

## BE CURIOUS NOT JUDGMENTAL: NEURODIVERSITY IN LEGAL EDUCATION

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### *Abstract*

*Our brains are wired such that we make quick, automatic judgments about other people because we do not have the time or energy to understand everything we see or encounter. These quick character judgments are based on what we understand, regardless of how limited that is. In fact, we do not even recognize how limited our understanding is. Our character attribution judgments tend to stick even when inaccurate. Although quick judgments are a natural process, it is important to acknowledge our tendency to do this and recognize when we should instead be curious and ask questions. This article examines the impact of attribution judgments in legal education, specifically when it comes to neurodivergent individuals, accessible learning environments, and how we define success. It questions the traditions that we continue to uphold as necessary legal skills and confronts the reality of how success is often related to access. It then explores ways that we can use curiosity to maintain the integrity and rigor of legal education and ‘thinking like a lawyer,’ such that everyone has an opportunity to not only rise to the challenges but to thrive.*

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## INTRODUCTION

“Be curious, not judgmental.”<sup>1</sup> The idea of being curious and not judgmental seems to be the embodiment of law school. The learning environment is rigorous, students are challenged to question what they know and grapple with complex issues. The foundation of many law school classes, the Socratic Method, requires curiosity as part of asking and answering probing questions that explore the limits of legal principles. Furthermore, law school is unique as it requires forward thinking and resolving issues we have not yet encountered. Law school personifies being curious and not judgmental. Or does it?

This article takes the position that the curiosity associated with legal education is limited to those who are neurotypical. For students who are neurodivergent, law school is a place of judgment not curiosity. The number of neurodiverse law students is increasing yet are not sufficiently supported in law school.<sup>2</sup> Why should we care about this? Because law schools should seek to create an inclusive environment for all students and authentically engage with all of our students. Approaching the issue with curiosity, rather than judgment, brings us to easy solutions.

This paper will seek to show how the current structures of legal education, although fundamentally sound have become overly rigid. Instead of providing students with intellectual foundations of legal doctrine that prepare them for the challenges of practicing law, the existing status quo stifles those goals. By limiting our practices to what we currently know, what we are comfortable doing, we limit our potential for excellence. In Part I, I introduce what neurodiversity means especially for law students, the problems they face, how law schools fall short, and why law schools should care about this. In Part II, I explain the legal mandates designed to remove barriers and the roadblocks legal education and law schools erect. In Part III, I lay out concrete solutions and strategies for engaging our curiosity rather than our judgment.

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<sup>1</sup> This quote often misattributed by Walt Whitman has recently been popularized by Ted Lasso, the title character in the Apple TV show, and everyone’s favorite football coach.

<sup>2</sup> Haley Moss, *Great Minds Think Differently*, 54 (2021).

## I. WHAT IS NEURODIVERSITY AND WHY SHOULD WE CARE?

A. *Neurodiversity and what does it look like in law students*

Neurodivergent, coined by Australian sociologist Judy Singer in the late 1990s, is a nonmedical term that describes individuals with differences in brain function and behavioral traits compared to someone who is neurotypical.<sup>3</sup> Examples of individuals who often identify as neurodivergent include those with Attention-Deficit Hyperactivity Disorder (ADHD), Autism Spectrum Disorder (ASD), Obsessive Compulsive Disorder, and Tourette's Syndrome.<sup>4</sup> Neurodivergent recognizes that everyone's brain develops differently and like fingerprints, no two brains are exactly the same.<sup>5</sup> Singer further developed this concept of neurodiversity as a perspective by which neurological differences are considered natural human variations.<sup>6</sup>

Being neurodivergent is not a problem, it is simply operating differently. Someone who is neurodivergent has different strengths and challenges from someone who is neurotypical. A neurodivergent person is not less capable than their neurotypical peer but might struggle in school or the workplace because the systems, processes and environments are not designed with them in mind.<sup>7</sup> Based on the premise that we want a legal profession that is best equipped to solve both present and future problems, this article seeks to broaden awareness about our students and our learning environments, by asking ourselves how we can leverage differences rather than stifle them.

There is an increased awareness about neurodiversity but without a supportive culture, the focus continues to be on the deficit<sup>8</sup>. It is important to have at least a foundational context for understanding the problems neurodiverse students encounter. As such I will give a brief explanation of two conditions to serve as illustrative examples: Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder.

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<sup>3</sup>Neurodivergent: What It Is, Symptoms & Types; Cleveland Clinic Health Library <https://my.clevelandclinic.org/health/symptoms/23154-neurodivergent> (last visited Dec. 13, 2023).

<sup>4</sup>*Id.*

<sup>5</sup>JUDY SINGER, *NEURODIVERSITY: THE BIRTH OF AN IDEA* (2017).

<sup>6</sup>*Id.*

<sup>7</sup>Nicole Baumer & Julia Frueh, *What is Neurodiversity*, Harvard Health Publishing, Harvard Medical School Blog, Nov. 23, 2021: <https://www.health.harvard.edu/blog/what-is-neurodiversity-202111232645>.

<sup>8</sup>Scott M. Robertson & Ari D. Ne'eman, *Autistic Acceptance, The College Campus, and Technology: Growth of Neurodiversity in Society and Academia*, 28 *DISABILITY STUDIES QUARTERLY* (2008) Here is the link: <https://dsq-sds.org/index.php/dsq/article/view/146/146>

## 1. Autism Spectrum Disorder

According to the National Institute of Mental Health, ASD is “a neurological and developmental disorder that affects how people interact with others, communicate, learn, and behave.”<sup>9</sup> It is called Autism Spectrum Disorder because of the wide variety of symptoms and depth which individuals experience those symptoms.<sup>10</sup> Common ASD attributes include heightened awareness of environmental conditions, importance of routine, and a tendency to take things literally.<sup>11</sup> With hypersensitivity, the person is more likely to experience sensory overload which can trigger physical, mental, and behavioral responses.<sup>12</sup> For example, the type of lighting in most university classrooms makes a noise that a neurotypical person either does not hear or automatically ignores, is not only distracting to a person with ASD but often can be painful. Furthermore, during a conversation or class discussion, a neurotypical person can usually pick up on unspoken “understandings” and fill in gaps with context clues. A person with ASD has to work harder to attach meaning beyond what is said and needs lots of definitions. However, because most of their classmates and peers are neurotypical, the person with ASD is not likely to admit they don’t understand what other people are saying. Instead they engage in masking. Masking is when someone mimics neurotypical behaviors such as imitating or mimicking gestures and facial expressions, pretending to understand non straightforward comments (jokes, sarcasm), pushing through sensory discomfort, holding back from stimming.<sup>13</sup> This leads to what scientists call “internal disjunction,” not so much because of the act of

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<sup>9</sup> National Institute of Mental Health: <https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd> (accessed Dec. 29, 2023).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Cleveland Clinic, Health Essentials: How to Manage (and Even Overcome) Sensory Overload, July 20, 2023, <https://health.clevelandclinic.org/sensory-overload>

<sup>13</sup> Steven K. Kapp, Roby Steward, Laura Crane, Daisy Elliot, Chirs Elphick, Elixabeth Pellicano and Ginny Russell, *People Should be Allowed to do What They Like': Autistic Adults' Views and Experiences of Stimming*, *Autism*, 23 Sage Journal 1782 (2019), (Explaining what stimming is. Stimming is the natural behavior of self-stimulation and is a coping mechanism that reduces anxiety, adapt to an unfamiliar environment, or address sensory overload. It usually involves repetitive movements or sounds. For a neurotypical person it might look like cracking knuckles, tapping pencil, jiggling foot, twirling hair around finger. For a neurodivergent person is it a bit more involved such as rocking, pacing, repeating words/phrases, bouncing, etc.). Here is the link: <https://journals.sagepub.com/doi/10.1177/1362361319829628>

masking but because it does not reflect the person's true self.<sup>14</sup> If relationships are based on how they present through masking and not who they really are, this diminishes feelings of community and belongingness.<sup>15</sup>

## 2. Attention Deficit Hyperactivity Disorder

According to the National Institute for Mental Health, ADHD is a neurodevelopmental disorder that impacts behavior.<sup>16</sup> Common symptoms include inattentiveness, deficits in executive function, and emotional dysregulation.<sup>17</sup> A person with ADHD is inattentive because, unlike a neurotypical brain that automatically prioritizes and focuses, the ADHD brain pays attention to everything.<sup>18</sup> This is connected to executive function which is the brain's ability to prioritize and manage thoughts, and appreciate long-term consequences of actions.<sup>19</sup> In school, a student with executive dysfunction might struggle with managing large, complex tasks that have long time horizons because it puts maximum demands on their executive function.<sup>20</sup> In the law school context, tasks such as legal writing assignments and exam preparation require extensive planning, breaking things down into steps and proactive time management. This is a challenge, even for the strongest self-directed learner. Lack of guidance often leads to frustration, procrastination, and increases anxiety, which exacerbates emotional dysregulation.<sup>21</sup>

In general terms, dysregulation is an inability to manage emotions

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<sup>14</sup> Danielle Miller, Jon Rees and Amy Pearson; *Masking is Life: Experiences of Masking in Autistic and Nonautistic Adults*, *Autism Adulthood*, 330-338 (2021) Here is the link: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8992921/>

<sup>15</sup> *Id.* at 335.

<sup>16</sup> National Institute of Mental Health (NIMH): <https://www.nimh.nih.gov/health/topics/attention-deficit-hyperactivity-disorder-adhd> (accessed December 22, 2023).

<sup>17</sup> Alessandra D'Agostino, Serena Covanti, Mario Rossi Monti & Vladen Starcevic, *Reconsidering Emotion Dysregulation*. 88 *Psychiatric Quarterly*, 812 (2017) (Emotional dysregulation is also present in many neurodivergent individuals including those with anxiety disorders, eating disorders, and borderline personality disorder.).

<sup>18</sup> NIMH, Brochures and Fact Sheets, *Attention-Deficit/Hyperactivity Disorder in Adults: What you Need to Know*, <https://www.nimh.nih.gov/health/publications/adhd-what-you-need-to-know> (accessed Dec. 29, 2023).

<sup>19</sup> Janice Rodden, *What is Executive Dysfunction? Signs and Symptoms of EFD*, *ADDitude* (2021).

<sup>20</sup> *Id.*

<sup>21</sup> Miller, Reese & Pearson, *supra*, at note 14; see also, Children and Adults with Attention-Deficit/Hyperactivity Disorder (CHADD), <https://chadd.org/for-adults/overview/>

because the prefrontal cortex (which helps make rational decisions) is offline so you are unable to choose appropriate strategies for achieving goals.<sup>22</sup> Examples of emotion dysregulation include, “avoidance, rumination, denial, emotion suppression, aggression, and venting.”<sup>23</sup> There is no question that everyone experiences emotions, including intense ones. The difference is that for someone with emotional dysregulation, \*all\* emotions tend to be intense (think- extreme highs and lows) and it is significantly difficult to return to a “baseline” position. Unlike a neurotypical person, there is no internal mechanism for self-regulation so the neurodiverse person has to learn how to recognize their emotions, learn alternative healthier regulation strategies, and then consciously and consistently activate those strategies.

