

The ‘F’ Word: The Top Five Complaints (and Solutions) About Formative Assessment

Olympia Duhart

INTRODUCTION

Anyone who has ever taught someone how to drive already knows the value of formative assessment. It would be unthinkable to take an anxious sixteen-year-old straight to the DMV with no practice time in the grocery store parking lot. Merely asking the student to listen to a lecture about driving would never work. Showing videos of people driving cars would not be much help. Asking the student driver to read and annotate a book on driving still would not teach the student how to properly operate a vehicle. The brightest person would not be equipped to pass a driving exam unless and until he or she got behind the wheel of a car and practiced. Even then, the practice would have to be frequent, low-risk, and marked by specific, timely feedback. The student driver would need a chance to knock over a few cones in the local parking lot, be told exactly how to improve and given the opportunity to try again. No one gets behind the wheel of a car for the first time on the day of the DMV road test. People know that practice counts.

Yet many law professors abandon this common-sense principle when it comes to teaching law students. Instead of providing multiple opportunities for practice with plenty of space to fail, adjust, and improve, many law school professors place almost everything on a single high-stakes test at the end of the semester. The overreliance on the final exam ignores what most people know about learning. The widespread use of formative assessment—techniques implemented throughout the learning process to improve student learning and teacher practices¹—offers many benefits to student achievement. As law

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1. David Thomson, *ABA Standard 314—What is Formative Assessment?* LAW SCHOOL 2.0 (Feb. 23, 2016, 9:34 PM), <http://www.lawschool2.org/lis2/2016/02/aba-standard-314-what-is-formative-assessment.html>. “Formative assessment should be designed to monitor student learning during the course, but also to allow the teacher to monitor and modify his or her teaching practices during the pendency of course.” *Id.*

schools move to implement changes to respond to the ABA's new formative assessment standards,² educators must consider the efficacy of various formative assessment models. For too long, law professors have become reliant on the familiar world of summative assessment or final exams. Now, many are being pushed to more expansively incorporate formative assessment into the law school classroom. But not everyone is eager to jump on board. For some professors, formative assessment is treated like a four-letter word.

This article addresses the top complaints law professors have about formative assessment. After the introduction, Part II explores the current case for formative assessment in law school classrooms, examining the new relevant standards implemented by the ABA and best learning practices. Part III examines the top five complaints law professors raise against the use of formative assessment in the law school classroom. Professors are worried about the time demands, discouraged by students who do not appreciate the extra effort, concerned about course coverage, determined not to infantilize their students, and slow to depart from the law school experience of their own education. This part also proposes solutions that are realistic, efficient, and pedagogically sound, and responds to the top five complaints by looking closely at the benefits and practical impact of incorporating more formative assessment into law school. This part uses cognitive science, learning theory, and research on formative assessment to respond to the most common complaints.

The Appendix features sample formative assessment exercises that respond to the most common concerns expressed by professors. Through an intentional and collaborative approach, law professors can successfully address most of their concerns about incorporating more formative assessment in class.

Why now? The Case for Formative Assessment

For years, a reliance on summative assessment has been the norm at law schools. Summative assessments are those that assign grades or “otherwise indicate the extent to which students have achieved the course goals.”³ These assessments typically appear as final exams, scholarly papers, or end-of-semester capstone simulations. Summative assessment essentially focuses on evaluation.⁴ In other words, did the student understand the material by the end of the course or unit? Think final exam in constitutional law or a midterm exam at the end of the unit on intentional torts.

This assessment strategy is flawed for a number of reasons. First, it places incredible performance pressure on law students,⁵ many of whom are already

2. See discussion *infra* pages 4-5 and accompanying notes.

3. Rogelio A. Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 BARRY L. REV. 73, 77 (2010).

4. MICHAEL HUNTER SCHWARTZ ET AL., TEACHING LAW BY DESIGN 154 (2009).

5. Ruth Colker, *Extra Time as an Accommodation*, 69 U. PITT. L. REV. 413, 462-64 (2008).

struggling with extraordinary stress levels.⁶ Next, it collides with a basic understanding of learning and assessment. Specifically, it places too much emphasis on evaluation. Although some feedback is available from summative assessment, that is not the central hallmark of summative assessment. Often, the feedback is instructive only in another course or unit. Students meet with professors at the end of the semester to review a test and promise to make changes for the next course. The reliance on a single high-stakes exam at the end of the semester is comparable to taking the student driver straight to the DMV without spending any time practicing behind the wheel of a car. In contrast, formative assessment focuses on a feedback loop.⁷ It provides critical information to both the students and instructor about student learning.⁸

Though the term formative assessment is relatively new in the law school environment, it is hardly new to education. Grade school teachers have long used formative assessment to both measure student performance and improve their own teaching. Colleges are increasingly relying on formative assessment as a way to meet the learning demands of millennial students.⁹ Furthermore, most graduate schools employ formative assessment tools such as quizzes and homework.¹⁰ Law school, however, has been late to the party.¹¹ Now, a combination of external pressure and a renewed focus on developing self-regulated lawyers has brought formative assessment front and center for law schools.

