Through Pre- and Post-Testing: A Case Study*, 107 *LAW LIBR. J.* 57 (2015) (discussing formative assessment with regard to instruction in legal research).

104. Westlaw (*see, e.g.*, Casebook Plus line of casebooks, discussed at <http://eproducts.westacademic.com/casebookplus>), Lexis (with education materials now available through Carolina Academic Press, whose "Context and Practice" series includes formative assessment resources, <http://www.cap-press.com/p/CAP>), and Wolters-Kluwer (Aspen) (with selected casebooks including formative assessment opportunities, *see, e.g.*, http://www.wklegaledu.com/aspen-casebook-series/id-9781454881995/Property_Ninth_Edition).

105. CALI: THE CENTER FOR COMPUTER-ASSISTED LEGAL INSTRUCTION, <http://www.cali.org> (last visited October 26, 2017). CALI has long supported faculty members who are interested in developing computer-assisted lessons in a variety of subject areas that allow students to gain formative feedback. Faculty members including this author have used CALI lessons as sources of formative assessment for students, since the lessons cover discrete subsets of doctrine and intersperse multiple choice questions that students complete and receive automated feedback about whether selected answers are correct or incorrect and why.

106. CALI also provides a free tool called "InstaPoll" that allows faculty members to deploy computer-based questions during class in order to track student responses about substantive topics and accordingly respond to students' areas of understanding or lack of understanding. *See CALI InstaPoll*, CALI, <https://www.cali.org/content/cali-instapoll> (last visited October 26, 2017).

As it has become easier for faculty members to employ formative assessment strategies, undoubtedly more have done so. While there does not appear to be any way to gauge the extent to which faculty members have adopted such strategies, a review of the literature suggests that more of them are embracing the ABA mandate, less because the ABA has directed such a change than because of their own desire to provide their students with effective instruction.

2. *Does formative assessment in standard classrooms make a difference in student performance?*

A growing number of legal educators have been working to ascertain whether their formative assessment efforts in standard classrooms make a difference in student performance.

To date there have been relatively few empirical studies of related questions, and those that have been undertaken have yielded somewhat different conclusions. Two studies were undertaken by Professor Andrea Curcio and colleagues.¹⁰⁷ The first involved use of five short essay exam questions during a spring 2006 civil procedure section in which students could receive extra credit for participation and accomplishment, and a comparison with another civil procedure section that did not employ this intervention, but used a common final exam question.¹⁰⁸ Professor Curcio and colleagues found that the students who benefited most from this intervention were those who had above-the-median LSAT scores and undergraduate grade point averages.¹⁰⁹ Curcio and colleagues suggested that metacognitive skills may have influenced this result.¹¹⁰

In a later study, Professor Curcio and other colleagues considered formative assessment in the context of a required second-year evidence class, taught in spring 2008 and spring 2009. The 2008 students were treated as the control group, and those in the 2009 “intervention group” were given five ungraded quizzes and a graded midterm exam as a form of “formative assessment.”¹¹¹ This second study concluded that formative assessments given during the required second-year evidence course benefited seventy percent of students in the intervention group, (both those above and those below the median of law school scores) compared with the control group that did not have such an intervention.¹¹²

107. Andrea A. Curcio, Gregory Todd Jones & Tanya M. Washington, *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance*, 35 FLA. ST. U. L. REV. 271 (2008); Carol Springer Sargent & Andrea A. Curcio, *Empirical Evidence that Formative Assessments Improve Final Exams*, 61 J. LEGAL EDUC. 379 (2012). See also Andrea A. Curcio, *Assessing Differently and Using Empirical Studies to See if It Makes a Difference: Can Law Schools Do It Better?*, 27 QUINNIPIAC L. REV. 934 (2009) (offering further reflections on assessment).

108. Curcio, Jones & Washington, *supra* note 107, at 286-90.

109. *Id.* at 291-302.

110. *Id.* at 303-06.

111. Sargent & Curcio, *supra* note 107, at 385-88.

112. *Id.* at 394-95.

A more recent study authored by Professors Daniel Schwarcz and Dion Farganis considered an opportunistic intervention at the University of Minnesota School of Law that involved individualized feedback for students in some first-year sections.¹¹³ The authors focused on differential performance evident when cohorts of students were combined in “double sections” for certain classes. In eight such double sections, over the period fall 2011 to fall 2015, students in cohorts that had received individualized feedback outperformed those in cohorts that had not received individualized feedback when both cohorts in the double section took an identical final examination.¹¹⁴ The authors concluded students who had received informal feedback also benefited in their other classes throughout the first year, those below the middle of the class benefited the most, and some students benefited by as much as half a grade increment.¹¹⁵

More recently, Ohio State University Moritz College of Law legal scholars undertook their own study on formative assessment and have provided perspectives on the earlier studies.¹¹⁶ The Ohio State study focused on a voluntary formative assessment opportunity made available to one section of students in a first-year constitutional law course compared with others taught during the same spring semesters during 2014, 2015, and 2016.¹¹⁷ The study sought to determine whether some students were more likely than others to avail themselves of the feedback, how those receiving this type of formative assessment fared in the constitutional law class, and how they fared in other classes during the same semester.¹¹⁸ This study provided a helpful discussion of the acknowledged methodological limitations of the earlier studies.¹¹⁹ It found that those who chose to engage in the voluntary formative assessment exercise tended to be female and tended to have higher undergraduate grade point averages.¹²⁰ The authors also found that voluntarily taking the formative assessment exercise in constitutional law resulted in a statistically significant

113. Daniel Schwarcz & Dion Farganis, *The Impact of Individualized Feedback on Law Student Performance*, 67 J. LEGAL EDUC. 139 (2018).

114. *Id.* (manuscript at 21-30). For information on the varying types of feedback received, see *id.* (manuscript at 13-16).

115. *Id.* (manuscript at 5).

116. Deborah Jones Merritt, Ruth Colker, Ellen Deason, Monte Smith & Abigail Shoben, *Formative Assessments: A Law School Case Study*, 95 U. DET. MERCY L. REV. (forthcoming 2017), <https://ssrn.com/abstract=2955055>.

117. *Id.* (manuscript at 13-14). The formative assessment was provided by giving students a two-week period to complete a take-home essay question from a prior final examination and to receive personalized written feedback and an estimated grade. *Id.*

118. *Id.* (manuscript at 3).

