2012

Outcomes and the Ownership Conception of Law School Courses

Steven I. Friedland

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OUTCOMES AND THE OWNERSHIP CONCEPTION OF LAW SCHOOL COURSES

Steven I. Friedland†

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† Professor of Law, Senior Scholar, and Director of the Center for Engaged Learning at Elon University School of Law. The author expresses appreciation to Elon University School of Law for CELL and the opportunity to explore avenues of engaged learning in legal education. The author thanks Lisa Watson, Reference/Government Documents Librarian, for her stellar assistance with this article.
I. INTRODUCTION

Who owns law school courses? Using the traditional conception of property ownership as a bundle of rights, including the rights to exclude, possess, use, and transfer, once a professor is assigned to a course, that professor can be said in some ways to “own” it. So long as the professor more or less stays within the boundaries of the course description, the professor generally has plenary authority to decide what material to cover, how deep the coverage should be, what kind of assessment will be given, and whether the students successfully met the professor’s express or implied objectives or outcomes based on the assessment. This traditional conception leaves course outcomes almost entirely within the purview of individual professors, without institutional participation.¹

Changing the ownership of course outcomes, however, or at least adding a notice requirement about them, has the potential for significant impact. Specifically, the proposed American Bar Association (ABA) standard adopting learning outcomes for law schools has caught the attention of law schools and the legal community.² The conversation about the propriety of adopting the proposed standard, and what compliance will look like,³ is a

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¹ This is just a general proposition, and is not true for all law school courses or teachers. Some courses, such as legal writing in the first year, often are administered in a lock-step manner across sections, belying the individualism of most law school classes. The same is likely true with other programs involving one director and several sections, such as externships.


³ Legal groups, such as the Association of Legal Writing Directors (ALWD) and the Clinical Legal Education Association (CLEA), along with individuals have provided their ideas. See Comments on the Comprehensive Review, supra note 2.
relatively new one for the collective body of law schools.\textsuperscript{4} The proposed standard provides for potentially transformative shifts in the way legal education courses are perceived, as well as delivered—from a strong individual ownership conceptualization,\textsuperscript{5} meaning controlled and assessed almost entirely by the individual professors teaching the course, to a more collaborative ownership shared by the entire faculty and the law school. This collaborative approach perceives the individual professors more as fiduciaries, responsible for the advancement of student knowledge, skills, and values in some articulable fashion, than as owners.

If such an outcomes standard is implemented, however, the question remains as to what impact the articulation of outcome requirements will have, if any. Will there be a return to Langdellian tradition,\textsuperscript{6} with only a few cosmetic alterations? Or will there be a shift in momentum toward dramatic change in the legal educational process?

The July 2011 iteration of proposed ABA Standard 302 states in part:

(a) A law school shall identify, define, and disseminate each of the learning outcomes it seeks for its graduating students and for its program of legal education.

(b) The learning outcomes shall include competency as an entry-level practitioner in . . .

(1) knowledge and understanding of substantive law, legal theory and procedure;

(2) the professional skills of:

(i) legal analysis[,] . . . problem solving, written and oral communication in a legal context . . . ;

(3) other professional skills . . . ;

(4) . . . understanding . . . of . . .

(i) ethical responsibilities[,] . . .

\textsuperscript{4} A broader question, not covered in this article, is the role of accreditation systems in general. See, e.g., Jay Conison, The Architecture of Accreditation, 96 IOWA L. REV. 1515 (2011) (analyzing the type and structure of possible accreditation systems).

\textsuperscript{5} This paper was propelled in part by hearing another professor declare in the context of possible curricular change, essentially, “This is my course, don’t touch it.”

\textsuperscript{6} Christopher Columbus Langdell was a famous Harvard Law Professor in the 1870s and 1880s who compiled one of the first casebooks on Contracts. See C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871) (this book was sufficiently successful to be updated into a second edition in 1879).
(ii) the legal profession’s values of justice, fairness, candor, . . . ; and
(iii) responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them.

(5) any other learning outcomes the school identifies as necessary or important . . . .

The fact that this proposal imports an unknown quantity into a long-standing power distribution in legal education yields more than a possible Kulturkampf. The proposed standard reflects ideas already streaming through many other parts of the academic world. To different extents, undergraduate, graduate, and trade education programs have embraced the metric of learning outcomes, and it is only the insularity of legal education, and its roots, tracing back to Christopher Columbus Langdell’s compilation of a Contracts casebook in 1871, that has kept it from being similarly affected.

The proposal also reflects, on a broad basis, the willingness to reconsider the strong individualized ownership conception of the law school curriculum that has accompanied the traditionalist approach. A Contracts teacher generally operates individually, creating a syllabus describing the contours of the course—what will be covered, what will be tested, and, in the professor’s discretion, what the discrete and concrete objectives are. Two sections of the same course, operating side-by-side in the course catalogue, might offer different substantive coverage, different emphases, different levels of skill instruction, and different types of and approaches to assessment. This proprietary conceptualization has permitted the


8. This German word means “culture struggle.” It has been used to illustrate various struggles, even by Supreme Court justices. See, e.g., Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (“The Court has mistaken a Kulturkampf for a fit of spite.”).

