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An Evaluation of Ten Concerns About Using Outcomes in Legal Education

Mary A. Lynch

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AN EVALUATION OF TEN CONCERNS ABOUT USING OUTCOMES IN LEGAL EDUCATION

Mary A. Lynch[†]

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[†] Clinical Professor of Law, Albany Law School; Director, Center for Excellence in Law Teaching (CELT), http://www.albanylaw.edu/sub.php?navigation_id=1709; Editor, Best Practices for Legal Education Blog, <http://bestpracticeslegaled.albanylawblogs.org>. I would like to thank Albany Law School, especially former Dean Thomas Guernsey, acting Dean Connie Mayer, Dean of Scholarship James Gathii, and my faculty colleagues, for encouraging me and supporting my interest in learning better ways to teach law and professionally develop law students. I am also grateful to my very capable research assistant Jennifer Jack, Special Assistant for Academic Instruction and Research Kevin Ramakrishna, who brought valuable sources to my attention, and Professors Melissa Breger, Christine Chung, Sarah Rogerson, and Nancy Maurer, who provided helpful suggestions. I am especially appreciative of Rudy Stegemoeller, my life partner, who reads my writing when it is in the “passionate, insightful, but not yet comprehensible stage” and assists me in organizing my thoughts and words.

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It has been five years since the parallel 2007 publications of *Educating Lawyers: Preparation for the Profession of Law* (“*Educating Lawyers*”)¹ and *Best Practices in Legal Education* (“*Best Practices*”).² Both books were the result of a collaborative and comprehensive study of American legal education. They documented rising dissatisfaction with the status quo, and found both stagnation and innovation in the varied landscape³ that makes up American legal education.⁴ These books not only became a focus of national

1. See WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) (offering an important and timely set of recommendations for improving the professional education of lawyers that will help to transform how lawyers are being prepared, practically and ethically, to play a vital and beneficial role, both professionally and in their communities).

2. See ROY STUCKEY AND OTHERS, *BEST PRACTICES FOR LEGAL EDUCATION* (2007) (discussing the author’s vision of what legal education might become if legal educators consider how they can most effectively prepare students for practice).

3. Currently, there are 200 ABA-approved law schools in the United States. *ABA-Approved Law Schools*, AM. B. ASS’N, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools (last visited Nov. 20, 2011).

4. STUCKEY AND OTHERS, *supra* note 2, at 2 (“Since the 1970’s, numerous groups of leaders of the legal profession and groups of distinguished lawyers, judges, and academics have studied legal education and have universally concluded that most law school graduates lack the minimum competencies

dialogue among law professors and law school administrators, but also captured the attention of the national media.⁵ Legal education reform became a dominant theme within and outside of the academy.

At the beginning, these documents, along with the scholars, teachers, and reformers who created them, were understood to be focused solely on better preparing legal professionals through changes in law school teaching methods.⁶ This included concepts such as the professional development of law school teachers; better integration of theory, professional judgment, and professional identity; increased opportunities for context-based and experiential learning;⁷ and more systematic evaluation of the traditional curriculum.⁸ However, natural allies emerged among those who emphasized law student health,⁹ engaged and active learning

required to provide effective and responsible legal services.”); SULLIVAN ET AL., *supra* note 1, at 8.

5. Jonathan D. Glater, *Training Law Students for Real-Life Careers*, N.Y. TIMES, Oct. 31, 2007, <http://www.nytimes.com/2007/10/31/education/31lawschool.html>; Margaret Moore Jackson, *The Chronicle of Higher Education Takes Note of Best Practices*, BEST PRACS. IN LEGAL EDUC. BLOG (Jan. 28, 2008), <http://bestpracticeslegaled.albanylawblogs.org/2008/01/28/the-chronicle-of-higher-education-takes-note-of-best-practices>. For discussion of the issues raised by reform advocates, see *Room for Debate: The Case Against Law School*, N.Y. TIMES (July 21, 2011), <http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school> (compiling eight articles in a discussion of legal education issues).

6. See generally MICHAEL HUNTER SCHWARTZ ET AL., *TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* (2009) (applying the latest research to teaching and learning methods for both new and experienced law teachers).

7. See Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 614 (2007) (discussing whether law students should pay for faculty scholarship); AALS COMM. ON CURRICULUM, *SURVEY OF INNOVATIONS IN LAW SCHOOL CURRICULA*, available at <http://www.aals.org/documents/curriculum/Survey.pdf> (last visited Nov. 25, 2011) (surveying current legal academics regarding non-traditional methods of teaching).

8. By systematic, I am referring to the process of: (1) identifying institutionally what you expect your students to have learned and be capable of doing and valuing upon graduation; (2) assessing whether your students have actually achieved these objectives; and (3) revising your curriculum, program development, and teaching support based on your findings.

9. See generally Barbara Glesner Fines, *Fundamental Principles and Challenges of Humanizing Legal Education*, 47 WASHBURN L.J. 313 (2008) (discussing three principles of humanizing legal education: reduce negative law school environment stressors, focus on student-centered teaching, and recapture the professional values of peace and justice); Janet Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Schools Might Transform the Educational Experience of Law Students*, 35 S. ILL. U. L.J. 225, 245–47 (2011) (discussing other initiatives to improve legal education,

methods,¹⁰ and post-law school satisfaction.¹¹ Other allies included

focusing primarily on the Humanizing Legal Education movement); *AALS Section on Balance in Legal Education*, FLA. ST. U.C.L., http://www.law.fsu.edu/academic_programs/humanizing_lawschool/index.html (last visited Nov. 20, 2011) (describing attempts by law faculty and law school professional staff to seek to enhance the overall health, well-being, and life satisfaction of law students and lawyers).

10. RONIT DINOVTIZER, NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 85 (2004), available at <http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf>.

11. Letter from Ian Weinstein, President, Clinical Legal Educ. Ass'n, to Donald J. Polden, Dean, Santa Clara Law Sch. 3 (July 5, 2011), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/20110705_comment_outcome_measures_clea.authcheckdam.pdf; SOC'Y AM. LAW TEACHERS, *SALT STATEMENT ON PROPOSED CHANGES TO INCREASE THE BAR PASSAGE REQUIREMENTS IN INTERPRETATION 301-6*, at 2–3 (July 6, 2011) [hereinafter *SALT STATEMENT*], available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/20110711_comment_outcome_measures_salt_i3016.authcheckdam.pdf (arguing that raising standards for passing the bar exam would undermine attempts to teach law students real-world, practical attorney skills); see Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 353 (2003) (proposing "a new, experience- and performance-based bar examination—which, because it would be conducted in a public service setting, I have called the Public Service Alternative Bar Examination (PSABE)"); Marjorie M. Shultz & Sheldon Zedek, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620, 622–23 (2011) (discussing the results of recent law school admissions testing); ASS'N OF THE BAR OF THE CITY OF N.Y. & N.Y. STATE BAR ASS'N, THE COMM. ON LEGAL EDUC. & ADMISSION TO THE BAR OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. & COMM. ON LEGAL EDUC. & ADMISSION TO THE BAR OF THE N.Y. STATE BAR ASS'N, *JOINT COMMITTEE REPORT: PUBLIC SERVICE ALTERNATIVE BAR EXAMINATION* 3–4 (June 14, 2002) [hereinafter *REPORT: PUBLIC SERVICE ALTERNATIVE BAR EXAMINATION*], available at <http://www.nysba.org/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=2803> (stating that the bar examination should test more of the competencies required to practice law); N.Y. STATE BAR ASS'N, *REPORT OF THE TASK FORCE ON THE FUTURE OF THE LEGAL PROFESSION* 24 (Apr. 2, 2011) [hereinafter *REPORT OF THE TASK FORCE*], available at http://www.nysba.org/AM/Template.cfm?Section=Task_Force_on_the_Future_of_the_Legal_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentID=48108 ("Even when a lawyer desires to stay at one firm, the career of the lawyer's significant other may lead in a different direction, impacting the employment of both."); see also DAVID OPPENHEIMER & KRISTIN HOLMQUIST, N.Y.L. SCH., *PREDICTORS FOR SUCCESSFUL LAWYERING: RETHINKING LAW SCHOOL ADMISSIONS* 4 (Apr. 15–16, 2011), available at <http://dotank.nyls.edu/futureed/2011proposals/07pfsf.pdf> (discussing the limits of the LSAT/UGPA index score). See generally HAZEL WEISER, SOC'Y AM. LAW TEACHERS (*SALT*), *COMMENTS ON THE INTERIM REPORT OF THE OUTCOME MEASURES COMMITTEE OF THE ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR 2* (July 21, 2008) [hereinafter *SALT COMMENTS ON THE INTERIM REPORT*], available at http://www.albanylaw.edu/media/user/celt/salt_comments_on_aba_outcomes_r

those looking for alternatives to outcome measure instruments such as the LSAT and the bar examination, which have been found to be discriminatory gatekeepers to diversity in the legal profession.¹² Clinical legal education faculty, who often receive secondary status in the historic customs of the academy, were suddenly thrust into the spotlight as possessing the necessary expertise to meet reframed legal education goals and priorities. Often these faculty members found themselves bearing the weight of the new demands being placed on institutions while lacking the power or status to either effectuate real change or to refuse to take on such a burden.

This recent legal education reform movement originated with academics but was soon wholly embraced by concerned leaders in the bar, clients, legal employers, and judges. The movement became increasingly relevant because of the changing demands placed on the legal profession itself, and the concomitant need for new skills and strengths in graduating law students.¹³ The worldwide recession and the significant loss of employment in the legal sector gave this movement a “populist” appeal. Other voices focused attention on the “law student as an uninformed consumer” and legal education as a “poor investment risk,” calling attention to debt-ridden graduates with fewer and less remunerative employment choices.¹⁴ These more fiscally concerned voices have been calling for a new “business model” of legal education to focus legal education resources more directly on what provides real value

eport_708.pdf (advocating a shift to outcome measures in law schools).

12. SALT COMMENTS ON THE INTERIM REPORT, *supra* note 11, at 1; SALT STATEMENT, *supra* note 11, at 1; Weinstein, *supra* note 11, at 4.

13. REPORT OF THE TASK FORCE, *supra* note 11, at 66–67.

14. See Debra Cassens Weiss, *Law Dean Says Schools ‘Exploiting’ Students Who Don’t Succeed*, A.B.A.J. (Jan. 20, 2009, 9:27 AM), http://www.abajournal.com/news/article/law_dean_says_schools_exploiting_students_who_dont_succeed (discussing a statement made by Richard Matasar concerning the cost of a legal education and whether or not students are being misled into the opportunities available to them if they are not in the top ten percent of their class); Kevin Ramakrishna, *Law Schools Could Take a Hint From Medical Schools on Curriculum Reform*, BEST PRACS. FOR LEGAL EDUC. BLOG (Apr. 30, 2010), <http://bestpracticeslegaled.albanylawblogs.org/2010/04/30/law-schools-could-take-a-hint-from-medical-schools-on-curriculum-reform> (“The nation’s legal-education system needs a major overhaul so that students graduating with more than \$100,000 in debt can find jobs in a shrinking market and graduate ready to practice. That was the consensus of most of the nearly 100 judges and law-firm partners who converged at a forum this week sponsored by Arizona State University’s Sandra Day O’Connor College of Law.”).

to debt-ridden graduates.¹⁵

Meanwhile, the entities responsible for oversight and accreditation of law schools also took up the question of reform. In October 2007, soon after the publication of *Best Practices* and *Educating Lawyers*, the chair of the American Bar Association's ("ABA") Section on Legal Education and Admissions to the Bar ("the Section") appointed a Special Committee on Output Measures to "determine whether and how we can use outcome measures, other than bar passage and job placement, in the accreditation process" and to "consider methods to measure whether a program is accomplishing its stated mission and goals."¹⁶ In October 2008, after a year of study, the Section's Special Committee issued a report calling for a shift in the focus of law school standards from inputs to outcomes.¹⁷ With this report in hand, the Council of the Section began a comprehensive review of the "ABA Standards and Rules of Procedure for the Approval of Law Schools" through the work of its Standards Review Committee ("SRC"). In July 2011, the SRC finalized proposals to require accredited law schools to "identify, define, and disseminate" anticipated student learning outcomes and to assess student learning and institutional effectiveness.¹⁸ These proposed changes

15. See Mary Lynch, *Matasar Responds to NY Times & Defends Legal Ed Reform*, BEST PRACS. FOR LEGAL EDUC. BLOG (July 20, 2011), <http://bestpracticeslegaled.albanylawblogs.org/?s=matasar>; Richard A. Matasar, *Law School Cost, Educational Outcomes, and a Reformer's Agenda*, N.Y.L. SCH., http://www.nyls.edu/news_and_events/matasars_response_to_nytimes (last visited Nov. 23, 2011); David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all>; Karen Sloan, *'Poster Child' Shares Frustration About Pace of Law School Reform*, NAT'L L.J. (July 26, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202508336129&rss=nlj&slret urn=1> (stating that, although legal jobs are scarce, law schools continue to raise prices).

