Advancing an Evidence-Based Approach to Improving Legal Education

Kellye Y. Testy

For many years during his tenure as a law school dean, Kent Syverud—now chancellor and president of Syracuse University[1]—sent his fellow law deans[2] an annual gift. The gift would demonstrate a point about what it was like to be a dean. For instance, Kent once gave us mini red fire hydrants labeled "Dean." And sure enough, some days felt like dean-as-dog-target days. Another year, Kent sent a more hopeful gift—a small replica of a traffic sign that cautioned us to ask: "How will this benefit our students, exactly?" I loved that sign, kept it visible on my desk, and frequently shared it with my visitors to request that they direct any pitch they were making to that student-centered question.

Student-centeredness should not be a remarkable idea for legal education. Yet, some educators resist student-centeredness on the grounds that such an approach sounds too much like "the customer is always king." Under this line of thought, faculty members instead see their role as the expert with the duty of deciding what the student needs. As one of my faculty colleagues once explained to me, "Dean, you pay me to mold them, not to listen to them."

In my experience, however, students usually do know what they need; we can learn a great deal by listening. In teaching, for example, in the institutions I served, student evaluations were often very consistent with those done by faculty peers. Moreover, to the degree that I did see divergence, students

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1.   *See Chancellor Kent Syverud*, Syracuse University, https://www.syracuse.edu/about/leadership/chancellor-syverud (last visited Apr. 2, 2021).

2.   Yes, most of them at that time were indeed "fellows." I was the first female dean of both schools I served, with the ranks of female law school deans growing from around ten percent in 2003 to almost forty percent today. For an account of the first women law deans, see Herma Hill Kay, *Women Law School Deans: A Different Breed, or Just One of the Boys?*, 14 Yale J. L. & Fem. 219 (2002).

sometimes had more rigorous standards of inclusive excellence.[3] That is not to say that teaching evaluations (whether by faculty or students) do not have flaws. They most certainly do, especially when it comes to issues of structural and implicit bias in evaluation.[4] It is also not to say that my experience is representative. It has been well documented that in some institutions student evaluation, especially of women of color, has been especially biased and that faculty review has helped present a more accurate and fair assessment.[5] My point is only that it is flawed to assume that we cannot learn from students about effective education. In law school, where passing the bar examination and being an effective lawyer for one's clients are at stake, most students seek learning and professional development, not the proverbial "easy pass."

Listening to students can and should take a variety of forms. In the classroom, engaged and effective pedagogy depends not just on a one-way conveyance of information, but a complex alchemy between and among the teacher and students. I have always subscribed to bell hooks' view that the "classroom remains the most radical space of possibility in the academy" and that we should "celebrate teaching that enables transgressions—a movement against and beyond boundaries . . . which makes education the practice of freedom."[6] Likewise, I am certain that I have learned as much in the classroom as I have taught.

Outside the classroom, too, individual and small-group engagement with students as advisors, mentors, and counselors conveys enormous amounts of important information to law faculty and staff with open ears. No matter how well one listens, however, the message is dependent upon whom one is listening to. As important as listening individually can be, it can also be easy to mistake the message of one or a few for the message of most or many—the common conflation of anecdote with evidence. As a result, strong educational programs are made stronger by reliable evidence-based longitudinal assessments of student learning and engagement.

Thankfully, the Law Student Survey of Student Engagement (LSSSE) has made that latter task possible for legal education. Since 2004, LSSSE has provided law schools an outstanding tool by which to understand many dimensions of student engagement and satisfaction.[7] I began using this survey

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3.   I would go a step further and note that while legal education as a whole is a field with many outstanding educators, there are those extreme cases where a colleague is—by any reasonable measure—deeply ineffective in the classroom. In those cases, my experience has been that it is the faculty (often backed up by university administrators) who shields the colleague from accountability, not the students.

4.   *See, e.g.*, Presumed Incompetent: The Intersections of Race and Class for Women in Academia (Gabriella Gutierrez y Muhs et al., eds., 2012); Presumed Incompetent II: Race, Class, Power and Resistance of Women in Academia (Yolanda Flores Niemann et al., eds., 2020).