9. LANGDELL, supra note 6.

10. Of course, the articulation of learning outcomes is not the ultimate objective, but only a useful first step to improving the efficacy and ethos of American legal education. Yet, it is only a harbinger of potential change and it relies on those charged with leading legal education to transform it to better meet the plethora of challenges that lie ahead.
decentralized ownership of courses by individual professors, allowing content, methodology, and outcomes to be effectively determined by the teacher. There are some limits, such as descriptions in course catalogues and grading scales, but these limits—including the idea of prerequisites—are not significant interferences and, except for grading, might not even be enforced in many situations.  

This article contends that the recognition of a learning outcomes standard for law schools philosophically shifts the model of legal education from a localized practice with the abstract objective of “thinking like a lawyer,” to a more collaborative polity with visible, collective standards owned not so much by the individual professor, but by the governing institution. This expansive, shared ownership calculus could, like food labels, increase the disclosure of objectives, lead to the creation of metrics that show how those objectives would be achieved, and lead to greater school-wide control over what constitutes acceptable results.  

One counterweight to the shift resulting from outcomes is the idea that this new conception encroaches on academic freedom. This paper submits that such an argument is a false neutral, and that no such infringement occurs on the teacher’s freedom to choose methodologies or to speak and write freely.

This essay offers two other observations. First, the ABA standard’s symbolic shift away from a focus of attention on the professor and the professor’s coverage of material, to what the students should be and are in fact learning, is more significant than it might at first appear. This is especially true given that the ownership conception of the law school classroom has been so strongly rooted for such a long period of time. What might be created is a new sphere of pedagogical analysis and evaluation.

11. For example, in many schools, while prerequisites are listed for courses, they might not be enforced institutionally, and instead left for the professor to check and ask about them on an individual basis.

12. The key word is “potentially,” since without enforcement or oversight, there is a strong likelihood that the mere adoption of a new standard will not spur substantive compliance.


14. This kind of analysis and evaluation is not necessarily new to education in general, just legal education. An example is Professor Bloom’s famous taxonomy.
Second, the implementation of compliance strategies, even those reflecting small steps, should promote a “politics of collaboration”—at the very least a new conversation between faculty members themselves and between faculty and the administration. The collaborative model might foster new structures that promote greater communication and coordination among professors about pedagogy objectives and methods, increase disclosure about what is being taught, and heighten intentional responsibility for educational outcomes.

The article advances several compliance strategies for meeting a learning outcomes orientation. These strategies include intentionality, labeling, inspection, and modification. Each strategy illustrates how schools can overcome resistance and confusion concerning the novelty and demands of the new imperative. Some of these strategies require little capital and others are more ambitious by several magnitudes. All strategies show how learning outcomes not only shift the ownership conceptualization of law school courses, but also provide the impetus to create a collaborative law school culture of disclosure, coordination, and communication about what the objectives are in legal education and how to meet them. Of course, without the equally important step of implementing these strategies, any new standard will be more symbolic than an agent of change.

The article is divided into four sections. After this introduction, the piece explores proposed Standard 302 and then the traditional ownership conceptualization of law school courses in a background section. The article then examines the shifts in ownership perspectives that might occur from a new Standard—especially through a critique of the false neutral of “thinking like a lawyer.” The article then discusses compliance strategies and their implications for collaborative politics, including coordination and communication.

of educational goals, a taxonomy that has permeated the academy of learning over the past fifty years. See A COMM. OF COLL. & UNIV. EXAM’RS, TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS, HANDBOOK I: COGNITIVE DOMAIN (Benjamin S. Bloom ed., 1956).

15. It can reasonably be expected, however, that some professors comfortably entrenched in a tradition-bound system might resist initially what compliance has to offer.

16. The discussion of strategic approaches to compliance takes a giant leap by assuming that some form of compliance strategies will occur. The initial response by some will be to fight changes in order to preserve the traditional educational model.
II. BACKGROUND

A. Proposed Standard 302

Standard 302 was for a long while focused on the curriculum and described by like terminology. The transformation of Standard 302 from a rule about curriculum to one framed in terms of learning outcomes started with a Report of the Outcome Measures Committee delivered in 2008. At that time, a comprehensive review of standards was initiated. This review was expected to take several years. The Standards Review Committee (Committee) created a statement of objectives and a schedule of

   (a) A law school shall require that each student receive substantial instruction in:
   (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
   (2) legal analysis and reasoning, legal research, problem solving, and oral communication;
   (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
   (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
   (5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.
   (b) A law school shall offer substantial opportunities for:
   (1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence;
   (2) student participation in pro bono activities; and
   (3) small group work through seminars, directed research, small classes, or collaborative work.

Id.


19. Reviews are mandated by the U.S. Department of Education. 34 C.F.R. § 602.21 (2009).
meetings. Throughout the process, the Committee invited outside comment.

The changes to Standard 302 and Chapter Three of the standards generally, were developed by a subcommittee the Student Learning Outcomes Committee, that not only based its decision-making process on leading critiques of legal education, such as *Best Practices for Legal Education*, and *Educating Lawyers*, commissioned by the Carnegie Foundation, but by a review of how other professional disciplines and educational venues approached the topic.

Multiple drafts have been proposed and continual revision has
occurred. \(^{24}\) Regardless of the final version of adoption, the shift to outcomes from an input-oriented, abstract, property ownership regime is a common thread to these drafts, particularly the most recent. \(^{25}\) From the changed lexicon to the redistribution of responsibilities, the changes have the potential to lead to dramatic results.

