

2022

## Square Pegs and Round Holes: Differentiated Instruction and the Law Classroom

Karen J. Sneddon

Follow this and additional works at: <https://open.mitchellhamline.edu/mhlr>



Part of the [Legal Education Commons](#)

### Recommended Citation

Sneddon, Karen J. (2022) "Square Pegs and Round Holes: Differentiated Instruction and the Law Classroom," *Mitchell Hamline Law Review*: Vol. 48: Iss. 4, Article 8.  
Available at: <https://open.mitchellhamline.edu/mhlr/vol48/iss4/8>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).  
© Mitchell Hamline School of Law

# SQUARE PEGS AND ROUND HOLES: DIFFERENTIATED INSTRUCTION AND THE LAW CLASSROOM

Karen J. Sneddon<sup>†</sup>

I.	INTRODUCTION .....	1096
II.	DESCRIBING DIFFERENTIATED INSTRUCTION .....	1097
III.	SITUATING DIFFERENTIATED INSTRUCTION IN THE CONTEXT OF POPULAR TEACHING AND LEARNING THEORIES 1101	
	A. <i>Learning Styles, Learning Preferences, and Multiple Intelligences.....</i>	1102
	B. <i>Growth Mindset, Cognitive Load, Scaffolding, and Grit .</i>	1104
	C. <i>Learning Outcomes, Performance Criteria, and Assessments .....</i>	1107
IV.	EXPLORING THE VALUE OF DIFFERENTIATED INSTRUCTION TO THE LAW SCHOOL CLASSROOM .....	1110
V.	APPLYING DIFFERENTIATED INSTRUCTION IN THE LAW SCHOOL CLASSROOM WITH EXAMPLES .....	1115
	A. <i>Modifications to Commonly Used Law School Instructional Strategies .....</i>	1116
	1. <i>What Do You Want to Learn?: Learning Outcomes and Course Planning.....</i>	1116
	2. <i>Write It on the Page: The Classic Essay.....</i>	1118
	3. <i>Pick One: Selected-Response Questions.....</i>	1120
	4. <i>Any Questions?: Improved Closing Prompts and Closing Activities.....</i>	1122
	a. <i>Closing Prompts.....</i>	1123
	b. <i>Closing Activities.....</i>	1124
	B. <i>Innovative Instructional Strategies: Student Choice.....</i>	1125
	1. <i>Learning Centers and Learning Stations.....</i>	1127
	2. <i>Learning Menus .....</i>	1129
	3. <i>Choice Boards.....</i>	1131
VI.	CONCLUSION .....	1133

---

<sup>†</sup> Karen J. Sneddon is Interim Dean and a Professor of Law at Mercer University School of Law. This article was supported by a research grant received from Mercer University School of Law, for which the author is grateful. Portions of this article were presented at the 2021 Association of American Law Schools (“AALS”) Annual Meeting Conference during a session co-sponsored by the AALS Section on Real Estate Transactions and the AALS Section on Academic Support. The reactions and comments of the presentation attendees informed work on this article. For their comments on drafts of this article, thanks to Professor Emily Grant and Professor Patrick Tolan.

## I. INTRODUCTION

As the academic semester begins, law students enter the classroom with sharpened pencils and charged laptops. Law professors enter the classroom with prepared notes and tabbed casebooks. But how will law professors ensure that the learning of each individual student is supported? Students do not take one path to law school. From English majors to engineering majors, students enter law school immediately upon graduating from college or years after graduation with various professional experiences. Despite criticism that legal education is resistant to change and over-relies on the Socratic Method, law school educators know that learning is not a one-size-fits-all experience. Yet, law school educators need to do more to respond to the needs of all learners.

Adapting to the needs of student learners while adequately preparing them for the challenges of the bar exam, and the demands of practice, may seem impossible. This Article shares a theoretical framework built from cognitive psychology, neuroscience, and educational theories that legal educators can use. That theoretical framework, commonly referred to as an instructional strategy, is differentiated instruction.<sup>1</sup>

This Article first describes differentiated instruction, which originated in K-12 education and has now been translated into higher education.<sup>2</sup> Second, this Article explores the value that differentiated instruction would add to the law school classroom.<sup>3</sup> Third, this Article situates differentiated instruction within the context of popular teaching and learning theories to share how differentiated instruction is compatible with what law professors do now and how some modifications in current methods can amplify the learning process.<sup>4</sup> Finally, this Article applies differentiated instruction in the law school classroom by presenting concrete examples that translate differentiated instruction to the law school classroom.<sup>5</sup> This Article presents a series of modifications to commonly used law school instructional strategies to enhance the ability of the professor to respond to the needs of learners. In addition, this Article presents a series of more innovative instructional strategies that use student choice to leverage learning potential and achievement. Law students have a range of experiences, preparations, and interests. As this Article demonstrates, differentiated instruction is a framework that allows law school educators to adapt and respond to the needs of all learners rather than forcing square pegs into round holes.

---

<sup>1</sup> *E.g.*, CAROL ANN TOMLINSON, *THE DIFFERENTIATED CLASSROOM: RESPONDING TO THE NEEDS OF ALL LEARNERS* 3-5 (2d ed. 2014).

<sup>2</sup> *See infra* Part II.

<sup>3</sup> *See infra* Part III.

<sup>4</sup> *See infra* Part IV.

<sup>5</sup> *See infra* Part V.

## II. DESCRIBING DIFFERENTIATED INSTRUCTION

Differentiated instruction is an instructional framework that incorporates a number of teaching and learning theories that enable educators<sup>6</sup> to respond and adapt their pedagogy to support the learning of all students.<sup>7</sup> Differentiated instruction recognizes that students have a range of learning readiness, varying learning profiles, and differing interests.<sup>8</sup> To support the learning process, educators shape the instructional content, the instructional process, and the student work products created.<sup>9</sup> Educators aim to facilitate the learning process for all student learners so that information is retained, recalled, and applied to future situations. To further describe differentiated instruction is to define the key terms of readiness, learning profile, interest, content, process, and product.

Readiness, which is not a synonym for ability, refers to an individual student's "entry point relative to particular knowledge, understanding, or skills."<sup>10</sup> The student's prior academic and non-academic experiences establish the student's learning foundation and sets the entry point for the acquisition of new knowledge, deeper understanding, and advanced skills. The various levels of readiness may require the educator to adjust the course materials.<sup>11</sup> For example, when the professor identifies gaps in knowledge or weaker skills, the professor may present material to cover, repeat, or reinforce the previous knowledge or skills. If the professor discovers that students have proficiently acquired and retained previous knowledge or demonstrate competency with identified skills, the professor also adapts.<sup>12</sup> The professor may accelerate the coverage of material because the students have already learned and retained that material, or omit from the learning unit the skills in which the students already demonstrate proficiency. The professor may alter the assignments to provide opportunities to address incomplete or superficial understanding or to increase the complexity of the

---

<sup>6</sup> The term educator is used extensively in this article. At times, the terms educator, teacher, and professor are used interchangeably throughout this article.

<sup>7</sup> *E.g.*, TOMLINSON, *supra* note 1, at 3-4 (2d ed. 2014); *see also* JOHN MCCARTHY, *SO ALL CAN LEARN: A PRACTICAL GUIDE TO DIFFERENTIATION* xiii, 3 (2017).

<sup>8</sup> TOMLINSON, *supra* note 1, at 5.

<sup>9</sup> *Id.* at 3-4, 18-19; *see also* GAYLE H. GREGORY & CAROLYN CHAPMAN, *DIFFERENTIATED INSTRUCTIONAL STRATEGIES: ONE SIZE DOESN'T FIT ALL* x (2002) (reciting the differentiated options as: (1) the content learned by students, (2) the assessment tools used, (3) the performance tasks assigned, and (4) the instructional strategies adopted).

<sup>10</sup> TOMLINSON, *supra* note 1, at 18-19.

<sup>11</sup> *Id.*; *see also* Nancy E. Millar, *The Science of Successful Teaching: Incorporating Mind, Brain, and Education Research into the Legal Writing Course*, 63 ST. LOUIS U. L.J. 373, 393 (2019).

<sup>12</sup> *See, e.g.*, Carol Ann Tomlinson, *Mapping a Route Toward Differentiated Instruction*, 57 EDUC. LEADERSHIP 12, 12 (1999) (encouraging educators to develop "academically responsive classrooms").

assignment given proficiency of the students.

Interest refers to a student's "affinity, curiosity, or passion for a particular topic or skill."<sup>13</sup> Interest-based techniques may be leveraged by educators not only exploring an existing interest, but to also facilitating development of related but new interests.<sup>14</sup> If the students are interested in a particular topic, the professor may expand the instructional minutes devoted to the topic. The professor may draw from current events that interest students to structure class discussions and exercises. Additionally, the professor may develop a product that corresponds to the interest of the students, such as developing writing assignments that reflect the students' interests in exploring particular genres of written text. Alternatively, a professor may create a roleplaying exercise that reflects the students' interests in creating skits. Students' interests do not dictate content. Instead, students' interests inform content expansion, pacing, and assignments.

Learning profile refers to a student's preferred methods of learning.<sup>15</sup> Although students may perceive that they are one type of learner, as discussed below, students benefit from various different learning strategies that relate to their learning styles, thinking styles, and multiple intelligences.<sup>16</sup> The preferred learning styles may be influenced by previous learning experiences and may vary from topic to topic or from course to course. The professor can gain insights from the students about their perceived learning profile by asking students to complete informational cards.<sup>17</sup> But professors should remember that no one student learner can be reduced into a single category of learner.<sup>18</sup> As a result, students should be exposed to various instructional methods that reference a number of learning styles.<sup>19</sup> For example, the professor may use graphic organizers to help students compare and contrast concepts. The professor may record five-minute lectures to set up a roleplaying exercise. Group work and independent work may be assigned during a learning unit. Learning is promoted when students engage with the material in different ways.<sup>20</sup>

Content refers to the information students will learn from a particular unit of instruction. Content may be thought of as the topics to be learned.<sup>21</sup> Content is often divided into courses and then subdivided into learning units or modules. Content may be proscribed by accrediting agencies through the

---

<sup>13</sup> TOMLINSON, *supra* note 1, at 19.

<sup>14</sup> Tanya Santangelo & Carol Ann Tomlinson, *The Application of Differential Instruction in Postsecondary Environments: Benefits, Challenges, and Future Direction*, 20 INT'L J. TEACHING & LEARNING IN HIGHER EDUC. 307, 308 (2009).

<sup>15</sup> TOMLINSON, *supra* note 1, at 19.

<sup>16</sup> *Id.*

<sup>17</sup> MCCARTHY, *supra* note 7, at 148-49.

<sup>18</sup> *Id.* at 147.

<sup>19</sup> See, e.g., M.H. Sam Jacobson, *Learning Styles and Lawyering: Using Learning Theory to Organize Thinking and Writing*, 2 J. ASS'N LEGAL WRITING DIR. 27, 28-37 (2004).

<sup>20</sup> MCCARTHY, *supra* note 7, at 13-14.

<sup>21</sup> TOMLINSON, *supra* note 1, at 3, 18.

promulgation of standards, by institutions with the adoption of institutional outcomes, or by faculty through the curriculum approval process. Even within these constraints, content can be varied in individual courses and learning units.<sup>22</sup> Content may be compacted, accelerated, or expanded—consistent with the relevant standards.<sup>23</sup> If diagnostic assessment or formative assessment evidence students’ competency, the professor may compact instruction and accelerate the pace of the course. Students do not thus have to devote learning time to material in which they have already demonstrated proficiency.<sup>24</sup> If the diagnostic assessment or formative assessment reveals students’ uncertainties, the professor may expand content coverage.<sup>25</sup> Another example of varying content is providing students the opportunity to choose a sub-topic within a main topic or unit of instruction that is consistent with the proscribed standards.<sup>26</sup>

Process refers to the instructional methods and learning opportunities that facilitate students’ use of information to recall, apply, or transfer that understanding.<sup>27</sup> Educators present information and seek to engage students using a variety of instructional methods because presenting information in a single communicative mode is less effective at promoting deep learning.<sup>28</sup> In addition, students themselves engage with the content through different processes when they prepare for class meetings, study the assigned materials, and create assigned projects.<sup>29</sup> Examples of differentiating the process from the “chalk-and-talk style” lecture include using graphic organizers, implementing role-plays, completing selected-response questions, and participating in learning centers and learning stations.<sup>30</sup>

Product refers to the “vehicles through which students demonstrate and extend what they have learned.”<sup>31</sup> As one expert in differentiated instruction phrased it, “[a]ssigning one product option is likely to lead to

---

<sup>22</sup> Jennifer P. Bailey & Thea Hayes Williams-Black, *Differentiated Instruction: Three Teacher’s Perspectives*, 29 NAVIGATING THE LITERARY WATERS: RSCH., PRAXIS AND ADVOC. 133, 133 (Martha M. Foote, Francine Falk-Ross, Susan Szabo & Mary Beth Sampson eds., 2008).

<sup>23</sup> TOMLINSON, *supra* note 1, at 148; *see also* SALLY M. REIS, DEBORAH E. BURNS & JOSEPH S. RENZULLI, CURRICULUM COMPACTING: THE COMPLETE GUIDE TO MODIFYING THE CURRICULUM FOR HIGH ABILITY STUDENTS 133 (1992).

<sup>24</sup> GREGORY & CHAPMAN, *supra* note 9, at 38 (describing the value of diagnostic assessment, also called preassessment, such that the decisions relating to “reteaching and enhancement” can be made).

<sup>25</sup> For suggestions on how to address gaps or deficiencies, see John F. Murphy, *Teaching Remedial Problem-Solving Skills to a Law School’s Underperforming Students*, 16 NEV. L.J. 173 (2015).

<sup>26</sup> Bailey & Williams-Black, *supra* note 22, at 136.

<sup>27</sup> TOMLINSON, *supra* note 1, at 18.

<sup>28</sup> MCCARTHY, *supra* note 7, at 7.

<sup>29</sup> TOMLINSON, *supra* note 1, at 72.

<sup>30</sup> Bailey & Williams-Black, *supra* note 22, at 137.