ASD and ADHD are two examples of neurodivergent conditions that law students have. I will use them throughout this paper to illustrate the challenges neurodivergent law students face beyond that of their neurotypical peers. While ASD and ADHD have distinct attributes and symptoms, what they have in common is that they are different from what society considers typical. As such, when someone is neurodivergent, there is a real fear of being identified as different beyond just being excluded but also because of bias and pre-existing notions about mental illness and disabilities.<sup>24</sup>

### B. Why Should We Care

#### 1. Prevalence of neurodiverse students and importance of diversity

Because we care about the integrity of legal education and the legal profession, we should strive to maintain a rigorous academic environment. In order to best prepare students for the challenges of practicing law, it seems that we should also care about what skills and abilities our students

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<sup>22</sup> Miller, Rees & Pearson, *supra*, note 14, at 808. Specifically, this recent study identified “five overlapping, not mutually exclusive dimensions of emotion dysregulation: decreased emotional awareness, inadequate emotional reactivity, intense experience and expression of emotions, emotional rigidity and cognitive reappraisal difficulty.” An earlier study defines it as, “(a) [lack of] awareness and understanding of emotions; (b) [lack of] acceptance of emotions; (c) the [in]ability to engage in goal-directed behavior, and refrain from impulsive behavior, when experiencing negative emotions; and (d) [unable to] access to emotion regulation strategies perceived as effective.” See also, Kim L. Gratz & Lizabeth Roemer, *Multidimensional Assessment of Emotion Regulation and Dysregulation: Development, Factor Structure, and Initial Validation of the Difficulties in Emotion Regulation Scale*, 26 *Journal of Psychopathology and Behavioral Assessment*, 43 (2004).

<sup>23</sup> *Id.*, at 812.

<sup>24</sup> R. Richard Grinker, *Autism, “Stigma,” Disability: a Shining Historical Terrain*. *CURRENT ANTHROPOLOGY*, 61(S21), S55-S67 2020.

come to law school with. According to recent data from the Centers for Disease Control and Prevention, approximately 15-20% of the population is neurodiverse.<sup>25</sup> The U.S. Department of Education estimates that 20% of undergraduate students and 12% of graduate students have a diagnosis that falls under the category of neurodiverse.<sup>26</sup> These numbers do not include students who are neurodiverse but have not been diagnosed.<sup>27</sup>

Despite the overall increase of individuals with disabilities in higher education, in 2021 only 5.5% of law school graduates reported having a disability.<sup>28</sup> Similar to undergraduate school, the actual percentage is higher but factors like stigma and pushback from instructors tend to prevent students with hidden disabilities from both formally (registering with a school's student disability services office) or informally disclosing.<sup>29</sup> Disability has been stigmatized for decades and a person with a disability is perceived as being inferior or negative.<sup>30</sup> This is especially true for those who identify as neurodivergent.

When it comes to professional positions like externships, summer job, and post-graduation employment, a resume might be impressive but employers are also looking for someone who is a "good fit" with their organization. This can be attributed to our cognitive bias towards people who are like us.<sup>31</sup> When it comes to hiring practices, we tend to justify maintaining the status quo as being "professional," thus making it acceptable to eliminate an applicant that is different- they did not make consistent eye contact, she laughed too loud, they did not immediately recognize sarcastic/dry humor, he did not give a firm handshake. The expectation that everyone "know" immediately serves to perpetuate the status quo.<sup>32</sup> The problem with the status quo is that the legal profession

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<sup>25</sup> Centers for Disease Control and Prevention, [Autism Spectrum Disorder Data and Statistics](#), 2022; [Attention-Deficit/Hyperactivity Disorder \(ADHD\) Data and Statistics](#), 2021.

<sup>26</sup> U.S. Department of Education National Center for Education Statistics, <https://nces.ed.gov/fastfacts/display.asp?id=60> (accessed Dec. 29, 2023).

<sup>27</sup> Solvegi Shmulsky, Ken Gobbo, Andy Donahue & Frank Klucken, *Do Neurodivergent College Students Forge a Disability Identity?*, 34 JOURNAL OF POSTSECONDARY EDUCATION AND DISABILITY, 54 (2021). Some individuals are undiagnosed due to lack of access to medical resources, parental fear of being "labeled," or mild symptoms during childhood are overlooked. See also, Centers for Disease Control and Prevention, *supra* at n. 19.

<sup>28</sup> NAT'L ASS'N FOR L. PLACEMENT, INC., 2021 REPORT ON DIVERSITY IN U.S. LAW FIRMS, 10 (2022). <https://www.nalp.org/uploads/2021NALPReportonDiversity.pdf>

<sup>29</sup> Ella Maiden, *Centering Disability in the Law School Pedagogy: A Way to Include Disabled Law Students*, 52 THE JOURNAL OF LAW & EDUCATION, 207-208 (2023).

<sup>30</sup> Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* Pg. X (2nd ed. 1990).

<sup>31</sup> *Infra*, section II.

<sup>32</sup> Renee Nicole Allen, *Taking Our Space: Women of Color and Antiracism in Legal Academia*,



needs individuals who embody those it represents.<sup>33</sup>

As openly autistic lawyer and advocate Haley Moss says, “We need all types of minds to get all kinds of jobs done.”<sup>34</sup> Haley can effectively advocate for diversity because of her status as a lawyer- people respect her and what she has to say.<sup>35</sup> However, getting to this point was not easy for Haley due, in part to the culture of ableism in both legal education and the legal profession.

In 2020, first phase findings from an ABA sponsored national study on disability in the legal profession showed that the legal profession operates under work expectations which creates barriers for individuals with disabilities.<sup>36</sup> In 2021, the full report on disability in the legal profession revealed that overall, the legal profession is not positioned to make reasonable accommodations, there is a general lack of understanding of how disabilities impact recruitment and retention, and there is reluctance to disclose a disability for fear of discrimination.<sup>37</sup> It is not surprising, then that a large number of individuals with disabilities report having negative experiences related to their disability in the legal workplace.<sup>38</sup>

Given this information, it seems that regardless of whether such biases are unintentional, there is a stigma associated with disability. When faced with fitting in or being excluded, neurodivergent students will do what it

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*Our Collective Work, Our Collective Strength*, RUTGERS LAW REVIEW, 106 (2021); citing PAMELA NEWKIRK, DIVERSITY, INC.: THE FAILED PROMISE OF A BILLION-DOLLAR BUSINESS 97-98 (2019) (ebook); The same is true in law school hiring: “Search committees hire people who look like them and come from similar backgrounds or share professional networks.” See also, Tracey E. George & Albert H. Yoon, *The Labor Market for New Law Professors*, 11 J. EMPIRICAL LEGAL STUD. 1, 1 (2014) (“[L]aw schools appear open to nontraditional candidates in the early phases of the hiring process but when it comes to the ultimate decision—hiring—they focus on candidates who look like current law professors.”).

<sup>33</sup> Maiden *supra* note 24, at 189.

<sup>34</sup> Haley Moss, *A Trailblazing Lawyer Advocates for Accessibility and Inclusion*, July 31, 2020 LSAC article: <https://www.lsac.org/blog/trailblazing-lawyer-advocates-accessibility-and-inclusion>

<sup>35</sup> *Id.*

<sup>36</sup> Peter Blanck, Ynesse Abdul-Malak, Aday M, Fitore Hyseni, Mary Killeen & Fatma Altunkol Wise, *Diversity and Inclusion in the American Legal Profession: First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 23 UNIVERSITY OF THE DISTRICT OF COLUMBIA LAW REVIEW 23 (2020).

<sup>37</sup> Peter Blanck, Fitore Hyseni, Fatma Altunkol Wise, *Diversity and Inclusion in the American Legal Profession: Discrimination and Bias Reported by Lawyers with Disabilities and Lawyers Who Identify as LGBTQ*, 47 AMERICAN JOURNAL OF LAW & MEDICINE 2021 9, \_\_ (2021). doi:10.1017/amj.2021.1

<sup>38</sup> *Id.* See also, Debbie Foster & Natasha Hirst, *Legally Disabled? The Career Experiences of Disabled People Working in the Legal Profession* (2020).

takes to fit in because individuals want to belong to something, be a part of a group. When someone differs from the “norm,” there is a real risk that they will be both excluded and disregarded.<sup>39</sup> As such, the neurodivergent student will try to mask their differences and fit into the norm, especially in a high-stakes environment like law school.<sup>40</sup>

## 2. Problems neurodiverse students face and how law schools fall short

A starting point for this stigma is how law schools and lawyers typically define success. Law students and lawyers tend to skew more Type A-driven, competitive, high-achieving.<sup>41</sup> Most students, both neurotypical and neurodivergent, enter law school having been high achievers for most of their academic careers.<sup>42</sup> There is nothing wrong with being selective in who goes to law school. The problem is that we equate high achieving with success. However, being a high achiever is not a good goal, and it is not the same as being successful, especially when success has a narrow definition—federal clerkships, and working in big law.<sup>43</sup> Even if this is an accurate definition of success, a high achiever is not simply challenging themselves to do well or seeking self-improvement, they are trying to show others and themselves that they are worthy.<sup>44</sup> High achievers are more likely to struggle with anxiety and stress due to overcompensating for what they think is expected of them.<sup>45</sup> A high achiever is constantly seeking to prove

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<sup>39</sup> O.J. Salinas, *Secondary Courses Taught by Secondary Faculty: A (Personal) Call to Fully Integrate Skills Faculty and Skills Courses into the Law School Curriculum Ahead of the NextGen Bar Exam*, 107 *Minnesota Law Review* 2663, (2023). 2678 (2023).

<sup>40</sup> Christina Payne-Tsoupros, *A Starting Point for Disability Justice in Legal Education*, 1 *Journal Committed to Social Change on Race and Ethnicity*, 167 (2020). “The culture of law school is marked by extreme competitiveness that is exacerbated when students compete against each other on a forced curve, all competing for the same one or two ‘A’ grades.” Note for editors— this quote directly cites research from Olympia Duhart 2015 and Wendy Hensel 2008. Want to make sure that is acknowledged correctly.

<sup>41</sup> Even if you’re a Type B in law school, you are a real-world Type A.

<sup>42</sup> Ask any law student if and when they ever got a B and they can recall with great detail about how it was horrible, unfair, and totally not their fault.

<sup>43</sup> For example, the Above the Law 2023 law school rankings give more weight for “quality jobs,” i.e., positions at the largest and best-paying law firms or in federal judicial clerkships.” <https://abovethelaw.com/2023/06/the-2023-atl-top-50-law-school-rankings-are-here/>

<sup>44</sup> Jamie Daniel-Farrell, *Why Highly Successful People Struggle With Low Self-Worth (and How You Can Reclaim Your Self-Worth)*, PsychCentral Blog: [Why Highly Successful People Struggle With Low Self-Worth \(and How You Can Reclaim Your Self-Worth\)](https://www.psychcentral.com/blog/why-highly-successful-people-struggle-with-low-self-worth/) (2017).