119. *Id.* (manuscript at 5-12).

120. *Id.* (manuscript at 17).

improvement in performance in constitutional law, as well as two other required courses.¹²¹

Although many legal educators may be interested in determining whether their efforts to incorporate formative assessments in their courses make a difference, they may lack the expertise in statistical analysis that marks such studies. Quite apart from individual faculty members' desire to engage in such assessments, questions are also posed at the institutional level. If law schools adopt a more systematic approach to formative assessments (such as requiring all faculty members who teach small sections of fewer than thirty students to engage in such assessments, or to require all first-year fall semester faculty members to employ practice exams that do not count toward semester grades), what might they learn?

But another compelling question lies just below the surface. As was noted in the recent Ohio State study, formative assessments are often afforded on a voluntary basis, and students need to engage with them to get the benefit of such opportunities. In their analysis, the Ohio State researchers explored this question.¹²² They noted that the disproportionate number of women who opted to undertake the optional formative feedback exercise might reflect greater risk aversion or more self-discipline.¹²³ Other possible factors influencing the decision to take the voluntary practice test might be lack of confidence, better study habits, adoption of a "growth" rather than "fixed" mindset, or the professor's gender.¹²⁴

Another recent empirical study has posed related questions by looking closely at law student study habits.¹²⁵ In that study, Professors Jennifer Cooper and Regan A.R. Gurung reviewed the limited empirical research on law student and undergraduate study habits and their relation to academic success.¹²⁶ They developed a new Law Student Study Habits Survey¹²⁷ that they then administered on a voluntary basis to first-semester students at two ABA-accredited law schools. After statistical analysis of the survey results, the

121. *Id.* (manuscript at 26-28).

122. *Id.* (manuscript at 33-37).

123. *Id.* (manuscript at 34).

124. *Id.* (manuscript at 34-37).

125. Jennifer M. Cooper & Regan A.R. Gurung, *Smarter Law Study Habits: An Empirical Analysis of Law Learning Strategies and Relationship with Law GPA*, 62 ST. LOUIS U. L.J. (forthcoming 2018), <https://ssrn.com/abstract=3004988>.

126. *Id.* (manuscript at 4-11).

127. *Id.* (manuscript at 14-15). The new Law Student Study Habits Survey was modeled on Dr. Gurung's undergraduate Study Behaviors Checklist, as modified for law study following interviews and pilot testing. *Id.* The Law Student Study Habits Survey covered time management, class preparation, note-taking, review, outlining, self-testing, exam review, and use of outside resources, and used a Likert scale asking respondents to describe their personal practices on a total of 37 specific prompts (responding never, rarely, sometimes, often or always). The two participating schools were Seattle University and Thomas Jefferson.

authors sought to determine what study behaviors correlated with higher or lower academic averages in law school. The use of practice questions to study and the ability to explain concepts to others are formative assessment practices (in effect practicing for a written exam or participating in an oral quiz). The authors found that engaging in these two study practices had a statistically significant correlation to higher law school grades.¹²⁸ On the other hand, several other experiences were significantly statistically correlated to lower law school grades, including an inability to organize essay answers, difficulty writing rules on exams because of lack of practice, weak critical reading skills, and weak synthesis skills.¹²⁹

These are the kinds of skills that could be developed if students undertook more formative assessment practice and developed the ability to reflect on their performance to develop greater metacognitive abilities. At the same time, it may be difficult to motivate them to opt for such approaches, rather than the more routine reading and rereading cases and working with case briefs.¹³⁰ Another recent study has suggested that “work drive” plays a major part in law students’ academic success.¹³¹ Drawing on his observations about the way that students who had worked full-time before law school often outperformed their predictors, Professor Jeffrey Minneti explored sociological literature and instruments used in other fields and developed a modified instrument to evaluate the “work drive” characteristics of law students. He found that while LSAT and undergraduate GPA explained eighteen percent of students’ first-year law school average, when work drive was added to those factors, twenty-seven percent of their first-year law grade point averages were explained.¹³²

As is the case with academic support and bar preparation programs, much depends upon students’ own recognition of the benefits of learning to learn more effectively and their capacity to do so (which may in turn depend on their nonschool obligations to work and family and their appreciation of what they do not know). It is heartening, however, to see empirical research that demonstrates the benefit of such engagement and to learn that faculty colleagues are creating new self-evaluation instruments that might be more widely deployed. All this work creates an important foundation for more widespread inquiry and adoption of best practices suited to diverse law schools across the country.

128. *Id.* at Figures 4 and 5.

129. *Id.* (manuscript at 18-19).

130. *See id.* (manuscript at 20-21). Heavy reliance only on reading, rereading, and case briefing was correlated with poor academic performance if practice questions or other means to deepen understanding were not also employed. *Id.*

131. Jeffrey J. Minneti, *Work Drive Matters: An Assessment of the Relationship Between Law Students’ Work-Related Preferences and Academic Performance*, 42 MITCHELL HAMLIN L. REV. 150 (2016).

132. *Id.* at 176.

IV. Institutional Assessment: Collective Obligations and Opportunities

A. Programmatic Learning Outcomes Background.

1. Background.

The 2014 ABA standards revisions also embraced the concept of learning outcomes for the first time, in part based on recommendations by an earlier committee that supported shifts from inputs to outcomes as guiding principles for ABA standards in keeping with trends elsewhere in higher education.¹³³

New Standard 302, relating to learning outcomes, reads as follows:

Standard 302. LEARNING OUTCOMES

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

- (a) Knowledge and understanding of substantive and procedural law;
- (b) Legal analysis and reasoning, legal research, problem solving, and written and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
- (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.¹³⁴

The ABA also promulgated related interpretations:

Interpretation 302-1. For the purposes of Standard 302(d), other professional skills are determined by the law school and may include skills such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.

Interpretation 302-2. A law school may also identify any additional learning outcomes pertinent to its program of legal education.¹³⁵

The new standard and interpretations relating to learning outcomes reflect extended ABA deliberations, including the work of a special committee on output measures that was appointed in October 2007 and submitted its report

133. See AM. BAR. ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE OUTCOME MEASURES COMMITTEE 54-62 (2008), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2008_outcome_measures_committee_final_report.authcheckdam.pdf.