<sup>31</sup> TOMLINSON, *supra* note 1, at 11.

some or many students not succeeding.”<sup>32</sup> Throughout a learning module, students may have the opportunity to create a range of products, such as a seminar paper, a multiple-choice question quiz, or a presentation. In addition to assigning multiple products during a learning unit, the professor may allow students to choose the product from a series of presented options.<sup>33</sup>

While the particular vocabulary may seem new to educators, the concept of differentiated instruction is not.<sup>34</sup> Whenever and wherever educators adapt instructional methods to ensure that all students are engaging with the material, differentiated instruction is occurring.<sup>35</sup> Differentiated instruction occurred in classrooms long before Dr. Carol Ann Tomlinson developed the name “differentiated instruction.”<sup>36</sup> In some sense, differentiated instruction harkens back to the one-room schoolhouse.<sup>37</sup> The one-room schoolhouse was a single classroom composed of students of varying ages, varying interests, and varying levels of preparation. The educator adapted instruction to both address the needs of the group and the needs of the individual student learner. While the one-room schoolhouse seems like an extreme example of learners of different ages and experiences, classrooms always have a range of learners. Adapting to the needs of the learners is what effective and efficient educators should do.<sup>38</sup>

Differentiated instruction allows educators to connect content, process, and product to students’ readiness, interests, and preferences.<sup>39</sup> Curricular elements do not need to be addressed by all forms of

---

<sup>32</sup> MCCARTHY, *supra* note 7, at 9.

<sup>33</sup> Bailey & Williams-Black, *supra* note 22, at 137.

<sup>34</sup> *E.g.*, MCCARTHY, *supra* note 7, at xii.

<sup>35</sup> The challenge for every level of education is as follows: “how to reach out effectively to students who span the spectrum of learning readiness, personal interests, and culturally shaped ways of seeing and speaking about and experiencing the world.” TOMLINSON, *supra* note 1, at 1.

<sup>36</sup> As Dr. Tomlinson summarized, “Fundamentally, differentiation is an instructional model focused on *how* teachers teach and *how* students learn in a classroom—not on *what* teachers teach or *what* students learn.” *Id.* at 78 (emphasis in original).

<sup>37</sup> *See generally id.* at 1 (referencing the historical one-room schoolhouse that included students of various ages who were at different stages of their learning process from beginner to advanced); Barbara Kline Taylor, *Content, Process, and Product: Modeling Differentiated Instruction*, 51 KAPPA DELTA PI RECORD 13 (2015).

<sup>38</sup> *See, e.g.*, MCCARTHY, *supra* note 7, at 23 (“Teachers have the ability and do differentiation, even those who do not realize it . . . . Those who claim that they are not differentiating instruction are not teaching.”); *see also* Jeffrey Minneti & Catherine Cameron, *Teaching Every Student: A Demonstration Lesson that Adapts Instruction to Students’ Learning Styles*, 17 PERSP.: TEACHING LEGAL RES. & WRITING 161, 161 (2009) (stating that the “goal in legal education is to assist *all* students in the development of the knowledge, skills, and values that they will need to become lawyers”) (emphasis added).

<sup>39</sup> MCCARTHY, *supra* note 7, at 5, 18 (“The key is to align the *instructional planning* elements—content, process, and product—with the *learner access* elements—readiness, interests, and learning preferences.”).

differentiated instruction.<sup>40</sup> Not all curricular elements require differentiated instruction, and educators do not need to teach all content in three or more different ways. Differentiated instruction occurs when (1) a student need requires differentiated instruction and (2) the educator believes that differentiated instruction will increase “the likelihood that learners will understand important ideas and use important skills more thoroughly.”<sup>41</sup> Differentiated instruction thus promotes the deliberate presentation and modification of learning opportunities. Educators vary content, process, and product throughout the learning unit, but that does not mean that every class meeting or lesson itself is differentiated. The educator responds to the needs of the current learners. Over time, educators will build up and draw upon a portfolio of strategies, approaches, and projects that can be used as appropriate.

The refrain that is often repeated is as follows: Learning is a shared responsibility between the teacher and the students.<sup>42</sup> Differentiated instruction welcomes all student learners into the learning community and adapts to the needs of all learners to enhance the learning process.<sup>43</sup>

### III. SITUATING DIFFERENTIATED INSTRUCTION IN THE CONTEXT OF POPULAR TEACHING AND LEARNING THEORIES

Differentiated instruction is a practical framework that is built upon cognitive psychology, neuroscience, and education theories.<sup>44</sup> Differentiated instruction is an example of student-centered learning.<sup>45</sup> Student-centered learning is the general term to cover a variety of instructional design and teaching methods that shift the focus from teacher-focused transmission to

---

<sup>40</sup> TOMLINSON, *supra* note 1, at 19–20.

<sup>41</sup> *Id.* at 21.

<sup>42</sup> This refrain can be found in a variety of works. *See generally* Steven W. Rayburn, Sidney Anderson & Jeremy J. Sierra, *Future Thinking Continuity of Learning in Marketing: A Student Perspective on Crisis Management in Higher Education*, 31 MKTG. EDUC. REV. 241 (2020); Trish McCulloch & Susan Taylor, *Becoming A Social Worker: Realising a Shared Approach to Professional Learning?*, 48 BRITISH J. OF SOC. WORK 2272, 2275 (2018); Stephen L. Chew, *Food Science Education and the Cognitive Science of Learning*, 13 J. FOOD SCI. EDUC. 65 (2014); Cassandra L. Hill, *The Elephant in the Law School Assessment Room: The Role of Student Responsibility and Motivating Our Students to Learn*, 56 HOW. L.J. 447 (2013).

<sup>43</sup> *See generally* Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. LEGAL EDUC. 402 (1998).

<sup>44</sup> *E.g.*, Kelly M. Anderson, *Tips for Teaching: Differentiating Instruction to Include All Students*, 51 PREVENTING SCH. FAILURE 49, 50 (2007) (“Differentiated instruction integrates what we know about constructivist learning theory, learning styles, and brain development with empirical research on influencing factors of learner readiness, interest, and intelligence preferences toward students’ motivation, engagement, and academic growth with schools.”).

<sup>45</sup> TOMLINSON, *supra* note 1, at 21 (“A differentiated classroom is, of necessity, student-centered.”); *see generally* Susan K. Lightweis, *College Success: A Fresh Look at Differentiated Instruction and Other Student-Centered Strategies*, 16 COLL. Q. (2013).



student-focused learning.<sup>46</sup>

One scholar described differentiated instruction as “[a]n eclectic approach [that] allows teachers to consider a wide range of sources and to choose the ones that best fit their students.”<sup>47</sup> This section aims to share how differentiated instruction is compatible with a range of current teaching and learning theories.<sup>48</sup> While a comprehensive review of all popular teaching and learning theories is beyond the scope of this Article, this section situates differentiated instruction within popular teaching and learning theories to show professors how differentiated instruction complements their existing teaching philosophies and learning strategies.<sup>49</sup>

### A. *Learning Styles, Learning Preferences, and Multiple Intelligences*

All learners develop learning habits and preferences.<sup>50</sup> The nature of these habits and preferences led to the development and proliferation of various theories related to learning styles,<sup>51</sup> thinking styles,<sup>52</sup> and multiple

---

<sup>46</sup> See generally Alison King, *From Sage on the Stage to Guide on the Side*, 41 COLL. TEACHING 30 (1993) (describing the shift from the transmittal model of learning that focuses on the teacher’s delivery of information to the constructivist model of learning that focuses on the active learning of the students). The early developer of student-centered learning is Swiss psychologist Jean Piaget. JEAN PIAGET, *THE ORIGINS OF INTELLIGENCE IN CHILDREN* (1952); see generally David Henry Feldman, *Piaget’s Stages: The Unfinished Symphony of Cognitive Development*, 22 SCIENCEDIRECT 175 (2004).

<sup>47</sup> Huong L. Pham, *Differentiated Instruction and the Need to Integrate Teaching and Practice*, 9 J. COLL. TEACHING & LEARNING 13, 13 (2012).

<sup>48</sup> See, e.g., Deborah L. Borman & Catherine Haras, *Something Borrowed: Interdisciplinary Strategies for Legal Education*, 68 J. LEGAL EDUC. 357, 358 (2019) (recommending that law professors “borrow from and collaborate with trained educators to incorporate and develop well-rounded teaching and learning strategies”).

<sup>49</sup> TOMLINSON, *supra* note 1, at 31 (noting that differentiated instruction is “an outgrowth of our best scientific and experiential insights about teaching and learning, not an end run around them”).

<sup>50</sup> See generally MCCARTHY, *supra* note 7, at 7 (noting that over time learners follow strategies and develop practices that form learning habits and influence their perceptions of learning preferences); Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. LEGAL EDUC. 402 (1998).

<sup>51</sup> See generally RITA DUNN, KEN DUNN & GARY PRICE, *LEARNING STYLE INVENTORY* (1996). The authors identify the learning styles as follows: (1) auditory, (2) visual, (3) tactile, and (4) kinesthetic. *Id.*; see also DAVID A. KOLB, *EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT* (1984) (describing the learning models as: (1) accommodating, (2) converging, (3) assimilating, (4) diverging); BERNICE MCCARTHY, *ABOUT TEACHING: 4MAT IN THE CLASSROOM* (2000) (identifying the four types of learners as: (1) imaginative, (2) analytical, (3) common-sense, and (4) dynamic); HARVEY F. SILVER, RICHARD W. STRONG & MATTHEW J. PERINI, *SO EACH MAY LEARN: INTEGRATING LEARNING STYLES AND MULTIPLE INTELLIGENCES* (2000) (describing four learning styles drawn from theories of Carl Jung and Isabel Briggs Myer as: (1) self-expressive learners, (2) mastery learners, (3) understanding learners, and (4) interpersonal learners).

<sup>52</sup> E.g., ANTHONY F. GREGOR, *THE MIND STYLES MODEL: THEORY, PRINCIPLES AND*

intelligences.<sup>53</sup> Research on learning styles has informed teaching and learning approaches in all levels of education, including legal education.<sup>54</sup> The idea that each learner has only one style of learning is now recognized as a myth that is not supported by science.<sup>55</sup> The process of learning is complex and cannot be compressed into exclusive one style. Individuals learn in a variety of ways. Nonetheless, learners do develop habits and preferences.<sup>56</sup> Some of these habits and preferences may result in the enhancement of learning, others may not.<sup>57</sup> Habits that were developed in response to past academic experiences may be directly transferred to new

---

PRACTICE, 1, 1–10 (1998) (describing four styles of thinking as (1) concrete random thinkers, (2) concrete sequential thinkers, (3) abstract sequential thinkers, (4) abstract random thinkers). *See generally* Robert J. Sternberg & Li-fang Zhang, *Styles of Thinking as a Basis of Differentiated Instruction*, 44 THEORY INTO PRAC. 245 (2005).

<sup>53</sup> *See generally* HOWARD GARDNER, MULTIPLE INTELLIGENCE: THE THEORY IN PRACTICE (1993) (identifying the following intelligences: (1) verbal/linguistic, (2) logical/mathematical, (3) visual/spatial, (4) musical/rhythmic, (5) bodily/kinesthetic, (6) interpersonal, (7) intrapersonal, and (8) naturalist). *See also* Fred C. Lunenburg & Melody R. Lunenburg, *Applying Multiple Intelligences in the Classroom: A Fresh Look at Teaching Writing*, 16 INT'L J. SCHOLARLY ACAD. INTELL. DIVERSITY 1 (2014) (defining the multiple intelligences and providing examples of learning activities for each intelligence). For an examination of Gardner's theories in the law school context, see Craig T. Smith, *Minds and Levers: Reflections on Howard Gardner's Changing Minds*, 14 PERSP. 116 (2006). For more on different theories of intelligences, see ROBERT J. STERNBERG, THE TRIARCHIC MIND: A NEW THEORY OF HUMAN INTELLIGENCE (1989); ROBERT J. STERNBERG, BEYOND IQ: A TRIARCHIC THEORY OF HUMAN INTELLIGENCE (1985) (proposing the following three intelligences that relate to the methods of processing information: (a) analytical, (b) practical, and (c) creative).

<sup>54</sup> For examples of learning styles research in the context of legal education, see generally Aida M. Alaka, *Learning Styles: What Difference Do the Differences Make?*, 5 CHARLESTON L. REV. 133 (2011); Eric A. DeGross & Kathleen A. McKee, *Learning Like Lawyers: Addressing the Differences in Law Student Learning Styles*, 2006 B.Y.U. EDUC. & L.J. 499 (2006); M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 SEATTLE U. L. REV. 139 (2001); Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 ALB. L. REV. 213 (1998).

<sup>55</sup> *E.g.*, JOHN HATTIE & GREGORY YATES, VISIBLE LEARNING AND THE SCIENCE OF HOW WE LEARN (2013); *see also* Paul A. Kirschner, *Stop Propagating the Learning Styles Myth*, 106 COMPUTS. & EDUC. 166, 166–67 (2017).

<sup>56</sup> *See, e.g.*, Borman & Haras, *supra* note 48, at 363–65 (attributing the lasting power of learning styles to common sense appeal). For an examination of learning styles and differentiated instruction, see Cristina Tulbure, *Do Different Learning Styles Require Differentiated Teaching Strategies?*, 11 PROCEDIA SOC. & BEHAV. SCIS. 155, 158 (2011) (asserting the research “tends to support the idea that students with different learning styles achieve better academic scores when confronted with teaching strategies that respond to their learning preferences”).

<sup>57</sup> *See generally* Paul A. Kirschner & Jeroen J.G. Van Merriënboer, *Do Learners Really Know Best? Urban Legends in Education*, 38 EDUC. PSYCH. 169, 166–67 (2013) (noting that a learner may develop learning preferences based upon previous use rather than what learning style is optimal to enhance learning).

academic experiences, slightly adjusted, or even abandoned.<sup>58</sup>

Classifying students by learning styles has appeal, but deep learning is promoted by having the learner engage with the material in multiple, meaningful ways.<sup>59</sup> Differentiated instruction is compatible with this idea because the educator varies the process—the instructional strategies used—in response to the needs, expectations, habits, and preferences of the learners.<sup>60</sup>

### *B. Growth Mindset, Cognitive Load, Scaffolding, and Grit*

All individuals have the potential to learn. Learning involves the processing of new information, the recalling of previously learned information, the application of concepts to new situations, and the creation of a range of work products.<sup>61</sup> Seeking to better understand how the learning process works has led to the development of a brain-based approach to teaching that draws from cognitive psychology and neuroscience.<sup>62</sup> The concepts of growth mindset, cognitive overload, scaffolding, and grit draw from this research.

Individuals have the ability to learn new skills and acquire new knowledge. The ability to learn is not defined by inherent talent or an IQ

---

<sup>58</sup> See Colleen P. Murphy, Christopher J. Ryan, Jr. & Yajni Warnapala, *Note-Taking Mode and Academic Performance in Two Law School Courses*, 68 J. LEGAL EDUC. 207, 221–27 (2019) (exploring academic performance with handwritten or typed class note-taking); Jennifer M. Cooper & Regan A.R. Gurung, *Smarter Law Study Habits: An Empirical Analysis of Law Learning Strategies and Relationship with Law GPA*, 62 ST. LOUIS U. L.J. 361, 364 (2018) (sharing that passive learning strategies, like reading and re-reading, that worked in undergraduate education do not work in legal education). See generally Ruth Vance & Susan Stuart, *Of Moby Dick and Tartar Sauce: The Academically Underprepared Law Student and the Curse of Overconfidence*, 53 DUQ. L. REV. 133 (2015) (exploring how previous academic experiences may hinder learning in the law school context).

