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# Changing Gears to Meet the 'New Normal' in Legal Education

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CHANGING GEARS TO MEET THE “NEW NORMAL” IN LEGAL  
EDUCATION

*Courtney G. Lee\**

ABSTRACT

The course of legal education is changing. Many law schools are downsizing, accepting classes with lower entering credentials, and encountering a new demographic of law student. A product of standardized federal education policies like the No Child Left Behind Act and the Common Core State Standards Initiative, this student has fewer or less refined critical thinking skills than most first-year law professors have come to expect. Part I of this Article explores the landscape of this “new normal” in legal education, examining the effects of new law school admissions policies, changes in K-12 and undergraduate education, and the link between law student entering credentials and critical thinking skills. Part II suggests ways in which law schools might change gears to ensure the success of these new law students and of the law schools themselves. Among other things, it emphasizes the importance of addressing both the current economic structure of law schools and the need for major curricular reform that creates more opportunities for student assessment. Part III explores the positive outcomes likely to result from a timely, smooth shift to this new approach in legal education.

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## INTRODUCTION

Growing up, I spent most of my summers at drag strips and racetracks. Before I even had my driver's license, my brother introduced me to the concept of a manual transmission: the sensitive give and take between the clutch and the gas, and the importance of smoothly changing gears at the right moment. I watched closely as drivers won and lost races based on that precise timing, and I carried that awareness with me as I myself began to race.

Legal education is much like car racing, at least in one sense. Like professional drivers, law professors and administrators need to be aware of variations in the track – a hairpin curve, a shift in elevation – and change gears and speed to suit the conditions before losing control and skidding into the barriers, or worse. Now is one of those moments.

The course of legal education is changing. Many schools are downsizing, accepting classes with lower credentials, and otherwise adjusting to a decrease in applications and a weak legal economy.<sup>1</sup> Moreover, students who are a product of federal education policies like the No Child Left Behind Act and the Common Core State Standards have started entering law school, many arguably with fewer or less refined critical thinking skills than most first-year law professors have come to expect.<sup>2</sup> These factors combine to create a very different student body than most law schools have seen in recent decades, and it is time to change gears to meet the needs of this “new normal.”

Part I of this Article explores the landscape of “the new normal” in legal education, and background influencing the gap between the critical thinking skills entering law students are expected to have and those most current students actually possess at matriculation. It examines the link between entering credentials (Law School Admissions Test score and undergraduate grade point average) and critical thinking skills, the outcomes of new admissions policies, and the effects of national pre-college educational issues on undergraduate learning, including the initial preparedness of law school applicants. Part II briefly suggests ways in which law schools might consider changing gears in order to ensure the success of these new law students, and the success of law schools themselves. Finally, Part III explores the positive outcomes that are likely to result from a timely, smooth shift.

## I. CHANGES CONTRIBUTING TO THE NEW NORMAL IN LEGAL EDUCATION

*“Law schools will be crushed if they don’t remake themselves. . . . This is Detroit in the 1970s: change or die.”*<sup>3</sup>

There are many, many evolving aspects of what scholars have termed “the new normal” in legal education – from budgets to

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1. Katherine Mangan, *Panel Suggests Dropping Tenure Requirement to Reform Legal Education*, THE CHRONICLE OF HIGHER EDUC. (Sept. 20, 2013), [http://chronicle.com/article/Panels-Ideas-for-Reforming/141763/?cid=at&utm\\_source=at&utm\\_medium=en](http://chronicle.com/article/Panels-Ideas-for-Reforming/141763/?cid=at&utm_source=at&utm_medium=en).

2. Valerie Strauss, quoting Kenneth Bernstein, *A Warning to College Profs from a High School Teacher*, WASH. POST: THE ANSWER SHEET (Feb. 9, 2013), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/02/09/a-warning-to-college-profs-from-a-high-school-teacher/>.

3. Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 14, 2012, [http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html?smid=pl-share&\\_r=0](http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html?smid=pl-share&_r=0) (quoting Frank Wu, Dean of Hastings College of the Law).

class size, to tuition to tenure, to student debt to campus use and so on – and there is a wealth of research and articles examining those issues.<sup>4</sup> This Article focuses mainly on the new demographic of students entering law school classrooms, and the lasting effects this change will have on legal education.

One of the primary functions of law school is to train students to think like lawyers, which includes critical reading, analysis, and writing.<sup>5</sup> Legal educators generally operate under the assumption that entering law students already have some foothold on these skills via their formative and undergraduate education.<sup>6</sup> Some scholars refer to this notion as the “skills deployment assumption,” which may, for example, lead to the belief that students’ post-college literacy skills include the ability to read and comprehend complex legal opinions.<sup>7</sup> Although the term is used to describe reading skills in particular, it could be applied just as easily to the other analytical and writing skills legal educators assume students possess upon matriculation to law school.<sup>8</sup>

It follows logically that most legal educators view their roles as refining – rather than introducing – these skills, which is not unreasonable. Recently, however, many law professors have observed that their new students greet them with significant and often surprising deficiencies in basic critical reading, thinking, analysis, and writing skills, usually manifesting as an overall lack of preparedness.<sup>9</sup> There are several possible explanations for this phenomenon, some of which are described below; but it seems fairly certain that the situation is unlikely to change anytime soon. Instead, legal education itself must change to meet these new challenges.

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4. See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012); see also Deborah L. Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437 (2013) (explores new challenges to legal education, including lack of consensus regarding the problem itself, and financial, structural, curricular, and value issues); Paul Campos, *The Crisis of the American Law School*, MICH. J. L. & REFORM (Oct. 2012) (examining the reasons for and consequences of the increased cost of legal education in the U.S.).

5. Paul T. Wangerin, *Skills Training in “Legal Analysis”: A Systematic Approach*, 40 U. MIAMI L. REV. 409 (1986) (describing the essential skills to enable thinking like a lawyer, including identifying and using facts effectively, interpreting statutory law, creating legal synthesis, using analogies and public policy, and reconciling contradictions).

6. Michael Jordan, *Law Teachers and the Educational Continuum*, 5 S. CAL. INTERDISC. L.J. 41, 59 (1996).

7. Leah M. Christensen, *Legal Reading and Success in Law School: An Empirical Study*, 30 SEATTLE U. L. REV. 603, 605-06 (2007).

8. *Id.* at 605.

9. Nancy B. Rapoport, *Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Schools*, 116 PENN. ST. L. REV. 1119, 1143-44 (2012); see also Jordan, *supra* note 6, at 41.

### A. *Changes in Law School Admissions*

In 2008, the national economy began a steep decline into the Great Recession, dragging most legal education programs along with it.<sup>10</sup> Worsening economic conditions impacted law school applications steadily across the nation, resulting in fewer applicants and, consequently, a decrease in the levels of applicant entering credentials accepted at many law schools.<sup>11</sup>

#### 1. *Fewer Law School Applications*

These economic shifts resulted in less demand for attorneys entering private practice in firms, which in prior decades formed the foundation of the legal industry and the primary feed from which most new law school graduates found jobs.<sup>12</sup> To meet new budgetary demands, private law firms and even some public employers reduced hiring, downsized, merged and laid off employees, or in some circumstances simply closed their doors.<sup>13</sup> From 2004 to 2010, for example, there were 47,000 fewer employees in U.S. law offices, and these numbers continue to decline.<sup>14</sup> In contrast to this downward trend in legal employment opportunities, during the same time period law schools saw relatively constant, or even increased, applications and enrollment.<sup>15</sup>

Despite this decrease in entry-level jobs in private practice, many researchers argue that the overall demand for lawyers has not lessened—in fact, if anything, it has increased—but the demand comes from low-income clients who cannot afford legal services, and who often are found in rural markets without many lawyers.<sup>16</sup> Although applicants often decide to pursue law school

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10. Patrick M. Kelly, *What can, or should, lawyers do about the decline in law school enrollment?*, THE DAILY J. (Jan. 2, 2014).

11. *Id.*; Jerome M. Organ, *Legal Education and the Legal Profession: Convergence or Divergence?*, 38 OHIO N. U. L. REV. 885, 899-900 (2012).

12. William Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 473 (2013).

13. See Organ, *supra* note 11, at 897-98; see also Caplan, *supra* note 3.

14. Henderson, *supra* note 12, at 473.

15. Organ, *supra* note 11, at 898 (“As further evidence of the market dysfunctionality, first-year enrollment increased in 2009 and 2010 to record levels, even as 2009 and 2010 law school graduates found the job market for law school graduates in decline.”); see also Law School Admissions Council, *End of Year Summary 2003—Present (ABA Applicants, Applications, Admissions, Matriculants, Enrollment, Tests, CAS)*, LSAC.ORG, [www.lsac.org/lisacresources/data/lisac-volume-summary](http://www.lsac.org/lisacresources/data/lisac-volume-summary) (last visited Feb. 6, 2014) [hereinafter LSAC End of Year Summary 2003—Present].

16. American Bar Association Task Force on the Future of Legal Education, *Report and Recommendations*, 13 (Jan. 2014), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf) [hereinafter

with the intent to help the less fortunate and serve these underrepresented clients, most law school graduates have crushing student loan debt<sup>17</sup> that prevents them from following these dreams.<sup>18</sup>

A law school graduate's total debt could range from \$160,000 to \$250,000, depending on the school, while the median salary for a typical entry-level legal job is roughly \$60,000 per year.<sup>19</sup> This is provided that the graduate can even secure such a job, which upwards of forty-five percent of recent law graduates, especially those in the bottom halves of their classes, cannot.<sup>20</sup> Recently updated government loan forgiveness programs, such as Income-Based Repayment, Public Service Loan Forgiveness, and Pay as You Earn (PAYE), might alleviate some students' financial woes; but loan repayment still may be a struggle, especially for low-performing students and graduates of lower-ranked law schools who may have difficulty finding a job at all.<sup>21</sup> The PAYE program, in particular, shows promise because payment obligations are conditioned solely on the borrower's income.<sup>22</sup> There are concerns with PAYE, however, due to the likelihood of a large tax obligation at the time of the final payment, the susceptibility of the program to governmental budget cuts, and ethical issues stemming from a failure to incentivize law schools to limit tuition or students to limit borrowing.<sup>23</sup>

Additionally, some researchers worry that the government may significantly reduce its funding of higher education tuition, given

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2014 A.B.A. Report and Recommendations]; see also Zoe Tillman, *Legal Aid Demand Outpaces Program Growth, Providers Say*, THE NAT'L L. J., Jan. 20, 2014, <http://www.nationallawjournal.com/id=1202639044623/Legal-Aid-Demand-Outpaces-Program-Growth,-Providers-Say?SIreturn=20140103103212>.

17. See TAMANAHA, *supra* note 4, at 107-25; see also Gregory Crespi, *Will the Income-Based Repayment Program Enable Law Schools to Continue to Provide "Harvard-Style" Legal Education?*, SMU L. REV. (forthcoming) (manuscript at 21-22).