<sup>45</sup> Nancy Jane Smith quoted in Forbes, *Just Because You’re a High Achiever Doesn’t Mean Mental Health is Not for You*, May 28, 2019 <https://www.forbes.com/sites/daniellebrooker>

they are worthy, capable, effective.

Another way to describe someone who is a high achiever is that they are “over-producing.” Your first inclination might be that this is a positive attribute; we should expect it of students as it will prepare them for the demands of legal practice. This might be true in a generic sense but similar to legal terms of art, over-production has a specific meaning: produce in excess and more than is needed in a negative way.<sup>46</sup> Using the core legal skill of analogies and using concrete examples to illustrate abstract concepts, let us consider the hormone cortisol which is necessary to respond to stress, maintain blood pressure, and regulate blood sugar.<sup>47</sup> Producing more cortisol can mean that you are better able to do these things. However, when the human body over-produces cortisol over a long period of time, it causes a disorder called Cushing’s syndrome.<sup>48</sup> The overproduction of cortisol can cause major health problems like heart attack, stroke, blood clots, diabetes, depression, memory loss, etc.<sup>49</sup> So while producing or achieving more is certainly a positive, at a certain point, it becomes excessive and the negative impacts outweigh the slight increase in benefits.

Law school is supposed to be hard, present challenges and require a big time commitment. Neurodiverse law students do not expect to work less than their neurotypical peers. For the same reason many neurodiverse students need additional time for tests and exams, neurodiverse students also need additional time to prepare for class and complete outside assignments.<sup>50</sup> In law school, the expectation is that for every hour in class, a student should put in at least 2-3 hours outside of class.<sup>51</sup> In addition to the time and effort that a neurotypical student must expend to do well in law

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[/2019/05/28/just-because-youre-a-high-achiever-doesnt-mean-mental-health-is-not-for-you/?sh=78d4aaf8798b](https://www.beyondbooksmart.com/executive-functioning-strategies-blog/a-day-in-the-life-of-a-college-student-with-executive-dysfunction) “High-functioning anxiety” ... exists typically when people are seen as being high-achievers and at the top of their game.”

<sup>46</sup> In economic terms, productivity growth. Overproducing is excessive and if it continues, leads to negative consequences. See, Merriam-Webster Dictionary <https://www.merriam-webster.com/dictionary/overproduction> (accessed Dec. 30, 2023).

<sup>47</sup> National Institute of Health: National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK) <https://www.niddk.nih.gov/health-information/endocrine-diseases/cushings-syndrome#:~:text=Cushing's%20syndrome%20is%20a%20disorder,glucose%2C%20also%20called%20blood%20sugar> (accessed Dec 30, 2023).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., Brittany Peterson, *A Day in the Life of a College Student with Executive Dysfunction*, Beyond Booksmart Blog, April 7, 2022, <https://www.beyondbooksmart.com/executive-functioning-strategies-blog/a-day-in-the-life-of-a-college-student-with-executive-dysfunction>

<sup>51</sup> ABA Standard 310(a) requires that for every credit earned, there must be “not less than one hour of classroom or direct faculty instruction and two hours of out-of-class work per week for [the semester.]”

school, a neurodivergent student almost always has to do more just to keep up. The neurodiverse student is responsible for developing learning strategies and external coping mechanisms that conform to neurotypical expectations. They must develop routines and habits that allow for better transitioning from task to task and handling unpredictability. This takes time beyond that which neurotypical students need to manage and prioritize and it demonstrates perseverance.

In addition, organizing large projects (like staying on track when course assessment is primarily determined by one exam) can be overwhelming, a neurodiverse student must independently develop a process that identifies the goal and the steps for achieving it. For every class. Then, because thinking about the past and the future is a distractor, the neurodiverse student must also develop strategies for concentrating on the now while still moving forward. Therefore, when a neurodivergent law student earns high grades, writes on to law review, has their article selected for publication, etc. it is because they are over-producing.

A person who over-produces goes beyond consistently doing well or doing more than others. An over-producer is afraid of failing and not meeting the expectations of others. This is not to say that academic excellence should not matter but we should consider it in context. As organizational psychologist Adam Grant writes in *Think Again*, “[i]t turns out that although perfectionists are more likely than their peers to ace school, they don’t perform any better than their colleagues at work.”<sup>52</sup> One can be successful- earn high grades, do high quality work, consistently meet high billable hours, etc. without being an over-producer. We should not want to equate over-producing with success, yet that is exactly what we do in the law school environment. And we do it under the guise of preparing students for legal practice. We are quick to justify our actions by claiming it falls under the umbrella of “thinking like a lawyer.” The problem is that there is no clear explanation of what this means.<sup>53</sup> The core of thinking like a lawyer is critical thinking- question, analyze, evaluate, and reason. Law schools do an excellent job of developing critical thinkers, but the reality is that we also praise and reward the over-producer:

[there is] the perception that the practice of law requires one to regularly work long grueling hours on endlessly time-sensitive matters generates cultural (and, by extension, legal) standards that may create a false tension between the legal profession and people with

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<sup>52</sup> ADAM GRANT, THINK AGAIN, 195.

<sup>53</sup> Salinas, *supra* note 39, at 2663-4.

chronic illnesses... However, this image of legal practice assumes that (1) this is an accurate depiction of legal practice, (2) this is the only way to practice law, and (3) this is the best way to practice law.<sup>54</sup>

We want our students to meet the demands of the profession and while the practice of law is demanding, it is also diverse. According to the National Association for Law Placement, in 2021 and 2022, about one third of graduates were employed at firms with 500+ lawyers while approximately 28% were employed at firms with 1-10 lawyers.<sup>55</sup> Almost 60% of employment was in private practice while public interest, clerking, business, and other government, each comprised about 10% of employment.<sup>56</sup> The demands within specific employment sectors are also diverse and depend on the practice area. As law professors, we want our students to succeed and to be prepared for the challenges of practice. For that to happen, it seems that we would want an accurate understanding of what those expectations are. If we limit ourselves and rely only on our own education and professional experiences, aren't we also limiting the success of our students?

Furthermore, despite the data from the Carnegie Report and Best Practices for Legal Education, and revisions of ABA legal education program requirements, the core features of the first-year law school curriculum have remained essentially the same for over 150 years.<sup>57</sup> For reasons discussed above, professors continue to use their individual experience as a basis for teaching. Professors who teach first year classes continue to focus heavily on the casebook method and are resistant to change as they often rely on the same methods by which they learned.<sup>58</sup> We are comfortable teaching the way we were taught because "it worked for me." We take pride in what becomes our standard operating procedures and routines, and we validate our decisions through the results we have set the procedures and routines to produce.<sup>59</sup> We often believe we have changed

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<sup>54</sup> Jasmine Harris, *Debating Disability Disclosure in Legal Education*, 69(4) J. LEGAL EDUC. 71 (2022 Forthcoming) SSRN Pg 13

<sup>55</sup> NALP Jobs & JDs: Employment for the Class of 2022, Selected Findings, pg 2.

<sup>56</sup> *Id.* at 5.

<sup>57</sup> WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007); ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* (2007).

<sup>58</sup> See Martha Minow, *Marking 200 Years of Legal Education: Traditions of Change, Reasoned Debate and Finding Differences and Commonalities*, 130 HARV. L. REV. 2279, 2283 (2017).

<sup>59</sup> GRANT, *supra* note 51 at 208.

because we “warm up” cold-calling by giving students notice of when they are on call, we use insta-polling, PowerPoint, and conduct classes on Zoom. Although these are significant changes, they are still superficial and ultimately serve to allow us to believe we are doing something different.

If we took away these trappings, we would still be doing substantially the same thing in the same way that law professors have done for decades. We also continue to rely heavily on the case-book method where students read and learn primarily from appellate decisions. In casebook classes, we still judge performance through end of the semester exams. And although many law schools have incorporated mid-terms into their 1L curriculum, it is still not the norm in upper-level classes. In legal writing classes, the writing assignments are often an office memo based on a format that has not changed in many years.

Before we conclude that this is the best and only way for students to learn how to think like lawyers, it is helpful to explore why we believe this. We want students to actively engage in the process of learning how to think, grapple with challenging issues, address ambiguities and inconsistencies in facts and law.<sup>60</sup> But the methods by which we do this were created for a much different audience. There is no question that law students are more diverse in every sense of the word.<sup>61</sup> Additionally, given how much the practice of law has changed, are the methods on which we continue to rely still as effective as they were even a decade ago, let alone 30, 50 or 100 years when first instituted?<sup>62</sup> Why aren't we curious about the effectiveness of a curriculum based on appellate court decisions that don't necessarily integrate the context in which they arose?<sup>63</sup> Don't we want to know if it is worth our time and effort to teach students how to draft a question presented and brief answer or whether there is a better alternative? Because we have gotten comfortable with and feel successful in our current practices, we do not even realize how we are missing opportunities to be curious and improve ourselves rather than prove ourselves.<sup>64</sup>

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<sup>60</sup> See PETER C. BROWN, HENRY L. ROEDIGER III & MARK A. MCDANIEL, MAKE IT STICK: THE SCIENCE OF SUCCESSFUL LEARNING, 225-226 (2014).

<sup>61</sup> E.g., race, gender, socio-economic, nationality, religion, age.

<sup>62</sup> Beth Hirschfelder Wilensky, *Detroning Langdell*, 107 MINNESOTA LAW REVIEW 2711 (2023).

<sup>63</sup> Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 600 (2007) (“By focusing on appellate cases, we also assume that the facts of the problem are known: if not because they are really known, then because the rules of procedure will treat them as no longer contestable.”).

<sup>64</sup> GRANT, *supra* note 51 at 215. It is important to acknowledge that improving over proving is not a good option unless a person has already achieved a level of competence. “Experiments show that people who haven't yet proven their competence are respected less if

### 3. Facing the consequences of our actions and inactions

What it most often comes down to is that the neurodivergent person has two options- be excluded or figure out a way to be included. Law schools and the legal profession reward the over-producer, which further incentivizes neurodivergent individuals to opt for the latter. In addition to academic success, they recognize the importance of being perceived as a neurotypical so they “mask” their neurodivergence. Masking feels like “you’re always a minute late,” or a half step off the beat.<sup>65</sup> Masking is so harmful because it requires constant nervous system activation and it takes so much energy-energy that neurodivergent students could otherwise be using on academics. Masking often leads to anxiety and anxiousness because when people mask, they are forcing themselves into situations that activate the nervous system over and over.<sup>66</sup> This requires the person to both internalize what is natural while externalizing what is not.

