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Judith Welch Wegner

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# Cornerstones, Curb Cuts, and Legal Education Reform

*Judith Welch Wegner\**

## I. INTRODUCTION

The University of Missouri School of Law has long been a leader in American legal education. Years ago, it was a bellwether for legal education reform when it introduced a sustained focus on preparing students to understand dispute resolution, shaping its curriculum accordingly. Its faculty scholars are renowned for their writings on important dispute resolution topics. It is my hope that this Symposium will assist others in learning from the University of Missouri's deep perspective on how to overcome barriers that keep law schools from doing all they might otherwise do in preparing law students for real-world practice. Special thanks are due to Professor John Lande for his efforts in assembling distinguished symposium contributors who have given such deep thought to the topic of legal educational reform.<sup>1</sup>

This essay seeks to contribute to this dialogue by offering both theoretical and practical observations about legal education reform. This approach reflects the judgment that current efforts to improve legal education will only get so far unless underlying impediments to change that are often invisible become better understood. The essay provides legal educators with theoretical insights from the design, organizational behavior, education, and psychology literature in order to help that process along. Theoretical insights can be hard to apply in the abstract, however. The essay therefore also offers practical recommendations about both small and large actions that might be taken by faculty members, law schools, and national legal education organizations in order to facilitate needed change.

The following observations are framed in terms of "cornerstones" and "curb cuts."<sup>2</sup> The essay's approach is influenced by my experience in working with architecture educators who, to date, have faced even more dramatic pressures for

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\* Judith Welch Wegner is Dean Emerita and Burton Craige Professor of Law at the University of North Carolina School of Law, Chapel Hill, North Carolina. She received her B.A. from the University of Wisconsin-Madison and her J.D. from UCLA. She is one of the co-authors of the "Carnegie Report," *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (Jossey Bass, 2007).

1. I appreciate in particular the comprehensive keynote remarks of Dean Emerita Lisa Kloppenberg of the University of Dayton, the views of Professor Barbara Glessner-Fines (recognized as one of the best law teachers in the country), the insights of education Professor David Moss (who has recently edited an important compilation of essays on legal education reform), the insights of Professor Clark Cunningham (a real contributor to international dialogue on issues of professionalism), the wisdom of Judge Simon Oliver (respected jurist and Vice Chair of the ABA Section Council of Legal Education and Admission to the Bar), and expertise of distinguished attorney John Phillips (a proud Missouri alumnus and thoughtful interpreter of the changing world of law practice).

2. New Oxford American Dictionary (3d ed. 2012) defines "cornerstone" as "a stone that forms the base of a corner of a building, joining two walls, or an important quality or feature on which a particular thing depends or is based: a national minimum wage remained the cornerstone of policy." The Canadian Oxford Dictionary (2d ed. 2010) defines "curb cut" as "a small ramp built into the curb of a sidewalk to make it easier for wheelchairs, strollers, etc. to pass from the sidewalk to the street."

reform than those facing legal educators.<sup>3</sup> This essay employs the metaphors of “cornerstones” and “curb cuts” to offer some straightforward counsel regarding how law schools might approach the process of legal education reform in order to remove the barriers under discussion at this Symposium. Accordingly, the term “cornerstones” refers to key principles that can provide meaningful foundations for moving forward with educational reform. In turn, the term “curb cuts” refers to practical strategies for overcoming barriers to change.

After giving preliminary consideration to some of the major challenges facing the legal education sector in Part I, Part II illuminates four key conceptual cornerstones that act to either block or facilitate change. These “cornerstones” include institutional characteristics, mental models, systems thinking (or the lack thereof), and approaches to assessment. Part III then offers four strategies that can serve as “curb cuts” to open the path to change: acknowledging local changes already underway; introducing and defining new mental models; advocating for changed roles of national organizations; and developing fresh assessment strategies to test assumptions.

## II. CORNERSTONES

Most legal educators have by now encountered claims from numerous sources contending that reform is necessary.<sup>4</sup> Because change is difficult, however, it is tempting to assume incremental change will suffice, rather than change at a foundational (“cornerstone”) level. Part II first explains why the traditional cornerstones of legal education are no longer sufficient to support the existing edi-

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3. I have benefited immensely from my service as a public director and member of the Board of the Association of Colleges and Schools of Architecture (ACSA) from 2009-2012. If legal educators think they face challenges, they should turn their attention to the more massive dilemmas facing architecture educators. Such dilemmas include the revision of architecture accreditation standards, the complexity of educational program design in institutions that may offer bachelors', masters', and Ph.D. degrees in a variety of specialties; the architecture profession's complex licensure requirements (including mandatory requirements for experiential credits often earned through internships); and a much more difficult employment climate for architecture graduates.

I dedicate this article to the extraordinarily talented architecture educators I was privileged to meet during my period of service on the ACSA Board, including Executive Director Michael Monti, Presidents Kim Tanzer, Marlene Davis, Tom Fisher, Daniel Friedman, Judith Kinnaird, and Donna Roberts; and a remarkable group of architecture educators and student leaders who served with me on the ACSA Board of Directors. We have much to learn from companion fields such as architecture. Legal education would also benefit immensely from opening our leadership circles more systematically to those from other fields who could offer us broader perspectives and helpful insights.

4. See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP, Clinical Legal Education Association, 2007 (hereinafter “BEST PRACTICES”); WILLIAM SULLIVAN, ANNE COLBY, JUDITH WEGNER, LLOYD BOND, & LEE SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (Jossey-Bass, 2007) (hereinafter CARNEGIE REPORT or EDUCATING LAWYERS); BRIAN TAMAHANA, FAILING LAW SCHOOLS (Univ. of Chicago Press, 2012); David Segal, *For Law Schools, a Price to Play the ABA's Way*, N.Y. TIMES (Dec. 7, 2011), <http://www.nytimes.com/2011/12/18/business/forlaw-schools-a-price-to-play-the-abas-way>; David Segal, *Law School Economics: Ka Ching!* N.Y. TIMES (July 16, 2011), <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all>; David Segal, *Is Law School a Losing Game?*, N.Y. TIMES (Jan. 8, 2011), <http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=4>.

face. It then addresses why and how new cornerstones can be constructed to support legal education in the future.

### *A. Introduction: Cornerstones as We Know Them*

What are the cornerstones of legal education as we have understood them early in the twenty-first century? At least three types of cornerstones—economic, professional, and intellectual—are often treated as fundamental. Significant vectors of change are currently applying great pressures on each of these traditional cornerstones, creating a considerable risk that the traditional cornerstones will crumble unless new cornerstones appropriate to current conditions can be conceived.

#### *1. Economic Expectations*

The economic foundations of legal education have significantly shifted as students are increasingly concerned about taking on unsustainable debt<sup>5</sup> in the face of an uncertain job market,<sup>6</sup> and declining applicant pools<sup>7</sup> place law school reputations and budgets under pressure.<sup>8</sup> Although law schools increasingly seek external support from their alumni and friends to supplement tuition revenues,

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5. The American Bar Association reported that for the 2010-11 school year, the average amount borrowed (by those who took out at least one loan) was \$75,728 for public law schools and \$ 124,950 for private law schools. *See* [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/avg\\_amnt\\_brwd\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/avg_amnt_brwd_authcheckdam.pdf) (last visited Dec. 19, 2012). According to an early March, 2012 report by the ABA Journal, debt loads had increased by 17.6 percent from the prior year for private law grads and 10 percent for public law grads. *See* [http://www.abajournal.com/news/article/average\\_debt\\_load\\_of\\_private\\_law\\_grads\\_is\\_125k\\_these\\_five\\_schools\\_lead\\_to\\_m/](http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m/) (last visited Dec. 19, 2012). After that publication, questions arose whether schools had accurately reported relevant data to the ABA and to US News. *See* [http://www.abajournal.com/news/article/law\\_schools\\_asked\\_to\\_double\\_check\\_did\\_they\\_give\\_aba\\_loan\\_numbers\\_on\\_student/](http://www.abajournal.com/news/article/law_schools_asked_to_double_check_did_they_give_aba_loan_numbers_on_student/).

6. *Class of 2011 Has Lowest Employment Rate Since Class of 1994*, NALP BULL. (Nat'l Ass'n for Law Placement, Inc.), July 2012, <http://www.nalp.org/0712research> (reporting 85.6% employment rate for class of 2011 graduates whose employment status was known, with slightly less than half employed in private practice, 65.4% employed in jobs requiring bar passage, and substantial increases in proportion of graduates employed in small firms of 25 or less [60%] as opposed to large firms of 101 or more [27.7%]); *see also* Claire Zillman, *Legal Sector Employment Inches Up in November*, THE AM. LAW DAILY (Dec. 7, 2012), <http://www.law.com/jsp/article.jsp?id=1202580713740&slreturn=20130104204439>.

7. *Three-Year ABA Volume Comparison* (Dec. 19, 2012), <http://www.lsac.org/lsacresources/data/three-year-volume.asp>. In prior years applicants to ABA accredited schools fell from 87,500 (for fall 2010) to 78,800 (for fall 2011) to 68,000 (for fall 2012). *LSAC Volume Summary* (Dec. 19, 2012), <http://www.lsac.org/lsacresources/data/lsac-volume-summary.asp>. For recent commentary on the reasons for and implications of this application downturn, *see* Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 31, 2013, <http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html?ref=ethanbronner>.

8. *See* Press Release, Am. Bar Ass'n, ABA Section of Legal Education Reports Preliminary Fall 2012 First-Year Enrollment Data (Nov. 28, 2012), <http://www.abanow.org/2012/11/aba-section-of-legal-education-reports-preliminary-fall-2012-first-year-enrollment-data/>.

squeezes on law firm revenues<sup>9</sup> affect lawyers' abilities to make substantial contributions. Universities used to tapping law school revenues to subsidize other parts of their academic programs find themselves with little flexibility to assist law schools in navigating the current storm, as parent institutions themselves face resistance to tuition increases and expectations to cut expenditures in times of declining endowment revenues and state support.<sup>10</sup> Will these economic pressures pass away soon? It seems highly unlikely. Thus, at least one of the recent cornerstones of legal education—growing numbers of applicants willing to take on substantial debt to gain lucrative employment opportunities while subsidizing university and law school activities unrelated to the educational process—seems at risk of crumbling.

## 2. Professional Expectations

A second cornerstone—the relationship between legal education and the traditional demand for entry-level attorneys to be employed within the legal sector—is also increasingly under pressure. The “big law” sector of the legal profession has, in recent years, significantly downsized and curtailed substantial entry-level hiring in favor of a model that emphasizes lateral hires who can bring dowries of established business to bear when affiliating with other firms.<sup>11</sup> Corporate clients are no longer willing to pay top dollar to subsidize exceptionally high salaries for entry-level “big law” associates, and firms have accordingly decreased entering classes and reduced pay in favor of offering new lawyers opportunities for formal “apprenticeships.”<sup>12</sup> Even apart from the plight of “big law,” the legal profession overall is facing profound changes for a number of reasons: increasing specialization, unbundling of services, technological transformation, globalization, competi-

9. See *The Survey of Law Firm Economics*, 34 NAT'L LAW JOURNAL 11 (2012) (reporting that in survey of nearly 200 law firms, revenue per lawyer declined 4.2 percent from prior year, the largest decline since 1985; noting that declines in revenue per lawyer varied by firm size, so that firms of one to nine lawyers saw a decline of 17 percent, firms with those of 76 to 150 lawyers witnessed declines of 10 percent and those of 150 faced declines of 9 percent).

10. Delta Cost Project at American Institutes for Research, *College Spending in a Turbulent Decade: Findings from the Delta Cost Project*, (2010), <http://www.deltacostproject.org/pdfs/Delta-Cost-College-Spending-In-A-Turbulent-Decade.pdf>.

11. For discussion of lateral hiring trends, see Victor Li, *Lateral Hiring Push Will Continue Despite Uncertainty About Its Impact*, THE AM. LAW DAILY (Oct. 16, 2012), [http://www.americanlawyer.com/PubArticleALD.jsp?id=1202575195242&Study\\_Lateral\\_Hiring\\_Push\\_Will\\_Continue\\_Despite\\_Uncertainty\\_About\\_Its\\_Impact](http://www.americanlawyer.com/PubArticleALD.jsp?id=1202575195242&Study_Lateral_Hiring_Push_Will_Continue_Despite_Uncertainty_About_Its_Impact) (reporting on study of strategic planning in Am-200 law firms, with data from 79 respondents, indicating that 96 percent of survey respondents “plan to hire laterals in the next two years as a means of growing, while nearly three out of four said their firms expect the increase in lateral hiring to extend over the next five years”; noting that “only 28 percent of survey respondents described such efforts as being ‘very effective’ over the past five years and 10 percent labeled them either neutral or negative”; recognizing the role of lateral hiring in the demise of Dewey & LeBoef). See also *Lateral Hiring Up for Second Year in a Row*, NALP BULL. (Apr. 2012), <http://www.nalp.org/0412research> (lateral hiring up 48% for 2011 compared to 2010, with notable regional differences).

12. See Kashmir Hill, *Screening ‘Big Law Apprentice’ at Law Firms*, ABOVE THE L. BLOG (June 29, 2009, 4:39 PM), <http://abovethelaw.com/2009/06/screening-biglaw-apprentice-at-law-firms/#more-820>; Karen Sloan, *Three Law Firms Claim Success With New Apprenticeship Model*, THE NAT'L LAW JOURNAL, June 15, 2010, <http://www.lawjobs.com/newsandviews/LawArticle.jsp?id=1202462701838&slreturn=201301042216>

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tion from non-lawyers and those in other disciplines, and economic pressures that have affected society at-large.<sup>13</sup> Thus, legal education can no longer rely upon a cornerstone assumption that law students will face favorable job prospects upon graduation, or that traditional educational strategies will prepare graduates adequately for the imperatives they will face upon entry into the legal profession.

### 3. Intellectual and Educational Assumptions

A third cornerstone of traditional legal education is under pressure—the cornerstone that assumes legal educators can rely upon traditional educational assumptions about students, student preparation, learning and teaching techniques, and responses to changing subject matter. Many legal educators have given only peripheral attention to the significant changes in student characteristics in recent years, as an ever-increasing numbers of students now come from disadvantaged backgrounds, have documented disabilities, are returning to law school on the way to a second career, and bring international backgrounds to their studies in the United States.<sup>14</sup> Emphases in high school have changed, due in part to the No Child Left Behind’s testing standards<sup>15</sup> and also in part to the increasing number of K-12 students who are being home-schooled.<sup>16</sup> Four-year colleges increasingly enroll transfer students who have begun their work in community colleges.<sup>17</sup> As the American population has become more diverse, so too have the students enrolled in higher education.<sup>18</sup> Insights drawn from the “learning sciences” have burgeoned.<sup>19</sup> Even as key insights about cognition and development have

13. THOMAS MORGAN, *THE VANISHING AMERICAN LAWYER* (Oxford Univ. Press, 2010); RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (Oxford Univ. Press, 2009).

14. The Law School Admissions Council does not provide particularly recent publicly available data. Its website indicates, however, that out of 78,500 applicants admitted for fall 2011, 43,200 were white (55.0 %), 9,100 were African-American (11.6 %), 6,300 were Asian-American (8.0 %), 7,000 were Hispanic/Latino/Puerto Rican (8.9%), 4,810 were Native-American, Native Hawaiian, Canadian Aboriginal, or multiple races (6.1%). 40,400 were men (51.5 %). For applicants seeking admission in 2009, 37,752 (out of 89,251) (42.3%) were 25 or older. Kimberly Dustman & Phil Handwerk, *Analysis of Law School Applicants by Age Group*, Law School Admission Council (2010), [http://www.lsac.org/docs/default-source/data-\(lsac-resources\)-docs/analysis-applicants-by-age-group.pdf](http://www.lsac.org/docs/default-source/data-(lsac-resources)-docs/analysis-applicants-by-age-group.pdf). For matriculants (those who enrolled) in fall 2011, 60.5% were White/Caucasian, 7.7% were Asian, 7.2% were Black/African-American, 7.7% Hispanic/Latino/Puerto Rican, 5.5% two or more races/ethnicities, .5% American Indian/Canadian Aboriginal/Hawaiian Native. See Law School Admission Council, *Matriculants by Ethnicity*, (2011), [http://www.lsac.org/docs/default-source/data-\(lsac-resources\)-docs/matric-eth.pdf](http://www.lsac.org/docs/default-source/data-(lsac-resources)-docs/matric-eth.pdf).

15. *No Child Left Behind*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/nclb/landing.jhtml> (last visited Aug. 22, 2013).

16. For data on home schooling trends, see NAT’L HOME EDUC. RESEARCH INST., <http://www.nheri.org/>.

17. A recent study by the National Student Clearinghouse (which holds data on students attending more than 3,000 colleges and universities) indicates that for the 2010-11 school year, 45 % of all students graduating with a four-year college degree had previously attended community college for at least some period (ranging from one term to more than ten terms). See NAT’L STUDENT CLEARINGHOUSE RESEARCH CTR. (2012), <http://www.studentclearinghouse.info/snapshot/docs/SnapshotReport6-TwoYearContributions.pdf>.

18. *Digest of Education Statistics: 2011*, NAT’L CTR. FOR EDUC. STATISTICS (2012), [http://nces.ed.gov/programs/digest/d11/ch\\_3.asp](http://nces.ed.gov/programs/digest/d11/ch_3.asp) (last visited Dec. 26, 2012).

19. See JOHN BRANSFORD ET AL., *HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE AND SCHOOL: EXPANDED EDITION* (Nat’l Acads. Press, 2000).

emerged, policy makers and researchers from around the world have sought to pinpoint the knowledge and skills needed in the 21<sup>st</sup> century workplace.<sup>20</sup>

The Carnegie Foundation for the Advancement of Teaching has also offered important insights on professional education in general and legal education in particular, highlighting the importance of pedagogical strategies in emphasizing certain educational objectives, under-appreciated gaps in professional preparation, and the need to integrate instruction across dimensions of cognitive, skills, and values preparation.<sup>21</sup> Law schools have also sought to keep abreast of the growing specialization of law practice by developing ever more specialized courses and creating certification courses in numerous fields.<sup>22</sup> As a result, the sizes of full and part-time faculties have grown, adding to instructional costs. Even as competitive pressures increase to recruit a dwindling number of law student applicants, this pressure to cover the waterfront of intellectual and professional expertise is unlikely to abate.<sup>23</sup>

### B. Cornerstones for the Future

A good case can be made that, as these traditional cornerstones crumble, it will be essential to build new cornerstones to support legal education in the future. What will it take for the traditional cornerstones of legal education to be reshaped in the face of these significant pressures? What would new cornerstones look like and how can they be put in place? The following section considers four conceptual cornerstones that can facilitate change, including: understanding change, mental models, systems thinking, and approaches to assessment.

#### 1. Cornerstone #1—Understanding Change

Few legal educators are familiar with the research literature on institutional change. Yet, for those who feel concerned that change is happening too slowly, it is worth inquiring: what do we really know about the inhibitors or facilitators of

20. See JAMES W. PELLEGRINO & MARGARET L. HILTON, EDUCATION FOR LIFE AND WORK: DEVELOPING TRANSFERABLE KNOWLEDGE AND SKILLS IN THE 21ST CENTURY (Nat'l Acads. Press, 2012).

21. Carnegie Report, *supra* note 4.

22. Catherine Carpenter, *A Survey of Law School Curricula, 2002-2012*, The Bar Examiner, June 2012, at 69-70 (hereinafter referred to as "ABA CURRICULAR SURVEY") (discussing certificate and specialization offerings; indicating that 55% (84 law schools) offered such programs in 2002, while 58% (94 law schools) did in 2010; documenting increased numbers of specialization or certificate programs offered by schools (in 2010, 35 schools had 2 or 3 specialization options, 15 had 4 or 5, 20 had 6 or 7, and 9 had 8 or more); and indicating that specialization or certificate programs were most common in the areas of international law, business law, intellectual property law, environmental/natural resources, criminal law and procedure, health law, tax law, and alternative dispute resolution).