<sup>59</sup> Maria Platsidou & Panayiota Metallidou, *Validity and Reliability Issues of Two Learning Style Inventories in a Greek Sample: Kolb's Learning Style Inventory and Felder & Soloman's Index of Learning Styles*, 20 INT'L J. TEACHING & LEARNING HIGHER EDUC. 324, 332 (2008) (noting that using labels to categorize student learners is reductionist, but that learning styles can be “a useful tool for supporting communication between student and teacher, encouraging the student to reflect on his/her own learning experience and actively seek different ways in which it can be improved”).

<sup>60</sup> E.g., Timothy J. Landrum & Kimberly A. McDuffie, *Learning Styles in the Age of Differentiated Instruction*, 18 EXCEPTIONALITY 6, 13 (2010) (“If instruction is to be effective, it must be matched to individual needs.”).

<sup>61</sup> MED. NAT'L ACADEMIES OF SCIENCES, ENG'G, DIV. OF BEHAV. AND SOC. SCIENCE AND EDUC., ET. AL., *HOW PEOPLE LEARN II: LEARNERS, CONTEXTS, AND CULTURES* 69 (The Nat'l Academies Press ed., 2018).

<sup>62</sup> See generally HORACIO SANCHEZ, *THE EDUCATION REVOLUTION: HOW TO APPLY BRAIN SCIENCE TO IMPROVE INSTRUCTION AND SCHOOL CLIMATE* 1, 5–9 (2017); DAVID A. SOUSA, *HOW THE BRAIN LEARNS* (5th ed. 2016); DAVID A. SOUSA & CAROL ANN TOMLINSON, *DIFFERENTIATION AND THE BRAIN: HOW NEUROSCIENCE SUPPORTS THE LEARNER-FRIENDLY CLASSROOM* (2011).

score.<sup>63</sup> This belief is referred to as a growth mindset.<sup>64</sup> In contrast, a fixed mindset is a belief that an individual's capacity to learn is defined and limited.<sup>65</sup> Legal education has begun to incorporate principles of a growth mindset.<sup>66</sup> With a growth mindset, student learners actively participate in a positive learning environment that provides opportunities to achieve the learning goals.<sup>67</sup> They seek challenges to stretch their understanding and development of new skills.<sup>68</sup>

Establishing appropriate challenges is important because the cognitive load must be managed to foster learning.<sup>69</sup> Theories relating to cognitive load suggest that a learner may become overwhelmed, or overloaded, with tasks and information such that the learning process shuts down.<sup>70</sup> Students cannot succeed when the tasks are beyond their understandings or abilities. As Dr. Tomlinson stated, "When a task is far too difficult for a learner, the learner feels threatened and 'downshifts' into self-protection mode. A threatened-learner will not persist with thinking or problem-solving."<sup>71</sup>

Student learners process information that relates to and builds upon previous understanding of material. This idea of "meeting the students where they are" alludes to Lev Vygotsky's "zone of proximal

---

<sup>63</sup> CAROL S. DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS 1, 7 (2016) (updated ed.) [hereinafter MINDSET].

<sup>64</sup> See *id.*; see also CAROL S. DWECK, SELF-THEORIES: THEIR ROLE IN MOTIVATION, PERSONALITY, AND DEVELOPMENT 1, 21 (2000).

<sup>65</sup> See generally MINDSET, *supra* note 63, at 6 (asserting that people who have a fixed mindset believe that intelligence and skills are set with limited ability to develop); Sue Shapcott, Sarah Davis & Lane Hanson, *The Jury Is In: Law Schools Foster Students' Fixed Mindsets*, 42 L. & PSYCH. REV. 1 (2018); Carrie Sperling & Susan Shapcott, *Fixing Students' Fixed Mindsets: Paving the Way for Meaningful Assessment*, 18 J. LEGAL WRITING INST. 39 (2012).

<sup>66</sup> Kaci Bishop, *Framing Failure in the Legal Classroom: Techniques for Encouraging Growth and Resilience*, 70 ARK. L. REV. 959, 977-1000 (2018) (relating the principles of "growth mindset" to legal education); see generally James McGrath, *Planning Your Class to Take Advantage of Highly Effective Learning Techniques*, 95 U. DET. MERCY L. REV. 153 (2018) (exploring the importance of growth mindset in legal education).

<sup>67</sup> See generally David J. Tarrien, *The Kids Are Alright (We, On the Other Hand, Could Use Some Work): A Guide and Case Study to Better Teaching and Learning in Law School*, 21 W. MICH. U. COOLEY J. PRAC. & CLINICAL L. 53 (2020).

<sup>68</sup> MINDSET, *supra* note 63, at 21.

<sup>69</sup> E.g., JOHN SWELLER, PAUL AYRES & SLAVA KALYUGA, COGNITIVE LOAD THEORY: EXPLORATIONS IN THE LEARNING SCIENCES, INSTRUCTIONAL SYSTEMS AND PERFORMANCE TECHNOLOGIES 3, 67 (2011).

<sup>70</sup> See generally Kenneth R. Swift, *Take a (Cognitive) Load Off: Using Principles of Adult Education Theory to More Effectively Integrate a Drafting Unit into a First-Year Legal Writing Course and Ensure Student Success*, 63 HOW. L.J. 29 (2019) (cautioning that cognitive overload can lead to a loss of learning because the learner disengages from the learning process); Terri L. Enns & Monte Smith, *Take a (Cognitive) Load Off: Creating Space to Allow First-Year Legal Writing Students to Focus on Analytical and Writing Processes*, 20 LEGAL WRITING: J. LEGAL WRITING INST. 109 (2015).

<sup>71</sup> TOMLINSON, *supra* note 1, at 33.

development.”<sup>72</sup> The basic premise is that students will develop and extend their knowledge and competency in completing tasks.<sup>73</sup> To begin, students are provided with learning activities that can be completed with assistance from the professors or peers.<sup>74</sup> Students then progress to independently completing those tasks and tackle increasingly complex or advanced tasks.<sup>75</sup> The educator must design tasks that correspond to the students’ readiness and monitor their developing competency to ensure that the students’ learning progresses to higher levels of proficiency.<sup>76</sup>

To maximize the zone of proximal development, professors need to support the ability of learners to transfer knowledge, skills, and experiences from past experiences to current experiences.<sup>77</sup> The process of transference relates to scaffolding.<sup>78</sup> Learners create connections with, and build upon, previously learned material.<sup>79</sup> Scaffolding can be used to help manage cognitive load by relating the new information and skills to previous experience.<sup>80</sup> Rather than constantly learn new information and perform new tasks, which may result in cognitive overload, educators enable students to form connections from concept-to-concept, from one learning experience to another, and even from course-to-course.<sup>81</sup>

---

<sup>72</sup> See LEV VYGOTSKY, *MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES* 84, 86–90 (1978) [hereinafter *MIND IN SOCIETY*]; LEV VYGOTSKY, *THOUGHT AND LANGUAGE* (1986) (originally published 1934); see also Barohny Eun, *The Zone of Proximal Development as an Overarching Concept: A Framework for Synthesizing Vygotsky’s Theories*, 51 *EDUC. PHIL. & THEORY* 18, 18–20 (2019).

<sup>73</sup> *MIND IN SOCIETY*, *supra* note 72, at 84, 86–90.

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

<sup>75</sup> See, e.g., Rob Wass & Clinton Golding, *Sharpening a Tool for Teaching: The Zone of Proximal Development*, 19 *TEACHING HIGHER EDUC.* 671, 671–72 (2014).

<sup>76</sup> MCCARTHY, *supra* note 7, at 11 (noting the tasks are structured so that “small steps will pave a path that reaches the desired goal”).

<sup>77</sup> Scaffolding is intertwined with learning outcomes. See generally Abdunassir Sideeg, *Bloom’s Taxonomy, Backward Design, and Vygotsky’s Zone of Proximal Development in Crafting Learning Outcomes*, 8 *INT’L J. LINGUISTICS* 158 (2016).

<sup>78</sup> E.g., Karim Shabani, Mohamad Khatib & Saman Ebadi, *Vygotsky’s Zone of Proximal Development: Instructional Implications and Teachers’ Professional Development*, 3 *ENG. LANGUAGE TEACHING* 237, 237 (2010) (“There is a consensus that the notion of the zone of proximal development and socio-cultural theory of mind based upon Vygotsky’s ideas are at the heart of the notion of scaffolding.”).

<sup>79</sup> “Brain research also strongly suggests that if learning is a process of connecting the unfamiliar to the familiar, teachers must create abundant opportunities for students to link the new with the old.” TOMLINSON, *supra* note 1, at 33.

<sup>80</sup> Scaffolding can also be referred to as schema. See generally Jennifer E. Spreng, *Spirals and Schemas: How Integrated Courses in Law Schools Create Higher-Order Thinkers and Problem Solvers*, 37 *U. LA VERNE L. REV.* 37 (2015); Christine M. Venter, *Analyze This: Using Taxonomies to “Scaffold” Students’ Legal Thinking and Writing Skills*, 57 *MERCER L. REV.* 621 (2006); Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 *WILLAMETTE L. REV.* 315 (1997).

<sup>81</sup> See generally Mary Nicol Bowman & Lisa Brodoff, *Cracking Student Silos: Linking Legal Writing and Clinical Learning Through Transference*, 25 *CLINICAL L. REV.* 269 (2019).

Related to the concept of a growth mindset, cognitive load, and scaffolding is the concept of grit.<sup>82</sup> Grit recognizes the importance of setting goals, acknowledging struggle, and requiring perseverance in the face of failure to accomplish those goals.<sup>83</sup> Grit acknowledges that hard work and perseverance, not just raw talent, is required to gain proficiency.<sup>84</sup> Learning tasks and opportunities should not be so challenging that student learners become frustrated, but learning tasks and opportunities should not be so simplistic that students never gain additional proficiency.<sup>85</sup> Encountering challenges promotes deep learning when multiple opportunities are presented to learners to meet and tackle those challenges.<sup>86</sup>

Differentiated instruction is premised on the belief that “[e]very learner has a hidden and extensive capacity to learn.”<sup>87</sup> That capacity is enhanced by building upon prior experiences, forging connections, and creating increasingly challenging tasks.<sup>88</sup> Accordingly, differentiated instruction incorporates the principles of growth mindset, cognitive load, scaffolding, and grit.

### *C. Learning Outcomes, Performance Criteria, and Assessments*

A teacher supports student learning by clarifying the learning process. As Dr. Tomlinson explained, “Clarity about what matters most in a topic increases the likelihood of introducing it in a way that each student finds meaningful, interesting, and appropriate.”<sup>89</sup> In other words, when the teacher articulates the learning outcomes, outlines the performance criteria, and uses valid assessment devices, the teacher clarifies the learning process.<sup>90</sup>

Identifying learning outcomes, also called learning objectives, is a first step in differentiated instruction.<sup>91</sup> Commonly phrased using one of the

---

<sup>82</sup> See generally ANGELA DUCKWORTH, *GRIT: THE POWER OF PASSION AND PERSEVERANCE* 180–82 (2016) (referencing the connection between Dweck’s work on mindset and grit).

<sup>83</sup> E.g., *id.* at 55 (sharing the “Grit Scale”).

<sup>84</sup> See generally Megan Bess, *Grit, Growth Mindset, and the Path to Successful Lawyering*, 89 UMKC L. REV. 493 (2021); Catherine Martin Christopher, *Normalizing Struggle*, 73 ARK. L. REV. 27 (2020).

<sup>85</sup> See generally Denitsa R. Mavrova Heinrich, *Cultivating Grit in Law Students: Grit, Deliberate Practice, and First-Year Law School Curriculum*, 47 CAP. U. L. REV. 341 (2019); Elizabeth M. Bloom, *Creating Desirable Difficulties: Strategies for Reshaping Teaching and Learning in the Law School Classroom*, 95 U. DET. MERCY L. REV. 115 (2018); Emily Zimmerman & Leah Brogan, *Grit and Legal Education*, 36 PACE L. REV. 114 (2015).

<sup>86</sup> DUCKWORTH, *supra* note 82, at 269 (exploring “the power of grit to help you achieve your potential”).

<sup>87</sup> TOMLINSON, *supra* note 1, at 29.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 17.

<sup>90</sup> E.g., Steven I. Friedland, *Outcomes and the Ownership Conception of Law School Courses*, 38 WM. MITCHELL L. REV. 947, 962 (2012) (explaining that explicit outcomes promote student ownership of the learning process).

<sup>91</sup> Santangelo & Tomlinson, *supra* note 14, at 312.

verbs from Bloom's Taxonomy,<sup>92</sup> student learning outcomes share and manage learning expectations.<sup>93</sup> The learning outcomes identify the knowledge, skills, experiences, and products that all students are expected to learn during the particular course, learning unit, learning module, or class meeting.<sup>94</sup> Learning outcomes typically include an action verb to identify the particular cognitive process and an object that describes the knowledge the learner will gain.<sup>95</sup> For example, the following learning outcome may be appropriate for a number of law school classes: the learner will employ effective reading strategies to identify and evaluate the relevant facts, rules of law, and policies underlying the holding of each assigned case. The following is another example of a learning outcome: the learner will distinguish between facts relevant to the legal problem(s) (i.e., legally relevant facts, emotionally-relevant facts, background facts) and facts that are not relevant to the legal problem(s) (i.e., extraneous facts). Accrediting agencies are increasingly requiring learning outcomes for each learning module.<sup>96</sup>

In addition to developing meaningful learning outcomes, the appropriate performance criteria should also be developed.<sup>97</sup> Performance criteria refers to the measure of achievement of a learning outcome.<sup>98</sup> The performance criteria may be an evaluation of the learning outcome, such as proficient, competent, or limited competency. The performance criteria may also be an articulation of how the student learner would demonstrate mastery of the learning outcome. For example, consider the following learning outcome: the student will apply known rules to a given set of facts

---

<sup>92</sup> BENJAMIN S. BLOOM, *TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS* (1956).

<sup>93</sup> See generally Debra Moss Vollweiler, *Don't Panic! The Hitchhiker's Guide to Learning Outcomes: Eight Ways to Make Them More Than (Mostly) Harmless*, 44 U. DAYTON L. REV. 17 (2018); B. Glesner Fines, *The Impact of Expectations on Teaching and Learning*, 38 GONZ. L. REV. 89 (2002).