5.   Meera E. Deo, Unequal Profession: Race and Gender in Legal Academia (2019).

6.   bell hooks, Teaching to Transgress: Education as the Practice of Freedom 12 (1994).

7.   *See About LSSSE*, Law School Survey of Student Engagement, https://lssse.indiana.edu/who-we-are.

early on in my work as a law school dean so that I could obtain a better understanding of our program's strengths and weaknesses. I found it eye-opening to be able to compare our students' data with that of peer institutions. For instance, I was hearing concerns about our financial aid office and began to consider whether I needed to make personnel changes in that office. After reviewing comparative data from the LSSSE survey, however, I could easily see that our students' satisfaction with our staff was very high compared with our peers. The actual root of student concern was about the level of financial support we had available; that was an issue I needed to address by raising more money for scholarships, not one our financial aid counselors could resolve.

That institutional planning is made better by institutional research seems an obvious point, yet less than half of law schools in the United States currently take advantage of this great tool. While some of those schools may have the institutional research capacity to do some measure of student data collection and analysis themselves, it is unlikely to come close to the benefits that would accrue to them individually and—even more importantly—to legal education as a whole were all schools to participate in this quality measurement instrument.

While there is, in the first instance, much to be gained by more schools participating individually in LSSSE, an even more robust national dataset on student engagement would open up a new opportunity to better understand the entire learning journey of a law student. While U.S. legal education is blessed with several allied national organizations that maintain rich datasets focused on distinct points along this journey, they are rarely linked with one another and thus function today as less than a sum of their parts. Perhaps in this moment of drawing more attention to the benefits of LSSSE, we might also seize the opportunity to create effective partnerships so that legal education may benefit from a more holistic approach to the student journey from prelaw to practice.

At the front end, the Law School Admission Council (LSAC) seeks to open the doors of legal education widely by promoting quality, access, and equity at the prelaw and enrollment phases of the learning journey. LSAC has an extensive national data library on law school admission and maintains real-time and annual data on a national basis.[8] Among other activities, LSAC nurtures and supports a national prelaw network, provides the technology system that powers each law school's enrollment functions, and assembles, verifies, and distributes each candidate's law school application.

In the middle, during the students' legal education, the American Bar Association's Section on Legal Education and Admission to the Bar (ABA Section) requires extensive annual and periodic reporting as part of its accreditation function. These requirements include the annual Standard 509 report, which summarizes core statistics about each law school to promote transparency and consumer protection, which each school must publish

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8.   *See* National Conference of Bar Examiners, https://www.ncbex.org.

prominently on its website.[9] Alongside the ABA, the Association of American Law Schools (AALS)—the learned society of the legal academy—maintains data on faculty and deans and supports an extensive professional development network for law faculty. And LSSSE, as noted earlier, collects and cultivates an extensive dataset on student engagement during law school.

As students transition to lawyers, at the opposite end of LSAC's work the National Association of Law Placement (NALP) maintains extensive national data on employment, both summer associate and postgraduation.[10] Finally, the National Conference of Bar Examiners (NCBE) works with all fifty states to offer various services connected with their annual administration of the bar exam and also has an extensive data collection related to bar passage.[11]

As a result, all along the students' learning journey there is extensive data that could shed light on the effectiveness of legal education, especially if these datasets were connected and accessible. Important trends could be better understood to develop actionable agendas for improvements that would strengthen legal education. For instance, why is it that women have made up half of the class in law school for a long time and yet are still so poorly represented at the partner rank in law firms? Why is it that our profession remains so much less racially diverse than the society it is charged with serving even though every racial subgroup is being admitted to law school at rates equal to or exceeding college graduation rates? What is the relationship between bar passage and undergraduate grades or major? What law school courses are most important to bar passage or to practice confidence and success? Why is there such a high degree of mental illness and addiction in the legal profession and at what point along the journey are lawyers most struggling?

