

August 2020

## Normalizing Struggle

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### Recommended Citation

Catherine M. Christopher, *Normalizing Struggle*, 73 Ark. L. Rev. 27 (2020).  
Available at: <https://scholarworks.uark.edu/alr/vol73/iss1/2>

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# NORMALIZING STRUGGLE

Catherine Martin Christopher\*

## INTRODUCTION

A person who is effective in law school, on the bar exam, and in practice utilizes the same set of skills in each of those scenarios: close, critical reading; synthesis of multiple sources of law into a coherent rule or schema; appreciation of both the big picture and the fine details of a set of rules of law; analysis of a factual scenario for facts that meet or fail a legal test; assessment of the validity and strength of counterarguments; and, of course, clear, concise, thorough, organized communication.<sup>1</sup> Because all these skills are useful from the first day of law school to the last

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\* Professor of Law and Associate Dean for Bar Success, Texas Tech University School of Law. J.D., University of Pittsburgh. This Article braids together a lot of threads from my classrooms, service, and scholarship, and I could not have woven these strands alone. Thanks to Alyson Drake and her excellent research team; Louis Schulze; participants at the Central States Law Schools Association workshop, including Kara Bruce, Mark Burge, Eric Johnson, Noemie Boivin, and Neil Sobol; participants at the 2019 Southwest Consortium of Academic Support Professionals Workshop, the SEALS 2019 Annual Conference, and the 2020 AALS Annual Meeting; the AccessLex semi-secret working group, including but not limited to Sara Berman and Ana Cordova; the Women's Faculty Writing Program at Texas Tech University, especially maestros Kristin Messuri and Elizabeth Sharp; Brian L. Frye and S.J. Morrison of the *Ipse Dixit* podcast; and the many others who have engaged with this Article. The Texas Tech University School of Law not only provides ongoing financial support, but it's also a wonderful family of colleagues, students, and alumni. Many, many thanks.

1. See Karen McDonald Henning & Julia Belian, *If You Give a Mouse a Cookie: Increasing Assessments and Individualized Feedback in Law School Classes*, 95 U. DETROIT MERCY L. REV. 35, 39 (2017). Missing from this list of crucial skills is legal research. The ability to conduct efficient, effective legal research is a skill probably more important in law practice than in law school or bar prep. No suggestion is made here that legal research become a part of the bar exam or bar prep, but legal research probably should be taught and assessed throughout legal education, not merely as part of a first-year legal writing course. Just as I hope that law schools adopt a writing-across-the-curriculum model, so too I hope they adopt a research-across-the-curriculum model. See Jamie Baker, *Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society*, 69 S.C. L. REV. 557, 558 (2018); Alyson Drake, *The Need for Experiential Legal Research Education*, 108 LAW LIBR. J. 511 (2016); see generally Alyson Drake, *You Can't Write Without Research: The Role of Research Instruction in the Upper-Level Writing Requirement*, 18 FLA. COASTAL L. REV. 167 (2017).

day of practice, it's silly to treat legal education, bar passage, and the practice of law like different topics. It's also silly to assume that law school is separate and distinct from the bar exam or that academic support is somehow outside the regular law school experience.

Learning lawyering skills, and becoming competent or proficient in them, is a struggle. Legal educators need to acknowledge that students struggle, to expect it, and to convey to students that their struggle is normal. In fact, it's productive—learning is hard, and lawyers learn and struggle throughout their careers.

This Article examines and criticizes the ways legal academia treats law students' academic struggle as a problem and suggests that legal educators reorient their attitudes toward struggle by forgiving and embracing student struggle, and even building opportunities for struggle into the curriculum. By normalizing the fact of struggle, law schools will not only improve the wellness of their students but will create lawyers who are better prepared to cope with the constant problem-solving required of a successful lawyer.

Part I analyzes the ways in which traditional legal education disapproves of student struggle and conflates struggle with failure. This marginalizes and alienates students who don't succeed on the first try, an unnecessary overreaction. Part II discusses the pervasiveness of struggle among law students. Part III is for law students; it seeks to reframe struggle generally as not only normal but productive, and it demonstrates the effectiveness of study strategies that encourage struggle. Part IV is for the individual law professor. This section reviews the literature on current legal pedagogy and illustrates how the best practices for a law professor include creating opportunities for students to struggle with material. Part V makes broader recommendations as to how law schools can normalize struggle, treating it as an ordinary and expected part of learning to be a lawyer.

## I. THE CULT OF KINGSFIELD: LEGAL ACADEMIA TREATS STRUGGLING LIKE A PROBLEM

There are many ways that law schools conflate the ideas of having high expectations and rejecting students who make errors. A student who struggles may be perceived by professors, classmates, and themselves as a hopeless failure. Some of these law school realities shouldn't necessarily be changed, but it is important to consider ways in which law schools tell a student that struggling is the same as failure.

### A. Traditional Legal Pedagogy

Cold-calling, the Socratic method, and other stand-and-deliver classroom techniques are classic techniques of legal education,<sup>2</sup> which easily and frequently humiliate students who do not have the complete, correct answer immediately. Consider the damnable Professor Kingsfield from the movie *The Paper Chase*, who is still held out as the prototypical law school professor.<sup>3</sup> Students who struggle are humiliated:

Kingsfield: Now, suppose I write you a contract. It says I agree for \$100 to paint your apartment with white paint. Is there any difference between this and a contract which says you agree to paint my apartment with white paint provided I pay you \$100[?] [Students begin raising their hands.] Mr. Brooks? [Brooks flips pages in his casebook.] You won't find it in the casebook, Mr. Brooks. It's just a hypothetical. [Pause.] I am waiting, Mr. Brooks.

Brooks: I'm not sure that I understood it all. Could you tell me it again?

Kingsfield: In one case there are two mutual promises. In the other, there is a condition on a promise. Mr. Brooks, do you know the difference between a condition on a promise and a promise? [Pause.] Mr. Brooks, did you *read* this material?

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2. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 6-7 (2007).

3. THE PAPER CHASE (Twentieth Century Fox 1973).

Brooks: Yes, I did read the material. I memorized the facts. I have a photographic memory.

Kingsfield: A what?

Brooks: A photographic memory.

Kingsfield: Could you repeat that?

Brooks: A photographic memory?

Kingsfield: A photographic memory is of absolutely no use to you, Mr. Brooks, without the ability to *analyze* that vast amount of facts between your ears. Did you hear me, Brooks?

Brooks: Yes, sir.<sup>4</sup>

Meanwhile, students who respond “correctly” to Professor Kingsfield articulate a ridiculous level of legal acumen for a first-year student:

Kingsfield: What are the elements that can lead to party being excused from performing his part of a contract and yet not paying damages? Mr. O’Connor?

O’Connor: Both parties predicate their contract on an assumption about a state of facts, and the assumption is untrue.

Kingsfield: Elaborate? Mr. Anderson?

Anderson: Both parties must share the assumption, and the assumption must be material, *i.e.*, that the true state of facts is that it is impossible to complete the contract in any reasonable manner. Both parties must be dealing with each other in a fair manner, and neither party may obtain an unfair advantage because the contract is dissolved.

Kingsfield: Example?

Anderson: Uh, well, suppose I were to agree to rent an apartment from you, an old apartment which you hadn’t visited in a while, and the time came for me to move in, and we discovered that the apartment house had been burned down. That actually happened to me. [Laughter.]

Kingsfield: Personal comment is not necessary.<sup>5</sup>

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4. *Id.*

5. *Id.*

Even more recent lighthearted films heighten the tension and the stakes of speaking up in a law school classroom:

Professor: “The law is reason free from passion.” Does anyone know who spoke those immortal words? [Student raises his hand.] Yes?

Student: Aristotle.

Professor: Are you sure?

Student: . . . Yes?

Professor: Would you be willing to stake your life on it?

Student: I think so.

Professor: What about [rapping another student on the head] his life?

Student: I don’t know.

Professor: Well, I recommend knowing before speaking. The law leaves much room for interpretation but very little for self-doubt. [Pause.] And you were right. It was Aristotle.<sup>6</sup>

These fictionalized accounts reflect the reality of many law school classrooms: The professor expects eloquent perfection in response to questions. Even if this isn’t the professor’s subjective expectation, students may expect perfection of each other or themselves. Struggle is quickly conflated with humiliation and failure.<sup>7</sup>

*Best Practices for Legal Education* found Socratic dialogue and the case method itself to be tremendously damaging to law student well-being, finding they “produce constant tension and insecurity about outperforming other students, and create the impression that personal values, ideals, and intentions are largely irrelevant to law school or law practice.”<sup>8</sup> In classrooms defined by the potential for humiliation, students do not feel free to take risks or admit struggle.<sup>9</sup>

Numerous articles further conclude that these cold-calling and Socratic methods actually stifle discussion rather than

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6. LEGALLY BLONDE (Metro-Goldwyn-Mayer 2001).

7. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 30 (2007).

8. *Id.* at 34.

9. *See id.* at 90.

encourage it.<sup>10</sup> The stifling effect is particularly pronounced for women, students of color, and other underrepresented groups.<sup>11</sup>

This Article does not suggest that law professors stop cold-calling or using the Socratic method.<sup>12</sup> There are valuable pedagogical goals achieved by these teaching methods.<sup>13</sup> Professors should, however, do what they can to separate—and help students separate—struggle from failure during classroom discussion.

Another law school classic is the final exam as sole determinant of a student's grade.<sup>14</sup> Without more opportunities for assessment, struggle on the final exam can easily—and literally—become failure.<sup>15</sup>

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10. See, e.g., Suzanne Dallimore, *The Socratic Method—More Harm Than Good*, 3 J. CONTEMP. L. 177, 177-78 (1977).

11. See, e.g., Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 3-4 (1994); Laura Kalman, *To Hell with Langdell!*, 20 LAW & SOC. INQUIRY 771, 771-72 (1995); Jenny Morgan, *The Socratic Method: Silencing Cooperation*, 1 LEGAL EDUC. REV. 151 (1989); see generally Judith Larkin & Harvey Pines, *Gender, Emotion and Risk in Public Performance*, in PSYCHOLOGY OF GENDER IDENTITY: AN INTERNATIONAL PERSPECTIVE 147 (Kam-Shing Yip, ed. 2006) (finding women less likely than men to take risks in public performances that could cause them to look foolish, including in classroom settings).

12. See STUCKEY ET AL., *supra* note 7, at 110-11; Phillip E. Areeda, *The Socratic Method (SM) (Lecture at Puget Sound, 1/31/90)*, 109 HARV. L. REV. 911, 911 (1996); Steven Alan Childress, *The Baby and the Bathwater: Developing a Positive Socratic Method*, 18 LAW TCHR. 95, 106 n.1 (1984); Jennifer L. Rosato, *The Socratic Method and Women Law Students: Humanize, Don't Feminize*, 7 S. CAL. REV. L. & WOMEN'S STUD. 37, 39 (1997); Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 455 (1996).

13. I cold-call in my non-seminar classes, particularly with first-year students, because I want and expect students to learn to read cases closely and critically. The only way to learn this skill is to read a lot of cases, and the only realistic way I can think of to incentivize students to read a lot of cases is to cold-call. I try hard not to shame a student who has read but not understood, though I admit I will make an example of a student who hasn't read. I am aware that this raises the stakes of being called upon; I feel that in this instance the pros outweigh the cons.

14. For an interesting empirical exploration of law students' perception of the importance of grades, see Emily Zimmerman, *Do Grades Matter?*, 35 SEATTLE U. L. REV. 305 (2012).

15. See SULLIVAN ET AL., *supra* note 2, at 7; see also *infra* Part IV for discussion of the value of formative assessment and feedback.