<sup>94</sup> See Robin Lightner & Ruth Benander, *Student Learning Outcomes: Barriers and Solutions for Faculty Development*, 24 J. FACULTY DEV. 34, 34-35 (2010).

<sup>95</sup> See *TAXONOMY FOR LEARNING, TEACHING, AND ASSESSING: A REVISION OF BLOOM'S TAXONOMY OF EDUCATIONAL OBJECTIVES 20-22* (Lorin W. Anderson and David R. Krathwohl eds., Pearson 2000).

<sup>96</sup> ABA Standard 302, for example, requires law schools to establish learning outcomes. See, e.g., Janet W. Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Students Might Transform the Educational Experience of Law Students*, 35 S. ILL. U. L.J. 225, 226-29 (2011) (providing background on the "new" ABA rules relating to assessment).

<sup>97</sup> See, e.g., Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics—Explicit Grading Criteria*, 2004 MICH. ST. L. REV. 1 (2004); see also Brenda D. Gibson, *Grading Rubrics: Their Creation and Their Many Benefits to Professors and Students*, 38 N.C. CENT. L. REV. 41 (2015).

<sup>98</sup> See generally Bryce F. Sullivan & Susan L. Thomas, *Documenting Student Learning Outcomes through a Research-Intensive Senior Capstone Experience: Bringing the Data Together to Demonstrate Progress*, 9 N. AM. J. PSYCH. (2007) (exploring how outcomes are measured using performance criteria).

to predict the likely resolution. The performance criteria may be broken into the following: (1) the student will articulate the relevant legal rules using primary, binding authority, (2) the student will distinguish between relevant and non-relevant facts, (3) the student will employ forms of legal reasoning, and (4) the student will present a prediction that is supported by the law and the facts. Performance criteria are related both to learning outcomes and to assessment.<sup>99</sup>

Assessment provides learners the opportunity to work with a learning unit's content and demonstrate competency.<sup>100</sup> Today, assessment is recognized as being integral to the learning process.<sup>101</sup> Historically, assessment was focused on the conferring of grades and recommendations about promotion to next grade levels, course completion, and graduation.<sup>102</sup> The value and purpose of assessment, however, is not restricted to grades or promotions.<sup>103</sup> Assessment is an evaluation of what has been learned, but that information is used to both improve learning and refine instructional strategies. As Dr. Tomlinson stated, "Assessment always has had more to do with helping students demonstrate what they know, understand, and can do than with cataloging their mistakes."<sup>104</sup> Assessment guides and informs instruction.<sup>105</sup> The students receive feedback on their progress, and educators then adapt course instruction to respond to the needs of the student learners.<sup>106</sup> Assessment is critical to adapting instruction, and adapting is a key aspect of differentiated instruction.<sup>107</sup>

For those reasons, assessment is critical to implementing differentiated

---

<sup>99</sup> *E.g.*, Abigail Loftus DeBlasis, *Building Legal Competencies: The Montessori Method as a Unifying Approach to Outcomes-Based Assessment in Law Schools*, 42 OHIO N.U. L. REV. 1, 20 (2015); Victoria L. VanZandt, *Creating Assessment Plans for Introductory Legal Research and Writing Courses*, 16 J. LEGAL WRITING 313, 332 (2010) ("Performance criteria are created by tying the course learning outcomes to a specific act of performance and a competency level.").

<sup>100</sup> MCCARTHY, *supra* note 7, at 8.

<sup>101</sup> *E.g.*, Rogelio Lasso, *A Blueprint for Using Assessments to Achieve Learning Outcomes and Improve Students' Learning*, 12 ELON L. REV. 1, 44 (2020).

<sup>102</sup> Tonya R. Moon, *The Role of Assessment in Differentiation*, 44 THEORY INTO PRACTICE 226, 226 (2005).

<sup>103</sup> *See generally* Barbara Glesner Fines, *Competition and the Curve*, 65 UMKC L. REV. 879, 884 (1997) (noting that grades do not necessarily motivate learning).

<sup>104</sup> TOMLINSON, *supra* note 1, at 18.

<sup>105</sup> Moon, *supra* note 102, at 228-29; *see also* Paul J. Manning, *Understanding the Impact of Inadequate Feedback: A Means to Reduce Law Student Psychological Distress, Increase Motivation, and Improve Learning Outcomes*, 43 CUMB. L. REV. 225, 254 (2012-2013); Lori A. Roberts, *Assessing Ourselves: Confirming Assumptions and Improving Student Learning by Efficiently and Fearlessly Assessing Student Learning Outcomes*, 3 DREXEL L. REV. 457, 468-69 (2011).

<sup>106</sup> *E.g.*, Herbert N. Ramy, *Moving Students from Hearing and Forgetting to Doing and Understanding: A Manual for Assessment in Law School*, 41 CAP. U. L. REV. 837, 845 (2013).

<sup>107</sup> TOMLINSON, *supra* note 1, at 17 ("[A]ssessment is today's means of understanding how to modify tomorrow's instruction.").



instruction. All students are moving toward the common standard or learning outcome, even in a differentiated classroom.<sup>108</sup> The summative assessment device, which may be in the form of a final examination, will typically be the same for all students. While the end product may be the same for all learners, the path to the final examination will be varied for each student learner. Differentiated instruction acknowledges that students during a learning module move at different paces with varying levels of independence toward that shared common end goal.<sup>109</sup> To begin, the diagnostic assessment provides the mechanism to gather information on student interest and readiness of a topic. During the learning module, formative assessment informs what modifications are needed to the methods of instruction, with varied assessment devices providing students different ways in which to showcase their mastery.<sup>110</sup> Using both multiple assessment devices and multiple *types* of assessment devices throughout a course promotes student learning.<sup>111</sup>

Assessment plays a critical role in differentiated instruction because the information gathered by assessments informs modifications necessary to the content, process, product, and environment.<sup>112</sup> The educator then differentiates the content, process, and product as appropriate to ensure that students achieve the learning outcomes.<sup>113</sup>

#### IV. EXPLORING THE VALUE OF DIFFERENTIATED INSTRUCTION TO THE LAW SCHOOL CLASSROOM

Differentiated instruction has been occurring to some degree in all levels of education for decades before given the name, and attention, by Dr. Tomlinson. The initial development and refinement of differentiated instruction occurred in K-12 education.<sup>114</sup> Higher education has also drawn

---

<sup>108</sup> Moon, *supra* note 102, at 231.

<sup>109</sup> *Id.*; see also TOMLINSON, *supra* note 1, at 17 (“In a differentiated classrooms, assessment is diagnostic and ongoing.”).

<sup>110</sup> *E.g.*, Olympia Duhart, *The ‘F’ Word: The Top Five Complaints (and Solutions) About Formative Assessment*, 67 J. LEGAL EDUC. 531, 541 (2018); Elizabeth M. Bloom, *A Law School Game Changer: (Trans)Formative Feedback*, 41 OHIO N.U. L. REV. 227, 249–50 (2015).

<sup>111</sup> See, e.g., Rogelio A. Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 BARRY L. REV. 73, 91–93 (2010).

<sup>112</sup> TOMLINSON, *supra* note 1, at 18; see also CAROL TOMLINSON & TONYA MOON, *ASSESSMENT IN A DIFFERENTIATED CLASSROOM: A GUIDE FOR STUDENT SUCCESS* 312 (2013).

<sup>113</sup> Santangelo & Tomlinson, *supra* note 14, at 312.

<sup>114</sup> See Wendy McCarty, Sherry R. Crow, Grace A. Mims, Dennis E. Potthoff & Jennifer S. Harvey, *Renewing Teaching Practices: Differentiated Instruction in the College Classroom*, 1 J. CURRICULUM, TEACHING, LEARNING AND LEADERSHIP IN EDUC. 35, 38 (2016) (“DI has been most extensively researched and utilized in P-12 grade levels. However, a growing body of research focused on college-level implementation of DI methodology has emerged.”).

in the concepts of differentiated instruction.<sup>115</sup> Indeed, higher education is an ideal setting for the incorporation of differentiated instruction.<sup>116</sup> Incorporating differentiated instruction into higher education acknowledges that students have diverse backgrounds with a range of academic experiences, life experiences, and professional experiences.<sup>117</sup> Legal education has also been acknowledging that law students are not a homogenous population.<sup>118</sup> Law professors have been searching for strategies that support the learning of all law students.<sup>119</sup> Just as has been discovered in higher education, differentiated instruction allows all student learners to succeed and provides a framework for professors to construct a meaningful student-centered learning environment.

For decades, educators and commentators have recommended changes to legal education.<sup>120</sup> Christopher Columbus Langdell<sup>121</sup> would not

<sup>115</sup> See, e.g., *id.* at 35; Santangelo & Tomlinson, *supra* note 14, at 307 (conducting a study about the impact of using differentiated instruction in an introductory-level graduate course).

<sup>116</sup> As two scholars posited, “At the higher education level, students are perhaps even more diverse than K-12 students due to their varied educational and life experiences, yet less consideration for diversity in instructional planning occurs.” Mary Dosch & Margaret Zidon, “*The Course Fit Use: Differentiated Instruction in the College Classroom*,” 26 NO. 3 INT’L J. TEACHING & LEARNING IN HIGHER EDUC. 343, 343 (2014); see also DEREK BOK, HIGHER EDUCATION IN AMERICA 77 (William G. Brown ed., revised ed. 2013) (stating that undergraduate students have been “growing far more diverse in age, race, and economic background” from 1960 to 2012).

<sup>117</sup> See, e.g., Dosch & Zidon, *supra* note 116, at 343; see also Ruth Boelens, Michiel Voet & Bram De Wever, *The Design of Blended Learning in Response to Student Diversity in Higher Education: Instructors’ Views and Use of Differentiated Instruction in Blended Learning*, 120 COMPUTERS & EDUC. 197, 198 (2018).

<sup>118</sup> See, e.g., Gregory W. Bowman, *The Comparative and Absolute Advantages of Junior Law Faculty: Implications for Teaching and the Future of American Law Schools*, 2008 B.Y.U. EDUC. & L.J. 171, 190 (2008); but see Mitchell M. Simon, M.E. Occhialino & Robert L. Fried, *Herding Cats: Improving Law School Teaching*, 49 J. LEGAL EDUC. 256, 256 (1999) (sharing that “[i]n many law schools, despite the institutional lip service paid to teaching, scholarship and other outside activities are understood to be more highly valued than good teaching . . .”).

<sup>119</sup> See Kia H. Vernon, Dorothy D. Nachman & Don Corbett, *Bridging the Gap: Developing Pedagogical Solutions for Underrepresented Law Students*, 22 RUTGERS RACE & L. REV. 37 (2020); Gerald Hess, Michael H. Schwartz & Nancy Levit, *Fifty Ways to Promote Teaching & Learning*, 67 J. LEGAL EDUC. 696, 696–97 (2018); E. Scott Fruehwald, *How to Help Students from Disadvantaged Backgrounds Succeed in Law School*, 1 TEX. A&M L. REV. 83, 84 (2013).

<sup>120</sup> See generally Gene R. Shreve, *History of Legal Education*, 97 HARV. L. REV. 597 (1983) (reviewing the book “*Law School: Legal Education in America from the 1850s to the 1980s*” by Robert Stevens). See also BOK, *supra* note 116, at 281 (asserting that “law schools have fallen behind other faculties in taking steps to improve the quality of pedagogy and enhance student learning”).

<sup>121</sup> Christopher Columbus Langdell developed the case method, which continues to be a key instructional strategy in legal education. For a biography of Langdell, see BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL 1826-1906* (2009).

be surprised at some aspects of legal education today,<sup>122</sup> such as the continued reliance upon the Socratic Method.<sup>123</sup> In Derek Bok's *Higher Education in America*, the Socratic Method is described as a "towering pedagogical achievement."<sup>124</sup> Bok describes the Socratic Method as a teaching technique that fosters active learning in a large classroom setting.<sup>125</sup> Bok also opined that "its constant use in class after class grows tedious and contributes to the flagging interest of students in the second and third years of law school."<sup>126</sup> While the Socratic Method may still offer educational benefits, its use has had some negative impacts on legal education.<sup>127</sup> Moreover, the continued reliance on the Socratic Method has, at least for a time, restricted development and implementation of pedagogy and theory developed in other educational settings.<sup>128</sup>

<sup>122</sup> Christopher C. Langdell, *Teaching Law as a Science*, 21 AM. L. REV. 121, 123-24 (1887); see also Nancy Cook, *Law As Science: Revisiting Langdell's Paradigm in the 21<sup>st</sup> Century*, 88 N.D. L. REV. 21, 29-30 (2012) (outlining the pedagogy developed by and advocated for use by Langdell); Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 L. & HIST. 421, 421-22 (1999) (noting that teaching "law as science" predated Langdell and started at the Litchfield Law School, the first independent U.S. law school).

<sup>123</sup> WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW* 23, 33-35 (2005) (describing the Socratic method as a signature pedagogy of legal education); Joseph A. Dickinson, *Understanding the Socratic Method in Law School Teaching After the Carnegie Foundation's Educating Lawyers*, 31 W. NEW ENG. L. REV. 97, 99-100 (2009); Benjamin V. Madison, III, *The Elephant in Law School Classrooms: The Overuse of the Socratic Method As An Obstacle to Teaching Modern Students*, 85 U. DET. MERCY L. REV. 293, 294-95 (2008); see also Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 521-415, 581-92 (1991) (examining both the history of Langdell's pedagogy and suggesting changes to adapt the pedagogy for the modern law school classroom). See generally Rory Bahadur & Liyun Zhang, *Socratic Teaching and Learning Styles: Exposing the Pervasiveness of Implicit Bias and White Privilege in Legal Pedagogy*, 18 HASTINGS RACE & POVERTY L.J. 114 (2021); Donald G. Marshall, *Socratic Method and the Irreducible Core of Legal Education*, 90 MINN. L. REV. 1 (2005).

<sup>124</sup> BOK, *supra* note 116, at 278.

<sup>125</sup> *Id.* at 278-97.

<sup>126</sup> *Id.* at 279.

<sup>127</sup> See, e.g., Jeannie Suk Gersen, *The Socratic Method in the Age of Trauma*, 130 HARV. L. REV. 2320, 2330-41 (2017) (exploring the "traumatic Socratic" method); Kristen K. Tiscione, *How the Disappearance of Classical Rhetoric and the Decision to Teach Law as a "Science" Severed Theory from Practice in Legal Education*, 51 WAKE FOREST L. REV. 385, 397 (2016) (asserting that Langdell's approach to teaching law as a science "transformed law school into a primarily theoretical endeavor"). Criticism of the Socratic Method is not a recent phenomenon. See, e.g., Suzanne Dallimore, *The Socratic Method—More Harm Than Good*, 3 J. CONTEMP. L. 177, 182 (1997) ("The Socratic Method has a severely negative psychological impact.").