At the time of printing, the latest iteration was developed in July of 2011. This current draft has been recommended to the ABA Council with possible adoption in the near future. The Standard as of July 2011 stated:

**Standard 302. LEARNING OUTCOMES**

(a) A law school shall identify, define, and disseminate each of the learning outcomes it seeks for its graduating students and for its program of legal education.

(b) The learning outcomes shall include competency as an entry-level practitioner in the following areas:

(1) knowledge and understanding of substantive law, legal theory and procedure;

(2) the professional skills of:

(i) legal analysis and reasoning, critical thinking, legal research, problem solving, written and oral communication in a legal context; and

(ii) the exercise of professional judgment consistent with the values of the legal profession and professional duties to society, including recognizing and resolving ethical and other professional dilemmas.

(3) a depth in and breadth of other professional skills sufficient for effective, responsible and ethical participation in the legal profession;

(4) knowledge, understanding and appreciation of the following values:

(i) ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice;

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25. The latest draft for consideration was discussed on July 9–10, 2011. See id. (listed under the “Meeting Date: July 9–10, 2011” heading). This page also has the meeting notes from the committee meetings dating back to October 2009. Id.
(ii) the legal profession’s values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law; and

(iii) responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them.

(5) any other learning outcomes the school identifies as necessary or important to meet the needs of its students and to accomplish the school’s mission and goals. 26

Interpretations offer further clarification of the meaning of this standard. For this reason, interpretations were proposed as well. 27

26. ABA STANDARDS JULY 2011 DRAFT, supra note 7, at 1–2.
27. The following “Interpretations” were proposed for Standard 302:
   Interpretation 302-1
   Training with respect to individual skills can be delivered in a variety of ways and the Standard does not require individual classes with respect to individual professional skills.
   Interpretation 302-2
   For the purposes of Standard 302(b)(2)(iii), a law school shall determine in which other professional skills its graduating students shall have competency, in a way that fulfills the mission of and uses effectively the strengths and resources available to the law school. Interviewing, counseling, negotiation, fact development and analysis, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation are among the professional skills that could fulfill Standard 302(b)(2)(iii).
   Interpretation 302-3
   A law school may determine tracks for students, such that graduates from different tracks have proficiency in differing bundles of professional skills.
   Interpretation 302-4
   The level of competency required is the level of competency that an entry level practitioner must have for effective, ethical and responsible participation in the legal profession. The level of competency of an entry-level practitioner may take into account the particular practice settings for which the law school prepares its students.

Id. at 2.
B. The Ownership Proposition of Legal Education Courses

1. Tradition

It is no measure of health to be well adjusted to a profoundly sick society.  

Often, the lexicon and practice of teaching a law school course aligns with a perspective of private property “ownership.” This could not be more obvious than when curriculum reform discussions occur, and some professors react from a position of course ownership, letting their lexicon telegraph the ownership of their courses (e.g., “For my Constitutional Law course, I believe . . . .”). Even newer professors, upon teaching a course within the traditional construct of legal education, soon realize there is considerable freedom to modify and possess the mechanics, pillars, and delivery of the course within the loose confines of the subject matter. Certain characteristics of the traditional delivery of legal education supported an especially broad rights analogue, offering a construction of teaching a course as a property interest.

First, pursuant to tradition, the first year of school is divided based on substantive law subjects, with Torts, Contracts, Property, Criminal Law, and Civil Procedure accorded course status. This idea of dividing up the program into separate course “buckets”—all essentially freestanding, although accompanied by an assumption of similar objectives or at least similar alignments—required no coordination or communication between different subjects or even different sections of the same subject matter. Thus, the generally distinctive subject matter is also accompanied by separate methodologies, assessments, and emphases as well.

Teachers, with little if any institutional directives or oversight related to outcomes, essentially control the particulars of the course design. That means teachers can and often do operate separately from other professors teaching the same course, the same group of students, or students in the same semester of law school. The teachers decide what to include in the syllabus, what to assess, what to inform the students about what is being assessed,


29. In a similar manner, a student who sits in the same seat in course after course also might develop an equivalent property interest.
how to assess, and then, whether the teachers have been successful by virtue of one event after the course has concluded—a final examination. Generally, it remains unclear what exactly the student learned in the course and whether the student learned because of a teacher or despite the teacher.

Significantly, the traditional conception is input-oriented, judged not so much by what students can do as a result of a course, but by what the professor decides, especially in terms of the scope of topics covered, the depth of coverage, and the nature of the coverage. These decisions are controlled almost exclusively by the professor, who can be seen as wielding “possession” over them, much like a property owner’s bundle of rights include exclusion, possession, and use.

The lack of outside outcomes control or influence is apparent from the way assessment is utilized in traditional educational formats. Traditional legal education does not collectively require specific measurable objectives in advance nor does it require measurement of those objectives, unless the broadly claimed abstract goal of “thinking like a lawyer” suffices. This idea is at once a refuge and unsettling because of the lack of concrete meaning of the objective and how it is exactly achieved in a course. Teachers can and do apply the idea of critical thinking; it is adapted by professors to their courses and their assessments. While students might be looking for a template of how to succeed, or at least guidance, it is often left up to the individual student to discover what the professor seeks or values. This is particularly true in the first year of law school, when cumulative experience has not yet become a guide for continuing students. While cognitive legal analysis is indeed valid and measurable, its use as an outcome and its varied implementation can be so diverse as to make it a false neutral—something that does not provide adequate specificity and notice about what exactly will be required to succeed in a law school course or as a lawyer.