16. Memorandum from Chief Justice Ruth McGregor, ABA Section of Legal Educ. and Admissions to the Bar, to Comm. Appointees 1 (Oct. 8, 2007), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/2007_special_committee_appointment.authcheckdam.pdf.

17. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE OUTCOME MEASURES COMMITTEE 1 (July 27, 2008), *available at* http://www.albanylaw.edu/media/user/celt/outcome_measures_final_report.pdf.

18. STANDARDS REVIEW COMM., ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, DRAFT FOR JULY MEETING 1 (July 2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july2011meeting/20110621_ch_3_program_of_legal_education_clean_copy.authcheckdam.pdf.

have sparked a stream of comments from several groups including the Society of American Law Teachers (“SALT”) and the Clinical Legal Education Association (“CLEA”).¹⁹

While many have engaged in reform efforts, others in and connected with legal education have raised alarms about the looming changes in legal education. Having been involved in the publication and dissemination of *Best Practices* and in presentations about the principles and strategies contained in *Educating Lawyers* and *Best Practices*,²⁰ I am fully aware that not everyone is pleased with these reform ideas. I have heard many a criticism, fear, and concern raised in response to them. Some warn that the legal education reform movement is “throwing out the baby with the bath water” or “overcorrecting the ship’s course right into the levee.”²¹ Some fear that the redirection of energy and resources

19. See *Standards Review Comm.*, ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, http://www.americanbar.org/groups/legal_education/committees/standards_review.html (last visited Nov. 25, 2011) (providing resources and information related to the ABA Standards Review Committee).

20. Resume of Professor Mary Lynch, Co-Chair, Best Practices Implementation Comm., AALS, Clinical Legal Education Section, Executive Comm., Clinical Legal Educ. Ass’n (2011) (on file with author) (listing presentations in which the author has participated, including: four professional development sessions to the Qatar University College of Law Faculty (Mar. 13–16, 2011); Using Critical Perspectives to Inform Change, a presentation at the AALS Clinical Section Annual Conference; Plenary Session in Baltimore, Md. (May 2010) (jointly presented with Professors Margaret Montoya, Sameer Ashar, and Tirien Steinbach); Assessment of Students, a presentation to the clinical faculty at Indiana University at Maurer School of Law in Bloomington, Ind. (June 2010); Best Practices, Carnegie, Outcomes Based Learning and ABA Revisions: A Conversation about Current Initiatives and Reforms in Legal Education in Bristol, R.I. (Feb. 2010); Is it a Clinic, an Externship or Something Else? Shedding Orthodoxies While Developing Transformative Conceptual Frameworks for Experiential Learning Opportunities, at the Strategic Alliance of Law Teachers (“SALT”) Bi-annual Teaching Conference in Honolulu, Haw. (Dec. 2011) (jointly presented with Professors Deborah Maranville, Phyllis Goldfarb, and Susan Kay); Incorporating Effective Formative Assessment into Course Planning: A Demonstration and Toolbox, at the Crossroads Assessment Conference in Denver, Colo. (Sept. 2009) (jointly presented with Professors Barbara Glesner Fines, Carolyn Grose, and Peter Joy); Current Legal Education Reform Movement, at the Faculty Workshop at Southern England School of Law in North Dartmouth, Mass. (Oct. 2009) (jointly presented with Professor Carolyn Kaas)).

21. ASS’N OF AM. LAW SCH., CONFERENCE ON THE FUTURE OF THE LAW SCHOOL CURRICULUM 5 (June 11–16, 2011), *available at* <http://www.aals.org/clinical2011/Clinical&CurriculumWorkbooklet.pdf> (describing how the organizers used an ongoing simulation of a “Faux Curriculum Committee” meeting to explore ideas about legal education reform). After one of these sessions, there was an opportunity for public comment and questions. After I commented on how hesitant the committee was to embrace some reforms, a self-identified first-year

will undermine the legal academy's scholarly and theoretical underpinnings, which are uniquely connected with the educational development of open-minded and creative law graduates.²² Some clinical faculty worry that outcomes will be used to steer resources towards simulation-based opportunities or to conflate the learning involved in direct client experience with the objectives of field placement opportunities.²³ Still others caution that the outcomes movement is being used as a foil for efforts to deregulate legal education, eliminate tenure, and deprive educators of academic freedom.²⁴

In the face of these various criticisms, one thing should be made clear. At the heart of the legal education reform movement is a dedication to improving students' experiences during law school and opportunities after graduation. Faculty engaged in this movement are committed to creating law graduates who will both serve their clients skillfully and ethically and contribute positively to the greater society. They are excited about opportunities to use interdisciplinary educational theory and, in particular, the pedagogical²⁵ benefits of *defining* student learning outcomes and

"core course" teacher used his time at the microphone to lecture me with the "levee" expression.

22. See William L. Reynolds, *Back to the Future in Law Schools*, 70 MD. L. REV. 451, 460–63 (2011) (discussing concerns with the emphasis on public law over private law in law schools); Ronald H. Silverman, *Weak Law Teaching, Adam Smith and a New Model of Merit Pay*, 9 CORNELL I.L. & PUB. POL'Y 267, 397 (2000) (expressing the concerns of professors, judges, and lawyers that, generally, "trendy new electives" are diluting the strength of the traditional courses).

23. See discussion *infra* Part IX (Criticism #9).

24. For example, attendees at a recent AALS meeting expressed these concerns during a question and answer period. See ASS'N OF AM. LAW SCH., 2010 ANNUAL MEETING PROGRAM 50 (Jan. 6–10, 2010), available at <http://www.aals.org/am2010/AMProgram2010.pdf>; *About Us*, SOC'Y OF AM. L. TEACHERS, <http://www.saltlaw.org/sections/view/aboutus> (last visited Nov. 25, 2011).

25. It would be more appropriate to use the term "andragogy" to refer to the art of helping adults learn. Roger Hiemstra, *Moving from Pedagogy to Andragogy, HELPING PEOPLE TAKE INCREASING RESPONSIBILITY FOR THEIR OWN LEARNING*, <http://www-distance.syr.edu/andraggy.html> (last visited Nov. 25, 2011), adapted from ROGER HIEMSTRA & BURTON SISCO, *INDIVIDUALIZING INSTRUCTION* (1990). This term was first used in 1968 by Professor Malcolm Knowles who identified "four basic assumptions about learners" to employ in an andragogical model:

1. Their self-concept moves from dependency to independency or self-directedness.
2. They accumulate a reservoir of experiences that can be used as a basis on which to build learning.
3. Their readiness to learn becomes increasingly associated with the developmental tasks of social roles.
4. Their time and curricular perspectives change from postponed to immediacy of application and from subject-centeredness to

requiring institutions to assess effectiveness in reaching those outcomes.²⁶

It is the core promise that identifying and assessing outcomes will improve student learning and capabilities that makes this effort worth the price of controversy. The multiplicity of voices directed at the outcomes and assessment movement requires an untangling of unfounded fears from real risks, honest misconceptions from self-protective backlash, and unbounded optimism from realistic assessment of the benefits. Relying on the expertise of higher education experts, such as Professor Barbara Walvoord,²⁷ this

performance-centeredness.

Id. Since “andragogy” is a newer and less frequently used term than “pedagogy,” I have chosen to use the word “pedagogy” to communicate ideas about teaching methods so that those not familiar with the distinction are not distracted by use of the word “andragogy.” However, what I do not wish to lose in the compromise is that the use of the word “pedagogy” should have some relationship to our “notions about a learner’s ability, need, and desire to take responsibility for learning.” *Id.* (citing MALCOLM S. KNOWLES, *THE MODERN PRACTICE OF ADULT EDUCATION* 44–45 (1980)); *see also* Jost Reischmann, *ANDRAGOGY.NET*, <http://www.unibamberg.de/fileadmin/andragogik/08/andragogik/andragogy/index.htm> (last visited Nov. 25, 2011).

26. Such work is interdisciplinary in nature and involves collaboration between general education scholars and law professors. See, for example, the collaboration between clinical faculty at several schools, including the Albany Law School Center for Excellence in Teaching, Syracuse School of Education Professor Corrine Roth Smith, and College of St. Rose Professor Theresa Ward. *2009 Northeast Regional Conference*, ALBANY LAW SCH. CTR. FOR EXCELLENCE IN LAW TEACHING, http://www.albanylaw.edu/sub.php?navigation_id=1828 (last visited Nov. 25, 2011). *See also* ASS’N. OF AM. LAW SCH., *2010 CONFERENCE ON CLINICAL LEGAL EDUCATION: ANSWERING THE CALL FOR REFORM: USING OUTCOMES ASSESSMENT, CRITICAL THEORY AND STRATEGIC THINKING TO IMPLEMENT CHANGE*, (May 4–8, 2010), *available at* <http://www.aals.org/clinical2010/clinical.pdf> [hereinafter *ANSWERING THE CALL FOR REFORM*]. One of the creators of this pedagogical theory supporting Backward Design presented it at this conference. *Id.* at 5. For more details regarding this conference, see *Faculty: 2010 Clinical Conference*, ASS’N OF AM. LAW SCH., https://memberaccess.aals.org/eweb/DynamicPage.aspx?Site=AALS&WebKey=98cec2db-8914-4c09-a6eb-7bf341e99e6c&RegPath=EventRegFees®_evt_key=0bf2b085-c92d-4ec8-b50b-fe1117b8f691 (last visited Nov. 25, 2011).

27. Professor Barbara E. Walvoord, Concurrent Professor Emerita at the University of Notre Dame, is the founder of four college and university faculty development centers, each of which has earned national recognition. She has consulted or led workshops at more than 350 institutions of higher education and has published widely on assessment, academic departments, and higher education students. She is the author of *ASSESSMENT CLEAR AND SIMPLE: A PRACTICAL GUIDE FOR INSTITUTIONS, DEPARTMENTS AND GENERAL EDUCATION* (2d ed. 2010), among other published work on higher education. I was fortunate to have heard her speak in June 2011 at the annual conference of the Institute for Law Teaching and Learning at New York Law School, and have been a fan ever since. Barbara

article examines some of the realities and misconceptions surrounding the use of student learning outcomes. It identifies the likely consequences of institutionalizing an outcomes model, acknowledges the pitfalls, and attempts to allay fears that are based more on antagonism to change than on likely risks.

The purpose of this article is not simply to rebut criticisms of the outcomes movement. Those who work on legal education reform need to be aware of the risks, pitfalls, and dangers of inappropriate institutionalization of outcomes. Moving to a process by which we identify and assess outcomes while integrating theory, practice, and professional identity is not a simple matter, but it *is* an important one.

I. CRITICISM #1. REQUIRING THE IDENTIFICATION AND ASSESSMENT OF STUDENT LEARNING OUTCOMES IS ANTI-THEORETICAL AND ANTI-SCHOLARLY.

Some legal education reformers maintain that resources in legal education have been disproportionately weighted towards scholarship goals and away from professional development of students.²⁸ They argue for what they see as a “fairer” distribution of resources.²⁹ This claim has caused concern that those seeking to

Walvoord, *Assessment is Coming! What the New ABA Accreditation Requirements Mean for Your Classes and Your Law School*, INST. FOR L. & LEARNING (June 3, 2011), <http://lawteaching.org/conferences/2011/handouts/plenary2keynote-AssessmentisComing.pdf>.

28. See generally Rubin, *supra* note 7 (arguing that the structure of rewards for professors focuses solely on their academic output and not at all on student development).