18. Organ, *supra* note 11, at 905-906.

19. Crespi, *supra* note 17, at 27-29.

20. *Id.*; see also TAMANAHA, *supra* note 4, at 114-116, 139; Kelly, *supra* note 10 (noting that "according to American Bar Association statistics, in 2012, there was only one job for roughly every two graduates – and those jobs most often went to the students with strong grades from the higher-rated law schools").

21. Crespi, *supra* note 17, at 27-29; see also TAMANAHA, *supra* note 4, at 114-116, 139; Kelly, *supra* note 10.

22. Jerome M. Organ, *Reflections on the Decreasing Affordability of Legal Education*, 41 WASH. U. J.L. & POL'Y 33, 56-57 (2013); see Philip G. Schrag, *Failing Law Schools – Brian Tamanaha's Misguided Missile*, 26 GEO. J. LEGAL ETHICS 387 (2013).

23. Organ, *supra* note 22, at 57; Brian Tamanaha, *What's Wrong with Income Based Repayment in Legal Academia: A Response to Schrag*, BALKINIZATION (Nov. 29, 2012), [balkin.blogspot.com/2012/11/whats-wrong-with-income-based-repayment.html](http://balkin.blogspot.com/2012/11/whats-wrong-with-income-based-repayment.html).

its financial vulnerability when faced with student loan defaults.<sup>24</sup> These researchers fear that the Department of Education will start conditioning its subsidization on the projected employment and income potential of certain fields or certain schools, or that the Department may not provide federal funds to schools that use tuition dollars to support initiatives that do not directly impact teaching, such as research and scholarship.<sup>25</sup> If these fears are realized, the impact on law school programs and enrollment could be devastating.<sup>26</sup>

These financial burdens and the decrease in the availability of traditional legal jobs have been widely broadcasted by the mainstream media in recent years.<sup>27</sup> Some law schools added fuel to the anti-law-school media firestorm by reporting job placement numbers that were misleading at best and blatantly incorrect at worst.<sup>28</sup> Some disillusioned graduates started popular blogs venting their dissatisfaction with their legal education,<sup>29</sup> and others filed highly publicized lawsuits against their alma maters, essentially alleging false advertising.<sup>30</sup> News stories concerning law schools that might only have been of local or regional interest in the past, if they were of any newsworthy interest at all, go national with the click of a mouse button.<sup>31</sup> All of this negative attention is complicated by the fact that much of the public blames the government—and the powerful, often-wealthy lawyers that influence politics and finance—for the economic downturn.<sup>32</sup> Moreover, it is

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24. Richard A. Matasar, *The Canary in the Coal Mine: What the University Can Learn from Legal Education*, 45 MCGEORGE L. REV. 161, 183 (2013).

25. *Id.*

26. *See id.*

27. Carrie Menkel-Meadow, *Crisis in Legal Education or the Other Things Law Students Should be Learning and Doing*, 45 MCGEORGE L. REV. 133, 133 (2013); Organ, *supra* note 11, at 899.

28. Joel F. Murray, *Professional Dishonesty: Do U.S. Law Schools That Report False or Misleading Employment Statistics Violate Consumer Protection Laws?*, 15 J. CONSUMER & COM. L. 3, 97, 100 (Summer 2012); *see also* William D. Henderson & Andrew P. Morriss, *How the Rankings Arms Race has Undercut Morality*, THE NAT'L JURIST, March 2011, at 8-10; *see also* TAMANAHA, *supra* note 4, at 145-154.

29. Jack Crittenden, *Angry Law Grads*, THE NAT'L JURIST, Oct. 2010, at 20-23; *see, e.g.*, THIRD TIER REALITY, <http://thirddtierreality.blogspot.com> (last visited Feb. 6, 2014); BUT I DID EVERYTHING RIGHT!, <http://butidideverythingrightorsoithought.blogspot.com> (last visited Feb. 6, 2014).

30. Rhode, *supra* note 4, at 444 (citing to specific complaints and explaining that “[t]he suits allege that the schools’ reports of placement rates failed to disclose how many positions [for which graduates were reported to have been hired within nine months of graduation] required a legal degree or were funded by the school, and that their reports of salary figures failed to disclose response rates”).

31. Matasar, *supra* note 24, at 166-167 (“Except for a handful of schools, whose turn has not yet come, there are two emerging story lines: (1) ‘look at this outrage – schools lie’ and (2) ‘something is fishy here, but we haven’t caught them yet.’”).

32. Kelly, *supra* note 10.

becoming easier and more common for non-lawyers to complete basic legal tasks without hiring an attorney; for example, creating a simple will with a template found on the Internet.<sup>33</sup>

A combination of these factors has affected national applications to law school, leading to historic lows.<sup>34</sup> The Law School Admission Council, the entity that administers the Law School Admissions Test (LSAT), reports that fall 2014 test applications have dropped 12.6%, down 13.7% from 2013.<sup>35</sup> This reflects a similar downward trend over the past few years.<sup>36</sup>

Even when prospective law students complete the LSAT, many are not moving forward and applying to law school.<sup>37</sup> This troubling decline in interest appears more prevalent with applicants who score the highest on the LSAT<sup>38</sup> – the students who reportedly are most likely to succeed in the first year of law school.<sup>39</sup> Overall, lower-performing applicants still seem to view a legal career as a viable option,<sup>40</sup> and many law schools feel obligated to adjust their entrance criteria to admit these students in order to fill their classrooms and thus ensure that they can pay the bills.<sup>41</sup>

## 2. *Subsequent Changes in Admissions Policies*

Before the number of applicants began to decline, nearly a quarter of U.S. law schools already were accepting half or more of their applicants.<sup>42</sup> As fewer and fewer application files made their ways

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33. See Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 30, 2013, [http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html?\\_r=0](http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html?_r=0).

34. *Id.*; see also LSAC End of Year Summary 2003—Present, *supra* note 15.

35. Law School Admissions Council, *Three-Year Applicant Volume Graphs*, LSAC.ORG (Jan. 24, 2014), [www.lsac.org/lscresources/data/three-year-volume](http://www.lsac.org/lscresources/data/three-year-volume).

36. *Id.*; see also LSAC End of Year Summary 2003—Present, *supra* note 15 (detailing percentage shifts over roughly a decade, including significant decreases beginning in 2011).

37. TAMANAHA, *supra* note 4, at 162-165.

38. Jordan Weissmann, *The Wrong People Have Stopped Applying to Law School*, THE ATLANTIC, (Apr. 10, 2012), <http://www.theatlantic.com/business/archive/2012/04/the-wrong-people-have-stopped-applying-to-law-school/255685/>; see also Debra Cassens Weiss, *Are Smartest People Avoiding Law School? Stats Show Bigger Drop in High LSAT Applicants*, A.B.A. J. (Apr. 11, 2012), <http://www.abajournal.com/news/article/are-smartest-people-discouraged-avoiding-law-school-stats-show-bigger-drop/> (noting that between 2011 and 2012, applicants scoring highest on the LSAT, between 175 and 180, dropped 13.6%, applicants scoring 170 to 174 dropped 20.7%, and applicants scoring 165 to 169 dropped 18.5%; conversely, applicants scoring below 140 dropped only 4.3%, those scoring 140 to 144 dropped 6.2%, and those in the 145 to 149 range dropped 13.8%).

39. Law School Admission Council, *LSAT Scores as Predictors of Law School Performance*, LSAC.ORG, <http://www.lsac.org/docs/default-source/jd-docs/lsat-score-predictors-of-performance.pdf>.

40. Weissmann, *supra* note 38.

41. See Organ, *supra* note 11, at 899-901.

42. TAMANAHA, *supra* note 4, at 164.

across admissions deans' desks, law schools found themselves faced with difficult choices: Either reduce the number of students admitted, thus maintaining the academic quality of the entering class but decreasing revenue (perhaps dramatically); or maintain revenue by admitting roughly the same number of students as in past years – meaning that the school likely would admit students whose entering credentials previously would not have qualified them for a seat in the class.<sup>43</sup> Another option is to increase the amounts and quantities of scholarships offered to prospective students, decreasing revenue but hopefully attracting a high-enough caliber of student to maintain the school's national ranking.<sup>44</sup>

Most law schools are tuition-driven.<sup>45</sup> Opting for choices that reduce entering class sizes and revenue would not be economically sustainable for more than a few years, at best.<sup>46</sup> On the other hand, opting for choices that maintain entering class sizes and revenue but reduce the academic credentials of the student body implicates a host of different challenges, from the need for often-significant curricular reform to ethical issues concerning whether those students will be able to graduate and pass the bar exam, or whether they will leave saddled with tens (or hundreds) of thousands of dollars of debt and little hope of paying it back.<sup>47</sup>

Facing these obstacles, different law schools have tried different options.<sup>48</sup> Some failed.<sup>49</sup> Others were marginally successful, though that “success” meant major structural changes for many schools, such as layoffs, faculty reduction incentives, and hiring freezes.<sup>50</sup>

With the exception of perhaps the highest-ranked schools, by this point most law schools have been forced to start accepting students with lower credentials than they would have accepted ten or even five years ago.<sup>51</sup> Fewer applications from fewer high-

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43. *Id.* at 166.

44. *Id.*

45. Frank H. Wu, *Where Law Schools Get Their Money*, ABOVE THE LAW (Oct. 3, 2013), [abovethelaw.com/2013/10/where-law-schools-get-their-money/](http://abovethelaw.com/2013/10/where-law-schools-get-their-money/).

46. *See id.*

47. 2014 ABA Report and Recommendations, *supra* note 16, at 2 (noting that law graduates with lower credentials tend to receive fewer scholarships and thus incur the most debt, and also have the fewest opportunities to find gainful legal employment); *see TAMANAHA*, *supra* note 4, at 160-66.

48. Bronner, *supra* note 33; Caplan, *supra* note 3.

49. TAMANAHA, *supra* note 4, at 166 (describing, for example, a school that attempted to retain entering credentials by reducing enrollment and overspending on scholarships for everyone in the entering class, yet still saw a four-point decline in median entering LSAT scores).

50. Bronner, *supra* note 33; Caplan, *supra* note 3.

51. Bronner, *supra* note 33; *see Organ*, *supra* note 11, at 901-02.

LSAT applicants means fewer opportunities for schools to maintain past standards.<sup>52</sup> This change might negatively impact a law school's ranking and the academic quality of its entering classes on paper,<sup>53</sup> but does it mean that these students really are any less capable of mastering the skills that make good lawyers?

3. *Do LSAT and UGPA Numbers Accurately Reflect Critical Thinking Abilities?*

Even the administrators of the LSAT recognize that it, "like any admission test, is not a perfect predictor of law school performance."<sup>54</sup> The LSAT is a roughly half-day, entirely multiple-choice test.<sup>55</sup> Its validity and its ability accurately to assess the abilities of potential law students have been questioned over the years, and consequently, the LSAT has undergone scrutiny and study.<sup>56</sup> According to the Law School Admission Council (LSAC), the entity that produces and administers the LSAT, studies show that, despite its limitations, the test helps ascertain whether applicants will succeed in law school.<sup>57</sup>

Congruently, studies show that the LSAT is correlated, at least to some statistically significant degree, to success in the first year of legal study.<sup>58</sup> Some researchers argue, however, that an applicant's LSAT score is not reflective of her actual abilities and thus is not an accurate predictor of law school success, whether in the

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52. Bronner, *supra* note 33; *see* Organ, *supra* note 11, at 901-02; TAMANAHA, *supra* note 4, at 160-66.