Oftentimes, we see a student who is academically successful, holds leadership positions, etc. and our impression is that they are doing fine. What we fail to consider is what goes into obtaining this level of achievement. For example, a student, we’ll call them “Eden,” would seem to be a model of success. Eden was objectively a standout individual- top of the class, leader of prestigious student organizations, secured impressive post-graduation employment, and was well-liked by everyone. However, Eden had also been diagnosed with a non-physical hidden disability.<sup>67</sup> Eden did not want people at school or their future employer to know about their disability because of the stigma attached to it. Although Eden had been granted accommodations such as being able to choose their seat in classrooms, notetaking technology, additional time for exams and use of noise canceling headphones, professors often failed to provide the classroom accommodation (either intentionally or unintentionally).

For example, Eden explained how they had to manage classroom seating throughout law school. It started during their 1L year when Eden had two large section classes of 60-70 students (for explanation purposes

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they admit their weaknesses. They aren’t just incompetent; they seem insecure, too.”

<sup>65</sup>Jeffery Howard, *What is Neurodivergent Masking & Why Do Professionals Do It?* Inclusion Hub, <https://www.inclusionhub.com/articles/what-is-neurodivergent-masking-why-do-professionals-do-it#:~:text=Neurodivergent%20masking%20refers%20to%20the,of%20the%20workplace%20or%20society>.

<sup>66</sup> Laura Hull, K V Petrides, Carrie Allison, Paula Smith, Simon Baron-Cohen, Meng-Chuan Lai and William Mandy, *Putting on my Best Normal: Social Camouflaging in Adults with Autism Spectrum Conditions*. 47 JOURNAL OF AUTISM AND DEVELOPMENTAL DISORDERS 2519-2534 (2017).

<sup>67</sup> Details omitted to protect the person’s privacy interest.

we'll call them "Statutes" and "Common Law") with assigned seating. Students did not know there would be assigned seating until the first day when the professors told them. Although the professors ostensibly allowed students to select their own seat, the Common Law professor assigned the seats based on where students sat on that first day. Although Eden had arrived early, so had many of their eager-to-start-law-school classmates. Eden had to sit towards the back of the classroom where they struggled to hear responses to the professor's questions. Fearing this would be the case in Statutes, which met after lunch, Eden went to that classroom where they stayed through the lunch block. That professor did not assign seats until the second class so Eden spent another lunch break sitting in the classroom to ensure they would be able to sit where they needed.

For the next three years, Eden would scout out rooms ahead of time and arrive as early as possible to secure a seat where they would not be distracted by what a neurotypical student would consider ambient noise. Sometimes, the advance planning did not work. In one upper-level class that met in a large classroom but had comparatively less students, the professor required everyone to sit together in the middle section. Eden had to move to accommodate the professor and expend energy staying regulated so they could participate on equal terms with neurotypical classmates.

Instead of thinking, "Eden should have said something," or "things seemed to have worked out so no harm no foul," consider that the burden should not have been on Eden and how much more time, effort, and energy Eden had to expend to maintain their level of achievement. We all have to deal with a certain level of distraction but for a neurodiverse person, sensory overload is like having an intense rash and not being able to scratch, put anything on it, or even acknowledge the discomfort. Now imagine having to sit in class for an hour a day the entire semester and act like there was nothing going on; while also taking notes, listening, answering questions, and trying to learn the material for an exam that counts for 95% of your grade. This is masking.

Not only does masking require a lot of energy but neurodivergent individuals might be able to mask so well that people won't believe them when they say they need something.<sup>68</sup> Neurotypical people do not understand that the neurodivergent person has been masking and how difficult that is to maintain. Instead, neurotypical people tend to be impressed by masking and perceive it as a strength. However, masking is a survival strategy.<sup>69</sup> It has short and long term negative effects such as

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<sup>68</sup> Danielle Miller, Jon Rees & Amy Pearson, *supra* note 14.

<sup>69</sup> Rebecca Joy Stanborough, MFA, *Autism Masking: To Blend or Not to Blend*, HEALTH



exhaustion, achievement, and quality of life.<sup>70</sup>

Neurodivergent masking is about concealing aspects of who you are to make other people feel more comfortable and requires you to expend energy that could be used elsewhere.<sup>71</sup> It often leads to anxiety and anxiousness because when a person masks, they are forcing themselves into situations that activate the nervous system over and over. They must internalize and not process feelings because there is no safe space to do so. This is exhausting.<sup>72</sup> Furthermore, masking can cause or exacerbate imposter syndrome because you are not being authentic and there is a constant fear of being found out.<sup>73</sup>

Putting this in the law school context, on days where there is a lot of social engagement, the neurodivergent student has less cognitive ability to do other heavily cognitive tasks. During times of the year when students are interviewing, and attending networking and mentoring events, a neurodiverse student has to expend additional energy on masking while still engaging in high level critical thinking in class. While their neurotypical peers are able to go home and prepare for the next day's classes and assignments, the neurodivergent person is drained and exhausted.<sup>74</sup> Yet, if they are to be successful in law school, they have no choice but to keep working.

When it comes to accommodations, the neurodiverse law student also faces skepticism and resistance from professors<sup>75</sup> and disclosing a disability is not without risk.<sup>76</sup> Although society's awareness of neurodiversity has grown and there is increased positive awareness, it is still outweighed by the

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LINE, Nov 19, 2021 <https://www.healthline.com/health/autism/autism-masking#bottom-line>

<sup>70</sup> Hull, Petrides, Smith, Baron-Cohen, Lai, & Mandy, *supra* note 65 at 2519-2534.

<sup>71</sup> Michelle Cleary, Sancia West, Rachel Kornhaber & Catherine Hungerford, *Austim, Discrimination and Masking: Disrupting a Recipe for Trauma*, 44 ISSUES IN MENTAL HEALTH NURSING, 801-802 (2023) – only published online so here is link: <https://www.tandfonline.com/doi/full/10.1080/01612840.2023.2239916>

<sup>72</sup> It is hard to comprehend what masking feels like and hence, hard to believe it is that bad. For some neurodivergent individuals, maintaining eye contact is challenging so for a neurotypical person to get a sense of how much energy it takes to mask, try having conversations without making eye contact- only look at the wall behind the person.

<sup>73</sup> <https://www.inclusionhub.com/articles/what-is-neurodivergent-masking-why-do-professionalsdoit#:~:text=Neurodivergent%20masking%20refers%20to%20the%20of%20the%20workplace%20or%20society.>

<sup>74</sup> Miller, Rees, Pearson *supra* note X.

<sup>75</sup> Katie Rose Guest Pryal, *Neurodivergent Students Need Flexibility, Not Our Frustration*, The Chronicle of Higher Education, July 3, 2023.

<sup>76</sup> Harris, *supra* note 53 at 94.

stigma, especially in law school and the legal profession.<sup>77</sup> Law students with disabilities are often tasked with having to explain/justify to their professors their eligibility for accommodations and have little recourse if their professor decides to interpret the accommodation in a way that suits the professor's needs, not the student's.<sup>78</sup>

Going back to the example of Eden and assigned seats, isn't it possible that a professor could provide notice about seating policies either in the syllabus or in an email before the start of the semester? A student who needs a seating accommodation would still be responsible for letting the professor know, and it would actually be less work for the professor because addressing it before class starts means it wouldn't require them to re-adjust previously assigned seats or revise the policy about requiring everyone to sit in one section of the room.

This unwillingness to provide reasonable accommodations is usually due to a combination of factors: the perception of what it takes to be successful in the legal profession, a lack of understanding of the process to obtain accommodations, and the misperception that accommodations somehow give an advantage rather than provide equal access. These are all forms of confirmation bias- the tendency to search for, favor, and interpret information in ways that confirm previously held beliefs and pre-existing practices.<sup>79</sup>

Our brains are wired such that we make quick, automatic judgments about other people because we don't have the time or energy to understand everything we see or encounter.<sup>80</sup> Sometimes we attribute the judgment to the situation (someone doesn't respond quickly to questions because they are tired) and sometimes we attribute it to the person's character.<sup>81</sup> We tend to make these quick character judgments based on what we do understand, regardless of how limited that is and character attribution tends to stick even if it is inaccurate.<sup>82</sup> Although making quick judgments is a natural process, it is important to be aware of our tendency to do this and recognize when we should be curious and ask questions rather than judgmental and make statements. This is especially true when it comes to our understanding of

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<sup>77</sup> *Id.*

<sup>78</sup> Jay Timothy Dolmage *Academic Ableism*, 24 (2017).

<sup>79</sup> Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 *REVIEW OF GENERAL PSYCHOLOGY* 175-177 (1998). [doi:10.1037/1089-2680.2.2.175](https://doi.org/10.1037/1089-2680.2.2.175), [S2CID 8508954](https://doi.org/10.1037/1089-2680.2.2.175); See also, Scott Plous, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* (1993).

<sup>80</sup> DANIEL KAHNEMAN, *THINKING, FAST AND SLOW*, PG (2011).

<sup>81</sup> *Id.* at \_\_\_\_.

<sup>82</sup> *Id.* at \_\_\_\_.

neurodivergent individuals. Instead of thinking that things are static, rigid, and can only exist in one form, we can question whether there is any flexibility or room for growth and change.

The reality is that we tend to do what is comfortable because we are the professors. This is true for both casebook professors and legal writing professors. For example, many legal writing classes, which often employ evidence-based learning strategies, continue to use The Bluebook citation manual even though it is not user friendly and much of the material is geared for academic citation. The leading alternative, the ALWD Guide, is created by legal writing directors specifically as a citation teaching tool and is identical to the Bluebook in citation form. Use of The Bluebook over the ALWD Guide might be because legal writing professors are not aware that the format is exactly the same. But continued use of The Bluebook also tends to be justified on the basis that it better prepares students for practice or for law review. Federal courts use Bluebook citation so this might be the best manual to use if the majority of your students will practice in federal court. Outside of that, the prevalence of The Bluebook is more likely because it is what legal writing professors learned in law school or used on law review.

ALWD is a more accessible learning tool for all students, not just those who are neurodiverse. First, ALWD is “written with teaching and learning in mind” in a “clear, pedagogically sound manner.”<sup>83</sup> Second, the examples are more diverse than what is in The Bluebook and are more representative of the authors and subjects students will encounter in the legal profession.<sup>84</sup> To address concerns that using ALWD might not adequately prepare students for practice or to be on a law journal, ALWD includes rule correlations to The Bluebook.<sup>85</sup> Perhaps using ALWD in a first year writing class might even be a way to teach students standard legal citation so that they can better use The Bluebook (for practice or journal).

Although the above paragraph might seem like a paid promotion for ALWD, the goal is not to persuade professors to abandon The Bluebook for ALWD, but to spark curiosity: look at an alternative, compare it to the current standard, maybe try it out in our own writing.<sup>86</sup> We could tap into curiosity as a way to confirm that what we are doing, beyond being the comfortable option, is also the best option.

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<sup>83</sup> Association of Legal Writing Directors: About the ALWD Guide to Legal Citation: <https://www.alwd.org/about-guide> (accessed Dec 27, 2023).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Both my research assistant and I used the ALWD Guide for the citations in this article.