29. STUCKEY AND OTHERS, *supra* note 2, at 119–20 (discussing “learning centers” and “assessment centers” which would help both students and faculty members get the most out of new teaching strategies). One approach to redistributing resources may involve reconsidering the compensation of law school professors by creating financial incentives for innovative teaching. See, e.g., *Center for Excellence in Law Teaching (CELT): Administrative Support for Teaching*, ALBANY L. SCH., http://www.albanylaw.edu/sub.php?navigation_id=1795 (last visited Nov. 25, 2011) [hereinafter *CELT: Administrative Support*] (listing summer curriculum grants); *CELT: Assessment*, ALBANY L. SCH., http://www.albanylaw.edu/sub.php?navigation_id=1753 (last visited Nov. 25, 2011) (providing scholarship and resources for teachers looking to use new assessment methods); *Faculty Workshop Luncheon Series*, ALBANY L. SCH., http://www.albanylaw.edu/sub.php?navigation_id=1784 (last visited Nov. 25, 2011) (listing, specifically, “New Teaching Ideas and Resources”, and “Teaching Evaluations” as potential means to accomplish this goal). See generally SULLIVAN ET AL., *supra* note 1 (examining various studies and the effects of tuition funding and allocation on teaching methods across law schools in the country); Rhonda V. Magee, *Legal Education and the Formation of*

emphasize student learning outcomes are part of an anti-theoretical or anti-scholarly movement. Identifying learning objectives and enabling students to meet universal learning objectives will, no doubt, require a redirection of resources, attention, and energy, at least for an initial adjustment period.³⁰ But that does not imply a diminution of the value placed on scholarship by law schools. Nor does it mean that the movement itself is anti-theoretical or anti-scholarly.³¹ Most importantly, it does not mean that discussions of the conceptual, the theoretical, or the scholarly will lose their importance in the classroom or in the clinic.

In *Assessment Clear and Simple: A Practical Guide for Institutions, Departments, and General Education*,³² Professor Walvoord, a widely recognized expert on the outcomes movement in higher education, notes:

Assessment does not limit itself only to learning that can be objectively tested. It need not be a reductive exercise Learning goals, such as the inclination to question assumptions, sensitivity to poverty and injustice, scientific literacy, the ability to work effectively with people of diverse backgrounds and cultures, the development of ethical values, or, for faith-based institutions, the development of spiritual qualities, are difficult to assess. Yet they are among the goals that faculty and institutions hold most dear, and they may be the most important qualities that higher education can nurture in the citizens of the future. To make good choices about how to nurture those qualities, educators need indicators of how well students are achieving them. A combination of direct and indirect measures can be

Professional Identity: A Critical Spirituo-Humanistic—"Humanity Consciousness"—Perspective, 31 N.Y.U. REV. L. & SOC. CHANGE 467 (2007) (advocating an approach to legal education that reaches and engages all students regardless of their social background).

30. STUCKEY AND OTHERS, *supra* note 2, at 99 ("Law schools cannot prepare students for practice unless they teach doctrine, theory, and practice as part of a unified, coordinated program of instruction."); SULLIVAN ET AL., *supra* note 1, at 63 ("[C]ase-dialogue teaching inculcates several, often largely tacit, meta-lessons well beyond the particular case under discussion on any given day, about how to gather knowledge and bolster comprehension.").

31. Rubin, *supra* note 7, at 651–54.

32. BARBARA E. WALVOORD, *ASSESSMENT CLEAR AND SIMPLE: A PRACTICAL GUIDE FOR INSTITUTIONS, DEPARTMENTS, AND GENERAL EDUCATION* (2004).

useful.³³

Similarly, Law Professor and Associate Dean Nelson Miller notes: “Legal education can be practical without being anti-intellectual. At least, others’ rigorous examination of some of our underlying assumptions can improve our own understanding to the point that we may be able to reach, serve, and inspire a few more students toward their own deep learning.”³⁴

In other words, the outcomes to be assessed are a *function* of the values, knowledge, perspectives, theories, and/or skills to be taught in any particular classroom. The assessment of outcomes does not *dictate* what these values, knowledge, perspectives, theories, or skills will be.³⁵

It is the desire to *theorize* about and intellectualize the teaching of law that motivates reformers. Examples abound. University of Georgia Law Professor Andrea Curcio has advocated the use of social science in evaluating how and if changes to legal pedagogy are actually achieving the student learning it promises.³⁶ The work of University of North Carolina’s Burton Craige Professor of Law Judith Wegner with the Carnegie Foundation was itself a scholarly and interdisciplinary analysis which forced many legal educators to become familiar with educational theory, cognitive development, and the comparative work being done between and among professional graduate programs.³⁷ Law Professor Barbara Glesner

33. *Id.* at 2.

34. NELSON MILLER, TEACHING LAW: A FRAMEWORK FOR INSTRUCTIONAL MASTERY 137 (2010).

35. Of course, requiring institutional identification of objectives or outcomes will require a collective evaluation by faculty of desired outcomes for students. This process will in turn cause a healthy re-evaluation of assumptions, redundancies and vacuums which may be built into existing curricula and may encourage redirection of faculty energies to address gaps or wrong-footed assumptions.

36. See 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. 899 (2009) [hereinafter Curcio, *Assessing Differently*]. Her other relevant publications include: Andrea A. Curcio, *Moving in the Direction of Best Practices and the Carnegie Report: Reflections on Using Multiple Assessments in a Large-Section Doctrinal Course*, 19 WIDENER L.J. 159 (2009) [hereinafter Curcio, *Moving*]; Andrea A. Curcio et al., *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance*, 35 FLA. ST. U. L. REV. 217 (2008).

37. For discussions of the significance of the Carnegie Foundation’s scholarly work on postgraduate education, see MICHAEL ROBERTSON ET AL., THE ETHICS PROJECT IN LEGAL EDUCATION 87 (2010) (citing SULLIVAN ET AL., *supra* note 1, at 12) (“The framework we propose seeks to mediate between the claims for legal theory and the need of practice, in order to do justice to the importance of both while

Fines' "Teaching and Learning Law Project" supports both teaching innovation and scholarship in this area by collecting important resources for general use.³⁸

Some resistance to identifying learning outcomes arises from the age-old and, in my opinion, needless tension between the notions of law school as a "graduate program" versus law school as a pre-professional program.³⁹ The claim of a dichotomy, that "theory" is somehow in opposition to, or unrelated to, "practice," should no longer have a place in serious discussion of legal education. This tension was sanctioned by legal education's historic, but no longer predominant, tradition of endowing lesser status, title, rights, salary, and remuneration upon "clinical faculty"⁴⁰ who taught students in practice settings as opposed to "regular faculty" who taught in the classroom. Hiring criteria often privileged a candidate's days on a law review while ignoring excellence in post-law school practice settings. The treatment of adjuncts and practitioners also reflected anti-practice bias. But these distinctions and cultural biases are waning.

The resistance to re-integrating theory and practice in legal education also has been exacerbated by attacks on academics made by commentators within, and outside of, the academy about the

responding to the demands of professional responsibility."); SULLIVAN ET AL., *supra* note 1, at 3 (noting that the work itself is part of a series of reports on professional education issued by the Carnegie Foundation through its Preparation for the Professions Program, which also includes reports on the study of professional formation of clergy, engineers, nurses, and physicians); WILLIAM M. SULLIVAN & MATTHEW S. ROSIN, *A NEW AGENDA FOR HIGHER EDUCATION: SHAPING A LIFE OF THE MIND FOR PRACTICE* 93–112 (2008) (proposing an educational aim of "practical reason," focusing on the interdependence of liberal education and professional training); GEORGE WALKER ET AL., *THE FORMATION OF SCHOLARS: RETHINKING DOCTORAL EDUCATION FOR THE TWENTY-FIRST CENTURY* (2008) (noting that the Carnegie Foundation examined doctoral and graduate programs in its report); Rubin, *supra* note 7, at 650–64 (proposing practical changes to law school curriculum).

38. See generally Barbara Glesner Fines, *The Impact of Expectations on Teaching and Learning*, 38 GONZ. L. REV. 89 (2003) (discussing the effect of high expectations on legal education).

39. See Rubin, *supra* note 7, at 643–50 (discussing the current appropriateness of Langdell's method); see also Judith Welch Wegner, *Reframing Legal Education's "Wicked Problems"*, 61 RUTGERS L. REV. 867, 969–72 (2009) (discussing the divide between "theory" and "practice").

40. Bryan L. Adamson et al., *Report and Recommendations on the Status of Clinical Faculty in the Legal Academy* 37–38 (Wash. Univ. in St. Louis Legal Studies Research Paper No. 10-06-07, Mar. 1, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628117.

“irrelevance” of academic legal scholarship.⁴¹ In 2010, a Justice of the U.S. Supreme Court jokingly referred to a particular constitutional argument as “the darling of the professoriate” during oral argument.⁴² Such overblown attacks serve no helpful purpose in improving teaching and collaboration within institutions.⁴³

The question is not *whether* to integrate theory and practice but how to do so most effectively.⁴⁴ To break down the misperception between and among law professors, the legal academy needs more opportunities for collaboration and cross-fertilization by those teaching in different parts of the law school curriculum, with different priorities and different perspectives. Collaborative efforts

41. Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 115–19 (2010); Reynolds, *supra* note 22, at 457–64; Gary M. Shaw, *A Heretical View of Teaching: A Contrarian Looks at Teaching, the Carnegie Report, and Best Practices*, SELECTED WORKS OF GARY M. SHAW 43–49 (Oct. 2010), http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=gary_shaw; see also Byron D. Cooper, *The Integration of Theory, Doctrine, and Practice in Legal Education*, 1 J. ASS'N LEGAL WRITING DIRS. 50, 50–56 (2001), available at http://www.alwd.org/publications/pdf/ErasingLines_Cooper.pdf (“[T]he determined separation of theory from practice has severely limited the scope of modern legal education.”); Michael Ariens, *Top Ten Changes in the Legal Profession Since 1979, Part II*, MARQ. U. L. SCH. FAC. BLOG (Jan. 3, 2010), <http://law.marquette.edu/facultyblog/2010/01/03/top-ten-changes-in-the-legal-profession-since-1979-part-ii> (“The focus on doctrine (and more doctrine) to the exclusion of either theory or practice was a major factor in the ennui upper-level law students suffered from.”).

42. During oral argument in 2010, Justice Antonin Scalia took a jab at constitutional scholars, stating, “What you argue is the darling of the professoriate, for sure, but it’s also contrary to 140 years of our jurisprudence.” Michael C. Dorf, *Justice Scalia Suggests that the Legal Academy is Out of Touch: Is He Right?*, FINDLAW.COM (Mar. 8, 2010), <http://writ.news.findlaw.com/dorf/20100308.html>. For a discussion of Chief Justice John Roberts’ attack on legal scholarship, see Vanessa Merton, *ABA Journal Generates Massive Commentary on C.J. Roberts’ Critique of Academic Legal Scholarship*, BEST PRACTS. FOR LEGAL EDUC. BLOG (July 9, 2011), <http://bestpracticeslegaled.albanylawblogs.org/2011/07/09/aba-journal-generates-massive-commentary-on-c-j-roberts-critique-of-academic-legal-scholarship> (“Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.”).

43. See, e.g., FRANCISCO VALDES, *LEGAL REFORM AND SOCIAL JUSTICE: AN INTRODUCTION TO LATCRIT THEORY, PRAXIS AND COMMUNITY* 13–14 (June 2003), available at <http://latcrit.org/latcrit/publications/monographs/lcfvenglish.pdf> (discussing the importance of collaboration and solidarity—versus competitive attacks—in the context of efforts to improve the community building and teaching methods of LatCrit theory in the legal academic community).

44. I am attracted, as many others are, to the notion of praxis as the integration of theory and practice. See *id.*

such as the Association of American Law Schools' Conference on the Future of the Law School Curriculum,⁴⁵ the work of the Institute for Law Teaching and Learning,⁴⁶ the Crossroads Conferences,⁴⁷ and the inaugural conference of the recently developed Center for Excellence in Law Teaching⁴⁸ should help build connections and understanding and reduce misconceptions.

II. CRITICISM #2. REQUIRING THE IDENTIFICATION AND ASSESSMENT OF STUDENT LEARNING OUTCOMES MEANS IMPINGING ON ACADEMIC FREEDOM IN THE CLASSROOM.

Some have argued that requiring the identification and assessment of student learning outcomes will impinge upon academic freedom.⁴⁹ I have often witnessed concern and sometimes hostility to the idea of asking law professors to articulate, identify, and assess outcomes.⁵⁰ These concerns appear to be driven by fear that this process will lead to the loss of academic freedom and the imposition of uniform methods of teaching, uniform selection of classroom content and assignments, and uniform evaluation and grading rubrics. For example, at one law

45. See *2011 Conference on the Future of the Law School Curriculum*, ASS'N OF AM. L. SCH., https://memberaccess.aals.org/eweb/DynamicPage.aspx?webcode=2011curhome&Reg_evt_key=4b89b4a7-b213-4fc1-b4f7-a06c87840cbd&RegPath=EventRegFees (last visited Nov. 25, 2011).

