

# Rescuing Pluto from the Cold: Creating an Assessment-Centered Legal Education

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“Law is a way of reimagining the real.”<sup>1</sup>—cultural anthropologist Clifford Geertz

## I. Introduction

In geospatial terms, assessment long has been situated as a cold and distant outsider in the galaxy of legal education, the functional equivalent of the dwarf planet Pluto. It lies far away from comfortable insider components, such as classes, the coverage of substantive law, and even “thinking like a lawyer.” Assessment functions as an outsider because it is used primarily as a sorting device, not as a salient component of learning. For professors, the awkward relationship with assessment has been encapsulated in a long-existing mantra describing the law professor’s job: “Teach for free, but get paid to grade.”<sup>2</sup>

Should assessment remain a distant outsider? Recently, the ABA made the strongest institutional clarion call yet to reel in assessment from the cold nether regions of legal education, through both Standard 302,<sup>3</sup> which demands fealty to learning outcomes, and Standard 314, requiring formative assessment and meaningful feedback.<sup>4</sup> Despite the standards, considerable obstacles to a functional assessment-centered environment remain; few if any incentives exist to add more assessments, especially since any faculty time and

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1. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* 14 (1983). The same can be said about law school, a proxy for lawyering and mental competency training.
2. Gregory W. Bowman, *Making it Count, One Day at a Time*, *W. VA LAW.* 12, 12 (2015).
3. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016-2017, Standard 302 at 15 (AM. BAR ASS’N 2016), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure_authcheckdam.pdf) [hereinafter ABA STANDARDS].
4. *Id.* Standard 314 at 23.

effort committed to it do not increase a teacher's position, salary, or perception of teaching quality. Also, assessments remain difficult and time-consuming to create—or at least to create well—cumbersome to provide, and when provided, often are untethered from prompt feedback.

External variables, however, have impacted legal education. These variables, such as the diminishing job market and dissipation of an implicit partnership with the legal profession, which served for decades as an unofficial finishing school for law school graduates, have ratcheted up the pressure on both the value and efficacy of the educational process. The pressures, especially those created by the economic downturn of 2008 and the diminished number of applicants and jobs, have led to increased scrutiny about the product of legal education and what graduates are trained to do, from both skills and performance perspectives.<sup>5</sup> “Think[ing] like a lawyer” no longer suffices as the sole product; graduates must be able to perform and act like lawyers as well.<sup>6</sup> In other words, the contextual variables are ripe for changing assessment's outsider status and the conspicuous lack of robust feedback.

If the role of assessment is reframed as a “smart” device with multiple functions—to engage, identify, monitor, and track progress in student learning, for example—it will be easier to incorporate and blend into the learning process in an incremental fashion, making it an insider and more valuable for students and teachers alike. Further, if an assessment-centered learning environment is adopted, it will merely reflect the ever-expanding culture of performance tracking—which now ranges from Fitbits to competitive cooking shows.

This article makes the case for an assessment-centered legal education, arguing that when reframed, legal education can become assessment-centric without losing its core learning environment: knowledge. The article shows how assessment can become a central ingredient of the educational process through the use of design thinking and high-impact practice frameworks. The paper concludes with illustrations of blended and efficient assessments.

## II. Background

### *A. Defining Assessment*

Assessment has several meanings within the educational context,<sup>7</sup> including evaluation, tracking, and observation. At least for the purposes of this paper,

5. See TONY WAGNER, *THE GLOBAL ACHIEVEMENT GAP xxii-xxviii* (2008) (discussing how even America's best schools leave out important skills, such as creativity, effective communication, and critical thinking); David Segal, *Is Law School a Losing Game?*, N.Y. TIMES (Jan. 8, 2011), <http://www.nytimes.com/2011/01/09/business/oglaw.html>. (“[A] generation of J.D.'s face the grimmest job market in decades.”).
6. Lee S. Shulman, *Signature Pedagogies in the Professions*, 134 *DAEDALUS* 52 (2005) (suggesting that graduate education is designed to help graduates think, act, and perform with integrity within the profession).
7. Two commentators defined it as follows: “[a]ssessment is the systematic collection, review, and use of information about educational programs undertaken for the purpose of

assessment is intended to have a broad interpretation, enhancing observation, monitoring, and reflection about some performance or activity, as well as graded evaluation.<sup>8</sup> In one sense, assessment occurs when judging the quality of something.<sup>9</sup> It occurs at differing times: diagnostically, at the beginning; formatively, while in progress; and summatively, at the end.<sup>10</sup> Regardless of the type used, assessment creates an opportunity for an important educational improvement tool: feedback.

Competent assessments are based on multiple principles. Commentators have listed seven principles for quality assessments: learner-centered, teacher-directed, mutually beneficial, formative, context-specific, ongoing, and rooted in good teaching practice.<sup>11</sup>

### 1. Assessment as Evaluation

Evaluation in education is primarily used to measure mental abilities.<sup>12</sup> Evaluation includes a normative component involving comparison and judgment, and, at least in legal education, generally is graded.

Evaluations often are proxies for identifying basic skill or competency levels, including substantive knowledge acquisition, processes, skills, and values.<sup>13</sup> The goals in measuring evaluations include: creating a hierarchical ranking through a sorting of performances; revealing the quantity and quality of previous learning; comparing performance over sections, classes, schools, or even years; and encouraging improvement in learning.<sup>14</sup>

The legitimacy of evaluative assessment is predicated on three basic criteria: validity, reliability, and efficiency. The first criterion, validity, refers to the

improving student learning and development.” TRUDY W. BANTA & CATHERINE A. PALOMBA, *ASSESSMENT ESSENTIALS: PLANNING, IMPLEMENTING, AND IMPROVING ASSESSMENT IN HIGHER EDUCATION 1-2* (2d ed. 2015).