Professors are not required—or often encouraged—to disclose specific objectives, and more importantly, how exactly to meet those objectives, so that students might prepare for an exam not knowing its format, general content, or grading scheme. Importantly, the ownership, conceptualization, and the emphasis

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30. It often refers to the process of problem solving used in legal disputes.
on teaching and coverage—not learning and outcomes—allows the omission of diagnostic and formative assessment. Moreover, the summative assessment used can be separated from the course in almost a disembodied way, without any requirements of testing what is taught in the way it was taught. This notion, if no other, emphasizes the property—and proprietary—conceptualization of the course.

Other than the bar exam, there is no standardized testing of law students during the legal education process, which means there is no real collective assessment of how students are performing during a course, or even on the final examinations as compared to students in other sections, years, or even other schools. Without this consistency and measurement opportunity, there is no real common thread about how the process of education should be conducted, and no agreement on what outcomes should be present as a result of any one course. Most core courses forsake diagnostic and formative assessment events for a single final examination. Exceptions obviously exist, such as seminar courses requiring papers, and skills courses such as pre-trial practice and clinical courses, where the focus is on application of skills to real world issues. This final exam culture often is amended by individual professors, but is the widely accepted norm as well as the minimum.

The abstraction of outcomes from a course, and whether it has been successful, is often seen in the disconnect between a teacher’s student evaluations and the quantity and quality of learning that has occurred in the course, particularly whether the learning will benefit the student in law practice, whether the course will further the student’s intellectual curiosity, and whether it will assist in the attainment of excellence in future law-related endeavors, from clerking to the bar exam.

2. Property

Property ownership is often described as according the owner a bundle of legal rights, including exclusion, possession, use, and transfer of that property. The legal nature of these property rights enables them to be enforced by a court of law. Exclusion provides the authority to prevent others from using the property and creates a potential shield that can be viewed as a layer of privacy. Possession allows the owner to control, change, and modify the property, within the general limits of criminal and civil law. Use allows the owner a more temporary and limited enjoyment of the
property than possession.

The power of nondisclosure, from not explaining assessment criteria to disclosing what is important in a course, also furthers the property conceptualization, equivalent to the right to exclude. Many professors do not know what their colleagues are doing in their courses—unless required to sit in to review. Institutions also have no understanding on a class-by-class basis of what occurs.

III. HOW LEARNING OUTCOMES SHIFT THE OWNERSHIP PROPOSITION OF LAW SCHOOL COURSES

The proposed standard on learning outcomes shifts the ownership conceptualization of law school courses from the teaching to the learning that occurs. Outcomes serve to loosen the grip of the teacher on course objectives, emphases, and, especially, evaluation. This is also true for what is disclosed to others institutionally as a result of the new requirements. While some might argue that outcomes interfere with the free delivery of a course and chill academic freedom, as more fully parsed in the next section, this contention is painted with overly broad brushstrokes.

A. Exclusion and Nondisclosure Versus Visibility and Disclosure

While ownership connotes the ability to exclude, coupled with a measure of nondisclosure to others at the owner’s discretion, the outcomes standard asks professors to articulate and then disclose, to both students and the school, what their specific objectives are in a course. It is not only a statement of objectives, however, that must be formulated, but also a statement about what students will be able to do as a result of a course. The diminishment of exclusion and disclosure serve to create greater visibility of the learning enterprise. Georgetown University Assistant Provost Professor Randy Bass, for example, advances a similar idea about learning in his Visible Knowledge Project.31 This idea is that learning should be visible to all—not simply an unseen thinking process. This notion has been considered in different forms by some law professors as well, particularly involving how students are

engaging with material or evaluating problems.\textsuperscript{32}

The shift toward visibility illuminates possible relationships of cause and effect—is it really the professor who is causing results from class; or are students succeeding despite class; or are the professor’s exhortations in effect a neutral influence? From this perspective, the outcomes standard is designed to make visible what the cause and effect of learning are in particular courses, and in the process limits a professor’s right to nondisclosure of goals and learning results.\textsuperscript{33}

B. Sole Versus Joint Possession

Another possible redirection involves the notion of sole possession. In a traditional course the learning process is linear, from individual professor to individual learner, with collaborative consultations optional. If learning outcomes are now the target, students have more of a shared responsibility in reaching those outcomes—particularly with the transparency of articulated and specific results—and the institution also must collaborate on whether the overall mission outcomes are being reached. If students are making progress toward those outcomes, they can now be tracked better in advance through formative assessment and remediation can occur prospectively if such progress is not being made. Unlike the current system where students are left without devices to monitor progress other than their own free-flowing calculus, the professors and schools can draw up rubrics describing different levels of advancement during a course—not just at the time of the final examination.

C. Free Use Versus Guided Use

Another implication will result from the property right of use. If a professor is merely “using” a course, there might be more pressure institutionally to align with other sections of a course or later courses that rely on the prior course as a prerequisite. There are numerous topics professors might leave out or minimize,

\textsuperscript{32} See, e.g., Leah M. Christensen, Show Me, Don’t Tell Me! Teaching Case Analysis by “Thinking Aloud,” 15 PERSP.: TEACHING LEGAL REASONING & WRITING 142 (2007) (explaining the teaching technique of “thinking aloud” for legal writing professors).