23. *Id.* at 74 (reporting significant increases in curricular offerings in the following areas, each of which had increased reported by at least 20 schools, beginning with the areas of greatest increase: international/comparative law, alternative dispute resolution, intellectual property law, business/corporate law, drafting, trial and appellate advocacy, commercial law/bankruptcy/securities, environmental law/natural resources, health care law, constitutional/civil rights law, criminal law/procedure, legal research, property/land use/real estate, legal writing, administrative law/legislation/government law, legal ethics/professionalism, employment law/benefits, jurisprudence/philosophy/law and economics/legal history, tax law).

change? How do institutional characteristics matter in shaping responses to pressures for change? Appreciating and building upon theoretical insights about change—particularly as they relate to higher education institutions, organizations, and individuals—can serve as an important cornerstone in an era where ongoing change is a fact of life.

*a. Change in Higher Education*

Sophisticated research literature on change in higher education has emerged in recent years. Scholars such as Adrianna Kezar<sup>24</sup> have probed the application of general insights relating to organizational change to higher education institutions in particular. Kezar notes it is often difficult to employ a common vocabulary in discussing “change,” since there are a number of definitional variables—such as organizational structures or values—that address the “why” of change, the “what” of change, the “how” of change, and the “outcomes” of change.<sup>25</sup> Theories of change fall into several categories that rest on differing assumptions, including: those that focus on evolutionary development; purposeful action by leaders and change agents; life cycle and developmental considerations; dialectical models of conflict and its resolution; social cognition; and culture.<sup>26</sup>

Kezar stresses the importance of considering the distinctive dimensions of higher education in order to avoid errors in analysis and to identify concepts that will prove salient to the academy’s values.<sup>27</sup> In an effort to probe related questions, she proposes there are distinctive features characteristic of higher education institutions that need to be taken into account, including: independence from the external environment, unique cultural characteristics, emphasis on institutional status, loosely-coupled characteristics that do not closely link individual institutions, a pattern of “organized analytical decision-making,” a commitment to shared governance, “goal ambiguity,” and attention to image and success.<sup>28</sup> Kezar stresses these features suggest that change is best understood within higher education through the lens of cultural, social-cognition, and political models.<sup>29</sup> She also notes the power of “image” and “identification” as key dimensions of change in higher education, particularly when there are “no bottom-line measures for examining performance,” and when the higher education system is characterized by a “loosely coupled structure, anarchical decision-making, and ambiguous goals [that] make meaning unclear.”<sup>30</sup> She likewise recognizes the role of “interde-

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24. Professor Kezar is a nationally regarded expert on change in higher education. She is on the faculty at the University of Southern California Rossier School of Education. For More information, see <http://www.usc.edu/dept/chepa/kezar/index.php#akezar> (last visited Aug. 22, 2013).

25. ADRIANNA KEZAR, PROVIDING A COMMON LANGUAGE FOR UNDERSTANDING ORGANIZATIONAL CHANGE, ASHE-ERIC HIGHER EDUCATION REPORT 11-24 (2001).

26. ADRIANNA KEZAR, HIGHER EDUCATION MODELS OF CHANGE: EXAMINATION THROUGH THE TYPOLOGY OF SIX MODELS, ASHE-ERIC HIGHER EDUCATION REPORT, 79-112 (2001).

27. ADRIANNA KEZAR, UNDERSTANDING THE NATURE OF HIGHER EDUCATION ORGANIZATIONS: KEY TO SUCCESSFUL ORGANIZATIONAL CHANGE, ASHE-ERIC HIGHER EDUCATION REPORT, 59-78 (2001) [hereinafter ASHE-ERIC].

28. *Id.*

29. *Id.* at 77.

30. *Id.* at 74-77.



pendent organizations,” such as disciplinary communities, accreditors, and the federal government.<sup>31</sup>

Kezar’s work offers a number of “research-based principles of change” that may prove helpful to higher education entities, including law schools.<sup>32</sup> Some of Kezar’s key research-based principles relating to internal institutional considerations and the dynamics of change may be summarized as follows: A number of principles appear related to the organization’s capacity to engage in learning—for example, imperatives to promote organizational self-discovery, construct opportunities for interaction that help develop new mental models, connect the change process to individual and institutional identity, and realize that strategies for change vary by change initiative);<sup>33</sup> Others relate to recognizing and shaping institutional culture—articulate core characteristics, focus on image, attend to institutional culture and how it affects change, create a culture of risk and help people in changing belief systems, realize that change is often political, focus on adaptability.<sup>34</sup> Still others concern institutional dynamics—laying groundwork for change, recognizing that that various levels or aspects of organization will need different change models, and facilitating shared governance and collective decision-making.<sup>35</sup> Kezar and colleagues have also written in more depth on related issues, including the nuanced dimensions of institutional culture<sup>36</sup> and the role of grassroots faculty leadership<sup>37</sup> in bringing about change

### *b. Change and Immunity to Change More Generally*

Other thoughtful scholars offer helpful insights about the challenges of education and the reasons that people and institutions often evidence an “immunity to change.”<sup>38</sup> Robert Kegan, a noted scholar at the Harvard Graduate School of Education, focuses on educational change and related psychological issues.<sup>39</sup> He and

31. *Id.* at 62-63.

32. ADRIANNA KEZAR, RESEARCH-BASED PRINCIPLES OF CHANGE, ASHE-ERIC HIGHER EDUCATION REPORT, 113-126 (2001).

33. *Id.* at 114, 118, 121, 121-122.

34. *Id.* at 120, 115, 121, 115-116, 117.

35. *Id.* at 116-117, 121-122, 119-120.

36. See Adrianna Kezar & Peter Eckel, *The Effect of Institutional Culture on Change Strategies in Higher Education: Universal Principles or Culturally Responsive Concepts?* 73 THE JOURNAL OF HIGHER EDUCATION 435-460 (2002) (hereinafter referred to as Kezar & Eckel, Institutional Culture). For example, in commenting on a series of institutional case studies, Kezar and Eckel highlight the following factors that tend to make a significance difference in terms of institutional culture and related change initiatives: (a) senior administrative support; (b) collaborative leadership (including leaders who hold leadership positions as well as others); (c) robust design (flexible vision, goals, and objectives); (d) staff development; and (e) visible actions (toward change). *Id.* at 436-437.

37. Adrianna Kezar & Jaime Lester, *Supporting Faculty Grassroots Leadership*, 50 RES. HIGH. EDUC. 715-740 (2009). This research identified barriers to faculty grassroots leadership such as rising standards for promotion and tenure, while also identifying ways to facilitate such leadership (treating faculty leadership efforts as part of faculty members’ service portfolios, attending to faculty workload and autonomy, providing professional development support for faculty leaders, improving dysfunctional departments, and fostering role models). *Id.* at 717-719.

38. See ROBERT KEGAN & LISA LASKOW LAHEY, IMMUNITY TO CHANGE: HOW TO OVERCOME IT AND UNLOCK POTENTIAL IN YOURSELF AND YOUR ORGANIZATION (Harvard Bus. Press, 2009) (hereinafter referred to as “IMMUNITY TO CHANGE.”)

39. See ROBERT KEGAN, IN OVER OUR HEADS: THE MENTAL DEMANDS OF MODERN LIFE (Harvard Univ. Press, 1994). Robert Kegan is William and Miriam Meehan Professor at the Harvard Graduate

his colleague Lisa Laskow Lahey<sup>40</sup> have proposed an alternative view of change based on educational and psychological insights—rather than organizational view points of the type offered by Kezar.

Over many years of research, Kegan and Lahey have developed the view that learning and psychological development are not limited to younger people, but, in fact, continue into adulthood. Kegan, in particular, has emphasized that the world at-large grows increasingly complex, presenting a challenging “curriculum” to adults as they grow older. The researchers posit that adults must cope with at least three major plateaus in their mental transitions beyond adolescence, each of which calls on them to transcend systematic limitations of prior mental views of the world. The three principal plateaus include the “socialized mind,” the “self-authoring mind,” and the “self-transforming mind.”<sup>41</sup>

The first of these plateaus (“the socialized mind”) occurs when individuals convey and receive information through the lens of their association with others and their desire to influence others by providing those others with what they want to hear. The limitations associated with this world view are those associated with distorting intake of information (in order to maintain a consistent world view), and attention to imagined subtexts that may not, in fact, be true. The second plateau (“the self-authoring mind”) filters information to others based on the individual’s desire to focus attention on the “self-author’s” belief about what others need to hear to further the author’s sense of mission. As Kegan observes, the difference between a “socialized mind” and a “self-authoring” mind is the difference between being in a car that is being driven by others and the desire of the self-authoring mind to be the one driving. Kegan and Lahey posit a third plateau that they describe as the “self-transforming mind.” In their view, the “self-transforming mind” is capable of stepping away from an initial agenda and instead making space for modification of a personal plan in order to reset an agenda.

Kegan and Lahey’s research and principles rely upon empirical research using several tools to test mental complexity.<sup>42</sup> They emphasize the gaps between

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School of Education. He is co-director of the Change Leadership Group. For more extensive information on Dr. Kegan, see <http://www.gse.harvard.edu/directory/faculty/faculty-detail/?fc=318&flt=k&sub=all>.

40. Lisa Laskow Lahey is a lecturer at the Harvard Graduate School of Education. She has also been affiliated with the Change leadership group as well as with Minds At Work, a consulting group that works with senior leaders and teams in corporations, government and non-profits. For more information on Dr. Lahey’s background, see <http://www.gse.harvard.edu/directory/faculty/faculty-detail/?fc=705&flt=l&sub=all>.

41. KEGAN & LAHEY, *supra* note 38, at 16-20.

42. In assessing mental complexity, Kegan and Lahey employed a “subject-object” interview protocol built on a model developed by Keith Eigel. They asked interviewees to take notes in preparation for discussion about when they may have experienced emotions relating to being angry, anxious, succeeding, taking a strong stand, being sad, being torn, being touched, losing something, changing and dealing with something important. *Id.* at 21-24. Interviewees were asked about their feelings, and what made them feel in a particular way. Interviews also asked about effectiveness in challenging existing processes, inspiring shared vision, managing conflict solving problems, delegating, empowering, and building relationships. *Id.* Based on related data, they concluded that competence at work correlated with mental complexity, and asserted that it is necessary at this juncture in history to have a “self-authoring mind” in order to deal effectively with changes in the work environment. The authors also discussed the Washington University Sentence Completion Test that has been used as an alternative assessment device. *Id.* at 27. Based on studies using these two instruments they concluded that data shows that 58% of a college-educated sample have as yet not developing self-authoring minds,

the extent to which college-educated individuals possess complex mental capacities and the requirements associated with current workforce needs.<sup>43</sup> They also stress the ways in which a disciplined approach may facilitate the dilemmas associated with differences between existing capacity and needed capacity. In particular, they advocate a “four column approach” that focuses on: (1) identifying commitments and improvement goals; (2) observing behaviors that work against goals; (3) identifying “hidden competing commitments” that constitute an “immunity system” and compete with or block the capacity to address improvement goals; and (4) considering competing “big assumptions.”<sup>44</sup>

Kegan and Lahey posit that it is most possible for individuals to move from one mental plateau to another if there is “optimal conflict,” that is, a persistent dilemma that results in experiencing limits tied to current ways of knowing, in an area of personal importance, with support that assures an individual is not overwhelmed or unable to deal with resulting conflict.<sup>45</sup> To bring about change, it is crucial in their view to consider how “immunity to change” (the internal processes that block change) plays out across the “change-prevention system” that thwarts challenging aspirations, the “feeling system” that manages anxiety, and the “knowing system” that organizes reality.

Kegan and Lahey offer examples of how “immunity to change” can be addressed. A particularly relevant example concerns medical school curriculum reform. This example resonates with potential legal education reforms. The authors documented discussions within a medical school regarding curriculum reform in which faculty identified desired core competencies for medical graduates.<sup>46</sup> The medical faculty identified gaps between aspirations and actual accomplishments of medical graduates.<sup>47</sup> The faculty then identified improvement goals relating to professional competencies, active learning, integration, and underserved topics.<sup>48</sup> They further identified existing obstructions to achieving their desired goals and teaching and assessment techniques, gathered related data to test their assumptions, created optional pilot programs to test assumptions and possibilities, and created strategies for implementing and testing possible changes.<sup>49</sup>

These researchers ultimately stress the importance of several steps in engaging with change and overcoming the commonplace immunity to change. It is first necessary to identify a “collective improvement goal” that is widely embraced and significant. Next, it is crucial to develop a “fearless” inventory of behaviors within an organization that are contrary to the improvement goal and to uncover collective competing commitments that impede change. Finally, it is important to uncover big assumptions and to test them.<sup>50</sup>

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and very few have self-transforming minds (resulting in a significant gap between society’s needs and reality). *Id.* at 27-28.

43. *Id.* at 24-28.

44. *Id.* at 56-57.

45. *Id.* at 54-56.

46. *Id.* at 109-124.

47. *Id.* at 110.

48. *Id.* at 111-115.

49. *Id.* at 116-119.

50. *Id.* at 120-124.

*c. Conclusion*

Insightful research such as that just described can provide an important theoretical cornerstone for legal education going forward. Kezar's work unpacks some of the institutional characteristics that make change difficult in higher education. These characteristics include distance from the external environment, emphasis on institutional status and image, "loosely coupled" connections with other institutions so that it is difficult for new models to migrate, and commitment to shared governance. In the face of such challenges, she offers research-based principles that can facilitate change, including attention to institutional culture, awareness of institutional dynamics, and support for organizational learning.

Kegan and Lahey offer a complementary psychological perspective. They recognize difficulty in embracing change may relate to individuals' capacities to bring to bear the more sophisticated levels of mental complexity that are called for given the increasing complexity of the problems they face in an ever-more-complex world. Their conceptualization of "immunity to change" provides judgment-free attention to an important dynamic that often impedes personal or organizational change, namely the often unrecognized interests served or benefits derived from maintaining the status quo. They offer a structured approach to navigating change that calls for identifying a clearly shared goal, examining behaviors that get in the way of achieving the goal, exploring underlying commitments that drive those behaviors, and then related big assumptions. Finally, they suggest engagement with the immunity to change can foster capacity to deal with complex problems by fostering growth in ability to bring to bear more complex mindsets.

Drawing on the works of thoughtful scholars such as those described above should provide legal education reformers with a new cornerstone: develop and employ a theory of change grounded in research and use research-based principles to guide your efforts.

*2. Cornerstone #2—Considering Mental Models*

Both the work of Kezar and that of Kegan and Lahey exemplify "mental models"—those intellectual conceptions of how things work. As described by the distinguished organizational behavior scholar, Peter Senge,<sup>51</sup> these "mental models" are "deeply held internal images of how the world works," ones that "limit us to familiar ways of thinking and acting" often without conscious awareness of their existence or implications. Mental models affect how people perceive the world around them, and in turn affect what action they take. A second cornerstone for educational reform is recognizing the power of mental models and to explore and set aside those mental models that may limit our capacity to imagine fresh approaches to the challenges facing legal education. This section highlights three examples of mental models that are held by significant numbers of legal educators, in hopes of illuminating related assumptions for fresh consideration.

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51. PETER SENGE, *THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF THE LEARNING ORGANIZATION* 205-232 (Doubleday, Rev. Ed., 2006) (hereinafter *THE FIFTH DISCIPLINE*).

*a. Pursuit of Prestige: A Mental Model for Higher Education*

A first mental model that is worthy of close consideration comes with being embedded in higher education. Historically, there has been a tendency by those in higher education to emulate strategies used by schools they regard as elite. Higher education researchers have studied this phenomenon and described it as “striving,” that is, “the pursuit of prestige within the academic hierarchy.”<sup>52</sup> Higher education scholar Kerry Ann O’Meara<sup>53</sup> has synthesized the research on how colleges and universities, which are not yet at the top of the academic hierarchy, tend to exhibit “striving” behavior that includes efforts to rise in relevant rankings (be they the “Carnegie” classifications of types of universities, or various sorts of polls). Prestige is conflated with quality, which is conflated further with student credentials, selectivity, and the availability of resources.<sup>54</sup> “Striving institutions” tend to exhibit common characteristics, including increased selectivity in admissions and attention to merit-based aid, efforts to hire “faculty stars,” reduction of teaching loads in favor of research obligations, attention to curriculum offerings that foster prestigious student employment or advanced educational placements, preference for language that emphasizes prestige, and increased spending on administration and amenities (often with resources being shifted away from instructional support).<sup>55</sup> O’Meara traces “striving” behavior to historic developments (such as the growth in highly specialized faculty), economic factors (such as competition for the most able faculty and students), “population ecology” (a tendency to emulate those higher in the pecking order to foster survival), sociological forces (a tendency to try to balance core institutional understandings with external pressures), political forces (such as efforts to gain resources and power correlated with prestige), and the dynamics of faculty reward systems (which may incentivize striving behavior by individual faculty members who in turn align themselves with striving institutions.)<sup>56</sup>

O’Meara also documents common behavioral patterns found in striving institutions. Striving institutions tend to demonstrate high selectivity in their recruitment of students. Such an objective may lead to recruitment of a higher volume of students (even if not likely to be admitted), increased expenditures on marketing, and a tendency to articulate “quality” of students in terms of test scores and prior grade performance.<sup>57</sup> Striving institutions also typically change their approaches to recruiting faculty (emphasizing research productivity), develop more stringent

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52. KERRY ANN O’MEARA, STRIVING FOR WHAT? EXPLORING THE PURSUIT OF PRESTIGE, 121–179 (J.C. Smart ed., 2007) (hereinafter O’MEARA). See also LARRY CUBAN, HOW SCHOLARS TRUMPED TEACHERS: CHANGE WITHOUT REFORM IN UNIVERSITY CURRICULUM, TEACHING, AND RESEARCH, 1890–1990 (Teachers College Press, 1999) (discussing developments in history departments and medical schools).

53. Dr. Kerry Ann O’Meara is associate professor in the College of Education of the University of Maryland. She previously served on the faculty of the University of Massachusetts-Amherst. She has written widely on a range of topics relating to higher education, including faculty development, experiential education, academic reward systems, the scholarship of engagement, and ranking systems in higher education. For more information regarding her background and work, see [http://www.education.umd.edu/EDHI/about/faculty\\_pages/komeara.html](http://www.education.umd.edu/EDHI/about/faculty_pages/komeara.html) (last visited Jan. 30, 2013).

54. O’MEARA, *supra* note 52, at 125–129.

55. *Id.* at 131.

56. *Id.* at 132–45.

57. *Id.* at 146–47.

tenure and promotion standards, and decrease teaching loads for faculty members in order to provide discretionary time for research and other activities that could add to institutional prestige.<sup>58</sup> Striving institutions likewise tend to create more specialized programs and “prestigious learning communities” such as centers or institutes.<sup>59</sup> Striving also brings with it a desire for more resources, with a concomitant shift of funds away from teaching and toward administrative functions that can support efforts to raise more funds (e.g. through securing research grants or engaging in institutional development activities).<sup>60</sup> Another common characteristic is increased attention to marketing and institutional image management.<sup>61</sup>

What are the implications of “striving” behavior? O’Meara highlights likely trends. As faculties are drawn more intensively toward research, they may be less available to students informally, teach less, and be less likely to feature “active learning” as part of their teaching.<sup>62</sup> At the same time, “striving” institutions may give more emphasis to academic rigor and may have smaller class sizes in at least some of their offerings.<sup>63</sup> “Striving” institutions may also put more emphasis on high credentials for entering students, reduce the number who come from disadvantaged socio-economic backgrounds, and may have more negative outcomes for such students.<sup>64</sup> O’Meara also references research on graduate programs that suggest there is an inverse relationship between the supportive nature of program climates and the emphasis of faculty members on external rankings and their own career ascent.<sup>65</sup> Research has also shown that “striving” behavior can have a positive benefit for faculty careers, insofar as it correlates with achievement, recognition, lesser teaching loads, and more time for scholarly pursuits.<sup>66</sup> There may, however, be greater work-life tensions in “striving” universities and faculty members hired with one set of expectations may face repercussions if promotion and tenure standards shift.<sup>67</sup> Along with other ramifications, O’Meara suggests “striving” may cause incremental and unexamined shifts in academic mission. For example, some colleges and universities may have committed themselves to missions that emphasize teaching with an eye to the needs of first-generation college students, but may incrementally shift their focus away from teaching toward research and graduate education in order to climb in the “pecking order” toward higher prestige.<sup>68</sup>

Does the “striving” phenomenon characteristic of many colleges and universities constitute a “mental model” also common among law schools? A fair reading of O’Meara and others research suggests many of the characteristics of “striving institutions” apply to law schools. O’Meara notes, at the time of her research synthesis, the following institutions are likely to strive: those just below the top “prestige” group threshold; those that try to recruit students on a regional or na-

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58. *Id.* at 149-50.