8. This means that ungraded experiences generating reflection, for example, count as assessment protocols.
9. *Assessment*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/assessment> (last visited Oct. 25, 2017).
10. The most common form of assessment in legal education has been summative. Traditionally, the only evaluation in a law school course was the final examination.
11. THOMAS A. ANGELO & K. PATRICIA CROSS, *CLASSROOM ASSESSMENT TECHNIQUES: A HANDBOOK FOR COLLEGE TEACHERS 7-11* (2d ed. 1993).
12. Evaluation has its own domain of study, psychometrics, the science of measuring mental processes and abilities.
13. In law school, the tests are often used as proxy measures of knowledge, analysis, the ability to transfer knowledge under time pressure, writing skills, and more.
14. See, e.g., Stacy L. Brustin & David F. Chavkin, *Testing the Grades: Evaluating Grading Models in Clinical Legal Education*, 3 *CLINICAL L. REV.* 299, 306 (1997) (suggesting that “the sole valid purpose of any grading system should be to encourage maximum educational achievement and learning on the part of students.”).

evaluation testing what it purports to measure.<sup>15</sup> In a law school course, a test is valid if it measures what the professor wanted students to learn in the course.<sup>16</sup>

The second criterion, reliability, requires a test be consistently measured—from one item to another item on the same evaluation, and from one respondent to the next.<sup>17</sup> In effect, reliability is like equal protection—similar exams should be scored similarly.<sup>18</sup>

Efficiency often is equated with fairness, meaning that the test is “workable.”<sup>19</sup> If an exam continued for fourteen hours nonstop, for example, it probably would begin measuring stamina instead of knowledge or application, and would be unfair.<sup>20</sup>

## 2. Assessment as a Multifunctional “Smart” Device

While assessment often is graded within a formal setting, such as a final examination, it also can serve observational, monitoring, and improvement functions.<sup>21</sup> In these contexts, it does not yield normative or comparative judgments among students or classes, but is rather concerned with the performance of individual actors instead. This can be seen when athletes videotape their performances to observe what exactly they are doing when skiing, swimming, running, swinging an object, etc.<sup>22</sup> This type of assessment is generally diagnostic in function, can be executed by the subject of the assessment, and can be performed informally, without grades or evaluation.

15. Tests can have low, medium or high validity. *See, e.g.*, RICHARD LINDEMAN & PETER MERENDA, EDUCATIONAL MEASUREMENT 74 (2d ed. 1979). For example, a thermometer should be used to measure temperature, not speed.
16. The larger the number of items on a topic, and the greater the variety of test questions, the more likely the test will validly evaluate the taker’s competency concerning the skills, knowledge, or application of the knowledge it is designed to measure.
17. Test scoring reliability factors include: (1) the number of positive relationships among items; (2) the number of test items (the more the better); and (3) the homogeneity of the test items (the more homogeneous, the greater the reliability).
18. Reliability errors often arise in certain types of situations, including: (1) Weighting errors; (2) linkage problems, in which one issue is linked to another; and (3) Spread in scores (distribution). If a test is unreliable, it is likely invalid as well.
19. This is a practical consideration of economy, not one of theoretical psychometrics.
20. Similarly, a test that references places or cultures with which the takers are unfamiliar also would yield skewed results and be unfair. As with the reliability criterion, an inefficient test may also be invalid.
21. These other functions illustrate the versatility of assessment. Also, if assessment is cabined within a grading framework, its true utility will be marginalized.
22. Erica R. Hendry, *How Technology is Changing the Way Athletes Train*, SMITHSONIAN.COM (Feb. 10, 2014), <http://www.smithsonianmag.com/innovation/how-technology-is-changing-the-way-athletes-train-180949633/>.

*B. The Relationship Among Teaching, Learning, and Assessment*

Teaching and learning remain the core elements of law school. While it is easy to slip into conflating the two as a single entity, they are generally separate activities. Just because teaching is taking place does not mean learning is occurring as well. The role of assessment can be embedded in both contexts, however. As revealed in a major study of undergraduate education reported by Bransford, Brown, and Cocking, understanding student learning should inform the teaching that occurs.<sup>23</sup> Several significant findings of that study show how assessment is essential to effective education.<sup>24</sup>

The first significant finding indicates that students are not equal “blank slates,” but build their knowledge based on prior learning experiences.<sup>25</sup> The prior experiences can help or hinder learning.<sup>26</sup> As stated in the study: “Students come to the classroom with preconceptions about how the world works. If their initial understanding is not engaged, they may fail to grasp the new concepts and information that are taught, or they may learn them for purposes of a test but revert to their preconceptions outside the classroom.”<sup>27</sup> This idea is applicable to legal education, where students do not have a homogeneous educational experience on the university level, but rather a plethora of majors and paths of study.

A second important finding of the study involves competencies. The study indicates that for a student to become competent in an area,<sup>28</sup> students must: “(a) have a deep foundation of factual knowledge, (b) understand facts and ideas in the context of a conceptual framework, and (c) organize knowledge in ways that facilitate retrieval and application.”<sup>29</sup>

A third major finding directly involves how teaching and learning relate to each other.<sup>30</sup> Far from the teacher simply serving as a conduit of expertise, a guidance function would greatly assist students as well: “A ‘metacognitive’ approach to instruction, for example, can help students learn to take control of their own learning by defining learning goals and monitoring their progress in achieving them.”<sup>31</sup> This understanding views assessment as a part of the learning calculus, and shows how monitoring can precede evaluation and

23. HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE AND SCHOOL 14-16 (John D. Bransford, Ann L. Brown & Rodney R. Cocking eds., 2000).

24. *Id.* at 15.

25. *Id.* at 15.

26. *Id.* See also, SUSAN A. AMBROSE, MICHAEL W. BRIDGES, MARSHA C. LOVETT, MICHELE DIPETRO & MARIE K. NORMAN, HOW LEARNING WORKS: SEVEN RESEARCH-BASED PRINCIPLES FOR SMART TEACHING 4 (2010).

27. HOW PEOPLE LEARN, *supra* note 23, at 14-15.

28. *Id.* Legal education also yields multidimensional definitions of competencies.

29. *Id.* at 16.

30. *Id.* at 18.

31. *Id.*

focus on how students organize the material, since “[h]ow students organize knowledge influences how they learn and apply what they know.”<sup>32</sup>

The authors in other research concurred, finding that “[g]oal-directed practice coupled with targeted feedback enhances the quality of students’ learning.”<sup>33</sup> Of course, the students’ motivation matters as well, and “[s]tudents’ motivation determines, directs, and sustains what they do to learn.”<sup>34</sup>

These findings all lead to a basic premise: Teachers create learning environments and cannot force students to learn. One way to judge teachers, then, is by the learning environments they create, including the assessment environment.

### C. Learning Environments Generally

If teachers can only create learning environments, learning essentially becomes a collaborative activity between teacher and student, including the accumulation, storage, retrieval, and application of knowledge. Learning is not simply the feeding of information by professors to students. “Today, students need to understand the current state of their knowledge and to build on it, improve it, and make decisions in the face of uncertainty...”<sup>35</sup> The definition of knowledge is temporal, including both the “records” of prior learning and a present “engagement in active processes as represented by the phrase ‘to do.’”<sup>36</sup> Accordingly, a learning environment combines teacher guidance and information; student motivation and prior knowledge combine to dictate whether learning occurs, and how.<sup>37</sup>

#### 1. Major Types of Learning Environments:

##### Knowledge-Centered; Learner-Centered; and Assessment-Centered

A knowledge-centered environment has several characteristics. It helps students develop understanding about subjects that lead to the transfer of that knowledge to novel situations and facts.<sup>38</sup> Thus, the environment provides context for understanding and not mere superficial learning. A learner-centered environment focuses on what attitudes, knowledge, skills, and beliefs the learners bring to a class and rely on in adding new knowledge,

32. AMBROSE ET AL., *supra* note 26, at 4.

33. *Id.* at 5.