134. AM. BAR ASS'N, *Standard 302: Learning Outcomes*, in ABA STANDARDS, *supra* note 52, at 15.

135. *Id.* at 16.

in July 2008.¹³⁶ The special committee, chaired by Professor Randy Hertz, considered recent recommendations for legal education reform¹³⁷ as well as accreditation practices in other countries and professional education and accreditation practices in other fields.¹³⁸ It concluded that a focus on outcomes, rather than the historic focus on inputs, such as the number of books in library collections, was more appropriate and, in its view, reflected incremental changes in the ABA's accreditation philosophy.¹³⁹ Based on these underpinnings, the ABA council adopted the new standard and interpretations relating to learning outcomes in 2014, but specified that the outcomes requirement would not go into effect until fall 2016 (when it would apply to first-year students entering at that time).¹⁴⁰

As evident from the text above, the new ABA learning outcomes standard provides some additional guidance to law schools seeking to satisfy this new requirement. Learning outcomes must address four particular focal areas: (a) knowledge and understanding of substantive and procedural law; (b) legal analysis and reasoning, legal research, problem-solving, and written and oral communication; (c) exercise of proper professional and ethical responsibilities to clients and the legal system; and (d) other professional skills needed for competent and ethical participation as a member of the legal profession. The interpretations allow law schools to incorporate additional outcomes that might, for example, include cultural competence, understanding of some facets of international or comparative law, or understanding and use of advanced technology.

2. *Questions worth asking about programmatic learning outcomes.*

Two questions worth asking in the face of this new standard concern which learning outcomes have been adopted by law schools and how well learning outcomes are being employed to guide law schools' curriculum and other programming. A third question, whether learning outcomes are being achieved and how schools are trying to track their achievement, is addressed in subpart B below.

(a) What learning outcomes have been adopted?

The Holloran Center at the University of St. Thomas, Minnesota has done legal educators and their schools a great favor by collecting law schools' stated

136. AM. BAR. ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *supra* note 133.

137. The special committee cited in particular the Carnegie Foundation for the Advancement of Teaching's study on legal education. *Id.* at 5-10. See also WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

138. AM. BAR. ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *supra* note 133.

139. *Id.* at 54-55.

140. Memorandum from the Am. Bar Ass'n Section of Legal Educ. and Admissions to the Bar, *supra* note 1, at 2.

learning outcomes.¹⁴¹ Based on their review of this information, Professors Jerry Organ, Neil Hamilton, and others have created a helpful taxonomy. Their data can be searched by law school or by learning outcome, and they have indexed their information and tied it to relevant website sources. The Holloran Center has created three categories on its website that address the ABA learning outcomes in slightly different terms, clustering them in the following areas: knowledge and understanding of substantive and procedural law;¹⁴² legal analysis and reasoning, legal research, problem solving, written and oral communication, and certain related professional skills;¹⁴³ and exercise of proper professional and ethical responsibilities to clients and the legal system and related professional skills.¹⁴⁴

141. *Learning Outcomes Database*, UNIVERSITY OF ST. THOMAS: HOLLORAN CENTER, <http://www.stthomas.edu/hollorancenter/resourcesforlegaleducators/learningoutcomesdatabase/> (last visited Oct. 27, 2017).
142. *Learning Outcomes 302(a)*, UNIVERSITY OF ST. THOMAS: HOLLORAN CENTER, [HTTP://WWW.STTHOMAS.EDU/HOLLORANCENTER/RESOURCESFORLEGALEDUCATORS/LEARNINGOUTCOMESDATABASE/LEARNINGOUTCOMES302A/](http://www.stthomas.edu/hollorancenter/resourcesforlegaleducators/learningoutcomesdatabase/learningoutcomes302a/) (last visited Oct. 27, 2017). Specific outcomes are:
 - i. fundamentals and bar exam
 - ii. legal policy and trends
 - iii. legal system
 - iv. practical knowledge
 - v. specialty areas
 - vi. basics
143. *Learning Outcomes 302(b) and (d)*, UNIVERSITY OF ST. THOMAS: HOLLORAN CENTER <http://www.stthomas.edu/hollorancenter/resourcesforlegaleducators/learningoutcomesdatabase/learningoutcomes302b/>. Specific outcomes are:
 - i. advocacy
 - ii. analyze/synthesize/distinguish
 - iii. citation/format compliance
 - iv. client interviewing
 - v. counseling
 - vi. document drafting
 - vii. feedback
 - viii. identifying authority
 - ix. investigating facts
 - x. issue-spotting
 - xi. live/simulated representation
 - xii. mediation/conflict resolution
 - xiii. negotiation
 - xiv. online research/technology
 - xv. persuasion/known audience
 - xvi. policy arguments
 - xvii. precise language
 - xviii. public speaking/oral argument
 - xix. time management/planning
 - xx. basics
144. *Learning Outcomes 302(c) and (d)*, UNIVERSITY OF ST. THOMAS: HOLLORAN CENTER <http://www.stthomas.edu/hollorancenter/resourcesforlegaleducators/learningoutcomesdatabase/learningoutcomes302c/>. Specific outcomes are:
 - i. active listening

What might be learned from this compilation? Very likely some important things. The Holloran Center database is a significant resource that may help schools to identify counterparts trying to achieve similar outcomes. If so, such schools might be able to compare educational strategies and assessment protocols to assess how well they are achieving their goals. The database also provides a potentially important tool for assessing law schools' views on their mission and culture. New strategies for identifying peer schools might emerge based on these stated aspirations. New research might be undertaken comparing practices between comparable or different schools.

(b) How well are learning outcomes being employed to guide law schools' curriculum and other programming?

This question is a much more difficult one, insofar as it is not addressed by available compiled data. Although some schools may be caught in a loop of ongoing faculty conversations as they attempt to articulate learning outcomes, the much greater challenge lies in determining whether stated outcomes actually motivate law schools to collect relevant information and, perhaps as a corollary, whether individual faculty members actually articulate associated learning outcomes in the classes they teach and assess students on their achievement of such outcomes. In all candor, it would be surprising if law faculty members actually closed the loop on learning outcomes by building assessments that determine whether students achieve the stated outcomes, and then whether law schools are interested or able to collect sufficient data across a range of courses to determine whether programmatic outcomes are in fact being addressed (let alone achieved). This is an area in which law schools need help in developing methodologies for assessment. To date few tools exist to help law schools respond to related challenges.