59. O’MEARA, *supra* note 52, at 150-51.

60. *Id.* at 151-52.

61. *Id.* at 153.

62. *Id.* at 160.

63. *Id.*

64. O’MEARA, *supra* note 52, at 161.

65. *Id.* at 161-62.

66. *Id.* at 162.

67. *Id.* at 162-63.

68. *Id.* at 169-70.

tional rather than local basis; those that are seeking enhanced revenue streams apart from tuition; those that are small and cohesive enough to respond to changes in administrative leadership; and those who have brought a substantial supply of research-oriented faculty to campus.<sup>69</sup> This characterization likely fits a substantial proportion of American law schools, particularly since law schools of all stripes have increasingly hired their faculty members from elite schools,<sup>70</sup> emphasized J.D./Ph.D. hires, and focused on prospective faculty members who have particularly good prospects for establishing rapid and strong publication records.<sup>71</sup>

The striving phenomenon may have made sense in an era when student applications remained high, law jobs were plentiful, and law schools were flourishing. However, harder questions are currently posed, during a time when those assumptions no longer apply. Can law schools continue to “strive” and “pursue prestige” during an era of declining job prospects and declining applications, particularly when, for most law schools, it may not be possible to maintain both the same size of entering class and the same level of student credentials? Reduced numbers of law students in turn results in lower total revenues. While the “striving” dynamic may function well as a mental model that can fuel increased prestige in an era of increasing applications and robust institutional and job growth, it seems much more problematic in the current era of application and job decline. Will law schools continue to cleave to this mental model when it no longer makes sense? It would surely seem ill-advised to do so. The challenge, however, is what “mental model” will replace “the pursuit of prestige.”

### *b. U.S. News & World Report Rankings*

A second mental model plagues legal education, namely the treatment of U.S. News & World Report rankings as a proxy for institutional quality, notwithstanding the serious flaws associated with the rankings’ methodology. Law schools’ pursuit of prestige (to satisfy their students, faculty, and alumni) has led them to compete for higher rankings in U.S. News & World Report,<sup>72</sup> even to the point of

69. O’MEARA, *supra* note 52, at 157.

70. See Michael Higdon, *A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias*, SOCIAL SCIENCE RESEARCH NETWORK (Feb. 21, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2007934](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2007934) at 7-9 (a discussion of hiring trends that privilege candidates for faculty positions who have attended elite law schools) (last visited Jan. 2, 2013) (citing 2003 study that found that only 14% of faculty who were hired had degrees from non-top-25 law schools).

71. BRIAN TAMANAHA, *FAILING LAW SCHOOLS* 57-58 (2012) (referencing trend of hiring law professors with Ph.D.’s in subjects other than law, many of whom have no legal experience at all; referencing trend at top 13 law schools which have hired 1/3 of faculty members with Ph.D.’s, while 1/5 of law schools ranked 14 through 26 have hired such faculty members without law degrees; also noting that an increasing proportion of faculty members have been hired following one to two years as fellows or visiting assistant professors; reporting that a sampling of 40 law schools reported that of tenure-track faculty members hired in the last decade, median practice experience is three years or less and among top law schools one year or less). For discussion of the lack of practice experience among many law professors, see Brent Newton, *Preaching What They Don’t Practice: Why Law Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105 (2010).

72. See *id.* at 71-84. See also Michael Sauder & Wendy Espeland, *Fear of Falling: The Effects of U.S. News & World Report Rankings on U.S. Law Schools, Law School Admission Council Grants Report*, LSAC RESEARCH REPORT SERIES (Oct. 2007),

employing various “gaming” strategies intended to gain competitive advantage.<sup>73</sup> To produce its rankings, U.S. News relies on deploying “coach’s polls” whose respondents need have no direct information about the institutions they are judging.<sup>74</sup> It also manipulates data collected from yearly questionnaire responses required by the American Bar Association (ABA)<sup>75</sup> regarding student credentials, faculty resources, placement results, and other similar factors. Even though data regarding many schools may cluster in close proximity, the “rankings” do not employ sound statistical analysis that would focus on the kinds of meaningful differences associated with standard deviations and other criteria for evaluating meaningful differences.<sup>76</sup> Instead the U.S. News approach appears designed to

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<http://www.lsac.org/lsacresources/Research/GR/GR-07-02.asp> [herein after U.S. News]; Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229 (2006). Tamanaha’s analysis is also subject to critique as privileging elite law schools. See Bryant Garth, *Crises, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, SOCIAL SCIENCE RESEARCH NETWORK (Oct. 24, 2012), <http://ssrn.com/abstract=2166441>; Elizabeth Chambliss, *It’s Not About Us: Beyond the Job Market Critique of U.S. Law Schools*, SOCIAL SCIENCE RESEARCH NETWORK (Dec. 13, 2012), <http://ssrn.com/abstract=2189021>.

73. *Id.* at 86-88 (discussing gaming relating to part-time programs); 88-96 (gaming relating to transfer students), and 96-99 (gaming through financial aid practices).

74. In 2012, US News used the following methodology in ranking law schools: quality assessment (25% poll of academics [including deans, associate deans of academic affairs, chairs of faculty hiring committees, and most recently tenured faculty members], 15% poll of lawyers and judges [firm hiring partners, state attorneys general, selected federal and state judges]); selectivity (12.5% median LSAT scores for all full-and part-time entrants in JD programs; 10% median undergraduate GPA for all full and part-time entrants to the JD program; 2.5% acceptance rate for combined proportion of applicants to full-time and part-time JD program); placement success (20%, considering placement at graduation and nine months thereafter); bar passage rate (2%); faculty resources (total of 15% including expenditures per student [10.9%], student-faculty ratio [3%], library resources [.75%], missing balance not explained). Overall rank is determined by determining means, standardizing around means, and weighting, totaling, and rescaling scores, setting top school as 100 and determining percentages of the 100. See Robert Morse & Sam Flanigan, *Methodology: Law School Rankings*, U.S. NEWS & WORLD REPORT (Mar. 3, 2012) available at

<http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2012/03/12/methodology-law-school-rankings>. This approach results in artificial distinctions between law schools by arraying them in order without considering whether there are statistically significant differences. It also artificially privileges private law schools that expend significant funds on financial aid, in contrast to those public law schools whose tuition is subsidized for in-state students by their home states. For other problems with the methodology see sources, *supra* note 72.

75. See ABA Statement on Law School Rankings (Mar. 16, 2012) [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/2012\\_statement\\_on\\_law\\_school\\_rankings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/2012_statement_on_law_school_rankings.authcheckdam.pdf) (The American Bar Association Section on Legal Education has disclaimed any involvement or support of US News rankings). Unfortunately, this disclaimer is confusing and deceptive, since the ABA’s requirements that law schools provide specified data means that the related data is necessarily available to US News in its deceptive rankings of law schools. If the ABA did not require law schools to submit specified data, the data would not be collected and would not be available under public records requirements for public law schools (among others). Accordingly, the ABA’s disclaimer is disingenuous at best.

76. See LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, <http://lssse.iub.edu/> (the Law School Survey of Student Engagement was developed based on the collegiate level “National Survey of Student Engagement” in order to assess the quality of students’ educational experiences, rather than “prestige.”) LSSSE employs more meaningful questions regarding the character of students’ educational experiences, debt loads, work patterns, access to faculty members, engagement with diverse student colleagues, and much more. It employs much more meaningful analysis, allowing schools to select



generate a listing tied to “prestige”—a more ephemeral and less grounded notion than “quality,” and one that is more clearly associated with large private endowments and the ability and willingness to expend substantial resources on glossy promotional brochures and short-term employment of graduates to bolster placement statistics. It is worth asking whether “prestige” is the same as quality (arguably it is not), and what other assumptions about private versus public law school education are embedded in the mental model underlying rankings by U.S. News.

### *c. American Bar Association Standards and Reporting Requirements*

A third mental model is that provided by the accreditation standards adopted by the American Bar Association’s Council of the Section of Legal Education and Admission to the Bar.<sup>77</sup> The ABA has long been recognized by the United States Department of Education as legal education’s specialized accreditor.<sup>78</sup> The ABA’s imprimatur is important for at least two reasons: it allows law students attending an accredited law school to qualify for federal financial assistance, and it serves as a criterion used by state supreme courts in allowing students who have attended law school in other jurisdictions to sit for a given state’s bar exam. The ABA’s “standards” for accreditation, and the related data that the ABA requires to be submitted on a yearly basis, reflect its evolving understanding of baseline quality requirements.

The ABA’s standards are currently under review.<sup>79</sup> Numerous proposals for change have been offered and many commentators have either supported or criticized related changes. For example, current proposals call for law schools to focus on student competence and to establish and assess institutional learning out-

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peer groups for comparison and reporting data with reference to statistically significant differences. See *LSSSE 2012 Mean Comparisons Report, Lsseeville Law School*, LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, (2012) <http://lsse.iub.edu/pdf/2012/LSSSE%202012%20Mean%20Comparisons%20%28Lsseeville%20Law%29.pdf> (example of report reflecting 2012 data).

77. See 2013-2014 A.B.A. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS available at [http://www.americanbar.org/groups/legal\\_education/resources/standards.html](http://www.americanbar.org/groups/legal_education/resources/standards.html) (the ABA’s Section on Legal Education and Admission to the Bar has adopted accreditation standards) [hereinafter A.B.A. STANDARDS & RULES].

78. The American Bar Association has long been recognized as the accreditor of legal education programs. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980’S* 95 (discussing creation of ABA Council of Legal Education), 205-231 (discussing accreditation trends following World War II) (1987); SUSAN K. BOYD, *THE ABA’S FIRST SECTION: ASSURING A QUALIFIED BAR* 25 (discussing practices in 1921), 34 (discussing practices in 1931), 35 (discussing practices in 1941), 45-51 (discussing practices in the 1950’s), 55-56 (discussing practices in the 1970’s), 57-62 (discussing development of standards in 1970’s), 66-68 (discussing disputes regarding accreditation of proprietary schools), 69-73 (discussing criticisms of accreditation process) (1993) See also Judith Welch Wegner, *Two Steps Forward, One Step Back: Reflections on the Accreditation Debate*, 45 J. LEGAL EDUC. 441 (1995) (describing hotly contested issues in law school accreditation during the mid-1990’s including litigation against the ABA by Massachusetts School of Law and the U.S. Justice Department’s investigation of antitrust claims against the ABA that resulted in a consent agreement); Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1485-1492 (2011) (discussing history of law school accreditation).

79. See STANDARDS REVIEW COMMITTEE, AMERICAN BAR ASSOCIATION (2013) available at [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review.html](http://www.americanbar.org/groups/legal_education/committees/standards_review.html) [hereinafter STANDARDS REVIEW COMMITTEE].

comes.<sup>80</sup> Recently adopted changes have required more data and greater transparency in placement data.<sup>81</sup> Yet there remain unfortunate ways in which the Standards reflect outdated mental models. For example, clinical faculty members receive only fractional treatment in calculating student-faculty ratios.<sup>82</sup> Perhaps most significantly for current purposes, the Standards have led to unfortunate standardization in which so many dimensions of legal education are regulated that innovation is constrained. Although the Standards allow for “variances” that would permit new models of quality legal education to emerge,<sup>83</sup> there has been little inclination to allow such variances. Thus, the “mental model” reflected in the Standards does not encourage, but rather stifles, fundamental change.

#### *d. Conclusion*

Mental models such as those associated with institutional “prestige,” *U.S. News*’ ranking criteria, and ABA accreditation and reporting requirements need to be recognized for what they are and what they are not. Law schools and their faculties need to surface and examine their unstated assumptions regarding educational quality and how quality is measured. They also need to bring critical thinking to bear in considering the possible disjunctions between “prestige” (as reflected in *US News* metrics), quality (as measured in student and faculty accomplishments), and institutional expectations (as reflected in ABA standards). Since these varying mental models have formed “cornerstone” assumptions that underlie legal education in the current era, their guiding assumptions need to be made more transparent, and their legitimacy needs to be re-evaluated against the backdrop of current challenges and concerns. In particular, law schools (and the ABA as ac-

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80. Proposals to focus on competence and learning outcomes assessment are available at *Standards Review Committee Meeting Agenda* (Nov. 16, 2012), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/July2012/2012\\_nov\\_src\\_meeting\\_materials.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/July2012/2012_nov_src_meeting_materials.authcheckdam.pdf) (including proposed standard 302 relating to competency and learning outcomes).

81. In 2011, the ABA House of Delegates concurred in recommendations by the Section Council to strengthen standard 509 relating to consumer information. See American Bar Association Section of Legal Education and Admissions to the Bar (Mar. 17, 2011), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20110317\\_hod\\_concurrence\\_s509\\_r10\\_r22\\_r24.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20110317_hod_concurrence_s509_r10_r22_r24.authcheckdam.pdf).

82. Interpretations of ABA accreditation standards provide that clinical faculty members who are not on tenure track or its equivalent are to be treated as 0.7 faculty members (rather than 1.0 faculty members) in calculating student/faculty ratios. See ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 2012-2013, STANDARD 402, INTERPRETATION 402.1(1)(A)(II), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/chapter\\_4\\_2012\\_2013\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/chapter_4_2012_2013_aba_standards_and_rules.authcheckdam.pdf).

83. See ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 2012-2013, STANDARD 802 available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/chapter\\_8\\_2012\\_2013\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/chapter_8_2012_2013_aba_standards_and_rules.authcheckdam.pdf) (defining “variance: A law school proposing to offer a program of legal education a portion of which is inconsistent with a Standard may apply for a variance. If the Council finds that the proposal is nevertheless consistent with the general purposes of the Standards, the Council may grant the variance, may impose conditions, and shall impose time limits it considers appropriate. Council may terminate a variance prior to the end of the stated time limit if the school fails to comply with any conditions imposed by the Council. As a general rule, the duration of a variance should not exceed three years”).

crediting body) need to be sure that they have not conflated “prestige” with “quality” with “minimum requirements” going forward.

Perhaps more importantly, fresh mental models need to be developed as possible replacements for at least some aspects of these traditional cornerstones that seem significantly out of step with current developments. Educating Lawyers, the 2007 report of the Carnegie Foundation for the Advancement of Teaching, has proved a catalyst for many faculty members and law schools in rethinking aspects of their curriculum. The study suggested the metaphor of “apprenticeships” as a means of highlighting key dimensions of professional education in law as well as in other fields. Law schools have been effective in developing critical thinking skills (the “cognitive apprenticeship,” developed through instruction in “thinking like a lawyer”), but have been less engaged in offering a comprehensive skills-related apprenticeship or an apprenticeship of identity and values.<sup>84</sup> The Carnegie study also highlighted the case-dialogue method as legal education’s “signature pedagogy,”<sup>85</sup> and numerous law faculty members have invoked this “mental model” as they have described teaching and learning models suitable to different parts of the curriculum going forward.<sup>86</sup> Developing fresh mental models in conceptualizing other aspects of legal education offers significant opportunities for change as well.

### 3. Cornerstone #3—Engaging in “Systems Thinking” to Move Beyond the Box

Many legal educators have begun to focus on discrete issues raised by the current pressures affecting legal education. In turn, this raises questions such as: How should we change our curriculum in order to help students succeed in the current job market? What teaching strategies should we employ? What might we do with our admissions policies to enroll more students from the declining applicant pool? Are there new strategies that our career services office might employ to help students gain job placements? Can we control costs more effectively? Can anticipated debt loads be controlled? Answers to such questions are difficult in isolation. Could we make more headway if we thought of them as interconnected? Theorists who have studied complex problems embedded in multifaceted contexts suggest the answer is “maybe so.”

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84. CARNEGIE REPORT, *supra* note 4, at 27-33.

85. *Id.* at 47-86.

86. See, e.g., Carol McCrehan Parker, *The Signature Pedagogy of Legal Writing*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 463 (2010); Kelly S. Terry, *Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose*, 59 J. LEGAL EDUC. 240 (2009); Susan Bryant & Elliott S. Milstein, *Rounds: A “Signature Pedagogy” for Clinical Education*, 14 CLINICAL L. REV. 195, 216 (2007) (describing case rounds as signature pedagogy in clinical teaching, and emphasizing importance of critical reflection in this process).

a. “Systems Thinking”

Peter Senge, an innovative theorist at MIT,<sup>87</sup> offered a new approach to organizational innovation in his 1990 publication, *The Fifth Discipline*.<sup>88</sup> Senge concluded that organizations seeking to survive and thrive in the current era needed to think of themselves as “learning organizations,” which embody five organizational disciplines, including “personal mastery,”<sup>89</sup> “mental models,”<sup>90</sup> “shared vision,”<sup>91</sup> “team learning,”<sup>92</sup> and “systems thinking,”<sup>93</sup> in order maximize their abilities to deal with fast-paced change. “Systems thinking” (the “fifth discipline”), in his view, depended upon and ultimately linked all the other important frameworks for navigating change, since it provided an opportunity for synergy. It links the other “disciplines” in a focused way that built upon their distinctive dimensions (individual mastery, mental models, shared vision, team-based capability), in order to create a synergy across these elements that could contribute to a cohesive organizational whole.<sup>94</sup>

Early in the book, Senge uses the famous “beer game” simulation, initially created by MIT Professor Jay Forrester,<sup>95</sup> to demonstrate the dynamics within a supply chain system. The game assumes there are four layers within the distribution system: the retailer, wholesaler, distributor, and manufacturer of a product called “Lovers Beer.” Teams are assigned to each of these four roles and are prohibited from communicating with teams at other stages in the supply chain. The aim of each team is to meet the retail customers’ demands for beer. Orders flow upstream (from retailer stepwise to manufacturer) while deliveries flow downstream in reverse order. There is a time lag between each step in the supply chain,

87. Dr. Peter Senge is Senior Lecturer in Leadership and Sustainability at the MIT Sloan School of Management. He is widely recognized as an intellectual leader who has guided the development of business strategy in the current era. He is the Founding Chair for the Society for Organizational Learning. See Peter Senge, Senior Lecturer, Leadership and Sustainability Biography, MIT Sloan Management (2013), [http://mitsloan.mit.edu/faculty/detail.php?in\\_spseqno=41415](http://mitsloan.mit.edu/faculty/detail.php?in_spseqno=41415).

88. See SENGE, *supra* note 51, at 8-11.

89. *Id.* at 7 (defining “personal mastery” as the “discipline of continually clarifying and deepening our personal vision, of focusing our energies, and of seeing reality objectively”). See also *id.* at 131-162 (in-depth discussion of personal mastery).

90. *Id.* at 8 (defining defines “mental models” as “deeply ingrained assumptions, generalizations, or even pictures or images that influence how we understand the world and how we take action”). See also *id.* at 163-190 (in-depth discussion of mental models).

91. *Id.* at 8 (defining defines “mental models” as “deeply ingrained assumptions, generalizations, or even pictures or images that influence how we understand the world and how we take action”). See also *id.* at 163-90 (in-depth discussion of mental models).

92. *Id.* at 9 (defining “shared vision” as involving “the skills of unearthing shared ‘pictures of the future’ that foster genuine commitment and enrollment rather than compliance”). See also *id.* at 191-215 (in-depth discussion of shared vision).

93. SENGE, *supra* note 51, at 69 (defining “systems thinking” as a conceptual framework for “seeing [the] whole,” “seeing interrelationships rather than things,” “seeing patterns rather than ‘static snapshots,’” and “seeing the structures that underlie complex situations”).