A. New ABA Standards

In fall 2016, the ABA implemented new standards that require the use of formative assessment in law schools.¹² Standard 314 explicitly requires law

6. See Nancy J. Soonpaa, *Stress in Law Students: A Comparative Study of First-Year, Second-Year and Third-Year Students*, 36 CONN. L. REV. 353 (2004) (examining the heightened level of stress for law students, even when compared with other graduate students).
7. SCHWARTZ ET AL., *supra* note 4, at 136.
8. *Id.*
9. Colker, *supra* note 5, at 464 (“In college, students were accustomed to quizzes and mid-year exams, along with finals.”).
10. See Steven I. Friedland, *Trumpeting Change: Replacing Tradition with Engaged Legal Education*, 3 ELON L. REV. 93, 115 n.119 (2011) (noting that medical schools have expanded grading to include oral and written assessments).
11. Though the widespread incorporation of formative assessment is relatively new to the law school community as a whole, I must stress (with pride) that legal writing professors have much experience with formative assessment. As Professor Mary Beth Beazley noted, “legal writing faculty have long used formative assessment as their signature teaching method. Much of their early scholarship, in particular, was devoted to articulating best practice for formative assessment, whether or not the authors used that term.” Mary Beth Beazley, *Finishing the Job of Legal Education Reform*, 51 WAKE FOREST L. REV. 275, 309 (2016).
12. AM. BAR ASS’N, *Standard 314: Assessment of Student Learning*, in STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016-2017 (2016), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf.

schools to use both formative and summative assessment to “measure and improve” student learning.¹³ The official interpretations of the standard go further to define formative assessment.¹⁴ The new standard and interpretations state:

Standard 314: Assessment of Student Learning

A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.

Interpretation 314-1

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

Interpretation 314-2

A law school need not apply multiple assessment methods in any particular course. Assessment methods are likely to be different from school to school. Law schools are not required by Standard 314 to use any particular assessment method.¹⁵

While the new standard from the accreditation body does not go so far as to require the use of formative assessment in every law school course, it does signal a strong support for an expanded commitment to formative assessment. Law schools are now required to use formative assessment, and the new standard will no doubt create more incentives for more law faculty to utilize formative assessment. The standard, however, merely reinforces what experts have stressed about the need to transform legal education.

B. Best Learning Practices

More than a decade ago, the Carnegie Foundation for the Advancement of Teaching studied a cross section of law schools in the United States and Canada.¹⁶ The results of the fieldwork conducted in sixteen law schools highlighted the strengths and weaknesses of legal education.¹⁷ While

13. *Id.*

14. *Id.*

15. *Id.*

16. See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 15 (2007) [hereinafter CARNEGIE REPORT].

17. *See id.*

summative assessment was noted as an important means to *sort and select* students,¹⁸ the authors of *Educating Lawyers*—commonly known as the “Carnegie Report”—noted that formative assessment was underdeveloped in law schools.¹⁹ The Carnegie Foundation specifically called on law schools to use formative practices as primary forms of assessment.²⁰ The report stressed that effective assessment practices are linked to the development of effective lawyers: “[A]ssessment should be understood as a coordinated set of formative practices that, by providing important information about the students’ progress in learning to both students and faculty, can strengthen law schools’ capacity to develop competent and responsible lawyers.”²¹

Another seminal text on law school teaching—*Best Practices for Legal Education*—also stresses the value of formative assessment.²² *Best Practices*, the result of a project organized by the Clinical Legal Education Association (CLEA), proposes a statement of best practices for legal education.²³ An entire chapter is devoted to assessing student learning.²⁴ One of the best practices for assessing student learning the authors identified is the need to “conduct formative assessments throughout the term.”²⁵ Specifically, *Best Practices* calls for making formative assessment the primary form of assessment in legal education.²⁶ The authors also note that formative assessment is especially critical among first-year students: “For many students what is needed is time—time to adjust, grapple with hidden difficulties, and gain an intellectual home—and assistance—feedback that lets them know where they stand and how to move ahead more quickly.”²⁷ An increase in formative assessment opportunities will give students more time to work through their struggle and provide helpful feedback so they can better gauge where they stand.

Finally, limited but important empirical evidence suggests the value of formative assessment in law schools. In a 2008-2009 study, professors Carol

18. See *id.* at 188 (“In its familiar summative form, assessment devices such as both standardized and essay tests sort and select students.”).

19. See *id.* at 189.

20. *Id.* (“Formative practices directed toward improved learning ought to be primary forms of assessment.”).

21. *Id.* at 171 (2007).

22. See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 255 (2007); see also BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD xii (Deborah Maranville et al. eds., 2015).

23. STUCKEY ET AL., *supra* note 22, at ix. CLEA advocates for clinical education as an essential that is “fundamental to the education of lawyers.” CLINICAL LEGAL EDUC. ASS’N, <http://www.cleaweb.org> (last visited Nov. 2, 2017).

24. STUCKEY ET AL., *supra* note 22, at 235-64 (explaining the importance of assessment and highlighting the various types of assessment available).

25. *Id.* at 255.

26. *Id.* at 256.

27. *Id.* at 256.

Springer Sargent and Andrea Curcio reviewed the impact of formative assessment in a required evidence class.²⁸ Their results demonstrated the positive impact of formative assessment among law students.²⁹ Their data supported two important points: a) formative assessments can improve final exam scores for a majority of students; and b) some students with weak first-year grades may be able to catch up with their better-performing peers with feedback.³⁰ Importantly, the professors stressed formative assessment techniques that could be implemented by busy law professors with *ease*.³¹

A combination of external pressures from the accreditation body for American law schools and experts in legal education have led to an expansive use of formative assessment in the law school classroom. Furthermore, common sense—consider sending the student driver straight to the DMV with no practice time—also makes a compelling case to move beyond a single summative exam. So why do some law professors still consider “formative assessment” a dirty word?