To build the strength of our profession and the rule of law, we need to focus much more holistically on the entire learning journey, starting from prelaw and continuing to enrollment, into law school itself, to licensure, and on into the profession. Access is not enough—we owe our students focus on the attainment of the skills needed to thrive in law school, at licensure, and in the many stages of career. There are no shortcuts; those include the fundamental skills of critical thinking, logical and analytical reasoning, reading comprehension, and writing, as well as adjacent skills required for academic and career success including teamwork, time and project management, and leadership.[12]

Moreover, a holistic approach, supported by accessible and reliable data, is especially important for legal education for a number of reasons having

9.   *See Legal Education and Admissions to the Bar*, ABA, https://www.americanbar.org/groups/legal_education/.

10.   *See NALP News*, NALP, https://nalp.org.

11.   *See* National Conference of Bar Examiners, *supra* note 8.

12.   For elaboration on this point, see Chad Christensen, *Preparing Law Students to be Successful Lawyers*, 69 J. LEGAL EDUC. 502 (2020); Kristen M. Winek, *Writing Like a Lawyer: How Law Student Involvement Affects Self-Reported Gains in Writing Skills in Law School*, 69 J. LEGAL EDUC. 568 (2020).

to do with its design. For example, unlike in medicine, we admit students without any prescribed preparatory curriculum—welcoming poets and physicists, math whizzes and music stars, and athletes and activists. Not only do our students' have differing disciplinary backgrounds, they also arrive with very different levels of educational and work experiences. Some are right out of undergraduate studies; others have deep disciplinary knowledge and experience. We must also keep in view that our students also enter legal education with the intersectional complexities of diverse social locations, with their differing familiarity with and relationships to our legal system(s). Some may be the children of famous jurists; others first-generation college graduates; some may have been incarcerated; others may be crime victims.

During school, the differences continue or magnify. While the names of some required courses may be the same, the students' experience can vary widely depending upon the school they attend, the course of study they choose, and the kinds of professional development experiences they have access to during school. On the back end, our students head into very different lines of work after graduation, some with well-formed systems of continued professional development and others with very little support. The first year of practice for one hanging out their own shingle, or joining a legal services organization, or starting as a first-year associate at an international law firm varies mightily.

Despite these differences, an evidence-based approach to legal education will help us serve all of our students, the academy, and the profession better. We need a rich and integrated set of data that spans the student learning journey to do that. While that point may not itself raise much controversy, the harder question is *how* to do it. There are both political and practical obstacles, which get more difficult the more fully we may seek to integrate the data rather than merely link the various sets. For instance, for some organizations that have invested substantial resources in creating an important dataset, it may not be workable to "give it away." More practically, it takes incredible resources of skill, time, and infrastructure to create and maintain a major dataset, so ceding control may also undermine the quality of the data itself unless that role is fully and competently assumed by another. Further, having data and using data well are two entirely different matters; there are significant technological and practical hurdles to overcome in merging datasets in useful ways.

Issues of trust are also real: No one wants too much control of data vested in too few hands, even though that consolidation may make the whole more useful. Data can be as seen as dangerous as it is important; in the wrong hands, it can be used not to advance legal education but to harm it—not to mention good-faith differences of view as to what "advancing" legal education might mean. Profit motives and privacy concerns also complicate trust issues; we all now know of the profit potential of data and the eagerness among commercial enterprises to mine data for multiple uses.

Acknowledging both the political and practice limits on data collaboration, the following exploratory ideas may help us make progress:

First, all law schools should continue to consistently and fully participate in creating each of the earlier discussed national datasets, not only where regulation compels it but also where the common good is advanced by having it. We need to see the collection and availability of national data as a collective asset worth each of our investments. This would thus include not only the minimal data required for accreditation, which has been declining in recent years as the ABA seeks to make regulation less onerous, but also the more robust national data maintained by, for instance, LSAC on enrollment, NALP on employment, AALS on faculty, and LSSSE on student engagement.