46. See INST. FOR L. TEACHING & LEARNING, <http://lawteaching.org/index.php> (last visited Nov. 25, 2011).

47. See Press Release, Univ. of Wash. Sch. of Law, UW Conference Looks at Legal Education (Aug. 14, 2008), <http://www.law.washington.edu/News/Articles/Default.aspx?YR=2008&ID=Crossroads>; *Legal Education at the Crossroads*, U. DENV. STURM C. L., <http://www.law.du.edu/index.php/assessment-conference> (last visited Nov. 25, 2011).

48. See *CELT's Inaugural Conference*, ALBANY L. SCH.: CENTER FOR EXCELLENCE IN L. TEACHING, <http://www.albanylaw.edu/celt2012> (last visited Nov. 25, 2011); *CELT: Scholarly Works on Assessment*, ALBANY L. SCH., http://www.albanylaw.edu/sub.php?navigation_id=1753 (last visited Nov. 25, 2011).

49. The Association of American University Professors ("AAUP") describes academic freedom as "the indispensable quality of institutions of higher education." *Academic Freedom*, AM. ASS'N OF U. PROFESSORS, <http://www.aaup.org/AAUP/issues/AF/> (last visited Nov. 25, 2011). "[T]he AAUP's core policy statement argues, 'institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.'" *Id.* (citation omitted).

50. As Director of the Center for Excellence in Law Teaching and Editor of the Best Practices Blog, I have had the fortunate opportunity to present at numerous workshops and consult with faculty colleagues at other institutions.

school, when the academic dean met with a group of professors who taught in a common subject matter area to discuss learning objectives, one faculty member refused to even engage in the conversation or articulate his goals for teaching. The faculty member's opposition included the concern that the request to identify "student learning objectives" was just the first step on a slippery slope that would result in taking away choice, personal style, and creativity.⁵¹ The fear that requiring assessment of student learning outcomes will dilute the freedom of teachers is not unique to that faculty member, his colleagues, or that school.⁵²

Any arguments premised on attacks on academic freedom must be given serious consideration. For legal educators and law students, the public discussion of unpopular ideas, as well as the representation of unpopular causes or clients, is not only a matter of academic freedom. It is critical to developing and absorbing professional identity.⁵³ For example, the iconic figure of Atticus Finch, from Harper Lee's classic *To Kill a Mockingbird*, is identified as the quintessential lawyer, possessing the ideal attributes of the lawyer-professional, precisely because he valiantly represents an

51. See also John M. Elmore, *Institutionalized Attacks on Academic Freedom: The Impact of Mandates by State Departments of Education and National Accreditation Agencies on Academic Freedom*, AAUP J. ACAD. FREEDOM, <http://www.academicfreedomjournal.org/VolumeOne/Elmore.pdf> (arguing that academic freedom has been under attack for the past thirty years).

52. Susan Hanley Duncan, *The New Accreditation Standards Are Coming to a Law School Near You—What You Need to Know About Learning Outcomes & Assessment*, 16 J. LEGAL WRITING 605, 609–10 (2010) ("Some faculty members object to assessment because they think it will endanger their academic freedom or be used to blame individual professors unfairly. In addition, others might question whether the real goals of higher education can be measured or argue that student learning is affected by factors beyond faculty control."). See generally Mary Crossley & Lu-in Wang, *Learning By Doing: An Experience with Outcomes Assessment*, 41 U. TOL. L. REV. 269 (2010) (discussing the benefits and goals of outcome assessment through examining its implementation at the University of Pittsburgh, generally, highlighting how professors were initially opposed to the outcome assessment of their students' performance and how that reflected on their teaching performance).

53. See SULLIVAN ET AL., *supra* note 1, at 120 (discussing professional identity, finding that clinical experiences can "expand students' expertise and professional identity through supervised responsibility for clients"); Karen Sloan, *Law Schools Chief Discusses Freedom Fears, Rock and Roll Dream*, NAT'L L.J. (Jan. 5, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202483795031> (interviewing AALS President Michael Olivas, who describes the importance of legal clinics, "[t]hat is almost always because those clinics have leaned against power and been successful in bringing cases. That's a big concern of the association and of me. If we can't go to court, how are we going to teach our students?").

unpopular client despite local community outrage. For legal educators, then, freedom of thought in the face of controversy has not only academic roots but professional ones as well.

In recent years, genuine attacks on academic freedom have become increasingly problematic in law schools⁵⁴ and particularly virulent against clinical faculty.⁵⁵ Arguably, no segment of the legal academic community is more vulnerable to assault on academic freedom than the clinical faculty. Because they tend to represent underserved individuals against powerful institutional interests, many clinicians live every day in the shadow of potential conflict with elected officials and other interests that may try to influence law school administrators. Yet, clinical legal education is exactly the kind of integrated learning experience that the legal education

54. Law schools have sustained many attacks on academic freedom in recent years. See Michael A. Olivas, AALS President, Presidential Address Before the House of Representatives at the AALS Annual Meeting (Jan. 7, 2011), available at http://www.aals.org/services_newsletter_presMarch11.php (containing AALS President Michael Olivas' announcement of his theme of "academic freedom and academic duty"). In his January 2011 interview with the National Law Journal, Olivas noted he chose this theme in response to many threats to the legal academy including:

A law professor from William Mitchell College of Law who was arrested doing pro bono duty in a Rwandan election dispute. A law professor from NYU who is in libel court in France because the journal he edits published a book review that the author didn't like. We have John Yoo and people want to storm his classroom and, in effect, hold him out for disapproval of his views and his involvement in national security matters. We've had many threats to successful clinics, which form the backbone of the practice side and skill-development side of legal education.

Sloan, *supra* note 53. Law schools have also had to face issues concerning the boundaries of academic freedom. See, e.g., Karen Sloan, *Panel Recommends Against Dismissal of Widener Professor—For Now*, NAT'L L.J. (Mar. 10, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202485592127> (reporting the school's decision to drop its efforts to dismiss associate professor Lawrence Connell for his use of violent hypothetical examples in his criminal law course).

55. Robert R. Kuehn & Peter A. Joy, "Kneecapping" *Academic Freedom*, ACADEME, Nov.–Dec. 2010, at 8, available at <http://www.aaup.org/AAUP/pubsres/academe/2010/ND/feat/kueh.htm> ("This year, across the nation, state legislators and powerful corporate interests with financial ties to universities and influence over them have launched an unprecedented number of attacks on law school clinics."); Olivas, *supra* note 54 (noting attacks on law clinics "reviled for their work, and threatened in Maryland, Louisiana, Michigan, New Jersey, and in several other states"); Robert R. Kuehn & Bridget M. McCormack, *Lessons from Forty Years of Interference in Law School Clinics*, 24 GEO. J. LEGAL ETHICS 59 (2010), reprinted in *Publicized Instances of Interference in Law School Clinics*, ACADEME, Nov.–Dec. 2010, at 12–13, available at <http://www.aaup.org/AAUP/pubsres/academe/2010/ND/feat/kuehchart.htm>.

movement espouses.⁵⁶

Content-based academic freedom is consistent with the desire to create “significant learning experiences”⁵⁷ for students that can be assessed by others.⁵⁸ Controversial subject matter, rather than being in conflict with legal education reform, is in direct support of it. Passionate involvement and engagement with ideas with which one agrees or disagrees are major psycho-educational motivators.⁵⁹ The more one examines the appropriate use of outcomes and assessment in other areas of higher education, the more one finds that assessing whether students meet articulated objectives does not call for a dilution of freedom of thought, teacher creativity, or independent professorial judgment in or out of the classroom.

Assessment rightly conducted does not ask faculty to repress their knowledge or judgments. Rather, it asks faculty to work together as colleagues to assess student work fairly by criteria respected in the field and to share their knowledge of student strengths and weaknesses, in order to improve curriculum, pedagogy, and other factors that affect learning.⁶⁰

Notably, requiring faculty to focus on whether their teaching produces actual outcomes is not *in and of itself* a dilution of academic freedom. It is important to distinguish between pure content-based freedom and issues of a more administrative nature that are properly the subject of ongoing give and take. Academic freedom is not the freedom to do *whatever* you want with your students. As Professor Walvoord succinctly notes:

56. See SULLIVAN ET AL., *supra* note 1, at 4 (“[W]ell-honed skills of legal analysis should be matched by similarly strong skill in serving clients and a solid ethical grounding.”); STUCKEY AND OTHERS, *supra* note 2, at 45 (discussing the second apprenticeship as involving simulated practice situations such as a clinical experience).

57. L. DEE FINK, CREATING SIGNIFICANT LEARNING EXPERIENCES: AN INTEGRATED APPROACH TO DESIGNING COLLEGE COURSES 43–44 (2003) (explaining that because law schools are post-collegiate institutions, “significance” will be more directly linked to students’ professional lives and the interaction between or integration of their professional and personal lives than is expected in college courses).

58. The central idea of the phrase “significant learning experience” is that “teaching should result in something *others* can look at and say: ‘That learning experience resulted in something that is truly *significant* in terms of the students’ lives.” *Id.* at 6 (emphasis added).

59. SCHWARTZ ET AL., *supra* note 6, at 91–92; see also GERALD HESS ET AL., TEACHING LAW BY DESIGN FOR ADJUNCTS (2010) (discussing legal teaching theory, including how to educate and motivate law students).

60. WALVOORD, *supra* note 32, at 8.

No one has ever had the right to teach a course just as she pleases; we always are bound by the rules of responsible interaction with students, by departmental agreement about what a course will cover, and by the requirement that we assign each student a grade that is public to limited audiences.⁶¹

Of course, as law schools transition to an outcomes approach, there are certainly risks to academic freedom that must be considered. For example, Education Professor John M. Elmore warns in the *Journal of Academic Freedom* that unduly burdensome assessment expectations may deprive faculty of the time and space needed to exercise autonomy:

State legislatures, governing boards, and departments of education, typically in cooperation with powerful accreditation agencies, have begun to dilute academic freedom, not necessarily in the name of political correctness but in the name of efficiency. They have placed an ever-increasing set of demands on programs, dictating content, required experiences, and “measurable” outcomes that simply leave no time nor space for academic freedom. In this circumstance, the enemy becomes less visible, the smoking gun less easily located.⁶²

Unrealistic or overly ambitious assessment expectations can work to the detriment of caring, creative, and effective law teachers.⁶³ Although not a direct attack on academic freedom, identifying and articulating objectives to be assessed will be time consuming for faculty unaccustomed to the challenge of precisely articulating what their course or the curriculum *achieves* in terms of student learning. Incorporating assessment of student learning outcomes into law school culture will take more work, time, thinking, and energy on the part of faculty. Institutions will need

61. *Id.*; see also Olivas, *supra* note 54 (citing DONALD KENNEDY, *ACADEMIC DUTY* 21–22 (1997)) (stating that responsibility and ethics are reciprocal obligations that flow from academic freedom); AM. ASS’N OF UNIV. PROFESSORS, *1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE* 3 (2006), available at <http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534-CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf> (describing the academic freedom that follows tenure).

62. Elmore, *supra* note 51, at 3.

63. This is the case, for example, if administrative deans or accrediting agencies require the kind of data collection about student learning which takes away from faculty and student time in and out of the classroom.

to support and provide appropriate resources to faculty who must transition to new expectations.⁶⁴ Institutions also need to be wary of overly burdensome assessment demands and cognizant of the danger to academic time and energy of unduly burdensome expectations.

III. CRITICISM #3. REQUIRING THE IDENTIFICATION AND ASSESSMENT OF STUDENT LEARNING OUTCOMES WILL HAVE UNFAIR CONSEQUENCES FOR INDIVIDUAL FACULTY MEMBERS.

The concern about meddlesome administrators breathing over faculty members' shoulders extends beyond the issue of academic freedom to fears that an outcomes approach will be used to "blame individual professors unfairly" when students do not meet learning objectives.⁶⁵ The faculty should not only observe closely whether assessment systems are used appropriately, but should also have a vigorous and vital role in defining and articulating learning outcomes and evaluating the import of the feedback. "The truth is that assessment brings to teaching a level of accountability that was not always present before and that can be used to benefit the students, the faculty, and the institution."⁶⁶

This new accountability can be frightening or liberating.⁶⁷ It is never easy to be evaluated, even if it is for the formative purpose of improving the institution.