The Top Five Complaints (and Some Solutions)

Even with several compelling reasons to expand the use of formative assessment in law school, law professors still treat formative assessment like a four-letter word. Most law schools have faculty that meet discussions about formative assessment with a healthy skepticism and a few eye rolls. Even faculty members with good intentions who embrace active teaching methods can be reluctant to move beyond the single final exam. Several law professors are resistant to making the leap to a more comprehensive formative assessment strategy. Even those who have elected to employ a more robust formative assessment plan are satisfied with a midterm exam and nothing more. Without working through the valid concerns about formative assessment, law professors are likelier to merely rely on a high-stakes midterm to meet the new formative assessment goals.³² Why are many law professors reluctant to make the change? Below are the some of the most common complaints³³ law professors have about the use of formative assessment, and some solutions and responses to these concerns.

28. Carol Springer Sargent & Andrea A. Curcio, *Empirical Evidence that Formative Assessments Improve Final Exams*, 61 J. LEGAL EDUC. 379, 385 (2012).
29. *See id.* at 400.
30. *See id.*
31. *See id.*
32. Olympia Duhart, “*It’s Not for a Grade*”: *The Rewards and Risks of Low-Risk Formative Assessment in the High-Stakes Law School Classroom*, 7 ELON L. REV. 491, 500 (2015).
33. These complaints are entirely anecdotal and are the result of my informal survey of law professors. I received feedback from colleagues at my home institution, and from colleagues at other law schools and teaching conferences where I have made presentations on formative assessment. To a large extent, they also reflect my own reservations about formative assessment.

A. "I Don't Have Time to Do More Work."

Most professors are told from their first day of teaching that the obligations for a professor are compared to a "three-legged stool" comprising (a) teaching, (b) scholarship, and (c) service.³⁴ As professors are stretched to accomplish more with less in the "age of austerity,"³⁵ there is often strong pushback to adding more work to an already full plate. Service responsibilities have many professors stretched thin, and many people are picking up a new course prep. The constant focus on scholarship production also demands time and commitment. The use of new and different assessment methods is often last on the list for many faculty. Giving one major test at the end of the semester is simply more efficient.³⁶

While time constraints are certainly real and significant, law professors can take steps to minimize the time required to implement effective formative assessment. Law professors must use their available resources to manage time demands required to implement formative assessment in a large classroom. One simple solution for time management is not grading everything. Through guided self-assessment and peer assessment, law professors can minimize the time required to grade all the formative assessment exercises. Simply reviewing materials for a good-faith completion also saves time. In addition to helping to manage the time demands of formative assessment, low-risk or no-risk formative assessment also has important pedagogical benefits.³⁷ Low-risk formative assessment give students multiple opportunities to make mistakes and actively engage with the material they are learning.

Rubrics are another effective tool that can help make formative assessment more efficient.³⁸ The first benefit of rubrics is the huge value that they provide to students, who receive explicit guideposts about instructor expectations.³⁹ When given in advance of an assignment, rubrics demystify the assignment process and make expectation clear. When given again in grading, they can provide an important level of specific feedback.⁴⁰ But rubrics are also essential

34. See Deborah Rieselmann, *How Professors Spend Their Time*, UC MAG. <http://magazine.uc.edu/issues/0207/professors1.html> (last visited Nov. 2, 2017).

35. Victor Fleischer, *The Unseen Costs of Cutting Law School Faculty*, N.Y. TIMES: DEALBOOK (July 9, 2013 3:46 PM), <https://dealbook.nytimes.com/2013/07/09/the-unseen-costs-of-cutting-law-school-faculty/> (addressing the faculty reductions at one law school as a way of dealing with budget constraints).

36. Colker, *supra* note 5, at 464.

37. See generally Duhart, *supra* note 32 (discussing some of the benefits of ungraded formative assessment).

38. See Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics—Explicit Grading Criteria*, 2004 MICH. ST. L. REV. 1, 7 (addressing the benefits of using rubrics to ease the burden on professors and improve teaching effectiveness).

39. See *id.* at 17.

40. 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, 853 (2013) ("The more specific the feedback, the easier it will be for students to adjust their approaches based on the professor's advice.").

in helping professors save time. Making the rubric requires a significant initial time investment. After that, the rubric can be reused or merely retooled. Professors can also use very detailed rubrics to facilitate peer assessment and self-assessment.⁴¹ Furthermore, a strong rubric can allow instructors to use teaching assistants to evaluate written work product. Technology—including electronic quizzes, “flipping the classroom,” and electronic classroom platforms—can also be leveraged to save time.⁴² Clickers and newer platforms such as Kahoot!⁴³ and Poll Everywhere⁴⁴ also make it easy and efficient to assess students on their understanding of new material without much time investment. By using all available resources, professors can increase formative assessment in their classroom and still have time to meet other professional demands.

B. “Students Do Not Take Advantage of the Extra Learning Opportunities.”

“The effectiveness of feedback from formative assessment depends on (1) what you give students and (2) the way students receive or interpret it.”⁴⁵ Because students are hard-wired to respond to the looming threat of high-stakes grades, they can sometimes be slow to take advantage of formative assessment opportunities that are not graded heavily or not graded at all. The challenge, then, is to persuade students to be open to extra learning opportunities that may not be graded. The first step in that journey is to be explicit and deliberate about your teaching methods. Explain to students the value of extra learning opportunities, and be as transparent as possible about the course teaching and assessment methods.⁴⁶

The practices advanced by legal educators only reinforces what cognitive scientists and learning experts tell us about how people learn best. “Contemporary learning theory suggests that efficient application of educational effort is significantly enhanced by the use of formative assessment.”⁴⁷ As the amateur driving instructor knows, people learning a new skill benefit from multiple opportunities to practice in low-risk scenarios that give them many opportunities to receive specific feedback. Even knocking down cones in the parking lot can be instructive to the driving

41. For an example of a very explicit rubric designed to facilitate peer review, review the Commerce Clause rubric I drafted in Appendix C of this article. This rubric allows my teaching assistants to effectively review student practice IRACs. This saves me time and allows me to return the paper for a large 1L section in one week. Feedback is more valuable when it is given closer in time to the assessment. See Ramy, *supra* note 40, at 853.