94. *Id.* at 11-12 (in Senge’s view, “systems thinking” is particularly important because “It is the discipline that integrates the five disciplines [and] makes [them] understandable. ... [It is] the way individuals perceive themselves and their world... [It provides] a shift of mind from seeing ourselves as separate from the world to connected to the world... from seeing problems as caused by someone ‘out there’ to seeing how our own actions create the problems we experience”).

95. *Id.* at 27-51. See also THE BEERGAME PORTAL, The University of Sydney & The University of Münster - Department of Information Systems (2012), <http://www.beergame.org/>.

thereby causing lag in between orders, submission, manufacturing, and deliveries. Orders can be fulfilled out of backlogs (if there is sufficient inventory) or through new production. Costs are associated with these alternatives, with items in stock costing half of the costs of backlogs. The goal of players is to try to fulfill orders through inventory rather than backlogs to keep their costs at a minimum. No information is exchanged as to customer demands or stock levels by those upstream of the retailer.

Shortly after the game begins, the retailer observes an increased demand for Lovers' Beer within one week (without being able to discern the reason). The retailer increases his order for several weeks running, but, due to the time lag on the way upstream and downstream, does not receive increased orders for four weeks, at which time he has depleted his supply and frustrated his customers. Meanwhile, the upstream suppliers become erratic in their ability to supply the retailer's needs, while also building up excess supply (because of the retailer's and others' repeated signals asking for more beer to be sent down the chain).

Senge observes many players of the beer game placed blame on the manufacturer, while others assumed there have been significant oscillations in consumer demand or simply blamed "the system." Those who used a "no strategy" strategy—simply ordering an amount of beer equal to the demand they had received—experienced persistent backlogs, while those who tried to correct imbalances did worse. Those who were more successful in the "beer game" avoided vicious cycles by redefining spheres of influence and appreciating that their individual conduct affected the actions of others. The best results for all occurred when individual teams refused to panic.

What is the essence of Senge's lesson for law schools in the current era? "Mental models," discussed above, play a significant role in decision-making. Systems that link numerous decisions are not easily navigated and, if navigated, may reflect erroneous decisions. "Systems thinking" is required in order to evaluate perceived realities at a local level, insofar as they are linked to more complex, interactive systems. Senge also notes "small changes can yield large results" (as in the beer game) but that "areas of highest leverage are often the least obvious."<sup>96</sup> Feedback loops are powerful and under-appreciated.<sup>97</sup> The ability to navigate these complexities is tied to personal mastery, shared vision, and team learning (as well as mental models and systems thinking).<sup>98</sup>

Senge's analysis provides a cautionary tale for law schools who might otherwise approach issues such as admissions, financial aid, placement, curriculum, extracurricular activities, alumni relations, and faculty hiring as separate and distinct concepts. His ultimate lesson is that all these considerations are closely related and need to be approached with an eye to their inter-relationship. As is true in the beer game, levels of the supply chain are interrelated (consider the ties be-

96. SENGE, *supra* note 51, at 63-65 (discussing function of "trim tab" that turns a ship's rudder, in order to allow the rudder to then turn the ship).

97. *Id.* at 68-91 (discussing the feedback loop involved in filling a glass of water, including desired water level, facet position, water flow, and perceived gap between water line and goal; also distinguishing between "reinforcing" feedback such as growth in sales due to positive customer word of mouth, and "balancing feedback" such as adding or removing layers of clothing to deal with temperature changes, and delays that can cause problems with both types of feedback loops).

98. *Id.* at 12.

tween student demand, admissions standards, faculty characteristics, teaching strategies, employment opportunities and law school revenues). Senge also emphasizes the ways in which short-term actions can lead to unexpected long-term results, particularly if little attention is paid to the dynamics of feedback loops.<sup>99</sup> Law schools seeking to survive within the current unstable climate need to attend to these interrelations or risk their survival.

### *b. Wicked Problems*

Systems thinking, as proposed by Senge, is also related to the earlier conception of “wicked problems,”<sup>100</sup> a notion developed by academic experts to assist others in appreciating the complex forces involved in responding to challenging design problems.<sup>101</sup> Both concepts emphasize the relationship among differing viewpoints and strategies. Both realized there are no obvious solutions. Both appreciate the powerful role played by perception in defining and responding to complex problems.

Earlier, I wrote at some length about “wicked problems” in legal education.<sup>102</sup> “Wicked problems” are ones that lack easy or straightforward principles to guide their resolution. The notion of “wicked problems” arose from architecture educators and other innovators to refer to problems that are difficult or impossible to solve because of their contradictory and changing characteristics, their shifting nature, the varying perspectives of observers on possible solutions, the difficulty in defining an appropriate solution, and the implications of iterative responses in shaping and reshaping possible resolution. “Wicked problems” are ones that often demand “systems thinking” because they are not readily framed in a definitive way, are often perceived from diverse and conflicting viewpoints, and are not amenable to ready resolution.

Problems such as “how can law schools prepare law students adequately for a rapidly changing professional climate” are undoubtedly “wicked” in nature. So are problems associated with maintaining the viability of law schools in the current era when student applications have declined and enrollment patterns are in

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99. *Id.* at 70-71 (citing an example of the war on terrorism. From the view of Americans, the 9/11 terrorist attacks led to a threat to Americans, and a need to respond militarily. From the vantage of the terrorists, American military activity resulted in perceived aggressiveness of the United States, resulted in an ability to recruit more prospective terrorists).

100. See Judith Wegner, *Reframing Legal Education's Wicked Problems*, 61 RUTGERS L. REV. 867, 870-877 (2009). In its current incarnation, the term “wicked problem” was coined by Horst Rittel and Melvin Webber to describe a class of problems that cannot readily be resolved by conventional analytical means, particularly in the realms of public policy or design. See Horst Rittel & Melvin Webber, *Dilemmas in a General Theory of Planning*, 4 POL'Y SCIS. 155-69 (1973); see also E. Jeffrey Conklin, *Dialogue Mapping: Building Shared Understanding of Wicked Problems* 3 (2006); C. West Churchman, *Wicked Problems*, 14 MGMT. SCI. 4 (1967).

101. See, e.g., Richard Coyne, *Wicked Problems Revisited*, 26 DESIGN STUD. 5 (2005) (discussing architecture's studio design culture); F. Stuart Chapin et al., *Increasing Wildfire in Alaska's Boreal Forest: Pathways to Potential Solutions of a Wicked Problem*, 58.6 BIOSCIENCE 531 (2008) (discussing wildfires); Cecilia Ferreyra, Rob C. de Loe & Reid D. Kreutzwisser, *Imagined Communities, Contested Watersheds: Challenges to Integrated Water Resources Management in Agricultural Areas*, 24 J. OF RURAL STUD. 304 (2008) (discussing watershed management).

102. See Wegner, *supra* note 100.

flux. Solutions to such problems require “systems thinking” in one of its many forms.

*c. Alternative Framings: “Design Thinking” and  
“Thinking Fast and Slow”*

For those who are willing to recognize collective thinking patterns may handicap our approaches to solving intransigent problems, such as those raised by legal education reform, two other thoughtful ways of framing “thinking” strategies are worth considering: those advocated by Tim Brown in *Change by Design* and those explained by Daniel Kahneman in *Thinking Fast and Slow*.

Brown is CEO and president of IDEO, a highly regarded design and consulting firm based in San Francisco.<sup>103</sup> His approach to “design thinking” is an iterative process that emphasizes the importance of inspiration (the problem than provides an opportunity for solution), ideation (the process of generating and developing ideas), and implementation (the process of taking ideas to market).<sup>104</sup> In Brown’s view, the process of “design thinking” often involves the discovery and evaluation of seeming constraints to determine fresh approaches to design challenges. —<sup>105</sup> Design thinking also reflects the transition from “design” (the creation of products) to an analysis of the relationship between people and products<sup>106</sup> and, ultimately, to a transition of observations into insights and products that will improve lives.<sup>107</sup>

Daniel Kahneman is a Nobel Prize winning psychologist who won the prize in economics. His most recent book, *Thinking Fast and Slow*, distills a lifetime of insights about how people think. He posits two “systems” of thinking: one he calls “thinking fast” (faster, instinctive, and emotional) and the other he describes as “thinking slow” (slower, more deliberative, more logical).<sup>108</sup> Based on experimental evidence, Kahneman explains people are more likely to act in order to avoid loss than to attain gain, are more likely than not to be influenced by irrelevant considerations (e.g. “anchoring” that yields results that are influenced by prior exposure to numbers), and are influenced by optimism, framing, sunk costs, and “reference points.”<sup>109</sup> In short, Kahneman’s analysis raises a number of significant questions for those who are responsible for charting the way forward in legal education. Kahneman’s insights provide a cautionary tale for deans and other legal education leaders who might assume their analyses of current events are well-grounded and beyond challenge.

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103. See TIM BROWN, *CHANGE BY DESIGN* (2009). Information on Brown’s notable design firm is available at IDEO, <http://www.ideo.com> (last visited Feb. 26, 2013).

104. *Id.* at 16.

105. *Id.* at 16-19 (discussing constraints include issues of feasibility, viability and desirability).

106. *Id.* at 41.

107. *Id.* at 44-61.

108. DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (2011).

109. *Id.* at 20-24.

*d. Conclusion*

Research such as that cited here reveals that developing new cornerstone concepts to underlie legal education will not be an easy process. Deans and faculty members engaged in reform processes will need to recognize the task of education reform is much more complex than they might otherwise have expected. The process of deliberation is not likely to yield simple choices based on easy logic as to possible change, but will instead result in best estimates of potential changes and their value (subject to ongoing evaluation). Choices are not likely to involve options between two distinct choices with clear evidence in support of one or the other, but instead options for “best guesses” regarding ways to proceed, with needed post-choice assessment to determine how well the choices made are operating. Deans and faculty members also need to appreciate their limitations and the need to tap non-traditional expertise to assess how best to proceed in the long term, as discussed below.

In effect, the process of educational reform is a creative one that lacks clear data to guide resolution at the outset of the process. It is therefore imperative that law faculties appreciate the need to engage in repeated cycles of inquiry relating to innovation, based on best judgments and review of data as they proceed.

Lessons from the literature of “systems thinking” and related analysis suggests it is crucial to consider the relationship among systems variables before taking unilateral action for reform. In the external sphere, admissions, debt, and job prospects are likely to be related. In the context of internal educational perspectives, curriculum, pedagogy, admissions, and placement strategies are likely to be linked. Meaningful reform in legal education is likely to require law deans and faculty members to broaden their perspectives and to consider interrelated dimensions of crucial policies.

As one example, it is increasingly evident many American law schools have developed or expanded LL.M. programs to attract foreign students who offer substantial revenues and whose credentials are not included within the JD admitted population when crunching numbers to submit to U.S. News. That approach reflects systems thinking; that is, reconsidering possible revenue streams and applicant pools. It will be important, however, to think through the full range of related questions, including how substantially increased numbers of LL.M. students will affect the schools’ curriculum, needed teaching and advising strategies, and perhaps ultimately the career expectations and potential bar passage issues that might arise even if such cohorts of students do not fall within the universe currently analyzed by U.S. News). Other approaches that turn elsewhere may include increased development of on-line LL.M. programs (such as already developed by some law schools), or one-year masters’ programs for professionals in other fields. The key in each instance is to use the insights of “systems” thinking to track through possible implications and to recognize the need for new approaches to relationships, rather than simply assuming there are but two parts of an equation for law school success—additional applicants and new revenue streams.



#### 4. Cornerstone #4—Taking Assessment Seriously

A fourth and final cornerstone for change is taking assessment seriously. Unfortunately, as the Carnegie Report explained, legal education lags behind other professional fields such as medical education in this regard.<sup>110</sup>

Perhaps it is understandable that legal educators are reticent and relatively ignorant about the role assessment can play in improving educational quality. For many, “assessment” smacks of “audits,” “accounting,” and other terms they would prefer to ignore. Yet, assessment, in its simplest meaning, refers to documenting and measuring students’ knowledge, skills, and beliefs often in comparison to desired educational outcomes.<sup>111</sup>

##### a. Law School Assessment Practices

Law schools use “assessment” in a number of different ways. At the individual course level, they employ “summative assessment” strategies such as final examinations or papers to determine what grades students will receive. An increasing number of law teachers use “formative assessment” tools (such as non-graded quizzes, or group exercises) to give students feedback (that is, to help students learn by letting them know how well or poorly they understand material presented in a course, and how they might improve).<sup>112</sup> In addition, law schools have historically relied heavily on LSAT and undergraduate GPA standards to determine which applicants should be admitted and have increasingly attended to graduates’ performance on bar examinations in keeping with accreditation standards set by the American Bar Association and rankings issued by US News & World Report.<sup>113</sup> Unfortunately, however, most law schools have not yet fully

110. CARNEGIE REPORT, *supra* note 4, at 162-184.

111. See GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 11 (Institute for Law Teaching and Learning ed., 2000) [hereinafter Munro, Outcomes Assessment], available at: <http://lawteaching.org/publications/books/outcomesassessment/> (last visited Jan. 7, 2013) (“[f]or law schools, this book proposes that assessment connotes a set of practices by which an educational institution adopts a mission, identifies desired student and institutional goals and objectives (‘outcomes’), and measures its effectiveness in attaining these outcomes.”).

112. See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 235-263 (Clinical L. Educ. Ass’n ed., 2007); Carol Springer Sargeant & Andrea Curcio, *Empirical Evidence that Formative Assessments Improve Final Exams*, 61 J. L. EDUC. 379 (2012); Laurie Barron, *Learning How to Learn: Carnegie’s Third Apprenticeship*, 18 CLINICAL L. REV. 101, 101 (2012); see e.g., *Legal Education at the Crossroads v. 3 Conference on Assessment*, STURM COLLEGE OF LAW, (2009), <http://www.law.du.edu/index.php/assessment-conference/program> (For a range of presentations relating to assessment).

113. Bar performance is a factor in US News rankings, as explained at The American Bar Association Section on Legal Education. ABA Statement on Law School Rankings, *supra* note 75, at 15. American Bar Association standards for accreditation give attention to bar passage. See Standard 301, Interpretation 301-1, Interpretation 301-6, Appendix 3, set forth at *ABA Standards*, A.B.A. SEC. OF L. EDUC. & ADMISSIONS TO THE BAR, [http://www.americanbar.org/groups/legal\\_education/resources/standards.html](http://www.americanbar.org/groups/legal_education/resources/standards.html) (last visited Jan. 7, 2013). The ABA has now authorized law schools to provide students with bar preparation assistance. See Standard 301, Interpretation 301-6(C)(iii), available at *ABA Standards*, A.B.A. SEC. OF L. EDUC. & ADMISSIONS TO THE BAR,

[http://www.americanbar.org/groups/legal\\_education/resources/standards.html](http://www.americanbar.org/groups/legal_education/resources/standards.html) (last visited Jan. 7, 2013). The ABA is currently considering significant changes in its standards regarding bar passage. Recent proposals would elevate the level of regulation from an interpretation to a new standard 309

fathomed the complex dynamics or power of assessment and often lack the expertise that would be helpful in giving assessment its due.

Many law faculty members are relatively naïve when it comes to assessment. We award grades within a specified grading curve (which operates on a “normative” basis to distribute grades across a prescribed range of performance). We rarely stop to inquire whether our students would do better or worse than the institutional norm if we awarded grades on a “criterion referenced” basis, which ties actual performance to a distinct qualitative standard. We don’t inquire whether giving students more “practice” opportunities to respond to criterion-referenced assessment exercises would help them improve their performance across the term. Instead, we do what generations before us have done and “rank” top students, “weed” out those who are unlikely to succeed at the end of the day, and approximate the relative performance of those in the middle (many of whom perform comparably, notwithstanding our ranking protocols).

We do not reckon on the significance of “stereotype threat,” a topic of significant interest among psychologists who have documented that students who recognize they may be expected to do worse than their peers because of their association with certain stereotypes, in fact, spend mental energy being particularly careful and often do worse as a result.<sup>114</sup> Finally, we turn a blind eye to students who start slow and need time to develop skills in critical thinking (known in law school as “thinking like a lawyer”), leaving them perennially behind those who have been lucky enough to receive strong liberal arts training before entering law school and are thus often perpetually ahead in class ranks and GPAs after the first year.

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(see Nov. 2012 proposal), and perhaps increase the percentage of bar passage required (see July 2011 proposal). For more up-to-date information, see *Drafts for Consideration at Committee Meetings*, A.B.A. SEC. OF L. EDUC. & ADMISSIONS TO THE BAR, [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review/meeting\\_drafts.html](http://www.americanbar.org/groups/legal_education/committees/standards_review/meeting_drafts.html) (last visited Jan. 7, 2013).

114. For a seminal discussion of “stereotype threat” see Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY AND SOC. PSYCHOL., 797 (1995) (In this significant paper, the authors defined “stereotype threat” as “being at risk of confirming, as self-characteristic, a negative stereotype about one’s group.” They explained that such threat adds to the cognitive pressure experienced by those taking high-stakes ability-related tests, when a particular salient stereotype is triggered, and those subjected to such tests accordingly experience differential pressure to perform in ways that disprove the stereotype). See also Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOL. 613, 616-618 (1997); Claude M. Steele, *Thin Ice: Stereotype Threat and Black College Students*, THE ATLANTIC, Aug. 1999, available at:

<http://www.theatlantic.com/past/docs/issues/99aug/9908stereotype.htm>

(discussing “stereotype threat” as “the threat of being viewed through the lens of a negative stereotype, or the fear of doing something that would inadvertently confirm that stereotype.”); Lisa A. Harrison et al., *The Consequences of Stereotype Threat on the Academic Performance of White and Non-White Lower Income College Students*, 9 SOC. PSYCHOL. OF EDUC. at 341, 341 (2006) (discussing effect of stereotype threat on lower-income but not middle-income students). For further discussion of stereotype threat, see Steven Stroessner & Catherine Good, REDUCINGSTEREOTYPETHREAT.ORG; <http://www.reducingstereotypethreat.org/> (last visited Jan. 3, 2013). For recent observations by Claude M. Steele, see WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US (W.W. Norton & Co. ed., 2010).

*b. Changing Assessment Practices: Rationales and Possibilities*

Why might we consider moving away from these long-standing practices, taking assessment more seriously, and understanding its significance more fully? There are a number of important reasons to do so.

First, educational theory suggests that assessment drives learning. We want students to learn. We should therefore use assessment strategies effectively to achieve that end. For skeptics who doubt the power of assessment to drive learning, it should be sufficient to simply refer to the U.S. News phenomenon discussed earlier on.<sup>115</sup> Law schools have “learned” what they should do to score well on the U.S. News rankings and have distorted their educational judgments and ethical practices as a result.<sup>116</sup> Putting aside this powerful institutional example, faculty members need to appreciate the ways in which sound assessment/evaluation strategies can help them achieve the important educational goals, by setting learning outcomes, shaping instructional strategies to achieve those goals, and assessing student performance with an eye to specified goals is a powerful educational technique.<sup>117</sup> Thoughtful instructional designers have documented the importance of “backward design” (that is, starting with what an instructor wants students to learn, and then building a course with a design that will accomplish intended results).<sup>118</sup> It is not surprising such strategies would assist students in learning because they provide students with a forecast about what they are expected to learn and build a coherent strategy to help them accomplish desired outcomes. Faculty members should be intellectually intrigued by the opportunity to see whether their instructional approaches actually achieve the outcomes they say they want students to attain. If such outcomes are not effectively demonstrated, instructional strategies should be changed.

Second, thoughtful national assessment strategies provide faculty members and law schools with an opportunity to broaden their priorities and re-conceive the meaning of educational quality. One example of an effort to move beyond the U.S. News framework is the development of the National Survey of Student Engagement (NSSE, for undergraduates) and the related Law School Survey of Student Engagement (LSSSE, for law students).<sup>119</sup> These voluntary assessment in-

115. See A.B.A. STANDARDS & RULES, *supra* notes 79-83, at 15-16 and accompanying text.

116. See Philip G. Schrag, *Failing Law Schools – Brian Tamanaha’s Misguided Missile*, 26 GEO. J. LEGAL ETHICS (forthcoming 2013)(manuscript at 19 n. 76), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2179625](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179625).