<sup>128</sup> See, e.g., Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21<sup>st</sup> Century*, 27 LOY. U. CHI. L.J. 449, 484-89 (1996); see also BOK, *supra* note 116, at 280 ("The success of the discussion method [of the Socratic Method] have also made it easier for law faculties to overlook its pedagogic deficiencies.").

Nonetheless, legal education has changed and is currently changing.<sup>129</sup> Some external factors motivating change are economic, societal, and social.<sup>130</sup> Various aspects of the legal profession—such as increased specialization, globalization of practice, varied staffing structures, and client expectations—have changed.<sup>131</sup> Increasing student diversity also includes the various learning styles and levels of multiple intelligences.<sup>132</sup> Student expectations have changed.<sup>133</sup> Some of these changes are a result of generational changes, with focus today on the entrance of Generation Z into higher education.<sup>134</sup> Some of these changes are a result of technological changes.<sup>135</sup> Some of these changes relate to the COVID-19 pandemic.<sup>136</sup>

<sup>129</sup> See generally Rebecca Flanagan, *Better by Design: Meaningful Change for the Next Generation of Law Students*, 71 ME. L. REV. 103 (2018); Gerald P. Lopez, *Transform—Don't Just Tinker With—Legal Education*, 23 CLINICAL L. REV. 471 (2017); Sheldon Krantz & Michael Millemann, *Legal Education In Transition: Trends and Their Implications*, 94 NEB. L. REV. 1 (2015); Susannah Furnish, *The Progression of Legal Education Models: Everything Old Is New Again*, 6 NE. U. L.J. 7 (2013).

<sup>130</sup> See, e.g., Paula A. Franzese, *Law Teaching for the Conceptual Age*, 44 SETON HALL L. REV. 967, 968–69 (2014) (“In response to the economic downturn, diminished employment prospects for law school graduates, and the ever-escalating costs of a legal education, declining law student enrollments, fickle and changing client demands, and an increasingly global playing field, both the academy and the practice of law continue to undergo rather seismic shifts.”); see also BOK, *supra* note 116, at 2–3 (summarizing recent external accountability of higher education from legislatures, employers, parents, and students).

<sup>131</sup> See, e.g., BENJAMIN BARTON, *GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* 2, 2–11 (2015).

<sup>132</sup> GREGORY & CHAPMAN, *supra* note 9, at XI; see also Paul Lustbader, *Principle 7: Good Practice Respects Diverse Talents and Ways of Learning*, 49 J. LEGAL EDUC. 448, 448–49 (1999).

<sup>133</sup> See, e.g., Robert Minarcin, *OK Boomer—The Approaching Disruption of Legal Education by Generation Z*, 39 QUINNIPIAC L. REV. 29, 30–32 (2020); Rebecca Flanagan, *Better by Design: Implementing Meaningful Change for the Next Generation of Law Students*, 71 ME. L. REV. 103, 105 (2018); Danielle C. Istl, *The Law School Experience: Staying Grounded and Enjoying the Journey*, 80 U. DET. MERCY L. REV. 485, 487 (2003).

<sup>134</sup> For an examination of Generation Z in the context of legal education, see generally Laura P. Graham, *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation*, 41 U. ARK. LITTLE ROCK L. REV. 29 (2018). For an examination of Generation Z's learning habits, preferences, and expectations, see COREY SEEMILLER & MEGHAN GRACE, *GENERATION Z LEARNS: A GUIDE FOR ENGAGING GENERATION Z STUDENTS IN MEANINGFUL LEARNING* 1–16 (2019).

<sup>135</sup> See, e.g., Shailini Jandial George, *Teaching the Smartphone Generation: How Cognitive Science Can Improve Learning in Law School*, 66 ME. L. REV. 163, 167–71 (2013); Richard K. Sherwin, Neal Feigenson, & Christina Spiesel, *Law in the Digital Age: How Visual Communication Technologies Are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. SCI. & TECH. L. 227, 231–32 (2006).

<sup>136</sup> See D. Benjamin Barros & Cameron M. Morrissey, *A Survey of Law School Deans on the Impact of the COVID-19 Pandemic*, 52 U. TOL. L. REV. 241, 242 (2021); Heather K. Gerken, *Will Legal Education Change Post-2020?*, 119 MICH. L. REV. 1059, 1060–65 (2021); Beverly Petersen Jennison & Christopher Steven Jennison, *Beyond Langdell: Legal Education in a Post-Pandemic World*, 2 NO. 2 MD. B.J. 136, 136–38 (2020); Christian

Some of these changes have been a result of individual professors who strive to improve the teaching and learning environment.<sup>137</sup> These changes have helped legal education resist shifting from student-centered learning to teacher-centered transmission.<sup>138</sup> Some of those changes have been from evaluations of education by respected organizations, such as those organizations that produced the Carnegie's Report<sup>139</sup> and CLEA's Best Practices.<sup>140</sup> Perhaps one of the greatest influences for continued change has been occasioned by the American Bar Association's accreditation standards.<sup>141</sup> The ABA Standards have encouraged focus on assessment, which requires the articulation of learning outcomes, development of performance criteria, and reflection on course alignment.<sup>142</sup>

---

Sundquist, *The Future of Law Schools: COVID-19, Technology, and Social Justice*, 53 CONN. L. REV. ONLINE 1, 5-9 (2020); Stephanie Francis Ward, *ABA Legal Ed Section Contemplates Rule Change in Light of Novel Coronavirus*, A.B.A. JOURNAL (May 8, 2020), <https://www.abajournal.com/news/article/legal-ed-contemplates-rule-change-due-to-covid-19-crisis> [<https://perma.cc/EU9R-N96C>].

<sup>137</sup> See generally Arturo Lopez Torres & Mary Kay Lundwall, *Moving Beyond Langdell II: An Annotated Bibliography of Current Methods for Law Teaching*, 35 GONZ. L. REV. 1 (2000) (listing a range of teaching and learning strategies used in law school classrooms).

<sup>138</sup> See, e.g., King, *supra* note 46. For a discussion of student-centered learning in the law school context, see Dennis R. Honabach, *Precision Teaching in Law School: An Essay in Support of Student-Centered Teaching and Assessment*, 34 U. TOL. L. REV. 95, 102-03 (2002). See generally Kristin B. Gerdy, *Teacher, Couch, and Judge: Promoting Learning through Learner-Centered Assessment*, 94 L. LIB. J. 59 (2002).

<sup>139</sup> SULLIVAN ET AL., *supra* note 123 (a project of The Carnegie Foundation for the Advancement of Teaching). For an examination of impact of the Carnegie Foundation's work in legal education, see generally William M. Sullivan, *After Ten Years: The Carnegie Report and Contemporary Legal Education*, 14 U. ST. THOMAS L.J. 331 (2018); Stephen Daniels, Martin Katz & William Sullivan, *Analyzing Carnegie's Reach: The Contingent Nature of Innovation*, 63 J. LEGAL EDUC. 585 (2014).

<sup>140</sup> ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP vii (2007) (a project of the Clinical Legal Education Association); see also Antoinette Selillo Lopez, *Beyond Best Practices for Legal Education: Reflections on Cultural Awareness—Exploring the Issues in Creating a Law School and Classroom Culture*, 38 WM. MITCHELL L. REV. 1176, 1178-79 (2012); Ira P. Robbins, *Best Practices on "Best Practices": Legal Education and Beyond*, 16 CLINICAL L. REV. 269, 274-75 (2009).

<sup>141</sup> The current ABA Standards and Rules of Procedure for Approval of Law Schools can be found at [https://www.americanbar.org/groups/legal\\_education/resources/standards/](https://www.americanbar.org/groups/legal_education/resources/standards/) [<https://perma.cc/6FJM-7QLX>]. For an examination of accreditation and its impact on legal education, see Susan Hanley Duncan, *They're Back! The New Accreditation Standards Coming to a Law School Near You—A 2018 Update, Guide to Compliance, and Dean's Role in Implementing*, 67 J. LEGAL EDUC. 462, 486-87 (2018); Sarah Valentine, *Flourish or Founder: The New Regulatory Regime in Legal Education*, 44 J.L. & EDUC. 473, 479 (2015).

<sup>142</sup> See generally Julie Ross & Diana R. Donahoe, *Lighting the Fires of Learning in Law School: Implementing ABA Standard 314 by Incorporating Effective Formative Assessment Technologies Across the Curriculum*, 81 U. PITT. L. REV. 657, 659-63 (2020) (describing a range of formative assessment devices that can be used in legal education). See generally Derek Luke, Abstract, *From Filling Buckets to Lighting Fires: The ABA Standards and the Effects of Teaching Methods, Assessments, and Feedback on Student Learning Outcomes*,

Approaching education as one-size-fits-all is not theoretically sound.<sup>143</sup> Educators have long known that learning is not one-size-fits-all.<sup>144</sup> Educators show that each student learner is unique. The challenge is knowing how to structure the learning process in a manner that responds to all learning. Educators try a variety of approaches. As was recently written by Professor Deborah Borman and Professor Catherine Haras in *The Journal of Legal Education*, “Without a cognitive framework, teaching is fad-driven.”<sup>145</sup> Differentiated instruction is not a fad. Differentiated instruction provides a cognitive framework that works at all levels of education, including legal education. The hallmark of differentiated instruction is the educator’s commitment to adapting to the needs, interests, and learning profiles of his or her students.<sup>146</sup>

## V. APPLYING DIFFERENTIATED INSTRUCTION IN THE LAW SCHOOL CLASSROOM WITH EXAMPLES

Law students are a diverse group of student learners.<sup>147</sup> They enter law school with a range of experiences, perspectives, preferences, and needs.<sup>148</sup> The large class size typically found in legal education, along with the limited contact with individual student learners, poses challenges to incorporate differentiated instruction in legal education.<sup>149</sup> This section shares exercises

---

81 U. PITT. L. REV. 209 (2019) (summarizing the background of the ABA standards and explaining how these standards will inform legal education); Judith Welch Wegner, Abstract, *Law School Assessment in the Context of Accreditation: Critical Questions, What We Know and What We Should Do Next*, 67 J. LEGAL EDUC. 412 (2018) (showcasing the significance of the inclusion of assessment in the ABA standards); Janet W. Fisher, Abstract, *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 (2011) (exploring the value of learning outcomes to the learning process); Susan Hanley Duncan, Abstract, *The New Accreditation Standards Are Coming to a Law School Near You—What You Need to Know About Learning Outcomes & Assessment*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 605 (2010) (describing the process and consequences of the ABA standards).

<sup>143</sup> See, e.g., Parviz Alavinia & Sima Farhady, *Using Differentiated Instruction to Teach Vocabulary in Mixed Ability Classes with a Focus on Multiple Intelligences and Learning Styles*, 2 INT’L J. APPLIED SCI. & TECH. 72, 72 (2012) (observing that “one-size-fits-all instruction based on age-grade groupings, whole-class lectures, and lockstep process continue[s] to be regarded as the norm even in today’s revolutionized pedagogical world”).

<sup>144</sup> See, e.g., *id.* at 74.

<sup>145</sup> Borman & Haras, *supra* note 48, at 367.

<sup>146</sup> See TOMLINSON, *supra* note 1, at 5.

<sup>147</sup> See, e.g., Ian Weinstein, *Learning and Lawyering Across Personality Types*, 21 CLINICAL L. REV. 427, 428 (2015).

<sup>148</sup> See, e.g., Mark Graham & Bryan Adamson, *Law Students’ Undergraduate Major: Implications for Law School Academic Support Programs (Asps)*, 69 UMKC L. REV. 533, 549 (2001).

<sup>149</sup> See, e.g., Dosch & Zidon, *supra* note 116, at 345 (describing the difficulties in

and teaching techniques that would help both experienced and developing law professors incorporate differentiated instruction into the law school classroom.

*A. Modifications to Commonly Used Law School Instructional Strategies*

As Dr. Tomlinson recommends, “Many teachers successfully start differentiating instruction with small, well-orchestrated changes.”<sup>150</sup> The following discrete modifications to commonly used law school instructional strategies may be used by law professors to promote differentiated instruction in a range of law school courses. Indeed, many law professors may find that they are better positioned to incorporate differentiated instruction than they might have initially thought.

*1. What Do You Want to Learn?: Learning Outcomes and Course Planning*

Institutional learning outcomes guide the development of course specific learning outcomes and inform all of the course planning.<sup>151</sup> Professors can customize learning outcomes and structure the course in a manner that reflects the individual needs, interests, and goals of the students.

The professor may gather information from the law school admissions office about student credentials and prior experiences. The professor may gather information from the law school’s career services department about student interest in employment opportunities and seek feedback from employers of recent graduates. The professor may also gather information from the law school’s academic success department about programming for current students and bar exam takers. In addition, the professor may plan to collect information from students who are enrolled in the particular course to involve the students in planning how the learning will progress

---

implementing differentiated instruction in higher education including class size, contact hours, and research obligations). *See generally* Andrea A. Curio, Gregory Todd Jones, & Tanya M. Washington, *Developing an Empirical Model to Test Whether Required Writing Exercises or Other Changes in Large-Section Law School Class Teaching Methodologies Result in Improved Exam Performance*, 57 J. LEGAL EDUC. 195 (2007); Paul T. Wangerin, *“Alternative” Grading in Large Section Law School Classes*, 6 U. FLA. J.L. & PUB. POL’Y 53 (1993).

<sup>150</sup> TOMLINSON, *supra* note 1, at 154.

<sup>151</sup> *Cf.* Melissa N. Henke, *When Your Plate Is Already Full: Efficient and Meaningful Outcomes Assessment for Busy Law Schools*, 71 MERCER L. REV. 529, 530–35 (2020) (sharing practical approaches to incorporating assessment in law school courses); Docia L. Rudley, *Organizing Program Level Assessment to Foster Dialogue About Improving Student Learning*, 95 U. DET. MERCY L. REV. 393, 394 (2018) (exploring how assessment of programs, in addition to assessment within courses, can improve legal education).

throughout the semester.<sup>152</sup> As Dr. Tomlinson phrased it, “Teachers are the chief architects of learning, but students should assist in essential ways with the design and the building.”<sup>153</sup>

The size of a law school classroom should not be a deterrent to gathering information about student interests, experiences, and goals.<sup>154</sup> From online surveys to hand raising, students can share their interests. In advance of the first class meeting, students may respond to the following questions:

- Why are you taking this course?
- What do you hope to achieve this semester?
- Share a concern that you have about this semester.
- Describe your previous academic, professional, or personal experiences that you believe will be relevant to this course.

The professor draws upon those responses to shape the learning outcomes for the course or for individual class meetings. In terms of course planning, the professor and the students may collaborate on course policies, such as setting the timing of office hours and establishing expectations about what questions are appropriate for office hours. Likewise, the professor and students may finalize due dates for assessments.