Outcomes experts emphasize that assessment of student learning should *not* be focused on scrutiny of individual faculty but rather on decision making with regards to "curriculum, pedagogy,

64. STUCKEY AND OTHERS, *supra* note 2, at 162 (discussing "learning centers" and "assessment centers" that would help both students and faculty members get the most out of new teaching strategies). At Albany Law School, we provide teaching assistants to support faculty providing multiple and formative assessments and summer grants for course revision consistent with *Best Practices* and Carnegie goals. See *CELT: Administrative Support*, *supra* note 29 (describing available summer curriculum grants); *CELT: Assessment*, *supra* note 29 (providing scholarship and resources for teachers looking to use new assessment methods); *Faculty Workshop Series*, *supra* note 29 (listing a number of faculty workshop resources, specifically, "New Teaching Ideas and Resources" and "Teaching Evaluations").

65. Duncan, *supra* note 52, at 609; see also *supra* text accompanying note 52 (noting the concern that outcomes assessment will diminish academic freedom).

66. WALVOORD, *supra* note 32, at 9.

67. This accountability concept is especially frightening since law professors have not been trained to teach nor is there a universal consensus on which training or hiring criteria supports good law teaching.

staffing, advising, and student support.”⁶⁸ Assessment involves acquisition of “the best possible data about student learning and the factors that affect it.”⁶⁹ Assessment measures used to improve curriculum and the overall institution should be completely separate from the assessment of individual faculty for promotion and/or tenure purposes.⁷⁰ After all, no single faculty member will affect the overall outcomes so dramatically. As Professor Walvoord notes: “A wise institution keeps the focus on collective action, not on individual blame.”⁷¹

Faculty at many law schools are already evaluated by numerical compilations of student surveys of their teaching and by peer evaluation, all of which are common, prominent parts of promotion or tenure policy.⁷² This current evaluation system has often been found to discriminate based on gender, race, and “otherness.”⁷³ Perhaps outcomes assessment can be liberating for law schools as it might test some long-held assumptions about what makes good teaching, assumptions that may well be founded more on traditional power and patriarchic stereotypes than on the provision of significant learning experiences for students.⁷⁴

In short, evaluation and assessment are not novel concepts for law schools. Law professors already evaluate their students for grades and their colleagues for promotion. Evaluation of how a school is doing in meeting student learning objectives is just one more piece of data collection with much less personal impact than a student’s grade or the decision about whether a colleague is granted tenure.⁷⁵ In addition, as colleagues work together to strengthen institutions, generalized feedback on what makes

68. WALVOORD, *supra* note 32, at 2.

69. *Id.*

70. *Id.*

71. *Id.* at 9.

72. For a discussion of professional development and post-tenure review, see Thomas F. Guernsey, *Continuing Professional Development in Law Schools*, 41 U. TOL. L. REV. 291 (2010).

73. Robert S. Chang & Adrienne D. Davis, *An Epistolary Exchange Making Up is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 HARV. J.L. & GENDER 1, 16–18, 33–36 (2010); see Kathleen S. Bean, *Gender Gap in the Law School Classroom—Beyond Survival*, 14 VT. L. REV. 23, 29 (1989) (finding that gender stereotyping created hostility and a perceived lack of credibility where a non-white male was teaching); Deborah J. Merritt, *Bias, the Brain, and Student Evaluations of Teaching*, 82 ST. JOHN’S L. REV. 235, 241 (2008) (finding that the non-verbal behavior of minority teachers impacts evaluations).

74. Chang & Davis, *supra* note 73, at 16–18, 33–36.

75. *Id.*

significant learning may break down stereotypes and defensiveness about individual weaknesses and create a culture of continuous improvement for all faculty.⁷⁶ At a minimum, it should encourage dialogue about the standards—implicit or explicit—against which we measure our teaching effectiveness.

IV. CRITICISM #4. REQUIRING THE IDENTIFICATION AND ASSESSMENT OF STUDENT LEARNING OUTCOMES CREATES INCENTIVES TO “TEACH TO THE TEST.”

American public school students, educators, and families were subjected very recently to the controversial policies and laws known as the “No Child Left Behind Act” (NCLB).⁷⁷ NCLB dramatically changed the landscape of the U.S. public school system and appears to have been, at least in some perspectives, a dismal failure.⁷⁸ Teachers and schools are evaluated in ways that ignore the economic, class, behavioral, nutritional, cultural, physically difficult, and/or violent environment in which their students live.⁷⁹ Schools and teachers are evaluated and “incentivized” under a numerical system that focuses on testing instead of on learning⁸⁰

76. WALVOORD, *supra* note 32, at 8 (“Assessment asks for an extension of this collegial work. It asks us to gather information about student learning and use it for decision making at the departmental and institutional level. It asks us to build on and improve the assessment we are already conducting.”); Gerald F. Hess, *Improving Teaching and Learning in Law School: Faculty Development Research, Principles, and Programs*, 12 WIDENER L. REV. 443, 451 (2006).

77. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. §§ 6301–6316 (2006)).

78. Christina Payne-Tsoupros, *No Child Left Behind: Disincentives to Focus Instruction on Students Above the Passing Threshold*, 39 J.L. & EDUC. 471, 474–80 (2010); Frederick M. Hess & Linda Darling-Hammond, *How to Rescue Education Reform*, N.Y. TIMES, Dec. 6, 2011, at A29, available at http://www.nytimes.com/2011/12/06/opinion/how-to-rescue-education-reform.html?_r=2&nl=todaysheadlines&emc=thab1.

79. Payne-Tsoupros, *supra* note 78, at 474–80.

80. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. §§ 6301–6316 (2006)) (requiring all schools receiving federal funding to administer annual state-wide standardized tests); Payne-Tsoupros, *supra* note 78, at 474–80 (arguing that “teaching to the test” creates an incentive for teachers to focus their efforts on the students at the threshold of passing to the exclusion of the on-level students; this results in a ceiling on student achievement); Gershon M. Ratner, *Why No Child Left Behind Act Needs to Be Restructured to Accomplish Its Goals and How to Do It*, 9 UDC/DCSL L. REV. 1, 2–3 (2007) (describing No Child Left Behind’s mandate that the states raise students test scores to meet escalating adequate yearly progress targets or be subjected to increasingly harsh and embarrassing sanctions).

and that ignores the stark differences between for-profit businesses and public schools intended to serve all age-appropriate children regardless of individual characteristics.⁸¹ With this backdrop looming so recently in regards to national educational policies, it is no wonder that academics and law professors are wary of any policies that, at first blush, seem to call for the use of numerical data to evaluate education.

The harmful consequences of NCLB also include instructors “teaching to the test.” Teaching to the test means “teaching a scripted, narrowed and dumbed-down curriculum concentrated on memorization of facts and . . . lower-level thinking skills”⁸² As Christine Payne-Tsoupros has described, it creates disincentives to focus instruction on students above the passing threshold.⁸³ Will a move to outcomes in legal education do the same?

To begin with, identifying and assessing outcomes on an institutional or departmental basis does not require standardized tests or “objective” measures.

Faculty regularly assess complex work in their fields and make judgments about its quality; in assessment of learning, faculty make informed professional judgments about critical thinking, scientific reasoning, or other qualities in student work, and then use those judgments⁸⁴ to inform departmental and institutional decisions.

Thus, outcomes assessment does not need to be, nor should it be, based on *numerical* data since *qualitative* assessment can be used just as well as *quantitative* assessment.⁸⁵

Moreover, legal education exists within a professional structure that already requires law school graduates to pass an external standardized examination—the bar exam—in order to be

81. Payne-Tsoupros, *supra* note 78, at 474–80.

82. Ratner, *supra* note 80, at 16 (citations omitted).

83. Payne-Tsoupros, *supra* note 78, at 471.

84. WALVOORD, *supra* note 32, at 2.

85. GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 111–12 (2000), *available at* <http://lawteaching.org/publications/books/outcomesassessment/munro-gregory-outcomesassessment2000.pdf>; CLINICAL LEGAL EDUC. ASS’N, CLINICAL LEGAL EDUCATION ASSOCIATION’S (CLEA) COMMENTS ON OUTCOME MEASURES TO THE ABA’S STANDARDS REVIEW COMMITTEE 2 (July 1, 2010) [hereinafter CLEA COMMENTS ON OUTCOME MEASURES], *available at* <http://www.cleaweb.org/Resources/Documents/CLEA%20outcomes%20comment%20July%202010.pdf>; *see also* REPORT OF THE TASK FORCE, *supra* note 11, at 8 (discussing the integration of legal education and professional development).

admitted into the profession.⁸⁶ Study for that exam does indeed involve a “scripted,” “narrow” curriculum “concentrated on memorization of facts” and “lower-level thinking skills.”⁸⁷ And certainly the *Best Practices* project took law schools to task for not properly preparing law students to pass this examination.⁸⁸ However, the thrust of *Best Practices* and *Educating Lawyers* was to emphasize the higher-order skills of reflection, judgment, and application of content to new and uncertain situations. The focus was on the more nuanced and important preparation for a professional life of law practice as opposed to a focus on content for passing a standardized test.⁸⁹

Finally, instead of narrowing teacher creativity, as arguably the NCLB did, the move to outcomes and assessment in legal education should encourage and trigger more innovation.

While major reforms are underway, the only outputs currently measured in the ABA Accreditation Standards are bar passage and career placement. This movement to reforming output measures, together with the focus on relating outputs to law school missions and strategic plans, will hopefully result in greater innovation and diversity in models of legal education.⁹⁰

Michael Hunter Schwartz, Sophie Sparrow, and Gerald Hess address the fear of “teaching to the test” head on in *Teaching Law By Design: Engaging Students From the Syllabus to the Final Exam*. They explain that good teaching involves setting course objectives and then creating assessment tools before even concentrating on what

86. NAT’L CONF. B. EXAMINERS, <http://www.ncbex.org> (last visited Nov. 25, 2011) (discussing the goals of the conference as the production of “reasonable and uniform standards of education and character for eligibility for admission to the practice of law; and . . . assist[ing] bar admission authorities by providing standardized examinations of uniform and high quality for the testing of applicants for admission to the practice of law”).

87. See Ratner, *supra* note 80, at 16; SOC’Y OF AM. LAW TEACHERS, STATEMENT ON THE BAR EXAM (July 2001) [hereinafter STATEMENT ON THE BAR EXAM], available at http://www.saltlaw.org/userfiles/file/2002_SALTBarExam.pdf (arguing that bar examinations are inadequate in a number of ways).

88. STUCKEY AND OTHERS, *supra* note 2, at 1–2 (“The Best Practices Project was motivated in large part by our concern about the potential harm to consumers of legal services when new lawyers are not adequately prepared for practice.”); see also SULLIVAN ET AL., *supra* note 1.

89. STUCKEY AND OTHERS, *supra* note 2, at 1–2; see also SULLIVAN ET AL., *supra* note 1, at 163 (discussing how examinations are used in law schools).

90. Eugene Clark, *Looking Forward: Challenges Facing Legal Education in the 21st Century*, 3 PHOENIX L. REV. 461, 464–65 (2010).

particular teaching methods or activities will be used in or out of the classroom.

Thinking about assessment, even before you start designing your course, may seem counter-intuitive to you (and it is certainly counter to common law school teaching practice). You may even worry that, if you were to design assessment instruments before you designed your course, you could be accused of ‘teaching to the test’ or of some equally anti-intellectual crime. Educational experts, however, recognize that designing assessment right after you have articulated your objectives and before you design your course ensures that your assessment instruments are congruent with your goals.⁹¹

In other words, focusing on clarity in defining objectives or outcomes, and then designing assessment tools congruent with the declared objectives simply means being transparent and fair to students.

V. CRITICISM #5. REQUIRING THE IDENTIFICATION AND ASSESSMENT OF STUDENT LEARNING OUTCOMES WILL FORCE FACULTY TO MOVE AWAY FROM TEACHING “ANALYSIS” OR CONTENT AND TOWARDS “SKILLS” TEACHING.