What is comfortable also tends to be based on the near homogeneity of law professors. A factor that perpetuates our tendency to have a narrow and shallow perception is the lack of diversity in the educational and professional backgrounds of most law school professors.<sup>87</sup> Over the past nine years, more than 40% of new tenure-track faculty hires were graduates of Harvard, Yale, or New York University and 77% attended a T14 law school.<sup>88</sup> Almost 60% have additional graduate degrees such as a PhDs, Masters, or LL.Ms, mostly from T14 law schools.<sup>89</sup> When it comes to professional experience, more than 35% of faculty hires in the past nine years had at least one federal clerkship<sup>90</sup> and over 70% had a fellowship (often at a T14 school).<sup>91</sup> Furthermore, although practice experience is important, as Yale Law School's "Preparing for a Career in Law Teaching" website advises,

In most cases, work experience is desirable as it informs your research agenda and your writing and gives you more credibility in the classroom. Yet it is often difficult for practitioners to find time to write, and sometimes practitioners can lose touch with the distinctive perspectives required for scholarship, which is why candidates who have practiced for more than five years often find the transition to academia challenging.<sup>92</sup>

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<sup>87</sup> Not to mention the lack of diversity in race, gender, sexual orientation, socio-economic status, etc.

<sup>88</sup> Sarah Lawsky, *Entry Level Hiring - JD School Total and Over Time*, <https://prawfsblawg.blogs.com/prawfsblawg/entry-level-hiring-report/>; see also Harvard Law School, Law Teaching Website: "11% of all law professors at American law schools are HLS graduates." <https://hls.harvard.edu/law-teaching/>; Yale Law School Law Teaching Program: "Yale Law School is the most successful institution in the world for educating future law professors." <https://law.yale.edu/studying-law-yale/areas-interest/law-teaching/law-teaching-program>;

<sup>89</sup> *Id.* Advanced degrees are in numerous fields. For example, in Spring 2023 entry level-hiring for the year included 43 with doctorates, 21 with a Masters, 6 with an LL.M, and one M.D. Of those degrees, the areas were: "Law: 16; Philosophy: 6; Political Science: 5; History: 4; Economics: 3; Sociology: 2; Literature: 2. The other doctorate topics, each of which had one hire, were Criminology; Accounting; Geography; Education; Psychology."

<sup>90</sup> Howard M. Wasserman, *Academic Feeder Judges: Are Clerkships the Key to Academia?*, 105 *Judicature*, 60, 62 (2021), citing *Legal Education at a Glance*, Ass'n of Am. L. Schs. (Jan. 25, 2021), <https://www.aals.org/wp-content/uploads/2021/01/2020-Legal-Education-at-a-Glance.pdf>. (Of the 9,329 full-time law faculty in fall 2020, 3,641 identified on their biographies or CVs as having federal clerking experience. This overall number will likely increase because in 2021, 2022, and 2023 the percentage of tenure-track hires with federal clerkships was almost 50%.)

<sup>91</sup> Lawsky, *supra* note 87.

<sup>92</sup> Yale Law School Teaching Program, *supra* note 87.

This is not meant to be a negative point, it is meant to illustrate that many law professors- who are responsible for preparing students for practice- themselves have limited practice experience. Although this data represents a decade of hiring, it demonstrates that the law professors tend to have a singular view of the legal profession.

In terms of educational experiences, neurodiverse students attend T14 law schools and there are law professors who are neurodiverse. But given the current adherence to neurotypical norms, it is likely that neurodiverse individuals believe their differences are deficits and are conforming to fit in. The homogeneous educational experience creates a shared and unchallenged sense of what legal education should be like, and homogeneous practice experiences lead to acceptance of assumptions about the toughness of law practice.

Law professors are bright, hardworking, and academically successful. And because most attended highly ranked law schools, it follows that their classmates were also academically successful.<sup>93</sup> Although outstanding students, law professors (similar to many other areas in higher education) receive little to no instruction in teaching. There are fellowships with a teaching component, but the focus is on preparing for the job market by developing scholarship.<sup>94</sup> Regardless of the field, if you have never learned how to teach (beyond a boot camp-type experience or independently using a “how-to” book<sup>95</sup>) and you are unfamiliar with learning pedagogy, evidence-based practices, course design, curriculum planning, constructive feedback,

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<sup>93</sup> According to ABA required disclosures, average UGPAs for the 2023 incoming classes at Yale, Harvard, and NYU are 3.96, 3.93, and 3.90, respectively. UGPAs for the bottom quartile are 3.89, 3.84, and 3.77, respectively. See, YLS 2023 Standard 509 Information Report, <https://law.yale.edu/sites/default/files/documents/pdf/Std509InfoReport.pdf>; HLS 2023 Standard 509 Information Report, <https://hls.harvard.edu/wp-content/uploads/2022/08/Standard-509-Information-Report.pdf>; NYU 2023 Standard 509 Information Report, <https://www.law.nyu.edu/sites/default/files/NYULaw-ABA-509-Standard-Information-Report.pdf>

<sup>94</sup> See, Harvard Law School, Law Teaching, *supra* note 87; “HLS residential academic fellows use their time here to prepare for entry-level law teaching jobs by undertaking original research and writing and becoming members of the community of HLS and Harvard University scholars.” See also, Yale Law School Law Teaching Program: “There are law schools that may hire professors primarily on the promise of excellent teaching, but for most law schools the quality of potential scholarship is a decisive factor. At the majority of schools, the single most important factor in obtaining a tenure-track academic law teaching position is demonstrated scholarly achievement—that is, writing. Most successful candidates have published at least one law review article and have, in addition, at least one completed manuscript (their job talk paper).”

<sup>95</sup> See, e.g., MICHAEL HUNTER SCHWARTZ, SOPHIE M. SPARROW & GERALD F. HESS, TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM (2017); MADELEINE SCHACHTER, THE LAW PROFESSOR’S HANDBOOK: A PRACTICAL GUIDE TO TEACHING LAW STUDENTS (2004).

formative and summative assessment, etc. it is hard to imagine teaching differently than what you experienced or that students would learn any differently than you.

The homogeneity of law professors and our educational experience matters because people tend to gravitate towards those who are like them.<sup>96</sup> We have a cognitive bias to prefer people that are like ourselves.<sup>97</sup> This affinity to similarity is comfortable and reinforcing.<sup>98</sup> It reinforces habits in how we act, think, perceive each other. Psychology Professors Angela Bahns and Chris Crandall’s research on how we seek similarity in relationships shows that, “[y]ou try to create a social world where you’re comfortable, where you succeed, where you have people you can trust and with whom you can cooperate to meet your goals.”<sup>99</sup> In fact, not only is there a strong tendency towards like-minded others, it is even stronger than previously believed.<sup>100</sup> Although “stability of identity, value systems and ideology” are important, the drawback is that you have limited exposure to anything different.<sup>101</sup>

Getting along with people who aren’t like you is really useful...Friends are for comfort, taking it easy, relaxing, not being challenged—and those are good things. But you can’t have only that need. You also need new ideas, people to correct you when you’re loony. If you hang out only with people who are loony like you, you can be out of touch with the big, beautiful diverse world.<sup>102</sup>

Agreeing with this statement is easier than acting on it. Given that 20% of the population is neurodiverse, there are certainly law professors who fall

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<sup>96</sup> R. Matthew Montoya, Robert S Horton, Jeffery Kirchner, *Is Actual Similarity Necessary for Attraction? A Meta-Analysis of Actual and Perceived Similarity*, 25 JOURNAL OF SOCIAL AND PERSONAL RELATIONSHIPS, 889, 891 (2008).

<sup>97</sup> No Author, *The Similar-To-Me Effect*, The Decision Lab, <https://thedeclaration.com/reference-guide/psychology/the-similar-to-me-effect> (accessed Dec 12, 2023), *see also*, Saul Mcleod, *Social Identity Theory in Psychology (Tajfel & Turner, 1979)*, Simply Psychology, (2019, Updated 2023), <https://www.simplypsychology.org/social-identity-theory.html>

<sup>98</sup> <https://www.psychologytoday.com/us/blog/close-encounters/201812/why-do-we-people-who-are-similar-us>

<sup>99</sup> Angela Bahns & Chris Crandall, *Similarity in Relationships as Niche Construction: Choice, Stability, and Influence Within Dyads in a Free Choice Environment*, 2016, <http://news.ku.edu/2016/02/19/new-study-finds-our-desire-minded-others-hard-wired-controls-friend-and-partner>

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*, at FN 33.

into this category or have neurodiverse family members. However, given the strong psychological incentive to adhere to the neurotypical standards and expectations, law professors have the same incentive as most neurodiverse people to try and hide their differences.

However, doing this perpetuates ableism. Ableism can be defined as “[a] system that places values on people’s bodies and minds based on societally constructed ideas of normalcy, intelligence, excellence, and productivity.”<sup>103</sup> Ableism has also been defined by disability scholar Fiona Kumari Campbell as “a network of beliefs, processes and practices that produces a particular kind of self and body (the corporeal standard) that is projected as the perfect, species-typical and therefore essential and fully human. Disability then, is cast as a diminished state of being human.”<sup>104</sup> The result is that success becomes a privilege “that is portioned out only along traditional lines: to ensure that students who move, think, or express themselves outside of a narrow set of norms will not thrive or survive in [law school].”<sup>105</sup> Too often, those who perpetuate ableism do not acknowledge that is what is going on or sidestep any responsibility for it by saying, “I didn’t know...” This is a defense mechanism that separates the person from their action and allows one to ignore the impact their words and actions have on anyone not like them.<sup>106</sup> Acknowledging ableism is not easy because it means we must question our privilege and a system from which we benefitted.

In her book, “I Never Thought of It That Way,” journalist Monica Guzman examines the reasons our differences have become barriers to progress and how we can become better because of, not in spite of.<sup>107</sup> She identifies how we tend to sort ourselves into groups of similarity. She describes this as a silo and she writes that the more entrenched we are in our silo of similarity, the better we think we are.<sup>108</sup> Silos also lead to excluding someone who is perceived as different, sometimes without even realizing it.

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<sup>103</sup> Talila Lewis, director of Helping Educate to Advance the Rights of Deaf Communities.

<sup>104</sup> Heidi L. Janz, *Ableism: The Undiagnosed Malady Afflicting Medicine*, 17 Canadian Medical Association Journal, 191, 191(2019). link to article: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6488478/>

<sup>105</sup> JAY TIMOTHY DOLMAGE, ACADEMIC ABLEISM: DISABILITY & HIGHER EDUCATION, 35 (2017).

<sup>106</sup> Jennifer Delgado Suarez, *15 Defense Mechanisms of “Ego” That You Use Without Knowing It*, Psychology Spot Blog, <https://psychology-spot.com/defense-mechanisms/>. This is rationalization- resorting to logical arguments to explain behavior so a person does not have to face a conflict, accept a situation, etc.