34. *Id.*

35. HOW PEOPLE LEARN, *supra* note 23, at 132.

36. *Id.* Examples given include doing mathematics by solving problems as well as abstracting, inventing, and proving. Doing history, by contrast, involves constructing and evaluating historical documents.

37. Prior student knowledge makes a difference, because students build on what they know.

38. HOW PEOPLE LEARN, *supra* note 23, at 136.

and how those learners progress.<sup>39</sup> Finally, there is the assessment-centered environment, which includes diagnostic and formative assessments, as well as summative ones. The centering of assessment uses it as a core component of the learning process, both inside and outside of the classroom. This environment often revolves around problem-based learning.<sup>40</sup> Constructive and prompt feedback is an essential part of assessment, and is utilized in different fashions by teachers who create the assessment-centered environment.

### III. The Problem: Assessment as a Geospatial Outsider

The problem of reeling in assessment from a disconnected and distant place in the legal education firmament is readily understood when it is seen how difficult it is to reframe deeply entrenched positions within the dominant structure. Insider efforts to reorder the outsider/insider dichotomy have been slow to take hold.<sup>41</sup> As one commentator has noted, “Law schools, like most established enterprises, change only when they have to.”<sup>42</sup> In effect, the long-standing insularity and power distribution in legal education that make assessment an outsider make it equally difficult to change the status quo.<sup>43</sup>

Outside pressures sometimes have more success in creating change. With the 2008 recession, the typical reliance on practicing attorneys to provide training for new lawyers has become a diminishing option, placing more pressure on the quality of the basic education and the learning that occurs during school years. As one commentator stated: “[I]t is harder for law firms to devote nonbillable time to training entry-level associates. Law graduates are expected to arrive knowing more than just how to ‘think like a lawyer.’”<sup>44</sup> But even in this challenging period, legal education has been slow to adapt.

39. There is also a community-centered environment that looks at the learners as an interactive classroom community, the school as a community, and the larger geographic area as another community.
40. According to commentators, “[p]roblem-based learning (PBL) represents a major development in higher education practice that continues to have a large impact across subjects and disciplines around the world.” David Gijbels, Filip Dochy, Piet Van den Bossche & Mien Segers, *Effects of Problem-Based Learning: A Meta-Analysis from the Angle of Assessment*, 75 REV. EDUC. RES. 27, 27 (2005).
41. The Carnegie Report decried the unduly narrow context of traditional legal education, recognizing the importance of critical legal analysis, but not to the exclusion or minimization of other valuable contexts. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).
42. Victor Fleischer, *The Shift Toward Law School Specialization*, N.Y. TIMES (Oct. 25, 2012, 12:22 PM), [https://dealbook.nytimes.com/2012/10/25/the-shift-toward-law-school-specialization/?\\_r=0](https://dealbook.nytimes.com/2012/10/25/the-shift-toward-law-school-specialization/?_r=0).
43. Blending and elevating assessment likely would yield a Kulturkampf. This German word means “culture struggle.” See, e.g., Scalia, J., dissent, *Romer v. Evans*, 517 U.S. 620, 636 (1996) (“The Court has mistaken a Kulturkampf for a fit of spite.”). It would radically alter the existing landscape.
44. Fleischer, *supra* note 42.

The ABA Standards 302 and 314 certainly alter the role of assessment in legal education, from syllabi with stated outcomes to conversations and conferences dedicated to implementing the standard.<sup>45</sup> Their focus on learning outcomes and formative assessment can be seen as a clear attempt to move assessment into a closer orbit, but real change is slow. While the standards have certainly agitated the traditional settings, they have not appeared to create the potential revolution some thought might occur.

#### A. *The Entrenched Outsider/Insider Orthodoxy*

In the well-entrenched traditional insider/outsider framework, the law school classroom is the primary locus for learning.<sup>46</sup> Within the classroom's walls, coverage of cases usually occurs from casebooks in a dialogical fashion, often through the signature pedagogy loosely labeled the "Socratic Method."<sup>47</sup> The spotlight in class is on the professor—the orchestra conductor of the class, and not the "musician" students or their learning<sup>48</sup>—and certainly not assessment of that learning.

The outsiders in legal education are equally entrenched and geospatial. What students do outside of class in their preparations is unknown, yet assumed. How students read for class, what resources they use, and how much they think and process the material are variables that generally remain undetected, particularly if a student seldom participates in the classroom discussions.

The traditional, but still outsider, pillar of assessment has been one lengthy final examination after the classroom learning has concluded. It is formulated at the individual professor's discretion, without any quality control

45. ABA STANDARDS, *supra* note 3, Standard 302, at 15 & Standard 314, at 23.

46. Due in part to the Internet and its instant access to activities around the globe, as well as other technologies, the lines between legal education insiders and outsiders have blurred somewhat in recent years. The classroom has become more portable, with learning exported far away from the physical walls of the classroom. Jeffrey A. Van Detta, *The Law School of the Future: How the Synergies of Convergence Will Transform the Very Notion of "Law Schools" During the 21<sup>st</sup> Century from "Places" to "Platforms"*, 37 U. LA VERNE L. REV. 103 (2015). For example, studying need not occur near reference books anymore, affecting library usage. Conversely, the live "face-to-face" class is not the sole insider anymore, sometimes transforming into "face-to-laptop" times instead, accompanied by laptop distractions and multi-tasking. Carrie B. Fried, *In-class Laptop Use and its Effects on Student Learning*, 50 COMPUTERS & EDUC. 906 (2008).

47. Its roots run deep, tracing back to Christopher Columbus Langdell's compilation of a Contracts casebook in 1871. C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871).