Faculty members whose mission centers on teaching students to “think like a lawyer” and those who have spent their teaching careers focused on the learning of particular legal concepts and principles have become alarmed by calls to redirect energy toward preparation of students for practice.⁹² Since these calls for redirection seem to be combined with the call to identify and assess student learning objectives or outcomes, the entire reform movement can be perceived as an attack on their expertise. In addition, they fear “course coverage” will suffer and that students will not learn as many cases and concepts if faculty members are worried about teaching lawyering skills at the same time that they

91. SCHWARTZ ET AL., *supra* note 6, at 43.

92. See *supra* Part I (Criticism #1); see also Reynolds, *supra* note 22, at 456 (“Unfortunately, most law schools have cut back the number of credits allotted to basic courses to accommodate more trendy curricular offerings. I believe this to be a mistake given the importance of these traditional, core courses for law students and new attorneys.”); Shaw, *supra* note 41 (arguing that the critiques of traditional law school teaching found in *Best Practices* and *Educating Lawyers* are misplaced with respect to Socratic dialogue and due instead to poor quality teaching).

are teaching legal doctrine and substantive concepts.⁹³

Both *Best Practices* and *Educating Lawyers* discussed at length the need to bring more balance into legal education. *Best Practices* called for law schools to “improve the preparation of their students for practice, clarify and expand their educational objectives, improve and diversify methods for delivering instruction, and give more attention to evaluating the success of their programs of instruction.”⁹⁴

Educating Lawyers concluded that law schools in the twentieth century overemphasized the teaching of “core knowledge” while underemphasizing direct training in professional practice and the development of professional identity:

One limitation [to current legal education] is the casual attention that most law schools give to teaching students how to use legal thinking in the complexity of actual law practice.⁹⁵

. . . .

The second limitation is law schools’ failure to complement the focus on skill in legal analyses with effective support for developing ethical and social dimensions of the profession.⁹⁶

Thus, it is true that the legal reform movement will engage law schools in a re-examination of customs and priorities that traditionally favored core knowledge over the development of professional judgment.

However, the move to identify and assess student learning objectives does not correlate necessarily with reducing emphasis on critical inquiry⁹⁷ or with the infusion of “skills training”⁹⁸ in every course. That is not to say that articulation of institutional mission and educational outcomes may not result in emphasizing early acquisition of skills needed in practice.⁹⁹

93. See Reynolds, *supra* note 22, at 463–64..

94. STUCKEY AND OTHERS, *supra* note 2, at 7.

95. SULLIVAN ET AL., *supra* note 1, at 188.

96. *Id.*

97. Wegner, *supra* note 39, at 969–72 (discussing what it really means to “think like a lawyer” and deconstructing that phrase).

98. See Deborah A. Maranville et al., *Re-Vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering* 8 (N.Y. Law Sch. Clinical Research Inst. Paper No. 10/11-6, June 22, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626568 (noting that “skills training” can be used as a pejorative).

99. Fisher, *supra* note 9, at 233 (2011) (“Assessment measures also can be

For example, if one of the law school's educational outcomes is preparing students to counsel clients, faculty responsible for aligning curriculum with outcomes may decide to introduce client counseling skills in the first-year Property course. A common performance measure or exam question could be embedded in all sections of the first-year Property course that would yield aggregate information on how well first-year students were learning basic client counseling skills.¹⁰⁰

Similarly, in assessing whether students have actually learned, one may find it helpful to use assessments that involve *real life* lawyering skills.¹⁰¹ Putting students in the role of a lawyer is a motivating factor to ensure better analysis and deeper understanding of course content;¹⁰² however, none of these choices are *mandated* by an outcomes and assessment regime.

What an outcomes system mandates is "departmental" and school-wide discussion and evaluation informed by a model of curriculum priorities. This may require distinguishing among legal concepts that are *core* and those, which, although they may be important, are not fundamental to acquisition of a law degree.¹⁰³ As part of this discussion, it may be that a school discovers that many teachers confuse "course coverage" with assigning students to read most of the required textbook. Traditional textbooks often include not only core concepts but also a wide range of cases of varying degrees of intellectual and topical relevance, reflecting the

embedded within courses."); *see also* Carolyn Grose, *Outcomes-Based Education One Course at a Time: My Experiment with Estates and Trusts* 15, 20 (N.Y. Law Sch. Clinical Research Inst. Paper No. 10/11 #7, Aug. 22, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1663327 (using an outcomes-based assessment to plan and teach an Estates and Trusts course).

100. Fisher, *supra* note 9, at 236.

101. *See* Curcio, *Moving*, *supra* note 36, at 160 ("[E]ducational literature suggests that the incorporation of performance-based assessments that replicate how doctrine and skills are used in practice helps students better understand the connection between the doctrine they are learning and its real-world application.").

102. Peggy Cooper Davis, Conference Materials, *Allowing Relational, Social and Legal Issues to Intersect in Legal Education*, Inst. for Law Teaching and Learning Conference: Engaging and Assessing Our Students 6 (June 2, 2011), *available at* <http://lawteaching.org/conferences/2011/handouts/plenary1keynote-EngagingOurStudents.pdf>.

103. Identifying a substantive legal area as "core" does not necessitate requiring all students to enroll in a course devoted to that core area. Rather, institutions may choose to expose students to that core concept in other substantive or doctrinal courses or through experiential learning.

judgment and tastes of the textbook authors.¹⁰⁴ In those cases, prioritizing among doctrinal components and including additional objectives geared toward professional identity or professional practice may be appropriate.

Alternatively, institutions may decide to adjust credit and hour allocation after evaluating their institutional student learning outcomes. For example, when extensive doctrinal coverage seems disconnected from important student learning objectives, courses may be reduced in credit hours to provide students more opportunity to meet other learning objectives in additional courses.¹⁰⁵ In other courses, institutions may add credit hours to allow for the infusion of new objectives into the course.

In sum, identifying objectives and outcomes does not mandate more “skills training” in each course; it is likely to mandate, however, that the “course coverage” is directly linked to student learning objectives that are linked to the institution’s mission and goals.¹⁰⁶

104. Interestingly, new casebooks and casebook supplements have been produced to meet the needs of law schools engaged in legal education reform. See *Context and Practice Series*, CAROLINA ACAD. PRESS, <http://www.cap-press.com/p/CAP> (last visited Nov. 25, 2011); Kevin Ramakrishna, *New Article: Improving Legal Education by Improving Casebooks: Fourteen Things Casebooks Can Do to Produce Better and More Learning*, BEST PRACS. FOR LEGAL EDUC. BLOG (Sept. 12, 2011), <http://bestpracticeslegaled.albanylawblogs.org/2011/09/12/new-article-improving-legal-education-by-improving-casebooks-fourteen-things-casebooks-can-do-to-produce-better-and-more-learning> (illustrating Michael Hunter Schwartz’s description of productive new casebooks); *The Store: Skills & Value Series Category*, LEXISNEXIS.COM, <http://www.lexisnexis.com/store/catalog/catalog.jsp?pageName=catalogProducts&catId=cat80002&id=cat80154> (last visited Nov. 25, 2011).

105. *But see* Reynolds, *supra* note 22, at 463–64 (“In reforming legal education, we should not dispense with what law schools do so well—namely, train law students to solve problems for clients. This training requires a foundation in the basic concepts of law, which students properly receive through the traditional first-year curriculum, thus ensuring they are not overwhelmed upon entering practice.”).

106. STANDARDS REVIEW COMM.: STUDENT LEARNING OUTCOMES SUBCOMM., ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, DRAFT FOR JAN. 8–9, 2011 MEETING, Standard 302(5) at 2 (Jan. 2011) [hereinafter DRAFT FOR JAN. 2011 MEETING], *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/drafts_f_or_consideration/report_of_subcommittee_on_student_learning_outcomes_jan_2011.authcheckdam.pdf (“[A]ny other learning outcomes the school identifies as necessary or important to meet the needs of its students and to accomplish the school’s mission and goals.”).

VI. CRITICISM #6. THE IDENTIFICATION AND ASSESSMENT OF STUDENT LEARNING OUTCOMES UNDERVALUES THE ROLE OF MULTICULTURAL COMPETENCE AND CRITICAL PERSPECTIVE IN LEGAL EDUCATION.

There is some concern that theoretical perspectives, such as critical race and feminist critique, and important values, such as diversity and the need for lawyers to be multiculturally competent,¹⁰⁷ will be relegated to the sidelines of legal education should the outcomes movement take hold.¹⁰⁸ Perhaps this concern emanates from a sense that such perspectives and values will not be prioritized or do not lend themselves to numerical evaluation. Or perhaps there is fear that students from diverse backgrounds will not perform as well under this kind of assessment structure. I believe these concerns are misplaced and, in fact, an outcomes-based approach is more likely to support multicultural competence in legal education.

As discussed earlier, identifying institutional or course outcomes should move beyond identification of knowledge components to embrace objectives, which include skills, such as cultural competence, and values, such as diverse perspectives.¹⁰⁹ For many years, clinical professors have consistently emphasized the role cultural competence plays in preparing students to assume the role of lawyer.¹¹⁰ In reality, practicing with cultural competence

107. Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 401 (2005).

108. More work must be done to build bridges between theoretical perspective scholars and clinical faculty. For examples of such bridge-building, see ANSWERING THE CALL FOR REFORM, *supra* note 26. For a discussion of Professor Goldfarb's goal of building such connections during a fall 2010 faculty workshop at Albany Law School, see Phyllis Goldfarb, *Re-vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering*, ALBANY L. SCH. (Oct. 20, 2010), http://www.albanylaw.edu/sub.php?navigation_id=1717 (presentation slides available at Albany Law School, Center for Excellence in Law Teaching, Conferences, Albany Law Initiatives).

109. WALVOORD, *supra* note 32, at 2; *see also* STUCKEY AND OTHERS, *supra* note 2, at 7 ("We call on law schools to make a commitment to improve the preparation of their students for practice, clarify and expand their educational objectives, improve and diversify methods for delivering instruction, and give more attention to evaluating the success of their programs of instruction.").

110. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 36 (2001); Jon C. Dublin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 HASTINGS L.J. 445, 455-56 (2000) ("[The benefits of diversity] apply with greater force to an educational discipline such as the study of law that is so deeply informed by human experience and personal interaction.");

is a fundamental lawyering *skill*, as is the ability to critically evaluate laws, culture, and societal systems from a variety of perspectives or lenses.¹¹¹ Respect for difference and other cultures and beliefs is also a fundamental lawyer *value*.

Indeed, identifying cultural competence and critical perspective as important student learning objectives can serve to mainstream these skills and values into all aspects of the law school curriculum. This should support, not diminish, the value of faculty who weave these objectives into their courses. Moreover, whether a school identifies or fails to identify such competencies or outcomes as part of its mission will be more transparent.¹¹²

Assessment can also assure that students from diverse backgrounds are learning in the most effective ways.¹¹³ As Professor Antoinette Sedillo Lopez points out, “[A] common theme of successful programs is to develop ways of giving students [from diverse backgrounds] meaningful feedback and guidance as they develop the analytical and writing skills necessary for success in law school.”¹¹⁴ Professor Janet Fisher notes that “[f]ormative assessment measures should be conducted throughout the semester and ‘ought to be the primary form of assessment in legal education’” in order to assist *diverse* students in having the same opportunities to succeed in their first year as other students.¹¹⁵

Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1810–11 (1993).

111. See Bryant, *supra* note 110; ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 181 (1992) (noting the skills needed to effectively counsel a client based on their individual concerns and values).

112. It may well be that transparency of objectives will be problematic for faculty who teach in schools at which identifying as a critical race, Latina/Latino-critical, or a feminist critical scholar is professionally detrimental. This, however, is a pre-existing problem of the institution and not a result of the outcomes movement. In fact, if required to be transparent about what it values, the institution should be assessed negatively by outsiders for undervaluing the contributions of those scholars, teachers, and perspectives.

113. See Curcio, *Assessing Differently*, *supra* note 36, at 932 (2009) (“[A]ssessment research . . . could also examine the impact of different types of assessment on learning outcomes and exam performance of students with economically-disadvantaged or racially and ethnically diverse backgrounds.”).

114. Antoinette Sedillo Lopez, *Leading Change in Legal Education—Educating Lawyers and Best Practices: Good News for Diversity*, 31 SEATTLE U. L. REV. 775, 777 (2008).