117. For recent writing on learning outcomes in legal education and their importance, see, e.g., Peter Devonshire & Ian Brailsford, *Re-Defining Learning Outcomes: A Case for the Assessment of Skills and Competencies in a Law Degree*, 25 NEW ZEALAND UNIV. L. REV. 270, 270-271 (2012); *Symposium on Contemporary Issues in Outcomes-Based Legal Education*, 38 WM. MITCHELL L. REV. 906 (2012) (including, Gregory M. Duhl, *Equipping our Lawyers: Mitchell’s Outcomes Based Approach to Legal Education*, 38 WM. MITCHELL L. REV. 906; Steven Friedland, *Outcomes and the Ownership Conception of Law School Courses*, 38 WM. MITCHELL L. REV. 947; Mary Lynch, *An Evaluation of Ten Concerns about Using Outcomes in Legal Education*, 38 WM. MITCHELL L. REV. 976; Deborah Maranville, Kate O’Neill, & Carolyn Plumb, *Lessons for Legal Education from the Engineering Profession’s Experience with Outcomes-Based Accreditation*, 38 WM. MITCHELL L. REV. 1017).

118. GRANT WIGGINS & JAY MCTIGHE, UNDERSTANDING BY DESIGN 13-34 (2d ed. 2005).

119. For information on the undergraduate instrument designed to assess student engagement (NSSE), see NSSE, <http://nsse.iub.edu/> (last visited Jan. 7, 2013); for information on the law school version of this instrument (LSSSE) see LSSE, <http://lsse.iub.edu/> (last visited Jan. 7, 2013).

struments are made available to undergraduate institutions and law schools, respectively, as a means of helping them assess the qualitative dimensions of students' experience, rather than simply assessing the funding and quantitative dimensions typically addressed by US News rankings. LSSSE provides a powerful means of determining how students gain from interacting with faculty members, how legal writing programs compare, how well-supported law students feel across a number of dimensions, how much students engage in work while enrolled in law school, and much more.<sup>120</sup> Indiana University-Bloomington has taken a leading role in exploring how exposing students to insights about the legal profession has aided them in their understanding of "professional identity."<sup>121</sup> Broader LSSSE data has demonstrated students who engage in clinical educational offerings are better prepared to become effective lawyers and understand their professional responsibilities.<sup>122</sup>

Third, law schools and their faculty members will face increasing demands to engage in serious assessment strategies as a means of assuring accountability. Over the last 30 years, universities have been pressed by the federal government to engage in assessment as part of national accreditation regimes that seek to assure institutions of higher education are accountable to funders, students, parents, state governments, and members of the public.<sup>123</sup> This trend reflects a fundamen-

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120. For a discussion of LSSSE generally, see *Symposium 2009: A Legal Education Prospectus: Law Schools & Emerging Frontiers Reframing Legal Education's "Wicked Problems"*, 61 RUTGERS L. REV. 867 (2008).

121. For summary of a Legal Profession course for first-year law students at Indiana University-Bloomington, Mauer School of Law, see *A New Educational Model*, INDIANA UNIVERSITY-BLOOMINGTON, MAUER SCHOOL OF LAW, <http://www.law.indiana.edu/degrees/jd/curriculum.shtml>.

122. See 2010 LSSSE annual report at 8 (discussing data that indicates that only 57% of 3L students generally feel prepared to understand the needs of clients but that students enrolled in clinical programs or engaged in pro bono activities feel more prepared for such responsibilities); Carole Silver, Am Garver, & Lindsay Watkins, *Unpacking the Apprenticeship of Professional Identity and Purpose: Insights from the Law School Survey of Student Engagement*, 17 LEGAL WRITING: J. LEGAL WRITING INST. 373 (2011).

123. For a discussion of the history of higher education accreditation in the United States, see *Assuring Academic Quality in the 21<sup>st</sup> Century: Self-Regulation in a New Era*, (AM. COUNCIL ON EDUC./NAT'L TASK FORCE ON INST. ACCREDITATION), 2012 at 9-11, available at <http://www.acenet.edu/news-room/Pages/Assuring-Academic-Quality-in-the-21st-Century.aspx> (last visited Jan. 7, 2013). More stringent accreditation policies evolved during the 1980's in the wake of growing concerns about the level of academic performance by American students when compared to others around the world. *A Nation at Risk: The Imperative for Educational Reform*, the highly influential study issued in 1983, reflected an early spike in public perception that both K-12 and college students were not keeping up and that as a result the nation's economic competitiveness might be at risk. This report is available at: <http://www2.ed.gov/pubs/NatAtRisk/index.html> (last visited Jan. 8, 2013). This report, by President Ronald Reagan's National Commission on Educational Excellence, called for higher academic tests, more use of standardized tests, and more competence teachers with pay to be "performance-based." Not long afterward, the federal Department of Education co-sponsored a national conference on assessment in higher education. Perhaps not surprising, it was not long after this critical juncture that the federal government and accrediting organizations began to shift their emphasis to employ an "outcomes"-oriented approach to accreditation. More specifically, in 1988, the United States Department of Education stated that accrediting entities needed to focus on "educational effectiveness," and required that schools document student achievement as evidence of effectiveness. Soon thereafter the federal government founded the Council for Higher Education Accreditation (CHEA), which in turn pressed accrediting agencies to focus on student outcomes. By the 1990's historical academic prerogatives were insufficient to hold back this growing tie. Public policy studies encouraged states to demand more of publicly-funded institutions of higher education. Leaders in higher education seemed ultimately to accept these onrushing demands and began to turn

tal shift away from “inputs” measures (funding, number of faculty members per student, and so forth) and toward “output” measures (students’ abilities to pass licensure exams, employment prospects, and so forth).<sup>124</sup> Regional higher education accreditors have pressed universities to engage in outcome-oriented assessment and to take steps to develop “quality improvement plans” to enhance student performance as part of periodic accreditation visits.<sup>125</sup> Law schools affiliated with

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their efforts to building greater expertise on how assessment of student outcomes could fruitfully be employed within their schools. For more information on state uses of accreditation and other topics, see COUNCIL FOR HIGHER EDUC. ACCREDITATION, <http://www.chea.org/default.asp?link=5> (last visited Jan. 8, 2013).

124. A recent peak in this evolution occurred under President George H.W. Bush, when demands for greater accountability among educational institutions swept the country. Attention to accountability in the context of K-12 education reached a high watermark in the K-12 context when Congress in 2001 adopted “No Child Left Behind” (NCLB), federal legislation designed to require state and local educational agencies to assure performance for students with diverse backgrounds, adopt more frequent standardized testing, and provide high-quality teachers and teachers’ assistants across the board. For more detailed information on the evolution of NCLB, see *No Child Left Behind Elementary and Secondary Education Act (ESEA)*, U.S. DEPT. OF EDUC. <http://www2.ed.gov/nclb/landing.jhtml> (last visited Jan. 8, 2013). A similar wave of attention hit higher education with the advent of the federal “Spellings Commission,” an effort to make higher education more accountable during the tenure of United States Secretary of Education Margaret Spellings. The Spellings Commission issued a major report in 2006: *A Test of Leadership: Charting the Future of American Higher Education*, U.S. DEPT. OF EDUC., <http://www2.ed.gov/about/bdscomm/list/hiedfuture/index.html> (last visited Jan. 8, 2013). The Report emphasized the importance of access to higher education, cost containment, financial aid, transparency and accountability, innovation and improvements in learning. Featured as part of the Report’s recommendations were references to course redesign in order to cut costs and suggested assessment instruments to be employed to gauge college learning. In particular, the Report recommended that “postsecondary institutions should measure and report meaningful student learning outcomes.” More particularly, the Report reached the following conclusions. (a) Faculty must be at the forefront of defining educational objectives for students and developing meaningful, evidence-based measures of their progress toward those goals. (b) The results of student learning assessments, including value-added measurements that indicate how students’ skills have improved over time, should be made available to students and reported in the aggregate publicly. (c) Higher education institutions should make aggregate summary results of all postsecondary learning measures, e.g., test scores, certification and licensure attainment, time to degree, graduation rates, and other relevant measures, publicly available in a consumer-friendly form as a condition of accreditation. (d) The collection of data from public institutions allowing meaningful interstate comparison of student learning should be encouraged and implemented in all states. By using assessments of adult literacy, licensure, graduate and professional school exams, and specially administered tests of general intellectual skills, state policymakers can make valid interstate comparisons of student learning and identify shortcomings as well as best practices. The federal government should provide financial support for this initiative. (e) Accreditation agencies should make performance outcomes, including completion rates and student learning, the core of their assessment as a priority over inputs or processes. (f) A framework that aligns and expands existing accreditation standards should be established to (i) allow comparisons among institutions regarding learning outcomes and other performance measures, (ii) encourage innovation and continuous improvement, and (iii) require institutions and programs to move toward world-class quality relative to specific missions and report measurable progress in relationship to their national and international peers. (g) In addition, this framework should require that the accreditation process be more open and accessible by making the findings of final reviews easily accessible to the public and increasing public and private sector representation in the governance of accrediting organizations and on review teams. Accreditation, once primarily a private relationship between an agency and an institution, now has such important public policy implications that accreditors must continue and speed up their efforts toward transparency as this affects public ends.

125. There are six regional accrediting agencies that oversee accreditation of colleges and universities in the following regions: New England (NEW ENGLAND ASS’N OF SCH. & COLL. COMM’N ON INST. OF HIGHER EDUC., <http://cihe.neasc.org>), Middle States (MIDDLE STATES ASS’N ON HIGHER EDUC., [www.msche.org](http://www.msche.org)), Southern (S. ASS’N OF COLL. & SCH. COMM’N ON COLL., [www.sacscoc.org](http://www.sacscoc.org)), North

universities have, in some instances, been swept into this process of “quality enhancement” and are subsequently required to develop learning outcomes, strategies for achieving such outcomes, and assessment approaches to test whether purported objectives are being attained.<sup>126</sup> The American Bar Association (ABA) has been drawn into consideration of related processes as a result of its efforts to evaluate “outcomes assessment” in various professional fields.<sup>127</sup> The ABA’s standards review process has also framed new standards that expect more out of law schools in terms of formulating learning outcomes, assessing achievements, and developing effective processes for connecting these tasks.<sup>128</sup> Unfortunately, such requirements are framed in ways that do not yet provide supportive protocols for law schools trying to comply with new requirements.<sup>129</sup> It remains to be seen

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Central (HIGHER LEARNING COMM’N: A COMM’N OF THE N. CENT. ASS’N, <http://www.ncahlc.org/>), Western (W. ASS’N OF SCH. & COLL., [www.wascweb.org](http://www.wascweb.org)), and Northwestern (NORTHWEST COMM’N ON COLL. & UNIV., <http://www.nwccu.org/>). CHEA also recognizes other specialized accreditors. For detailed listings of recognized accreditors, and other data regarding numbers of students in accredited institutions and programs, see *CHEA Almanac Online*, <http://www.chea.org/2011-2012%20Almanac%20Online/index.asp> (last visited Jan. 8, 2013) and *FAQs about Accreditation*, U.S. DEPT. OF EDUC., <http://ope.ed.gov/accreditation/FAQAccr.aspx> (last visited Jan. 8, 2013).

126. For discussions of law schools’ experience with learning outcomes, see Mary Crossley & Lu-in Wang, *Learning by Doing: An Experience with Outcomes Assessment*, 41 UNIV. OF TOLEDO L. REV. 269 (2010) (discussing University of Pittsburgh School of Law’s experience); Gregor M. Duhl, *Equipping our Lawyers: Mitchell’s Outcomes-Based Approach to Legal Education*, 38 WM. MITCHELL L. REV. 906 (2012) (discussing William Mitchell’s experience); Lori Shaw, *Developing a Comprehensive Assessment Plan: Lessons Learned*, in *Legal Education at the Crossroads v. 3 Conference on Assessment*, STURM COLLEGE OF LAW, (2009), <http://www.law.du.edu/index.php/assessment-conference/program>; Sharon Sandeen, *Getting Buy-In From Your Colleagues: The Challenges and Triumphs of Assessment Planning*, in *Legal Education at the Crossroads v. 3 Conference on Assessment*, STURM COLLEGE OF LAW, (2009), <http://www.law.du.edu/index.php/assessment-conference/program>; Sharon Sandeen, *Professional Learning Communities: A Tool to Jump-Start the Learning Outcomes Assessment Process*, 5 NORTHEASTERN L. REV. (forthcoming 2013)(manuscript at 1), available at <http://www.northeastern.edu/law/academics/conferences/experience-the-future/> (last visited Jan. 8, 2013). Hastings College of Law has also gained significant experience with learning outcome assessment in connection with its recent accreditation by the Western Association of Schools and Colleges. See *Outcomes Based Education*, UNIV. OF CAL. HASTINGS COLL. OF LAW, <http://www.uchastings.edu/academics/wasc/outcomes/index.php> (last visited Jan. 8, 2013).

127. See *Report of Special Committee on Outcomes Measures*, in *Special Committee Reports*, A.B.A. SEC. OF L. EDUC. & ADMISSION TO THE BAR, [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review/special\\_committee\\_reports.html](http://www.americanbar.org/groups/legal_education/committees/standards_review/special_committee_reports.html) (last visited Jan. 7, 2013).

128. See proposed section 302 of standards for accreditation, *Previous Meeting Drafts*, A.B.A. SEC. OF L. EDUC. & ADMISSION TO THE BAR, (Nov. 2012 draft) [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review/meeting\\_drafts.html](http://www.americanbar.org/groups/legal_education/committees/standards_review/meeting_drafts.html) (last visited Jan. 7, 2013).

129. See [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/august\\_2013\\_open\\_session/2013\\_src\\_memo%20to\\_council\\_re\\_c h%201\\_%203\\_%204\\_and%20s203\\_b\\_and\\_s603\\_d.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/august_2013_open_session/2013_src_memo%20to_council_re_c h%201_%203_%204_and%20s203_b_and_s603_d.authcheckdam.pdf) (last visited September 7, 2013). The ABA Standards Review Committee recommended that the ABA Section Council adopt new accreditation standards requiring law schools to adopt learning outcomes (standard 302), and to evaluate student competency against the learning outcomes on an ongoing basis (standard 315). Interpretation 315-1 provides that “ Examples of methods that may be used to measure the degree to which students have attained competency in the school’s student learning outcomes include: review of the records the law school maintains to measure individual student achievement pursuant to Standard 314; evaluation of student learning portfolios; student evaluation of the sufficiency of their education; student performance in capstone courses or other courses that appropriately assess a variety of skills and knowledge; bar exam passage rates; placement rates; surveys of attorneys, judges, and alumni; and

how law schools trying to comply with national requirements will be supported and judged.<sup>130</sup>

Several other considerations relating to assessment are important. Law faculty members and deans need to think beyond their current contexts as they engage in important changes if they wish to have an honest read of the implications of new decisions. For example, it will be important to consider how law schools add value to the marketplace when they expand enrollments to include a substantial number of foreign LLM students. What new outcomes have they identified to prepare a new generation of trans-national graduates to perform effectively in an international context? What “value added” might they be able to document in terms of benefits to American JD students who enroll in enriched programs with international LLM candidates? Law schools also need to think deeply about how best to articulate benefits derived from enrolling students across a range of cognate fields who can prepare their JD peers to perform more effectively as lawyers in the future and how to document those benefits.

Lastly, growing attention to assessment will allow law deans and faculty members to bring a more critical eye to bear on assessment strategies that, while employed outside the realm of individual schools, have a profound impact on policies and practices within law schools.<sup>131</sup> For example, UC–Berkeley scholars Marjorie Shultz and Sheldon Zedeck published significant research that demonstrates the extent to which LSAT scores fail to predict students’ abilities to engage in effective law practice.<sup>132</sup> Likewise, the National Conference of Bar Examiners (NCBE) remains focused on marketing a uniform national bar examination<sup>133</sup> at a time when alternative innovations could substantially aid law students and schools deal with debt issues, as discussed below.

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assessment of student performance by judges, attorneys or law professors from other schools. The methods used to measure the degree of student achievement of learning outcomes are likely to differ from school to school and law schools are not required by this standard to use any particular methods.” While this interpretation lists possible tools for assessment it does not give schools much guidance on how such tools might be employed.

130. The ABA has not specified how its possible proposed assessment requirements should be implemented. For additional insight on assessment matters, see Barbara E. Walvoord, *ASSESSMENT CLEAR AND SIMPLE: A PRACTICAL GUIDE FOR INSTITUTIONS, DEPARTMENTS AND GENERAL EDUCATION* (2d ed. 2010); Robert M. Diamond, *DESIGNING AND ASSESSING COURSES & CURRICULA* (3d ed., 2008); Marilee J. Bresciani, *OUTCOMES-BASED ACADEMIC AND CO-CURRICULAR PROGRAM REVIEW* (2006); *TAKING OWNERSHIP OF ASSESSMENT* (Amy Driscoll & Diane Cordero eds., 2006); Trudy Banta et al., *DESIGNING EFFECTIVE ASSESSMENT: PRINCIPLES AND PROFILES OF GOOD PRACTICE* (2009); MUNRO, *OUTCOMES ASSESSMENT*, *supra* note 111, at 47 n. 115.

131. Such policies include those embedded in current admissions screening tests and bar examinations, both of which drive law school decisions about which students they choose to enroll and how such students are taught.

132. See Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 L. & SOC. INQUIRY, no. 3, Summer 2011, at 620; see also Marjorie M. Shultz & Sheldon Zedeck, *Final Report: Identification, Development, and Validation of Predictors for Successful Lawyering* (Sept. 2008)(unpublished manuscript) (on file with Univ. of Cal., Berkeley – Sch. of L.), available at <http://ssrn.com/abstract=1353554> or <http://dx.doi.org/10.2139/ssrn.1353554> (last visited Jan. 8, 2013).

133. See The Unif. Bar Examination (UBE), Nat’l Conf. of Bar Exam’rs, <http://www.ncbex.org/multistate-tests/ube/> (last visited Jan. 7, 2013).

*c. Conclusion*

Law schools have been relatively ineffectual to date in developing meaning strategies to enhance legal education, taking into account core principles relating to assessment. Law schools need to take assessment seriously, since assessment drives learning. There are a variety of ways in which greater attention to assessment can both increase effective learning by law students and keep law schools honest about priorities for effective educational design.

## III. CURB CUTS

Part II suggested four theoretical “cornerstones” that legal reformers should consider in reshaping legal education for the better. This Part offers a companion set of “curb cuts,” strategies that might be used to reduce barriers to change. It highlights four strategies that might serve to open the path to change: acknowledging local changes already underway; introducing and defining new mental models; advocating for changed roles of national organizations; and developing fresh assessment strategies to test assumptions. The first two examples are very modest ones that proved exceptionally helpful to faculty members at the University of North Carolina School of Law (UNC Law) during our recent efforts at curriculum reform. The second two are “thought experiments” that I believe could significantly improve legal education around the country, ones I have long contemplated but which have not yet come to fruition. The broad point is that, given the range of barriers that impede needed educational reform at the present moment, it is imperative we both “think small” and “think big” in order to address the challenges we face.

*A. Experiencing Change*

A recent study by the American Bar Association has highlighted curriculum changes around the country as they developed during the period 2002-2010.<sup>134</sup> As Dean Kloppenberg has discussed in her Symposium essay, significant changes have occurred, particularly in the areas of skills-development (legal writing, professional skills, clinics) and in certain growing areas of real-world practice.<sup>135</sup> As Symposium author David Moss and Deborah Moss Curtis have shown in their recent collection of essays and case studies,<sup>136</sup> a growing number of law schools have employed diverse methods and instructional design strategies to bring about

134. A.B.A. Sec. of L. Educ. & Admission to the Bar, A Survey of Law School Curricula, 2002-2010, (Catherine L. Carpenter, ed., 2012) [hereinafter “ABA Curriculum Survey”], available at [http://www.abanow.org/wordpress/wp-content/files\\_flutter/1341346391LawSchoolCurriculaSurveyExecSummary.pdf](http://www.abanow.org/wordpress/wp-content/files_flutter/1341346391LawSchoolCurriculaSurveyExecSummary.pdf); Catherine Carpenter, Recent Trends in Law School Curricula: Findings from the 2010 ABA Curriculum Study, 81 THE BAR EXAMINER, no. 2, June 2012, at 6.