<sup>107</sup> See, MONICA GUZMAN, I NEVER THOUGHT OF IT THAT WAY (2002).

<sup>108</sup> *Id.*, at 31.

If it is brought to our attention that we have not been inclusive, the tendency is to fortify our silo and excuse our behavior (I didn't know..., they were acting weird..."), often by shifting blame to the individual for making us feel uncomfortable. We stay comfortable instead of taking responsibility for our failure to accept someone who is different. It is easier to look for reasons to reinforce what we know and believe instead of being curious and saying, "I never thought of it that way." It is scapegoating individuals (and groups) who might cause discomfort.

It does not matter if the exclusion is intentional or unintentional because, if you do not question or follow why you label something or someone as different, there is no action to break out of your silo. By staying comfortable, it is also less likely that you will encounter and engage with someone who is neurodivergent.

A neurodivergent person doesn't fit in so we don't want to hang out with them, study with them, hire them, work with them. This is not because we think the person isn't capable or nice but because it is slightly uncomfortable and would make things harder for us. It is easier to exclude than to adjust what we typically do.<sup>109</sup> In legal education, it is easy to maintain the status quo when you are part of that status quo. "Breaking the assumption may require doctrinal faculty and administrators to question their own superiority and distance themselves from the traditional hierarchical structures that gave them their superior status."<sup>110</sup> It is not easy to openly admit to being elitist or ableist so we find ways to justify our actions. Instead of taking this personally and looking for reasons to stay the same, consider being curious. Be curious by thinking about the neurodivergent student and considering their perspective.

Neurodivergent law students are not trying to make a statement or trying to stand out. They are in law school because they want to enter the legal profession, they want that sense of professional belonging. Having a sense of belonging is a key predictor of success.<sup>111</sup> The legal profession tends to have narrow and closely enforced norms based on an abstract notion of professionalism. Legal education and the profession reward and reinforce the value of fitting in with your immediate environment. However, research

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<sup>109</sup> GUZMAN *supra* note 106 at 45. This is "bridging," and it requires us to step out of our neurotypical silo and see things differently.

<sup>110</sup> Salinas, *supra* note 52.

<sup>111</sup> David W. Leake & Robert A. Stodden, *Higher Education and Disability: Past and Future of Underrepresented Populations*, 27 JOURNAL OF POSTSECONDARY EDUCATION AND DISABILITY 399, 403 (2014). Research shows that when people have a higher need to belong, they are at greater risk for conforming to expectations even when those expectations conflict with personal values.



shows that in groups that have “fitting in” cultures, the lack of diversity actually hurts the group’s ability to move forward and improve. The focus is on image and success is evaluated based on aspirations instead of data.<sup>112</sup> It is one thing to set high standards but we should want to periodically re-examine those standards to ensure that they are still serving the goals we seek to achieve.

Whether it is intentional or due to oversight, when a professor fails to provide a granted accommodation, it puts the student at a disadvantage because they do not have equal access to course material at the same time as their classmates. Students should be able to rely on the process and procedures in place and have a reasonable expectation that the learning environment will be an accessible one. Law professors know the importance of processes and procedures. Even with anonymous grading, the power dynamic between the professor and student is undeniable.<sup>113</sup> This diminishes a student’s agency in their learning. Agency in this context is when individuals can regulate and monitor their learning<sup>114</sup> and do not have to worry about being called out or judged. It is not reasonable to expect a student to request that a professor provide their accommodation either publicly in class or speaking with the professor outside of class.<sup>115</sup>

Furthermore, when professors are judgmental instead of curious, the impact of accessibility and accommodations has a ripple effect on the academic burden on all students. Academic burden is the “effect of schoolwork loads on students’ physical and mental condition.”<sup>116</sup> A

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<sup>112</sup> Dorothy Suskind, *Being Yourself at Work: Choosing Belonging Over Fitting In*, PSYCHOLOGY TODAY (Posted Aug. 28, 2020) <https://www.psychologytoday.com/gb/blog/bully-wise/202008/being-yourself-at-work-choosing-belonging-over-fitting-in>.

<sup>113</sup> In addition to the natural power dynamic, there is often an intimidation factor because 75% of law professors graduated from a T14 law school. Even if unintentional, it is still there.

<sup>114</sup> Jillianne Code, *Agency for Learning: Intention, Motivation, Self-Efficacy and Self-Regulation*, 5 FRONT. EDUC. 1, 1 (2020); *See also*, Barry J. Zimmerman, Albert Bandura & Manuel Martinez-Pons, *Self-motivation for academic attainment: the role of self-efficacy beliefs and personal goal setting*, 29 AM. EDUC. RES. J. 663, 664, 671 (1992) (“a significant causal path was found between students’ perceived efficacy for self-regulated learning and their efficacy for academic achievement...”); Paul R. Pintrich, *A Conceptual Framework for Assessing Motivation and Self-Regulated Learning in College Students*, 16 EDUC. PSYCHOL. REV. 385, 395 (2004) (discussing self-regulation of motivation and affect in college students).

<sup>115</sup> Speaking privately with the professor often imposes an even greater burden because it subjects the student to inquiry and they are faced with the untenable option of either refusing to or being forced to reveal private information and “argue their case.”

<sup>116</sup> Jinming Liu, & Ping Huang, *Evaluation and Analysis of Student Academic Burden: A Global Perspective*, 10 SCIENCE INSIGHTS EDUCATION FRONTIERS, 1423, 1424, 1425, 1427 (2021). Physical burden is the consumption of physical energy in time and intensity. Mental burden is the consumption of mental energy. This psychological burden arises out of a conflict between

reasonable academic burden is the pressure associated with learning and is necessary for a student to progress but an excessive academic burden has a negative impact on learning.<sup>117</sup>

For example, let's look at the ripple effect and unnecessary increase in academic burden when a professor has a course policy banning laptops<sup>118</sup> and there are students who need access to notetaking technology. To "accommodate" these students, the professor designates 1-2 notetakers who are allowed (required) to use laptops and the designated notetakers must distribute the information to their classmates. At the surface level this might appear reasonable but there are several ways it negatively impacts academic burden. The professor does not know why a student needs notetaking technology and incorrectly assumes that designating notetakers is the equivalent of using a laptop.<sup>119</sup> If a student needed a note-taker, the school disability services office would have granted that accommodation. In addition to denying students with disabilities equal access to learning, it shifts responsibility for providing access to learning to other students. Just as a blanket ban on laptops penalizes students and detracts from their learning, so does requiring students to use them (even on a rotating basis) and effectively prevents them from actively engaging in class.<sup>120</sup>

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the learning requirements and expectations and a student's ability and interest to meet them. This has been "measured as a spectrum from learning happiness to learning fatigue to learning anxiety to learning weariness." 'Learning happiness' is when students have high satisfaction with their learning environment and academic performance; moving from learning fatigue to weariness is when the student shifts from depression to fear, and as learning pressure increases, to boredom and indifference.

<sup>117</sup> *Id.* at 1429, 1431.

<sup>118</sup> As I have written before, banning laptops is about professor insecurity, not student learning... Instead of thinking about pedagogy and the effectiveness of the teaching method, it shifts the blame onto the student." Katherine Silver Kelly, *Banning Laptops Is Not the Solution to Better Learning*, ABA FOR LAW STUDENTS, STUDENT BLOG (Dec. 13, 2017), <https://abaforlawstudents.com/2017/12/13/banning-laptops-not-the-solution-betterlearning/>

See also, Ruth Colker, *Symposium: Universal Design: Stop Banning Laptops!*, 39 CARDOZO L. REV. 483, 483 (2017) (arguing against laptop bans and instead adopting universal design principles).

<sup>119</sup> Matthew L. Timko, *Applying Universal Design in the Legal Academy*, LAW LIBRARY JOURNAL Vol. 114:4, Fall 2022, 344, 356, citing, *Jones v. National Conference of Bar Examiners*, 801 F.Supp. 2d 270, 285-86 (D. Vt. 2011) "the standards of the ADA and other statutes is not just access to any accommodations but access to accommodations that allow for equality in information comprehension."

<sup>120</sup> Kelly, *supra* note 117.

#### 4. Neurodiversity strengths

This section will address the strengths of neurodiverse individuals but with a caveat- it is not meant to be a blanket statement about neurodiversity. Neurodiverse is just that- diverse. Not all people with ASD experience hypersensitivity, not everyone with ADHD is easily distracted. Because the core concept of neurodiversity is that brains work differently, instead of considering neurodiverse attributes as deficits, reframe them as strengths and abilities that are a foundation for learning.<sup>121</sup> Research has shown that many neurodivergent people have higher-than-average abilities such as pattern recognition, memory, and complex collaborative skills.<sup>122</sup> For example, where a neurotypical brain tends to think linearly, someone with ADHD is not as constrained and can often quickly make connections between concepts.<sup>123</sup> This is a key skill for analogical and inferential reasoning.

As lawyers we appreciate the value of perspective and understand how it provides better thinking and decision-making. The ability to compare differing viewpoints is cognitively complex, so examining different perspectives helps build critical thinking skills.<sup>124</sup> As such, we can become more effective problem-solvers when we examine an issue from multiple angles. If we can consider alternative ways of thinking or understanding an issue, we are better equipped to address it and we might discover there are multiple ways to solve a problem. This is beneficial in both learning about the law and in practice. For example, effective advocacy includes the ability to identify and anticipate opposing arguments, and then reconcile them in your favor.<sup>125</sup> Neurodiverse students bring a perspective that might not otherwise be considered and because we don't hear this viewpoint, we do not even know how valuable it might be.

Taking a strength-centered approach (as opposed to neurodiversity as a

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<sup>121</sup> Ludmila Praslova, *Autistic Strengths, Human Value, and Human Uniqueness: Untangling the Strengths-Based Approach from Stereotypes and Simplifications*, SPECIALISTERNE (Oct. 15, 2021).

<sup>122</sup> Robert D. Austin & Gary P. Pisano, *Neurodiversity as a Competitive Advantage*, HARVARD BUSINESS REVIEW, 96-103 (2017).

<sup>123</sup> Heidi E. Ramos-Zimmerman, *The Need to Revisit Legal Education in an Era of Increased Diagnoses of Attention-Deficit/Hyperactivity and Autism Spectrum Disorders*, 123 DICK. L. REV. 113, 138-9 (2018) (Identifying strengths such as creative and out of the box thinking, spontaneous thinking).

<sup>124</sup> RICHARD PAUL & LINDA ELDER, *CRITICAL THINKING: LEARN THE TOOLS THE BEST THINKERS USE*, \_\_\_\_ (2005).