48. No specific and measurable deliverables often are required during the classroom phase of a course other than to be generally prepared to discuss the readings. No advance criteria or structure of the discussion are usually offered; the students learn about the direction of the discussion when they engage in it.



or standardization.<sup>49</sup> The form and scoring of the evaluation also are left to the complete discretion of the professor.<sup>50</sup>

### *B. What Makes Assessment an Outsider?*

Assessment remains the ultimate outsider for multiple reasons, despite its educational value. In a nutshell, enhanced assessment arguably impedes the coverage of substantive law; does not support perceived improvement of the teacher or the quality of an institution's legal education under the current ranking system;<sup>51</sup> is difficult to create, especially without training;<sup>52</sup> has few incentives for teachers to spend time and effort on it;<sup>53</sup> and is used in legal education primarily as a sorter,<sup>54</sup> with some assistance from enforced or aspirational curves.<sup>55</sup> Consequently, few resources have been devoted to assessment institutionally,<sup>56</sup> perpetuating its outsider position. Another significant impediment is politics—the perception that advancing assessment is a tool used by administrators and others to hold faculty members more accountable for their results.<sup>57</sup>

Perhaps the most immediate objection to a more centralized assessment is that there is no room at the main table for it. Coverage of substantive law has

49. It generally contained lengthy issue spotter essays, filled with facts and details, and answered under time pressure, often without the opportunity to refer to resources, such as class notes.
50. The professor's discretion in evaluating student performance can be limited by an arbitrary grading curve imposed by the particular institution, guiding grades whether 'deserved' or not.
51. The primary reference for a school's ranking is issued by the magazine U.S. NEWS & WORLD REPORT.
52. Pat Hutchings, *Opening Doors to Faculty Involvement in Assessment* (NILOA, Occasional Paper No. 4, April 2010), <http://www.learningoutcomeassessment.org/documents/PatHutchings.pdf>.
53. Doug Lederman, *The Faculty Role in Assessment*, INSIDE HIGHER ED (May 28, 2010), <https://www.insidehighered.com/news/2010/05/28/assess>.
54. Roy Stuckey, *Can We Assess What We Purport to Teach in Clinical Law Courses?*, 9 INT. J. CLINICAL LEGAL ED. 9 (2006).
55. In traditional legal education, assessment effectively has a low profile, satisfying the old adage "out of sight, out of mind."
56. These observations have been reflected by commentators seeking change since well before the recent seismic tremors were felt in legal education. For example: Daniel Keating, *Ten Myths About Law School Grading*, 76 WASH. U. L.Q. 171 (1998) (describing student and faculty-held myths about law school grading); Philip Kissam, *Law School Examinations*, 42 VAND. L. REV. 433 (1989) (advocating modifying the traditional "blue book" essay exam approach). Further, legal educators often work alone, in veritable "silos," perpetuating marginal assessments that have not been peer-reviewed or subject to a reasoned articulation justifying the use of assessments—which often occurs with scholarship reviews. Instead, teachers are left to replicate evaluations based on their own experiences in law school—and to maintain those exams throughout the arc of their careers.
57. HUTCHINGS, *supra* note 52. "Assessment was seen first and foremost as an educational practice" years ago, but has been advanced by outsiders such as politicians to hold educators accountable for outcomes. *Id.* at 8.

provided a common and unitary framework for legal education for more than a century.<sup>58</sup> Using class time for assessment can be viewed as adversely affecting the coverage of material,<sup>59</sup> a major objective in a knowledge-centered learning environment.<sup>60</sup> Creating quality assessments also requires faculty time, which is a true commodity for many law teachers.<sup>61</sup>

Other arguments proliferate. Assessment's typical function as a sorter, not a learning catalyst, fails to promote investment in time or resources.<sup>62</sup> Allocating resources and time on assessment is not encouraged by the systemic design<sup>63</sup> or dominant culture of a professional law faculty, which is a part of two worlds, academia and professional training. Professors who spend extra time and effort on assessment as professional training do not get increased pay, status, position, or any kind of benefit.<sup>64</sup> Instead, the time spent is seen as taking time away from other more productive endeavors in the academic world, such as scholarship.<sup>65</sup>

The professors who create the assessments also generally have no systematic preparation in how to assess effectively.<sup>66</sup> Law professors are not offered a thorough course in evaluation—what the foundational elements are, how to implement them, and how to do so efficiently.

Even if teachers were trained in the foundational elements of examinations, creating quality assessments is difficult. While law teachers might think they are creating masterpieces with strange or funny names, the students who

58. Students learn about the rule of law, and the tests that dictate whether the rules are violated, mostly through appellate cases and hypotheticals.
59. The knowledge canvas stretches over the casebooks serving as course materials, the syllabi drawn up by professors, and the way classes are divided.
60. There appears to be a ready alignment between the coverage of substantive material and use of appellate case report analysis, which arguably would be diluted by alternative methodologies.
61. HUTCHINGS, *supra* note 52, at 9.
62. As a sorter, evaluation takes the quality and quantity of learning about a variety of skills in a course and measures, weighs, and narrows it to a single evaluative number or letter, depending on the system.
63. As one commentator has noted, “[t]he rankings, which do not measure student learning, have created pressure on schools to employ time and resources on U.S. News criteria.” Ruth Jones, *Assessment and Legal Education: What Is Assessment, and What the \*# Does It Have to Do with the Challenges Facing Legal Education?*, 45 MCGEORGE L. REV. 85, 110 (2013).
64. That is different, however, in a professional training clinic, where such training is part of the process, not an appendage sorter following it.
65. Jones, *supra* note 62, at 109. According to the author, “[u]nless faculty members are convinced that there is a significant benefit to assessment, many will not fully participate.” Assessment seems to garner the most attention when an instructor engages in a misstep in the area, either through a faulty exam or in grading out of line with other professors. *Id.*
66. That is not to say there is absolutely no training—the AALS New Law Teachers conference, held annually in June, discusses assessment for a fraction of the brief conference.

take the exams (and the psychometrics<sup>67</sup> experts) might well differ, but have no voice in the process or opportunity to review their assessments, except, perhaps, on social media.

Further, a final exam's disembodied relation to a course is reinforced by the fact that teachers can either reuse exams or create them days or hours before the test is given. This temporal delay allows for haste, promotes ease of creation, and distorts what is tested.<sup>68</sup>

Last, expectations are low for the utility of individual exams, substituting the collective grades of students over a term or year to reflect student mental abilities, strengths, and weaknesses. Unlike the LSAT<sup>69</sup> before law school and the bar exam<sup>70</sup> after it, law school exams are not intended to serve as standardized measures of performance. Within this sandwich, unguided law school tests are naturally idiosyncratic.

All of this creates multiple disincentives to move assessment to the figurative center of a course or program, rather than maintain it on the periphery—despite the urging from educators and the new assessment standards implemented by the ABA.<sup>71</sup>

#### **IV. Making the Case for an Assessment-Centered Learning Environment—*Chopped* and the Fitbit**

“In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.” —Felix Frankfurter<sup>72</sup>

A key point in arguing for fealty to the ABA assessment standards—and centralized, integrated, and blended assessments throughout a course—is that assessment need not supplant other learning environments, but rather complements them instead.<sup>73</sup> In essence, assessment can produce a certain

67. See, e.g., *What is Psychometrics?*, PSYCHOMETRICSOCIETY.ORG, <https://www.psychometricsociety.org/content/what-psychometrics> (last visited July 17, 2017).