115. See Fisher, *supra* note 9, at 238–39, 243–44 (describing how course-based assessment, which includes formative assessment, would “provide the information

Certain traditional assessment methods can raise bias issues.¹¹⁶ As discussed earlier, law school commentators find that student evaluations of faculty members can often be skewed by a professor's race, gender, or sexual orientation.¹¹⁷ Moreover, the issue of "speediness" in test-taking may well be a discriminatory issue. A preliminary study by Professor William Henderson suggests that performance gaps between white students and students of color are narrowed when students are given take-home exams and papers rather than timed in-class exams.¹¹⁸ Legal educators and administrators need to pay careful attention to these issues and research as they challenge current and traditional methods of assessment, such as the end-of-semester timed final exam and the bar exam. And certainly there are many legal educators doing just that.¹¹⁹

Indeed it is *because* traditional assessment methods such as the LSAT and the bar exam are subject to bias that we must endeavor to better link our objectives, our teaching, and our assessments with the fundamental attributes of good lawyering and not with traditional sorting devices.¹²⁰ In this vein, the work of Berkeley Professors Marjorie Shultz and Sheldon Zedek is particularly instructive. Their research overturned the assumptions implicit in using a testing mechanism such as the LSAT as the primary method

necessary to succeed to all students equally via the courses themselves").

116. See Chang & Davis, *supra* note 73 (noting that research suggests that student evaluations, in terms of how they rate their professor, can often be skewed by the professor's race, gender, or sexual orientation, and therefore, challenges the effectiveness of student evaluations and the assessments movement overall). As to the effectiveness of students' ability to evaluate the teacher, that may well be true. As to the ability of the teacher to evaluate the students' learning, that does not necessarily follow.

117. See *id.*; *supra* Part III (Criticism #3).

118. William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 982-83 (2004).

119. See REPORT OF THE TASK FORCE, *supra* note 11, at 52 ("In particular, we urge attention to the very difficult issue of disparate results for test takers of color and note recent work suggesting that purely situational factors may play a larger role than previously thought in the underperformance of certain groups."); REPORT: PUBLIC SERVICE ALTERNATIVE BAR EXAMINATION, *supra* note 11, at 4 ("[T]he existing bar examination has a substantial disparate effect on minority law graduates, thus undermining the profession's efforts to increase diversity in the bar."); STATEMENT ON THE BAR EXAM, *supra* note 87, at 1 (describing the inaccuracies of bar examinations to measure competency to practice law).

120. See STUCKEY AND OTHERS, *supra* note 2, at 236-37 (referring to Judith Wegner's description of law school grading as focused on weeding out students rather than developing knowledge).

for selecting potential lawyers.¹²¹ Similarly, law schools will need to test their own tacit and unchallenged assumptions about how to produce competent graduates by gathering information and data from multiple constituencies to assess whether their graduates actually have learned.¹²²

VII. CRITICISM #7. REQUIRING THE IDENTIFICATION AND ASSESSMENT OF STUDENT LEARNING OUTCOMES IS TOO COSTLY.

Some have argued that moving to an outcomes system is too costly because of its inherent move toward experiential learning and its implicit demand for smaller class sizes, as well as the cost of actually conducting the assessment.¹²³ Each of these claims needs further analysis.

As discussed in the introduction, the crisis over law student debt and the scarcity of well-paid legal jobs in the current economic climate provides moral heft to the desire to provide cost-

121. Marjorie Shultz, *Expanding the Definition of Merit*, BOALT HALL TRANSCRIPTS, Summer 2005, at 26 (finding that the LSAT, while instructive of first-year law school grades, may not correlate as strongly to lawyering performance).

122. See Barbara E. Walvoord, *Assessment of Graduate Programs: Clear, Simple, and USEFUL*, CORNELL U. GRADUATE SCH., http://www.gradschool.cornell.edu/sites/default/files/field_file/GradAssessWalvoord.pdf (last visited Nov. 25, 2011) (describing a process for the assessment of educational programs).

123. See THOMAS F. GUERNSEY ET AL., AM. B. ASS'N, STATEMENT BY NEW ENGLAND DEANS CONCERNING THE PROPOSED REVISION OF THE ABA STANDARDS REGARDING OUTCOME ASSESSMENT 3 (Oct. 2009), http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/commnet_outcome_assessment_new_england_deans_statement.doc ("While we recognize that clinical instruction is a highly desirable component of modern legal education, it requires a low student-faculty ratio and is therefore very expensive. A drop in the market for lawyers is now forcing law schools to seek ways to freeze or reduce tuition. As our graduates struggle with their debt burden, any requirement that increases costs must be weighed very carefully."); see also Memorandum from Inst. for Law Teaching and Learning to Standards Review Comm. 2 (Oct. 2, 2009), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/comment_re_draft_aba_standards_institute_for_law_teaching_and_learning_october_2009.doc ("Law schools also can be expected to evaluate their own assessment efforts and to use data from those assessments to inform curricular reforms, to make changes to teaching practices, and to evaluate their outcomes. At least during this seven- or eight-year initial time frame, the Institute does not recommend that law schools be required to demonstrate that a specified percentage of their graduates (80% or 100%) have attained all of their identified outcomes."). For additional information on outcome assessments, see MUNRO, *supra* note 85, at 155–68 (describing how to overcome obstacles to assessment); CLEA COMMENTS ON OUTCOME MEASURES, *supra* note 85, at 4 (discussing cost concerns).

effective legal education.¹²⁴ Whether experiential learning is as costly as is commonly asserted depends on the context of the comparison. If one compares the cost of one faculty member teaching eight students to a faculty member teaching one hundred, then experiential learning will be deemed expensive. If one compares the cost of supporting scholarship and scholarly chairs at an institution to the cost of running three field-placement clinics, experiential learning might appear less expensive.¹²⁵ Because cost is a comparative label which involves a multiplicity of factors, the better analysis would assess the “*value added*” of proposed alterations to current institutional organization and priorities.¹²⁶ In other words, what is the value to students of using resources directed at better preparing them for professional life?

With respect to the issue of course faculty-student ratio, assessment of outcomes in and of itself does not require smaller class sizes. Engaged and active learning can occur in large as well as small classes.¹²⁷ Teaching innovations in team-based learning

124. See Kyle McEntee & Patrick J. Lynch, *Do Law Schools Defraud Students?*, N.Y. POST, Oct. 11, 2011, http://www.nypost.com/p/news/opinion/opedcolumnists/do_law_schools_defraud_students_mYO0KW5TBKNBaYQVYpCQJI; Margaret Moore Jackson, *What the ABA Could Do*, BEST PRACTICES FOR LEGAL EDUC. BLOG (July 24, 2011), <http://bestpracticeslegaled.albanylawblogs.org/2011/07/24/what-the-aba-could-do>; Kevin Ramakrishna, *Moving Beyond the Headlines*, BEST PRACTICES FOR LEGAL EDUC. BLOG (Oct. 13, 2011), <http://bestpracticeslegaled.albanylawblogs.org/2011/10/13/moving-beyond-the-headlines>.

125. See generally David Segal, *What They Don't Teach Law Students: Lawyering*, OCALA.COM (Nov. 19, 2011, 6:30 AM), <http://www.ocala.com/article/20111119/ZNYT01/111193006> (questioning the large amounts of money spent to support legal scholarship). This topic has also been discussed on the Clinical Legal Education Association's listserv. See *Clinical Legal Education*, WASHBURN UNIV. SCH. OF LAW, <http://www.washlaw.edu/subject/lawclinic.html> (last visited Nov. 25, 2011) (allowing visitors to join the listserv).

126. Edward Rubin, *Curricular Stress*, 60 J. LEGAL EDUC. 110, 110 (2010) (noting that one type of stress on students is “the pedagogic stress all students experience in being subjected to a mode of instruction that is specifically designed to be stressful, and does so in violation of the 20th century discoveries about the way people learn”); Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 139, 139 (2008) (“Law schools are predominantly financed by student tuition payments, yet a significant proportion of their expenditures do not directly benefit the students, but rather support faculty research.”).

127. See MUNRO, *supra* note 85, at 149 (discussing the use of “law firms” for large classes). For an example of the resources and techniques available to law school professors, see *Teaching First-Year Contracts with Case Files*, INST. FOR L. TEACHING AND LEARNING, <http://lawteaching.org/conferences/2011/workshops/sessionplenary1followup.php#session-c> (last visited Nov. 25, 2011) (describing a presentation by Arthur S. Leonard at the Institute for Law Teaching and Learning Conference: Engaging and Assessing our Students Workshop, discussing a method

and small group exercises enable professors to offer formative assessment in larger class settings.¹²⁸ It is true, however, that the size of the class may limit the ability to include development of certain skills or the use of certain teaching methods. An appropriate standard for supervision in a legal clinic setting is a 1:6 or 1:8 faculty-student ratio.¹²⁹

As to the cost of conducting assessment, that may be less time consuming and costly than feared. For one thing, law schools already engage in assessments through student evaluations and promotion and tenure processes. Professor Walvoord notes that:

[O]ne of the most effective yet least time-consuming modes of assessment is to use a classroom assignment that is being conducted for grading purposes and feed back the information to the department.¹³⁰

....

If your department has a common student course evaluation, you may be able to aggregate the returns to get a department-wide picture.¹³¹

It is true that there is a “quantitative assessment” business, which would love to see law schools as its next client pool.¹³² However, as Professor Walvoord notes, there is a choice in responding to the call for outcomes:

Assessment can be divisive and unnecessarily time consuming or it can be productive, inspiring, and

of teaching contracts through “client-problem hypothetical[s]”).

128. Curcio, *Moving, supra* note 36, at 162 (describing “various assessment methods used in a large-section civil procedure course and the pros and cons of each method”); Sophie Sparrow, *Assessing Professional Behavior in Teams*, STURM C. OF L. (Sept. 12, 2009), <http://www.law.du.edu/documents/assessment-conference/Sparrow-Working-Professionally-with-Others.pdf> (Presentation at Sturm College of Law, University of Denver: Crossroads v. 3.0); Sophie Sparrow, *Harnessing the Power of Small Group Learning*, ALBANY L. SCH., http://www.albanylaw.edu/media/user/celt/albany_910_slides_harnessing_the_power_of_small_.pdf (last visited Nov. 6, 2011) (preserving a presentation made at Albany Law School).

129. Robert Dinerstein, *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508 (1992); see also CENTER FOR STUDY OF APPLIED LEGAL EDUC., <http://www.csale.org/survey.html> (last visited Nov. 14, 2011) (citing a study that examines aspects of a legal education from an institutional standpoint).

130. WALVOORD, *supra* note 32, at 60.

131. *Id.* at 61; see RANDY L. SWING & CHRISTOPHER COOGAN, VALUING ASSESSMENT: COST-BENEFIT CONSIDERATIONS (2010), available at <http://www.learningoutcomeassessment.org/documents/SwingCoogan.pdf> (discussing how undergraduate institutions should approach budgeting for outcomes assessment).

132. In fact, a representative of one such business approached those of us who attended the 2009 Crossroads Assessment Conference in Denver.

thought-provoking for the department, helping the department to be more clear about its aims and more effective and cost efficient in achieving them.¹³³

VIII. CRITICISM #8. REQUIRING THE IDENTIFICATION AND ASSESSMENT OF STUDENT LEARNING OUTCOMES WILL NOT BE WELCOMED ENTHUSIASTICALLY BY STUDENTS.

The legal education reform movement emphasizes putting student learning at the center of the educational mission, focusing on better preparation of graduates for their professional lives, and urging faculty to provide more assessment and feedback to their students. Thus, one might expect that current students would be the happiest about these reforms. However, the reality is a bit more nuanced.

To begin with, students who receive graded formative feedback from only certain professors, or only in certain subjects, often penalize their instructors with lower student evaluation scores.¹³⁴ This is not surprising. Most of today's students expect A's when they put forth effort. Moreover, law school teaching evaluations are not always geared toward acquiring feedback about whether students *learned* as opposed to whether students liked the professor.¹³⁵ And most importantly, first- or second-year law students may not yet know what they really need to learn. Often clinical and lawyering professors have to wait until their students are out in practice to receive rewarding feedback from alumni

133. WALVOORD, *supra* note 32, at 51.

134. Curcio, *Moving*, *supra* note 36, at 172-73; see Judith D. Fischer, *How to Improve Student Ratings in Legal Writing Courses: Views from the Trenches*, 34 U. BALT. L. REV. 199 (2004) (discussing surveys in which legal writing professors find that they tend to receive worse evaluations because they offer graded feedback throughout the semester, and having evaluations after grading has proven to produce lower scores).

135. The problem with current evaluation instruments is a real one. When I surveyed my faculty about teaching issues, I received suggestions both through the anonymous survey and in private discussions with faculty about the importance of working on teaching evaluations while introducing legal education reforms. Additionally, the Center for Excellence in Law Teaching performs yearly surveys on teaching and assessment techniques. The survey is anonymous. The 2011 survey asked: "How did students respond to your use of approaches, techniques, assessment methods or teaching methods?" One professor wrote: "Students complained loads about quizzes, homework. Trashed me in evaluations." As a result there have been calls to review the teaching evaluation forms. The Albany Law School Teaching Enhancement Committee is now reviewing evaluation forms. Other schools are doing the same per discussion on clinic listservs.

about how very helpful were the lessons learned in these courses.