135. See Lisa A. Kloppenberg, *Training the Heads, Hands and Hearts of Tomorrow’s Lawyers: A Problem Solving Approach*, 2013 J. DISP. RESOL. 101 (2013).

136. DAVID M. MOSS & DEBORAH MOSS CURTIS, REFORMING LEGAL EDUCATION 11-195 (David M. Moss & Deborah Moss Curtis eds., 2012) [hereinafter REFORMING] (documenting curriculum developments at a number of law schools including Washington & Lee, Washburn, Iowa, Nova Southeastern, Golden Gate, Charlotte, and Western States).



curricular change.<sup>137</sup> Anecdotal evidence suggests many other law schools have been engaging in curriculum reform in the last few years<sup>138</sup>, although their processes and results are typically not so fully documented.

Schools can take various approaches to reform. Some may track studies such as those just cited. Others may consult or invite external experts from schools whose approaches they wish to emulate. Still others conduct surveys of faculty opinion, post inquiries to listservs, engage with alumni and leading lawyers about perceived shortcomings, take note of findings from student surveys such as the LSSSE or self-study polls, or treat curriculum reform as part of strategic planning exercises.

Whatever techniques are used, it is worth augmenting them using a very simple approach that can break the ice, fuel engaged discussion, and pave the way for change.

Assume that at least some of your faculty colleagues have been experimenting with change in ways about which you are unaware. Identify some topics that might be of interest to a significant number: how can a teacher ... Get wide engagement in large classes? Work with hot topics such as race or sexual orientation? Work effectively with complex statutes? Teach seminars? Use formative assessment techniques? Integrate skills training in large classes? Grade written products efficiently? See if you can find two colleagues to partner as discussion leaders on a given topic—with their role being nothing more than to get the ball rolling by talking about their own experiences, thereafter turning the floor over to others. Invite all interested to a brown-bag lunch.<sup>139</sup>

Such discussions inevitably bring home the reality that change is already happening. Faculty members who might not share the same scholarly interests are nonetheless drawn into discussion about teaching. Junior colleagues can learn from the most senior and vice versa. Keeping such a tradition ongoing over time has the benefit of providing a way of helping junior colleagues appreciate a law school's teaching culture, assisting associate deans and curriculum committee chairs on issues that may need attention, and creating a system of organizational learning that gives everyone a shared stake and baseline about the teaching and learning enterprise.

This approach also provides a model of how the Kezar and Kegan/Lahey principles discussed above can play out in practice. Kezar's principles include promoting organizational self-discovery, constructing opportunity for interaction to develop new mental models, and connecting change to individual and institutional identity.<sup>140</sup> She also emphasizes the importance of institutional culture (creating a culture of risk, helping people change their belief systems, focusing on adaptability), and institutional dynamics (laying groundwork for change, and facilitating shared governance).<sup>141</sup> Institutional culture is often invisible to its denizens, yet is crucial as a milieu in determining how well an organization can deal

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137. *Id.*

138. See Judith Welch Wegner, *The Carnegie Foundation's Educating Lawyers: Four Questions for Bar Examiners*, 80 THE BAR EXAMINER, no. 2, June 2011, at 11.

139. Thanks to Professor Jane Aiken of Georgetown Law School who shared information about a similar approach used there.

140. See ASHE-ERIC, *supra* note 27-29, at 7 and accompanying text.

141. *Id.*

with institutional stress. Developing simple means that make culture more tangible and encourage greater trust and effective communication can pay real dividends in the end.

This simple model of faculty teaching roundtables also resonates with Kegan and Lahey's work on immunity to change. As discussed above, they suggest a four-step model can be helpful: identifying a shared goal; finding out what is happening in reality to impede the accomplishment of that goal; asking what purposes are served by not addressing such impediments; and then assessing whether core assumptions underlying past practice are necessarily true or might be tested on an experimental basis.<sup>142</sup> The simple faculty teaching roundtable model just sketched tracks this approach as well. It identifies a shared goal (understanding a particular teaching dilemma), provides a means of surfacing how that dilemma is being addressed in reality, surfaces in conversation the possible reasons that different people see and approach the dilemma differently, and provides a mechanism for testing new assumptions (by giving colleagues a chance to learn from and experiment with strategies used by others).

While a home-spun approach—such as monthly “teaching roundtables”—may not be earthshaking, this model provides one example of other cost-free, simple means of shifting the tonality of discussion, finding early successes, and paving the way for greater change if common concerns or possible solutions come to light. It also models civil discourse in a low-stakes setting and enhances buy-in to a shared culture of commitment that gives teaching and learning a high profile as a matter of shared concern. Law schools interested in paving the way for change might find it fruitful to explore this and other “low-tech” mechanisms for collective deliberation on educational matters of note.

### *B. Reframing Mental Models*

The concept of “mental models” may seem complex and difficult to understand. Such models are not as complex or difficult as they first appear, however.

A simple example is one available from recent curriculum reform at the UNC School of Law. Faculty and students engaged in significant discussions about how to improve instruction in lawyering skills and preparation for practice. As part of the curriculum review process, faculty members discussed how to provide students with applied learning opportunities. Considering applied learning opportunities inevitably raised a variety of possible designs: more clinical programs, more externships, more simulations, more offerings of other types that integrate instruction in theory with practice opportunities. The faculty ultimately adopted a “mental model” that was different from anything previously employed by deciding to solicit and adopt courses that emphasized “transition to practice.” They identified a variety of formats that might be employed for such purposes, including: courses taught by traditional faculty members that employed different learning objectives or assessment requirements geared to practice; courses co-taught throughout with practitioners; course taught by traditional faculty members with companion courses (one unit supplemental courses) taught by practitioners that are geared toward practice; courses taught with practitioners with an emphasis on

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142. See KEGAN & LAHEY, *supra* note 38, at 8 and accompanying text.

developing sophisticated practice skills and concepts; and other, more diverse formats.<sup>143</sup>

The UNC Law faculty has now embraced the “transition to practice” model. They found this “mental model” more useful than alternative models (such as “practicum” or “capstone” approaches). Their dialogue about “transition to practice” courses emphasizes the importance of introducing students to the realities of practice. These courses therefore span more substantive areas than would be feasible under “clinical” or “externship” models, since the “transition to practice” offerings engage students with sophisticated experiences in areas that might not be feasible for clinical offerings (which are subject to third year practice rules that emphasize representation of individuals or groups with limited means) or externships (which are not necessarily limited to settings involving organizations serving those of limited means). The UNC Law faculty concluded there are a variety of arenas where clinics and externships are not viable, but which students should nonetheless have opportunities to engage in as applied learning (ranging from family law to intellectual property, privacy law, estate planning, bankruptcy law, complex litigation, advanced administrative law, advanced family law, and many others). They also concluded embracing the “transition to practice” model would allow them to repurpose some seminar offerings with a different focus, without requiring an allocation of new resources.

The new “transition to practice” mental model has encouraged UNC Law faculty members to develop fresh approaches to teaching advanced courses in areas of great interest to both them and their students. They have shared insights regarding instructional strategies and stretched students to accomplish more than they might otherwise have anticipated. The law school’s budget has not been significantly affected, except to the extent private funds have been employed to provide modest summer stipends for faculty members who commit themselves to develop new courses with an emphasis on the “transition to practice” model.

Other mental models might be developed to move curriculum innovation forward. This example from the UNC School of Law is intended merely to serve as an example. A crucial dimension of legal education reform is to “make visible” new approaches to teaching and learning. The UNC “transition to practice” mental model has already yielded dividends in engaging faculty members and preparing students more effectively for changing times within the legal profession.

### *C. Systems Thinking and the Role of National Organizations that Affect Legal Education*

In contrast to the relatively home-spun, noncontroversial “curb cuts” just mentioned, the next two strategies reflect bigger-picture and higher-stakes proposals that involve the entire “system” of legal education, emphasizing national organizational players rather than individual law schools. As an observer of legal education for more than three decades, I am frankly surprised that, in all the hoop-

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143. See UNIV. OF N.C. SCH. OF L., [www.law.unc.edu](http://www.law.unc.edu) (last visited Jan. 3, 2013); see also discussion by Nancy Oates, *New Upper-Level Courses Give Hands-On Experience*, UNC SCH. OF L., at <http://www.pageturnpro.com/UNC-School-of-Law/46379-Carolina-Law-Fall-Winter-2012-Intellectual-Property-20/index.html#28> (last visited Jan. 3, 2013).

la about “failing” law schools, there has not been more attention to how national organizations have contributed to current failings by action or inaction.

### *1. National Organizations that Affect Legal Education and Their Missions*

Relatively few faculty members, other than law deans, have time or reason to probe the charters, functions, dysfunctions, governance practices, or interrelationship of major national organizations that affect legal education in significant ways. I count myself among those interested in these topics, in part because I had the opportunity to serve on the AALS Accreditation (now Membership Review) Committee and Executive Committee for a number of years from the 1980’s through the 1990’s, including service as AALS president in 1995. Because of my work on the Carnegie Report, *Educating Lawyers*, I had the opportunity to re-engage with several of these key entities in the following decade. I think very highly of most of them and appreciate the challenges they face. Nonetheless, as a member of the extended legal education family, I think it is time for them to step up to the plate and help individual law schools and legal education more generally address the demanding challenges we face today.

When I speak of national organizations involved in legal education, I mean, in particular, the following: the American Bar Association’s Council of Legal Education and Admission to the Bar;<sup>144</sup> the Association of American Law Schools;<sup>145</sup> the Law School Admissions Council;<sup>146</sup> the National Conference of Bar Examiners;<sup>147</sup> and the National Association for Legal Career Professional (formerly the National Association for Law Placement).<sup>148</sup>

As discussed in more detail in related footnotes, these organizations play crucial roles that affect legal education insofar as they serve as accreditors, thought-leaders, gate keepers to law school, gate keepers to the profession, and experts on legal employment. Unfortunately, however, it seems each of these organizations has, to one degree or another, failed to realize its potential for contributing to the improvement of legal education, in large part because each seems in recent years to have been mired in its own institutional agendas and dilemmas rather than working constructively together to address the pressing issues now facing legal education.

#### *a. American Bar Association (ABA)*

The ABA’s Council for the Section of Legal Education and Admission to the Bar has long taken pride in its role as specialized accreditor for legal education.<sup>149</sup> It sets standards for national accreditation of law schools and operates an accreditation system that has a major impact on the establishment of new law schools and

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144. A.B.A. SEC. OF L. EDUC. & ADMISSION TO THE BAR, [http://www.americanbar.org/groups/legal\\_education.html](http://www.americanbar.org/groups/legal_education.html) (last visited Jan. 3, 2013).

145. ASS’N OF AM. L. SCH., <http://www.aals.org> (last visited Jan. 3, 2013).

146. L. SCH. ADMISSION COUNCIL, <http://www.lsac.org/> (last visited Jan. 3, 2013).

147. NAT’L CONF. OF BAR EXAM’RS, <http://www.ncbex.org/> (last visited Jan. 3, 2013).

148. NAT’L ASS’N FOR L. PLACEMENT, <http://www.nalp.org/> (last visited Jan. 3, 2013).

149. See Boyd, *supra* note 78.

the mobility of law school graduates.<sup>150</sup> It also collects data from law schools on a yearly basis and, as a result of that data collection system, feeds the maw of the US News and World Report ranking system, pursuant to state public records laws if nothing else.<sup>151</sup> It also has various committees on various topics related to legal education as part of a structure whose leadership includes traditional law faculty members and deans, clinicians, practitioners, state bar leaders, judges, and bar examiners.<sup>152</sup> Over the years, it has defended its accreditation prerogatives against challenges that they boost educational costs,<sup>153</sup> facilitate salary enhancement for faculty,<sup>154</sup> enforce ill-advised conformity,<sup>155</sup> and engage in special pleading that universities find unconvincing and off-putting.<sup>156</sup>

At this juncture, the ABA Section Council faces many challenges.<sup>157</sup> Its efforts to revise and update accreditation standards in certain areas (such as elimination of faculty tenure and security of position for clinicians, its proposals to require enhanced learning outcomes and assessment strategies, its consideration of eliminating admissions tests as a requirement, and its demands for higher bar passage) have met resistance from a number of sectors of the legal academy.<sup>158</sup> Its

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150. For a discussion of the increasing number of law schools and the ABA's role, see Herbert Kritzer, *It's the Law Schools Stupid! Explaining the Continuing Increase in the Number of Lawyers*, 4-5 (Minn. L. Studies Research Paper No. 12-23, 2012), available at <http://ssrn.com/abstract=2088861> (providing comparative analysis of numbers of law schools in the United States and elsewhere); Mark Gans, *Not A New Problem: How The State of The Legal Profession Has Been Secretly In Decline For Quite Some Time* 32-44 (June 24, 2012) (unpublished manuscript) (on file with author), available at <http://ssrn.com/abstract=2173144> (discussing increasing numbers of JDs and paralegals; critiquing NALP approach to analyzing employment data).

151. U.S. News criteria are discussed at U.S. News, *supra* note 74, at 14-15 and accompanying text. Information on the ABA Section of Legal Education and Admissions to the Bar's yearly questionnaire is available at: *ABA Questionnaires*, A.B.A. SEC. OF L. EDUC. & ADMISSION TO THE BAR, [http://www.americanbar.org/groups/legal\\_education/resources/questionnaire.html](http://www.americanbar.org/groups/legal_education/resources/questionnaire.html).

152. Current members of the ABA Council for the Section of Legal Education and Admission to the Bar are identified at: 2013-2014 *Council*, A.B.A. SEC. OF L. EDUC. & ADMISSION TO THE BAR, [http://www.americanbar.org/groups/legal\\_education/about\\_us/leadership.html](http://www.americanbar.org/groups/legal_education/about_us/leadership.html) (last visited Sept. 7, 2013). The Council has recently reorganized its committee structure. See *Council Open Sessions*, A.B.A. SEC. OF L. EDUC. & ADMISSION TO THE BAR, [http://www.americanbar.org/groups/legal\\_education/about\\_us/leadership/council\\_meetings.html](http://www.americanbar.org/groups/legal_education/about_us/leadership/council_meetings.html) (last visited Jan. 8, 2013).

153. In a 2009 study, the United States Government Accountability Office reviewed the relationship of law school costs and accreditation requirements. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-20 HIGHER EDUCATION, ISSUES RELATED TO LAW 10-20 (Oct. 2009), available at <http://www.gao.gov/new.items/d1020.pdf> (last visited Jan. 3, 2013) (in face of critiques of law school accreditation, finding that law school officials believed that rising costs related primarily to more intensive educational methods and competition among law schools for rankings rather than ABA accreditation requirements).

154. For discussion of dispute between ABA and US Department of Justice relating to antitrust concerns, see Judith C. Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1487-1491 (2011). For details of the settlement, see Press Release, U.S. Dept. of Justice, Justice Department and American Bar Association Resolve Charges that the ABA's Process for Accrediting Law Schools was Misused (June 27, 1995) (on file with U.S. Dept. of Justice), available at: [http://www.justice.gov/opa/pr/Pre\\_96/June95/363.txt.html](http://www.justice.gov/opa/pr/Pre_96/June95/363.txt.html) (last visited Jan. 3, 2013).

155. A.B.A. STANDARDS & RULES, *supra* note 77, at 15.

156. See STANDARDS REVIEW COMMITTEE, *supra* note 79, at 16.

157. See notes 158-162 and related text.

158. For the extensive comments on ABA proposed standards revisions, see *Comments on the Comprehensive Review*, A.B.A. SEC. OF L. EDUC. & ADMISSION TO THE BAR, [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review/comments.html](http://www.americanbar.org/groups/legal_education/committees/standards_review/comments.html) (last visited Jan. 8, 2013).

standards review process has gone on for so long that many seeking clarity (or at least closure) are frustrated.<sup>159</sup> Students, journalists, and members of Congress have criticized the Section for not doing enough to police law school reporting regarding admissions data and placement results (in large part because of the ways in which “gaming” data reports skew U.S. News rankings).<sup>160</sup> The ABA Section Council has been criticized as allowing too many law schools to open in recent years, thereby flooding a limited employment market with graduates who cannot find jobs in times of increasing debt.<sup>161</sup> The Council has also struggled with challenges regarding its role viz-a-viz other organizations involved in legal education, including NALP (which has been unhappy with ABA efforts to take on a larger role in policing placement data) and the LSAC (which has been unhappy with proposals to eliminate requirements that law schools employ admissions tests such as the LSAT).<sup>162</sup>

*b. Association of American Law Schools (AALS)*

The Association of American Law Schools serves as legal education’s “learned society,” organizing and hosting annual meetings providing professional development opportunities and scholarly encounters for more than 4,000 legal educators and mid-year meetings that typically focus more narrowly on specific topical areas that are in flux.<sup>163</sup> It also provides an infrastructure for faculty hiring (maintaining a registry of candidates and organizing a hiring meeting that allows law schools to engage in preliminary interviews of faculty candidates in an efficient blitz weekend) and an intensive orientation program for new faculty members during the summer.<sup>164</sup> The AALS has historically been the home of “sections” that focus on substantive specialties and an affinity of interest, thereby giving faculty members from member schools the chance to work with each other,

159. The ABA is now in the fifth year of its comprehensive review of accreditation standards. *See Comments on the Comprehensive Review*, A.B.A. SEC. OF L. EDUC. & ADMISSION TO THE BAR, [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review/comments.html](http://www.americanbar.org/groups/legal_education/committees/standards_review/comments.html) (last visited Jan. 8, 2013) (referencing 2008 efforts initiating standards review).

160. *See Looking into Legal Education: Achieving Accountability and Substantial Reform*, LAW SCHOOL TRANSPARENCY, <http://www.lawschooltransparency.com/> (last visited Jan. 8, 2013) (student-driven initiative regarding law student employment); J. Maureen Henderson, *Why Attending Law School is the Worst Decision You’ll Ever Make*, FORBES (June 26, 2012, 10:21 AM), <http://www.forbes.com/sites/jmaureenhenderson/2012/06/26/why-attending-law-school-is-the-worst-career-decision-youll-ever-make>.

161. For a list of law schools accredited by the ABA, in reverse chronological order, *see ABA-Approved Law Schools by Year*, A.B.A. SEC. OF L. EDUC. & ADMISSION TO THE B. [http://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/by\\_year\\_approved.html](http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html) (last visited Jan. 3, 2013). *See* Kritzer, *supra* note 150, at 33. *See also* Gans, *supra* note 150, at 33.

162. For evidence of NALP’s unhappiness with the ABA’s efforts to take responsibility for collecting employment data, *see* the letter from NALP Bd. of Dir. to A.B.A. SEC. OF L. EDUC. & ADMISSION TO THE BAR (July 28, 2011), *available at* [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/2011\\_nalp\\_letter.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/2011_nalp_letter.authcheckdam.pdf) (last visited Jan. 8, 2013).

163. The AALS addresses its mission as part of its bylaws. *See* NAT’L CONF. OF BAR EXAM’RS, <http://www.ncbex.org/publications/ncbe-job-analysis/> (last visited Jan. 8, 2013).