42. See generally MONICA BURNS, #FORMATIVE TECH: MEANINGFUL, SUSTAINABLE, AND SCALABLE FORMATIVE ASSESSMENT WITH TECHNOLOGY (2017).

43. KAHOOT!, <https://kahoot.com> (last visited Nov. 3, 2017).

44. POLL EVERYWHERE, <https://www.polleverywhere.com> (last visited Nov. 3, 2017).

45. Sargent & Curcio, *supra* note 28, at 381.

46. See SCHWARTZ ET AL., *supra* note 4, at 11, 14.

47. CARNEGIE REPORT, *supra* note 16, at 189.

student when he or she is told how to improve. After all, feedback is an essential element of improving performance.⁴⁸

Two educational theorists and leaders in the formative assessment arena—Paul Black and Dylan Wiliam—concluded that formative assessment produces significant improvement in student learning, compared with the measurement of student learning without formative assessment.⁴⁹ These experts posit that formative assessment is actually a joint process between student and teacher that includes “all those activities undertaken by teachers, and/or by their students, which provide information to be used as feedback to modify the teaching and learning activities in which they are engaged.”⁵⁰ A simple step toward helping students take advantage of additional learning opportunities is explaining why you are offering additional assignments and exercises. Transparency is an important but overlooked tool in teaching.⁵¹ Students in law school are adult learners who are often making significant financial investments. Explain to them the value of formative assessment and extra feedback opportunities and they may be more motivated to participate in a meaningful way. Student motivation is an important component of effective teaching.⁵²

Students may also be more enthusiastic about formative assessment opportunities if they enjoy the experiences. Cognitive science reinforces the notion of a *social brain*—a brain that benefits from social engagement.⁵³ Formative assessment techniques such as student presentations, collaboration, and gamification are all effective ways to leverage the social brain. Specifically, “[t]he data are clear that children learn better when they learn in order to teach someone else than when they learn in order to take a test.”⁵⁴ Another formative assessment technique that harnesses the power of the social brain

48. CARNEGIE REPORT, *supra* note 16, at 171.

49. Paul Black & Dylan Wiliam, *Assessment and Classroom Learning*, 5 ASSESSMENT EDUC.: PRINCIPLES, POL’Y & PRAC. 7, 16-17 (1998); see also Anthony Niedwiecki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students Through More Effective Formative Assessment Techniques*, 40 CAP. U. L. REV. 149, 176 (2012). A review of more than 250 articles and books on formative assessment found significant learning gains linked to the use of formative assessment. *Id.*

50. Black & Wiliam, *supra* note 49, at 7-8; Niedwiecki, *supra* note 49, at 175.

51. See HOWARD KATZ & KEVIN O’NEILL, STRATEGIES AND TECHNIQUES OF LAW TEACHING: A PRIMER FOR NEW (AND NOT SO NEW) PROFESSORS 31 (2009) (stressing the value of being transparent in all aspects of teaching).

52. ELIZABETH F. BARKLEY, STUDENT ENGAGEMENT TECHNIQUES: A HANDBOOK FOR COLLEGE FACULTY 4-7 (2010).

53. See, e.g., Ralph Adolphs, *The Social Brain: Neural Basis of Social Knowledge*, 60 ANN. REV. PSYCHOL. 693 (2009) (analyzing social cognition in humans).

54. Gareth Cook, *Why We are Wired to Connect, Scientist Matthew Lieberman Uncovers the Neuroscience of Human Connections—and the Broad Implications for How We Live Our Lives*, SCI. AM. (Oct. 22, 2013), <https://www.scientificamerican.com/article/why-we-are-wired-to-connect/>. Learning to teach someone else, the author notes, is “prosocial and relies on the social networks of the brain.” *Id.*

is collaboration. Collaborative assessment activities also have a positive effect on student learning.⁵⁵ Students who engaged in collaborative assignments have shown gains in academic achievement, motivation,⁵⁶ and retention.⁵⁷ Students who worked in cooperative groups performed better on tests and were even more willing to ask questions (in class or through office visits) than those who did only individual work.⁵⁸ Hundreds of studies “demonstrat[e] the superiority of cooperative learning groups” when compared with all other teaching methods.⁵⁹

In addition, gamification—testing knowledge and understanding through low-risk “games” in class—exploits the social nature of the human brain. Scientists have noted an increase in norepinephrine, epinephrine, and dopamine in the brain during games.⁶⁰ These chemicals not only create good feelings, they also make us more receptive to learning.⁶¹ Psychologists also describe a state of “flow” that can be induced by games.⁶² *Flow* refers to gratification, immersion in the experience, and a heightened state of creativity and performance.⁶³ Games support a strong learning state by inducing *flow*.⁶⁴ Bringing focused goals, a sense of novelty, competition, and various roles into the classroom through creative formative assessment games can improve student performance and engagement.⁶⁵

Social interaction plays a critical role in learning.⁶⁶ “Students engage in crucial mental activity when they negotiate meaning and seek to synthesize their personal understandings.”⁶⁷ Making formative assessment techniques novel is not only educationally sound, it may be entertaining enough to keep