\textsuperscript{33} In essence, the schools now can have more control over what they are getting from professors for their money.
hoping they are covered in other courses, such as nuisance and takings law in Property, due process in Civil Procedure, the Confrontation Clause in Evidence, the death penalty in Criminal Law, and so on. Instead of coverage of substantive topics at the general discretion of the professor, outcomes will help guide and structure a professor’s use of the course, if only to align with other sections of the course or the overall responsibility of the institution to the legal profession.

D. Transfer of Knowledge

The transfer of property is a key element of ownership rights, and is an equally important product of learning. As has been studied with greater frequency, it is not simply the knowledge gained from a law course that counts, but whether it can be deftly and efficiently transferred by students to different situations that really matter.

In law school, the idea of student non-ownership reveals the converse—students generally have no right to transferable skills and knowledge as the result of a course. There are no identifiable targets that students can reasonably expect to walk away with from a course—either in the short term, or of greater significance, in the long-term. With the adoption of learning outcomes, students are effectively accorded rights to some kind of results—provided of course students do all of the requisites through performance markers and good faith efforts.

With student course interests come responsibilities, and the imposition of learning outcomes will serve to promote engaged learning and knowledge transfer. This means students will be expected to be more active collaborators. To transfer knowledge

34. See, e.g., Sarah Leberman et al., The Transfer of Learning: Participants’ Perspectives of Adult Education and Training 1 (2006).


36. “Students become engaged in learning when they actively participate in their own education.” Gerald F. Hess, Heads and Hearts: The Teaching and Learning
in the long-term, and not just for a final examination, engaged learning has been shown to be a vehicle for improved results.\textsuperscript{37} Challenging students with meaningful and complex tasks can augment the output desired and transfer ownership interests in a course.\textsuperscript{38}

IV. COMPLIANCE STRATEGIES AND THE POLITICS OF COLLABORATION

A. Academic Freedom and Noncompliance

The proprietary interest of teachers in academic freedom is deeply rooted, especially in legal education, and protected by all of the major governing bodies.\textsuperscript{39} There are different definitions, although the definitions generally provide that the concept accords both rights and responsibilities on teachers and researchers.\textsuperscript{40} The ABA, in a statement that tracks the 1940 text of the American Association of University Professors (AAUP), describes academic freedom as providing teachers with a variety of protections, including:

\begin{quote}
\end{quote}


39. Robert R. Kuehn & Peter A. Joy, \textit{Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility}, 59 J. LEGAL EDUC. 97, 103 (2009) (“The AAUP, AALS, and ABA each promote academic freedom principles in law school teaching.”). As the authors also point out, though, certain aspects of legal education tend to be academic freedom lightning rods, such as clinical education. \textit{See id.} at 104.

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

3. College or university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as a citizen, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence, they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.41

While these standards possess a degree of ambiguity, many teachers understand academic freedom as the ability of a teacher to express ideas, particularly within classrooms42 and scholarship contexts, and explore a subject without institutional limitation or interference. The rationale for this assurance involves modeling for students the freedom associated with critical thinking.43

The imposition of learning outcomes does not impact either the spirit or letter of academic freedom, no matter how broadly it is painted. Moreover, given that course descriptions and the outcomes of those courses are shaped by faculties in committees

41. ABA STANDARDS, supra note 17, at 167 (footnote omitted).
42. Kuehn & Joy, supra note 39, at 98 (stating the classroom is an expansive concept, not necessarily bounded by four walls). “Teaching through experiential learning methods in the sciences, medicine, law, and other fields defines the ‘classroom’ broadly to include wherever the teaching and learning take place, which may be in a field setting, hospital, law clinic office, or courtroom.” Id.
43. According to several commentators, “[S]tudents cannot learn how to exercise a mature independence of mind unless their instructors are themselves free to model independent thought in the classroom.” MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD 81 (2009).
and as a whole and by a school’s administration, teachers cede some control over courses to faculties and institutions from a functional perspective as well. This shaping is generally desired to pursue a school’s mission, which also factors into the course selection calculus.

Thus, academic freedom issues are not really implicated by a collective discussion and agreement about outcomes. Instead, the subject of academic freedom will more likely be used as an obstacle or shield to resist change. Significantly, teachers do not own the outcomes of their courses and cannot use the talisman of academic freedom to evade such structures. Under a system of directed outcomes, academic freedom still exists—particularly in the way the courses are presented, from materials chosen, to teaching methodologies, to assessment formats. In essence, institutional goals can be legitimately implemented on a course-by-course basis for the overall advancement of the law school.

While academic freedom is a nonissue, it still might be used to validate noncompliance. Although noncompliance is not exactly a compliance stratagem, it is a foreseeable response, even if ABA Standard 302 is enacted in its current form. Established faculty members will not readily deviate from existing behaviors if the incentive is insufficient. Directives from administrators about what goes on in a legal education classroom, especially its content, might appear to veer close to pedagogy choices and concerns, appearing to impact academic freedom concerns.