## B. The Reaction to Formative Assessment

In 2014, the American Bar Association added to its accreditation requirements that law schools “utilize both formative and summative assessment methods in [their] curricul[a] to measure and improve student learning and provide meaningful feedback to students.”<sup>16</sup> Law school classes have historically engaged in summative assessment, in the form of final exams and papers that “measure[d] the degree of student learning.”<sup>17</sup> It was the addition of required formative assessment—“measurements at different points during a particular course . . . that provide meaningful feedback to improve student learning”<sup>18</sup>—that caused the bellyaching.

Professors complained bitterly about formative assessment.<sup>19</sup> Frequent complaints were about additional workload, that formative assessment meant reducing the rigor of legal education, or objections to changing an educational model that’s been in existence for over a century.<sup>20</sup>

Articles on law school formative assessment are almost uniformly defensive: “Like it or not, the move to outcomes-based assessment in ABA-accredited law schools has begun[.]” states one otherwise optimistic law review article.<sup>21</sup> “[T]he purpose of

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16. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 314 (AM. BAR ASS’N 2017-2018).

17. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 314 Interpretation 314-1 (AM. BAR ASS’N 2017-2018).

18. *Id.*

19. See, e.g., Katherine Mangan, *Law Schools Resist Proposal to Assess Them Based on What Students Learn*, CHRON. HIGHER EDUC. (Jan. 10, 2010), [<https://perma.cc/87M7-QRJP>]; Katherine Mangan, *As They Ponder Reforms, Law Deans Find Schools ‘Remarkably Resistant to Change,’* CHRON. HIGHER EDUC. (Feb. 27, 2011), [<https://perma.cc/7KRS-PR5C>].

20. See Olympia Duhart, *The ‘F’ Word: The Top Five Complaints (and Solutions) About Formative Assessment*, 67 J. LEGAL EDUC. 531, 537-44 (2017).

21. Abigail Loftus DeBlasis, *Building Legal Competencies: The Montessori Method as a Unifying Approach to Outcomes-Based Assessment in Law Schools*, 42 OHIO N.U. L. REV. 1, 21 (2015). Professor DeBlasis’ article is an inspirational invitation to law professors to dedicate themselves to student learning, but the “like it or not” language suggests there are an awful lot of professors who don’t like it. See also Debra Moss Vollweiler, *Don’t Panic! The Hitchhiker’s Guide to Learning Outcomes: Eight Ways to Make Them More Than (Mostly) Harmless*, [<https://perma.cc/8DF8-2KRN>] (an optimistic article about the pedagogical value of learning outcomes and assessments in law schools).

assessment, which is a form of scholarship, is improving student learning, not just for satisfying accreditors[,]” suggests another.<sup>22</sup>

While it’s natural for anyone to object when their work duties are expanded without additional compensation,<sup>23</sup> professors’ negative reaction to formative assessment suggested professors don’t care whether students are learning and don’t care to assist those who are struggling. Even if students aren’t aware of faculty meeting conversations, the not-my-job mentality could close off a professor to helping a student engage with material not readily grasped.

### C. Specialized Academic Support and Bar Prep

Many law schools now employ academic support and bar prep experts,<sup>24</sup> which of course is a laudable effort to support struggling students. On the other hand, relegating academic support and bar prep to a specific professor or group of professors sends the message that the other faculty do not deal in struggle.<sup>25</sup> Just as a family physician refers complex or severe problems to specialists, so the existence of an academic support professor suggests that “regular” professors are there for the students who understand the material—those who struggle need to see a specialist.

All faculty specialize, of course, and so they should; the tax professors understand the intricacies of the Internal Revenue Code better than any other faculty members, and there is a

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22. Larry Cunningham, *Building a Culture of Assessment in Law Schools*, 69 CASE W. RES. L. REV. 395, 421 (2018).

23. See Steven I. Friedland, *Rescuing Pluto from the Cold: Creating an Assessment-Centered Legal Education*, 67 J. LEGAL EDUC. 592, 592-93 (2017) (“[F]ew if any incentives exist to add more assessments, especially since any faculty time and effort committed to it do not increase a teacher’s position, salary, or perception of teaching quality.”).

24. ASS’N OF ACAD. SUPPORT EDUCATORS, SUMMARY REPORT AND FINDINGS OF THE AASE NATIONAL LAW SCHOOL SURVEY 47 (2018), [<https://perma.cc/S7XC-98DY>].

25. See Susan Stuart & Ruth Vance, *Bringing a Knife to the Gunfight: The Academically Underprepared Law Student & Legal Education Reform*, 48 VAL. U. L. REV. 41, 46 (2013) (“[W]e assume that students who are academically underprepared are in need of the services of academic support personnel. Perhaps some of them are. However, the increasing academic underpreparedness is becoming systemic rather than singular.”).

credible argument that academic support and bar prep should be provided by those with developed expertise in the field.<sup>26</sup>

On the other hand, having separate academic support experts means that a struggling student may feel alienated in the classroom. If “regular” professors are not engaged in academic support, their struggling students may feel that the professors are there to teach only the students who don’t struggle. The struggling student is left to muddle through class as best they can, then seek help from an academic support professor who isn’t in the class and isn’t an expert in the subject. The student—an imperfect narrator—will have to explain the course and the struggles as best they can, and the academic support expert must then guess at both the struggling student’s problem and the appropriate solution. (The student and academic support professor could collaborate with the classroom professor but at high cost to the time and resources of all involved.)

As more students matriculate to law school without sufficient critical thinking skills,<sup>27</sup> academic support resources are stretched thin.<sup>28</sup> Academic support programs only work when there are a limited number of students who need their services.<sup>29</sup>

Moreover, academic support and bar prep experts are often lower status and receive lower pay than tenured and tenure-track faculty, signaling to all stakeholders that the value of the services provided (and, by extension, the people who need them) is less than that of other classes and professors.<sup>30</sup> The fact that academic

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26. A similar argument has been advanced regarding legal writing professors. See, e.g., Catherine Martin Christopher, *Putting Legal Writing on the Tenure Track: One School’s Experience*, 31 COLUM. J. GENDER & L. 65, 74 (2015) (“Teaching legal writing requires specialized knowledge, and specialists should teach it.”) (citing Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562, 564 (2000)).

27. See *infra* Part II.A.

28. Rebecca Flanagan, *The Kids Aren’t Alright: Rethinking the Law Student Skills Deficit*, 2015 BYU EDUC. & L.J. 135, 171, 174 (2015).

29. *Id.* at 171.

30. Again, this is akin to the well-documented status problems with legal writing professors. See Christopher, *supra* note 26, at 68; Marina Angel, *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1, 2 (2000); Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293, 307 (2004); Debra Branch McBrier, *Gender and Career Dynamics Within a Segmented Professional Labor Market: The Case of Law Academia*, 81 SOC. FORCES 1201, 1214

support and bar prep faculty are more likely to be female and faculty of color<sup>31</sup> further complicates this. It's undeniably important for students to see professionals who look like them,<sup>32</sup> but an academic support faculty that is visibly different from doctrinal faculty sends terrible messages to all students about the roles and expectations for minority students.

## II. YOU'RE NOT DUMB; YOU'RE NEW: STRUGGLE IS NORMAL

This Part begins with one of my mantras. I frequently tell students, especially 1Ls, "You're not dumb; you're new. I understand the difference."<sup>33</sup> I say that in an effort to reduce their reluctance to ask seemingly dumb questions.<sup>34</sup> I tell them I expect them to struggle, and I tell them that if they're not struggling, they're probably not doing something right. In short, I'm trying to make them feel that struggling is normal.<sup>35</sup>

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(2003); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 205-06 (1997); Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 326-27 (2000); Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status and Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 476-77 (2004); Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS'N LEGAL WRITING DIRS. 12, 14-15 (2001); D. Kelly Weisberg, *Women in Law School Teaching: Problems and Progress*, 30 J. LEGAL EDUC. 226, 243 (1979).

31. See Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 116-17, 128 (2009).

32. See, e.g., Andrew Martinez, *Why Representation Matters in the Professoriate*, DIVERSE ISSUES HIGHER EDUC. (Nov. 19, 2018), [<https://perma.cc/4TTN-M65K>].

33. Some sources offer frameworks to delineate levels of expertise among law students. See, e.g., JANE BLOOM GRISÉ, *CRITICAL READING FOR SUCCESS IN LAW SCHOOL AND BEYOND* 4-5 (2017) (articulating characteristics of novice legal readers and expert legal readers); Neil W. Hamilton, *The Major Transitions in Professional Formation and Development from Being a Student to Being a Lawyer Present Opportunities to Benefit the Students and the Law School*, 73 BAYLOR L. REV. (forthcoming 2020) (manuscript at 11-13 tbl.2), [<https://perma.cc/V5NU-VNUM>] (setting out an assessment chart for students and faculty to rate student development among six stages, ranging from "Novice Learner" to "Mastery-Level Practicing Lawyer").

34. Truly, though, if a student isn't sure what the difference is between a warrant and a warranty, I want them to get that cleared up!

35. Professor Bishop takes this approach further, having developed a "failure framework" to help students understand that in an adversarial profession, failure is inevitable but not final. Kaci Bishop, *Framing Failure in the Legal Classroom: Techniques for Encouraging Growth and Resilience*, 70 ARK. L. REV. 959, 987-94 (2018).

This section discusses the reality that law students are increasingly underprepared for the academic expectations of law school, through no fault of their own. This academic underpreparedness will inevitably cause struggle, particularly if faculty do not realize how their incoming students today differ from those in days of yore. It also touches on some non-academic, psychological struggles that students experience that can dramatically impact their success in law school.

### A. Kids These Days

The fact of the matter is that law students struggle in law school.<sup>36</sup> Setting aside the “kids these days” grouching,<sup>37</sup> there is evidence from a variety of sources that students come to law school without the reading, writing, critical thinking, and other academic skills professors have been able to expect in the past.

A student who entered law school in the fall of 2018, assuming the student went straight from high school to a four-year college and then straight on to law school, has had her formative education shaped by the No Child Left Behind Act.<sup>38</sup> Passed in 2001, No Child Left Behind placed significant emphasis on multiple-choice testing.<sup>39</sup> With school funding on the line, students were carefully taught skills that would help them do well on these particular tests, including skimming relatively short passages, choosing the correct answer, and promptly moving on.<sup>40</sup> Through no fault of their own, students finished their K-12

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36. *See id.* at 962.

37. Educators have been complaining about “kids these days” for millennia. *See, e.g.*, Attributed to Socrates, in RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 195 (Suzy Platt ed., 1989), [<https://perma.cc/G6L8-FGQA>] (last visited Jan. 31, 2020) (“The children now love luxury; they have bad manners, contempt for authority; they show disrespect for elders and love chatter in place of exercise.”). *See also* John Protzko & Jonathan W. Schooler, *Kids These Days: Why the Youth of Today Seem Lacking*, 5 SCI. ADVANCES 1, 1 (2019), [<https://perma.cc/SEK5-PJRD>].

38. Pub. L. No. 107-110, 115 Stat. 1425 (2002).

39. *See* Thomas S. Dee & Brian A. Jacob, *The Impact of No Child Left Behind on Students, Teachers, and Schools*, 2010 BROOKINGS PAPERS ECON. ACTIVITY 149, 154 (2010), [<https://perma.cc/F6EE-TF5V>].