68. Teachers by nature test what has been more recently covered, rather than a more representative version of the course.

69. The Law School Admission Test is administered three times a year by the Law School Admissions Council. *About the LSAT*, LSAC.ORG, <https://www.lsac.org/jd/lsat/about-the-lsat> (last visited July 17, 2017).

70. The National Conference of Bar Examiners administers the Multistate Bar Examination. See NATIONAL CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/> (last visited July 17, 2017).

71. See ABA STANDARDS, *supra* note 3.

72. Letter from Felix Frankfurter to Mr. Rosenwald (May 13, 1927) (Felix Frankfurter papers, Harvard Law School library), *quoted in* RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS, at 156 (1989).

73. Rogelio A. Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 BARRY L. REV. 73, 78-79 (2010).

type of coverage of material that supplements discussions or dialogues about cases and law. It offers a way to show students how to use the cases, statutes, the Constitution, and regulations in analyzing and resolving legal issues. In this way, it promotes knowledge, skills, values, and even community, because of its collective enterprise. In effect, it can augment the other environments, not diminish them.

### A. Why an Assessment-Centered Environment Works

#### 1. Assessment-Centered Environments Are Everywhere

Precedents for a centralized assessment environment are found everywhere in the current dominant culture. If one looks at a person's Fitbit,<sup>74</sup> one sees an assessment-oriented tool providing performance tracking of steps taken, sleeping habits, and other activities. Television cooking shows, such as *Chopped*,<sup>75</sup> are not so much about cooking as about the competition between chefs based on a rubric of multiple objective criteria, from presentation to texture, balance, creativity, taste, and more.

#### 2. An Assessment-Centered Environment Promotes Rigor

While the Socratic method<sup>76</sup> is often claimed to be a rigorous teaching tool—certainly when used by the fictitious law professor played by John Houseman in *The Paper Chase*<sup>77</sup>—it is not the teaching method alone that is rigorous, but rather what students must do to meet expectations in response to such methods. An assessment-centered environment, such as one framed by a rubric, creates rigor by raising the expectations of student performance on a regular basis. When an assessment is viewed as a deliverable—something that must be performed by students, with the opportunity for varying results—then the required engagement, participation, and performance tracking create greater rigor in the course. While the length, time allotted, and level of difficulty of assessments all factor into their value, their use generally served to promote rigor within a course.

#### 3. An Assessment-Centered Environment Creates Transparency in Learning

Learning in law school, as in many other educational arenas, is generally opaque. Teachers and students are often unaware of how well a student is performing until assessments are administered. While students are led through dialogues in class that illuminate what should be learned, the quality of student responses might be affected by pressures of being on-the-spot and

74. For more information about the Fitbit device, see, e.g., FITBIT, <https://www.fitbit.com/home> (last visited July 17, 2017).

75. *Chopped* (Food Network).

76. *Socratic Method*, BLACK'S LAW DICTIONARY (10th ed. 2014).

77. *THE PAPER CHASE* (Twentieth Century Fox 1973).

answering in front of peers. It is also unclear how much learning is attributed to in-class versus outside-of-class learning.<sup>78</sup>

An assessment-centered environment, on the other hand, provides a window into student learning and performance, showing what a student knows and, more important, the depth of what a student understands, at various points in the course. Systematic use of multiple assessments while a course is underway, especially through technology, allows the accumulation of data points that can be sorted and utilized for learning purposes by individual students and the professor.<sup>79</sup> As several commentators have noted:

Formative assessments—ongoing assessments designed to make students’ thinking visible to both teachers and students—are essential. They permit the teacher to grasp the students’ preconceptions, understand where the students are in the “developmental corridor” from informal to formal thinking, and design instruction accordingly. In the assessment-centered classroom environment, formative assessments help both teachers and students monitor progress.<sup>80</sup>

This concept has been advanced at Georgetown University through its Visible Knowledge Project.<sup>81</sup> There, Professor Randy Bass has engaged in numerous experiments showing that visible learning—the student’s mental processes—is helpful to improvement.<sup>82</sup>

#### 4. An Assessment-Centered Environment Properly Broadens the Understanding of Student Achievement

A broader understanding of student achievement can expand student motivation and capture what skills and measures will promote long-term success in the real world, particularly for students training to become ethical practitioners. As some commentators have noted, “[g]rades and scores are incapable of capturing the complex interactions between students and their academic accomplishments.”<sup>83</sup> While this assertion does not mean grades and scores have no value, the transferability of what is tested is often less important in the long-term than those things that are not tested on a summative exam, require no talent at all—such as work ethic, passion,

78. A final examination provides some indicia of learning, but it occurs after the learning period in the class has putatively ended, and does not provide a window on the source of that learning.

79. DAVID EUBANKS & DAVID GLIEM, *IMPROVING TEACHING, LEARNING, AND ASSESSMENT BY MAKING EVIDENCE OF ACHIEVEMENT TRANSPARENT* (2015).

80. *HOW PEOPLE LEARN*, *supra* note 22, at 24.

81. *About the VKP*, VISIBLE KNOWLEDGE PROJECT (Dec. 12, 2008), <https://blogs.commonsgorgetown.edu/vkp/about-the-vkp/>.

82. *Id.*

83. EUBANKS & GLIEM, *supra* note 79, at 4.

energy, attitude, preparation, effort, coachability, and timeliness—and yet are important to lawyers on a daily basis.<sup>84</sup>

#### 5. An Assessment-Centered Environment Creates Opportunities for Self-Assessment

While the size of a traditional class—especially a larger one—does not encourage much, if any, structured space to assess learning,<sup>85</sup> an assessment-centered environment inherently creates opportunities to do so. Formative assessments, even if not graded, offer the chance to perform, and with any deliberation or review, track that performance within the instrument individually, or as compared with others. The assessment can be self-executing or simply guided by the professor, minimizing the time allocated. It also can occur after a class and not during it, minimizing the class time allocated to the important subject of metacognition and improvement opportunities.<sup>86</sup>

#### 6. An Assessment-Centered Environment Aligns with Technology

The explosion of technology is just beginning to be harnessed in legal education.<sup>87</sup> Many tools, from instant polling to mobile or online instruction, are available to supplement or complement face-to-face learning. Assessment provides a ready outlet for the use of technology in law school.

#### 7. An Assessment-Centered Environment Opens Opportunities for Formative Assessment by the Professor

If assessment became a fixture, built into the core of law school courses, its use would become a natural part of the new process. It would be built into course books, incorporated into online links to problems and exercises, and assigned like readings, and it would occur outside of class, as well as in it.<sup>88</sup> If more professors engaged in it, the culture would shift more easily to embrace it.