As stated in many venues in the past several years, the economic downturn and uncertainty have led to increased scrutiny about the legal education “product” and what graduates can do from a skills and performance perspective. This conversation

44. This is not to say there are no serious disputes between faculty members and universities around the borderline of academic freedom. Some of these disputes, such as between public employees and the government, are decided on constitutional grounds. See, e.g., Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding the First Amendment only protects a public employee’s speech when the employee speaks as a citizen).

evaluates the responsibility of law schools, coinciding with the discussion of outcomes. This discussion makes clear that outcomes—and the collective, institutional requirements outcomes impose—are not an infringement on academic freedom. Rather, it is about the nature of the professional school and what it seeks to achieve.

B. Compliance Strategies if Outcomes Matter

If learning outcomes truly matter, and are incorporated into the fabric of an institution, then the compliance strategies will matter as well. The adoption of compliance strategies would have an impact on a collaborative or associative orientation at a law school. The development of strategies would impact the notion of professors operating independently from each other, almost like independent contractors, with unconnected courses and with little oversight by the larger law school polity.46

There are many different types of compliance strategies for an outcomes mandate. Four specific, task-oriented, and measurable strategies include intentionality, labeling, inspection and assessment, and modification. These will be discussed further below.

1. Intentionality

Intentionality means engaging in a more purposeful inquiry about what is taught in law school, what is learned in law school, and what is learned by students as direct consequences of the program. Law professors have certainly inquired about these issues before, but such inquiry has not been embedded as part of institutional assessment and review.47 Currently, the assembly-line nature of legal education occurs without meaningful links between course inputs and outputs, how knowledge transfers from one course to

("[A] generation of J.D.’s face the grimmest job market in decades").

46. While the student evaluation of teaching is one form of oversight, it is inherently flawed if it is not based on specific objectives created in advance of the course that can be measured—by the students—accurately. That just does not happen through the evaluation generally given to courses and teachers.

47. See, e.g., Gregory S. Munro, How Do We Know if We Are Achieving Our Goals?: Strategies for Assessing the Outcome of Curricular Innovation, 1 J. Ass’n Legal Writing Directors 229, 229 (2002) (discussing how a law school can use assessment to measure “effectiveness in meeting its mission and in achieving its student and institutional outcomes”).
another, or how collaboration—between teachers, between students, or between teachers and students—could be a useful pedagogical tool.

Effective intentionality has several components. It includes identification, explanation, and dissemination. Identification means to engage in the process of defining what outcomes are and how they can be reached and then measured. This process is a backwards review of a course, showing the ends first, not the inputs. Explanation is the process of defining what has been identified with clarity, transparency, and examples. This can occur through rubrics, setting forth the characteristics of different levels of competency. Rubrics provide not only notice to students about outcomes but also useful information about what successful performance looks like.

2. Labeling

Labeling involves the purposeful identification and dissemination of information about the outcomes desired within a course, a semester, or over a law school career. Traditionally, professors used coverage of material and the goal of legal reasoning—or “thinking like a lawyer”—as the calculus for what was being taught in a course. Labeling is designed to enhance notice and measurement. Not only will students know what to expect in courses, but they also can learn how the outcomes in law school, law practice, and the bar exam are all somewhat different, but overlap.

With labeling, many more specific labels about the contents of the product should occur—much like food labels on items in the supermarket. Further, greater labeling should enhance efforts to inspect whether the “bottom line” is being satisfied. Notice can be achieved by using the syllabus, the course catalog, the school website, and other locales to describe what kind of methodology, engaged learning experiences, and other techniques are occurring.

The labeling can occur in many different contexts. On a school’s website, courses can be labeled with identifying outcomes. The admissions office can label what outcomes students will reap upon completing each year of law school. Individual students will be better able to assess how to approach course selection when options occur, particularly if the school in relation to each other
Perhaps most importantly, professors can label the outcomes that a course is designed to achieve—and which will be inspected and tested.

The consciousness brought to labeling will raise the profile of a school’s mission and what it prioritizes and values. The occurrence of a variety of teaching methods and techniques has been in place for years, but it simply has not been catalogued in a methodical way as part of a school’s basic structure.

3. Inspection and Assessment

“What we measure affects what we do; and if our measurements are flawed, decisions may be distorted.”

“[P]rofessional schools cannot directly teach students to be competent in . . . all situations . . . [but should instead] form practitioners who are aware of what it takes to become competent in their chosen domain and to equip them with the reflective capacity . . . to pursue genuine expertise.”

Inspection is designed to deal with important questions: How do legal educators really know if outcomes are being met? Is good learning a direct result of good teaching? Does the nature of what students learn in class matter to how effective the students are as lawyers? Inspection also creates greater accountability of teachers and students. When learning is expressly a subject for serious consideration, the idea of meta-cognition, how students learn,
and self-regulated learning, where students learn how to effectively direct their attention and energy, gain currency as well. 54

The mere inspection of whether outcomes are occurring could spur action—from greater clarity about how to achieve goals to what is being measured. While students might ask, “Will this subject be on the exam?” inspection helps sort what types of issues covered in class will be tested—from knowledge, to skills, to values. As in the area of labeling, inspection could promote the creation of rubrics to provide clarity with respect to what performance is desired, and to allow students to improve their learning. The use of rubrics can improve teaching as well as learning. 55

While inspection can be conflated with assessment, 56 the two are not the same. Inspection for the purposes of this article means observation and scrutiny. Assessment generally is considered to have an evaluative component.