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- ii. cultural competence
 - iii. diligence
 - iv. ethics plus
 - v. feedback
 - vi. high professionalism
 - vii. improving the profession/system
 - viii. integrity
 - ix. judgment
 - x. leadership
 - xi. networking
 - xii. personal code of ethics/values
 - xiii. pro bono
 - xiv. professionalism
 - xv. reflection/self-evaluation
 - xvi. respect for others
 - xvii. self-care
 - xviii. self-directedness
 - xix. teamwork/collaboration
 - xx. technology/business component
 - xxi. basic learning outcomes

B. *Institutional Assessment Techniques.*

1. *Background.*

The ABA standards have built upon requirements relating to learning outcomes by imposing new requirements relating to institutional assessment. Standard 315 (relating to evaluation of programs of legal education, learning outcomes, and assessment methods) provides that:

The dean and the faculty of a law school shall conduct ongoing evaluation of the law school's program of legal education, learning outcomes, and assessment methods; and shall use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum.¹⁴⁵

An associated interpretation provides more details:

Interpretation 315-1

Examples of methods that may be used to measure the degree to which students have attained competency in the school's student learning outcomes include review of the records the law school maintains to measure individual student achievement pursuant to Standard 314; evaluation of student learning portfolios; student evaluation of the sufficiency of their education; student performance in capstone courses or other courses that appropriately assess a variety of skills and knowledge; bar exam passage rates; placement rates; surveys of attorneys, judges, and alumni; and assessment of student performance by judges, attorneys, or law professors from other schools. The methods used to measure the degree of student achievement of learning outcomes are likely to differ from school to school and law schools are not required by this standard to use any particular methods.¹⁴⁶

Unfortunately, this laundry list of techniques for assessing student competency and success in achieving learning outcomes offers little guidance for schools trying to comply with this new requirement. Accordingly, it is important to consider "questions worth asking."

2. *Questions Worth Asking About Institutional Assessment Techniques.*

(a) *What do law schools need to do to engage in the type of institutional assessment that the ABA now requires, and to embrace the benefits of more sophisticated institutional strategies for themselves?*

Read literally, the new ABA requirement has several distinct aspects: evaluation must (a) be *ongoing*; (b) cover *the program of legal education, learning outcomes, and assessment methods*; (c) be used to determine the *degree of student attainment of competency in learning outcomes*; and (d) be used to make appropriate changes to *improve the curriculum*. Trying to address all these distinct requirements, including

145. AM. BAR ASS'N, *Standard 315: Evaluation of Program of Legal Education Learning Outcomes, and Assessment Methods*, in ABA STANDARDS, *supra* note 52, at 23.

146. *Id.* at 24.

focusing on the myriad learning outcomes that law schools are identifying, can be a daunting task. One way to approach the associated challenges is to think about the process of embracing institutional assessment in two stages.

(i) *Getting Started.*

Law schools would be well-advised to get started on institutional assessment well in advance of their next cycle of ABA accreditation review. An inevitable inertia comes into play whenever uninvited obligations or new systems are introduced into academic institutions that have their own values and momentum. Yet the start-up process is very likely to take about two years. Law schools should, if possible, plan deliberately for a start-up process and try to maximize their readiness to really get moving on institutional assessment thereafter. Here are some steps that might fruitfully be addressed as part of the start-up process.

(a) Identify and Share Real Reasons to Care.

Simply advising faculty and staff members of new accreditation requirements is unlikely to motivate anyone. It is natural for those already fully engaged with existing duties to view new procedural obligations as extraneous and ill-considered—burdens rather than opportunities.¹⁴⁷ Compliance with such added requirements also imposes significant burdens on schools, whether in outright expenditures for consultants, survey systems, or data analysis, or in faculty and administrator time. Since none of these adverse impacts on schools is directly acknowledged by ABA accreditors, and few examples of positive benefits are cited within the ABA's "command and control" culture, it is easy to see why new requirements perceived as requiring additional busy work without benefits can give rise to resentment rather than engagement. Law deans, their faculties, and professional staff therefore need to identify *real* reasons for engaging in institutional assessment, reasons that transcend the response "the ABA told me so."

Happily, such reasons are plentiful. Many faculty members who have adopted learning outcomes for their classes have learned that giving students clear indications of what is expected (particularly if final exams or other graded assignments relate to the stated outcomes) is very helpful in adding focus to course planning and instruction.¹⁴⁸ There is a need to translate related insights

147. For discussion of change in academic settings, see Judith Welch Wegner, *Cornerstones, Curb Cuts, and Legal Education Reform*, 2013 J. DISP. RESOL. 33 (2013).

148. For examples of faculty members' embrace of learning outcomes as a way to drive student attention and achievement in particular classes, see Lori A. Roberts, *Assessing Ourselves: Confirming Assumptions and Improving Student Learning by Efficiently and Fearlessly Assessing Student Learning Outcomes*, 3 DREXEL L. REV. 457 (2011); Jacob M. Carpenter, *Unique Problems and Creative Solutions to Assessing Learning Outcomes in Transactional Drafting Courses: Overcoming "The Form Book Problem,"* 38 U. DAYTON L. REV. 195 (2012); Kelly S. Terry, *Embedding Assessment Principles in Externships*, 20 CLINICAL L. REV. 467 (2014).

to the institutional level, but, given the current stressors on law schools, that may be relatively easy to do.

Schools might naturally wish to identify potential strong points (for example, legal writing, clinical programs, or approaches to professional formation), and might accordingly be willing to undertake meaningful efforts for honest assessment of such programs in order to strengthen them and present their successes to potential employers. Schools might also naturally wish to understand their weak points, such as why student performance on metrics like the bar examination are not up to par and how they might improve such performance.

In addition, schools might start with experiments undertaken by one or more faculty members. For example, one thoughtful law school adopted a requirement for first-year students to elect from among several possible courses related to the regulatory state, including such options as administrative law, tax law, environmental law, and immigration law. The faculty members teaching these courses then developed one common question to be included in all their examinations to gauge how well students mastered core concepts. If such a school could document its effective instruction of all students in gaining important insights about regulation, it might be able to encourage employers with related priorities to consider hiring its students. A similar incentive might arise with regard to a school's tax program, in which faculty members conducted a curriculum-mapping exercise and then built a strong progression of offerings including practicums. Being able to demonstrate the potential for transfer of learning along a course progression that leads to good employment prospects might encourage faculty members to engage more deeply in assessment ventures.