84. This interest in aligning assessment, legal education and law practice has been a topical subject for decades. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) (“For some time now, I have been deeply concerned about the growing disjunction between legal education and the legal profession . . . . The schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use.”).
85. Naomi Winstone & Lynne Millward, *Reframing Perceptions of the Lecture from Challenges to Opportunities: Embedding Active Learning and Formative Assessment into the Teaching of Large Classes*, 18 PSYCHOL. TEACHING REV. 31 (2012).
86. “The teaching of metacognitive skills should be integrated into the curriculum in a variety of subject areas.” HOW PEOPLE LEARN, *supra* note 23, at 21.
87. Van Detta, *supra* note 46.
88. See, e.g., INTERACTIVE CASEBOOK SERIES, <http://interactivecasebook.com/default.aspx> (last visited Nov. 28, 2017), an interactive book series by West Publishing Company, which incorporates assessments in each unit of study.

## 8. An Assessment-Centered Environment Facilitates the Opportunity for Improvement—in Class and out

### *a. Boosting Effective and Prompt Feedback*

A key consequence of assessment is feedback. If assessment plays a central role in a course, assessment could provide many opportunities for prompt and effective feedback usable by both teacher and student. By including metacognition in a course, the teacher would help students understand the value of feedback and how it could be used to improve performance.

### *b. Engaging and Monitoring Students*

In a classroom environment in which some students face a variety of distractions, particularly from electronic devices, assessment serves at a minimum to promote engagement by all students who take a quiz, test, or other assessment by requiring performance. Some students have no idea how they are performing until the final examination—when it is too late to do anything about it. While such a baseline of engagement provides a performance floor, having all students engage the course subject matter at least guides students to interact with the course, if not the professor, and serves as a first step toward improvement. Monitoring performance through formative feedback offers a second step, a practice that athletes, musicians, and many other people increasingly utilize to track performance.<sup>89</sup> In the current culture of performance tracking everything, why should legal education be omitted?

## V. How to Create an Effective and Efficient Assessment-Centered Environment

If an assessment-centered environment that aligns with the ABA assessment standards is the goal, how can it be created? Simply mandating the creation of such an environment without changing the dominant knowledge-centric culture would be difficult. Despite such difficulty, tools exist to assist in restructuring and reframing the legal education process. These tools include design thinking principles and high-impact practices.

### *A. Use a Design Thinking Framework—Ask, “What Are We Hiring Assessment to Do?”*

Expanding the focus of the educational goals of a course beyond knowledge and the transfer of that knowledge can result in dramatic changes to the course content. Design thinking does just that by reaching deep to discover what the operative questions are relating to a problem, and how to implement the solutions that best effectuate the outcomes desired.<sup>90</sup> The design thinking

89. HENDRY, *supra* note 22. See also ATHLETE MONITORING, <http://www.athletemonitoring.com/> (last visited Aug. 9, 2017).

90. As one commentator has noted, “[o]riginally harnessed to create technological innovations, such as the Apple iPod, human-centered design is now being successfully applied to promote good governance and a vibrant civil society, and to address challenges in areas such

process is intended to uncover the real inflection points in a problem.<sup>91</sup> In effect, if the question is how to improve a service or product, design thinking might frame it as, “What do we hire that service or product to do?”<sup>92</sup>

The Stanford Design Institute approach<sup>93</sup> uses a five-step process oriented not only to generate solutions to issues, but also to mine what the real questions are relating to the problems presented. The five steps are: (1) empathy (placing oneself in the shoes of the users or subjects of the problem); (2) definitions (creating sufficient definitional terms to sync the users of those terms); (3) ideating (a form of controlled brainstorming); (4) testing (in controlled conditions); and (5) prototyping.<sup>94</sup> Thus, design thinking is a tool for adapting to a rapidly changing world, which certainly includes law practice in its current iteration. Two examples illustrate how design thinking can be used.

#### Example #1: Redesigning Legal Education Workshop

On May 12, 2017, an interdisciplinary group of professionals met for a daylong workshop to consider the question, “How might we create an alternative legal education model that better prepares students as citizens and practitioners and gives faculty and staff a richer experience in delivering that learning environment?”<sup>95</sup> The program brought together an associate provost of a university, a consulting Army psychologist and business coach,

as health, poverty, education, equality, and economic development. The approach begins with the belief that all problems are solvable and that the people who face these problems in everyday life hold the key to solving them. Human-centered designers empathize with stakeholder communities, seeking to deeply understand those served and to partner with these stakeholder communities to create innovative solutions rooted in people’s actual needs, concerns, and experiences.” Victor D. Quintanilla, *Human-Centered Civil Justice Design*, 121 PENN. ST. L. REV. 745, 748-49 (2017).

91. *Id.* at 747. Design theory can be applied in many contexts. As noted, “[a] hospital in St. Louis invites a team of human-centered designers to improve emergency rooms by capturing the patient experience. One of these designers puts himself in a patient’s shoes and goes through the emergency room process from admission to examination while video-recording the entire ordeal, developing an understanding of the experience in a way no doctor, nurse, or hospital administrator could possibly have explained.” *Id.*
92. See, e.g., Professor Clayton Christensen’s explanation of what a milkshake at a fast-food restaurant “is hired to do” by the consumer. Carmen Nobel, *Clay Christensen’s Milkshake Marketing*, HARV. BUS. SCH.: WORKING KNOWLEDGE (Feb. 11, 2011), <http://hbswk.hbs.edu/item/clay-christensens-milkshake-marketing>.
93. See, e.g., The Stanford Design School’s Video, *A Virtual Crash Course in Design Thinking*, STANFORD.EDU, <https://dschool.stanford.edu/resources-collections/a-virtual-crash-course-in-design-thinking> (last visited July 17, 2017).
94. Institute of Design at Stanford, *An Introduction to Design Thinking Process Guide*, STANFORD.EDU, <https://dschool-old.stanford.edu/sandbox/groups/designresources/wiki/36873/attachments/74b3d/ModeGuideBOOTCAMP2010L.pdf?sessionID=573cfa71aea50503341224491c862e32f5edcoag> (last visited July 17, 2017).
95. The workshop was held at Elon Law School, but was a product of a campus wide initiative to apply design thinking to education. See Design Thinking Workshop Materials, Elon Design Thinking Workshop (May 12, 2017) (maintained at Elon University School of Law).



several law professors from around the United States, a law firm partner, a law firm associate, and a facilitator who works as an education design thinking consultant.

Participants were asked to draw a “New Student Empathy Map” that provided a continuum from the functional jobs to be done to the emotional jobs to be done in a quality legal education. To this end, the map included both academic skills and “soft” skills. Participants were given suggested ideal law school design criteria, with goals that included “develop multiple advanced skill sets and competencies for practicing law, develop cross-cultural competencies, gain ready retrieval abilities (expert thinking skill), develop deep chunked knowledge (expert thinking skill), learn to be coachable and adaptable, graduate prepared to pass a bar exam, learn when doing enough means doing extra, develop good learning practices.”<sup>96</sup> By sifting and sorting these design criteria, the participants applied what they believed were the most important criteria to an ideal legal education prototype.