Assessments can occur on several levels. While it is most likely to occur within courses, assessments can occur on an institutional level to determine if schools are meeting their targets by year and comprehensively, from start to finish. Institutional assessments generally occur within the context of a school’s curricular review or reform. Some reforms are addressed to law schools collectively. 57

Additional and effective assessments are probably one of the most important potential byproducts of the use of learning outcomes. While professors traditionally are expected to create their own assessments, it is not a central part of the job function and has no bearing on a professor’s evaluation, promotion, or advancement—despite the major implications for students.

Professors are not given instruction on basic assessment principles. Assessment can be a complicated and nuanced area, and greater focusing of attention on the area cannot do anything but improve the quality of it in legal education.

Many law professors might shy away from assessment because of the assumption that improved quality or quantity of assessment will necessarily occupy more time. Yet assessments need not be graded to have value and can take many forms. Multiple quizzes, for example, will provide greater accuracy in evaluating student performance, and even oral examinations based on a written instrument can be given in smaller classes. From a broader perspective, there can be a more realistic assessment of whether schools are succeeding in their overall missions.

4. Modification

The whole training of the lawyer leads to the development of judgment.

Outcomes requirements can result in real and substantial modification of the existing ethos of legal education. Modification can occur not only within specific courses, but along the contours of institutional structures as well. If enough redesign occurs, it will usher in a new period of legal education.

Renewed focus on outcomes can lead to the revision of fundamental beliefs about how law schools are creating student preparedness. In particular, the idea of preparedness is not simply about creating “practice-ready” graduates, which will be illusory for students without sufficient experience, but rather graduates who


60. As Justice Louis Brandeis added in his 1905 speech about the opportunity available for lawyers:

His early training—his work with books in the study of legal rules—
have the foundation necessary to reach excellence in law practice as well as the understanding of what it will take to reach that level of excellence as a lawyer in their chosen area.

Modifications can take many forms. These include the collaboration of professors teaching in the same subject areas or with the same section, the labeling and creation of experiential education modules or wrap-around courses, or the inclusion of a wide variety of assessment mechanisms. Alverno College of Wisconsin, for example, has used assessment as a backbone of its education, creating comprehensive assessment portfolios for each student in the school. Other schools utilize numerous diagnostic and formative assessment tools. Some specific potential changes follow.

a. Greater Emphasis on Learning, Not Teaching

With identifiable outcomes, specific tasks can be crafted to create thresholds of improvement and reorganize the structure of law school courses around completing tasks—and learning from them—and not teaching. This idea of learner-centered teaching is another way of reflecting student engagement. By its very nature, focusing on learning facilitates interactive instructional models.

Engaged learning has been shown to improve the quality of teaches him patient research and develops both the memory and the reasoning faculties. He becomes practised [sic] in logic; and yet the use of the reasoning faculties in the study of law is very different from their use, say, in metaphysics. The lawyer’s processes of reasoning, his logical conclusions, are being constantly tested by experience.

Id. 61. See, e.g., SELF ASSESSMENT AT ALVERNO COLLEGE (Georgine Loacker ed., 2000) (examining self-assessment efforts used in various areas of study at the college).

62. Learning outcomes thus comport with the greater use and integration of identifiable—and to a large extent, measurable—skills in legal education.

63. See generally MARYELLEN WEIMER, LEARNER-CENTERED TEACHING: FIVE KEY CHANGES TO PRACTICE (2002) (describing how teachers can create and implement a learner-centered instructional practice).

64. “The most powerful models of instruction are interactive... Students teach others interactively and interact generatively with their teacher and peers. This allows for co-construction of knowledge, which promotes engaged learning that is problem-, project-, and goal-based.” JONES ET AL., supra note 37, at 62; see also Sharon Gaatz & Stephen Meehan, Investigating Engaged Learning and Best Use of Technology, LINC OnLine, http://ed.fnal.gov/lincon/el_invest.shtml (last updated July 19, 2006) (detailing an engaged learning lesson).
student learning. Engagement can occur in many contexts, but it generally involves active over passive learning, the use of identifiable tasks, and shared student responsibility for reaching the outcomes. The use of engaged education to direct outcomes or results avoids passivity in students. It also changes the relevant framework from “winning” at grades on a final exam as a proxy for learning to consistent, multiple performances—a system better aligned with law practice, where attorneys are asked to perform for their clients almost every single day.

The focus on learning, improvement, and regular performance during the semester also allows for increased student self-regulation of strengths, weaknesses, and gaps in learning. Instead of learning whether the preparation succeeded in a course only after a final exam, this conceptualization promotes ongoing visible learning and improvement techniques.

65. Jones et al., supra note 37; see also Beau Fly Jones et al., Council for Educ. Dev. & Research, Plugging In: Choosing and Using Educational Technology (1995) (defining indicators of engaged learning). Note that as of 2005, the related group, NCREL (North Central Regional Educational Laboratory) was no longer in operation. The benefits of engaged learning provided a significant rationale for conducting a survey of law students (as well as a separate one for university students) involving how much they are engaged at their institutions of higher learning. The Law Student Survey of Student Engagement (LSSSE) has 164 law school participants and is described on the Survey website as based on the following premise:

LSSSE asks students about their law school experience—how they spend their time, what they feel they’ve gained from their classes, their assessment of the quality of interactions with faculty and friends, and about important activities. Extensive research indicates that good educational practices in the classroom and interactions with others, such as faculty and peers, are directly related to high-quality student outcomes. LSSSE focuses on these practices by assessing student engagement in key areas.