40. *See* Teniell L. Trolan & Kristin S. Fouts, *No Child Left Behind: Implications for College Student Learning*, 16 ABOUT CAMPUS 2, 5 (July/Aug. 2011) (discussing the concerns of emphasizing memorization and testing strategies rather than comprehension, applied learning, or critical skill development).

educations without having spent extensive time on close reading of long passages, critical thinking, and contemplating ambiguity.<sup>41</sup> Nor are these skills meaningfully developed in college. A variety of forces have converged to change college from an academic experience to a social and credentialing one, resulting in historically low levels of critical thinking skills among college graduates.<sup>42</sup> The LSAT also tests (and therefore incentivizes) completion speed rather than depth or quality of thought.<sup>43</sup> Students then come to law school “demonstrably less prepared . . . because their critical-thinking and problem-solving skills are significantly lower than those of students in the 1970s and 1980s.”<sup>44</sup>

In a tragic twist, research demonstrates that students who are most incompetent are the most unaware of it, and they are the ones who most overestimate their abilities. In one study, forty-five undergraduates were given twenty logical reasoning LSAT questions.<sup>45</sup> After taking the questions, on average, the students

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41. Linda Darling-Hammond, *Evaluating “No Child Left Behind,”* THE NATION (May 2, 2007), [<https://perma.cc/W2G2-NDVM>] (“As emphasis on drilling for multiple-choice tests has increased, the amount of research, project work and scientific inquiry has declined[.]”).

42. See Jennifer M. Cooper, *Smarter Law Learning: Using Cognitive Science to Maximize Law Learning*, 44 CAP. U. L. REV. 551, 556 n.21 (2016) (discussing the fact that students are opting to limit their workload and earning a degree for the credentials with as little effort as possible); see also Flanagan, *supra* note 28.

43. *Puzzle Rush, Season 4, Episode 1*, REVISIONIST HIST. (Jan. 30, 2020), [<https://perma.cc/DPN7-FK74>] (interviewing bar prep tutors describing their own reading strategy for the LSAT: “[I]n a reading comprehension passage, if I hit a paragraph that I don’t fully understand, I don’t get to go back and reread it. I just kind of have to accept the parts that I understand and move on.” and “For me, I’m like, ‘Eh, all right, I didn’t get that,’ but if the question asks about it I will go back. But it doesn’t bother me. As long as I understand the topic sentence of the paragraph and the overall thrust of the author’s argument, if I miss a few details here and there, or even a chunk of the argument, I’m like, ‘All right, fine, who cares.’ I’ll go dig it out exactly when I need to . . . I don’t even aim for a level of what we would normally call comprehension in my first read. I am out to process the information, not understand it. I don’t get any points for understanding it.”); see also *Tortoise and the Hare, Season 4, Episode 2*, REVISIONIST HIST. (Jan. 30, 2020), [<https://perma.cc/U8H2-DQKP>].

44. Stuart & Vance, *supra* note 25, at 41; see also *id.* at 43 (“Today, more students enter the legal academy without even rudimentary problem-solving skills. Indeed, emerging empirical evidence reveals that fewer students possess the basic higher-order cognitive processes that the academy has assumed are the threshold educational attributes necessary for success in law school.”).

45. Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One’s Own Incompetence Lead to Inflated Self-Assessments*, 77 J.

each estimated their logical reasoning ability to be in the 66th percentile of student performance (while the students' actual average was, of course, at the 50th percentile).<sup>46</sup> Those students whose score on the test was in the bottom quartile nevertheless believed their logical reasoning ability to be at the 68th percentile.<sup>47</sup> These students were not only the most incompetent, but the most deluded. To illustrate, the average student at the 50th percentile overestimated their logical reasoning abilities by about 16% (because they believed their abilities to be at the 66th percentile), whereas those in the bottom quartile, scoring at the 12th percentile on average, overestimated their abilities by 56% (because they believed their abilities to be at the 68th percentile).<sup>48</sup>

The implications for law schools are obvious. Professors often bemoan the fact that the students who need help are the ones who don't seek it out.<sup>49</sup> This may be because the students are embarrassed, but it may also be that the students aren't aware of how dire their poor understanding and performance is.

Rather than bemoaning the characteristics of millennial students, perhaps it is possible to evolve legal education in a way that plays to our students' strengths.<sup>50</sup> In addition to having been sheltered and taught that they're each special,<sup>51</sup> millennials are

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PERSONALITY & PSYCHOL. 1121, 1124 (1999). Overconfidence stemming from incompetence has been called "the Dunning-Kruger effect," after the authors of this study. See, e.g., Ruth Vance & Susan Stuart, *Of Moby Dick and Tartar Sauce: The Academically Underprepared Law Student and the Curse of Overconfidence*, 53 DUQ. L. REV. 133, 136 (2015).

46. Kruger & Dunning, *supra* note 45, at 1125.

47. *Id.* Interestingly, those students who performed in the top quartile, scoring at the 86th percentile, estimated their performance to be at the 68th percentile and their logical reasoning ability to be at the 74th percentile—the study authors referred to this underestimation as "the burden of expertise." *Id.* at 1125, 1131.

48. *Id.* at 1125.

49. Myron H. Dembo & Helena Praks Seli, *Students' Resistance to Change in Learning Strategies Courses*, 27 J. DEVELOPMENTAL EDUC. 2, 2 (2004).

50. See, e.g., Stephanie Gallo and Heather Spielmaker, *When First Gen Meets iGen: What to Expect and How to Get Through*, NALP BULL. (Oct. 2018) (suggesting law school career services utilize students' technological proficiency to provide more efficient, effective career planning).

51. Michele Monaco & Malissa Martin, *The Millennial Student: A New Generation of Learners*, 2007 ATHLETIC TRAINING EDUC. J. 42, 42-43.

confident, team-oriented, civic-minded high achievers.<sup>52</sup> Those are some good characteristics for a lawyer in the making—how can legal education capitalize on these characteristics?<sup>53</sup>

### B. Productive Struggles

What existing research doesn't discuss is this: law students *should* struggle in the classroom.<sup>54</sup> The law is a complex specialty, and those just entering legal education are by and large unfamiliar with the demands being placed upon them.<sup>55</sup>

Overall, “[l]earning is deeper and more durable when it’s *effortful*.”<sup>56</sup> Students who breezed through high school and college may be brought up short when law school proves challenging. It is important for law faculty to help students understand that effortful learning is quality learning. After all, if law school were easy, everyone would go. Part III, *infra*, expands on the kind of effortful learning that law faculty should embrace so as to help students see struggling with the material as being a normal part of law school and the practice of law.

### C. Unproductive Struggles

Certain struggles outside the classroom may also be common but are not necessarily beneficial. As a group, lawyers and law students have well-documented problems with substance abuse and mental health problems.<sup>57</sup> A recent study assessed and

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52. *Id.*; Lydia Abbot, *11 Millennials' Traits You Should Know About Before You Hire Them*, LINKEDIN TALENT BLOG (May 8, 2019), [<https://perma.cc/LFE3-XN32>]; Brenda Bauer, *Why Do Millennials Get A Bad Rap?*, PSYCHOL. TODAY (Apr. 18, 2017), [<https://perma.cc/N2M5-X7RM>].

53. Professor Chase explores this question. Ashley Krenelka Chase, *Upending the Double Life of Law Schools: Millennials in the Legal Academy*, 44 U. DAYTON L. REV. 1, 2-3 (2018).

54. Certain struggles outside the classroom may also be common but are not necessarily beneficial. *See infra* Part II.C.

55. Laura P. Graham, *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation*, 41 U. ARK. LITTLE ROCK L. REV. 29, 57-59 (2018).

56. PETER C. BROWN ET AL., MAKE IT STICK: THE SCIENCE OF SUCCESSFUL LEARNING 3 (2014).

57. *See, e.g.*, Patrick R. Krill et al., *The Prevalence of Substance Abuse and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016); *see*

reported significant law student problems with alcohol, street drugs, prescription drugs used without a prescription, depression, anxiety, eating disorders, and suicide, as well as comparative reluctance to seek help for these problems.<sup>58</sup> This is certainly not the type of struggle that should be encouraged, though it should be destigmatized.

Another problem for struggling students is stereotype threat. Identified by psychologist Claude Steele, stereotype threat is the well-documented psychological phenomenon that occurs when a person who is a member of a particular group is put in a position that risks confirming a negative stereotype about the group—the mere pressure of possibly confirming that negative stereotype causes such stress to the person that they are likely to underperform, thereby actually confirming the stereotype.<sup>59</sup> For example, when college men are asked to complete a miniature golf course and are told they are being tested on their “natural athletic ability,” black men outperform white men, because white men are stereotyped to have less natural athletic ability than black men.<sup>60</sup> Lest you think that conclusion is a stretch, when those college men are told that the same putt-putt course is a test of their “sports strategic intelligence,” the white men outperform the black men, because black men are stereotyped to have less strategic intelligence than white men.<sup>61</sup>

Stereotype threat has been documented in dozens of scenarios, as affecting any number of populations against whom

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also Joanna Litt, ‘*Big Law Killed My Husband*’: An Open Letter from a Sidley Partner’s Widow, LAW.COM (Nov. 12, 2018), [https://perma.cc/7TNR-AVFL]; Mark S. Goldstein, ‘*Scared. Ashamed. Crippled.*’: How One Lawyer Overcame Living with Depression in Big Law, LAW.COM (Feb. 12, 2019), [https://perma.cc/BE2L-CDC4].

58. Jerome M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 116, 127, 133-39 (2016); see also G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 246-47 (1986); Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 280, 282 (2004); Ass’n Am. L. Schs., *Problems of Substance Abuse in the Law Schools*, 44 J. LEGAL EDUC. 35, 41, 44 (1994).

59. CLAUDE STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO 5 (2010).

60. *Id.* at 8-9.

61. *Id.* at 10.

negative stereotypes are associated: men completing counseling degrees, based on the stereotype that men aren't good at talking about feelings; older people attempting to memorize a list of words, based on the stereotype that older people are forgetful; black and Latinx students taking standardized tests, based on the stereotypes that these students aren't as smart as white and Asian students.<sup>62</sup> In each of these studied situations, as with all instances of stereotype threat, people who felt threatened by the presence of the stereotype underperformed similarly-situated people who were not in fear of confirming the stereotype—the older folks who'd been asked to read an article on the negative effects of age on memory actually remembered less than older folks who hadn't read that article or read an article claiming that age had little effect on memory.<sup>63</sup>

The implications for law school are apparent here. Many students come into the law school building under the pressure of stereotype threat, particularly our black, Latinx, and Native American students, who may feel at risk of confirming the stereotype that students of their races/ethnicities are not as academically capable as white and Asian students.<sup>64</sup> Students who are the first in their families to go to college may face additional stereotype threats based on perceptions that these students are less likely to be successful without highly-educated

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62. *Id.* at 96-97. Interestingly, some research has also supported the existence of a stereotype *boost*; that is, when a person is associated with a group for which there is a positive stereotype, that supportive/affirming stereotype causes the person to over-perform. For example, in one study, groups of Asian women were asked to take a math test. Some of the women were cued before the test to associate with being female (by being asked seemingly-innocuous questions like whether their dorm was co-ed or single sex, whether they'd prefer a single-sex dorm, etc.)—these women underperformed on the math test, based on the negative stereotype about women being bad at math. Other women were cued before the test to associate with being Asian (being asked questions about how many generations of their family had been born in the United States, what languages they spoke at home, etc.)—these women over-performed on the math test, based on the positive stereotype about Asian people being good at math. The control group in this study, also Asian women, were asked neutral questions about their cable TV and cell phone providers. Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 80-81 (1999).