53. *See* Bronner, *supra* note 33; Organ, *supra* note 11, at 901-02; TAMANAHA, *supra* note 4, at 160-66.

54. Law School Admission Council, *supra* note 39.

55. Law School Admission Council, *About the LSAT*, LSAC.ORG, <http://www.lsac.org/jd/lsat/about-the-lsat.asp> (last visited Feb. 13, 2014). The LSAT does include a thirty-five-minute writing component at the end, but that segment does not count toward the overall score. *Id.*

56. *Id.*; Andrea A. Curcio, Gregory Todd Jones, & Tanya M. Washington, *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance*, 35 FLA. ST. U. L. REV. 271, 283-84 (2008).

57. *Id.* This study evaluated 189 law schools. The correlations between LSAT scores and first-year law school grades varied from school to school, but the median correlation was .36 on a scale of 0.00 to 1.00 (where 0.00 no more than a coincidental relationship and 1.00 is perfect correlation).

58. Lisa C. Anthony, Susan P. Dalessandro, & Lynda M. Reese, *Predictive Validity of the LSAT: A National Summary of the 2011 and 2012 LSAT Correlation Studies*, L. SCH. ADMISSION COUNCIL LSAT TECHNICAL REP. 13-03, 1, 19, (2013); Andrea A. Curcio et al., *supra* note 56, at 285-86 (noting that "to the extent the LSAT has predictive value for first-year grades, this value likely results [because] the LSAT attempts to measure the same narrow subset of skills considered to be the focus of most first-year law school exams," because test-taking speed is a factor in both contexts, and because success in both formats is a learned skill).

first year or later.<sup>59</sup> These scholars suggest that the timed nature of the test favors some individuals over others, and thus, the correlation of LSAT score to first-year law school success may be at least partially attributable to test-taking speed, as opposed to general analytical and critical thinking ability.<sup>60</sup>

The LSAT purports to test skills that are highly relevant to legal study, however:

The LSAT is designed to measure skills that are considered essential for academic success in law school: the reading and comprehension of complex texts with accuracy and insight; the organization and management of information and the ability to draw reasonable inferences from it; the ability to think critically; and the analysis and evaluation of the reasoning and arguments of others.<sup>61</sup>

Law schools also give significant consideration to LSAT scores when evaluating a student's potential admission due to the skills tested, and likely also due at least in part to the fact that LSAT scores are weighted rather heavily, at 12.5%, in *U.S. News & World Report* law school rankings.<sup>62</sup> Additionally, since the LSAT is a standardized test, it provides an objective measure to consider for all applicants, which is helpful as law school admissions teams sift through piles of subjective materials like recommendation letters and personal statements.<sup>63</sup> Even undergraduate grade point

59. William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEXAS L. REV. 975, 985-1000 (2004) (questioning whether "part of the predictive validity of the LSAT may be attributable to test-taking speed rather than a loading of acquired verbal reasoning and reading skills, which is the construct the LSAT is designed to measure"); see also Jennifer Jolly-Ryan, *The Fable of the Timed and Flagged LSAT: Do Law School Admissions Committees Want the Tortoise or the Hare?*, 38 CUMB. L. REV. 33 (2007) (noting that an applicant who reads slowly and carefully – valuable traits in a lawyer – and therefore is forced to guess on a segment of questions could score extremely high on the questions she had a chance to read, though still get the same overall score as another applicant who reads more quickly but less carefully and finishes the exam).

60. Henderson, *supra* note 59; see also Jolly-Ryan, *supra* note 59.

61. Law School Admission Council, *supra* note 55.

62. Jolly-Ryan, *supra* note 59, at 35; Sam Flanigan & Robert Morse, *Methodology: 2015 Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Mar. 10, 2014, 9:49 PM), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2013/03/11/methodology-best-law-schools-rankings>; Shawn P. O'Connor, *Learn the 5 Deciding Factors in Law School Admissions*, U.S. NEWS & WORLD REP. (Nov. 12, 2012, 10:00 AM), <http://www.usnews.com/education/blogs/law-admissions-lowdown/2012/11/12/learn-the-5-deciding-factors-in-law-school-admissions>. These are just a few of the multitude of resources available regarding law school admissions criteria.

63. See Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620, 622 (2011).

average (UGPA) numbers are subjective to a certain degree, since different undergraduate institutions employ different grading curves and standards, and the rigor of students' chosen courses and majors vary widely, as well.<sup>64</sup>

Even more predictive than a law school applicant's LSAT score alone, however, is her LSAT score combined with her UGPA.<sup>65</sup> Although this combination is somewhat less objective than the LSAT considered alone, it still produces a much higher correlation for first-year law school success: .48 on a scale of 0.00 to 1.00.<sup>66</sup>

While LSAT and UGPA credentials help predict whether a law student will succeed in her first year, they do not appear to be connected to bar passage or to students' success in professional practice.<sup>67</sup> The LSAT measures cognitive test-taking skills that often mirror those evaluated in most first-year law school courses, such as reading fact patterns, spotting and analyzing issues, and assembling arguments under time constraints.<sup>68</sup> Those skills do not link to many of the factors that contribute to lawyer effectiveness in practice, however, such as integrity, creativity, passion, engagement, networking and business development, the ability to negotiate, etc.<sup>69</sup> Additionally, studies have found that the LSAT's predictive value regarding first-year law school success diminishes when law professors employ alternative grading tools, such as take-home exams or papers, that require students to demonstrate more practical skills.<sup>70</sup>

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64. See RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES 4-5* (2011) [hereinafter *ACADEMICALLY ADRIFT*].

65. See, e.g., *LSAT Scores as Predictors of Law School Performance*, *supra* note 39; Edward G. Haggerty, *LSAT: Uses and Misuses*, 70 N.Y. St. B. J. 45, 45 (1998); Organ, *supra* note 11, at 901-02. Like the LSAT itself, the combination of LSAT and UGPA is not a perfect predictor, but it is widely considered the best data available to determine a potential law student's success in the first year.

66. *LSAT Scores as Predictors of Law School Performance*, *supra* note 39; see also Shultz & Zedeck, *supra* note 63, at 622 (summarizing several studies over more than two decades that support the predictive value of LSAT and UGPA regarding first-year law school success).

67. Curcio et al., *supra* note 56, at 284-86; see also Nicholas L. Georgakopoulos, *Bar Passage: GPA and LSAT, not Bar Reviews* 7-12 (Robert H. McKinney Sch. L. Legal Stud. Res. Paper No. 2013-30), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2308341](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2308341) (studying graduates from Indiana University Robert H. McKinney School of Law sitting for two administrations of the bar exam and observing that, with respect to bar passage, UGPA is largely irrelevant and the link to LSAT scores is present but attenuated).

68. Shultz & Zedeck, *supra* note 63, at 622.

69. *Id.* at 622-23, 632-33.

70. *Id.* at 622-23 (drawing upon a study by William D. Henderson, *supra* note 59, and comments by William P. La Piana, *A History of the LSAC and the LSAT*, LSAC.ORG (May 28, 1998), [http://www.lsac.org/docs/default-source/publications-\(lsac-resources\)/history-lsac-lsat.pdf](http://www.lsac.org/docs/default-source/publications-(lsac-resources)/history-lsac-lsat.pdf)).

One study proposes that even first-year law school GPA (LGPA), while relevant to bar passage, is not as strongly correlated as upperclass LGPA.<sup>71</sup> This suggests that “nurture dominates nature” in the path to a successful law career, meaning that strong analytical training and student engagement in law school might be even more important than teaching substantive knowledge.<sup>72</sup>

It follows that critical thinking and analysis are learned skills; they are not simply innate.<sup>73</sup> A student who earns a lower LSAT score and thus offers less attractive credentials nonetheless could, with good analytical training, proceed to pass the bar exam on the first attempt and enjoy a successful legal career.<sup>74</sup> This is consistent with studies that show that an applicant can improve her LSAT score by taking a review course.<sup>75</sup> Law schools therefore should consider a potential student’s less-than-ideal LSAT score along with other relevant information, including the student’s relevant work experience, the difficulty of the course load the student carried in college, etc.—a difficult task in light of the score’s weight in *U.S. News* rankings.

When all is said and done, despite the criticisms, do LSAT and UGPA credentials accurately reflect potential law students’ critical thinking abilities? No evaluation scheme is perfect, and although this one is not without its deficiencies, it appears to be the best and most accurate available.<sup>76</sup> Despite the fact that LSAT and UGPA are not perfect predictors of law school success, various data support that they at least provide a generally accurate pic-

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71. Georgakopoulos, *supra* note 67, at 7-12.

72. *Id.* at 12-13. Professor Georgakopoulos lays out three theories that might explain why upperclass LGPA is more closely related to bar passage than first-year LGPA: course shopping (upperclass students deliberately choosing courses that seem “easy” or have less stringent grading/exam requirements); grade inflation in upper-level courses; and learning (students in small upper-level elective courses often are more engaged due to smaller class size and interest in the elected subject). He debunks the first two theories as unsupported by the data; if easy grading or grade inflation is what drives upperclass course selection, then higher grades would not reflect learning and would either have no effect or perhaps even a deleterious effect on bar passage. He concludes that the learning theory is fully consistent with the data. Of course this is one study conducted at one school, but the potential curricular implications are interesting.

73. Curcio et al., *supra* note 56, at 285-86.

74. *See id.*

75. *Id.* (citing Jay Rosner, an expert witness, in *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 860 (E.D. Mich. 2001), *rev’d on other grounds*, 539 U.S. 306 (2003), who stated that LSAT preparation courses can improve an applicant’s score by approximately seven points).

76. *See* Shultz & Zedeck, *supra* note 63, at 622. “The validity of the LSAT and UGPA as predictors of first-year [law school] grades has consistent statistical support (Schrader 1977; Powers 1982; Linn and Hastings 1983; Evans 1984; Wightman 1993; Anthony, Harris, and Pashley 1999; Dalessandro, Stilwell, and Reese 2005).” *Id.*

ture of where an applicant stands with respect to critical thinking skills at the beginning of law school.<sup>77</sup>

#### 4. *Implications for Law School Teaching*

Since these entering credential levels are in decline at most law schools, legal educators must make adjustments to compensate if they expect their students and programs to succeed. The case is far from hopeless, but it requires a retooling of traditional legal education to foster student engagement and focus on analytical skills beyond a predominantly substantive teaching agenda.<sup>78</sup>

Further, the recent shifts in undergraduate, high school, and earlier education suggest that the students starting to apply and matriculate to law school now are very different as a whole, regardless of falling entering credential criteria at specific schools.<sup>79</sup> Even if economic conditions were to revert to their prior states and allow law schools to restore previous admissions policies—an unlikely scenario<sup>80</sup> – these changes in pre-graduate education suggest that entering law students still will have very different academic skills and needs than what law professors have seen from students in recent decades.