Students may be invited to share their interests, experiences, and perspectives throughout the course. During the semester, for example, a professor may ask students to rate their interest in a specific topic on a scale of one to five, with five being the highest level of interest. Students may record their response by raising hands or by submitting a number on an index card, which may be done without identifying the submitter by name. Students may wish to connect previously learned materials with material to be covered in this course. Students in one course may have a particular practice area in mind where a current “hot topic” is of interest. Current events, especially local community events, may pique student interests. That information can be used by the professor in the future planning and development of the course content, including the depth of treatment. The course content remains consistent with the required standards and course

---

<sup>152</sup> Joshua Aaron Jones, *Building a Community of Inquiry Through Interactive Materials: The Interactive Syllabus*, 45 NOVA L. REV. 353, 356–58 (2021) (relating interactive materials to differentiated instruction).

<sup>153</sup> TOMLINSON, *supra* note 1, at 21.

<sup>154</sup> Cf. Marieke van Geel, Trynke Keuning, Jimmy Frèrejean, Diana Dolmans, Jeroen van Merriënboer & Adrie J. Visscher, *Capturing the Complexity of Differentiated Instruction*, 30 SCHOOL EFFECTIVENESS & SCHOOL IMPROVEMENT 51, 61 (2019) (stating that for differentiated instruction to be effective the professor needs to gather information about their students).



description, but it is able to be customized to reflect the students' interests. When students are interested in the content to be learned, the students will be more engaged with the material.<sup>155</sup>

Because learning is a shared responsibility, inviting students to share their interests, expectations, and perspectives involves the students in the learning process and allows the professor to adapt the instruction to the students.

## 2. *Write It on the Page: The Classic Essay*

The summative assessment device used in many law school courses is an essay-based final examination.<sup>156</sup> To prepare students for such a summative assessment, essays may be assigned throughout the semester.<sup>157</sup> Assigning essays during the semester presents a varied instructional strategy that allows students to practice what students will be asked to do on the summative assessment. During the semester, students should not only be able to compose essay responses to questions that are comparable in complexity and length to the type of prompts presented on the summative assessment, but they should also receive feedback on their responses in a manner that will inform the learning process.

Providing meaningful feedback when students are submitting multiple essay responses throughout a semester can be challenging, especially if fifty or more students are enrolled in the course. A professor may provide individualized written feedback on each student's response, but other instructional strategies can provide meaningful feedback and allow the students to take the lead on evaluating their responses. Model or sample answers can be distributed for in-class discussion, posted on a course

---

<sup>155</sup> Student interest can serve as an intrinsic motivator for learning. *E.g.*, Margaret Ryznar & Yvonne M. Dutton, *Lighting a Fire: The Power of Intrinsic Motivation in Online Teaching*, 70 SYRACUSE L. REV. 73, 81–86 (2020).

<sup>156</sup> *See generally* Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433 (1989) (examining the benefits and pitfalls to using an essay exam to evaluate student learning and to prepare students for the practice of law). The essay exam is not the only form of written-based assessment commonly used in law school classrooms. Writing assignments, projects, and exercises may be used throughout the semester to facilitate learning. Timothy W. Floyd, Oren R. Griffin & Karen J. Sneddon, *Beyond Chalk and Talk: The Law School Classroom of the Future*, 38 OHIO N. U. L. REV. 257, 258 (2011).

<sup>157</sup> *See* Joan M. Rocklin, *Exam-Writing Instruction in a Classroom Near You: Why It Should Be Done and How to Do It*, 22 LEGAL WRITING: J. LEGAL WRITING INST. 189, 207 (2018); Andrea A. Curcio, Gregory Todd Jones & Tanya M. Washington, *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance*, 35 FLA. ST. U. L. REV. 271, 287–89 (2008). *See also* Karen McDonald Henning & Julia Belian, *If You Give a Mouse a Cookie: Increasing Assessments and Individualized Feedback in Law School Classes*, 95 U. DET. MERCY L. REV. 35, 54–60 (2017) (examining the use of both essay questions and multiple-choice quizzes as formative assessment devices).

management platform<sup>158</sup> for virtual conferences, or released via a recording that analyzes the response.<sup>159</sup> Allowing students to compare and contrast their individual response to a model or sample response varies the learning process. Instead of releasing a model or sample response, the professor can release a checklist.<sup>160</sup> That checklist presents both the content that should have been included in the essay response and the logical sequence of that content. The students may use the checklist as a form of self-assessment.<sup>161</sup> Self-assessment empowers students to take an active role in evaluating their essay responses. During office hours or appointments, the professor can discuss the individual essay response with students by referencing the model/sample answer or the student-completed checklists.<sup>162</sup>

Composing essay-length responses is one valuable learning activity, but another valuable learning activity is the one-minute paper, also called a “minute paper.”<sup>163</sup> The minute paper is a time-restricted in-class writing exercise completed in response to a professor-supplied prompt.<sup>164</sup> A student typically composes their response in one to five minutes during class time.

---

<sup>158</sup> For a review of course management systems, see Joan MacLeod Heminway, *Caught In (or on) The Web: A Review of Course Management Systems for Legal Education*, 16 ALB. L.J. SCI. & TECH. 265, 290–98 (2006).

<sup>159</sup> For an exploration of the benefits and pitfalls of model answers, see Elizabeth Ruiz Frost, *Feedback Distortion: The Shortcomings of Model Answers as Formative Feedback*, 65 J. LEGAL EDUC. 938, 940 (2016); Terrill Pollman, *The Sincerest Form of Flattery: Examples and Model-Based Learning in the Classroom*, 64 J. LEGAL EDUC. 298, 299–301 (2014).

<sup>160</sup> The professor may release a checklist or a rubric in advance of student submission of the response. The released checklist or rubric can inform student completion of the essay response. A professor-completed checklist or rubric that is released after the students submit the essay responses may be more detailed and include an allocation of points earned on the assignment. Providing learners the checklist or rubric—whether a general one as the students compose a response or a detailed one that provides evaluation post-student submission—supports learning. *E.g.*, Jessica Clark & Christy DeSanctis, *Toward A Unified Grading Vocabulary: Using Rubrics in Legal Writing Courses*, 63 J. LEGAL EDUC. 3, 4 (2013). *See generally* Sandra L. Simpson, *Riding the Carousel: Making Assessment a Learning Loop through the Continuous Use of Grading Rubrics*, 6 CAN. LEGAL EDUC. ANN. REV. 35 (2011).

<sup>161</sup> For more of a discussion on how to encourage self-assessment, see Sarah J. Schendel, *What You Don't Know (Can Hurt You): Using Exam Wrappers to Foster Self-Assessment Skills in Law Students*, 40 PACE L. REV. 154, 211–14 (2020); Katherine A. Gustafson, *From Self-Assessment to Professional Effectiveness: Five Steps to Teaching Students to Effectively Self-Assess*, 88 MISS. L.J. 49, 63–69 (2019); Julie M. Spanbauer, *Using a Cultural Lens in the Law School Classroom to Stimulate Self-Assessment*, 48 GONZ. L. REV. 365, 374–81 (2012).

<sup>162</sup> For an examination of the value of checklists and rubrics to the learning process, see Sparrow, *supra* note 97, at 16–32.

<sup>163</sup> *E.g.*, Renee Nicole Allen & Alicia R. Jackson, *Contemporary Teaching Strategies: Effectively Engaging Millennials Across the Curriculum*, 95 U. DET. MERCY L. REV. 1, 11 (2017) (listing the one-minute paper as an effective teaching strategy); Barbara Tyler, *Active Learning Benefits All Learning Styles: 10 Easy Ways to Improve Your Teaching*, 11 PERSP.: TEACHING LEGAL RSCH. & WRITING 106, 107 (2003) (listing the one-minute paper as an example of one active learning strategy).

<sup>164</sup> *See id.*

These short, focused writing exercises prompt students to prioritize points for inclusion. The exercise provides the opportunity to assess students' understanding of a particular concept and provides students the opportunity to translate knowledge of a concept into a written response. The written responses may be collected by the professor, discussed during a class meeting, or both.

The following sentence frames are example prompts that professors could use for minute papers, all of which rely on a variety of verbs from Bloom's Taxonomy to help students progress from memorization to application of concepts:

- Explain the significance of [doctrine].
- How does the [rule, doctrine, definition] advance the goal of [policy consideration]?
- Under what circumstances will [cause of action arise/occur]?
- Compare and contrast [doctrine x] and [doctrine y].
- Describe the role of the lawyer in [practice area or topic].
- What does a nonlawyer need to understand about [concept or cause of action]?

Professors should customize the text within the brackets for the particular course or learning module. For example, a minute paper prompt in a Trusts and Estates course may be as follows: How does the harmless error rule advance the goal of the freedom of disposition?

Minute papers present students with a different process than the oral responses of the Socratic Method or the extended writing requirements of an essay response. The product created, a distilled, brief text, is a different product than the oral report. The professor quickly reviews the minute paper responses to inform instructional content for future class meetings. Accordingly, minute papers allow for differentiation of content, process, and product.

Essay responses are a standard, perhaps even conventional, instructional strategy to incorporate into the law school classroom. Slight modifications make essay responses part of the differentiated law school classroom, with professors using student-submitted responses to evaluate the content to be examined. Composing written responses, whether those responses are multiple pages in the classic essay question format or condensed responses with the minute paper, varies the learning process more than the Socratic dialogue or chalk-and-talk lecture that results in a different student work product.

### *3. Pick One: Selected-Response Questions*

Law professors regularly use selected-response questions to provide diagnostic, formative, and summative assessments.<sup>165</sup> Selected-response questions are multiple-choice, true-false, and matching questions. Students select the best answer to the question based upon a limited number of possible answers. The question format and the limited number of answers provide learners a different way of working with the content using a different process to produce a different product.<sup>166</sup>

A selected-response question, or a series of selected-response questions, may be used to determine students' retained knowledge, introduce a new course topic, or help students collect information from different learning modules.<sup>167</sup> For example, in a real estate transactions class meeting, the professor may share a series of selected-response questions on recording acts. Given that recording acts are typically discussed as part of a required property course, the real estate transactions professor can determine how much knowledge has been retained by the students from their previous learning experience. The professor uses the results to inform future instruction on recording acts. The responses may be collected using an auto-graded question on a number of technology platforms, or students may raise their hands during a class meeting to indicate their responses. The professor may find that students have a general understanding of the purpose of the recording acts but have difficulty applying the recording acts to particular factual circumstances. This collection of responses allows the professor to adapt and respond to the needs of the students.

Professors can also use the selected-response question as a comprehension check to determine how much of the assigned material or previously covered concepts the student understood.<sup>168</sup> For example, the professor may share a selected-response question that asks students to correctly identify the issue or identify the relevant definition. The professor uses the responses to alter the learning content and then focus more directly on what the students did not understand or push the students to have a more nuanced understanding. In the event that the collected responses reveal that

---

<sup>165</sup> For an examination of the typical law school assessments, including the use of selected-response questions, see Steven Friedland, *A Critical Inquiry Into the Traditional Uses of Law School Evaluation*, 23 PACE L. REV. 147, 164-66 (2002).

<sup>166</sup> See, e.g., Herbert T. Krimmel, *Dear Professor: Why Do I Ace Essay Exams But Bomb Multiple Choice Ones?*, 63 J. LEGAL EDUC. 431, 433 (2014).

<sup>167</sup> For an examination of the benefits and challenges of using selected response questions, also called multiple-choice questions, to improve learning, see Janet W. Fisher, *Multiple-Choice: Choosing the Best Options for More Effective and Less Frustrating Law School Testing*, 37 CAP. U. L. REV. 119, 124-35 (2008).

<sup>168</sup> Selected-response questions can facilitate the inclusion of spaced repetition in the law school classroom. E.g., Brian Sites, *Learning Theory and the Law: Spaced Retrieval and the Law School Curriculum*, 43 L. & PSYCH. REV. 99, 100 (2019) (sharing that "repeated encounters with the material over time produces superior long-term learning") (quoting Sean H. K. Kang, *Spaced Repetition Promotes Efficient and Effective Learning: Policy Implications for Instruction*, 3 POLY INSIGHTS FROM BEHAV. & BRAIN SCI. 12, 12 (2016)).

students are struggling with the content, the professor can then use another instructional method to facilitate student learning of the material.

The format of the selected-response questions may seem limiting, but the format is adaptable. For example, the question may provide students with a statute. The students are then asked to determine who prevails, given the statute and the facts presented. Another example question prompt may ask students to identify the concerns raised given the particular set of facts. Alternatively, the professor may ask the students to identify an incorrect response. Or the professor may ask students to write a brief explanation of their thought process. The student thus engages with the material more than selecting one correct answer.

The professor may draft the selected-response question, which might replicate an MBE-style format.<sup>169</sup> In addition to using professor-created selected-response questions, students can create the questions and answers themselves.<sup>170</sup> The professor may assign topics to students—as individuals or in groups—to create the questions and answers.<sup>171</sup>

Selected-response questions provide an alternative instructional strategy to the Socratic Method that promotes students engaging with the material in a different manner. The defined options force students to read the call of the question carefully and critically evaluate the responses. Selected-response questions can thus serve as an example of differentiated instruction in the law school classroom.

#### *4. Any Questions?: Improved Closing Prompts and Closing Activities*

Law professors regularly end class meetings with the following prompt: “Are there any questions?” Inviting student questions and allocating class time to respond to student questions is important.<sup>172</sup> Students, however, often struggle with formulating questions or feel intimidated to ask during the class meeting. To that end, closing prompts and closing activities can be used to complement the broad “are there any questions” ending to a class meeting. Professors can use these closing prompts and closing activities at the end of a learning topic, unit, module, or class meeting. Closings, which may also be referred to as “cool downs,” invite the student learner to reflect,

---

<sup>169</sup> For guidance on creating valuable multiple-choice questions, see Susan M. Case & Beth E. Donahue, *Developing High-Quality Multiple-Choice Questions for Assessment in Legal Education*, 58 J. LEGAL EDUC. 372, 374–87 (2008).

<sup>170</sup> See generally Sophie M. Sparrow, *Using Individual and Group Multiple-Choice Quizzes to Deepen Students’ Learning*, 3 ELON L. REV. 1 (2011).

<sup>171</sup> Cf., Dexter R. Woods, Jr., *An Appealing Exercise: Group Review of Multiple-Choice Exams*, 12 ATLANTIC L.J. 198, 212 (2010).