63. STEELE, *supra* note 59, at 96-97.

64. See Christine R. Logel et al., *Unleashing Latent Ability: Implications of Stereotype Threat for College Admissions*, 47 EDUC. PSYCHOL. 42, 43, 49 (2012).

role models at home.<sup>65</sup> Students who are academically struggling—on probation, or required to take “remedial” classes—may face additional stereotype threats because they’ve been stigmatized as underperforming, regardless of their other characteristics (such as race).<sup>66</sup>

Interestingly, research demonstrates that a college student’s “sense of belonging” can affect their academic as well as health well-being: an “intervention [that] provided students with a narrative that framed social adversity in school as shared and short-lived . . . encouraged students to attribute adversity not to fixed deficits unique to themselves or their ethnic group but to common and transient aspects of the college-adjustment process” caused increases in GPA and subjective happiness, while also causing decreases in self-reported negative feelings and even frequency of doctors’ appointments.<sup>67</sup> Analysis of how a sense of belonging impacts law students is nascent, but demonstrates that a sense of belonging (or lack thereof) also impacts law student success.<sup>68</sup>

Many law students also face financial struggles of varying degrees of severity, which can impact their ability to focus and engage on classroom work.<sup>69</sup> Financial struggle among law students is a complex issue, and its inclusion here on a list of

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65. See Ben Galina, *Teaching First-Generation College Students*, VAND. U., [<https://perma.cc/7HY3-75ML>] (last visited Jan. 21, 2020).

66. See Catherine Martin Christopher, *Eye of the Beholder: How Perception Management Can Counter Stereotype Threat Among Struggling Law Students*, 53 DUQ. L. REV. 163, 170-71 (2015).

67. Gregory M. Walton & Geoffrey L. Cohen, *A Brief Social-Belonging Intervention Improves Academic and Health Outcomes of Minority Students*, 331 SCI. 1447, 1448 (2011). See also Geoffrey L. Cohen & David K. Sherman, *The Psychology of Change: Self-Affirmation and Social Psychological Intervention*, 65 ANN. REV. PSYCHOL. 333, 333 (2014) (“Timely [self-]affirmations have been shown to improve education, health, and relationship outcomes, with benefits that sometimes persist for months and years.”); *infra* text accompanying note 154.

68. See, e.g., Victor D. Quintanilla, *Guest Post: A LSSSE Collaboration on the Role of Belonging in Law School Experience and Performance*, LSSSE BLOG (Jan. 25, 2019), [<https://perma.cc/EPW9-BWEH>].

69. See Christopher J. Ryan, Jr., *Paying for Law School: Law Student Loan Indebtedness and Career Choices*, U. ILL. L. REV. (forthcoming 2021) (manuscript at 1-2) [<https://perma.cc/HN7X-53ZJ>] (noting that aggregate outstanding law school loan debt currently exceeds \$7 billion, with the average law school debt burden being \$115,481 per student in 2018).

unproductive struggles is intended to flag, rather than examine, its significance.

### III. STRUGGLE IS PRODUCTIVE: THE ONLY WAY PAST IT IS THROUGH IT

A first-year law student said to me once, “I can’t wait to get out into practice, when the answers will be more clear-cut than in the hypos the law professors give.” I blinked a couple of times and finally managed, “If the answer is obvious, no one’s going to hire a lawyer.” What I wasn’t able to articulate during that exchange is that the struggle she experienced in law school wasn’t something from which she should be hoping to escape. Law school hypos are difficult, yes, but that’s not an artificial condition law professors force their students into so that one day the students will emerge on the other side, where everything is simple and straightforward.

Indeed, lawyers constantly face new conundrums, scenarios that have never before existed posing questions that have never before been asked. Legal education must prepare students for this. The law is—and always will be—hard work. Law students must be explicitly taught that struggling with a legal problem isn’t a sign of stupidity or failure, but rather that it’s the normal state of affairs.

Happily, scientific research demonstrates that the best learning happens while the learner is struggling.<sup>70</sup> Law students can capitalize on this fact by reframing their own academic struggles as effective and beneficial.<sup>71</sup> This in turn will create more resilient law students and happier, more effective lawyers.<sup>72</sup>

This Part summarizes the major themes of the scientific empirical literature, which is bursting with evidence of what learning techniques and strategies provide the most robust educational results. Each Sub-Part also touches on an ironic

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70. Douglas Fisher & Nancy Frey, *Show & Tell: A Video Column/The Importance of Struggle*, 74 EDUC. LEADERSHIP 85, 85-86 (2017).

71. See R. Lisle Baker, *Designing a Positive Psychology Course for Lawyers*, 51 SUFFOLK U. L. REV. 207, 250 (2018).

72. *Id.* at 231, 250.

problem: Effective study techniques do not give the student a sense of mastery, while study strategies that give a sense of comfort actually provide weak learning.<sup>73</sup> Students must learn to push through their sense of unease and trust in their results.

### A. Spaced Repetition

At the law school where I teach, first-year final exams are spaced out, so that, for example, the Property final is on a Monday, Constitutional Law that Friday, and Criminal Law the Friday after that. As you may suspect, many 1Ls study only one subject at a time, in the days before the relevant exam. So, for instance, no one even considers studying Criminal Law until after the Constitutional Law final. Students call this “cramming,” and the cognitive and educational psychologists call it “massed practice,” the studying of one thing in a huge helping.<sup>74</sup> And sure, cramming for that Criminal Law final will probably be effective in getting you a good grade on the exam.<sup>75</sup> But you’ll forget it all in the weeks, days, even hours afterward.<sup>76</sup>

Hermann Ebbinghaus studied memory in the late 1800s.<sup>77</sup> He memorized a list of syllables and tested his ability to recall the list after various lengths of time.<sup>78</sup> He charted the number of remembered words on what are now called his “forgetting curves.”<sup>79</sup> Unsurprisingly, as time went by, he remembered fewer and fewer words.<sup>80</sup> But what he learned was that by refreshing himself periodically, he retained things a little longer—he forgot more slowly.<sup>81</sup>

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73. See, e.g., Louis Deslauriers et al., *Measuring Actual Learning Versus Feeling of Learning in Response to Being Actively Engaged in the Classroom*, 116 PNAS 19251, at 5-6 (2019). The lead author admitted that he would have liked to call the article “The Dangers of Fluent Lectures.” Colleen Flaherty, *The Dangers of Fluent Lectures*, INSIDE HIGHER ED BLOG (Sept. 9, 2019), [<https://perma.cc/HU76-EGNS>].

74. BROWN ET AL., *supra* note 56, at 3.

75. *Id.* at 31.

76. *Id.*

77. BENEDICT CAREY, *HOW WE LEARN: THE SURPRISING TRUTH ABOUT WHEN, WHERE, AND WHY IT HAPPENS* 26-29 (1st ed. 2014).

78. *Id.* at 28.

79. *Id.* at 28-29.

80. *Id.* at 25-26.

81. *Id.* at 28.

This periodic refreshing is now known as “spaced repetition” or “distributed practice,” and it has been demonstrated to be far more effective for long-term retention than cramming, or massed practice.<sup>82</sup> Spaced repetition occurs when a student reviews material some period of time after first learning it, and again and again some periods of time after that.<sup>83</sup> The key to spaced repetition is to allow time for forgetting in between review sessions.<sup>84</sup>

The ironic twist here is that even though spaced repetition is demonstrably more effective, students report that they still prefer cramming.<sup>85</sup> This is because massed practice creates the sense of mastery.<sup>86</sup> For a brief, shining moment, the student can hold a vast amount of Constitutional Law in their head, and if that shining moment happens to be the moment the Constitutional Law final takes place, the student can perform well on the exam. (Because yes, cramming is effective in the short term.<sup>87</sup>)

Spaced repetition, on the other hand, forces students to confront their own forgetting, which is an unpleasant prospect.<sup>88</sup> However, the more times a student refreshes material, the better their long-term recall.<sup>89</sup> The educator’s goal for a student must then be to have students confront their own forgetting many, many times.

Students are unhappy to realize that material they mastered a week ago has faded from their memory. Yet repeated refreshing is the key to long-term, as opposed to only short-term, retention of information.<sup>90</sup> Moreover, confronting your own not-knowing is an essential part of a lawyer’s job. Law students must become

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82. John Dunlosky et al., *Improving Students’ Learning with Effective Learning Techniques: Promising Directions from Cognitive and Educational Psychology*, 14 PSYCHOL. SCI. PUB. INT. 4, 39-40 (2013); Brian Sites, *Learning Theory and the Law: Spaced Retrieval and the Law School Curriculum*, 43 L. & PSYCHOL. REV. 99, 101 (2019).

83. Sites, *supra* note 82, at 104-05.

84. See Gabe Teninbaum, *Here’s the Best Way to Learn*, NAT’L JURIST (Jul. 24, 2019), [<https://perma.cc/ND6T-XUZS>].

85. BROWN ET AL., *supra* note 56, at 54.

86. Dunlosky et al., *supra* note 82, at 39; BROWN ET AL., *supra* note 56, at 47.

87. BROWN ET AL., *supra* note 56, at 31.

88. I was complaining to a colleague once that students procrastinate writing practice essays for the bar exam, and he replied simply, “People don’t want bad news.”

89. Sites, *supra* note 82, at 114, 116.

90. BROWN ET AL., *supra* note 56, at 47.

accustomed to the normalcy and reality of learning and re-learning material over months and years.

### B. Variety and Challenge

Struggling tends to make students uncomfortable; it makes them feel like they're doing something wrong. Perhaps it is this discomfort that has caused some people to equate consistency with safety. Take, for example, B.F. Skinner's efforts to develop a pedagogy of "errorless learning,"<sup>91</sup> or the conventional wisdom that students should find a quiet place to study and study there consistently.<sup>92</sup> Students themselves prefer to study a particular subject (or subtopic) until they feel confident with the material before moving on.<sup>93</sup>

But empirical evidence demonstrates that variety is, indeed, the spice of life, even while studying. This includes physical variety: Changing the location of a class session increases retention of the information presented there.<sup>94</sup>

It also includes intellectual variety. "Interleaved practice," or changing tasks regularly, increases competence.<sup>95</sup> (This is not to be confused with multi-tasking, which is unproductive.<sup>96</sup>) Take, for example, students in an art appreciation course, who will be asked to identify which artist painted a painting they have not seen before. Students are more able to correctly discern the painter if they were introduced to Picasso, Matisse, and Cézanne paintings all mixed together, than if they had spent a period of time first studying Picasso paintings, then Matisse paintings, then

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91. *Id.* at 90.

92. Art Markman, *A Surprising Reason Why Learning Is Harder with Noise*, PSYCHOL. TODAY (Jul. 23, 2018), [<https://perma.cc/5M85-7ECE>].

93. Elizabeth Adamo Usman, *Making Legal Education Stick: Using Cognitive Science to Foster Long-Term Learning in the Legal Writing Classroom*, 29 GEO. J. LEGAL ETHICS 355, 390-91 (2016).

94. Saga Briggs, *10 Smart Study Tactics That Support How the Brain Actually Works*, INFORMED (Mar. 21, 2015), [<https://perma.cc/Y9CV-C8WF>].

95. Dunlosky et al., *supra* note 82, at 40, 44 (rating interleaved practice as having "moderate utility").

96. See Helene Hembrooke & Geri Gay, *The Laptop and the Lecture: The Effects of Multitasking in Learning Environments*, 15 J. COMPUTING HIGHER EDUC. 1, 2 (2003); *Multitasking: Switching Costs*, AM. PSYCHOL. ASS'N (Mar. 20, 2006), [<https://perma.cc/3PWB-PN9G>].