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77. *Id.*

78. See Shultz & Zedeck, *supra* note 63, at 622-23 (concluding that skills tested on the LSAT and in first-year law school courses that traditionally focus almost exclusively on substantive law do not reflect skills necessary for successful legal practice); see also Georgakopoulos, *supra* note 67, at 12-13. Professor Georgakopoulos posits a theory that law students in upper-division courses who increase their GPAs do so because students choose their own classes, which also tend to be smaller, leading to greater motivation and engagement, and thus “a better educational outcome for the student[s].” If this study is correct that upper-division courses engage law students more effectively and thus encourage more true learning, then some legal educators may presume that this analytical development is sufficient and traditional first-year courses can remain focused solely on teaching foundational legal doctrine. This may not be enough, however, since many modern first-year law students are entering with deficiencies in critical thinking skills. Leaving the responsibility for making up lost ground to upper-division courses could have disastrous consequences, such as higher first-year attrition than what is sustainable and lower bar passage for those students who progress to the third or fourth year.

79. See ACADEMICALLY ADRIFT, *supra* note 64, at 1-2.

80. Matasar, *supra* note 24, at 163-64 (noting that changing demographics in past decades provided boosts to law school enrollment – e.g., returning veterans enticed to higher education by government initiatives like the G.I. Bill, and increased gender and ethnic diversification efforts – but that “the future holds the perfect demographic storm: more poor students [due to a higher birth rate among poorer families], fewer family assets [due to the erosion of home equity], and no new demographic population to stir demand”).

## B. *Changes in Pre-Graduate Education*

*“This is nuts. We have a national policy that is a theory based on an assumption grounded in hope. And it might be wrong, with disastrous consequences for real children and real teachers.”*<sup>81</sup>

### 1. *K-12 Education*

Clearly, changes in the economy have had a profound effect on legal education and the apparent academic caliber of most law schools’ entering classes.<sup>82</sup> But even if the economy recovers, law school professors should not expect the basic skill level of their entering students necessarily to recover along with it. Fundamental changes in teaching from elementary schools to the university level—not all of which are considered positive—are affecting the critical thinking ability and preparedness of students, many of whom just now are beginning to apply to graduate school.<sup>83</sup> Disturbingly, many of these students claim that they have not been challenged in their undergraduate education, and that they do not invest much effort in their academic endeavors.<sup>84</sup>

#### i. *The No Child Left Behind Act*

In 2002, President Bush signed the No Child Left Behind (NCLB) Act into law.<sup>85</sup> NCLB was intended to ensure that all children are able to meet minimum state proficiency requirements in education, with the goal of improving overall academic achievement.<sup>86</sup> Although states may develop and administer tests

81. Valerie Strauss, *Everything You Need to Know About Common Core – Ravitch*, WASH. POST (Jan. 18, 2014), [www.washingtonpost.com/blogs/answer-sheet/wp/2014/01/18/everything-you-need-to-know-about-common-core-ravitch/](http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/01/18/everything-you-need-to-know-about-common-core-ravitch/) (quoting Diane Ravitch, who was referring specifically to the Common Core State Standards, discussed *infra* in section B).

82. See, e.g., TAMANAHA, *supra* note 4; 2014 ABA Report and Recommendations, *supra* note 16, at 6.

83. See ACADEMICALLY ADRIFT, *supra* note 64, at 1-2.

84. Richard Arum, Josipa Roksa & Esther Cho, *Improving Undergraduate Learning: Findings and Policy Recommendations from the SSRC-CLA Longitudinal Project 2* SOC. SCI. RES. COUNCIL 2 (2011), <http://www.ssrc.org/publications/view/D06178BE-3823-E011-ADEF-001CC477EC84/>.

85. *No Child Left Behind*, EDUC. WEEK (Sept. 19, 2011), <http://www.edweek.org/ew/issues/no-child-left-behind/>.

86. *Id.*; see also No Child Left Behind Act of 2001 (NCLBA), 20 U.S.C. § 6301 (Statement of Purpose).

in additional subjects, NCLB requires standardized testing in reading, math, and science.<sup>87</sup> As a condition for federal funding, public schools' test scores must meet NCLB benchmark accountability standards.<sup>88</sup> If they do not, the government imposes heavy penalties, from changes in funding to allowing parents to transfer their children to different public schools, to major curricular reform and, in extreme cases, school closure.<sup>89</sup>

Whether NCLB is succeeding is debatable.<sup>90</sup> Although premised on good intentions, NCLB reforms yielded unintentional negative consequences, particularly in relation to students' basic critical thinking skills.<sup>91</sup> For example, the high-stakes nature of NCLB testing arguably created an incentive for schools to cut corners by diluting proficiency standards, thus lowering the bar to reach students rather than building students' skills to reach the bar.<sup>92</sup> Proficiency scores also vary from state to state, as does the rigor of the tests themselves.<sup>93</sup> Further, NCLB and other similar standardized testing requirements—for example, high school Advanced Placement testing—encourage an environment of teaching to the test, moving schools away from curriculums that develop fundamental critical thinking skills.<sup>94</sup>

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87. *Stronger Accountability: Testing: Frequently Asked Questions*, U.S. DEPARTMENT OF EDUC., <http://www2.ed.gov/nclb/accountability/ayp/testing-faq.html> (last visited Sept. 21, 2013).

88. Joseph P. Viteritti, *The Federal Role in School Reform: Obama's "Race to the Top"* 87 NOTRE DAME L. REV. 2087, 2094-2095 (2012); see also Victor Bandeira de Mello, *Mapping State Proficiency Standards onto NAEP Scales: Variation and Change in State Standards for Reading and Mathematics, 2005-2009* 2 NAT'L CTR. FOR EDUC. STATISTICS (Aug. 10, 2011), <http://nces.ed.gov/nationsreportcard/pdf/studies/2011458.pdf> (studying 79 cases and finding that 25 showed an increase in the rigor of their standards, 14 showed no change, and 40 showed a decrease).

89. Jonathan C. Augustine & Crag M. Freeman, *Grading the Graders and Reforming the Reform: An Analysis of the State of Public Education Ten Years After No Child Left Behind*, 57 LOY. L. REV. 237, 239, 249, 251 (2011); Michelle Goodwin, *Law Professors See the Damage Done by "No Child Left Behind"*, THE CHRONICLE OF HIGHER EDUC (Mar. 12, 2013), <https://chronicle.com/blogs/conversation/2013/03/12/law-professors-see-the-damage-done-by-no-child-left-behind/>.

90. See James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004).

91. See Jodi Wood Jewell, *Legislating Higher Education: Applying the Lessons of No Child Left Behind to Post-Secondary Education Reformation Proposals*, 50 IDAHO L. REV. 53, 61-2 (2013).

92. *Id.*; Sam Dillon, *Federal Researchers Find Lower Standards in Schools*, N.Y. TIMES, Oct. 30, 2009, [http://www.nytimes.com/2009/10/30/education/30educ.html?\\_r=0](http://www.nytimes.com/2009/10/30/education/30educ.html?_r=0).

93. Halimah Abdullah, *No Child Left Behind Dilemma: What Does "Proficient" Mean?*, MCCLATCHY NEWSPAPERS (Oct. 18, 2007), <http://www.mcclatchydc.com/2007/10/18/20587/no-child-left-behind-dilemma-what.html#Uj9caRbDjph..>

94. Strauss, *supra* note 2; Jewell, *supra* note 91, at 62.

The ultimate goal of NCLB was gradual improvement over twelve years of education, ultimately leading to 100% of students reaching proficiency.<sup>95</sup> Though laudable, this goal presented problems, as measurement methods evaluated schools as a whole rather than considering individual student improvement.<sup>96</sup> Some critics argue it also ignored a school's history, its racial and ethnic makeup, its percentage of students who are not native English speakers, and its student population participating in special education programs.<sup>97</sup> This further contributed to the temptation to game the system.<sup>98</sup>

Students bearing the full effect of NCLB are just now starting to enter colleges and graduate schools.<sup>99</sup> For more than a decade, they have been subject to education built around primarily multiple choice questions and essay questions that require only unstructured, largely unsupported arguments—and that refers just to the subjects tested under NCLB.<sup>100</sup> As for other subjects, such as history, art, music, and writing—subjects that are directly linked to critical thinking skills—some schools' resources might be eliminated altogether.<sup>101</sup> If resources are not eliminated altogether, teachers are forced to teach vast amounts of content to large amounts of students, detracting substantially from their ability to delve deeper into topics to hone students' analytical skills.<sup>102</sup> Many Americans feel that NCLB made no improvement to high school education, and a significant number believe it actually made things worse.<sup>103</sup>

## ii. *Common Core State Standards*

With a new presidency came new changes to national education policy, and the opportunity to try to fix the faults of NCLB.<sup>104</sup> In 2009, President Obama signed into law the American Recovery

95. Jewell, *supra* note 91, at 62.

96. *Id.*

97. *Id.*

98. *See id.* at 62-63.

99. Strauss, *supra* note 2; Goodwin, *supra* note 89.

100. Goodwin, *supra* note 89; Linda Darling-Hammond, *Evaluating "No Child Left Behind"*, THE NATION (May 2, 2007), <http://www.thenation.com/article/evaluating-no-child-left-behind#axzz2ffoAzzni>.

101. Darling-Hammond, *supra* note 100; *see Stronger Accountability*, *supra* note 87.

102. *See Stronger Accountability*, *supra* note 87.

103. Lydia Saad, *No Child Left Behind Rated More Negatively Than Positively*, GALLUP POLITICS (Aug. 20, 2012), <http://www.gallup.com/poll/156800/no-child-left-behind-rated-negatively-positively.aspx> (noting that by August 2012, 29% of Americans believed NCLB made education worse; 38% did not think it made much difference; 16% thought it made education better; and 17% were not familiar with NCLB or did not have an opinion).

104. *See Strauss*, *supra* note 81.

and Reinvestment Act, which contained four billion dollars to distribute to schools through the Race to the Top Fund (RTT).<sup>105</sup> RTT is a competitive grant program that rewards states that implement comprehensive and innovative elementary and secondary education reform.<sup>106</sup> The Department of Education awards grant money to winning RTT school applicants based upon compliance with several “priorities” and “selection criteria,” including development of a common set of educational standards and assessments for students from kindergarten through twelfth grade (K-12).<sup>107</sup>

To provide an example of such standards and encourage uniformity and clarity in student achievement goals, the National Governors Association Center for Best Practices and the Council of Chief State School Officers collaborated with various teachers, school administrators, parents, and experts to create the Common Core State Standards (CCSS).<sup>108</sup> The CCSS comprise a set of K-12 educational standards in English language arts and mathematics that are meant to prepare high school graduates for success in entry-level, credit-bearing two or four-year college courses, or to enter the workforce.<sup>109</sup> Proponents claim that the standards prepare students for college or work, provide clear and consistent guidance for schools across the country, are rigorous and evidence-based, and stem from global best practices while built upon working state standards that are currently in place.<sup>110</sup> Forty-three states, the District of Columbia, four territories, and the Department of Defense Education Activity have implemented the CCSS.<sup>111</sup>

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105. Overview Information; Race to the Top Fund; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010, 74 Fed. Reg. 59,836-01, 59,840 (Nov. 18, 2009); Robert S. Eitel & Kent D. Talbert, *The Road to a National Curriculum: The Legal Aspects of the Common Core Standards, Race to the Top, and Conditional Waivers*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 17, 20 (2012).