<sup>125</sup> JOAN M. ROCKLIN, ROBERT B. ROCKLIN, CHRISTINE COUGHLIN & SANDY PATRICK, *AN ADVOCATE PERSUADES*, 108 (2022) (“I know about that rule. I’m not scared of it. And it does not preclude the outcome I seek.”).

deficit) means that our learning environments should be accessible to all of our students. Contrary to what one might think, making something accessible does not unfairly advantage one group or negatively impact anyone who does not need it.<sup>126</sup> In fact, quite the opposite is true.<sup>127</sup> Providing accessibility benefits more than just those with disabilities. This positive externality (when consumption or production of a good benefits a third party), commonly called a “curb cut effect,” comes from the design feature that allows wheelchair access from sidewalks to the street.<sup>128</sup> The curb cut benefits many more people than those in wheelchairs. It makes it easier for people with strollers, rolling luggage, hand trucks, those food delivery robots, etc.<sup>129</sup>

Similar to a person in a wheelchair being able to navigate with equal ease as someone who is ambulatory, a student with a disability should be able to navigate the classroom without **additional** barriers.<sup>130</sup> And similar to the positive externality of a curb cut, there is a positive externality in the classroom. When a student with a disability can fully participate, the entire class can benefit from their perspective, thoughts, ideas, and input that would otherwise be missed. Importantly, expectations remain high and more students are able to meet those expectations because they can focus on critical thinking and developing reasoning skills instead of trying to figure out what is going on at a basic level.

## II. BARRIERS AND ROADBLOCKS

In an ideal world, individuals and institutions would voluntarily adopt practices and procedures that support inclusive learning and working environments. Even if institutions refrain from negative treatment of

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<sup>126</sup> Lucy Wilkinson & Cleo Wisdom, The British Psychological Society, *THE PSYCHOLOGIST*, July 25, 2022 <https://www.bps.org.uk/psychologist/its-if-its-seen-unfair-advantage-rather-attempt-level-playing-field> (“It’s as if it’s seen as an unfair advantage rather than an attempt to level the playing field.”).

<sup>127</sup> *Id.* “Preconceived notions that disabled employees will not be able to produce the same quality work, or will be more absent from the workplace due to their condition, are unequivocally false.”

<sup>128</sup> Angela Glover Blackwell, *The Curb-Cut Effect*, Innovation Review, Civic Engagement (Winter 2017). [https://ssir.org/articles/entry/the\\_curb\\_cut\\_effect#](https://ssir.org/articles/entry/the_curb_cut_effect#)

<sup>129</sup> *Id.*

<sup>130</sup> *See*, Amanda Kraus, *Disabled Students Need Equity, Not Just Access*, American Association of Colleges and Universities, *LIBERAL EDUCATION*, Summer 2021. Accessibility is not about giving advantages to a person or group of persons, it is about addressing disadvantages that exist because of a disability.

individuals with disabilities, barriers to access still remain.<sup>131</sup> As such it becomes necessary to establish rules and regulations that require and expect participation.<sup>132</sup> This section will address the barriers the Americans with Disabilities Act seeks to remove, how it is consistent with our professional code of conduct, and the roadblocks law schools tend to erect.

#### A. *The ADA Removes Barriers to Access*

The Americans with Disabilities Act (ADA) was enacted in 1990 and prohibits discrimination against individuals with disabilities.<sup>133</sup> The ADA expanded Section 504 of The Rehabilitation Act of 1973 because “Congress recognized that disability discrimination remained ‘serious and pervasive’ and announced its intention to ‘provide a clear and comprehensive national mandate’ to achieve its elimination.”<sup>134</sup> The ADA is such landmark legislation because it not only prohibits discrimination towards individuals with disabilities but it also requires action- policy change and removing barriers to equal access and opportunity.<sup>135</sup> In the mid-1990s approximately 6% of students reported having a disability.<sup>136</sup> As of 2016, more than 20% of undergraduate and 12% of graduate students reported having a disability.<sup>137</sup> This number is expected to continue to increase because more individuals have access to healthcare, diagnosis and treatment, and as such, the protections afforded by the ADA.

As defined by the ADA an individual with a disability is “a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an

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<sup>131</sup> 42 U.S.C. 12101(a)(2), (b)(1); see also, The Americans with Disabilities Act: A Brief Overview, Congressional Research Service, October 11, 2022 <https://sgp.fas.org/crs/misc/IF12227.pdf>

<sup>132</sup> *Id.* (“Congress recognized that disability discrimination remained ‘serious and pervasive’ and announced its intention to ‘provide a clear and comprehensive national mandate’ to achieve its elimination.”); See, e.g., the Family and Medical Leave Act, U.S. Congress, House Committee on Education and Labor, *Family and Medical Leave Act*, committee print, 103rd Cong., 1st sess., February 2, 1993, H. Rept. 103-8, pt. 1 (“Congress observed that voluntary provision of such leave by private and government employees had ‘failed to adequately respond to recent economic and social change.’”)

<sup>133</sup> 42 U.S.C. §12101(a)(1).

<sup>134</sup> 42 U.S.C. § 12101(a)(2), (b)(1).

<sup>135</sup> *Id.*

<sup>136</sup> IES National Center for Education Statistics <https://nces.ed.gov/fastfacts/display.asp?id=60>

<sup>137</sup> US Dept of Education reported in the 2015-16 year, 20% of undergrads and 12% of graduate students have a disability and number expected to increase. <https://nces.ed.gov/fastfacts/display.asp?id=60>

impairment, or a person who is perceived by others as having such an impairment.”<sup>138</sup> The ADA intentionally does not name every impairment and “disability” is a broad term that includes mental health conditions, chronic health issues, temporary injuries (ex: concussion, broken arm), physical disabilities, and cognitive conditions such as ADHD, Autism, and learning disabilities.<sup>139</sup> Title II specifically applies to educational institutions and requires, among other things, that educational opportunities be accessible to all students.<sup>140</sup>

In the more than thirty years since it was enacted, the ADA has continued to lower environmental barriers such as lack of awareness, information, and increased access to resources. It is important to keep in mind that the ADA mandates are the minimum requirements; institutions may choose to implement broader policies and regulations that allow for access and opportunity.<sup>141</sup>

Beyond the floor established by the ADA, legal professional organizations also acknowledge the importance of equal access and opportunity. The American Bar Association (ABA) is not only the leading membership organization for lawyers, but it is also the accrediting body for legal education.<sup>142</sup> One of the ABA standards is to advocate for the profession by “work[ing] to promote the best quality legal education, competence, ethical conduct and professionalism...”<sup>143</sup> Furthermore, “[t]he ABA maintains a longstanding commitment to diversity by eliminating bias and enhancing inclusion in the Association, the legal profession and the justice system.”<sup>144</sup>

The law school accreditation standards recognize “the importance of cross-cultural competency to professionally responsible representation and **the obligation of lawyers to promote a justice system that provides**

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<sup>138</sup> 42 U.S.C. §12102(10(A)(B)(C))

<sup>139</sup> Definition used by Ohio State Student Life Disability Services (Creating Access Together, Intro for Faculty/Staff) chrome extension://efaidnbmnnnibpcajpcgclefindmkaj/https://slds.osu.edu/posts/documents/creating-access-together-introduction-for-faculty-staff.pdf

<sup>140</sup> 42 U.S.C. §12131(1)

<sup>141</sup> For example, under ADA § 504.2, handrails are required if a stair has a minimum of four risers but institutions may choose to put handrails on all stairs, even those with less than four risers.

<sup>142</sup> American Bar Association, Legal Education and Admissions to the Bar, [https://www.americanbar.org/groups/legal\\_education/](https://www.americanbar.org/groups/legal_education/) The ABA “is recognized by the U.S. Department of Education (DOE) as the national accrediting agency for programs leading to the J.D.”

<sup>143</sup> American Bar Association, About the ABA, [https://www.americanbar.org/about\\_the\\_aba/](https://www.americanbar.org/about_the_aba/) (last accessed Jan 4, 2024).

<sup>144</sup> *Id.*

**equal access and eliminates bias, discrimination,** and racism in the law should be among the values and responsibilities of the legal profession to which students are introduced.”<sup>145</sup>

There is no question that ADA requirements and the ABA’s commitment to equal access have created more access to legal education for individuals with disabilities. Despite this progress, barriers to accessibility continue to exist for neurodivergent individuals in law school.

Legal mandates have removed barriers, they are not barriers to how we educate our students because they are not limitless. There is no mandate to provide every accommodation, only those that are reasonable.<sup>146</sup> Once an individual student identifies themselves to the institution, and establishes eligibility for ADA services; it is the institution and professor’s responsibility to create accessible learning environments and provide reasonable accommodations.<sup>147</sup> Unfortunately, some law schools and law professors perceive this as a barrier to their teaching and the result is that they erect roadblocks.

### *B. Law Schools Erect Roadblocks*

It is unlikely that professors believe neurodivergent students are not capable of being lawyers. Professors want students to be successful and want to help them achieve success. So, why then are professors skeptical and resistant to accommodations and accessibility?<sup>148</sup> This resistance and skepticism arises not out of malice or ill-will but a belief that the learning environment is already accessible, a lack of understanding about the accommodation process, a lack of information because of the underlying privacy interest,<sup>149</sup> and gatekeeping instead of establishing standards.

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<sup>145</sup> American Bar Association, *supra* note 141 (emphasis added).

<sup>146</sup> Institutions are not required to make accommodations that fundamentally alter the program or are an undue burden.

<sup>147</sup> Rob Gould, Sarah Parker Harris, Courtney Mullin, *Higher Education and the ADA*, Department of Disability and Human Development University of Illinois at Chicago, 2019. (“Access to higher education is a vital part of the ADA’s broader social promise to promote equal access and full participation in all aspects of US society; especially considering that postsecondary education is often a prerequisite for many jobs in the U.S.”). Here is the link: [https://adata.org/research\\_brief/higher-education-and-ada#:~:text=The%20overarching%20goal%20of%20the,sufficiency%20for%20Americans%20with%20disabilities](https://adata.org/research_brief/higher-education-and-ada#:~:text=The%20overarching%20goal%20of%20the,sufficiency%20for%20Americans%20with%20disabilities).

<sup>148</sup> Pryal, *supra* note 74.

<sup>149</sup> See, e.g., Rebecca Schuman, *The Student Accommodation Problem No Professor Wants to Talk About*, Slate State of Mind, <https://slate.com/technology/2022/11/flexible-deadlines-accommodations-students-disabilities-college.html> 2022 (writing about the frustrations of professors who receive minimal communication about students’ accommodation needs or how to implement them.)

## 1. A Belief That a Learning Environment is Accessible Does Not Mean it is Actually Accessible

It is safe to presume that many professors think they are teaching classes in a way that is accessible to their students. Accessibility allows an individual with a disability to be effective and productive, and not feel at a disadvantage. In higher education accessibility means that institutions must provide an equal opportunity for individuals with disabilities to benefit and succeed,<sup>150</sup> and be assessed fairly instead of based on their disability. Given this definition, most professors would still identify their classes as accessible- of course we are providing an equal opportunity and assessing students fairly.