55. See Clifford S. Zimmerman, “Thinking Beyond My Own Interpretation:” *Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZ. ST. L.J. 957 (1999) (addressing the benefits of collaborative learning in the law school classroom).
56. Kathleen M. Cauley & James H. McMillian, *Formative Assessment Techniques to Support Student Motivation and Achievement*, 83 CLEARING HOUSE: J. EDUC. STRATEGIES, ISSUES AND IDEAS 1, 1 (2010).
57. *Why Use Cooperative Learning?*, STARTING POINT: TEACHING ENTRY LEVEL GEOSCIENCE, <https://serc.carleton.edu/introgeo/cooperative/whyuse.html> (last visited Nov. 2, 2017).
58. *Id.*
59. SCHWARTZ ET AL., *supra* note 4, at 7.
60. Craig Miller, *The Gamification of Education*, 40 DEV. BUS. SIMULATION & EXPERIENTIAL LEARNING 196, 197 (2013).
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 199.
66. SCHWARTZ ET AL., *supra* note 4, at 7.
67. *Id.*

students interested in taking full advantage of all the additional learning opportunities.

C. "I Will Not Be Able to Cover Everything in My Book."

Another common objection to incorporating more formative assessment into the traditional law school classroom is the concern about "opportunity costs in terms of course coverage."⁶⁸ Doctrinal professors are often concerned that multiple formative assessments will impair course coverage.⁶⁹ If time is spent giving and reviewing quizzes, how will the professors ever get through all the material in the book?

The short answer is that professors are not required to "cover" everything in the textbook. More than teaching students the black-letter law—which is dynamic, subject to change, and endless—it is critical to teach students to have mastery and control over their own learning process. Without giving students feedback through formative assessment, professors often teach material that is more complicated without testing their students' readiness to tackle more challenging topics.⁷⁰ Furthermore, law students need multiple opportunities to develop the important lawyering skill of self-regulation. The traditional law school reliance on a single exam—rather than the integration of multiple formative assessment opportunities—undercuts the goal of helping students develop into well-adjusted practicing lawyers.⁷¹ Lawyers need to be experts at self-regulated learning. They are constantly learning new clients, new legal issues, and new law. Professor Anthony Niedwiecki has advanced the idea of formative assessment techniques as a critical means of boosting the metacognitive skills of law students in service of helping them develop as lifelong learners.⁷²

Students who get the benefit of a formative assessment approach are in a better position to monitor learning strengths and weaknesses.⁷³ Niedwiecki asserts that formative assessment facilitates better self-regulated learning when it provides a platform to provide specific feedback and an opportunity to close the gap between student performance and desired learning outcomes.⁷⁴ Most importantly, formative assessment should be a tool for both students

68. Emmeline Paulette Reeves, *Teaching to the Test: The Incorporation of Elements of Bar Exam Preparation in Legal Education*, 64 J. LEGAL EDUC. 645, 651 (2015).

69. *Id.*

70. Ramy, *supra* note 40, at 837.

71. Emily Zimmerman, *An Interdisciplinary Framework for Understanding and Cultivating Law Student Enthusiasm*, 58 DEPAUL L. REV. 851, 881, 896-97 (2009).

72. See Niedwiecki, *supra* note 49, at 152 (advocating a focus on the student learning process rather than a solitary focus on the product); see also Elizabeth M. Bloom, *A Law School Game Changer: (Trans)formative Feedback*, 41 OHIO N.U. L. REV. 227 (2015).

73. See Niedwiecki, *supra* note 49, at 176; see also D. Royce Sadler, *Formative Assessment and the Design of Instructional Systems*, 18 INSTRUCTIONAL SCI. 119, 120-21 (1989).

74. Niedwiecki, *supra* note 49, at 177.

and teachers to make adjustments.⁷⁵ Professors should use information from formative assessment to self-assess their own teaching.⁷⁶ Students should have an opportunity in the formative assessment to conduct self-assessment and reflect on their learning process.⁷⁷ “Integrating self-assessments into the feedback process has proven to help students identify and correct more errors than asking students to self-assess before giving feedback.”⁷⁸ Rather than an overemphasis on course coverage, formative assessments give students the practice they need to become self-regulated learners. Formative assessment also allows professors to better gauge student readiness for more complex material; this knowledge allows professors to make important adjustments in their teaching plan. Though there is certainly essential black-letter law that merits attention, some course coverage can be properly reallocated to time spent on formative assessment tools that better prepare students.

D. “I Refuse to Treat These Law Students Like Babies.”

Some professors also complain that giving law students more opportunities for feedback is essentially “dumbing down” law school material or infantilizing adult learners in law school. However, these criticisms ignore the need to humanize the law school experience and support a community of learners.⁷⁹ Test anxiety—which seriously affects about twenty percent of the school-going population⁸⁰—is fueled by a single high-stakes final exam at the end. And according to one study, about forty percent of law students are suffering from clinical depression by graduation.⁸¹

In addition, the cooperative teaching model employed by many formative assessment techniques creates more accountability in the classroom. More opportunities for practice facilitates ownership in the course.⁸² The integration of more formative assessment is also central to the concept of promoting justice

75. *Id.*

76. *Id.* at 179.

77. *Id.* at 182.

78. *Id.* at 182. Professor Niedwiecki specifically advocates for incorporating portfolios and self-assessment surveys into the course as a significant way to boost metacognitive skills. *Id.* at 184-93.

79. Duhart, *supra* note 32, at 511.

80. See Valerie Strauss, *Test Anxiety: Why It Is Increasing and 3 Ways to Curb It*, WASH. POST (Feb. 10, 2013), <https://www.washingtonpost.com/news/answer-sheet/wp/2013/02/10/test-anxiety-why-it-is-increasing-and-3-ways-to-curb-it/>.