Cézanne paintings.<sup>97</sup> Likewise, batters in baseball have a higher batting average if they have practiced hitting forty-five curveballs, fastballs, and change-ups in a random pattern than if they had practiced fifteen curveballs in a row, then fifteen fastballs, and then fifteen change-ups.<sup>98</sup>

Too many law students seek nonthreatening study techniques, such as getting an outline from a second- or third-year student and re-reading it ad nauseum or taking nonsensical advice from second- and third-year students about how to succeed.<sup>99</sup> Instead, students should take advantage of the cognitive benefits of variety by studying material in several different ways, always with the goal of challenging themselves.

Many law school study techniques challenge students' understanding of the material, and students should take advantage of as many of these strategies as possible. This advice is not intuitive for many students, and legal educators need to be explicit about the benefits of variety and interleaved practice. For example, even if the Torts final is an essay exam, students will benefit from doing some multiple-choice practice questions because *it's all tort law*. Indeed, applying tort law in different contexts will increase a student's understanding of and flexibility with the doctrine.<sup>100</sup>

Furthermore, students should not be encouraged to put off practice questions until after they feel they have reviewed enough. This sets students up for failure in three possible ways. First, many students put off doing practice questions because they do not feel they know the information well enough yet to test themselves on it.<sup>101</sup> This turns review into a form of procrastination, and students may spend valuable time rereading the wrong material: rules of law they already understand or

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97. See BROWN ET AL., *supra* note 56, at 53-54.

98. *Id.* at 79-81.

99. I tell students—particularly 1Ls—that there's a lot of study advice out there, just as there's a lot of diet advice out there. They've learned to think critically about the weight loss advice (an all-grapefruit diet doesn't sound like a good idea), and I encourage them to be equally skeptical when a more experienced law student tries to give them "One Weird Trick" about getting As on law school exams.

100. See Sites, *supra* note 82, at 108-09.

101. *Id.* at 122-23.

irrelevant information such as the procedural history of *Hadley v. Baxendale*.<sup>102</sup> Second, a review-until-you're-ready approach suggests that doing poorly on a practice question would be an unrecoverable disaster. This is obviously not the case; rather, struggling on practice questions helps students identify what black letter rules of law they need to spend more time reviewing.<sup>103</sup> By extension, doing well on some practice questions helps students identify what material they do understand, so they can move on to other, more difficult material.<sup>104</sup> Third, mere rereading does not increase understanding.<sup>105</sup> Students need to see how the rules of law apply in situations—only in this way can students probe the nuances and find the holes in their grasp of the black letter law.<sup>106</sup>

As with spaced repetition, however, students who engage in interleaved practice do not *feel* as if they've mastered material as well as if they'd studied one thing at a time.<sup>107</sup> Nevertheless, students need to become accustomed to the sensation of picking up and putting down projects that are in a state of flux. Studying law isn't linear and comfortable, but that's okay—the practice of law isn't either. Lawyers work on lots of projects in a day, and lawyers don't always work on a case from its inception to its resolution.<sup>108</sup> Students who get comfortable with variety and the attendant feeling that they haven't completely nailed something down will become lawyers who are more comfortable with the pace and reality of practice.<sup>109</sup>

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102. 9 Exch. 341 (1854).

103. Sites, *supra* note 82, at 126.

104. *Id.*

105. Dunlosky et al., *supra* note 82, at 29.

106. Sites, *supra* note 82, at 115.

107. Usman, *supra* note 93, at 370.

108. See Ann Sinsheimer & David J. Herring, *Lawyers at Work: A Study of the Reading, Writing, and Communication Practices of Legal Professionals*, 21 J. LEGAL WRITING INST. 63, 99-100 (2016).

109. See Usman, *supra* note 93, at 370.

### C. Retrieval

Most students study by rereading text.<sup>110</sup> Law students are no exception. When asked how they prepare for exams, students reply that they review their notes, read Nutshells and Examples and Explanations, and reread their outlines—or worse, reread someone else’s outline.

But reading and rereading text does not increase retention of the information.<sup>111</sup> Instead, cognitive scientists have confirmed various study techniques that do effectively increase the retention of information, and they all require the student to engage in one form or another of *retrieval*: forcing the student to recall information from memory.<sup>112</sup> In other words, testing.<sup>113</sup> This testing need not be a paper-and-pencil exam in the classroom; importantly, students can test themselves by using a variety of techniques that require retrieval of information. Students can quiz each other in study groups. The humble flashcard can stand in for a study partner, posing a question but withholding the answer until the student attempts to answer and then flips the card over. Students can also test themselves without flashcards, by answering review questions, extracting main themes from texts, or quizzing themselves on whether they can define terms and articulate concepts.

Retrieval works even if the students are wrong. In one study, where students were asked fictional questions they couldn’t possibly get correct (“What peace treaty ended the Calumet War?”), when they were later taught an answer to that question, they retained the information better than students who’d been taught the information without first being tested.<sup>114</sup>

The mere act of being tested on material increases student retention. This is called the *testing effect*.<sup>115</sup> Give two classrooms

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110. Jeffrey D. Karpicke et al., *Metacognitive Strategies in Student Learning: Do Students Practise Retrieval When They Study on Their Own?*, 17 *MEMORY* 471, 472 (2009).

111. *Id.* at 472-73.

112. *See generally* Dunlosky et al., *supra* note 82, at 29.

113. *Id.*

114. Nate Kornell et al., *Unsuccessful Retrieval Attempts Enhance Subsequent Learning*, 35 *J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION* 989, 989, 991-92 (2009).

115. BROWN ET AL., *supra* note 56, at 28.

of eighth graders a passage on Ancient Rome and give one of those classes a quiz—even a no-stakes quiz—and a week later, the students who took the quiz would retain much more of the information.<sup>116</sup>

Of course, the law and law school are about much more than memorization. Memorizing rules of law does not necessarily mean a student will be able to apply them correctly. But the reverse is undeniable: a student cannot apply rules correctly if they don't know those rules.<sup>117</sup>

Here's an important takeaway about retrieval: It is not merely a dipstick to see how much a student knows.<sup>118</sup> Retrieval is itself a learning tool, forcing the brain to recall and reconsolidate information.<sup>119</sup> Retrieval also aids in students' metacognition, allowing them to discover what material they know and what they don't.<sup>120</sup> Students who have been tested study the material they missed more effectively and efficiently.<sup>121</sup>

Students should engage in retrieval and active recall exercises for two reasons. First, doing so encourages long-term memory of material.<sup>122</sup> Second, if the struggle of retrieval becomes a normal part of their educational experience, it will destigmatize the need to review.<sup>123</sup> Lawyers reread and relearn frequently, which is not a sign of failure. Rather, it is a sign of ethical, responsible lawyering to ensure that all details are carefully addressed.

#### IV. EMBRACING STRUGGLE IN THE CLASSROOM

This Part is built upon two basic premises. First, students do not know the best ways to study. Empirical evidence

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116. *See id.* at 20.

117. *Id.* at 2 (“[T]o be useful, learning requires memory, so what we’ve learned is still there later when we need it.”).

118. *Id.* at 19-20.

119. *Id.* at 20.

120. BROWN ET AL., *supra* note 56, at 20.

121. *Id.* at 42.

122. Glenda Thorne, *10 Strategies to Enhance Students' Memory*, READING ROCKETS, [<https://perma.cc/6W9A-KMFT>] (last visited Jan. 17, 2020).

123. *See* Brian Platzer & Abby Freireich, *How to Help Your Child Study*, N.Y. TIMES (Aug. 22, 2019), [<https://perma.cc/6PRP-QH7K>] (suggesting students engage in repetitive reviewing of material as study habit to reinforce retention).

demonstrates that students' preferred study techniques are actually the least effective. Most students study by highlighting and rereading, despite those techniques being demonstrably ineffective.<sup>124</sup> Moreover, study techniques that are proven to be effective don't feel that way; students who study by testing themselves, etc., feel less confident in the material afterwards, even when their retention is actually better than those who reread and highlighted.<sup>125</sup>

Second, professors should deliberately build their courses in such a way to maximize the students' retention of information.<sup>126</sup> This is not to absolve students of the responsibility for their own learning. Rather, professors, as expert teachers, can and should design their courses so that students learn more effectively.<sup>127</sup>

Law professors—as expert educators who care whether and how well students are learning material—should incorporate effective learning strategies into their courses and syllabi. This kind of deliberate course design will help students get more out of law school (which they're paying through the nose for), do better on the bar exam (which allows them to practice and makes the school look better), and serve clients competently (which is what this is all about, right?). In short, better teaching helps the students, the law school, and the public.

This Part provides recommendations for individual professors.<sup>128</sup> The following strategies can be employed in

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124. Dunlosky et al., *supra* note 82, at 21, 29 (finding both highlighting and rereading “as having low utility”).

125. BROWN ET AL., *supra* note 56, at 54.

126. See Elizabeth L. Bjork & Robert A. Bjork, *Making Things Hard on Yourself, but in a Good Way: Creating Desirable Difficulties to Enhance Learning*, in *PSYCHOLOGY AND THE REAL WORLD: ESSAYS ILLUSTRATING FUNDAMENTAL CONTRIBUTIONS TO SOCIETY* 56, 58 (Morton A. Gernsbacher et al. eds., 2011), [<https://perma.cc/7RLF-E4WA>].

127. “‘I get sick of people taking my psych intro class and coming back next year and not remembering anything,’ [said] Melody Wiseheart, a psychologist at York University in Toronto[.]. ‘It’s a waste of time and money; people pay a lot for college. As a teacher, too, you want to teach so that people learn and remember: That’s your job.’” CAREY, *supra* note 77, at 76. See also Deborah Zalesne & David Nadvorney, *Why Don’t They Get It?: Academic Intelligence and the Under-Prepared Student as “Other,”* 61 J. LEGAL EDUC. 264, 265 (2011) (“We emphasize the teacher’s responsibility to bridge the gap between some students’ readiness (or lack thereof) and the goals of the course.”).

128. These recommendations are not comprehensive. For a professor interested in reading further about study strategies, I recommend the following (in addition to other sources cited in these footnotes): Jennifer M. Cooper & Regan A. R. Gurung, *Smarter Law*

individual classrooms to increase student understanding and retention of information.<sup>129</sup>

### A. Space Things Out

People learn best when they study something, step away for a while, forget a bunch of it, and revisit the material.<sup>130</sup> Struggling to refresh oneself isn't a sign that the first round of studying was unsuccessful—rather, the struggling to get back up to speed is when a tremendous amount of learning is occurring.<sup>131</sup>

Humans naturally forget over time. The more we refresh ourselves, however, the slower that forgetting occurs.<sup>132</sup> Teachers who recognize that covering material once isn't enough for genuine, long-term learning can build in opportunities to revisit material.<sup>133</sup>

Some suggestions: Make the final exam cumulative, even if there were midterms, or ask people to recall material from earlier in the semester, whether in a formal quiz or an informal setting. Make everyone do it, not just the one student you call on. My preferred strategy is to give the entire class a few moments of silence to write down the answer, then we come back together as a group, and I call on one person. In this way, everyone in the

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*Study Habits: An Empirical Analysis of Law Learning Strategies and Relationship with Law GPA*, 62 ST. LOUIS U. L.J. 361 (2018); K. Anders Ericsson, *Deliberate Practice and Acquisition of Expert Performance: A General Overview*, 15 ACAD. EMERGENCY MED. 988 (2008); Nancy E. Millar, *The Science of Successful Teaching: Incorporating Mind, Brain, and Education Research into the Legal Writing Course*, 63 ST. LOUIS U. L.J. 373 (2019); Pamela A. Wilkins, *Law School in a Different Voice: Legal Education as a Work of Mercy*, 63 ST. LOUIS U. L.J. 401 (2019); Ann C. Juliano, *The Games We Play*, 63 ST. LOUIS U. L.J. 453 (2019).