106. Race to the Top Fund, 74 Fed. Reg. at 59,836; *Race to the Top Fund*, U.S. DEP'T OF EDUC., [www2.ed.gov/programs/racetothetop/index/html](http://www2.ed.gov/programs/racetothetop/index/html) (last visited Feb. 26, 2014).

107. Race to the Top Fund, 74 Fed. Reg. at 59,843; *Race to the Top Program Guidance and Frequently Asked Questions*, U.S. DEP'T OF EDUC. 5, 17, available at [www2.ed.gov/programs/racetothetop/faq.pdf](http://www2.ed.gov/programs/racetothetop/faq.pdf) (last updated May 27, 2010) [hereinafter RTT FAQ].

108. Common Core State Standards Initiative, *Frequently Asked Questions*, <http://www.corestandards.org/resources/frequently-asked-questions> (last visited Mar. 1, 2014) [hereinafter CCSS FAQ].

109. *Id.*

110. Common Core State Standards Initiative, *About the Standards*, [www.corestandards.org/about-the-standards](http://www.corestandards.org/about-the-standards) (last visited Feb. 27, 2014).

111. Common Core State Standards Initiative, *In the States*, [www.corestandards.org/in-the-states](http://www.corestandards.org/in-the-states) (last visited Feb. 27, 2014). The seven states that have not adopted the CCSS are Alaska, Indiana, Minnesota, Nebraska, Oklahoma, Texas, and Virginia. *Id.*

Like NCLB, the CCSS Initiative is a national effort that relies heavily on regular, standardized testing.<sup>112</sup> Also like NCLB, the program began with admirable intentions but faced intense debate and controversy in practice.<sup>113</sup> Much of the scrutiny focuses on that standardized testing.<sup>114</sup> Opponents of the CCSS claim that adoption of these standards promotes the over-testing of students and the valuation of teachers based primarily upon student scores, ignoring the fact that teachers of affluent students likely will earn higher ratings than teachers of poor students, students with disabilities, and students who are not native English speakers, regardless of their actual teaching abilities.<sup>115</sup> Further, students devote more time to trying to beat these tests than they do engaging in academic and extracurricular activities, such as music, art, etc., that contribute to a well-rounded undergraduate, work, and life experience.<sup>116</sup>

The tests themselves also are suspect: They are overly long, so students tend to give up before finishing; they only test a narrow set of skills; they do not consider cultural or financial bias; they carry great financial costs in terms of administration and curriculum adjustment; and many believe that the bar for a passing score is set unreasonably high.<sup>117</sup> If a teacher's students do not perform well on these tests, she faces a very real possibility of losing her job, and her school might even close.<sup>118</sup> Thus, like NCLB, the CCSS Initiative and RTT encourage schools to place much greater

112. Strauss, *supra* note 81.

113. *Id.*; Eitel, *supra* note 105, at 20 (noting also that “the only evidence in support of Common Core” comes from entities with a conflict of interest in favor of the CCSS, such as panels of experts funded by the Gates Foundation, a major financial backer of the CCSS Initiative itself).

114. Strauss, *supra* note 81.

115. *Id.* (noting that no other “high-performing nation” judges the quality of its teachers based on the test scores of their students).

116. See Todd Balf, *The Story Behind the SAT Overhaul*, N.Y. TIMES, Mar. 6, 2014, [http://www.nytimes.com/2014/03/09/magazine/the-story-behind-the-sat-overhaul.html?\\_r=0](http://www.nytimes.com/2014/03/09/magazine/the-story-behind-the-sat-overhaul.html?_r=0) (referring specifically to the SAT test but also addressing standardized testing in general).

117. Strauss, *supra* note 81 (citing as an example New York state, which administered the CCSS tests and only saw a 30% passage rate (3% pass rate for English language learners, 5% pass rate for students with disabilities, and under 20% pass rate for African American and Hispanic students)); Valerie Strauss, quoting Marion Brady, *Eight Problems with the Common Core Standards*, WASH. POST (Aug. 21, 2012), [http://www.washingtonpost.com/blogs/answer-sheet/post/eight-problems-with-common-core-standards/2012/08/21/821b300a-e4e7-11e1-8f62-58260e3940a0\\_blog.html](http://www.washingtonpost.com/blogs/answer-sheet/post/eight-problems-with-common-core-standards/2012/08/21/821b300a-e4e7-11e1-8f62-58260e3940a0_blog.html). “The Common Core Standards are a set-up for national standardized tests, tests that can’t evaluate complex thought, can’t avoid cultural bias, can’t measure non-verbal learning, can’t predict anything of consequence (and waste boatloads of money).” *Id.*

118. Strauss, *supra* note 81.

emphasis on standardized test performance than on true student engagement and learning.<sup>119</sup>

But adoption of the CCSS is voluntary.<sup>120</sup> RTT officially requires only that a school develop “a common set of K-12 standards,” not the CCSS specifically.<sup>121</sup> This autonomy does not appear truly to exist in practice, however, as common understanding indicates that to receive funding a state must implement the CCSS itself, not some other set of common state educational standards, even if different standards would fit better within a particular state’s school system.<sup>122</sup> A state earns more points under RTT—and thus a greater chance of winning grant money—if it adopts a set of standards that a majority of other states also adopt.<sup>123</sup> Conversely, a state earns fewer points if its standards are shared by half of the country or less.<sup>124</sup> The need for that funding is desperate, especially in light of the economic downturn, which is the time when RTT and the CCSS were conceived.<sup>125</sup> Consequently, all twelve state winners of RTT funding from the 2010 application cycle either adopted or indicated their intention to adopt the CCSS.<sup>126</sup>

### *iii. Decline in ACT and SAT Writing Scores*

Most professors will agree that good writing skills are closely linked to good critical thinking.<sup>127</sup> Unfortunately, national college admissions tests report stagnant or declining scores in high school

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119. *Id.*; Strauss, *supra* note 117.

120. CCSS FAQ, *supra* note 108.

121. RTT FAQ, *supra* note 107.

122. Strauss, *supra* note 81 (noting that some states adopted the CCSS sight-unseen, “even though their own standards were demonstrably better and had been proven over time”); Eitel, *supra* note 105, at 21.

123. Eitel, *supra* note 105, at 21 (summarizing data provided in 74 Fed. Reg. 59,836-01 at 59,855-59,856 (Nov. 18, 2009)).

124. *Id.*

125. The Times Editorial Board, *Was Adopting Common Core a Mistake?*, L.A. TIMES (June 17, 2013), <http://articles.latimes.com/2013/jun/17/opinion/la-ed-race-to-the-top-common-core-curriculum-20130617>.

126. Eitel, *supra* note 105, at 21.

127. See ACADEMICALLY ADRIFT, *supra* note 64, at 93 (“[H]aving demanding faculty who include reading and writing requirements in their courses (i.e., when faculty require that students both read more than forty pages a week and write more than twenty pages over the course of a semester) is associated with improvement in students’ critical thinking, complex reasoning, and writing skills.”); see also Bryan A. Garner, *Three Years, Better Spent*, N.Y. TIMES (July 25, 2011), <http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/three-years-in-law-school-spent-better> (arguing for the restructuring of legal education to include more rigorous writing requirements and noting that “clear writing equates with clear thinking, and judges and employers cry out for both”).

graduates' writing and reading skills,<sup>128</sup> which is especially troubling when considering the link between these skills and the critical thinking required in law school and legal practice.<sup>129</sup>

For example, the ACT, which alongside the SAT is one of the nation's most popular college entrance exams,<sup>130</sup> measures student progress in the context of college readiness.<sup>131</sup> About eighty percent of four-year colleges and universities use one of these tests as an admission requirement.<sup>132</sup> In a 2013 report, the ACT found that sixty-four percent of high school graduates who took the ACT that year met benchmark levels in English, and only forty-four percent met those levels in reading, not showing much change for the past five years.<sup>133</sup> Although there were small increases in math and science scores, more than one quarter of students did not meet benchmark levels for college readiness in any of the four tested subjects: math, reading, English, or science.<sup>134</sup> Writing scores have remained the same since 2010, showing a gradual decrease since that optional portion of the test was introduced in 2005.<sup>135</sup>

As for the SAT, originally known as the Scholastic Aptitude Test, there are strong parallels between the skills assessed on that test and those needed to be successful in law school.<sup>136</sup> The SAT measures reading, math, and writing knowledge, as well as "how a student reasons, communicates, and solves problems."<sup>137</sup> The reading section of the exam assesses skills such as the "ability to draw inferences, synthesize information, [and] distinguish be-

128. *The Condition of College & Career Readiness 2013*, ACT NAT'L REP., (2013), <http://www.act.org/research/policymakers/cccr13/pdf/CCCR13-NationalReadinessRpt.pdf> (last visited Sept. 29, 2013) [hereinafter ACT REP.]; Lyndsey Layton & Emma Brown, *SAT Reading Scores Hit a Four-Decade Low*, WASH. POST (Sept. 24, 2012), [http://articles.washingtonpost.com/2012-09-24/local/35495510\\_1\\_scores-board-president-gaston-caperton-test-takers](http://articles.washingtonpost.com/2012-09-24/local/35495510_1_scores-board-president-gaston-caperton-test-takers).

129. See ACADEMICALLY ADRIFT, *supra* note 64, at 93.

130. Layton & Brown, *supra* note 128.

131. ACT REP., *supra* note 128, at 1 (These benchmarks, derived from actual grades earned by ACT test takers in college, are the minimum scores necessary to show that "a student has a 75 percent chance of earning a grade of C or higher or a 50 percent chance of earning a B or higher in a typical credit-bearing first-year college course in that subject area.").

132. Balf, *supra* note 116.

133. ACT REP., *supra* note 128, at 1.

134. *Id.*

135. *2012 ACT National and State Scores: National Score Trends*, ACT (2012), <http://www.act.org/newsroom/data/2012/trends.html> (last visited Sept. 29, 2013).

136. See *The SAT Report on College & Career Readiness: 2012*, THE C. BOARD (2012), <http://media.collegeboard.com/homeOrg/content/pdf/sat-report-college-career-readiness-2012.pdf> (last visited Sept. 29, 2013) [hereinafter *SAT Report*].