One part of the workshop focused on assessment, specifically utilizing formative as compared to summative forms.<sup>97</sup> Participants were asked to create proposed assessments and to select those types they valued the most. Then, small groups were asked to develop prototypes for use in the alternative educational model being developed.

The results were interesting and far different from those resulting from a typical faculty or committee meeting. The diversity of voices and the different perspectives encouraged by the design thinking lens provided intriguing and surprising alternatives—moving assessment in from the periphery—or, as Pluto, in from the cold—but in a way that accounted for the importance of the human dimension, getting the faculty on board as well as influencing students with considerable prompt and effective feedback.<sup>98</sup>

Example #2: Stanford Law Course “Legal Design Law:  
Consumer Contracts”<sup>99</sup>

According to one co-teacher of the Stanford Law School course, applying design thinking to law “means taking a creative, experimental, and user-centered approach to how we provide legal services.”<sup>100</sup> The expansion of considerations to the users of websites and other contractual providers offers a

96. *Id.*

97. *Id.*

98. “The assessment literature is replete with admonitions about the importance of faculty involvement, a kind of gold standard widely understood to be the key to assessment’s impact ‘on the ground,’ in classrooms where teachers and students meet. Unfortunately, much of what has been done in the name of assessment has failed to engage large numbers of faculty in significant ways.” Peter T. Ewell, *Abstract to HUTCHINGS*, *supra* note 52, at 3.

99. Sharon Driscoll, *Applying Design Thinking to Law*, STAN. LAW., no. 94, Spring 2016, <https://law.stanford.edu/stanford-lawyer/articles/legal-design-lab-consumer-contracts/>.

100. *Id.*

new lens on evolving contexts, namely, the Internet. According to the other co-teacher of the course, “[i]t’s taking the same design process that the d-school [Stanford Design Institute] teaches and aiming it at the legal system, taking the human-centered design approach and applying it to the world of law.”<sup>101</sup>

### *B. Use the Framework of High-Impact Educational Practices*

It is sometimes assumed that all practices used in a class enjoy equal importance. Yet, studies about high-impact practices show this assumption is not accurate; some practices have a more significant impact than others.<sup>102</sup> These practices may consist of writing-intensive courses, service learning, collaborative assignments, and common intellectual experiences.<sup>103</sup>

Of equal significance to the practices themselves are the elements that give practices their high impact. Several of these key elements support an assessment-centered environment:<sup>104</sup>

\*Performance expectations set at appropriately high levels. (Example: multiple short papers, problem sets, or projects.)

\*Significant investment of time and effort by students over an extended period of time. (Example: a multiple-part class assignment on which a student works over the course of the academic term.)

\*Interactions with faculty and peers about substantive matters. (Example: out-of-class activities.)

\*Frequent, timely, and constructive feedback. (Example: a research project.)

\*Periodic, structured opportunities to reflect and integrate learning. (Example: linked courses in a learning community.)

\*Opportunities to discover the relevance of learning through real-world applications. (Example: an internship, practicum, or field placement.)<sup>105</sup>

Assessment can be used to promote high impacts, such as high expectation levels, distributed student practices over the course of a semester, regular interactions with faculty, opportunities to reflect and integrate learning, and feedback through experiential learning. One commentator suggested what it

101. *Id.*

102. While the exploration of practices mainly occurred in the context of undergraduate education, it also has great applicability to legal education.

103. GEORGE D. KUH, HIGH-IMPACT EDUCATIONAL PRACTICES: WHAT THEY ARE, WHO HAS ACCESS TO THEM, AND WHY THEY MATTER (2008).

104. *High-Impact Practices: Eight Key Elements and Examples*, ACADEMIC RESOURCE CONFERENCE 2015, <http://2015.wascarc.org/sites/default/files/Kuh-HIPs-figure-4-1-13.pdf> (last visited Aug. 9, 2017).

105. *Id.*

means to provide useful feedback—“faculty need to work to provide balanced feedback to individual students, feedback that is specific and concrete in describing what students need to do to improve and further feedback that then notes improvement.”<sup>106</sup> In addition, that feedback, at least for written work, should be directed to individuals and the class as a whole.<sup>107</sup>

### *C. Creating Assessment-Centered Activities by Design and High Impact*

The following ideas can provide opportunities for self-feedback and other feedback on a collective scale for both teachers and students. Each idea is intentionally streamlined for efficiency purposes. The activities can occur inside the classroom or beyond it. Either way, it is often useful to incorporate metacognition by asking what the purpose of the exercise or activity is in relation to learning.

If assessment is to occur outside of the classroom, a common locus is an online platform, such as TWEN, Blackboard, or Moodle. If an assessment-centered environment is created, it is useful to inform the students about activity objectives to provide notice and transparency in the learning process.

#### *1. Inside the Law School Classroom*

##### *a. “All Writes”*

While a common practice in a class is to call on individual students to answer questions, an alternative is to ask the question collectively and then have all the students write down their answers. This activity accomplishes several things—everyone in the room is engaged and participating, everyone is working on an important communication skill, writing, and everyone has an opportunity to reflect for a few seconds on how the question should be answered. The feedback occurs from the subsequent class discussion, permitting individual writers to assess their answers against the context of the discussion. These “all writes” do not take much more time than it does to elicit a verbal response from a single student, and thus the “all writes” are efficient feedback tools.

The “all write” deliverable also makes it easier to create additional feedback for the student. While the students are writing, especially if a response would take more than a minute or two, a teacher can circulate in the class and speak to students one on one or even look at the students’ writing. This provides additional feedback, both for the teacher and the student.

Another self-assessment activity follows up the “all write” exercise when students are asked to play a different role than writer, and that is as a reader. Students can be asked to read out loud what they just wrote in their “all write” to their neighbor in pairs of two. This tool permits the writer to hear

106. MARYELLEN WEIMER, *IMPROVING YOUR CLASSROOM TEACHING* 110 (1996).

107. *Id.* As with exams, the feedback for written work needs to be aimed at both the individual student and the class as a whole.

what he or she wrote and to process it differently, as well as the listener to hear how another person responded to the same question. The technique also exemplifies why writing is really about improved iterations, or drafting and redrafting, showing that improvement on an initial set of thoughts can and should occur. In short, this technique promotes visible learning through the different media of writing and speaking.