129. For a thought-provoking discussion on how learning can be enhanced during office hours, see DeShun Harris, *Office Hours Are Not Obsolete: Fostering Learning Through One-on-One Student Meetings*, 57 DUQ. L. REV. 43 (2019).

130. See *supra* Part III.C.

131. See BROWN ET AL., *supra* note 56, at 202.

132. See *supra* text accompanying notes 77-81 (discussing Ebbinghaus's "forgetting curves"). But see CAREY, *supra* note 77, at 30-32 (discussing Phillip Bosward Ballard's research finding "spontaneous improvement" of memory in recalling lines of poetry two days after memorization and testing). Ballard found this "reminiscence" to be "strong for imagery, for photographs, drawings, paintings—and poetry, with its word-pictures." *Id.* at 34. In this study, memory peaked a few days after study. *Id.*

133. See Cooper, *supra* note 42, at 585-86.

room has engaged in an active recall exercise.<sup>134</sup> I could collect all the written responses and give feedback, but I usually don't. Instead, my pedagogical goal is to make students articulate something if they know it, thereby strengthening the connection between concepts and easing the process of recall,<sup>135</sup> or forcing students to realize they don't know the answer, leaving it to them to seek out remediation of that deficit. Short multiple-choice exercises can be done electronically, in class or outside of it, anonymously or not, with group discussion of the correct analysis.<sup>136</sup>

In short, design your course so that students revisit key concepts at regular, sensible intervals.<sup>137</sup> The students will naturally have forgotten some of the material over time, and designing an opportunity to practice active recall will help them retain the information better and longer.<sup>138</sup>

### B. Mix Things Up

Variety is the spice of life and of learning. Interleaving, or doing different kinds of tasks, increases retention and fluency of learning.<sup>139</sup>

So, in your classes, mix things up a little. Lecture a little. Call on one student to answer some questions. Ask everyone to write down an answer to a question (whether you collect the

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134. See *supra* Part III.C.

135. CAREY, *supra* note 77, at 19-20.

136. There are numerous electronic polling platforms that can be employed quite easily, such as Poll Everywhere, Kahoot!, Socrative, Top Hat, Blackboard, and many more. *17 of The Best Surveys and Polls Creation Tools for Teachers and Educators*, EDUC. TECH. & MOBILE LEARNING (Feb. 28, 2018), [<https://perma.cc/4DJU-H26S>].

137. James McGrath, formerly a Professor of Law and Associate Dean of Academic Success at Texas A&M University School of Law, and now the President and Dean at Western Michigan University Thomas M. Cooley Law School, writes and presents regularly on this point. See, e.g., James McGrath, *Planning Your Class to Take Advantage of Highly Effective Learning Techniques*, 95 U. DETROIT MERCY L. REV. 153, 171 (2018). See also Sites, *supra* note 82, at 118-20.

138. See CAREY, *supra* note 77, at 77 (providing information on the optimal time intervals at which to review material). In a classroom or similar educational setting, the appropriate interval for review depends on how far away the exam is. *Id.*

139. See *supra* Part III.B.

answers or not).<sup>140</sup> Ask students to discuss an issue in small groups before coming back for an all-class discussion (frequently called a “pair and share” exercise). Incorporate some short-answer or multiple-choice questions to do in class. Assign different kinds of homework, not just pages from a casebook. At the end of class, ask students to write down the most important black-letter law they learned in the past hour. Incorporate multi-state performance tests, like those used on the bar exam<sup>141</sup>—these can be used in doctrinal and skills classes across the curriculum, either as exercises during the semester or as part of the final exam.<sup>142</sup>

You could even consider having class in a different location sometimes—one study found that students who studied in two different locations performed better on tests than students who studied twice in the same location.<sup>143</sup>

### C. Assessments

The science is clear: Frequent, low-stakes testing improves learning.<sup>144</sup> Assessment actually serves two purposes, though: one for the professor and one for the students. First, assessment informs faculty of areas of student weakness.<sup>145</sup> It can be difficult

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140. Professor Friedland calls this an “all-write,” and he expands upon the pedagogical value of the exercise. Friedland, *supra* note 23, at 610.

141. More information and previous bar exam MPTs are available online. *Preparing for the MPT*, NAT’L CONF. B. EXAMINERS, [<https://perma.cc/Z8N3-T5Z5>] (last visited Feb. 1, 2020).

142. See generally Sara J. Berman, *Integrating Performance Tests into Doctrinal Courses, Skills Courses, and Institutional Benchmark Testing: A Simple Way to Enhance Student Engagement While Furthering Assessment, Bar Passage, and Other ABA Accreditation Objectives*, 42 J. LEGAL PROF. 147 (2018). The Appendix to the Berman article lists MPTs by subject matter, for ease of incorporation into doctrinal courses. *Id.* at 165-170.

143. CAREY, *supra* note 77, at 64.

144. Henning & Belian, *supra* note 1, at 50.

145. See MICHELE R. PISTONE & MICHAEL B. HORN, *DISRUPTING LAW SCHOOL: HOW DISRUPTIVE INNOVATION WILL REVOLUTIONIZE THE LEGAL WORLD* 16-17 (2016). Assessments which are designed as simulations may also help law schools produce practice-ready students. Law schools are frequently—and rightly—criticized for focusing on academic research rather than practical approaches to the study of law. *Id.* at 12-13 (“For many years, law students and their employers accepted the learn-to-think value proposition. But now, as in other areas of higher education, the value proposition of law schools is evolving to one that places a much greater emphasis on a learn-to-practice paradigm. From

to determine from the podium whether students have mastered the subject matter or whether the students have the appropriate skills to communicate their mastery. Blank stares can mean either confusion or boredom, and I hope I'm not the only professor who sometimes can't tell the difference between the facial expressions for "We get it; please move on" and "We are hopelessly lost." A reliable way to find out is to assess the students. Reading a stack of terrible final exams is a depressing way to realize the students didn't understand the material; early assessment and appropriate remediation can make grading final exams more pleasant.<sup>146</sup> Importantly, if faculty determine that students are in need of remediation, they should first attempt that remediation personally; faculty should *not* immediately assign struggling students to academic support, bar prep, or legal writing faculty for remediation.

Second, and perhaps more importantly, assessment provides the students with insights about themselves. Students learn when they study for and when they complete assessments, and assessments help students in "clearing up misconceptions about learning, building confidence in what they learned accurately, and becoming better at self-assessment."<sup>147</sup>

Tests are not mere "dipsticks," assessing how much a student has learned; they are better thought of as learning experiences.<sup>148</sup> Learning information and then being tested on it causes students to retain information better than learning the information without the testing opportunity.<sup>149</sup> This result holds true even if the student answers the test question incorrectly—a student who answers a question incorrectly and is given both feedback and the

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both sides—that of prospective law students and that of their future employers and clients—there is increasing dissatisfaction with the on-the-job tradition of training entry-level lawyers in the practice of law.”).

146. *But see* Henning & Belian, *supra* note 1, at 66 (finding that individualized feedback on bi-weekly short essay formative assessments resulted in improvement on the structure of essay answers on final exams, but no consistent improvement from quizzes to final exams).

147. James S. McGrath & Andrew P. Morriss, *Assessments All the Way Down*, 21 GREEN BAG 2D 139, 147 (2018), [<https://perma.cc/XK89-BRNU>].

148. *See* BROWN ET AL., *supra* note 56, at 19-20.

149. Mark A. McDaniel et al., *Test-Enhanced Learning in a Middle School Science Classroom: The Effects of Quiz Frequency and Placement*, 103 J. EDUC. PSYCHOL. 399, 399 (2011).

correct answer will retain and recall the information better than a student who was not tested at all.<sup>150</sup>

Law faculty should thus offer assessments to students for the benefit of student learning. The test itself will act as a knot at the end of a string of beads, securing information in the students' brains.<sup>151</sup> The test will also help students themselves to identify what material they do and do not understand. Upon receiving results of a test, students will be able to see where they met—and did not meet—faculty expectations.

#### D. Feedback

Students need feedback before they can improve. Some law students struggle with feedback, arguing with it rather than incorporating it. This may have to do with the students' mindset. Students with a "fixed mindset" tend to believe their intelligence is fixed, making negative feedback threatening, while students with a "growth mindset" view feedback as a means to improvement.<sup>152</sup> Providing feedback in a variety of ways—whether in a single classroom or across the curriculum—may help break down student resistance.

Methods of assessment and feedback will naturally vary according to the course content, number of students, pedagogical goals, and other factors.<sup>153</sup> Assessing student learning need not

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150. See Kornell et al., *supra* note 114, at 990, 996.

151. See BROWN ET AL., *supra* note 56, at 28.

152. See Bishop, *supra* note 35, at 966-67 (“[T]hose who occupy a fixed mindset often blame in the face of failure and see intelligence as static, effort as fruitless, and feedback as criticism, [while] those with a growth mindset often respond to failure with humility and curiosity, see intelligence as malleable, and effort and feedback as the keys to mastery.”). See generally Carrie Sperling & Susan Shapcott, *Fixing Students’ Fixed Mindsets: Paving the Way for Meaningful Assessment*, 18 J. LEGAL WRITING INST. 39, 44-58 (2012) (exploring “the finding that students with a fixed mindset react to critical feedback in maladaptive ways”); see also Ruth Colker et al., *Formative Assessments: A Law School Case Study*, 94 U. DETROIT MERCY L. REV. 387, 414-15 (2017) (hypothesizing that students who took an optional practice exam “might place a higher value on formative feedback due to a growth mindset”). The concepts of growth and fixed mindsets were identified and popularized by psychologist Carol Dweck. See generally CAROL DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS* (2016).

153. See Rogelio A. Lasso, *A Blueprint for Using Assessments to Achieve Learning Outcomes and Improve Students’ Learning*, 12 ELON L. REV. (forthcoming 2020) (manuscript at 20-27) [<https://perma.cc/9L7H-R6P2>]. See generally Heather M. Field, *A Tax Professor’s Guide to Formative Assessment*, 22 FLA. TAX REV. 363 (2019).

be overwhelmingly time-consuming, though of course a professional teacher should expect to spend some time engaging with student work product to see how the teaching and learning is going.<sup>154</sup>

These Sub-Parts discuss various ways to provide students with feedback on assessments. Much of the feedback discussed below can be adequately provided by teaching assistants.

### *1. Individual Written Comments*

Individual feedback on written work product can be extremely beneficial to students, because the feedback is personalized to each individual.<sup>155</sup> Professors may find the time commitment daunting, however. Short exercises can be reviewed more quickly than long, complex ones, and rubrics can speed up the process.<sup>156</sup> If the assessment is sufficiently straightforward, teaching assistants can provide feedback directly to students. Teaching assistants can also be used to screen student work product, passing along to the professor only those papers that need attention.

To be most effective, individualized feedback should frame problems as temporary, specific, and hopeful.<sup>157</sup> Temporary

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154. Henning & Belian, *supra* note 1, at 38. Interestingly, Henning and Belian reported having to spend significant time “managing students’ emotions in order to keep them invested in the long-term process of learning despite their discomfort with the feedback they were receiving.” *Id.* An institutional culture of assessment may lessen this time burden. If all (or at least many) professors are engaging in assessment and providing feedback, students will come to expect feedback, and even—dare we hope—appreciate it.