In addition, adding formative and evaluative feedback to courses is perceived as creating more work, not only for the faculty member, but also for the student. Professors who have introduced quizzes, midterms, or other “extra” work anecdotally tell me that they receive both gratitude from students who are eager to reflect on their strengths and weaknesses and pushback for introducing expectations for performance earlier than the final exam.¹³⁶ As one graduate fellow explained to me about the attraction to passivity evidenced by current students, “Law school is so stressful and there are so many competing demands, many students just like to ‘chill’ when they are in class.” In order to support attempts to improve student learning, law school administrators and faculty committees should examine institutional course evaluation instruments to ensure the data collection is congruent with the goals of improving student learning. Institutions must be aware that the culture needs to change as a whole, or individual professors may be penalized for imposing extra work that is out of step with the dominant culture.

Other cultural expectations of students also need to be considered as we move forward in this process.¹³⁷ It is not only faculty members who may conflate syllabus content with true learning. Students often express concerns that Professor Y didn’t cover as much material as Professor X. These complaints may be targeted at those who integrate reform ideas into their course design. Law review literature suggests that first-year students, and law students in general, may have initial resistance to departures from their expectations of a “normal” doctrinal class with a final exam at the end.¹³⁸

Finally, the experience of Washington and Lee University School of Law, which moves students out of the classroom and into the real world of legal practice during their third year, was that outside constituencies and alumni reacted positively while students—who had not yet experienced the world of practice—

136. Almost all of these anecdotes come from younger female professors who teach in first-year courses or courses students consider mandatory for passing the bar examination. It is unclear whether it is the nature of the expectations or the identity of the instructor that causes the pushback.

137. Stefano Moscato, *Teaching Foundational Clinical Lawyering Skills to First-Year Students*, 13 J. LEGAL WRITING INSTRUCTION 207, 221–22 (2007) (discussing how students would likely not respond well to adding clinical skills courses to their first year, even though it would likely enhance what they learn).

138. *Id.*

were much more resistant.¹³⁹ At the outset, when the program was voluntary, almost half of the third year class opted out of the program. In a conversation I had with then-Dean Rodney Smolla about his program, he said that graduates of the program were always much more supportive when they came back to campus than when they were on campus. He surmised it was because, once in practice, they better understood how much of value they learned in that experiential year.

IX. CRITICISM #9. REQUIRING THE IDENTIFICATION AND ASSESSMENT OF STUDENT LEARNING OUTCOMES COULD RESULT IN DIMINUTION OF IN-HOUSE CLINIC OPPORTUNITIES.

Not all clinical faculties are thrilled with the outcomes movement.¹⁴⁰ At least one clinic director has been directly advised by her dean that supporting the ABA outcomes initiative would necessarily pull resources away from the in-house clinic and towards simulation courses. At another school, clinical faculty reported that after an outcomes approach was instituted, resources were redirected from in-house clinical experiences and towards less

139. Debra Cassens Weiss, *Washington & Lee's 3Ls Learn in-the-Trenches Practice*, A.B.A. J.: L. NEWS NOW (Dec. 18, 2009, 11:28 AM), http://www.abajournal.com/news/article/washington_lees_3ls_learn_in-the-trenches_practice ("The program, launched this fall by law dean Rodney Smolla after six years of preparation, is optional this year for 3Ls, and 49 opted out. Next year it is mandatory."); Brian Leiter, *Washington & Lee's Radical Transformation of the 3rd Year of Law School*, BRIAN LEITER'S L. SCH. REPORTS (Mar. 24, 2008, 4:49 AM), <http://leiterlawschool.typepad.com/leiter/2008/03/washington-lees.html> (note the comments and discussion in response to the blog by law school faculty and students discussing the introduction of the 3L program at Washington and Lee); see Leslie A. Gordon, *Rodney Smolla: Running a New Play*, A.B.A. J.: LEGAL REBELS (Sept. 24, 2009, 7:13 PM), http://www.abajournal.com/legalrebels/article/rodney_smolla_running_a_new_play ("For the next two years, the revamped curriculum will be voluntary. Still, more than 50 percent of the 3Ls signed up—testament, perhaps, to the outdated nature of traditional coursework as well as student willingness to try something new in challenging times. . . . News of the innovative curriculum resulted in a 'remarkable admissions year,' with applications up 33 percent.").

140. This conclusion is based on my confidential communications with scores and scores of clinicians as co-chair of the Best Practices Implementation Committee from 2007 to 2010 and as a member of the Executive Committee of the Clinical Section of the Association of American Law Schools from 2007 to 2010. In 2010, Chair of the Section, Professor Amy Applegate, assigned me, along with Fordham Law School Professor Elizabeth Cooper, to study and advise the executive committee about the consequences of the ABA-proposed changes to accreditation standards.

expensive field placements. And early proposals of the ABA Standards Review Accreditation Committee have only exacerbated the confusion by conflating simulations, field placements, and clinics as if they were equally similar experiences with similar objectives.¹⁴¹ Rather than improving the preparation of students for practice and professional life, might the outcomes movement in legal education result in fewer live client experiences?

It might. But it should not. Appropriate identification of outcomes for law graduates should necessarily involve beginning experiences with the lawyer-client relationship and with the ability to interview, counsel, and communicate with a client. Moreover, recent research on the characteristics of effective lawyers reveals a breadth of aptitudes that involve human interaction.¹⁴² And national efforts to develop model competencies for lawyers also focus on the kinds of skill building and development of judgment,¹⁴³ which necessitates practice in a supervised, supported setting such as a clinic.

An underdeveloped, simplistic adaptation to an outcomes regime may indeed undervalue the in-house clinic, or it may prioritize the less expensive field placement offering over a new in-house clinical experience. The tendencies to undervalue the clinic, or to view field placements as an easier way to provide experience to students, are pre-existing conditions. They are not *caused* by the move to outcomes. However, proponents of outcomes must advocate for careful articulation of objectives when it comes to experiential learning, or face the prospect of producing graduates who have had fewer supervised opportunities to interact with and counsel real clients before graduation.

141. DRAFT FOR JAN. 2011 MEETING, *supra* note 106, Standard 303(a)(3) at 3 (“[E]very student [must] complete satisfactorily at least: one faculty-supervised, rigorous course after the first year that integrates doctrine, theory, skills and ethics and engages students in performance of one or more professional skills The course shall be (i) a simulation course, (ii) a live client clinic, or (iii) a field placement”); CLEA COMMENTS ON OUTCOME MEASURES, *supra* note 85, at 2 (“The draft language of 303(a)(4) also equates simulation courses with live client clinics and field placements, suggesting that they are interchangeable in their educational benefits.”).

142. Shultz, *supra* note 121, at 24–25.

143. ALL-ABA CONTINUING PROF'L EDUC. & THE ASS'N FOR CONTINUING LEGAL EDUC., EQUIPPING OUR LAWYERS: THE FINAL REPORT OF THE CRITICAL ISSUES SUMMIT 5–9 (Charles C. Bingaman ed., 2010), *available at* http://www.equippingourlawyers.org/documents/final_report.pdf.

X. CRITICISM #10. REQUIRING LAW SCHOOLS TO IDENTIFY AND ASSESS STUDENT LEARNING OUTCOMES DOES NOT SOLVE ALL PROBLEMS.

Neither *Educating Lawyers* nor *Best Practices* promise quick fixes. Both documents call for engagement with the many challenges of legal education today, continued dialogue among constituencies, and experimentation with new ideas.¹⁴⁴ Professor Judith Welch Wegner, one of the authors of *Educating Lawyers*, has documented extensively and comprehensively the many intransigent issues facing legal education in her 2009 article, *Reframing Legal Education's 'Wicked Problems.'* In that article, Professor Wegner notes that legal education reform has many if not all of the elements of what has been called in public policy and planning debates a “wicked problem,” i.e., one not “readily . . . resolved by conventional analytical means.”¹⁴⁵ In particular, she identifies the “advanced curriculum” of the second and third years of law school as a “wicked problem.”¹⁴⁶ She does provide some insights and guidance, but they involve long-term processes such as creating and recreating institutional mission, rethinking context, rethinking pedagogy, and rebalancing teaching and learning priorities.¹⁴⁷ She also references the work of Dr. Jeffrey Conklin on “wicked problems” in design. He recommends that “intensive attention be devoted to building shared understanding of complex problems, drawing in the full range of shareholders” and to the importance of building “shared commitment to solutions.”¹⁴⁸ Theorists upon whose ideas Conklin’s work builds caution that if a “wicked” problem is treated like a “tame” problem the “wicked problems” will simply re-emerge as constraints change, stakeholders resist, and “solutions” simply trigger additional problems.¹⁴⁹

Although the Best Practices Project arose from the work of the Clinical Legal Education Association (CLEA), and CLEA published the book *Best Practices in Legal Education*, CLEA has been outspoken

144. STUCKEY AND OTHERS, *supra* note 2, at 109 (“Improving the quality of teaching in United States’ law schools will not happen quickly or easily.”); SULLIVAN ET AL., *supra* note 1, at 19 (“We want to encourage more informed scholarship and imaginative dialogue about teaching and learning for the law at all organizational levels . . .”).

145. *See* Wegner, *supra* note 39, at 870–77.

146. *Id.* at 941.

147. *See id.* at 941–1009.

148. *Id.* at 873.

149. *Id.* at 872.

in pointing out the complexity of outcomes assessment during the ABA Standard Review Committee's (SRC's) accreditation review process.¹⁵⁰ Professors Roy Stuckey and Richard Neumann have warned the SRC that simplistic adoption of outcomes language without proper comprehensive evaluation will not be worth the effort¹⁵¹ while the AALS executive committee cautioned the Standards committee to espouse the principle to "Do No Harm."¹⁵²

And as pointed out in the recent New York State Bar Association's Taskforce on the Future of Legal Education,¹⁵³ the professional formation of lawyers does not occur within a period of three years. The work of professional formation is done over time with cooperation and collaboration between all stakeholders and constituencies.

Thus, the movement to identify and assess student learning outcomes for law schools is part of a larger profession-wide commitment to re-examine many interrelated systems and issues. Some are challenging law schools' reliance on the LSAT; others explore the meaningfulness or fairness of current bar examinations; still others examine the commitment of the bar to mentoring and developing young lawyers. Assessing student learning outcomes is just one step toward producing a more skilled, diverse, and ethical profession.

Effectively adapting outcomes assessment to legal education

150. See CLEA COMMENTS ON OUTCOMES MEASURES, *supra* note 85.

151. Letter from Richard K. Neumann, Jr., Professor, Hofstra Univ. Sch. of Law, & Roy Stuckey, Professor Emeritus, Univ. of S.C. Sch. of Law, to ABA Section of Legal Educ. and Admissions to the Bar Standards Review Comm. (July 14, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/outcome_measurements/comment_outcome_measures_neumann_stuckey_july_2010.authcheckdam.pdf (discussing May 5th draft of Student Learning Outcomes Standards).

152. Letter from H. Reese Hansen, President, Ass'n of Am. Law Sch., & Susan Westerberg Prager, Exec. Dir., Ass'n of Am. Law Sch., to ABA Section of Legal Educ. and Admissions to the Bar Standards Review Comm. (Mar. 15, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/outcome_measurements/comment_outcome_measures_aals_march_2010.authcheckdam.pdf.

153. REPORT OF THE TASK FORCE, *supra* note 11, at 38–39 (noting that development occurs throughout a lawyer's career). The Task Force's report was adopted by ABA House of Delegates at their August 10, 2011 meeting. See Kevin Ramakrishna, *ABA Passes NYSBA Resolution on Developing Practice Ready Lawyers*, BEST PRACS. FOR LEGAL EDUC. BLOG (Aug. 10, 2011), <http://bestpracticeslegaled.albanylawblogs.org/2011/08/10/aba-passes-nysba-resolution-on-developing-practice-ready-lawyers>.

will need continued examination, involve experimentation by law faculty and schools, and demand further dialogue. As law schools begin to identify learning objectives and assess institutional effectiveness, law faculty and administrators must carefully scrutinize results and consequences. It is efforts such as the current symposium edition, of which this article is a minor part, that will ultimately point the way to improvement of student learning outcomes and, ultimately, of legal education.