137. *Id.*

tween main and supporting ideas.”<sup>138</sup> The writing portion of the test “requires students to communicate ideas clearly and effectively; improve writing through revision and editing . . . and improve coherence of ideas within and among paragraphs.”<sup>139</sup> Disturbingly, SAT writing scores have fallen almost every year since that portion of the exam was introduced in 2006.<sup>140</sup> Reading scores in 2013 were the lowest in forty years, capping off a steady decline.<sup>141</sup> Math scores were relatively constant over the last six years, but show slight improvement over the last decade.<sup>142</sup>

As seems to be the case with most standardized tests, the SAT in particular is not without its critics.<sup>143</sup> For instance, a recently-retired director of writing at M.I.T. claimed that he could train students to score in the highest percentiles simply by filling up both available pages, using a few big, “fancy” words, and including a quotation or two from prominent figures, whether they applied to the content of the essay or not.<sup>144</sup> Further complaints come from students, who feel they do not know what to expect on the test; parents, who feel pressured to spend money for their children to complete expensive test-prep courses, thus creating an achievement gap between poor but capable students who cannot afford the prep courses and wealthier students who can; and finally, teachers, whose performance often is measured by their students’ SAT scores, much like the CCSS standardized tests.<sup>145</sup>

As a result of such criticisms, the College Board, which administers the SAT, has begun implementing major changes to the test.<sup>146</sup> The new SAT, to be administered starting in spring 2016, will feature more evidence-based content that more directly tests what high school students are, or should be, learning in their classrooms.<sup>147</sup> The rules will be more transparent and the questions will focus on the reading and math that the students likely

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138. *Id.*

139. *Id.*

140. Layton & Brown, *supra* note 128.

141. *Id.*

142. *SAT Report*, *supra* note 136.

143. Balf, *supra* note 116.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

will encounter in work or undergraduate education.<sup>148</sup> The writing portion will be optional and scored separately.<sup>149</sup>

While these changes to a widely used test like the SAT seem to be a step in the right direction, some educators are skeptical.<sup>150</sup> The president of the College Board, David Coleman, was very involved in shaping the CCSS, and his intent to fashion the SAT into a test that more directly reflects what students are learning in high school creates a direct parallel to the CCSS and the problems that may accompany it.<sup>151</sup> Further, some critics worry that this gives Mr. Coleman too much power over K-12 education, and that even more focus on standardized testing compromises worthy educational goals<sup>152</sup> and widens the achievement gap between rich and poor students.<sup>153</sup>

Regardless of these alleged improvements, the outlook regarding students' writing skills does not appear to change much, considering that SAT writing scores are in decline, even though the writing portion apparently was so easy to pass with high marks.<sup>154</sup> It is possible that great student writers did not earn scores reflective of their talent because they did not know how to game the system properly—i.e., that it helped to fill both pages or use big words and famous historical quotations—but, in light of other research pointing to educational focus on standardized testing as opposed to reading and good analytical writing,<sup>155</sup> this is unlikely.

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148. *Id.* (explaining that the new SAT will replace current reading and writing questions with those that pertain to “pieces of writing – from science articles to historical documents to literature excerpts – which research suggests are important for educated Americans to know and understand deeply”).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* But see Sam Sue, *How to Make Test-Enhanced Learning Work in a Law School Classroom*, EDDOCTORINHOUSE.ORG (Mar. 8, 2014, 10:12 PM), [eddoctorinhouse.org/2014/03/08/how-to-make-test-enhanced-learning-work-in-a-law-school-classroom/](http://eddoctorinhouse.org/2014/03/08/how-to-make-test-enhanced-learning-work-in-a-law-school-classroom/) (noting that despite the “growing chorus of criticism that there has been too much testing,” regular testing can enhance learning if it is frequent, low-stakes, and includes prompt, effective feedback that students understand how to use and are motivated to employ in the future).

153. See Balf, *supra* note 116. The article notes that undergraduate institutions that stopped requiring the SAT, such as Wake Forest, saw “a lot more social, racial and lifestyle diversity. You could see it on campus. Wake Forest was a little too much like a J. Crew catalog before we went test-optional.” The College Board is endeavoring to reorient the new SAT to encourage a truer meritocracy, however, by offering free online test preparation to all students and urging students from disadvantaged backgrounds who earn high scores to choose selective colleges by including application fee waivers with their SAT results packets.

154. Layton & Brown, *supra* note 128; see also *id.*

155. See Strauss, *supra* note 2 (quoting a retired high school teacher as he apologized to college professors for his students' poor writing skills, a result of being forced by standard-

It is possible that the slight increases in math and science scores on standardized tests like the SAT show a modicum of promise, since the quantifiable, so-called “hard” sciences do require certain critical thinking skills; but a decline in non-quantifiable, “soft” skills like novel and adaptive thinking is troublesome.<sup>156</sup> In a 2011 national survey, more than one thousand hiring decision-makers ranked novel and adaptive thinking as one of the most sought-after skills in their organizations, along with social intelligence, which is the ability to connect with others in a deep and direct way, and design mindset, which is the ability to work processes for desired outcomes.<sup>157</sup> These are the same skills that also are important for success in law school and legal practice. The surveyed managers reported a significant discrepancy, however, between the necessity of these skills and job applicants’ competence in them.<sup>158</sup>

Essentially, students are not graduating from high school with the skills necessary to succeed in college-level reading and writing courses.<sup>159</sup> This poses subsequent problems for undergraduate educators who must try to make up that lost ground.

## 2. *Undergraduate Education*

In a study of over two thousand high school seniors, forty-six percent agreed with the statement, “Even if I do not work hard in high school, I can still make my future plans come true.”<sup>160</sup> Because many modern high school graduates proceed to college without sufficient critical thinking skills, it falls to college educators to fix the problem if those students are to advance to law school with the fundamental skills first-year law professors generally expect.<sup>161</sup> Although readiness for professional school may not be a

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ized testing to teach students to write without much concern for factual analysis and critical thinking: “My students did well on those questions because we practiced bad writing”).

156. Gary Beach, *Critical Thinking Must Complement Quantitative Skills*, CITIZEN IBM (Aug. 13, 2013, 8:00), <http://citizenibm.com/2013/08/gary-beach.html> (last visited Sept. 29, 2013).

157. *Id.*; FTI Consulting, *Key Findings from a Survey of Hiring Decision-Makers*, ACCREDITING COUNCIL FOR INDEP. C. & SCH. (Dec. 5, 2011), <http://www.acics.org/events/content.aspx?id=4718&terms=hiring%20decision%20maker%20survey>. The surveyed managers worked in various industries, not necessarily law firms.

158. *Id.*

159. ACADEMICALLY ADRIFT, *supra* note 64, at 56 (“Forty percent of college faculty agree with the statement: ‘Most of the students I teach lack the *basic skills* for college level work’” (emphasis in the original)).

160. JAMES ROSENBAUM, BEYOND COLLEGE FOR ALL: CAREER PATHS FOR THE FORGOTTEN HALF, 61 (2001).

161. See ACADEMICALLY ADRIFT, *supra* note 64, at 121.

primary goal at some colleges, most faculty members agree that teaching students to think critically—arguably one of the most important foundational skills for legal study—is.<sup>162</sup> Due to deficiencies in the standardized K-12 curricula described above, students entering colleges and universities around the country arguably are less prepared than their predecessors, forcing college professors to try to compensate somehow.<sup>163</sup>

Another study, including over one thousand U.S. college and university presidents, found that fifty-eight percent think public high schools are worse at preparing students for college than they were a decade ago.<sup>164</sup> The outlook is even more negative at for-profit institutions, where fifty-two percent of presidents claim public high school graduates' performance has declined in the last ten years.<sup>165</sup> Only six percent of all undergraduate institution presidents surveyed think public high schools are doing a better job now.<sup>166</sup>

Despite the lack of preparedness of entering college and university students, or perhaps because of it, undergraduate students may not sufficiently develop such basic skills as critical thinking, complex reasoning, and writing.<sup>167</sup> For example, in one study that followed 2300 undergraduate students at twenty-four universities, researchers gave the students a “Collegiate Learning Assessment” (CLA) test before and during their college education.<sup>168</sup> The CLA tests skills including analytic reasoning, critical thinking, and written communication.<sup>169</sup> Results showed that as many as forty-five percent of the students involved in the study did not show any significant improvement in higher-level skills like critical thinking, analysis, and writing in the first two years of college, the time span when most gains in general skills occurs.<sup>170</sup> Of the students

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162. *Id.* at 2, 35.

163. *See Is College Worth It? College Presidents, Public Assess, Value, Quality and Mission of Higher Education*, PEW RES. SOC. & DEMOGRAPHIC TRENDS (May 15, 2011), <http://www.pewsocialtrends.org/2011/05/15/is-college-worth-it/> [hereinafter *Is College Worth It?*].

164. *Id.* at 5.

165. *Id.*

166. *Id.*

167. ACADEMICALLY ADRIFT, *supra* note 64, at 35.

168. *Id.* at 20.

169. *Id.* at 21; *see also CLA+ Overview*, COUNCIL FOR AID TO EDUC., 2013, <http://cae.org/performance-assessment/category/cla-overview/> (last visited Nov. 12, 2014).

170. ACADEMICALLY ADRIFT, *supra* note 64, at 30, 35-6 (noting that “freshmen who enter higher education at the 50th percentile would reach a level equivalent to the 57th percentile of an incoming freshman class by the end of their sophomore year,” representing an improvement of only 0.18 standard deviation).

that did show improvement, gains were only modest.<sup>171</sup> Other studies using measuring instruments other than the CLA show similar findings,<sup>172</sup> and suggest that these disappointing results are quite different from those in recent decades.<sup>173</sup>

Complicating matters, current students' academic motivation, interest, and engagement—factors crucial to effective learning—also appear to decrease in the first year.<sup>174</sup> The CLA study found that thirty-two percent of college students each semester did not enroll in classes in which they were assigned forty or more pages of weekly reading.<sup>175</sup> Further, half of the students did not take a course requiring more than twenty pages of writing.<sup>176</sup> Since critical reading and writing are key skills to hone prior to entering law school,<sup>177</sup> these trends suggest that law schools will not see much improvement in the skills level of their entering classes anytime soon.

Adding to this lack of academic rigor, students do not appear to be studying as much as they did in past years.<sup>178</sup> Over half of U.S. college presidents believe their students study less than they did ten years ago, and only seven percent think their students study more.<sup>179</sup> Undergraduate students spend an average of only twelve to fourteen hours per week studying.<sup>180</sup> Over a third of these students reported studying for only five or fewer hours per week.<sup>181</sup>

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171. *Id.* at 35.

172. *Id.* at 36 (describing another study, by Charles Blaich at the Wabash National Study of Liberal Arts Education, that analyzed over three thousand students from nineteen schools and found no significant improvement in critical thinking skills in the first two years of college).

173. *Id.* at 35-6 (comparing the skills development 0.18 standard deviation to 0.5 in the 1990s and 1.0 in the 1980s – almost twice as high).

174. *Id.* at 36.

175. Scott Jaschik, 'Academically Adrift', INSIDE HIGHER EDUC. (Jan. 18, 2011), [http://www.insidehighered.com/news/2011/01/18/study\\_finds\\_large\\_numbers\\_of\\_college\\_students\\_don\\_t\\_learn\\_much](http://www.insidehighered.com/news/2011/01/18/study_finds_large_numbers_of_college_students_don_t_learn_much); see ACADEMICALLY ADRIFT, *supra* note 64, at 70-71, Table A3.5; see also George D. Kuh, *What We're Learning About Student Engagement from NSSE*, CHANGE, March/April 2003, at 27 (noting that most students begin college expecting to read and write more than they actually do).