164. A listing of AALS sections is *available at* <https://memberaccess.aals.org/eWeb/DynamicPage.aspx?Site=AALS&WebKey=87e3b982-657e-4a7c-be71-33605903d797> (last visited Jan. 8, 2013).

advance scholarly agendas, and be recognized as leaders within the professoriate. The AALS in recent years has moved beyond asserting that it plays a role in “accreditation” and instead focuses on its role as an association of “member schools” that share core values including commitments to diversity and scholarly inquiry.<sup>165</sup> It also maintains a range of committees that deal with such issues as curriculum, academic freedom, and other topics.<sup>166</sup>

The AALS has, in recent years, spent the bulk of its energies on planning annual and mid-year meetings (from which it derives substantive revenues), hosting the annual faculty hiring meeting, providing professional development programming for new law professors, continuing its commitment to pressing for diversity within legal education and the profession, and hosting a growing number of affinity-oriented or subject-oriented “sections.”<sup>167</sup> In other respects, the Association has played it safe in advocating for educational reform (asking the ABA to slow its standards review rather than offering the kind of fresh constructive insights that are needed),<sup>168</sup> failing to engage deeply with issues facing its member schools (other than to provide programming at meetings and responding to questions), and losing its cachet as a national “learned society” to others with narrower agendas in an area of increasingly specialized scholarship. Critics might also say that the AALS has tended to react rather than initiate in areas of great importance and has done less than it might in serving as a meaningful resource center for legal education as a whole.<sup>169</sup>

### c. Law School Admissions Council (LSAC)

The Law School Admissions Council (LSAC) is also a central player in legal education. Its principal role continues to be the development and administration of the Law School Admissions Test (LSAT). It also hosts admissions forums and provides significant support to law school admissions offices through related data collection services that assist law schools in compiling credentials, recommendations, and related information regarding candidates for admission.<sup>170</sup> In recent years, the LSAC has allocated a portion of its profits to research on issues relating to admissions and legal education and has fostered significant initiatives such as the development of academic support programs in law schools around the country.<sup>171</sup>

165. *AALS Handbook Membership Requirements*, The Association of American Law Schools (Jan. 8, 2013), [http://www.aals.org/about\\_handbook\\_requirements.php](http://www.aals.org/about_handbook_requirements.php).

166. See generally *AALS*, The Association of American Law Schools, [www.aals.org](http://www.aals.org).

167. For discussion of AALS activities, see *Association of American Law Schools Presidential Address 2012*, The Association of American Law Schools (Jan. 8, 2013), [http://www.aals.org/services\\_newsletter\\_presFeb12.php](http://www.aals.org/services_newsletter_presFeb12.php).

168. *Comments on the Comprehensive Review*, American Bar Association (Jan. 8, 2013), [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review/comments.html](http://www.americanbar.org/groups/legal_education/committees/standards_review/comments.html).

169. *Committee on Curriculum: Overview of Curricular Innovation/Survey*, The Association of American Law Schools, [http://www.aals.org/services\\_curriculum\\_committee.php](http://www.aals.org/services_curriculum_committee.php) (last visited Aug. 23, 2013).

170. See <http://www.lsac.org/> (Law School Admissions Council home website with descriptions of various activities).

171. For a summary of LSAC-funded research initiatives, see

The LSAC runs the same risk as other major legal education organizations insofar as it may become captive to its traditional role and income streams. For example, as referenced above, significant research was completed by UC–Berkeley Professors Marge Shultz and Sheldon Zedeck regarding a range of “lawyer effectiveness factors” demonstrably important in law practice, yet not touched upon in the LSAT.<sup>172</sup> Moreover, the LSAT, like other high-stakes tests, may yield skewed results that reflect “stereotype threat” rather than more neutral patterns of performance.<sup>173</sup> LSAT results are also normed against first year law school performance, rather than performance at the end of law school, thereby creating potentially skewed analysis that favors students who enter law school with the strongest initial preparation, rather than those who are able to achieve analytical competence after three years of law school.<sup>174</sup> In short, the LSAC appears to have committed itself to retaining the status quo, rather than opening up possibilities for fresh approaches to admissions testing that might capture a broader range of lawyering abilities (and thereby enhance the diversity of law school classes).

#### *d. National Conference of Bar Examiners (NCBE)*

The National Conference of Bar Examiners (NCBE) is a major gatekeeper for the legal profession. It acts on behalf of states’ boards of bar examiners (and state supreme courts) to develop and administer a range of bar examination tests, including the Multistate Professional Responsibility Examination (MPRE), the Multistate Bar Examination (MBE), the Multistate Essay Examination (MEE), the Multistate Performance Test (MPT), and, most recently, the Uniform Bar Examination (UBE).<sup>175</sup> The NCBE offers state bar examiners significant expertise in test development and administration.<sup>176</sup> It also provides significant training, professional development, and research and collaboration opportunities for bar examiners.<sup>177</sup>

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<http://www.lsac.org/lsacresources/research/lsac-research-reports.asp> (last visited Jan. 8, 2013). For discussion of academic support resources, see <http://www.lsac.org/lsacresources/grants/lsac-research/academic-assistance-programs>

172. See Shultz & Zedeck, *supra* note 132.

173. See sources on stereotype threat, *supra* note 114.

174. See Deborah A. Suto, Lynne L. Norton & Lynda M. Reese, *Analysis of Differential Prediction of Law School Performance by Racial/Ethnic Subgroups Based on 2008-2010 Entering Law School Classes* (Law School Admissions Council Technical Report 12-02, October 2012), at 2 (discussing efforts to assure that LSAT’s predicted law school first-year grade point average correlates with actual law school first-year grade point average)

<http://www.lsac.org/docs/default-source/research-%28lsac-resources%29/tr-12-02.pdf?sfvrsn=2> (last visited September 7, 2013).

175. For information on the National Conference of Bar Examiners generally, see <http://www.ncbex.org> (last visited September 7, 2013). For information on the multistate bar examination, see *The Multistate Bar Examination*, National Conference of Bar Examiners, <http://www.ncbex.org/multistate-tests/mbe/> (last visited Aug. 23, 2013). For information on the Uniform Bar Examination, see <http://www.ncbex.org/multistate-tests/ube/>.

176. See *Prelaw - How Can NALP Resources Help Me Make Good Choices?*, NALP: The Association for Legal Career Professionals, [http://www.nalp.org/pre-law\\_nalp\\_resources](http://www.nalp.org/pre-law_nalp_resources) (last visited Aug. 23, 2013).

177. *About us*, The NALP Foundation for Law Career Research and Education, <http://www.nalpfoundation.org/mission> (last visited Aug. 23, 2013).



Like the LSAC, however, the NCBE runs the risk of being captured by its own economic interests. There is little doubt the Conference believes its Uniform Bar Examination provides states, which lack the expertise to develop their own examinations, with a product capable of testing legal principles that apply nationwide and that are validated using the NCBE's validation system (which considers correlations among its various test offerings and employs its expertise in developing different forms of tests).<sup>178</sup> At the same time, a nationally uniform test may fail to assure bar applicants actually appreciate the nuances of state law in the jurisdiction in which they are seeking to practice. It also remains to be seen whether creation of a uniform national examination will create risks that states will compete to raise passing scores, rather than making considered judgments about performance expectations tied to local context. The NCBE also validates its examinations with reference to first-year law school grades (as is the case of the LSAC) and accordingly does not do enough to grapple with students' development beyond the first year.<sup>179</sup> Moreover, the NCBE has been relatively conservative in considering proposals for reform, such as the suggestion below that the bar examination should be bifurcated to facilitate better assessment of law student performance of basic analytical tasks and potential debt reduction.<sup>180</sup> It could do better and it could do more.

*e. National Association for Legal Career Professional (NALP)*

The NALP (formerly the National Association for Law Placement) is the final national organization that has played or could play a significant role in improving legal education. NALP has historically been a provider of services and "best practices" for major law firms, and has functioned as the go-between for law schools and major legal employers in establishing protocols for student recruitment. NALP has also engaged in important research regarding the experiences of junior lawyers and law students engaged in summer clerkships and the overall placement process.<sup>181</sup> It has funded important research, including the "After the JD" study.<sup>182</sup> It provides professional development and support for legal career (placement) professionals and sets key protocols for data collection regarding student placement (which have in turn been fed into ABA data collection and U.S. News ranking protocols).<sup>183</sup>

178. For publications regarding the Uniform Bar Examination and other issues, see *The Bar Examiner*, <http://www.ncbex.org/publications/the-bar-examiner/> (last visited Jan. 8, 2013).

179. The National Conference of Bar Examiners has recently commissioned a study of the skill sets needed by newly licensed lawyers. See Steven Nettles & James Hellrung (AMP), *A Study of the Newly Licensed Lawyer*, <http://www.ncbex.org/publications/ncbe-job-analysis/> (last visited Aug. 23, 2013).

180. See *National Conference of Bar Examiners (NCBE)*, *infra* section III(C)(1)(iv).

181. See *Lawyer & Law Student Professional Development*, NALP: The Association for Legal Career Professionals, <http://www.nalp.org/uploads/2011ExpLearningStudy.pdf> (last visited Aug. 23, 2013) (discussion of student experiences).

182. See *After the JD Monographs*, NALP: The Association for Legal Career Professionals, <http://www.nalp.org/afterjdmonographs> (last visited Aug. 23, 2013).

183. For information on NALP's approach to data collection, see [http://www.nalp.org/lseotf\\_bestpract](http://www.nalp.org/lseotf_bestpract) (last visited September 7, 2013). See also the examples of NALP survey questions found at <http://www.nalp.org/erssinfo>.

NALP faces its own challenges. NALP and the ABA Section Council recently became at odds regarding how placement data should be defined and collected in the interests of transparency and integrity.<sup>184</sup> NALP has also had to struggle with changes in the legal employment market and how those changes affect its relationships with firms that had previously provided financial support for its efforts.<sup>185</sup> Law schools are also asking more of their career services and placement personnel as the job market falters and law school rankings become more dependent on placement success.<sup>186</sup> Undoubtedly, different approaches to data collection are likely to favor differently situated schools, putting pressure on NALP's governance processes.<sup>187</sup>

#### *D. National Legal Education Organizations: What More Might We Ask?*

The challenges facing legal education (and its associated organizations) are significant. Law schools are unlikely to be able to face these crucial challenges in isolation, school by school. The following section identifies significant steps that might be taken by national organizations relating to legal education (ABA Section on Legal Education, Association of American Law Schools, Law School Admissions Council (LSAC), National Conference of Bar Examiners (NALP)) to address current challenges. After identifying shortcomings of each of these organizations, it suggests ways in which they might work together in complementary ways to enhance legal education overall.

As is evident in the preceding commentary, national organizations related to legal education accomplish much, but face significant challenges. They tend to be good at maintaining and enhancing their revenue streams and attending to their core missions. They are less effective, however, in working effectively across boundaries to find solutions to pressing issues facing legal education as a whole. What more might legal educators ask of these organizations? What more might they do to find effective, collaborative solutions to the significant questions facing legal education as a whole?

The proposals outlined below are relatively modest, yet raise important challenges to the status quo among American legal education organizations. How might American legal education organizations address pressing problems? The following discussion considers related issues.

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184. See *supra* note 162 and accompanying text.

185. For discussion of changes in placement trends as reported by NALP, see [http://www.nalp.org/classof2012\\_selected\\_pr](http://www.nalp.org/classof2012_selected_pr) (information on class of 2012); <http://www.nalp.org/employmentpatterns1999-2010> (trend reports regarding changes in placement patterns 1999-2010).

186. After the *JD Monographs*, *supra* note 182.

187. Law placement personnel face significant pressures, particularly since all law schools are not similarly situated. Consider, for example, the differences among law schools that may be able to employ recent graduates to increase their apparent placement rate and those that are not able to provide similar subsidies to recent graduates. See, e.g., bridge programs reported at <http://www.nalp.org/classof2011> (last visited January 31, 2013).

*I. American Bar Association (ABA)*

The ABA should reconsider important aspects of its accreditation and data collection strategies. Within the accreditation system, the ABA should encourage law schools to engage in innovation and urge them to apply for waivers from typical accreditation standards (rather than declining to engage seriously with possible waivers). The availability of waivers should depend upon quality-oriented benchmarks. Thus, proposals should detail experimental alternatives, underlying rationales, instructional designs, and resource implications. Such proposals should also be accompanied by assessment plans, on the understanding that yearly updates on educational effectiveness would need to be submitted in order to comply with waiver requirements.

The ABA should also step back and reconsider its data-collection policies. At this juncture, the ABA's traditional data collection requirements mandate that law schools submit voluminous yearly data.<sup>188</sup> The costs of data collection and reporting for law schools are significant.<sup>189</sup> Such data collection would seem to serve two possible purposes: to provide needed oversight of law schools by the ABA on a yearly basis or to assure law schools themselves engage in related data analysis as a means of improving the quality of their operations. During a time when law school costs have added to growing tuition rates, it would seem the ABA should step back and consider the costs-versus-benefits analysis associated with such data collection mandates on law schools. Certain aspects of data collection (such as information on admissions credentials, attrition, placement rates, bar passage, and student financial aid) are directly relevant to students applying for law school as a matter of consumer protection. It is less clear whether other sorts of data (such as data relating to staffing patterns, curriculum, library collections, revenues and expenditures generally) are needed on a yearly basis.<sup>190</sup> Moreover, the ABA's expansive data collection protocols have fed directly into the U.S. News ranking system, which has played a major role in fueling the growth in expenditures and tuition costs in American law schools. To the extent the ABA's yearly data collec-

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188. *ABA Questionnaires*, American Bar Association, [http://www.americanbar.org/groups/legal\\_education/resources/questionnaire.html](http://www.americanbar.org/groups/legal_education/resources/questionnaire.html) (last visited Jan. 18, 2013).

189. Data has not been collected regarding the costs of responding to the ABA's annual data-collection questionnaire. Based on her experience as a dean for ten years, from 1989-99, the author of this article estimates that yearly costs are approximately \$250,000 if deans closely review relevant data (to confirm accuracy), associate deans and other law school personnel spend time needed at hourly rates to provide requisite data, if law school placement personnel spend the time needed to track job information regarding recent graduates, and if law school financial personnel spend the time required to translate law school financial data as reported to parent universities in terms that are requested by the ABA and US News data requests.

190. The ABA's Questionnaire Committee has announced that it plans to undertake a comprehensive review of the annual questionnaire to improve the quality and reliability of data, make the reporting process more efficient, and determine how relevant questions relate to accreditation standards. See *Data and Policy Collection Committee*, American Bar Association, [http://www.americanbar.org/groups/legal\\_education/committees/data\\_policy\\_and\\_collection\\_committee.html](http://www.americanbar.org/groups/legal_education/committees/data_policy_and_collection_committee.html) (last visited Aug. 23, 2013). The committee has also indicated that it will consider whether each question asked relates to accreditation standards and whether all data needs to be collected on a yearly basis. It would be helpful if the committee also considered the costs associated with data collection by law schools and whether "best practices" information should best be collected through separate means than the yearly questionnaire.

tion requirements have facilitated a system of rankings that reflect a wasteful “arms race” of expenditures on non-essential matters,<sup>191</sup> the ABA should look closely at the costs and benefits associated with each aspect of the data it collects.

Finally, recent proposals to revise the ABA’s accreditation standards deserve at least brief comment. Possible controversial changes include eliminating the requirement that schools use an admissions test, increasing graduates’ passing rate on bar examinations, and sharply reducing security of position and tenure requirements.<sup>192</sup> Other proposals include new mandates that direct law schools to focus on developing lawyer competencies in their students, expand skills-oriented coursework, adopt learning outcomes statements, and engage in more systematic assessment of students’ performance in reference to the chosen outcomes.<sup>193</sup>

Mandating schools to develop programmatic learning outcomes and engage in systematic assessment may not seem controversial, but care is needed to assure schools actually have some idea about what is expected of them should these requirements be imposed. The experience of regional accrediting bodies responsible for accreditation of colleges and universities suggest a substantial culture change is often needed for academic programs and their faculties to appreciate the significant shift in perspective embodied in working with this new paradigm.<sup>194</sup> While a handful of law schools have gained some related experience as a result of regional accreditation requirements,<sup>195</sup> significant developmental work will be needed before law schools can really engage with such new demands. It is also unclear whether the ABA is the right place to look for developmental assistance on these issues, since it lacks the breadth and depth of educational experience found in regional accrediting agencies. If the ABA continues down the current path, and such new requirements are imposed, it will be crucial for it to work with

191. Adrianna Kezar, *Understanding the Nature of Higher Education Organizations: Key to Successful Organizational Change*, ASHE-ERIC HIGHER EDUCATION REPORT, 28 (4), at 77 (2001).

192. At its August 2013 meeting, the Council of the ABA Section of Legal Education and Admission to the Bar considered a number of proposals presented by the ABA Standards Review Committee (including proposals for curriculum requirements, and provisions relating to security of position, but not yet those relating to admissions policies). See [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/august\\_2013\\_open\\_session/2013\\_src\\_memo%20to\\_council\\_re\\_c h%201\\_%203\\_%204\\_and%20s203\\_b\\_and\\_s603\\_d.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/august_2013_open_session/2013_src_memo%20to_council_re_c h%201_%203_%204_and%20s203_b_and_s603_d.authcheckdam.pdf) (last visited Sept. 7, 2013). Several alternatives were presented regarding security of position and “professional environment” (see alternative versions of Standard 405, *id.*). Alternative versions were posted for notice and comment. See

[http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20130906\\_notice\\_comment\\_chs\\_1\\_3\\_4\\_s203b\\_s603d.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20130906_notice_comment_chs_1_3_4_s203b_s603d.authcheckdam.pdf) (last visited Sept. 7, 2013). Provisions regarding bar passage remained under review by the Standards Review Committee in July 2013. See [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/july\\_2013\\_meeting/201307\\_src\\_meeting\\_materials.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july_2013_meeting/201307_src_meeting_materials.authcheckdam.pdf).

193. See the proposed revisions in standards 301 – 305 now published for comment following preliminary review by the Council of Legal Education and Admission to the Bar at its August 2013 meeting, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20130906\\_notice\\_comment\\_chs\\_1\\_3\\_4\\_s203b\\_s603d.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20130906_notice_comment_chs_1_3_4_s203b_s603d.authcheckdam.pdf) (last visited Sept. 7, 2013).

194. For discussion of cultural changes required for new approaches to assessment, see Wendy F. Weiner, *Establishing a Culture of Assessment*, *Academe* (July-August 2009), available at <http://www.aaup.org/article/establishing-culture-assessment#.UiuGnz-TLvI> (last visited Sept. 7, 2013).

195. See *supra* note 126.

organizations better suited to undertake associated developmental work—perhaps including the AALS in partnership with assessment experts from other fields.<sup>196</sup> It will also be important for the ABA to provide adequate training for its accreditation site teams, since many legal educators, lawyers, and judges on such teams have little or no experience with learning outcomes and institutional assessment practices.

### 2. Association of American Law Schools (AALS)

The AALS has historically served as legal education's learned society and as a resource center for its member schools. At this juncture, there is significant need for support of schools seeking to establish learning outcomes and engage in institutional assessment of educational attainments. As noted above, the AALS would seem better situated than the ABA to provide support for its member schools in undertaking such efforts—by developing systematic resources for administrator and faculty training in related matters—and for communicating new approaches across its array of member schools. It could also enhance its institutional capacity, so as to have researchers on staff who might assist law schools on a contractual basis in designing and implementing assessment strategies that necessitate use of sophisticated social science strategies. Absent such a sustained effort, it is hard to see how a new paradigm focused on learning outcomes and complex institutional assessment could be put in place.

### 3. Law School Admissions Council (LSAC)

The LSAC has, for years, served as the expert source of admissions testing for American legal education. Its role is currently under challenge in light of the ABA's consideration of eliminating admissions testing requirements. Even if the ABA policies do not change, the LSAC might contribute significantly to needed change within legal education if it considered some of the following concerns.

The LSAT has historically focused on assessing a relatively narrow band of aptitudes that have been correlated to class rank at the end of the first year of law school.<sup>197</sup> While the LSAT in its current incarnation provides meaningful information relevant to student performance in certain narrow realms, such as analysis and reading comprehension, its narrow focus does not encompass a broader range of abilities pertinent to effective performance by lawyers following graduation. As referenced above, UC–Berkeley Professors Marge Shultz and Sheldon Zedeck have demonstrated the importance of 26 lawyer effectiveness factors, most of

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196. See, e.g., <http://planning.iupui.edu/conferences/national/nationalconf.html> (Indiana University–Purdue conference on assessment issues). This annual conference convenes higher education experts in assessment to engage in a discussion of a variety of assessment topics. The AALS could begin to develop similar conferences on assessment in legal education, bringing together experts from higher education generally as well as those with significant experience using enhanced assessment practices in legal education such as experts referenced in footnote 126 *supra*.