81. Debra Cassens Weiss, *‘You are Not Alone’: Law Prof Who Considered Suicide Tells His Story*, A.B.A. J. (Apr. 8, 2014, 10:50 AM.), http://www.abajournal.com/news/article/you_are_not_alone_law_prof_who_considered_suicide_tells_his_story/. The same study found that before law school, law students were no more depressed than the general population, of which about eight percent report depression. *Id.*

82. Duhart, *supra* note 32, at 510.

in the classroom.⁸³ “The teacher is no longer merely the-one-who-teaches, but one who is himself taught in dialogue with the students, who in turn while being taught also teach. They become jointly responsible for a process in which all grow.”⁸⁴

Despite the numerous benefits of numerous feedback and formative assessment opportunities, there is a real risk of increased assessment without student accountability. Professors should be mindful about not creating an atmosphere of dependency in the classroom.⁸⁵ When the student becomes too dependent on the professor to complete tasks, performance is impaired.⁸⁶ Learned dependence can be especially pernicious when professors are training future lawyers. Even with low-risk formative assessments, professors can thwart dependency and increase accountability by offering completion points on practice assignments and penalizing students who do not successfully complete efforts. Many law professors properly see themselves as gatekeepers to the profession; formative assessment that includes mechanisms for accountability protects the self-sufficiency required by practicing attorneys.

E. “This Is Not the Way I Learned.”

A final concern about formative assessment in law school is rooted in the ways the techniques depart from the ways most law professors learned. Law professors wading into the new world of formative assessments should be mindful not to import biases cemented by their own experiences in law school and decades of reliance on the Langdellian model.⁸⁷ Most law professors are not trained in learning theory and pedagogy.⁸⁸ Rather, they have learned to teach law through the “apprenticeship of observation.”⁸⁹ The term captures the reality that law professors generally approach teaching influenced by the thousands of hours spent as students.⁹⁰ Their own experiences as law students effectively serve as de facto “apprenticeships” that make it hard for professors

83. See generally SpearIt, *Priorities of Pedagogy: Classroom Justice in the Law School Setting*, 48 CAL. W. L. REV. 467 (2012).

84. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 67 (Myra Bergman Ramos trans., 1970).

85. Niedwiecki, *supra* note 49, at 180.

86. See Mantz Yorke, *Formative Assessment in Higher Education: Moves Towards Theory and the Enhancement of Pedagogic Practice*, 45 HIGHER EDUC. 477, 489 (2003).

87. The Langdellian tradition—dating back to the late 1800s at Harvard Law School—is marked by the case method and a high-stakes end-of-term final exam. Lasso, *supra* note 3, at 79-801. The teaching and testing format is attributed to Dean Christopher Columbus Langdell, the former dean of Harvard Law School. *Id.*

88. Olympia Duhart, *Improving Legal and Latino Education: Cluster Instruction—Education and Pedagogy—On Identity and Instruction*, 48 CAL. W. L. REV. 453, 458 n.23 (2012).

89. David M. Moss, *Legal Education at the Crossroads in REFORMING LEGAL EDUCATION: LAW SCHOOLS AT THE CROSSROADS* 1,4 (David M. Moss & Debra Moss Curtis eds., 2012) (citing DAN C. LORTIE, *SCHOOLTEACHER: A SOCIOLOGICAL STUDY* (1975)).

90. *Id.*

to change their perception of how a law student should be taught and assessed.⁹¹ One truism is especially relevant in this arena: “One of the most difficult aspects of change is not learning new skills, but unlearning old ways of being.”⁹² Many law professors have a difficult time imagining a different law school experience.

But the modern law student demands a new approach. The need to give students multiple low-risk opportunities to fail and get feedback is especially critical as we deal with today’s law students. The good news is that millennials are experiential and exploratory learners.⁹³ However, they also have some limitations. Millennials were raised at the height of the self-esteem movement, which has insulated them from the fear of failure and given many of them overconfidence.⁹⁴ Experts have characterized today’s students as being both academically underprepared and having an overinflated view of their abilities.⁹⁵ Further, students—who are experienced with formative assessment and active teaching methods in both grade school and college—expect more from their law school instructors. Millennials prefer interactive learning opportunities, regular assessments, and immediate feedback.⁹⁶ Law students are aware of the limitations of limited feedback throughout the semester; they have expressed dissatisfaction with the lack of meaningful feedback provided by their professors.⁹⁷ Based on their own experiences, today’s students expect more opportunities for formative assessment. And they need it.

Conclusion

Indeed, concerns about expanding the use of formative assessment in law school are legitimate. However, professors can properly address most of these concerns with an intentional approach to instruction. In addition, there are practical institutional shifts law schools can implement to encourage the use of more formative assessment in the law school classroom.

The benefits of formative assessment are supported by cognitive science, learning theory, legal education experts, and common sense. An exhaustive review of the literature on formative assessment in various schools settings has shown that it consistently improves academic performance.⁹⁸ And

91. Duhart, *supra* note 32, at 496; *see also* Moss, *supra* note 89, at 4.

92. *See* NANCY CAMERON, *COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE* 89 (2d ed. 2014).

93. Amy Novotney, *Engaging the Millennial Learner*, AM. PSYCHOL. ASS’N: MONITOR ON PSYCHOL. (Mar. 2010), <http://www.apa.org/monitor/2010/03/undergraduates.aspx>.