<sup>172</sup> See HOWARD E. KATZ & KEVIN FRANCIS O’NEILL, *STRATEGIES AND TECHNIQUES OF LAW SCHOOL TEACHING: A PRIMER FOR NEW (AND NOT SO NEW) PROFESSORS* 50–51 (2009).

identify, describe, evaluate, or apply information learned.<sup>173</sup> The professor may collect student responses via digital submissions, hard copy, or oral responses. The collection of student responses allows the professor to adapt the pace of instruction and draw in student interests. In other words, these closing prompts and closing activities vary the instructional strategies used within the classroom and ask students to create a varied product, that is, the response to the prompt or activity. That is differentiation.

*a. Closing Prompts*

A closing prompt is a one-sentence prompt that asks students to reflect, identify, describe, evaluate, or apply information learned. This process is critical for student learning.<sup>174</sup> The example prompts below require students to perform a range of cognitive tasks in accordance with Bloom's Taxonomy. Examples include the following:

- Share one question you have about the material covered in class today.
- How would you summarize today's class meeting for someone who was unable to attend the class meeting?
- Describe three key concepts from today's class meeting.
- Identify three key terms from chapter [x].
- Complete the following sentence: [X concept] is different from [Y concept] because [student to insert reason].
- List at least three reasons that [course of action/plan] would be recommended by an attorney.
- Share one course topic that you would like us to discuss in-depth again?
- In less than 100 words, describe the defining characteristic of [professor to insert concept, doctrine, or rule of law].

Closing prompts are similar to minute papers, and often the prompts

---

<sup>173</sup> For examples of a number of closing activities, see DANA JANUSZKA & KIRSTEN VINCENT, *CLOSING CIRCLES: 50 ACTIVITIES FOR ENDING THE DAY IN A POSITIVE WAY* (2012).

<sup>174</sup> *E.g.*, Elizabeth M. Bloom, *Teaching Law Students to Teach Themselves: Using Lessons from Educational Psychology to Shape Self-Regulated Learners*, 59 WAYNE L. REV. 311, 315 (2013) (describing self-regulated learning as "strategies that law professors can use to enable a diverse population of law students"); Jaime Alison Lee, *From Socrates to Selfies: Legal Education and the Metacognitive Revolution*, 12 DREXEL L. REV. 227, 229 (2020) ("Metacognitive thinking, an intellectual strategy for mastering complex material that focuses on planning, performance, self-reflection, and self-correction, is dramatically reshaping the law curriculum.").

for minute papers can be repurposed for closing prompts. In general, however, closing prompts focus more on reflecting and summarizing, while minute-paper prompts focus more on describing and applying.

Students may share their responses in various ways, including by posting to a course blog, by participating in a virtual-classroom chat, or by submitting a document in hard copy or via a course-management platform. The professor may use the material to determine what content should be included in future class meetings, what process may optimize continued learning, and what product would allow students to demonstrate their learning proficiency.

*b. Closing Activities*

A closing activity refers to an exercise, series of questions, or brief assignment that requires extended reflection, description, evaluation, and application of material learned. The following are three examples of closing activities that vary the learning process by allowing the professor to alter the content of future class meetings based on the student-created products.

The first example of a closing activity takes less than fifteen seconds of classroom time. That activity is the “Thumbs Up/Thumbs Down” Activity.” Students are presented with the following question: *Are you ready to move to [insert name of next topic/next stage]?*

In response to this question, students raise a thumb up or a thumb down. Students can respond during the last thirty seconds of an in-person class meeting with the thumbs-up or thumbs-down sign. Alternatively, students can respond during a virtual class meeting using one of the reactions on the videoconferencing service. Students could also record a yes or no response via an anonymous poll released either during the in-person class meeting or during a virtual class meeting. No explanation is needed. Instead, the professor receives an immediate snapshot of the students’ comfort and interest level. The professor may use the responses to help with course pacing and content development. Instruction may be accelerated, compacted, or expanded based on the responses.

The second example of a closing activity poses students with three questions. This closing activity is called “The Three W’s.” The three questions help students process information, as processing information is critical to learning. The three questions are (1) what, (2) so what, and (3) now what. More specifically, the first question asks students the following: *What have you learned?* The professor directs student reflection by suggesting that students identify three things they have learned from the learning module or unit. The second question asks students the following: *Why does what you learned matter?* The professor asks students to describe the relevance, importance, and usefulness of what they have learned. The students thus refer back to their response to the first question. The third question asks students the following: *What happens next?* The professor

prompts reflection with the follow-up question: How does what you have learned prepare you for the next steps/next instructional unit?

The third example of a closing activity uses the countdown format. With the three-two-one countdown format, professors direct the students to:

3. Identify three things you learned this [week/month/learning unit or module].
2. List two questions you have about the material covered this [week/month/learning unit or module].
1. Describe one connection you have made between the material presented this [week/month/learning unit or module] and the material presented last [week/month/learning unit or module].

Students may submit their responses or share their responses during the class meeting with the closing activity. By doing this, students actively construct their own responses, rather than passively relying upon the professor to distill, repeat, or summarize the information. The students engage in a different learning process to formulate a different product that will inform future learning content.

### *B. Innovative Instructional Strategies: Student Choice*

As noted above, professors may use discrete modifications to existing instructional strategies to bring differentiated instruction into the law school classroom. This can be done by altering the information explored within a learning unit—the content—by greater varying the instructional methods—the process—and by varying the vehicle students use to demonstrate learning—the product. This section explores what might be considered a more innovative instructional technique that leverages student choice. Student choice empowers student learners while still ensuring that students progress toward the course learning goals.<sup>175</sup> The choices allow students to focus on particular content, use different processes than might otherwise be available,

---

<sup>175</sup> A student-centered learning environment should empower the student learning. So, student choice assignments are examples of student-centered learning. *E.g.*, Cheryl Hanewicz, Angela Platt & Anne Arendt, *Creating a Learner-Centered Teaching Environment Using Student Choice in Assignments*, 38 DISTANCE EDUC. 273, 273-75 (2017). As two scholars stated, “[a]llowing student choice in assignments, sometimes referred to cafeteria-style grading, replaces each traditionally required assignment with a set of assignments that address the same course objective as the original assignment, but may offer different approaches to the material that could appeal to students with different interests and learning styles.” Jamie Pinchot & Karen Poullet, *Using Student Choice in Assignments to Create a Learner-Centered Environment for Online Courses*, 19 INFO. SYS. EDUC. J. 15, 15 (2021) (citations omitted).



and create products that enable them to pursue their own interests, revisit skills, and reflect on their own learning preferences.<sup>176</sup> Studies assert that student-choice assignments increase student engagement, promote student satisfaction with the learning experience, and produce improved academic outcomes.<sup>177</sup>

Law schools already incorporate aspects of student choice. Within certain parameters, students have a variety of choices to make. They may select the courses that are of greatest interest to them, choose professors who use instructional strategies that draw upon students' preferences, and choose what time of day the student perceives to present the optimal learning time for them. Professors may include student choice in course planning by having students vote on the number of assignments, the assignment due dates, or the date of review sessions.<sup>178</sup> Furthermore, law schools already include a differentiated instruction opportunity in their law school curriculum: the independent research project. This may take the form of a separate credit for a student to work individually with a professor, but this may also take the form of a student selecting the topic for his or her journal note or comment. Even the selection of a seminar paper topic is an example of differentiated instruction.<sup>179</sup> The product is an academic paper, but the student selects the content based upon the student's individual interest.<sup>180</sup> The student receives feedback during the research and writing process, which often takes the form of individualized meetings and written comments.

Other innovative ways of incorporating student choice can be used to enhance learning. Student-choice instructional strategies empower student learners while still ensuring that students progress toward the shared course learning goals. These choices allow students to focus on particular content,

---

<sup>176</sup> The value of student choice may be summarized as follows:

When students explore concepts and skills in an area that interests them, they are more likely to make connections. They may also be willing to spend more time on the tasks because the work appears engaging to them. Offering choices allow students to decide their own way. This empowerment of student choice can lead to greater buy-in of investing time.

MCCARTHY, *supra* note 7, at 13.

<sup>177</sup> Hannah MacNaul, Rachel Garcia, Catia Cividini-Motta & Ian Thacker, *Effect of Assignment Choice on Student Academic Performance in an Online Class*, BEHAV. ANALYSIS PRAC. 1, 1 (2021).

<sup>178</sup> *E.g.*, Emily Zimmerman, *What Do Law Students Want?: The Missing Piece of the Assessment Puzzle*, 42 RUTGERS L.J. 1, 7-9 (2010) (exploring law students' perspectives and thoughts on law school assessments).

<sup>179</sup> For guidance on how to productively support student creation of seminar papers, see Emily Zimmerman, *Re-envisioning Law Student Scholarship*, 69 CATH. U. L. REV. 291, 301-37 (2020); Jessica Wherry Clark & Kristen E. Murray, *The Theoretical and Practical Underpinnings of Teaching Scholarly Legal Writing*, 1 TEX. A&M L. REV. 523, 538-48 (2014).

<sup>180</sup> These projects are examples of what is referred to as orbital studies. "Orbital studies are independent investigations . . . They 'orbit,' or revolve, around some facet of the curriculum." TOMLINSON, *supra* note 1, at 71.

use different processes than might otherwise be featured in the course, and create products that allow students to pursue their own interests, revisit skills, and develop new approaches.

### 1. *Learning Centers and Learning Stations*

Learning centers and learning stations are a series of in-classroom or virtual learning spaces where students work on a specific course topic, exercise, or activity.<sup>181</sup> The tasks are designed to allow independent student practice or student enhancement.<sup>182</sup> Learning centers and learning stations vary the process, and they allow for variation of the content and the product.<sup>183</sup> The centers or stations may be presented as in-classroom instruction or online modules. The term “center” and the term “station” are sometimes used interchangeably, but centers and stations are different.<sup>184</sup>

A learning center focuses on a discrete task or topic that does not need to be completed in conjunction with another task or topic. Within the center, students may have a range of tasks related to a particular topic to complete. Multiple centers are typically established. Students then select which center to visit depending upon what practice or enhancement would facilitate their individual learning. For example, in a legal writing course, the professor may create three learning centers that provide students the opportunity to practice different aspects of the writing process. One center may present an exercise about paragraphing, where students are reminded about the components of a strong paragraph. Another center may focus on editing strategies.<sup>185</sup> And yet another center may explore citation. Within each center, students may be presented with a series of tasks, allowing them to select which specific tasks will benefit their learning. Within the citation center, for instance, the students may be instructed to complete two of three

---

<sup>181</sup> *E.g.*, Mevlut Aydogmus & Cihad Şentürk, *The Effects of Learning Stations Technique on Academic Achievement: A Meta-Analytic Study*, 9 RESEARCH IN PEDAGOGY 1, 2 (2019) (“The learning stations technique is a form of course processing in which students perform a series of learning activities in specific areas created in the learning-teaching process [within the classroom or outside the classroom] by working individually or in groups with the help of specific guidelines created by the teacher or student teacher in order to learn or review a topic.”).

<sup>182</sup> *See, e.g.*, Marlow Ediger, *Learning Stations in the Social Studies*, 131 EDUC. 467, 467–68 (2011).

<sup>183</sup> MCCARTHY, *supra* note 7, at 59–60.

<sup>184</sup> Paul R. Daniels, *Learning Centers and Stations: A Different Concept*, in INDIVIDUALIZED INSTRUCTION PROGRAMS AND MATERIALS: SELECTED READINGS AND BIBLIOGRAPHY 257, 257–58 (James E. Duane ed., 1973).

<sup>185</sup> The center may present an exercise or have recordings about editing strategies. For instance, the professor may remind students about the distinction between revising and editing using the grade school acronyms of ARMS (Add, Remove, Move and Substitute) versus CUPS (Capitalize, Usage and grammar, Punctuation, and Spelling). *E.g.*, Karen J. Sneddon, *More than IRAC: Acronyms to Support the Writing Process*, 28 PERSP.: TEACHING LEGAL RSCH. & WRITING. 26, 27 (2020).

presented tasks. One task may be a multiple-choice citation quiz. Another task may require the student to write the appropriate citation formats when supplied with information about the authorities to be cited, such as the inclusion of opinion captions. A third task may be to revise citations within an excerpt. The content is the same, but the process and product varies.

Students can work through the centers in any order based upon their own needs. So, a student may begin with the citation center or begin with the paragraphing center. Students may be assigned to particular centers based upon diagnostic or formative assessments. Centers provide students the opportunity to engage with the material, knowledge, and tasks, but the centers are independent of each other. They do not need to be completed in a particular order.

In contrast, a learning station is typically one stage of a series of stages that allow students to practice material in a sequential order.<sup>186</sup> For example, a professor may create three stations surrounding three inter-related course concepts. Students rotate through three different stations. The material in the station works in concert with the following stations to help students progress in their learning goals. For example, students in a legal writing course may need to progress from a station on issue identification, to a station on research planning, and finally to a station on research tools. In another example, the professor may create three learning stations for students in a wills, trusts, and estates course to practice with will validity. One station would focus on valid will creation. The second station would focus on valid will revocation. A third station would focus on sequential wills, where a testator has validly created a series of wills. The stations build upon each other and often increase in complexity. As a consequence, the learning stations are intended to be completed by the students in a particular order because the work within each learning station builds upon the work completed in the previous learning station.

Professors may create the materials for the centers and stations or identify existing exercises, problems, or activities from their assigned course material.<sup>187</sup> For example, a professor may identify assessments, questions, cases, or chapters that will become the focus of the learning centers or learning stations. Indeed, one course assignment may be for the students themselves to design learning centers and stations for the members of the class to complete as a course review at the end of the semester.<sup>188</sup>

---

<sup>186</sup> TOMLINSON, *supra* note 1, at 75 (“Centers differ from stations . . . in that centers are distinct. Stations work in concert with one another.”).

<sup>187</sup> Professors may assign course supplements, such as West’s *Developing Professional Skills* series, and use specific exercises from the assigned supplements in centers and stations. Additionally, textbooks and their accompanying Teacher’s Manuals often include supplemental assessments and exercises that could be used to create materials for centers and stations.

<sup>188</sup> This assignment could be part of the flipped classroom. *See, e.g.*, Jennifer Rosa, *Flipped*

The learning centers and learning stations may be completed during a dedicated period of class time or be presented as an online module where students complete the exercises at a required number of centers or stations within specified time parameters. Students may work in groups or individually. Learning centers and learning stations are flexible instructional strategies that can be used to reinforce previously learned concepts, support exploration of concepts, and promote deep learning of the course material by permitting students to engage with the material in a varied way.<sup>189</sup> In other words, learning centers and learning stations allow for differentiation of content, process, and product.