176. Jaschik, *supra* note 175.

177. See *id.* at 93; Gamer, *supra* note 127.

178. *Is College Worth It?*, *supra* note 163, at 5; see, e.g., ACADEMICALLY ADRIFT, *supra* note 64, at 69, 97-98; Kuh, *supra* note 175, at 27 (noting that about a fifth of both college freshmen and seniors participating in the National Survey of Student Engagement reported "frequently" arriving to class unprepared, and the belief that their schools do not put much emphasis on studying and spending time on academic endeavors).

179. *Is College Worth It?*, *supra* note 163, at 5.

180. ACADEMICALLY ADRIFT, *supra* note 64, at 69, 97; Kuh, *supra* note 175, at 27.

181. *Id.*

Further, this studying occurs mostly in groups, in social settings inappropriate for learning.<sup>182</sup>

Other research confirms these findings. One study, using the Collegiate Assessment of Academic Proficiency instead of the CLA, found that thirty-three percent of undergraduate students surveyed did not show significant gains in learning fundamental skills, and forty percent did not write papers of at least twenty pages in their classes.<sup>183</sup> These students spent fifteen hours per week studying.<sup>184</sup> Comparably, the National Survey of Student Engagement, also known as the NSSE or “Nessie,” surveyed over two million students during the last ten years and found that over half of them reported that they did not write papers more than twenty pages long during the current academic year, even at top schools.<sup>185</sup> Full-time students also reported spending about thirteen to fourteen hours per week studying.<sup>186</sup> So how are these students graduating from college with grades strong enough to earn admission to law school, even regardless of the changes in admissions practices noted above? Lack of engagement between students and faculty is one possible answer.<sup>187</sup>

Although most college and university professors are dedicated to their students and want to help them succeed, other demands and obligations, such as scholarship and service, compete for their time.<sup>188</sup> Further, in response to the economic downturn many undergraduate institutions are laying off support staff, faculty, or both, meaning that remaining professors are stretched even more thinly.<sup>189</sup> This all contributes to what one author calls the “disengagement compact:” an unspoken agreement between professor

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182. *Id.* at 68-70, 100-102. Although study groups can be helpful learning tools when used properly, this study found that most students studying in groups did so in environments not conducive to learning, and experienced diminished performance on CLA tests compared to their counterparts who studied primarily alone.

183. Dan Berrett, *What Spurs Students to Stay in College and Learn? Good Teaching Practices and Diversity.*, THE CHRON. OF HIGHER EDUC. (Nov. 6, 2011), <http://chronicle.com/article/What-Spurs-Students-to-Stay-in/129670/> (describing a study by Patrick T. Terenzini, Distinguished Professor of Education, Emeritus, and Senior Scientist, Emeritus, at Pennsylvania State University).

184. *Id.*

185. Arum, et al., *supra* note 84, at 2.

186. *Id.* at 3.

187. Kuh, *supra* note 175, at 25, 28.

188. *See id.* at 28.

189. *See* Scott Jaschik, *Layoffs Without ‘Financial Exigency’*, INSIDE HIGHER EDUC. (Mar. 2, 2010), <http://www.insidehighered.com/news/2010/03/02/exigency> (noting that even tenured university faculty positions may not be safe from layoffs); *see also* ACADEMICALLY ADRIPT, *supra* note 64, at 5-6 (noting that “the percentage of full-time instructional faculty in degree-granting institutions declined from 78 percent in 1970 to 52 percent by 2005”).

and student that “I’ll leave you alone if you leave me alone.”<sup>190</sup> If a professor does not assign as much reading or writing, then she will not have to grade as much.<sup>191</sup> If she does not grade as much, students probably will not come talk to her individually as often.<sup>192</sup> She saves precious time, and the students are likely to leave her course with a decent grade without having to work too hard to get it.<sup>193</sup>

Undergraduate grade inflation has been the subject of much debate.<sup>194</sup> One study of over 100 four-year colleges and universities found that forty-three percent of grades given were at the “A” level.<sup>195</sup> Other studies note, fairly, that many factors beyond just quality of teaching and academic rigor can affect a student’s UGPA, such as how many credits the student completes, or how many “in progress” or pass/fail grades the student receives.<sup>196</sup> Even keeping that in mind, however, there still is a disproportionate amount of undergraduate students who earn higher grades despite not reading and writing as much as students in the past.<sup>197</sup>

Students who receive higher grades also tend to write more positive course evaluations.<sup>198</sup> To the extent that a faculty member’s teaching skills are relevant to tenure decisions—admittedly, that extent may be small compared to considerations like scholarship production—reviewing committees usually measure quality teaching by student satisfaction as conveyed on course evaluations.<sup>199</sup>

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190. Kuh, *supra* note 175, at 28; ACADEMICALLY ADRIFT, *supra* note 64, at 5-6.

191. Kuh, *supra* note 175, at 28; ACADEMICALLY ADRIFT, *supra* note 64, at 5-6.

192. Kuh, *supra* note 175, at 28; ACADEMICALLY ADRIFT, *supra* note 64, at 5-6.

193. Kuh, *supra* note 175, at 28; ACADEMICALLY ADRIFT, *supra* note 64, at 5-6. This is not to say that all college professors run their programs like this; certainly there are professors who devote themselves fully to the success of their students and do an excellent job of developing their students’ academic abilities. The author herself had the privilege of working with several such wonderful educators during her college years, and knows many others as colleagues and friends. Various national studies, surveys, and scholarship do show, however, that in general, lack of rigor in undergraduate education is a problem.

194. See Scott Jaschik, *Missing the (Grade) Point*, INSIDE HIGHER EDUC. (May 20, 2013), <http://www.insidehighered.com/news/2013/05/20/study-challenges-data-and-ideas-behind-grade-inflation-higher-education>.

195. Stuart Rojstaczer & Christopher Healy, *Where A Is Ordinary: The Evolution of American College and University Grading, 1940-2009*, TCHRS C. REC., 2012, <http://www.tcrecord.org/Content.asp?ContentId=16473>.

196. Jaschik, *supra* note 175; See LESTER H. HUNT, ED., GRADE INFLATION: ACADEMIC STANDARDS IN HIGHER EDUCATION (2008).

197. Rojstaczer, et al., *supra* note 195; see ACADEMICALLY ADRIFT, *supra* note 64, at 4-5 (noting that college and university students’ lack of academic focus has not negatively impacted their grades, because they are able to manipulate their schedules and workloads in order to evade rigorous academic work and/or grading).

198. ACADEMICALLY ADRIFT, *supra* note 64, at 7.

199. *Id.* (pointing out that this is true despite the fact that student course evaluations do not adequately evaluate student learning).

Practices like this further encourage professors to focus more on making their students happy, i.e., by reducing student workload and/or distributing higher grades, than on academic rigor and student learning.<sup>200</sup>

### 3. *Implications for Law School Teaching*

Although these changes directly affect education at the K-12 and undergraduate levels, the implications for legal education are very real. For example, in states that have adopted the CCSS, which is most of them, the standards play a major role in curricular decisions and reform.<sup>201</sup> If programs like NCLB and the CCSS Initiative force schools to focus on training for specific, narrowly-focused standardized tests in order to survive, then high school educators cannot spend adequate time building foundational critical thinking skills.<sup>202</sup> As one recently-retired high school teacher lamented:

I would like to believe that I prepared [my students] to think more critically and to present cogent arguments, but I could not simultaneously prepare them to do well on that portion of the test and teach them to write in a fashion that would properly serve them at higher levels of education.<sup>203</sup>

If students do not receive adequate training in critical thinking and writing in high school, they arrive to college underprepared.<sup>204</sup> If they arrive to college underprepared, that suggests that they will leave less prepared for graduate school, since undergraduate professors will have to devote more time to teaching fundamental skills than to refining nuanced critical thinking, reading, and writ-

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200. *Id.*

201. *See* Strauss, *supra* note 2.

202. *See* Eitel, *supra* note 105, at 21 (arguing against the migration to a nationalized curriculum; the difficulty teachers have in adapting is especially present if the testing requirements change from presidency to presidency, as some critics complain that they did between President Bush's NCLB Act and President Obama's RTT and CCSS programs).

203. Strauss, *supra* note 2 (referring to Advanced Placement standardized tests). This teacher is not alone. *See, e.g.,* Valerie Strauss, *Teacher's Resignation Letter: 'My Profession . . . No Longer Exists'*, WASH. POST: THE ANSWER SHEET (Apr. 6, 2013), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/04/06/teachers-resignation-letter-my-profession-no-longer-exists/> (quoting Gerald J. Conti lamenting that "data driven" education seeks only conformity, standardization, testing and a zombie-like adherence to the shallow and generic Common Core" and describing "testing and evaluation systems that are Byzantine at best and at worst, draconian").

204. *See* ACADEMICALLY ADRIFT, *supra* note 64, at 55-56 (explaining that "a sizable proportion of students enter higher education unprepared for college-level work.").

ing.<sup>205</sup> Graduate professors then must make up this lost ground if they want their students, and their institutions, to succeed in practice.<sup>206</sup>

Moreover, the shifts in pre-graduate education mean that the decreased critical thinking skills of many law schools' entering classes will continue over years to come, even if the economy improves, more students apply to law school, and schools can return to previous admissions standards and procedures. In the unlikely event that such a return to past practices becomes feasible, legal educators still must adjust their teaching to meet the needs of students who are a product of NCLB, the CCSS, and other national standardized testing programs.

## II. MEETING THE NEEDS OF NEW NORMAL LAW STUDENTS

*What students do in higher education matters. But what faculty members do matters too. Faculty are most directly involved in shaping student experiences, although the support and incentives advocated by their deans, provosts, and presidents will influence whether and how they engage in activities that facilitate student learning.*<sup>207</sup>

Law school professors must meet the needs of this new demographic entering their classrooms; they cannot simply continue teaching as they have for years and expect their students and their schools to succeed. The cost of legal education is high and rising.<sup>208</sup> Legal educators are morally bound not to take hundreds of thousands of dollars from students without believing those students are capable of succeeding, and at least trying to help them do so. Furthermore, lawyers already suffer from a high degree of depression and substance abuse,<sup>209</sup> and this may increase if schools produce mediocre attorneys with no other options to repay their debts than to take jobs they hate—if they can find legal jobs at all.

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205. See *id.* at 57 (conceding that some students do see significant skills improvement in college, but concluding that “the higher-education system as a whole is failing to improve many students’ critical thinking, complex reasoning, and writing skills at desirable levels”).

206. See Goodwin, *supra* note 89.

207. ACADEMICALLY ADRIFT, *supra* note 64, at 117.

208. Bronner, *supra* note 33.

209. Tyger Latham, Psy.D., *The Depressed Lawyer*, PSYCHOL. TODAY (May 2, 2011), <http://www.psychologytoday.com/blog/therapy-matters/201105/the-depressed-lawyer>.