(b) Identify Leaders Who are Intellectually Engaged
and Who Can Work Across Silos.

Most deans realize that they are lucky to have faculty colleagues who are gifted leaders and may be interested in institutional leadership roles going forward. Such colleagues may become associate deans for academic affairs, or may be adept at chairing challenging committees. Although little research has been done on the development and characteristics of effective leaders within legal education, anecdotal evidence suggests that faculty members interested in leadership roles often take on the responsibilities of associate deans to determine their interest in future leadership.

Law schools may, at first blush, tend to place responsibilities for institutional assessment on associate deans or on faculty members who chair major committees but who also have talents that might lead them to serve as associate deans. It also appears that some schools are developing professional positions dedicated to data management, strategic planning, or related matters. It would be well, however, for schools to step back and consider their specific needs for assessment expertise, and to consider these models as well as others.

Among many law school populations, academic support professionals may have more expertise than most in assessing student capabilities; depending on the law school in question, it might be appropriate to assign leadership responsibilities to a well-respected faculty member in the academic support program, particularly if that person has advanced training in education (such as a master's in education).

Another perhaps unconventional approach would be to assign the role of assessment coordinator to the lead law librarian. Law librarians are often skilled in managing information and working with diverse populations. Law librarians also tend to have strong connections with those at other schools, and a capacity to build research-oriented databases. In addition, law librarians tend to serve for extended periods (more than the typical two-year rotation for associate deans), and have staff who can assist in developing institutional memory. They often also have ties with other parts of universities. Given the challenges facing law libraries as to transitional funding and responsibilities, they may be particularly eager to assume other institutional roles that involve significant ongoing responsibilities.

Law schools have as yet not developed standard practices on which of these varying models to employ in tapping leaders for their institutional assessment practices. Perhaps institutional frameworks will become more standardized in coming years. In the interim, it will be important for law schools to share experiences about diverse models and to develop national communication systems for connecting those engaging in responsibilities such as these, whatever their titles.

(c) Get Oriented.

Law schools should not try to reinvent the wheel, but should instead try to learn from others. A growing number of books and articles address institutional assessment for law schools.¹⁴⁹ These books and articles build upon other excellent resources relating to institutional assessment in higher

149. For excellent discussions of institutional assessment in law schools, see ANDREA SUSNIR FUNK, *THE ART OF ASSESSMENT: MAKING OUTCOMES ASSESSMENT ACCESSIBLE, SUSTAINABLE, AND MEANINGFUL* (2017); LORI E. SHAW & VICTORIA L. VANZANDT, *STUDENT LEARNING OUTCOMES AND LAW SCHOOL ASSESSMENT: A PRACTICAL GUIDE TO MEASURING INSTITUTIONAL EFFECTIVENESS* (2015); *BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD* (Deborah Maranville et al. eds., 2015) (hereinafter *BUILDING ON BEST PRACTICES*); Judith Welch Wegner, *Assessment Plans that Support Student Learning*, in *BUILDING ON BEST PRACTICES*, *supra*, at 25-36; Barbara Glesner Fines, *An Institutional Culture of Assessment for Student Learning*, in *BUILDING ON BEST PRACTICES*, *supra*, at 415-21.

education.¹⁵⁰ A growing number of organizations have also held conferences on assessment.¹⁵¹

Regional accreditors and universities themselves likewise provide very helpful resources.¹⁵² These organizations have long required attention to institutional assessment, including assessment relating to learning outcomes. Law schools affiliated with universities often have a marginal role in university-level accreditation, depending on the region and the institution. Nonetheless, universities preparing for regional accreditation reviews typically require component units, including law schools, to engage in institutional assessment undertakings. Likewise, free-standing law schools that wish to offer master's-level degrees must engage in accreditation review with regional accreditors, since ABA accreditors can approve only J.D. programs. Any opportunity to engage with standards that are more sophisticated and tested than those adopted by the ABA will undoubtedly assist law schools to develop more sophistication as to assessment practices. So, too, will be any opportunities that law schools have to engage with partners in other locales who have similar student bodies and missions. Wise law school leadership would identify

150. For leading books on higher education assessment, see BARBARA E. WALVOORD, *ASSESSMENT CLEAR AND SIMPLE: A PRACTICAL GUIDE FOR INSTITUTIONS, DEPARTMENTS, AND GENERAL EDUCATION* (2d ed. 2010); A BIRD'S-EYE VIEW OF ASSESSMENT (Trudy W. Banta ed., 2011); MICHAEL F. MIDDAGH, *PLANNING AND ASSESSMENT IN HIGHER EDUCATION: DEMONSTRATING INSTITUTIONAL EFFECTIVENESS* (2009); GRANT WIGGINS, *EDUCATIVE ASSESSMENT: DESIGNING ASSESSMENTS TO INFORM AND IMPROVE STUDENT PERFORMANCE* (1998); THOMAS A. ANGELO & K. PATRICIA CROSS, *CLASSROOM ASSESSMENT TECHNIQUES: A HANDBOOK FOR COLLEGE TEACHERS* (1993).
151. The Institute for Law Teaching and Learning has sponsored conferences on assessment with varying focal points. See *Conferences*, INSTITUTE FOR LAW TEACHING AND LEARNING, <http://lawteaching.org/conferences/> (last visited Oct. 27, 2017). The American Association of Law Schools has also sponsored conferences and annual meeting sessions on related themes. See, e.g., *Workshop on Measuring Learning Gains: Institutional Effectiveness for the New Era*, ASS'N OF AM. L. SCHS., <https://memberaccess.aals.org/eweb/DynamicPage.aspx?WebKey=EC4821F4-2FF5-4D7D-8751-4253D9E4F921&> (last visited Oct. 27, 2017). Other law schools and organizations have likewise offered conferences. A major higher education assessment conference is held yearly by Indiana University-Purdue University Indianapolis. See *Assessment Institute in Indianapolis*, INDIANA UNIVERSITY-PURDUE UNIVERSITY INDIANAPOLIS, <http://assessmentinstitute.iupui.edu/> (last visited Oct. 27, 2017).
152. See, e.g., *Resources for Institutions*, WASC SENIOR COLLEGE AND UNIVERSITY COMMISSION, <HTTPS://WWW.WSCUC.ORG/RESOURCES> (last visited Oct. 27, 2017). Many higher education institutions themselves provide helpful collections of resources for their faculty and others. See, e.g., *Assessment Resources*, CORNELL UNIVERSITY CENTER FOR TEACHING INNOVATION, <https://www.cte.cornell.edu/teaching-ideas/assessing-student-learning/assessment-resources.html> (last visited Oct. 27, 2017); *Assessment Resources*, DUKE UNIVERSITY TRINITY COLLEGE OF ARTS & SCIENCES OFFICE OF ASSESSMENT, <HTTPS://ASSESSMENT.TRINITY.DUKE.EDU/ASSESSMENT-RESOURCES> (last visited Oct. 27, 2017); *Assessment Resources*, UNIVERSITY OF KENTUCKY UNIVERSITY ASSESSMENT, <https://www.uky.edu/oua/assessment-resources> (last visited Oct. 27, 2017); *Law School Learning Outcomes and Assessment*, CATHOLIC UNIVERSITY OF AMERICA JUDGE KATHRYN J. DUFOUR LAW LIBRARY, <http://libguides.law.cua.edu/learningoutcomes> (last visited Oct. 27, 2017); *Law School Learning Outcomes and Assessment*, The Library at Washington and Lee University School of Law, <http://libguides.wlu.edu/lawlearningassessment> (last visited Oct. 27, 2017).