66. “What does engaged learning look like? Successful, engaged learners are responsible for their own learning, . . . [T]heir joy of learning leads to a lifelong passion for solving problems, understanding, and taking the next step in their thinking.” Jones et al., supra note 37, at 61 (emphasis omitted). “In order to have engaged learning, tasks need to be challenging, authentic, and multidisciplinary. Such tasks are typically complex and involve sustained amounts of time.” Id.

67. The term engaged education is not intended to mean there is a discrete threshold that exists to clearly mark engagement. Instead, it is a more accurate understanding to view learning on a continuum, with rubrics reflecting differing levels of engagement.

68. See, for example, the work of a vice-provost of Georgetown University, Randy Bass. Going Public, Visible Knowledge Project, https://blogs.commons.georgetown.edu/vkp (last visited Dec. 28, 2011) (a national research project on
b. Modules Within Existing Courses

A module, or self-contained specialized unit, can be offered within a course. A module can be experiential in nature and task or performance oriented.\(^69\) It can be about a subject, such as easements—asking students to find them in the real world, for example—or about how students problem-solve in an exercise of metacognition, asking students to evaluate their own strengths, weaknesses, and gaps in knowledge.\(^70\) Within a Criminal Law course, for example, it could include a trip to the local court to report on a case in progress, a fingerprint demonstration after a review of pertinent case law, or the creation of an indictment after watching a role play of a mock crime. In Evidence, it could involve a partial or even full mock trial, with students required to play a minor role. This would be importing a form of applied trial advocacy into the Evidence course.

c. Transition Classes

A transition class would address gaps in the legal education process by assisting students with advances within law school and from school to practice. The view that students would receive transitional aid from practitioners post-graduation is simply no longer an accurate reflection of the new globalized, increasingly competitive practice of law. For the large majority of students, the most important transition is from law school to practice, and courses such as law practice management would help. It could involve more than that, however, and expand to classes in important skills, such as negotiation, mediation, interviewing, counseling, and pre-trial practice, to name a few. In addition, the transition through law school, and from college analysis to law learning in the humanities).

\(^69\) Such modules are consistent with calls over the past two decades to broaden the objectives and focus of legal education to include a wider variety of skills than just critical thinking. See, e.g., ABA Section of Legal Educ. & Admissions to the Bar, Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap 138–40 (1992) (outlining lawyering skills and commonly referred to as the MacCrate Report); see also Stuckey and Others, supra note 21, at 7–9 (outlining some key recommendations for law school education); Sullivan et al., supra note 22, at 12–14 (discussing a new legal education framework).

school, is difficult for some students. Special classes can be adopted to help students become better self-regulated learners and advance on an optimal basis—through the bar exam and into practice.

d. Wraparound Classes

There is no reason why classes must stick to the semester or term format. Some courses can be accelerated, some self-paced, and some wrapping around several semesters. For example, a core upper-level course can also assign a significant paper pursuing a topic within that course in-depth, to be completed within three weeks of the beginning of the next semester. This provides students the opportunity to contemplate and reflect on what they learned and continue to learn.

5. Varying Delivery Formats

The call for varying teaching methodologies has been a clarion call for many, given that students learn differently. The use of different methodologies can occur more intentionally than in the traditional framework, which lacks collaborative structures.

a. Scale-up Studio Teaching

Scaling-up involves large classes being taught collaboratively by several teachers. Students sit around tables and the professors rotate around the room, with students working on specific tasks. This model accommodates large classes, while providing non-linear approaches to learning—using collaboration between students and small-group attention to promote the learning curve.

b. Distance Education

Distance education offers mobility and elasticity to the learning process, even within traditional class structures. By varying delivery formats, students would receive varied learning stimuli, some better aligned with advancing technology as well as efforts to create engaged learning. Students could be tasked with posting on threaded discussions, creating a lasting record of performance. Students also could be engaged in a synchronous online class, much like a real law school class, only with remote access.
c. **Nonlinear Delivery**

Nonlinear delivery means any kind of learning without a direct flow from teachers to students, to notes, to exams. Nonlinear delivery increases the bandwidth of teaching formats and could include: collaborative projects between students in or outside classes; note breaks during class, in which students check with each other to determine their own accuracy; and self-regulation, in which students are asked to assess their own strengths, weaknesses, and gaps in their knowledge. Students also could be tasked with creating hypos from actual cases and posting them for other students to observe and use, and students engaging in interviews or other fieldwork could report on it, either in class or on a course web platform.

V. **Conclusion**

The articulation of learning outcomes is a useful first step in shifting the ownership of conceptualization of law school courses away from individual professors and toward a collective of faculties and institutions. This change in ownership comes with a price, creating additional institutional responsibility. Yet, the shift provides numerous benefits. Imposing learning outcomes can lead to a collaborative culture of disclosure, coordination, and communication about what the specific objectives are in legal education, and how to meet them. The shared property conception can improve both the efficacy and ethos of American legal education, orienting it to meet the numerous challenges of a challenging lawyering marketplace. Yet, without oversight, implementation strategies, such as intentionality, labeling, inspection and modification, and enforcement, a new rule including outcomes serves only as a harbinger for potential change.