94. Renee Nicole Allen & Alicia R. Jackson, *Contemporary Teaching Strategies: Effectively Engaging Millennials Across the Curriculum*, 95 U. DET. MERCY L. REV. (forthcoming Winter 2018) (manuscript at 2-3) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2985145).

95. 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).

96. Bloom, *supra* note 72, at 230.

97. CARNEGIE REPORT, *supra* note 16, at 165.

98. Valerie J. Shute, *Focus on Formative Feedback*, 78 REV. EDUC. RES. 153 (2008) (offering an extensive

before “formative assessment” was coined as a term of art, the importance of practice, repetition, and feedback was known for more than two thousand years.⁹⁹ Furthermore, the modern law student, who expects more feedback from instructors and is often in need of more opportunity to receive feedback, requires more robust formative assessment in today’s law school classroom. Finally, the ABA standard on formative assessment will no doubt push more law professors to employ this practice.

Yet many professors have strong reservations about offering more formative assessment in their own classrooms. Professors raise several legitimate concerns about the expansion of formative assessment across the law school curriculum. These complaints include concerns about time investment, students not taking advantage of the additional opportunities, course coverage, the risk of infantilizing students and an unfamiliar departure from the law school classroom they experienced.

A better understanding about how to deal with some of the challenges of formative assessment can elevate the perception of formative assessment and make it easier for professors to embrace the practice. With some thought and planning, law professors can successfully implement formative assessment in ways that are both efficient and effective. The new interest around formative assessment in law school will help good teachers become better. As Roy Stuckey wrote in the foreword to *Building on Best Practices*: “Law teachers are very bright people and most have good intentions. They want to be known as good teachers, and they want their students to become effective, ethical, and responsible members of the legal profession.”¹⁰⁰ The best driving instructors want their students to learn how to drive. And they recognize that their students need to practice behind the wheel.

review of literature that demonstrates the positive learning effects of formative feedback).

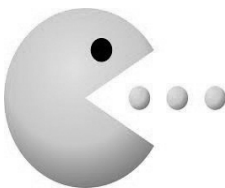


99. Ramy, *supra* note 40, at 837.

100. Roy Stuckey, *Foreword to BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD* at xi, xii (Deborah Maranville et al. eds., 2015).

Appendix A¹⁰¹**Constitutional Law**

Image Bank Association Review

In the space provided, write the constitutional law principle triggered by the image presented. Consider the powers and limits we have reviewed in class.

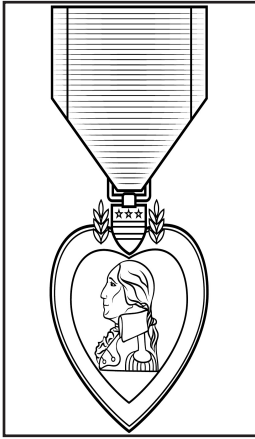
| | |
|---|--|
|  | |
|  | |
|  | |

101. This is an ungraded assignment for Constitutional Law, it is a simple formative assessment that the students can complete individually in about five minutes. The professor can then spend another five minutes reviewing the answers. The “answers” are: Pacman: Judicial Review as a power grab; crying baby: Capable of Repetition Yet Evading Review (“CRYER”) as an exception to mootness; and an umbrella as a way to consider justiciability limits that fit under the same “umbrella.” These would include standing, mootness, ripeness, political questions, and advisory opinions.

Appendix B¹⁰²

Constitutional Law II

Stolen Valor Opinion



Congratulations! You have just been appointed (and confirmed) to the Supreme Court of the United States. As one of your first official duties, you must draft an opinion to *United States v. Alvarez*. Given your understanding of content-based restrictions, please draft an opinion that includes references to the relevant portions of the Constitution, the rule you would apply, and at least one case covered in class. (Do not refer back to *Alvarez* here.)

You must use Times New Roman 12-point font, and the opinion should be double-spaced. A one-inch margin is required on all sides. The assignment cannot exceed two pages. You are not required to Bluebook. Please state your name at the start of the opinion. Good news: You may write a concurring or dissenting opinion. Indicate the position you are advancing. Base your opinion on sound legal analysis and precedent. Also, include at least one public policy argument. Please underline your policy argument.

This assignment must be completed alone; no collaboration is permitted. It is due to my faculty inbox no later than Tuesday, Oct. 14, 2017, at 5 p.m. Late work will be subject to sanctions. Failure to complete this assignment will result in a five-point reduction in your final exam grade.

102. This assignment, used in Constitutional Law II, is completed outside of class and returned with feedback and a rubric. I also spend about twenty minutes reviewing common mistakes in a follow-up class about a week later. Because it is not graded, I can limit my individual comments to the rubric, which makes the feedback delivery much more efficient. Teaching assistants can also be used to help review the papers quickly. I also post a student-written “model” answer after the feedback session.

Appendix C¹⁰³**Constitutional Law****Commerce Clause Grading Rubric**

Name: _____

Format requirements

- Did student adhere to two-page limit?
- Did student use Times New Roman?
- Did student double-space throughout?
- Did student leave a one-inch margin on all sides?

Issue

- Did student properly frame the issue before the court?
- Was it clear that the opinion was dissenting/concurring or both?

RulePower

- Was the relevant rule used?
- Did student cite the relevant portion of the Constitution?
- Did student cite the Lopez test?
- Did student give a complete statement of the rule?
- Was the rule amplified through the inclusion of subparts for the substantial effects test?
- Did student make distinction between plenary power for I/C and rational basis standard for substantial effects?

Limit

- Did the student refer to the prohibition under the 10th against Congress reaching completely internal, noneconomic activities?