155. See Daniel Schwarcz & Dion Farganis, *The Impact of Individualized Feedback on Law Student Performance*, 67 J. LEGAL EDUC. 139, 139-40 (2017). In this article, Schwarcz and Farganis recount a “natural experiment” at the University of Minnesota, whereby some 1L students received individualized feedback prior to the final exam in at least one doctrinal (that is, not legal writing) course. Students who received this feedback performed significantly better than those who did not: an average of one-third of a grade better, when controlling for LSAT score, undergraduate GPA, and other demographic factors. The effect was found not only in the class for which feedback was provided, but for other classes as well, suggesting the students were able to transfer the feedback to other classes. Importantly, the effect of the feedback was stronger for those students whose LSAT scores and undergraduate GPAs were below the class’s median. *Id.* at 139.

156. See, e.g., Henning & Belian, *supra* note 1, at 38.

157. 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, 253-54 (2013).

feedback is about this paper and this error only, using phrases like “Fix this instance of X,” as opposed to more permanent criticism like “You’re bad at X.”<sup>158</sup> Feedback is specific when it clearly identifies the weakness, such as “This topic sentence is a correct statement of the rule, but it would be more helpful to the reader if you incorporated your legal conclusion here, too” as opposed to “You need a better topic sentence.”<sup>159</sup> Hopeful feedback helps a student understand that there is a path to success, rather than wallowing in a state of permanent incompetence.<sup>160</sup> For example, “If you use more specific facts, the reader will be able to follow your logic more clearly” gives helpful direction, whereas “I don’t know what you’re trying to say here” is nasty and condemning.<sup>161</sup>

## 2. Guided Self-Assessment

I am particularly enamored of assessment techniques that help students diagnose holes in their own knowledge or weaknesses in their skills. My preference for this self-assessment is rooted in pedagogy: Law schools should teach students how to teach themselves. For example, in order to successfully study for and pass the bar exam, students will need to be self-directed learners. Most bar prep now occurs online, and students must seek out feedback in the form of multiple-choice diagnostics or essay graders.<sup>162</sup> Furthermore, in the practice of law, attorneys need to not only evaluate their own understanding of the law but also assess the effectiveness of their written and oral communication.<sup>163</sup> Therefore, it is important for law professors to teach students how to evaluate themselves and how to give themselves feedback on their own thinking and writing.

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158. *See id.* at 245.

159. *Id.* at 250.

160. *Id.* at 241-42.

161. *See id.* at 249.

162. *See generally* *FAQ*, THEMIS B. REV., [<https://perma.cc/5BFF-S9PQ>] (last visited Jan. 20, 2020); *FAQ*, BARBRI, [<https://perma.cc/6KXH-TK4G>] (last visited Jan. 20, 2020); *(Bar) Academic Support*, KAPLAN, [<https://perma.cc/733J-YWD9>] (last visited Jan. 20, 2020).

163. Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 14-15 (2019).

For example, law professors (and bar prep companies) often provide a sample answer to a practice question, giving students the opportunity to compare their own answer to the sample and determine the strengths and weaknesses of their work product. This is a good strategy, though weak students in particular are often unable to extract useful lessons from a sample answer.<sup>164</sup> I see two kinds of unhelpful reactions: The student may be overwhelmed by the depth and breadth of the answer, concluding that “I’ll never be able to write like that,” or the student sees only the similarities and none of the differences between their work and the sample, giving themselves the unearned congratulations of “That’s what I wrote, too!”

The use of sample answers is even more effective if the professor—or teaching assistant—leads the students through the sample answer, asking guiding questions and *giving students time in class* to compare the sample to their own response.<sup>165</sup>

For example, in my own classroom, I often take the sample answer paragraph by paragraph. I’ll point out the rules of law, where and how they are articulated, and then I’ll give the students several minutes of silence to review their own answers, asking them a series of questions like, “Did you recite the same rules of law as the sample answer? Where are they? Underline them. Does the sample answer include rules of law that you didn’t include? If so, do you see why those are relevant rules that should be included? If you included rules of law that aren’t in the sample answer, do you see why those are less relevant and can be left out?” Then we move on to the application paragraphs, and I’ll ask guided questions again, such as: “Did you find the same facts

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164. Shailini Jandial George, *Teaching the Smartphone Generation: How Cognitive Science Can Improve Learning in Law School*, 66 ME. L. REV. 163, 188-89 (2013); Elizabeth M. Bloom, *A Law School Game Changer: (Trans)formative Feedback*, 41 OHIO N.U. L. REV. 227, 242 (2015).

165. Self-assessments can also be provided via written guides. See, e.g., Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 LEGAL WRITING 175, 175-76 (1997); Sarah J. Schendel, *What You Don’t Know (Can Hurt You): Using Exam Wrappers to Foster Self-Assessment Skills in Law Students*, 40 PACE L. REV. 154, 169 (2020), [<https://perma.cc/9Z9Q-BT4S>]; Julie Ross & Diana Donahoe, *Lighting the Fires of Learning in Law School: Implementing ABA Standard 314 by Incorporating Effective Formative Assessment Techniques Across the Curriculum*, 81 U. PITT. L. REV. (forthcoming 2020) (manuscript at 36-40), [<https://perma.cc/6MZJ-6TFZ>].

as the sample answer? Did the sample discuss facts you left out, and do you see why those facts are important? Did you discuss facts the sample didn't, and do you see why those are less important? Did the sample analyze the facts from both sides? Did you?"

Perhaps most importantly, I implore students over and over again, "Make some notes for yourself about how you'll do this differently next time. What can you do next time to make your answer look more like the sample answer?"<sup>166</sup>

This sounds like a lot of talking from me, but actually my primary goal during these exercises is to provide silent time for students to think critically about their work product. I'm happy to answer questions, but I'm comfortable with and even protective of the silence.<sup>167</sup>

Deeper and more effective self-assessment is also important for multiple-choice question sets. Students should learn to detect patterns in their wrong answers.<sup>168</sup> Were questions missed because the student didn't know the law? Knew the law but not the exception? Misread the facts? Misapplied the law to the facts? Answered a question other than the one being asked? Got distracted by wrong answer choices? Faculty can help students develop charts so students can track and visualize their errors.<sup>169</sup>

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166. It is my hope that students will learn to ask these questions of themselves, particularly during bar preparation. See CATHERINE MARTIN CHRISTOPHER, TACKLING THE TEXAS ESSAYS 41-43 (2018).

167. Thanks to Laurie Zimet for teaching me the value of silence in the classroom.

168. This series of question is adapted from SUZANNE DARROW-KLEINHAUS, MASTERING THE LAW SCHOOL EXAM 234 (2007).

169. For example, a chart may look something like this:

Q#	Right or wrong	Topic/Subtopic	Didn't know rule/exception	Misread facts	Misread question	Incorrect application	Distracted by wrong answer choice	Other

By charting out reasons for missed questions, a student may be able to discern patterns of errors, which can then lead to the development of specific strategies for remediation.

### 3. Peer Feedback

Students can benefit tremendously from exchanging work product with peers for feedback.<sup>170</sup> The student providing the feedback benefits from the experience of being a reader by identifying and explaining what improvements can be made to a work in progress.<sup>171</sup> The student receiving feedback also benefits from hearing the reaction of a peer.<sup>172</sup>

However, students can be resistant to peer feedback; some students feel unqualified to assess their peers' work, and some students find peer feedback inexpert and therefore unhelpful.<sup>173</sup> In order to mitigate student concerns and increase the effectiveness of the peer feedback, faculty should plan peer feedback exercises carefully and be transparent about the goals of the exercise.<sup>174</sup> It is also helpful to provide a rubric or otherwise set standards and guidelines for peer review.<sup>175</sup>

### E. Teach Studying

Because students now matriculating to law school are less academically prepared than previous generations,<sup>176</sup> law schools should explicitly teach students how to study.<sup>177</sup> The current gold standard is set by Florida International University's law school, and, fortunately for law schools everywhere, two of the program's professors have written articles specifically detailing the program.<sup>178</sup> The proof is in the pudding. FIU Law has had the

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170. Bloom, *supra* note 164, at 245.

171. See Cassandra L. Hill, *Peer Editing: A Comprehensive Pedagogical Approach to Maximize Assessment Opportunities, Integrate Collaborative Learning, and Achieve Desired Outcomes*, 11 NEV. L.J. 667, 672-73 (2011).

172. See *id.* at 672-74.

173. See Kathleen Magone, *Peer Editing*, in *TECHNIQUES FOR TEACHING LAW* 245, 246 (Gerald F. Hess & Steven Friedland eds., 1999).

174. Ross & Donahoe, *supra* note 165, at 36-40. See generally Hill, *supra* note 171.

175. See Hill, *supra* note 171, at 689.

176. See *supra* note 44 and accompanying text.

177. I developed and implemented such a course, in collaboration with my colleagues, at Texas Tech University School of Law. The course is modeled after a similar course at Florida International University (see *infra* note 178 and accompanying text) and is a required, graded course for all first-semester law students.

178. Louis N. Schulze, Jr., *Using Science to Build Better Learners: One School's Successful Efforts to Raise Its Bar Passage Rates in an Era of Decline*, 68 J. LEGAL EDUC.

highest bar passage rate in the state nearly every year since the program was initiated, significantly outperforming the incoming indicators of its student body.<sup>179</sup> Beyond teaching how to read cases and outline, a course designed to teach studying can also include instruction on self-regulated learning, grit (defined as “passion and perseverance for pursuing long term goals”), and growth mindset.<sup>180</sup>

Law schools should also explicitly teach students how to transfer information and skills learned in one class to other classes, bar prep, and the practice of law.<sup>181</sup> For example, professors can preview how what they are currently teaching can lead to future applications, or ask students to engage in reflection of how rules and skills will be applicable in the future—these techniques engage students in “stretching forward” rather than simply building on what has come before.<sup>182</sup>

### V. STRUGGLE IS THE SIGN OF EMOTIONAL STRENGTH, NOT INTELLECTUAL WEAKNESS: EMBRACING STRUGGLE IN THE INSTITUTION

The title for this Part is another one of my mantras: Struggle is the sign of emotional strength, not intellectual weakness. It’s a paraphrase of an article on the differences between Eastern and Western K-12 education where Western countries focus on the

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230 (2019); Raul Ruiz, *Leveraging Noncognitive Skills to Foster Bar Exam Success: An Analysis of the Efficacy of the Bar Passage Program at FIU Law* (Fla. Int’l U. Legal Stud. Res. Paper Series, Research Paper No. 20-03, 2020), [<https://perma.cc/3NYY-FEEC>].

179. Michael Hunter Schwartz, *Florida International School of Law and the Bar Pass Secret Sauce*, LAW SCH. BLOG NETWORK: WHAT GREAT LAW SCHOOLS DO (June 12, 2018), [<https://perma.cc/B28E-M74A>].

180. See Megan Bess, *Grit, Growth Mindset, and the Path to Successful Lawyering* (Sept. 23, 2019) (manuscript at 3), [<https://perma.cc/RYPD4-WZPR>]; see also Zalesne & Nadvorney, *supra* note 127, at 272–79. But see Jennifer A. Gundlach & Jessica R. Santangelo, *Teaching and Assessing Metacognition in Law School*, 69 J. LEGAL EDUC. (forthcoming 2020) (manuscript at 2-4), [<https://perma.cc/7QPC-XWDL>] (finding that law students who engaged in metacognition earned higher grades, but finding that teaching metacognition had no effect on students’ employment of those strategies); Emily Zimmerman & Leah Brogan, *Grit and Legal Education*, 36 PACE L. REV. 114, 143 (2015) (finding no correlation between grit and law school grades).

181. For more on transference of learning, see Mary Nichol Bowman & Lisa Brodoff, *Cracking Student Silos: Linking Legal Writing and Clinical Learning Through Transference*, 25 CLINICAL L. REV. 269, 274-81 (2019).