partner schools with whom they could exchange assessment practices to assess their own strategies.

(d) Remember What You Know.

The ABA's new standards are not written on a fresh slate. Instead, law schools should remember how they have approached past self-studies and what they have found to be effective (or ineffective) strategies for data-gathering and analysis. For example, many schools have used the Law School Survey of Student Engagement (LSSSE)¹⁵³ as a means of assessing student satisfaction with key aspects of the curriculum, informal interaction, and performance of differing support units.¹⁵⁴ Because LSSSE has an option for developing questions to be shared by clusters of schools, and to compare schools' performance on basic performance indicators, it is an exceptionally useful tool for schools engaging in institutional assessment.

Many law schools have also developed their own systems for assessing students' credentials and bar examination performance. Once again, however, little evidence exists of a systematic national protocol on this point.¹⁵⁵

Another common practice historically used by law schools engaged in self-studies is to employ surveys of law alumni. The literature on best practices in developing and deploying such surveys is limited.¹⁵⁶ Undoubtedly, many law schools have also worked with campus institutional research offices to develop surveys of law alumni and legal employers. Ideally, some well-tested, commonly used survey would be available to law schools seeking to assess their effectiveness with external audiences, but unfortunately, no standard assessment tools have as yet been identified and shared.

A wise practice for law schools would be to identify partners at a distance with similar institutional characteristics and develop institutional partnerships in developing assessment tools. Such practices may occur informally at this

153. See *The LSSSE Survey Tool*, LSSSE, <http://lssse.indiana.edu/about-lssse-surveys/> (last visited Oct. 27, 2017). For specific years' survey results see *Annual Results*, LSSSE, <http://lssse.indiana.edu/annual-results/> (last visited Oct. 27, 2017). Yearly reports tend to focus on particular areas of interest. See, e.g., LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, LOOKING AHEAD: ASSESSMENT IN LEGAL EDUCATION (2014), http://lssse.indiana.edu/wp-content/uploads/2016/01/LSSSE_2014_AnnualReport.pdf (last visited Oct. 27, 2017) (2014 annual report dealing with assessment issues).

154. The core LSSSE survey addresses a range of issues including matters such as interaction with classmates and faculty, classroom participation, characteristics of legal writing courses, time spent on academics or working or leisure, emphasis of law school programs, and more. The LSSSE Survey Tool, *supra* note 153. LSSSE also offers participating law schools the opportunity to adopt supplemental survey modules relating to law library services, bar preparation and professionalism, student services, and student stress. *Topical Survey Modules*, LSSSE, <http://lssse.indiana.edu/topical-survey-modules/> (last visited Oct. 27, 2017).

155. See *infra* Part III for discussion of bar examination issues.

156. For an example of an alumni survey, see Sheila F. Miller, *Are We Teaching What They Will Use? Surveying Alumni to Assess Whether Skills Teaching Aligns with Alumni Practice*, 32 MISS. C. L. REV. 419 (2014).

juncture but are definitely below the radar. If law school deans and their colleagues engaged in institutional assessment were more sanguine, they would build more bridges such as these.

(c) Build a Culture of Assessment.

The wisest scholars writing about institutional assessment in legal education confirm the importance of creating a “culture of assessment.”¹⁵⁷ That phrase suggests the importance of embedding assessment practices within the core conversation of faculty members, professional staff, and law school processes. There is a growing literature about how to achieve this goal, but more needs to be done to succeed. Law schools that create a culture of assessment are likely to thrive. Those that do not will find it more difficult to comply with ABA standards.

(ii) *Moving forward.*

(a) Make a Plan.

Based on the evidence available, it appears that most law schools have identified a number of institutional learning outcomes that will ultimately need to be assessed. Many law schools have also developed strategic plans, either at the behest of their parent institutions or for their own reasons (such as fundraising). Ideally, law schools would find a way to meld these two frameworks for thinking about their strengths, weaknesses, and futures.

Consider, for example, a regional law school that seeks to prepare its graduates for practice in its area (including a major metropolitan area and outlying communities). Along with most other law schools in the country, it has identified institutional learning outcomes relating to:

- (i) preparing students to be effective legal analysts
- (ii) preparing students to be effective problem-solvers
- (iii) preparing students to be effective researchers
- (iv) preparing students to be effective communicators
- (v) preparing students to be skilled litigators or transactional lawyers in particular areas
- (vi) preparing students to work across cultural traditions and diversity
- (vii) preparing students to understand issues facing urban populations

157. For a discussion of the importance of a “culture of assessment,” see FUNK, *supra* note 149, at 9; Glesner Fines, *supra* note 149.

(viii) preparing students who are self-sufficient and prepared to represent those who need to be

(ix) preparing students who are committed to pro bono service and the greater good

(x) preparing students who have strong character and a strong work ethic

(xi) preparing students who are ethical and whose character reflects the highest ideals of professionalism

This law school's strategic plan suggests particular pride in its focus on some important, parallel, measurable accomplishments that track its stated institutional learning outcomes. For example, it believes its graduates are particularly strong in

- (a) Legal writing and research;
- (b) Abilities as problem-solvers in a range of fields;
- (c) Skills in oral advocacy;
- (d) Representation of individuals from a range of cultural traditions;
- (e) Commitment to pro bono service and engagement with professional norms.