197. For a research study considering the possibility of LSAT listening assessments see Kenneth Olson, *LSAT Listening Assessment: Theoretical Background and Specifications*, Law School Admission Council LSAC Research Report 03-02, Oct. 2003, at 1.

which are not assessed through the LSAT.<sup>198</sup> Indeed, the Shultz–Zedeck research suggests lawyer effectiveness relates more to factors not tested on the LSAT than to those captured by the LSAT and conventional measures of success during law school.<sup>199</sup> Although Schultz and Zedeck have sought support from the LSAC to expand testing of their supplemental admissions testing protocols, the LSAC has not as agreed to pursue the matter.

Other questions may reasonably be raised regarding the current LSAT regime. For example, could the LSAC find better ways to assess key factors such as prospective students' resilience or capacity as self-starters? Does the way the LSAT is administered give rise to "stereotype threat" that can depress the performance of minority students?<sup>200</sup> Is the current system of benchmarking LSAT scores against student rankings in the first year of law school appropriate, when a more meaningful standard for ultimate competence would instead link scores to student performance at the end of three years of law school (while also considering performance in terms of quartiles of performance rather than statistically insignificant differences in student ranking)? At least arguably, the LSAC would serve the legal education community more effectively if it developed wider-ranging assessments of student potential for success in the legal profession.

Possible reforms to the LSAT would be especially important in helping law schools assess applicants during a period in which applicant pools are in flux, as are the skills needed to contribute successfully to the legal profession. The LSAC must also rise to the challenges raised by current challenges to the diversity of law school applicants, taking into account recent court challenges.<sup>201</sup> Finally, the LSAC needs to follow through on its efforts over the past 20 years to buttress academic support programs. What has been learned through such programs should provide experts with deeper insights about how to craft admissions tests that correlate to student performance beyond the first year. It is time for the LSAC to face these challenges in the interest of legal education as a whole.

#### 4. *National Conference of Bar Examiners (NCBE)*

The NCBE is currently focused upon encouraging states to adopt its uniform bar examination.<sup>202</sup> It has justified this approach in terms of its ability to validate test questions and to correlate performance across the range of tests it provides.<sup>203</sup> At the same time, it is difficult to ignore the financial considerations at work that may affect its neutral judgment and priorities. The uniform bar exam is the NCBE's current headline product. The product's financial dimensions matter to the NCBE. It therefore is preoccupied with encouraging states to adopt this

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198. See Shultz & Zedeck, *supra* note 132, at 620.

199. See Shultz & Zedeck, *supra* note 132, at 641-654.

200. See sources referenced at note 114, *supra*.

201. See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

202. As of August 2013, thirteen jurisdictions have adopted the uniform bar exam. See *The Uniform Bar Examination*, National Conference of Bar Examiners, <http://www.ncbex.org/multistate-tests/ube/> (last visited Aug. 7, 2013).

203. Kelley Early, *The UBE: Policies Behind the Portability*, 80 BAR EXAM'R No. 3 (Sept. 2011) (discussing the Uniform Bar Examination).

“product,” whatever other priorities might arguably be worth its attention as an institutional matter.

I have previously argued (in major meetings of the NCBE and otherwise) that the NCBE should reconsider its priorities and instead consider “bifurcating” the bar exam as it has been understood historically (focusing on national multiple choice and essay exams). My argument is as follows:

The NCBE should establish a two-step bar examination process and make it available to state bar examiners. An initial step-one exam would be made available at the end of the first year of law study (with the possibility of repeating this step after the second or third year) and a step-two exam made available at the end of the third year.

The step-one exam would make available national multiple choice and national essay exams on subjects typically taught during the first year (property, civil procedure, torts, criminal law, contracts, and constitutional law).<sup>204</sup> Students could (but would not be required to) take the step one exam and receive scores after their first year summers.

These scores would be portable across jurisdictions (subject to minimum score requirements). Law students would inform their schools about their performance and law schools would in turn help students develop fundamental analytical skills well in advance of graduation. Equally important, law students could accrue such scores and be able to decide whether to “step out” and work before returning to law school and completing their degrees. Crucial benefits of this approach would include allowing law students to stop out (knowing their level of accomplishment) after a first year of study without taking on a full three years of debt. In addition, by stopping out and working, law students could gain a clearer understanding of their interests and priorities, could earn enough to pay off initial debt before returning to law school, and could provide the legal profession with valuable employees whose expertise would be worthwhile (even if a full JD had not yet been awarded).

The step-two bar examination would differ from the traditional, existing bar exam. Since first-year subjects would be tested (on an optional basis) at the end of the first year of law school, the test given at the end of the third year of law school could differ significantly from the current bar examination. Time and testing resources would no longer need to be devoted to first year subjects (such as civil procedure, contracts, constitutional law, criminal law, torts, and property law, none of which would need to be re-tested at the end of third year). Instead the focus of the step-two bar examination would be on advanced subjects beyond the first year. Applicants for part two of the bar examination might be tested on a core set of advanced subjects determined by state bar examiners to be appropriate for all test takers (such as business associations, evidence, and perhaps criminal procedure, trusts/estates, and family law). State bar examiners could also then devote substantial time to examine applicants in depth in areas of declared student expertise in which applicants might be tested using practice-related protocols (for example, testing using practice-oriented files and tasks in areas of proposed practice similar to the multi-state performance examination, but allowing students to

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204. See Kloppenber, *supra* note 135, at 47-61.

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opt into examination in particular areas such as criminal law, civil litigation, general practice, family law, and so forth).

This approach would help keep law schools honest. It would help assure that first-year law students had attained a core level of competence related to analytical problem-solving in common law courses, and assure that law schools are held accountable for their abilities to provide students with related analytical skills. It would also help provide a benchmark that would in turn encourage law schools to engage in more innovative instruction in the second and third year, with an emphasis on application of legal principles and advanced subject matter instruction (rather than continuing to stress the basics of “thinking like a lawyer” that students should have attained after the first year).

### *5. National Association for Legal Career Professional (NALP)*

NALP has changed its focus as evident from its reframing and renaming. It is no longer the National Association of Law Placement and is now the Association for Legal Career Professionals. The process of renaming suggests a significant change in orientation and not necessarily one that is beneficial to legal education as a whole. While it is important for various professionals to have support systems and associated professional development organizations, the renaming of NALP suggests this shift in orientation steps back from an earlier orientation toward service and data analysis that benefited law schools and employers and instead emphasizes support and protection of career services professionals.

It is understandable this change has been made in a time of stress, particularly when NALP has come under criticism regarding its protocols for gathering law placement statistics and the ABA has stepped into the breach.<sup>205</sup> NALP faces challenges not only because of its past practices but also because of its structure. To the extent its approach to data gathering and policy development has reflected its partnership with large law firms as legal employers, it is inevitably limited in its overall perspective.

Law schools and the legal profession need an objective system for analyzing placement data and policies. It is not clear whether NALP can fill the bill, given its historical organization. It is therefore significant that the ABA Council of the Section of Legal Education has stepped up to oversee related data collection and analysis. NALP needs to step back and consider whether it is prepared to undertake responsibility for data collection and analysis on a neutral and objective basis (rather than as a representative of large law firm employers). Moreover, NALP needs to consider whether it is serious about serving as the research and development arm of legal education in terms of identifying trends in legal employment and potentially undertaking efforts to encourage employers to hire students for “JD advantaged” jobs. At this point, NALP has not faced up to these challenges, but it is possible that it might in the future.

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205. See Mark Hansen, *ABA Plan to Collect Detailed Law School Employment Data Riles NALP* (Aug. 11, 2011), available at [http://www.abajournal.com/news/article/aba\\_data\\_collection\\_plan\\_riles\\_nalp/](http://www.abajournal.com/news/article/aba_data_collection_plan_riles_nalp/) (last visited Sept. 7, 2013) (discussing ABA decision to begin collecting employment data). For access to employment data collected by the ABA, see <http://employmentsummary.abaquestionnaire.org/> (lasts visited Sept. 7, 2013).



## 6. Conclusion

The challenges facing legal education (and associated organizations) are significant. Law schools are unlikely to be able to face these crucial challenges in isolation, school by school. This section has suggested significant steps that might be taken by national legal education organizations to address current challenges on a systematic and effective basis.

### *E. Giving Assessment Its Due: Developing a System that Facilitates Documented Educational Quality Rather than Assumed Prestige*

This Essay has argued that much more serious attention needs to be given to assessment as a fundamental cornerstone of change and has considered the role of law schools and national organizations in addressing that need. Relying only on individual law schools or national organizations to make needed changes seems overly optimistic, however, given the history-to-date. Law faculty members have also tried to engage with assessment issues through organizations that link individual members (such as the Clinical Legal Education Association and the Society of American Law Teachers).<sup>206</sup> Others have written thoughtfully about ways assessment strategies might be improved.<sup>207</sup>

#### 1. Rationale

What seems to be needed, however, is a different kind of “curb cut”—one that would create both effective incentives and functional mechanisms for law schools and their faculties to move forward promptly with quality enhancement and cost containment. Ideally, such a “curb cut” would provide a meaningful alternative for dissemination of documented best program practices. It would assist students in choosing top-quality opportunities for law study apart from the smoke and mirrors characterizing the U.S. News rankings system. In effect, a better system would use some form of “criterion-referenced” assessment that would be applied through knowledgeable peer judgments and would welcome law schools generally demonstrate that they have achieved demonstrable educational quality. In short, such a system would provide an alternative means of assessing and encouraging quality in law school programming that would be criterion-based (that is, tied to articulated standards)<sup>208</sup> and stand in sharp contrast with the “norm referenced,” statistically problematic rankings strategies employed by U.S. News. Ideally, such a system would also provide a means of recognizing and disseminating information about top-quality programming based on meaningful judgments

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206. See *Comments on the Comprehensive Review*, American Bar Association, [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review/comments.html](http://www.americanbar.org/groups/legal_education/committees/standards_review/comments.html) (last visited Jan. 8, 2013).

207. KEZAR, *supra* note 27, at 77.

208. See Leslie Rose, *Norm-Referenced Grading in the Age of Carnegie: Why Criteria-Referenced Grading is More Consistent With Current Trends in Legal Education and How Legal Writing Can Lead the Way*, 17 J. OF LEGAL WRITING INST. 123, 127-28 (2011).

about quality and relevance, rather than on public relations and marketing information that lacks substance and depth.<sup>209</sup>

## 2. Design

How might such a system operate? Consider a three-part scheme.

### *a. Conception and Proposal Development*

If change is to occur at a programmatic level (rather than only in individual classrooms), it is essential for faculty members at individual law schools to develop proposals for programmatic instructional improvement. Such proposals might take a variety of forms: a new legal research/writing/skills program design; an effort to track lawyering skills developed in clinical programs; an analysis of learning outcomes from seminar instruction; a “transition to practice” program (such as UNC’s, described above); an academic success program; a bar preparation program; an effort by a group of faculty members to develop and deploy more meaningful formative assessments in large required classes; a systematic approach to enhancing students’ sense of professional identity; a design to foster effective performance on bar exams; an approach to building substantive strength through progressive courses in a particular area of the curriculum; an evaluation of the synergy between substantive courses and certain extracurricular activities; an evaluation of “flipping” the curriculum (shifting student responsibilities for prior preparation and in-class engagement); or any of a myriad of other topics.

In short, it should be possible to encourage faculty members and schools to engage in more imaginative approaches to programmatic educational improvement. Important lessons can be drawn from the Carnegie Foundation for the Advancement of Teaching’s efforts to foster the “scholarship of teaching and learning.”<sup>210</sup> This approach has gained support across the country in recent years by encouraging faculty members to bring the same spirit of inquiry to their teaching as they do to their scholarly efforts. In effect, faculty members and law schools open to a wide array of scholarship<sup>211</sup> can ask themselves questions such as: what is going on in our classrooms, and why? An outstanding example is the inquiry of a chemistry faculty member at Notre Dame who asked himself: why do women and people of color not thrive in “gateway” chemistry classes and move forward as chemistry majors, and how might redesign of teaching strategies affect their success?<sup>212</sup> By documenting the difference between traditional instructional ap-

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209. *Educating Tomorrow’s Lawyers*, Institute for the Advancement of the American Legal System, <http://educatingtomorrowlawyers.du.edu/about-etl/> (last visited Jan. 8, 2013).

210. *Carnegie Academy for the Scholarship of Teaching and Learning (CASTL)*, Carnegie Foundation for the Advancement of Teaching, <http://www.carnegiefoundation.org/scholarship-teaching-learning> (last visited Aug. 23, 2013).

211. See Ernest Boyer, SCHOLARSHIP RECONSIDERED: PRIORITIES FOR THE PROFESSORiate (Carnegie Foundation for the Advancement of Teaching, 1990) (Boyer recognized four types of scholarship: the scholarship of discovery, integration, teaching and learning, and engagement).

212. Professor Dennis Jacobs, then of Notre Dame, was a CASTL scholar with the Carnegie Foundation for the Advancement of Teaching. Dennis C. Jacobs, *Cooperative Learning in General Chemistry*, University of Notre Dame,

proaches and innovative use of teaching assistants to facilitate learning, the faculty member was able to demonstrate existing instructional strategies were the reason that not all students thrived.<sup>213</sup> Similar, rigorous inquiries might be brought to bear in legal education if we chose to do so.

*b. Professional Development and Support: Innovation Institutes*

The development of a concept and possible proposal is only the starting point. It can often be very important for faculty leaders and administrators to develop cogent plans backed with adequate research and exemplars and to encourage colleagues to support proposed changes. Faculty leaders, such as associate deans and chairs of curriculum or academic affairs committees, often lack expertise in facilitating discussion, dealing with disagreement, or encouraging and managing change. In addition, very few faculty leaders or deans have had significant exposure to educational theory, educational research, or assessment strategies (except on occasion through involvement in regional accreditation reviews for their universities). In short, there is a significant deficit in professional development training of the sort that could significantly assist those interested in change and their law schools to move ahead in a meaningful way with requisite skill sets.

Bolstering a national climate for innovation also requires linking change-minded faculty members in individual schools with colleagues from elsewhere who can provide meaningful support and thoughtful critiques. One way to address both the professional development and support needs is to create a yearly “institute” that would bring together faculty teams from schools seeking to undertake meaningful change, providing them with requisite training and peer interaction. Models for such efforts already exist, such as the yearly Georgetown Summer Institute for Clinical Teaching.<sup>214</sup> Ideally, innovation teams from a number of schools could be drawn together for a week-long summer institute where they could share proposals, receive training in assessment and related topics, and provide peer critiques that would enhance proposals. Possibly, support for such innovation institutes might be drawn from foundations or nonprofit organizations that would invite proposals geared to enhancing quality in legal education while reducing costs.

*c. Assessing and Disseminating*

Marketing of, and bragging on, law school program innovations is to be expected. To move legal education ahead, however, a more meaningful, fact-based, peer-reviewed system of assessment is needed. Happily, there are meaningful models that can be built upon, including those long-established through the United

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[http://gallery.carnegiefoundation.org/collections/castl\\_he/djacobs/index2.htm](http://gallery.carnegiefoundation.org/collections/castl_he/djacobs/index2.htm) (last visited Aug. 23, 2013).

213. *Id.* For examples of other “scholarship of teaching and learning” projects supported by the Carnegie Foundation, see [http://gallery.carnegiefoundation.org/gallery\\_of\\_tl/castl\\_he.html](http://gallery.carnegiefoundation.org/gallery_of_tl/castl_he.html). For information on various Carnegie Foundation publications regarding the scholarship of teaching and learning, see <http://www.carnegiefoundation.org/publications/sotl-publications>.

214. For discussion of the Georgetown program, see generally Wallace J. Mlyniec, *Developing a Teacher Training Program for New Clinical Teachers*, 19 CLINICAL L. REV. 327 (2012)

States Department of Education's Fund for the Improvement of Post-Secondary Education (FIPSE).<sup>215</sup> Historically, FIPSE has solicited applications from programs in designated areas (such as access, retention, student preparation for college, cost-effectiveness and curricular reform) and has assessed submissions in terms of their level of innovation, goals, impact, management, and dissemination efforts.<sup>216</sup> Although FIPSE does not currently maintain an innovative program support initiative, its historical approach provides a helpful benchmark.<sup>217</sup> Projects that it has recognized, supported, and disseminated include: those that are innovative (in goal, method, scope, target population, cost or efficiency); those with clear and specific goals relating to student learning, faculty development, or institutional change; those which articulate specific objectives that would make sense to a non-specialist; those that have clear statements regarding proposed project impact; those that have "game-changing" implications; those that are well-managed; and those that have made efforts to document efforts and disseminate insights.<sup>218</sup>

Legal educators could adopt a similar approach to documenting and disseminating educational innovations, even without FIPSE funding. What would be essential is the establishment of a system of knowledgeable peer review and assessment and the creation of a meaningful review and dissemination system. Unfortunately, no such system currently exists. Sabbatical inspections by the ABA do not include peer review teams made up of experts who can assess particular program innovations and do not do so in a timely way. The AALS does not undertake to solicit information about innovations on a systematic basis, provide needed professional development or other support, or facilitate peer assessments in a timely way that relates to particular innovative initiatives. In short, there is no extant institutional structure that is able to provide the inspiration, professional development, or review functions needed to document and disseminate quality-oriented and cost-efficient educational innovations within legal education. Perhaps it is time to establish a structure apart from existing institutions that would be able and willing to take on such a role.

### F. Summary

This Part has considered possible "curb cuts" that could facilitate change within legal education. "Curb cuts" refer to strategies that might be used to reduce barriers to change, including four strategies that might serve to open the path

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215. *Fund for the Improvement of Postsecondary Education*, U.S. Dept. of Educ., <http://www2.ed.gov/about/offices/list/ope/fipse/index.html> (last visited Jan. 31, 2013).

216. For a discussion of FIPSE's history, see Virginia Smith, *FIPSE's Early Years: Seeking Innovation and Change in Higher Education* Change, CHANGE: THE MAGAZINE OF HIGHER LEARNING 34(5), 10 at 11-16 (Sept.-Oct.2002).

For a discussion of the role of FIPSE in supporting improvements in medical education, see Sandra Levison & Joan Straumanis, *FIPSE: Changing Medical Education Forever*, CHANGE: THE MAGAZINE OF HIGHER LEARNING 34(5), at 18, 19 - 26 (Sept.-Oct. 2002) (discussing support for development of standardized patients to assess clinical skills, and improvements in medical education to give more emphasis to women's health issues).

217. See <http://www2.ed.gov/programs/fipsecomp/index.html> (last visited Jan. 31, 2013) (indicating that due to budget cuts, there was no funding for program support in 2011 or 2012).

218. *Fund for the Improvement of Postsecondary Education – Welcome and Overview of FIPSE Programs and Web Resources*, U.S. Dept. of Educ., <http://www2.ed.gov/about/offices/list/ope/fipse/welcome.html> (last visited Jan. 31, 2013).

to change: acknowledging local changes already underway; introducing and defining new mental models; advocating for changed roles of national organizations; and developing fresh assessment strategies to test and document assumptions and innovative methods. “Curb cuts” can include modest innovations at the local level, such as establishment of teaching roundtable discussions and creation of new “transition to practice” instructional models. “Curb cuts” can also include significant challenges to national legal educational organizations that need to embrace innovation as never before and provide recommendations to create new frameworks for national innovation and assessment led by faculty members and law schools committed to programmatic innovation.

#### IV. CONCLUSION

This Essay has endeavored to contribute to the important conversation about legal education reform initiated by the University of Missouri–Columbia School of Law through this Symposium. It has adopted the metaphors of “cornerstones” and “curb cuts” as a means of illuminating the important choices implicit in educational reform. It has proposed four new “cornerstones” for change, including fresh approaches to understanding change, attention to mental models, engagement with systems thinking, and meaningful engagement with assessment. The Essay has also suggested four “curb cuts” including attention to experiencing change, reframing mental models, encouragement of systems thinking by national legal educational organizations, and fresh approaches to quality assessment that could be driven by leading thinkers about legal education.

Change will not happen without engagement and commitment by law faculty members, deans, leading practitioners, and judges. Nor will it happen without the inspiration of generations of law students who inspire us all to do better. I hope the critiques and ideas discussed in this Essay will move American legal education forward in keeping with current imperatives related to preparing future lawyers to address the need for social justice. If legal educators do not rise to the challenges that face us in this era, we will not have taken our obligations seriously. I hope we will not be found wanting on this score.