182. See *id.* at 291-304.

right answer and Eastern countries focus on the process, treating struggle as a natural phase.<sup>183</sup> The article depicts what was for me (a former child, now a parent of elementary students) a horrifying scene: a child alone at a blackboard, piece of chalk in hand, standing there for a long time without knowing how to complete the assigned task. The article explains how a Western classroom will typically seek to spare the child the embarrassment of not knowing the answer, will excuse the child back to her seat, and call on another child who can answer quickly and correctly.<sup>184</sup> An Eastern classroom, however, will encourage the student to stay with the problem, to struggle—this makes the victory infinitely sweeter when the child eventually solves the problem.<sup>185</sup> Born and raised in the United States, I instinctively perceive the struggling child at the blackboard as being humiliated. But what if it wasn't embarrassing to not have the answer?

Part III, *supra*, discussed study strategies that can be employed by individual students; Part IV, *supra*, outlines ways individual professors can build academic struggle into the syllabus. In this Part, I discuss institution-wide efforts and attitudes that can normalize struggle.<sup>186</sup>

### A. All Professors Should Be Academic Support Specialists

First, all law professors should become, and should consider themselves, academic support professionals. Professors are good at recognizing incompleteness and inaccuracy on final exams;

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183. Alix Spiegel, *Struggle Means Learning: Difference in Eastern and Western Cultures*, KQED NEWS (Nov. 15, 2012), [<https://perma.cc/G368-9EK5>].

184. *Id.*

185. *Id.*

186. A topic not explored in depth in this Article is curricular innovations. Whether curricular innovation can benefit student learning—and how we would measure that efficacy—is a subject worthy of more attention. See Dan Rodriguez, *Innovation in Legal Education Is a Data Desert*, LEGAL EVOLUTION BLOG (June 2, 2019), [<https://perma.cc/DU3Z-JXZF>]; Dan Rodriguez, *Toward Evidenced-Based Legal Education Reform: First, Let's Experiment*, LEGAL EVOLUTION BLOG (Oct. 13, 2019), [<https://perma.cc/7SR3-RKMA>]; see also Ian Holloway & Steven I. Friedland, *The Double Life of Law Schools*, 68 CASE W. RES. L. REV. 397 (2017) (discussing innovations that will be necessary for the legal education of the future).

professors should become equally adept at identifying struggling students before the exam and developing interventions.

To do this, professors should read books and articles on providing academic support to law students—the footnotes of this Article are stuffed with recommendations. Professors should attend panels on academic support and bar prep at conferences or attend one of the many annual conferences and workshops devoted entirely to these topics.<sup>187</sup>

Professors must meet students where they are, without judgment. Law students matriculate without the critical thinking and other skills they once had, and it's not their fault.<sup>188</sup> We cannot take students' tuition dollars without providing the education they need—even if it's education they used to get elsewhere. This attitude of acceptance can also help our students with their non-academic struggles, such as mental health and substance abuse problems.<sup>189</sup>

## B. Institutional Attitudes

Faculty, administration, and staff of law schools collectively set the tone and attitude of the institution. Attitude is set from the podium, where professors can encourage and support student struggling, or they can act like Kingsfield. Professors should model growth mindset,<sup>190</sup> candidly talking about their professional struggles and setbacks, and how they deal with them.<sup>191</sup>

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187. My favorite annual conference is put on by the Association of Academic Support Educators (AASE, pronounced “ace”). For more information, see *Upcoming Conferences*, ASS'N ACAD. SUPPORT EDUCATORS, [https://perma.cc/43AJ-XSH2] (last visited Jan. 21, 2020). There are also frequent academic support and bar prep panels at the AALS Annual Meetings and SEALS Annual Conferences.

188. See *supra* Part II.A.

189. David B. Jaffe, *The Key to Law Student Well-Being? We Have to Love Our Law Students*, AM. U. WASH. C. L. (Feb. 6, 2018), [https://perma.cc/NJ5F-3FQK].

190. Dweck, *supra* note 152; see also Carol Dweck, *The Power of Believing You Can Improve*, TED (Nov. 2014), [https://perma.cc/L39T-QG8W].

191. In one of my academic support classes, I assign frequent sets of multiple-choice questions from a subject tested on the MBE (the multiple-choice portion of the bar exam). I take the questions myself before class, and I sometimes share my score with the students. One day in the fall of 2018, I announced, “I only got 7 of these 12 Civil Procedure questions right, and I’m telling you this because I’m not threatened by my score. This material is challenging, and it’s hard to keep these detailed rules straight in my mind.”

Importantly, professors and institutions need to reject the idea that innovative teaching approaches are the same as “dumbing-down” the material.<sup>192</sup> Student bodies are more diverse than ever before, in terms of educational background, race and ethnicity, disability, family responsibilities, and other characteristics.<sup>193</sup> The Langdellian case method was developed in the 1870s for a very homogenous student body,<sup>194</sup> and it is normal to ask whether different teaching approaches will be more effective for the changing face of the student body.<sup>195</sup> Institutions should foster a sense of belonging in all students.<sup>196</sup> Student needs should be anticipated and addressed, not merely reacted-to when a student makes a request or a complaint.<sup>197</sup>

Law schools should also explore institution-wide expectations and norms regarding formative assessment. If at all possible, feedback should be delivered constructively, and in such a way that students are most likely to actually receive it (as opposed to spring semester final exams being merely made available in September to any student interested in seeing them). Faculty members should explore and discuss various ways of providing feedback to students, finding feasible methods that

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192. See Friedland, *supra* note 23, at 593 (“[L]egal education can become assessment-centric without losing its core learning environment: knowledge.”).

193. See Cruz Reynoso & Cory Amron, *Diversity in Legal Education: A Broader View, a Deeper Commitment*, 52 J. LEGAL EDUC. 491 (2002); Louis M. Rocconi et al., *Beyond the Numbers: An Examination of Diverse Interactions in Law School*, 12 J. DIVERSITY HIGHER EDUC. 27, 27 (2019), [<https://perma.cc/4DQ9-BRME>].

194. Bruce A. Kimball, *The Proliferation of Case Method Teaching in American Law Schools: Mr. Langdell’s Emblematic “Abomination,” 1890-1915*, 46 HIST. EDUC. Q. 192, 193 (2006); Rocconi et al., *supra* note 193.

195. For information on law student demographics, see AM. BAR ASS’N, PROFILE OF THE LEGAL PROFESSION: LEGAL EDUCATION 27-28 (2019), [<https://perma.cc/62A2-G2GJ>]. For ideas on innovative teaching strategies, see Gerald F. Hess et al., *Fifty Ways to Promote Teaching and Learning*, 67 J. LEGAL EDUC. 69 (2018).

196. See *supra* text accompanying notes 67-68; see also THE LAW SCH. SURVEY OF STUDENT ENGAGEMENT, 2018 ANNUAL SURVEY RESULTS: RELATIONSHIPS MATTER 8 (2018).

197. This includes students’ mental-health needs. See *infra* Subpart C. Students must sometimes take it upon themselves to develop mental health support programming at their law schools, which is simultaneously an impressive display of initiative and a disheartening reflection of the need for such programming as well as law schools’ indifference or inability to provide it. See, e.g., Karen Sloan, ‘Law School Was Kind of a Shock:’ Students Take the Lead in Mental Health Initiatives, LAW.COM (Aug. 5, 2019), [<https://perma.cc/B6GH-A2PF>].

deliver high-quality feedback to students but also conserve faculty time. Particularly for first-year classes, schools should sequence midterm exams so that they don't all fall within a short window—doing this will reduce student anxiety as well as increase preparation and participation in classes other than the one with the most pressing midterm.<sup>198</sup>

### C. Wellness

Institutions should emphasize and make space for student wellness.<sup>199</sup> It should be an institutional expectation that students have time to sleep, make and eat good food, exercise, practice religion and mindfulness, etc.<sup>200</sup> Students need to hear from their law school that they should take time to rest. Rest helps the brain, both academically and personally,<sup>201</sup> and law schools need to be explicit that students are not expected to kill themselves with work. (The practicing bar needs to do this, too.)

This is easy to say and hard to do.<sup>202</sup> Law students often feel like they're drowning, and "at-risk" students are often assigned more work and meetings than their classmates.<sup>203</sup> Law schools

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198. Amanda Gernentz Hanson, *Self-Care During Midterm Exams in Law School*, LAW SCH. TOOLBOX (Oct. 2, 2017), [<https://perma.cc/5XMU-B3JZ>].

199. This may even be a literal space devoted to wellness, such as the "wellness room" at Texas Tech University School of Law. Angela Morris, *There's Absolutely No Studying Allowed in this Room at Texas Tech School of Law*, YAHOO! NEWS (Apr. 30, 2019), [<https://perma.cc/54NP-7QWH>]; Matthew Setzekorn, *Stress-Free Zone*, 82 TEX. B. J. 323, 323 (2019).

200. Volume 48 of the Southwestern Law Review is a symposium issue entitled *Mindfulness and Well-Being in Law Schools and the Legal Profession*. See Symposium, *Mindfulness and Well-Being Law Schools and the Legal Profession*, 48 SW. L. REV. 199 (2019). That volume contains a multitude of perspectives on mindfulness in relation to law students and lawyers. *Id.* See also Paula Schaefer, *Examples of How Law Schools are Addressing Law Student Well-Being*, BEST PRACS. LEGAL EDUC. (Jul. 11, 2019), [<https://perma.cc/JM4S-3BQP>].

201. See CAREY, *supra* note 77, at 198, 204-05.

202. Even analyzing law student well-being is difficult. See, e.g., Peter H. Huang, *Subjective Well-Being and the Law*, in HANDBOOK OF WELL-BEING, at 1-6 (E. Diener et al. eds., 2018), [<https://perma.cc/WC5Y-V2CQ>] (summarizing legal scholarship related to law students' subjective well-being); Emily Zimmerman & Casey LaDuke, *Every Silver Lining Has a Cloud: Defensive Pessimism in Legal Education*, 66 CATH. U. L. REV. 823, 824-28 (2017) (analyzing law students' defensive pessimism attitudes in relation to other academic and social characteristics).

203. Daniel T. Lukasik, *In the Beginning—Depression in Law School*, LAWS. WITH DEPRESSION (Jan. 21, 2012), [<https://perma.cc/AJ35-355J>].

need to take a hard look at how much is being asked of all students and assess whether this is a realistic amount. Furthermore, law schools must work hard to unburden struggling students—what support can be provided, and what requirements can be eased or deferred, to allow students to struggle forward in a healthy, productive way?<sup>204</sup> Are restrictions, such as prohibiting probation students from serving in student government, serving their purpose or are they punishing struggle? Are there multiple kinds of success possible in law school, beyond just high grades, and how can a law school validate and support those other successes? This Article does not purport to answer these questions, but rather exhorts faculty to take a close look at whether the demands placed on law students are meaningful.

### CONCLUSION

Normalizing the academic struggles of law students can only benefit the students, their law schools, and the profession. Students will learn to struggle *through* their work, *toward* something rewarding and valuable. They will be better prepared to handle setbacks, to stick with difficult projects, and to handle multiple demands on their attention and time.<sup>205</sup> While this will make law school a more humane experience (without losing rigor), it will also set students up for success on the bar exam and in the practice of law. In short, law schools should teach students that struggling isn't a sign that they don't belong, but rather, just the opposite.

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204. See Elizabeth Ruiz Frost, *Failure Begets Failure: An Examination of the Psychology of Failure and How Law Schools Ought to Respond*, 48 STETSON L. REV. 33, 34, 67-68 (2018).

205. Stephanie Francis Ward, *Students at Top Law Schools Ask for More Mental Health Support*, A.B.A. J. (Jan. 3, 2018), [<https://perma.cc/UT4E-FEWT>].