How might this law school proceed with its initial assessment of institutional learning outcomes? It might be wise to select a small set of areas to focus upon in an initial stage.

- *Bar performance.* It, like many other law schools, might like to determine why some proportion of its students do not pass the bar exam the first time they take it. This outcome is not explicitly stated as either a learning outcome or strategic plan outcome, but undoubtedly has a bearing on students' potential employment. The school might accordingly develop a strategy for assessing which students are at risk of failing the bar exam and why, and it might accordingly ask its academic support faculty to develop and share with colleagues approaches for identifying at-risk students and working with them.
- *Legal writing and research.* The school might take on the challenge of graduating law students who are particularly adept at legal writing and research in the region. Its legal writing faculty might first develop a survey for legal employers to identify what kinds of legal writing and research are required in practice. The school might then step up to assess student performance with

an eye to the tasks identified by the local bar. Such an approach might include requiring students to perform legal research and writing tasks identified by the bar (as part of the legal writing curriculum) and then assessing performance (on a four-point competence scale) of select papers using a panel of academics and local practitioners.

- *Ethics and professionalism.* This area might be assessed using multiple strategies. The Law School Survey of Student Engagement is particularly helpful because the survey incorporates a range of questions concerning professionalism. Student participation in pro bono programs might also be a measure suggesting the level of engagement and performance.

(b) Don't Let the Perfect Be the Enemy of the Good.

More can be said, and more possibilities can easily be imagined. The point is that law schools need to consider what is important to them, develop reasonable, well-grounded plans to determine whether their hopes are being realized, set priorities about what needs to be done first, and then take steps to improve their programs based on hypotheses developed from the data that they can discern. These tasks are not easy, but they can be rewarding, particularly once a law school has gained experience about how to engage and address initial issues and can then move on to others.

(c) Could Better Systems be Developed to Support Law Schools in their Efforts to Engage in Institutional Assessment?

Undoubtedly, better systems might be developed. At this juncture, law schools more or less seem to be dealing with institutional assessment issues on their own. That is truly unfortunate, since ideally it would be possible to establish national good or best practices for assessment on a number of fronts.

For example, it would be very helpful if there were a national gold-standard research methodology for determining how student characteristics and experiences affect bar examination performance (taking into account entering credentials, experiences, courses taken, performance trajectories, and more). Likewise, it would be very helpful to have a national gold-standard research methodology for student admissions (taking into account factors other than traditional indicators that affect student success). Other gold-standard research practices might be envisioned, for example, relating to academic support programming in the first year, student success from the first year until graduation, the bar courses that make a difference, and how clinical experiences shape student success. Unfortunately, very few assessment frameworks have been developed based on educational theory relating to these issues, and even fewer have been tested across more than one law school. Individual schools, perhaps partnering with campus institutional research offices or consultants, may each be spending limited funds and time of staff members, who may not be well-trained to take on such tasks. To move legal

education standards forward, it will be important to develop, share, and test more national gold-standard assessment methodologies.

One way to accomplish this goal would be to ask the Association of American Law Schools (AALS) to take a more active role in developing best-practice standards for assessment methodologies that are likely to be needed across the universe of legal education more generally. For example, having a gold-standard bar performance study would truly help law schools that have limited access to sophisticated institutional research resources and would allow more sophisticated analysis of differences among states and schools (something that is very difficult at this time).

The AALS might consider developing staff resources for institutional research that could be made available to member schools around the country. The more that schools contracted with AALS to provide particular assessment services, the more experience an AALS research office would accrue, allowing it to perfect its methodology to aid member schools on a cost-effective basis.

Summary.

This part has focused on accreditation-related assessment practices within law schools. After providing some necessary context about the changing universe of law school applicants, it proceeds to examine several specific areas affected by new and emerging ABA standards. In particular, it addresses the growing importance of academic and bar preparation support programs and considers empirical research and unanswered questions in that arena. The essay then turns to formative assessment practices employed by individual professors and the research being done to determine whether and how such practice can improve student learning. Turning then to requirements about institutional assessment, this part concludes by providing information on developing practices as to institutional learning outcomes, and suggestions for processes by which schools might proceed in meeting new ABA requirements.

V. Assessing Accreditation Requirements: Concluding Observations

This extended essay has focused in-depth on issues relating to accreditation standards and assessment of student learning within law schools. In particular, Part I has explained the importance of understanding the ways that student populations have changed so that assessment practices required by new ABA accreditation standards can be grounded in current realities rather than nostalgia. Part II has introduced important developments, questions, and insights provided by academic support professionals, a new cohort of faculty members with sophisticated insights about student learning. Part III addresses formative assessment practices being developed and tested by innovative faculty members who increasingly understand that even ungraded educational tasks and associated feedback for students can boost learning in significant ways. Part IV considers the difficult challenges associated with institutional assessment now required by the ABA standards, considering first the development of programmatic learning outcomes focused on various

sorts of professional competences that they wish to develop during the course of students' educational experiences, and then exploring the challenges of assessing how well those outcomes have been achieved by graduating students as a collective group.

Faculty members and law schools may accept the new ABA requirements relating to assessment within law schools as the current gospel. It is nonetheless worth pointing out that these requirements reflect policy choices, and that they have been mandated but not yet evaluated to determine whether they in fact improve student learning. It is hard not to ask, "Is the ABA section council right in what it is doing?" And if assessment is so important, shouldn't those who assess law schools to determine whether they can be accredited have their mandates and practices be assessed as well?

AALS Executive Director Dean Judith Areen has provided a helpful overview of accreditation generally, one that captures the nuances of higher education accreditation in the United States.¹⁵⁸ Dean Areen observed that American accreditation embodies several well-accepted characteristics:

Three are procedural: (1) accrediting bodies are nongovernmental; (2) accreditation is conducted primarily by volunteers; and (3) accreditation is repeated at regular intervals. The other three are conceptual: (4) the accreditation process relies on self-studies and peer evaluation; (5) the goal of accreditation is quality enhancement, not just assurance; and (6) the accreditation process takes into account the mission of the institution being accredited.¹⁵⁹

How well are these principles mirrored in the practices employed by the ABA? In some ways, the ABA clearly hews to these characteristics. It is worth asking, however, whether the legal education accreditation process does a sufficient job of populating site review teams with diverse individuals having relevant expertise, fosters quality enhancement in a meaningful sense rather than simply compliance, and takes institutional missions sufficiently into account.