## 2. *Learning Menus*

A learning menu presents students with a number of projects and requires the students to select one project to complete.<sup>190</sup> Students are presented with alternate projects—the products—to demonstrate achievement of the learning unit's outcomes. Students may select the project that appeals to them or interests them. Students may have a particular interest in the content relevant to the product or have preference as to the product to be created.<sup>191</sup> Accordingly, the learning menu assignment allows for varying content, process, and product.

A learning menu can be presented to students in a variety of law school courses. For example, students may be provided with three options for a course project that will serve as a summative assessment. Below are five examples of projects that could be developed for a number of law school courses:

- Write a letter to a client explaining a draft document by referencing both information in the provided draft document and information provided by the client on a client intake questionnaire.
- Create a community presentation and handout that meets the audience expectations given the announcement of the presentation's focus.
- Compose a client counseling plan and record a client counseling session that presents the client with a range of options and evaluations the options given information about the client's file and goals.

---

*Learning: Promoting Collaboration, Cooperation, and Civility*, 96 MICH. BAR J. 56, 57 (2017).

<sup>189</sup> See discussion *supra* Section V.B.i.

<sup>190</sup> TOMLINSON, *supra* note 1, at 148; see also MCCARTHY, *supra* note 7, at 10, 59.

<sup>191</sup> See Lisa Burke, *Module 13: Differentiating Your Instruction*, in SUPERVISION MODULES TO SUPPORT EDUCATORS IN COLLABORATIVE TEACHING: HELPING TO SUPPORT & MAINTAIN CONSISTENT PRACTICE IN THE FIELD 204–08 (Kathryn L. Lubniewski, Debbie F. Cosgrove & Theresa Y. Robinson eds., 2019).

- Draft a model statute and provide a commentary that explains the choices made in the model statute.
- Record a podcast that includes an interview of an individual with expertise.

Each of the projects on the learning menu represents a different product. With the first choice, students create a legal letter that follows the conventions of a business letter to convey substantively accurate, but client accessible, information. With the second choice, students create a presentation plus a handout that balances images with text to meaningfully engage the audience. With the third choice, students create a counseling plan plus a vignette that translates legal concepts into action plans while highlighting legal and non-legal implications. With the fourth choice, students are in the role of legislators in drafting a model statute about one of the course concepts and explain the reason for the statute formulation. With the fifth choice, students are in the role of presenter and interviewer as they explore a course topic.

The professor can alter the facts for each project. Indeed, the professor may supply students with client-completed intake questionnaires, a community organizer's event flyer, a recording of an initial client interview, or a recent case that highlights a problem the model statute seeks to address, or a newspaper article focusing on a timely topic for discussion. The differences may be apparent, but all of the projects on the learning menus will help students achieve the shared course learning outcomes.<sup>192</sup> Specifically, the five options above will help students do the following:

- Promote functional legal literacy as relates to the course concepts.
- Employ effective reading strategies to identify and evaluate facts that are presented in a variety of documents.
- Construct analytical framework/s to identify and resolve problems in a manner that is appropriate for individuals, future litigants, and society using appropriate legal principles and non-legal implications.
- Create a practice-based document that presents the information in a manner that is accurate and accessible to a non-lawyer.

By choosing a project from the offerings outlined on the learning menu, students can take ownership of the project. The variety of the projects allows differentiation for content, process, and product.

---

<sup>192</sup> See MCCARTHY, *supra* note 7, at 10 ("The key is that all product options will enable students to demonstrate learning at the same required level regardless of the choice made.").

### 3. Choice Boards

Another example of a student choice instructional strategy that uses differentiated instruction is the choice board.<sup>193</sup> Like with the learning menu, students are presented alternate products to demonstrate their learning that may require using different processes and focus on varying content. In contrast to the learning menu, where students are selecting one project to complete, the choice board will typically present a greater number of tasks and require students to complete a set number of those tasks.

The choice board often takes the format of a tic-tac-toe board.<sup>194</sup> Students are presented with a nine-box grid. Each box contains a different task that relates to the information included in the learning unit. These tasks may take the form of practice-based documents, such as the creation of legal letters, interrogatories, intake questionnaires, or motions. These tasks may also take the form of different study materials, like the the creation of multiple-choice questions or a series of frequently asked questions. Having a range of different tasks engages students in different processes to create a variety of products. Students can select the tasks they are most interested in completing.

In addition to offering students choices, these choice-board tasks allow students to take creative approaches that may not otherwise be included within the course instruction.<sup>195</sup> For example, students may have the option to create a comic strip or perform a skit. These atypical or unconventional tasks for the law school classroom encourage creativity. Creativity is an important part of problem solving and can become lost in a typical law school classroom where students unintentionally presume that one solution or approach is appropriate.<sup>196</sup> Below is an example of an adaptable nine-box grid that could be used in a number of law school classrooms.

---

<sup>193</sup> TOMLINSON, *supra* note 1, at 148.

<sup>194</sup> *E.g.*, MCCARTHY, *supra* note 7, at 10.

<sup>195</sup> As two law professors explained: “If we [law professors] are to train students to become effective lawyers, then we must train them to be creative thinkers. Legal education, for the most part, fails to accomplish this because it is, as will be described in this article, stuck in a rut.”

Janet Weinstein & Linda Martin, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 CLINICAL L. REV. 835, 835- (2003).

<sup>196</sup> See generally Larry O. Natt Gantt, II, *The Pedagogy of Problem Solving: Applying Cognitive Science to Teaching Legal Problem Solving*, 45 CREIGHTON L. REV. 699 (2012). See Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375, 379-80 (1998).

Students must complete three tasks in a row. The row may be vertical, horizontal, or diagonal. The professor may include a “free choice” square within the nine-square grid that allows for students to complete any of the tasks or even to propose another task. As a result, this tic-tac-toe choice board promotes student learning of course concepts, encourages

1. Review a recently published law review article related to [insert the course or course topic].	2. Evaluate two recent news articles related to [insert the course or course topic].	3. Design a floor plan for a law firm/legal organization to conduct client meetings.
4. Make a “Now You Know” Digital Recording where you explain one course concept.	5. Create a comic strip where you explore [insert particular topic/course concept].	6. Record a roleplay of an attorney-client interaction that raises three professional responsibility issues related to this course.
7. Compose a fictional narrative backstory on one of the cases in the textbook.	8. Critique a client intake questionnaire that would be used by an attorney practicing in [insert practice area].	9. Annotate a [insert form document relevant to the course].

active learning with the course material, extends an understanding of the course materials, and permits creation of a range of work products. The variety of tasks allows differentiation for content, process, and product.

Appendix 1 includes an example of the tic-tac-toe board presented in the author’s wills, trusts, and estates class as an extra credit assignment. The tasks were varied and allowed the students to revisit previously covered

course content in light of their own interests. For example, some students focused on high net worth tax planning, and other students focused on the growth of will substitutes. Appendix 1 includes not only the tic-tac-toe board, but the additional instructions related to each task to provide further guidance to students. Students engaged with the material in a manner that furthered learning while also working toward mastery of the course learning outcomes.

Choice boards provide students the opportunity to expand their learning by customizing the content, the process, and the product. That is what differentiated instruction aims to do.

## VI. CONCLUSION

Legal education has been steadily adapting to the demands of practice, the requirements of accrediting agencies, and the needs of student learners. A theoretical framework is needed so that law professors can adapt and respond to the needs of all learners. Differentiated instruction is an overarching instructional strategy that is compatible with popular teaching and learning theories while also promoting student ownership, student engagement, and student achievement. Adapting courses and classroom instruction can initially seem overwhelming, yet professors are constantly adapting course structure and classroom instruction strategies. This Article has presented a framework for law professors to approach such adaptation in a deliberate manner that enhances student learning and fosters a student-centered learning environment. Law students have a range of experiences, preparations, and interests. Differentiated instruction helps professors respond to the needs of all learners rather than forcing square pegs into round holes.



---

**Appendix 1**  
**Wills, Trusts, and Estates**  
**Extra Credit Opportunity**

You have the opportunity to earn extra credit in the form of extra credit points to be added to your total raw points earned on the final examination.

**Goals:**

- ✓ To promote student learning of course concepts
- ✓ To encourage active learning and engagement with course materials
- ✓ To extend an understanding of the course materials
- ✓ To create a range of work products

**Tasks:**

This extra credit opportunity is in the form of a Tic Tac Toe Board. **You must complete three tasks to form “three in a row.”** The row may be vertical, horizontal, or diagonal.

Each of the tasks is identified on the Tic Tac Toe Board on page 2 of this handout with additional guidance provided on pages 3-5 of this handout. Unless otherwise provided, you may use any appropriate format and formatting.

Please note that all three submitted tasks must be both complete and be three in a row to earn the extra credit. No partial credit will be awarded.

**Collaborations:**

Although the submissions should reflect your own work, you may collaborate with a classmate who is not currently enrolled in the course, friend, or family member.

**Due Date:**

Submissions may be made in advance of the due date. Late submissions will not be accepted.

**Manner of Submission:**

You must submit the three tasks via Assignments on the Canvas Course Page. The Assignment Page should allow you to upload multiple files using a variety of formats. Unless otherwise instructed, use the format that would be most appropriate given the nature of the task you are completing. Please ensure that your name is on each submission. Your name may appear directly on the submission or appear in the file name.

<p>1. Review a recently published law review article related to Wills, Trusts, and Estates.</p>	<p>2. Evaluate two recent news articles related to Wills, Trusts, and Estates.</p>	<p>3. Design a floor plan for a law firm/legal organization to hold will execution ceremonies.</p>
<p>4. Make a “Now You Know” Digital Recording where you explain one course concept.</p>	<p>5. Create a comic strip where you explore one specific will substitute.</p>	<p>6. Record a “perfect” will execution ceremony of an attested will.</p>
<p>7. Compose a fictional narrative backstory on one of the cases in the textbook.</p>	<p>8. Critique an estate planning specific client intake questionnaire.</p>	<p>9. Annotate a will form.</p>

**Extra Credit Points:**

The extra credit points earned will be 9% of the total raw points on the final examination.

If you have any questions about the extra credit opportunity, please let me know.

**1. Review a recent law review article related to Wills, Trusts, and Estates.**

Locate and review a recent law review article. The article must be published in a law review or legal journal between the years of 2016 and 2021. The article may not be a student note or a student comment. You may review an article from any law review or legal journal, but you may find it helpful to research articles published in journals focused on estate planning, such as *The Elder Law Journal*, *The ACTEC Law Journal*, *The Quinipiac Probate Law Journal*, and *The Estate Planning & Community Property Law Journal*. The article may be about any topic related to Wills, Trusts, and Estates.

The review must be at least 250 words and be submitted as a Word file. The review should include the following content:

- Proper citation for the law review article
- Notation of article's length (number of pages and number of footnotes)
- Summary of the article
- Assessment of the value of the article as relates to the concept(s)/policy consideration(s) in Wills, Trusts, and Estates

**2. Evaluate two recent news articles related to Wills, Trusts, and Estates.**

Locate and evaluate two recent news articles. The news articles must be published by a reputable publisher/organization between the years of 2018 and 2021. The articles may be on any topics related to Wills, Trusts, and Estates. The articles may be on the same or different topics. Create one Word file that includes the evaluation of both articles. Each evaluation must be at least 150 words. For each evaluation, you should include the following information:

- 🔗 Proper citation for each article
- 🔗 Notation of the length of the article
- 🔗 Brief summary of the article (words or pages)
- 🔗 Evaluation of the accuracy/connection to the concept(s) in Wills, Trusts, and Estates

**3. Design a floor plan for a law firm/legal organization to hold will execution ceremonies.**

Design an ideal room to hold will execution ceremonies. The floor plan should include the dimensions of the room. The location of door(s), window(s), furniture, furnishings, and lighting should be noted. Consider details like the size, shape, and location of the furniture, what would be on the furniture, etc. You may hand draw or use a computer drawing program to create the floor plan. With the floor plan, you need to also submit a description of at least 100 words that shares how the floor plan would ensure

that all will execution ceremonies held in the room would comply with the strictest interpretation of the Wills Act formalities. The description should be in a Word file. You can submit the floor plan as a separate document in any format.

**4. Make a “Now You Know” digital recording where you explain one course concept.**

Make a digital recording that would educate an audience about one specific course concept. For example, do not create a recording on all methods of revocation, but focus on dependent relative revocation. The recording must be at least one minute and no more than three minutes. The recording may be a mix of text, audio, still images, and moving images. For example, you may create a “live action” video in which you are the star or a “movie trailer” video that compiles a variety of images with a voice over. You may submit a link (accompanied with a password if the link is password protected) to provide access to the recording.

**5. Create a comic strip where you explore one specific will substitute.**

Create a comic strip that focuses on one specific will substitute. You may choose any will substitute to feature. The comic strip must have at least eight frames and no more than twelve frames. One frame may be the title frame. An image must appear in each frame. Text should also appear in each frame. You may add speech bubbles and narration captions (with the captions either appearing at the top or bottom of the frame). You may hand draw or use a computer program to create the comic strip. You may submit the comic strip in any format.


**6. Record a role play of a “perfect” will execution for an attested will.**

Record a role play of a will execution ceremony. The recording must be at least two minutes and no more than five minutes. The recording may be “live action” or animated. You may reference the model execution ceremony on pages 158-160 of the textbook. You may submit a link (accompanied with a password if the link is password protected) to provide access to the recording.

**7. Compose a fictional narrative backstory on one of the cases in the text book.**





Select one of the cases featured in the textbook and compose a fictional narrative about the case. The narrative, which should be in similar format to a short story, must be at least 250 words and be submitted as a Word file. The narrative should be inspired from the facts in the case, but you also have creative freedom to make inferences and fill in the gap with information you consider appropriate. No outside research is required. You may use any style, tone, and conventions you consider appropriate. In the narrative, include the following information:

 title

 the case name with proper citation format

**8. Critique an estate planning specific client intake questionnaire.**

Locate an estate planning specific client intake questionnaire and critique the questionnaire. The critique should be at least 250 words. Consider to what extent the questionnaire provides for client completion of accurate information and reflects a range of property interests & relationships. In addition, critique the following:

-  nature of the instructions
-  order of prompts/questions
-  coverage of topics/subjects
-  formulations of the prompts/questions

**9. Annotate a will form.**

Locate and annotate a will form. A will form refers to a model or sample document. You can select any will form, but you may find it helpful to use a will form from *Redfern's Wills and Administration in Georgia* or similar form book. Make sure to include a citation/location/source for the selected will form in one of the annotations. You should annotate specific provisions, items, or sections. You must have at least fifteen annotations and no more than twenty-five annotations. The annotations should appear as comment bubbles on a Word or pdf file of the selected will form. The annotations should include information like the following:

- description of the purpose of the identified provision, item, or section
- identification the course concept or rule that the identified provision, item, or section relates to
- notation of what issue, problem, or concern the identified provision, item, or section references

\*\*\*