Application

- Did the student apply the facts in the Gonzales case to the Commerce Clause rule?
- Did the student initially dispose of medical use of marijuana as NOT implicating channels or instruments of interstate commerce?
- Did the student walk through the substantial effects test?
- Did the student address legislative findings?
- Did the student address jurisdictional element?
- Did the student address substantial economic effect?
- Did student indicate that subfactors were not dispositive?
- Was application well-reasoned and sophisticated?
- Did student avoid making conclusory statements?

103. This is an example of a rubric used to evaluate practice IRACs that are assessed for a few points. No grade is attached to the assignment; rather, students are given points toward the final for a “good faith” completion. Students who do not complete the assignment lose points on their final grade for the course. Rubrics require great time to develop initially, but are essential to making formative assessment more efficient for busy professors reading papers. When they are very detailed—such as the rubric presented here—they can also be used by teaching assistants. Professors can also post these rubrics to help students with peer edits or self-edits. Feedback specificity is a hallmark of effective formative assessment.

- Did the student raise counterarguments? (“On the other hand ...”)

Conclusion

- Did student clearly indicate where he or she landed in conclusion?

Writing guidelines

- Did student effectively employ any text or policy arguments?
- Did student cite at least two Commerce Clause cases discussed in class?
- Was writing grammatically correct?
- Did writing flow smoothly?
- Were transitions used as needed?
- Did submission make sense without a “live interpretation?”

Initials of Teaching Assistant: _____¹⁰⁴

104. When teaching assistants (“TAs”) are used to evaluate practice IRACs with this rubric, they should identify themselves; this improves accountability and shows that I have confidence in my TAs. My TAs are also available to meet with students to review their practice IRACs. It is essential to “calibrate” the TA feedback by reviewing the comments on the first few papers with them. We talk about gaps and make appropriate adjustments.

Appendix D¹⁰⁵**Constitutional Law**

School Desegregation PPT Competition



Based on your understanding of the Little Rock Nine and *Cooper v. Aaron*, please work with a team (three or four people) to create a PowerPoint slideshow highlighting the events. Also identify at least two constitutional law issues raised by the events. You are encouraged to use images, text from the relevant case law or constitutional provisions, and your imagination.

The top three slideshow presentations will be posted on my faculty web page. I will also choose material from the top slideshow to include on the final exam. This assignment is due at the end of the class. Make sure your slideshow presentation includes at least one slide that features the names of all your team members.

While you are not required to include text on all slides, a slideshow presentation made up exclusively of images will not be acceptable. Minimum number of slides: six, including the team members' names. Winners will receive an awesome prize.

105. This assignment, suggested to me by Professor William Araiza, is used in constitutional law. This is an example of a “game” or contest students can complete in a group. I devote about twenty minutes of class time to allow students to compete. In addition to “publishing” winners on my classroom platform, I also give winners an “awesome prize”—usually a free pocket Constitution.

Appendix E¹⁰⁶

**Umbrella Rubric
LRW Winter 2017**

**Class Mish Mash
Prof. Duhart**

Instructions for reviewing your Big Umbrella: Self-Edit Sheet



1. Read through the written piece once without making any markings on the paper. Do the sentences logically flow into one another? Do you notice any “jumps” in logic that the writer does not clearly explain? Based on your initial observations, respond to the prompts in the comment section on the last page of this handout.

2. Now return to the beginning of the Big Umbrella. Circle the prayer for relief. Circle any grammatical errors. Make any other notes on the paper you believe are warranted.

3. Finally, fill out the chart below. Make any needed adjustments.

General Guidelines

| | Good | OK | Needs Work |
|---|-------------|-----------|-------------------|
| Does it start with a prayer for relief (granting the amended motion for a new trial)? | | | |
| Does the umbrella “begin big” by framing the issues broadly first, then going down into more compact units? | | | |
| Is the general rule for a motion for a new trial stated? | | | |
| Does the first paragraph discuss the constitutional guarantees and limitations? | | | |
| Does the first paragraph frame any underlying policy concerns? | | | |
| Does it use case law as precedent to demonstrate the application of the procedural standard and to transition from the procedural standard to the substantive rule? | | | |

106. This assignment, used in Legal Research in Writing, supports a self-edit on a discrete part of a memo draft. This rubric is tailored to the particular problem tackled in class. Rubrics should be as specific as possible, and give novice editors explicit directions on how to evaluate work product. The self-assessment of a draft helps students understand the value of formative assessment. Professors can collect the self-assessments to get a snapshot of student performance and identify areas of concern before the final product comes in. This self-review of an umbrella can be completed in class as the professor plays the song “Umbrella” to make the experience less stressful.

| | Good | OK | Needs Works |
|--|-------------|-----------|--------------------|
| Does this case explain how a motion for a new trial worked in the Fourth Circuit (providing a microbrief with motion granted in favor of defendant)? | | | |
| Does the next paragraph start with a general statement of the substantive rule (pro se representation and ineffective assistance of counsel)? | | | |
| Does it <i>persuasively</i> identify the issues in the order in which they will be addressed? Self-representation (timeliness and balancing interests) and ineffective assistance (deficient performance and prejudice)? | | | |
| Does it conclude by restating major point heading and referencing the instant case? | | | |
| Does it espouse a policy argument about constitutionally protected right to counsel and the correlative inference of the right of self-representation, and/or any other societal goals? | | | |
| Does the umbrella cite when necessary? | | | |
| Are the rule citations in proper order, starting with the strongest? | | | |

Big Umbrella Comments:

Any questions or concerns after reading the Big Umbrella?

How would you improve this Big Umbrella?

What did you think was most effective about this Big Umbrella?