More profoundly, however, those in legal education should be asking whether the governing accreditor itself embodies best practices within this universe of accreditation principles rather than adopting a relatively static model reflecting a "command and control" orientation. Notably, however, these characteristics refer to the operative protocols for administering accreditation systems, but not how accreditation systems develop the specific standards they endeavor to apply in fostering "quality enhancement" as well as assurance.

The ABA section uses notice and comment in reaching decisions about standards before they are implemented and periodically invites comments on what issues should be on its agenda for standards review. But it does very little to conduct a periodic open process in which there would be open, transparent

158. Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471 (2011).

159. *Id.* at 1479.

discussion among a broader community about what it is doing well or poorly.¹⁶⁰ In contrast, within the field of architecture, affiliated organizations including those engaged in accreditation, licensure, the profession, faculty members and students¹⁶¹ convene every five years as a broader community to discuss the comprehensive conditions and procedures employed in program accreditation.¹⁶² While architecture is a smaller profession than law, some variation of that process could be used to document viewpoints and possibilities. Alternatively, a national consortium could be created to convene focus groups or undertake survey research on such questions as:

- Does the ABA encourage innovative and effective legal education?
 - Does the ABA engage in efficient regulation that is no more costly than necessary to schools?
160. The ABA is periodically reviewed by the NACIQJ, as discussed *supra* in note 4; that type of review is typically quite remote from many legal educators' radar. The ABA has also been subjected to periodic reviews resulting from congressional dissatisfaction. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-20, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS (2009), <http://www.gao.gov/assets/300/297206.pdf>. Based on ABA claims and law schools' evident wishes to protect the ABA's accreditation role, this report found that the accreditation process did not add substantially to costs of legal education at that time. Some, including this author, are very skeptical about that conclusion.
161. These groups include the National Architecture Accreditation Board, the American Institute of Architects, National Council of Architectural Registration Boards, the Association of Schools and Colleges of Architecture, and American Institute of Architecture Students. The National Architecture Accreditation Board was established in 1940 by the American Institute of Architects, National Council of Architectural Registration Boards, and the Association of Schools and Colleges of Architecture. In 1975, it was restructured so as to include representatives of the American Institute of Architecture Students. Governing documents regarding the creation of NAAB and its restructuring are available at the organization's website, <http://www.naab.org/public/> (under NAAB documents). These five organizations refer to each other as "the five collaterals." See <http://www.naab.org/info/collateral-organizations/>. The author of this essay has previously served as a public director on the Board of Directors of the Association of Schools and Colleges of Architecture, and currently serves as a public director on the Board of the National Architecture Accreditation Board.
162. See National Architecture Accrediting Board, www.naab.org, <http://www.naab.org/public/>. For information on the 2008 Accreditation Review Conference (ARC) see <http://www.naab.org/public/>, go to "Accreditation," then go to 2008 Accreditation Review Conference to review relevant documents considered in connection with that conference. For information on the 2013 Accreditation Review Conference, go to <http://www.naab.org/public/>, click "Accreditation," then click folder marked "ARC 2013." The next accreditation review conference will be announced in early 2018; white papers will be submitted by early 2019; the conference will occur in July 2019; drafts of conditions will be reviewed by mid-2020; drafts of procedures will be reviewed by early 2021; beginning in 2022, the new standards and procedures will be used for accreditation reviews. For preliminary information on the 2019 Accreditation Review Conference, see <http://www.naab.org/public/> under "news," "NAAB releases ARC 2019 position paper" (April 17, 2017), and referenced position paper available at <http://www.naab.org/wp-content/uploads/NAAB-ARC19-Position-Report-vfinal.pdf>.

- Do the ABA section council and staff have knowledge and expertise that can assist law schools in facing new challenges affecting their operations?

Indeed, organizations that seek to improve their own quality often engage in 360-degree evaluations of their performance among affected constituents. It might be reasonable for the ABA to agree to pay for such an institutional assessment, but only if an independent review board designed and conducted the study.¹⁶³

Notably, in architecture, the three most well-funded collaterals—the American Institute of Architecture (comparable to the ABA), the Association of Colleges and Schools of Architecture (comparable to the AALS), and the National Council of Architectural Regulatory Boards (comparable to the National Conference of Bar Examiners)—created the free-standing accreditation entity (NAAB). These three collaterals hold seats on NAAB’s board (along with two student representatives of the American Institute of Architecture students and two public members nominated by the collateral boards), and they also contribute carefully separated funds to NAAB’s budget.¹⁶⁴ The ABA’s council of the Section of Legal Education and Admission to the Bar is currently considering consolidating key committees (including the section council, accreditation and standards review committees) as a means of saving money given the limited funds available from its parent ABA.¹⁶⁵ Perhaps it is time to negotiate a more expert, transparent collaborative system involving key stakeholders such as that employed in architecture, with a separate accrediting board, structured to assure input from key collaterals, and perhaps some different understandings about funding.

These musings about the importance of assessing those who set assessment parameters may seem quixotic. Adopting some of the suggestions presented here about assessment within law schools would be beneficial in improving student learning and improving the competence of the profession. In the last analysis, however, national accreditation practices directing law schools and their faculties to engage in new forms of assessment should be as wise, fair, and effective as possible. Only by assessing the accreditors can the potential of “best practices” developed from the full range of constituent perspectives be achieved.

163. The ABA Task Force on the Future of Legal Education conducted a review and developed a report with recommendations to the ABA section in 2014. See TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS (2014), https://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html. Although the task force made a number of recommendations, relatively few have been acted upon by the ABA.

164. See NAAB founding documents from 1940 and 1975, referenced at note 161 *supra*.

165. See Barry Currier, A Big Idea: Combine Council, AC and SC into One Body: Concept and Overview (June 2017) at 2 (discussing revenue constraints among other factors), available at https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/June2017OpenSessionMaterials/2017_council_ac_src_merger_concept.authcheckdam.pdf.