#### b. Class Note Breaks and Reflection

Students are expected to regularly take notes in a law school class. These notes are important reflections of a note taker's knowledge and are important to information retrieval. Professors make numerous assumptions about the note-taking function—that students know what to emphasize, understand how to organize the notes, and are accurate in how they describe points of law. Yet considerable differences often can be found in the substance and form of the notes taken, depending on who is taking them.

A note-taking break in the middle of a class serves numerous purposes. First, the break allows assumptions about note-taking to be tested. During the short break of three to five minutes, students are encouraged to talk with neighbors about the important points made in a class, how they are “packing” or organizing the notes, and whether their notes are in accord with others. This activity serves several purposes. It directs students to the importance of organized self-directed learning. It also elides the problem of inaccurate notes being carried forward in perpetuity—including on the exam and perhaps a bar examination as well. It also tests an important but unappreciated skill, listening. How well did students listen to the class discussion or what the professor said?

#### c. Shifting the Power: Students Ask the Questions

In law school, the classroom balance of power is decidedly tilted toward the professor for many reasons. Yet students as lawyers will be asking the questions—of clients, of witnesses, and of other lawyers. This questioning skill can be practiced in the class by having students create different kinds of questions about a legal problem, especially through role-playing as a lawyer representing a particular client. Questioning can be divided into categories, such as inquiry (nonleading) questions and advocacy (leading) questions to demonstrate the scope and impact of question types.

#### d. Collaborative Learning

While some students prefer to work alone, the real world of law practice involves numerous forms of collaboration. Even solo practitioners must collaborate in many ways with others, either on a case, in a workspace, or in arrangements about what cases to take or refer to others. Collaboration can be built into classes, with groups assigned to deal with issues, to rule together as a court on a particular issue, or to decide how to approach a hypothetical. Group interaction can provide significant feedback, and creates involvement

for most if not the entire class. One easy-to-use exercise is for students to create Ignite PowerPoint presentations about a concept or principle in a course that they wish to explore in greater depth. While similar to a capstone course project, this allows students to gain more knowledge while satisfying a course requirement.

## 2. *Outside the Classroom*

These activities can be viewed as feedback bridges for the classroom; they augment and enhance course learning without significantly modifying in-class methods and substance.

### a. Review Assessments

A certain population of students do not take advantage of the feedback function of assessments. While this cannot be forced, it can be incorporated institutionally into the course structure. Students can be asked to engage in directed reviews of assessments, quizzes and even final exams—what worked? what did not?—and then develop a plan of improvement. Currently, it is often left up to students whether to review their quizzes and exams, and this option is often viewed as unimportant in comparison with the many alternatives competing for student attention.

### b. Experiential Exercises: Go Find or Do

Experiential exercises can supplement any class, not just in upper-level clinics or simulation courses. Students can be asked to engage with the material in a real-world setting. For example, students can be asked in a first year Property Law course to go find an easement, take a picture of it and bring in the photo or representation in a later class. Students also could be asked in a criminal law or criminal procedure course to interview a law enforcement officer or investigator. This provides the students with context, and an opportunity to assess learning in a very different way. Students would then prepare a memorandum or short paper about what they learned in each activity to acquire an even broader opportunity for feedback and reflection.

Experiences provides bridges to the legal profession as well as feedback opportunities.<sup>108</sup> William M. Sullivan argues that the dual aims of “more efficient and effective education plus ways to assess and ensure professional competence at an appropriate level can each be better achieved if they are conceived together. They are two facets of a single educational challenge: the formation of competent and committed legal professionals.”<sup>109</sup> Sullivan advocates making the assessments commensurate with law practice, not simply other standardized tests.

108. William M. Sullivan, *Align Preparation and Assessment with Practice*, 85 N.Y. ST. B. ASS'N J. 41, 41 (2013) (examining the Daniel Webster Scholars Program at U. of New Hampshire Law School, where the “assessment of the competence to practice is ‘embedded’ in the process of learning, in stages appropriate to achieving the goals of competence and professionalism.”).

109. *Id.*

### c. Framing Preparation: Asking Questions in Advance of Class

Another way to encourage self-directed learning through self-assessment is to provide students with questions about the subject matter in advance of a class. Questions can be about aspects of a case, rule of law, doctrine or facts. This idea is consonant with the meticulous preparation in advance of a trial preparation, other hearings, or proceedings, or client meetings. With the teacher asking questions in advance, students can better understand how to critically read and think about cases and areas of law. Students can compare the instructor's preview questions with the ones they developed on their own. This concept of presenting questions in advance might be especially helpful in theoretical classes with thick and nonintuitive concepts, such as constitutional law or property.

### d. "Just-in-Time" Teaching: Gathering Data About Preparation

This method was developed by university physics professors who wanted to learn what their students understood as they were entering the class, so the class could be oriented toward what the students needed to work on the most.<sup>110</sup> This approach involves administering a set of questions to students in advance of a class or at the very beginning of class, to obtain data about what the students understand and do not understand, providing feedback to the instructor that allows for customization of the class around the data obtained.<sup>111</sup>

### e. Using Technology Outside of Class

With wave after wave of advancing technology, the opportunities for mobile learning in legal education have grown exponentially. One easy form of assessment is to have students post a response to a question online, outside of the classroom. These posts can be given general or individualized feedback, and can be subject to a brief podcast or in-class review after they are completed. The student posts reveal many things: a student's thinking process, effort in responding, how well the class collectively understands an area, and how students are structuring doctrinal areas. Another use of technology is the short podcast, somewhere from three to ten minutes in length, either summarizing important points of a class or unit, presenting a problem in an area that will provide additional practice and guidance, or both.

## VI. Conclusion

Assessment traditionally has been a distant outsider in legal education orthodoxy, used primarily to sort students and rank their competency levels. If the solar system served as an analogy, assessment would be the dwarf planet Pluto. Given the demands of a volatile practice environment, pressures

110. G. Novak, *What is Just-in-Time Teaching?*, JUST-IN-TIME TEACHING, <https://jittdl.physics.iupui.edu/jitt/> (last visited Dec. 5, 2017).

111. *Id.* See also, Cynthia Brame, *Just-in-Time Teaching (JiTT)*, CENTER FOR TEACHING, <https://cft.vanderbilt.edu/guides-sub-pages/just-in-time-teaching-jitt/> (last visited Dec. 5, 2017).

are increasing to improve the student learning process. The ABA is usually not in the business of promoting the student learning narrative, but its new assessment standards do just that. In essence, important constituencies recognize that bringing assessment in from the cold to the figurative center of the system provides a stronger educational process. Using principles of design theory and high-impact practices, a cost-effective assessment-centered environment can be created. When assessment is reframed as a tool to engage, monitor, and evaluate important practices, it becomes an insider in both status and function, providing robust feedback and better educational consequences.