Second, law schools and their allied service organizations should agree upon a way to track a student from prelaw and on into practice so that we can understand the full range of their journey and where any leaks may arise along the pipeline. There are several options for this practically speaking. For example, because each student already enters law school with an LSAC "L" number, this would be a convenient way to do so (it would not have to displace other school-specific methods, but just be added so it is associated). LSAC, law schools, NCBE, and state bar organizations would need to agree to use that or another common number.

Having a way to keep track of student information all along their journey would be useful not only for research about legal education, but also for schools during legal education. Right now, rarely does information about the student that is known at admission get incorporated into what is known about the student during school, and more rarely still does the information about a student get transferred well to an alumni database. Schools could serve students better if all of these systems were integrated with one another rather than having each stage of the learning journey on a separate system. Though no one system that can do this exists currently, there will likely be one in the future, including one that LSAC has recently developed for candidates called "LawHub" that could be extended into this functionality for schools.

Third, we should create a national data-sharing consortium for legal education, made up of all law schools and the few national organizations listed earlier that generate key datasets (AALS, ABA Section, LSAC, LSSSE, NCBE, and NALP). Those entitled to use the data would be those who are meeting membership standards for its creation and use. New members could be admitted by petition under established criteria in the event that any new entities that create and maintain original data emerged. Nonmembers could purchase access to data on specified terms, with the funds used to offset the costs of operating the consortium. The consortium could agree upon a leadership structure, processes for undertaking research across the learning journey, and other aspects of governance. This is far more likely to be effective structure for data collaboration than asking these organizations to cede "their" data to another curator, especially one that is not themselves coinvested in the welfare of legal education to the same degree.

With the ongoing ravages of the COVID-19 pandemic,[13] the need for more understanding of our students' full professional journey seems all the more

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13.   *See Coronavirus Resource Center*, John Hopkins Univ.of Medicine, https://coronavirus.jhu.edu for one of the best sources of data on the effects of the pandemic (last visited July 5, 2020).

urgent. The rapid shift to online legal education at a time when it is fair to say that we were in the most nascent stages of that digital transformation has brought forth new questions about the effectiveness and equity of legal education.[14] Whom has this shift left behind? What have been its benefits? What ground will we need to make up? Likewise, the pandemic has upended the system of lawyer licensure across the nation as one by one states change and rechange plans for administering the bar, in some cases opening diploma privilege in ways that, again, leave a trail of winners and losers.[15]

The pandemic's well-documented disproportional health and economic impacts on marginalized communities, as well as renewed vigorous and sustained demands for racial justice amid continued unlawful killings of Black, Indigenous and other people of color at the hands of police raise fundamental and urgent questions for the rule of law. Data may seem to be the least of our worries at such a moment. But it is exactly at the time of our most urgent and important questions that we most need data. We have seen too vividly in this pandemic the impact of policies and (in)actions that are against or without reliable data.

Regardless of our roles or our viewpoints, all of us in the academy and in the legal profession should be committed to evidence-based decision-making. Law, like medicine, has the potential to gravely harm or bravely heal our world, and using data and evidence makes it far more likely we will do the latter. While I am not naïve to the distance we all still have to travel, I believe that law remains our best pathway to a just and humane world. For law to be strong and just, so must be legal education. To draw again from the one who has influenced me so deeply in my approach to education, bell hooks, I close by paraphrasing her well-known quote:

> *Law school, with all its limitations, remains a location of possibility. In that field of possibility, we have the opportunity to labor for freedom, to demand of ourselves and our comrades, an openness of mind and heart that allows us to face reality even as we collectively imagine ways to move beyond boundaries, to transgress. This is legal education as the practice of freedom.[16]*

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14. *See, e.g., Power, Privilege, and Transformation: Lessons from the Pandemic for Online Legal Education*, University of Miami School of Law, https://www.law.miami.edu/academics/power-privilege-transformation-lessons-from-the-pandemic-for-online-legal-education.

15. *See NCBE COVID-19 Updates,* NCBE National Conference of Bar Examiners, http://www.ncbex.org/ncbe-covid-19-updates (last visited July 5, 2020).

16. BELL HOOKS, *supra* note 6, at 207.