### A. *Fostering a Culture of Innovation*

Change is not easy, especially in an established law school with tenured professors who may have been teaching for decades.<sup>210</sup> Most professors have the best intentions, and are dedicated to their craft and to helping their students succeed using what they believe are the best methods possible; resultantly, they may not be open to drastically changing those methods, or in some cases, even changing them at all.<sup>211</sup> To rise to the challenge of adapting to “the new normal” in legal education, however, law schools must foster a culture of innovation and openness to meaningful change.<sup>212</sup>

The purpose of this article is to help readers understand the background behind this need for changing gears in legal education and the fact that the situation is unlikely to revert back to the “old normal,” not necessarily to address the shift itself. Still, there are basic ideas legal educators should embrace as they foster this culture of innovation, a few of which are noted briefly here.

#### 1. *Changing the Financial Structure*

Most importantly, law schools must address their financial structure, as many already have out of necessity since the economic downturn.<sup>213</sup> But more than just cutting costs in order to keep the doors open, legal educators must seriously reconsider the value they provide to their students, particularly since potential applicants are more skeptical now than in the past, when many blindly entered their legal studies based upon the assurance of high-paying law jobs available for everyone at the end.<sup>214</sup>

#### 2. *Curricular Reform*

This reconsideration may result in major curricular reform, from restructuring graduation requirements to incorporating alternative revenue streams not based on tuition, to drastic measures such as transforming the structure of legal education

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210. Henderson, *supra* note 12, at 463; 2014 ABA Report and Recommendations, *supra* note 16, at 15-16.

211. 2014 A.B.A. Report and Recommendations, *supra* note 16, at 16.

212. *Id.* at 2, 15-16.

213. See TAMANAHA, *supra* note 4.

214. See Matasar, *supra* note 24, at 202-03 (noting the importance of justifying tuition cost by providing a unique approach to education keyed to student learning outcomes, and that in order to survive, “[m]any schools will have to occupy a value-oriented niche”).

itself.<sup>215</sup> For example, several schools have instituted revenue-producing legal training programs for people who do not need or want a J.D., such as foreign attorneys, health professionals, and those working in other highly regulated fields.<sup>216</sup> Other changes intended to help schools produce more perceived value for J.D. students' tuition dollars include integrating significant periods of off-campus practical training into the curriculum;<sup>217</sup> embracing more online and distance learning opportunities;<sup>218</sup> and providing opportunities for students to earn a J.D. in fewer than the typical three years.<sup>219</sup> Some law schools also develop programs for undergraduate students to spur interest in attending law school, as well as continuing legal education programs to keep graduates engaged with their alma maters.<sup>220</sup>

### 3. *Individual Assessment*

In addition to reconsidering finances, curricula, and other aspects of the big picture of legal education, law professors also must reevaluate their own teaching and assessment practices. Regardless of the delivery format—online, accelerated, clinical, etc.—ultimately it will fall upon individual law professors to reach the new demographic of law students successfully. A thoughtful focus on student learning outcomes and assessment is essential to both student and teacher progress.<sup>221</sup> Yet despite the multitude of research touting the importance of regular, quality, formative as-

215. *See id.* at 201-05.

216. Jennifer Smith & Ashby Jones, *More Often, Nonlawyers Try Taste of Law School*, WALL ST. J. (May 19, 2013), <http://online.wsj.com/news/articles/SB10001424127887323463704578492932332188870>.

217. Matasar, *supra* note 24, at 202.

218. *Id.* at 202-04.

219. *See, e.g.,* Northwestern University School of Law, <http://www.law.northwestern.edu/academics/ajd/> (last visited Mar. 29, 2014); Pepperdine University School of Law, <http://law.pepperdine.edu/academics/juris-doctor/accelerated-option/> (last visited Mar. 29, 2014); Arizona State University Sandra Day O'Connor College of Law, <http://www.law.asu.edu/Default.aspx?TabID=3130> (last visited Mar. 29, 2014); Washburn University School of Law, <http://washburnlaw.edu/admissions/twoyear.html> (last visited Mar. 29, 2014). These schools represent just a few of those that offer a two-year accelerated J.D. program. It could be argued that students entering law school with fewer basic critical thinking skills might suffer a detriment from participating in an accelerated program, because it allows even less time to establish and hone those skills; but often accelerated J.D. programs are reserved for "highly motivated" (i.e., top) students, and even if not, stronger teaching focused on student learning outcomes and effective assessment will help address these issues.

220. Matasar, *supra* note 24, at 204.

221. MICHAEL HUNTER SCHWARTZ, SOPHIE SPARROW & GERALD HESS, *TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* 21, 166 (2009).

assessment, many professors still rely on end-of-course exams to assess their students.<sup>222</sup> To prosper in the new normal, this must change.<sup>223</sup>

Although not all assessment must be graded, periodic assessment exercises with prompt feedback administered throughout a course allow students to evaluate and work to resolve their weaknesses on an ongoing basis.<sup>224</sup> Not only should professors assess their students regularly, but the feedback professors provide on those exercises must equip students to learn and improve.<sup>225</sup> Comments should be specific, constructive, and informational, and they should assist students on the path to becoming self-regulated learners who ultimately can evaluate their own work.<sup>226</sup> This teaching practice results in students who are better able to think critically and solve legal problems.<sup>227</sup> Further, students who are taught in this way are less likely to suffer from psychological distress issues common among law students and lawyers, such as depression, since they are encouraged to view problems as temporary and solvable.<sup>228</sup> Supporting students' autonomy in this manner promotes true learning and psychological well-being, leading to more effective, happy lawyers in practice.<sup>229</sup>

Of course this is easier said than done in an environment where staffs are shrinking and demands on professors' time are increasing.<sup>230</sup> Counter-intuitively, individual class sizes might also increase in the new normal if schools decide to shrink the sizes of their faculties, despite a decrease in overall entering class size.<sup>231</sup> Accreditation standards that focus on expenditures and selectivity rather than student learning outcomes also may conflict with ef-

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222. ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION 177-78 (2007) [hereinafter BEST PRACTICES].

223. *See id.*

224. *Id.* at 93.

225. *Id.*; *see also* Paula J. Manning, *Understanding the Impact of Inadequate Feedback: a Means to Reduce Law Student Psychological Distress, Increase Motivation, and Improve Learning Outcomes*, 43 CUMB. L. REV. 225, 244-45 (2011).

226. Manning, *supra* note 225, at 245-51 (noting the ineffectiveness of common professorial feedback such as writing "No" in the margin or drawing a large "X" across a segment of a student's work product).

227. BEST PRACTICES, *supra* note 222, at 93.

228. Manning, *supra* note 225, at 227, 245.

229. *Id.* at 331-32; *see also* Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test and Extension of Self Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883, 894 (2007) (concluding that law student autonomy leads to stronger final GPA and bar passage, in addition to increased motivation and psychological well-being).

230. *See* ACADEMICALLY ADRIFT, *supra* note 64, at 5-6.

231. *See id.*

forts to change.<sup>232</sup> Although daunting, these difficulties provide all the more support for the proposition that all aspects of legal education, from individual courses to overall structure, should be subject to reevaluation and adaptation.<sup>233</sup>

### III. POSITIVE IMPLICATIONS FOR THE FUTURE

*“This crisis makes it easy to forget that the law attracts pragmatic types, able to handle changed circumstances.”*<sup>234</sup>

Most of the research concerning the new normal in legal education is pessimistic, and admittedly much of this article has been as well. Law is no longer seen as a career that guarantees lucrative employment upon graduation. This has led to a decline in law school applications, the downsizing of law schools, and is a major threat to the current scheme of legal education as a whole.<sup>235</sup> On top of this, as explained above, students matriculate to law school today with significantly different levels of critical thinking skills than they did in the past, in turn requiring different professorial attention to nurture.<sup>236</sup> The car is speeding up a hill toward a blind corner, and some passengers already have bailed out; those still inside are anxious and uncertain as to whether they will make it without crashing.

Ultimately, however, these external changes and the internal adjustments they force have the potential to improve legal education dramatically, resulting in better, happier, and more well-adjusted attorneys. First, now that the public no longer views law as a failsafe career choice, fewer people will choose to pursue a J.D. simply because they do not know what else to do with a liberal arts education.<sup>237</sup> Media attention on truthful law school data

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232. See Ronald G. Ehrenberg, *American Law Schools in a Time of Transition*, 63 J. LEGAL ED. 98, at 111 (2013).

233. See Matasar, *supra* note 24, at 202.

234. Caplan, *supra* note 3.

235. TAMANAHA, *supra* note 4.

236. See discussion *supra* Section I.

237. See SHELDON KRANTZ, *THE LEGAL PROFESSION: WHAT IS WRONG AND HOW TO FIX IT*, 17-19 (2013) (noting that the primary reason students chose to enroll in law school in recent decades was to make money and gain prestige, but surveys from 2012 indicate more altruistic goals of helping others, with financial goals related more to repaying debt than socioeconomic status); see also Kelly Phillips Erb, *Attorney Offers Students 1,000 Reasons to Skip Law School*, FORBES (Dec. 22, 2013), <http://www.forbes.com/sites/kellyphillipserb/2013/12/22/attorney-offers-students-1000-reasons-to-skip-law-school/> (describing a scholarship an attorney established to encourage potential law students to choose a different graduate

reporting means potential law students will be able to make informed decisions regarding both law school and the field in general, and they should matriculate with a clearer picture of what a legal education will provide and what to expect in practice. Law students in “the new normal” should have a deeper dedication to legal study and a stronger sense of purpose in pursuing the profession. Additionally, although law schools are in the negative media spotlight at the moment, they are not the only education providers dealing with these issues. The Great Recession impacted other graduate programs, undergraduate providers, and earlier education providers as well; but law schools are subject to more stringent reporting requirements and thus are easier to criticize, even though some of the criticisms are warranted.<sup>238</sup>

Finally, the legal institutions that weather the current upheaval and thrive in its aftermath likely will do so due in no small part to better teaching methods. As discussed above, professors who want their students, programs, and schools to succeed will adjust to their students’ needs in ways that encourage true learning and lead to greater psychological well-being.<sup>239</sup> Furthermore, the careful, systematic evaluation of law school programs necessary to thrive in the new normal is likely to encourage more coordination between departments and a more cohesive educational experience for students.

#### IV. CONCLUSION

Indeed, the car may be speeding uphill toward a blind curve; but it will not crash as long as the driver remains focused and changes gears before it is too late. The landscape has changed, and although it may feel easier to continue driving at the current speed and in the same direction, doing so simply will not work anymore. Legal educators can navigate the obstacles in their roads effectively if they recognize the need for change and commit to the shift despite the fact that it might significantly disrupt the status quo. Law schools can survive and even thrive in “the new normal” if they reevaluate their programs and teaching with a focus on the unique needs of their incoming students. After all, change is not always a bad thing; after a difficult portion of the racetrack the road usually evens out for a nice straightaway.

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school path, since many enroll in law school because “they don’t know what else to do,” resulting in a disservice to those students and to the profession).

238. Matasar, *supra* note 24, at 167-68.

239. See discussion *supra* Section II.A.