Many public and private colleges and universities generally define an accommodation as an “alteration of environment, curriculum format, or equipment that allows an individual with a disability to gain access to content and/or complete assigned tasks.”<sup>151</sup> An accommodation is reasonable when it does not fundamentally alter the essential nature of the course, curriculum, or program.<sup>152</sup> Importantly, a reasonable accommodation does not lower academic standards or compromise an academic program’s integrity.<sup>153</sup> Again, based on this definition, most professors would have little issue with providing a reasonable accommodation. It is likely, however, that students might have a different perspective on the accessibility of their learning environment.

Reasonable accommodations for individuals make a program, course, or environment accessible but are not necessary when the environment or format is already accessible. Although we want to believe that our learning

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<sup>150</sup> 42 U.S.C. §§ 12131-12134; 29 U.S.C. § 794 (Section 504),

<sup>151</sup> See, e.g. North Dakota State University Center for Accessibility and Disability Resources, [https://www.ndsu.edu/disabilityservices/faculty\\_resources/faculty\\_handbook/glossary\\_of\\_disability\\_related\\_terminology/](https://www.ndsu.edu/disabilityservices/faculty_resources/faculty_handbook/glossary_of_disability_related_terminology/); University of Washington, Disabilities, Opportunities, Internetworking, and Technology <https://www.washington.edu/doit/room/accessrem?page=61>; Albright College Accessibility Policy, <https://www.albright.edu/policies/accessibility-policy/>. See, also, U.S. Department of Education, Office for Civil Rights, Protecting Students with Disabilities, FAQs, 2007 <https://www2.ed.gov/about/offices/list/ocr/504faq.html>

<sup>152</sup> Title II Regulations Supplementary Info, 28 CFR Part 35 35.130(7)(i); see also *Alexander v. Choate*, 469 U.S. 287, 300 (1985) (interpreting 504 and holding that discrimination statutes mandate reasonable, not fundamental or substantial adjustments).

<sup>153</sup> ADA Compliance Guide §504 interpreting 42 U.S.C. §12189 and 28 U.S.C §36.309, see also *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (holding that requiring extensive modifications or substantial adjustments would raise grave concerns about a program’s validity).



environments are accessible, we could also allow ourselves to be curious about what that might look like for our students. For example, a student with low vision who needs individual access to PowerPoint material during class would not need an individual accommodation if it is the instructor's standard practice to provide everyone access to the slides prior to or during class. Furthermore, allowing all students to use laptops and tablets during class means that the low vision student would not need access ahead of time as they could simply have the slides on their individual screen. We would not likely question either providing the accommodation or making the class more accessible for this student. But would we be so willing to do this for a neurodivergent student whose disability is not as well understood? In this way, the ADA provides both protections and access and allows students with hidden disabilities<sup>154</sup> to fit in instead of facing accusations of "that's not fair," why are they allowed to use a laptop/have the material," when "they don't look disabled," etc.

## 2. Understanding the Accommodation Process while Respecting Privacy Interests

Unless they have sought accommodations for themselves or a family member, professors are not typically well-versed in how the process works. For a student to be granted an accommodation, they must do more than simply declare, "I want an accommodation." In fact, the process is not a simple one and requires time, energy, and resources.<sup>155</sup> The standards for receiving accommodations must be reasonable but the process and procedure differs depending on the college or university.<sup>156</sup> The Association on Higher Education and Disability (AHEAD) recommends two categories of documentation: (1) student self-report, and (2) professional observation and diagnosis. The self-report, guided by questions, should be a narrative of their experience with their disability that also identifies barriers encountered, and past accommodations have and have not worked.<sup>157</sup> This

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<sup>154</sup> As defined by U.S. Department of Education Office for Civil Rights, a hidden disability is a physical or mental impairment that is not readily apparent to others. Examples include learning disabilities and physical disabilities such as diabetes, epilepsy, low vision, heart disease and other chronic illnesses. <https://www2.ed.gov/about/offices/list/ocr/docs/hq5269.html>

<sup>155</sup> See, U.S. Department of Education, Office for Civil Rights, *Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities*, Washington D.C. 2011. Here is the link: <https://www2.ed.gov/about/offices/list/ocr/transition.html>

<sup>156</sup> *Id.*

<sup>157</sup> Association on Higher Education and Disability (AHEAD), *Supporting Accommodation Requests: Guidance on Documentation Practice*, <https://www.ahead.org/professional-resources/>

supporting documentation from a qualified professional should include “a diagnosis of your current disability, as well as supporting information, such as the date of the diagnosis, how that diagnosis was reached, and the credentials of the diagnosing professional; information on how your disability affects a major life activity; and information on how the disability affects your academic performance.”<sup>158</sup> Trying to obtain accommodations is an “exhausting and time-consuming process,” especially when you must also deal with the shame of admitting you need them, and harmful misperceptions of non-disabled classmates.<sup>159</sup>

It is worth noting a hidden barrier regarding documentation- it presumes all students have easy access to it. Although a student who went straight from high school to college to law school may have little difficulty providing medical documentation, it can present a barrier for international students and older students who took time off between degrees to work, serve in the military, etc.<sup>160</sup>

Even with this understanding about the process for receiving accommodations, another level of skepticism arises. Although professors are given information about the reasonable accommodation, students have a recognized privacy interest in that they do not have to “out” themselves as having a disability in the classroom or to their classmates.<sup>161</sup> Both FERPA and the ADA do not allow faculty access to disability-related information such as a diagnosis and medication.<sup>162</sup> Protecting this privacy interest can sometimes result in professor resistance to providing the accommodation. A professor does not know why a student needs access to note taking technology or why they need notice before being cold-called. Because a professor believes their teaching methods are the best way for students to learn, an accommodation is perceived as making the class easier and giving that students advantages over others.<sup>163</sup> However, this brings us back to the

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[accommodations/documentation](#)

<sup>158</sup> U.S. Department of Education, *supra* note 133.

<sup>159</sup> Katherine Macfarlane, *Making Peace with Testing Accommodations*, MS. JD, Jan. 28, 2018, <https://ms-jd.org/blog/article/making-peace-with-testing-accommodations>; Katherine Macfarlane, *Testing Accommodations Are Not a Gift of Extra Time*, MS. JD, Jan. 10, 2019, <https://ms-jd.org/blog/article/testing-accommodations-are-not-a-gift-of-extra-time>.

<sup>160</sup> *Id.* A law student might have to obtain a new evaluation report which presents multiple roadblocks. Most colleges and universities do not offer this service and paying for it is the student’s responsibility. It is a comprehensive evaluation and often must be scheduled months in advance, requires multiple sessions, typically costs around \$1000 which is not always covered by insurance.

<sup>161</sup> Pryal, *supra* note 69.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

basis for receiving an accommodation- not only must they be eligible, but the accommodation must also be reasonable. A reasonable accommodation means it cannot fundamentally alter the essential nature of the course, curriculum, or program.<sup>164</sup> When we open ourselves to asking questions about accessibility and accommodations, we can start to understand how those concepts facilitate, not hinder, the learning goals we seek to achieve.

### 3. Acting as Gatekeepers instead of Maintaining Standards

The ADA is not designed to substantially limit how professors teach and we should not create roadblocks where none exist. The first step towards becoming curious is to recognize that we are gatekeeping and that this is not the same as setting standards. One way that we tend to gatekeep is to assume that all students have the same level of knowledge about professional norms and expectations. However, it is too easy to use professionalism as a proxy for gatekeeping.<sup>165</sup> Gatekeeping controls who gets access to resources, opportunities, and power.<sup>166</sup> Gatekeeping grants and denies access based on personal preferences and experiences and measures individual traits as making someone worthy (or not) of passing through the gates.<sup>167</sup> This is not to say we should not set standards. We should set high academic and professional standards, but we have to make sure that is actually what we are doing. When we set standards we identify pathways to success, recognize there may be barriers and roadblocks preventing access, and work to clear those paths.<sup>168</sup> Unlike gatekeeping, standards are based on objective goals and look at whether conditions are

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<sup>164</sup> *Infra* at new FN \_\_- Title II Regulations Supplementary Info, 28 CFR Part 35.130(7)(i); see also *Alexander v. Choate*, 469 U.S. 287, 300 (1985) (interpreting 504 and holding that discrimination statutes mandate reasonable, not fundamental or substantial adjustments).

<sup>165</sup> See Kendra Albert, *Care, Not Respect: Teaching Professionalism* (July 15, 2021) <https://kendraalbert.com/2021/07/15/care-not-respect-teaching-professionalism.html>

<sup>166</sup> Gatekeeping, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/gatekeeper#dictionary-entry-1> (last visited Dec. 11, 2023).

<sup>167</sup> David DeIulius, *Gatekeeping Theory from Social Fields to Social Networks*, 34 COMMUNICATION RESEARCH TRENDS, 6 (2015). Explaining Kurt Lewin's research of how gatekeeping is a way to examine how objective problems are affected by subjective states and cultural values. See also, Adam Grant, *How to Bust Bias at Work: Transcript*, Worklife with Adam Grant (May 18, 2021) "It's not just individuals who have bad bias habits. Organizations have them too -- collective patterns of discrimination that continue without questioning. They're often passed on as norms or traditions. But if we can change organizational systems-- from how we hire to who we promote-- then we can change organizational habits. And this is a gateway to building more diverse and inclusive workplaces."

<sup>168</sup> Adam Grant, HIDDEN POTENTIAL \_\_ (2023).

conducive to development and advancement towards those goals.<sup>169</sup>

Professional or academic standards are based on values, not individual beliefs or opinions. Values are the principles on which you live your life.<sup>170</sup> According to Kendra Abercrombie, DEI Manager for the Illinois Commission on Professionalism, professional values should represent our highest standards and ideals and we should be able to connect values to legal skills and competency.<sup>171</sup> “Professionalism is being good at what you do and making sure what you do is good.”<sup>172</sup> On an exam, a student who is quick to judge or answers questions based on personal opinions instead of grounding their analysis on legal principles would not do well. Professional and academic standards are complex and multi-faceted and just as legal thinking and analysis is not based on shallow or conclusory thinking, our professional and academic expectations should not be either. Are you curious enough to seek new knowledge or broaden your understanding, or do you judge things that don’t conform with your current beliefs?

Instead of finding ways to justify our beliefs and policies, we should consider the student perspective. Students who receive accommodations are not trying to get out of working hard or seeking a shortcut to a high grade. As discussed above, reasonable accommodations do not provide an advantage, they remove the disadvantage. It is “not just access to any accommodation, but access to accommodations that allow for equality in information comprehension.”<sup>173</sup> A reasonable accommodation may change how a student learns or how a student is tested, but it does not change what a student learns or what a test/exam measures. It removes a barrier so that a student with a disability has an opportunity to achieve the same outcome and obtain the same benefits as their peers. What is unreasonable is to not believe the accommodation is necessary and to require students to continually request and monitor whether they are receiving granted accommodations.

This is not to say that professors should abandon all course policies or ignore their experience. The goal should still be that students engage and

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<sup>169</sup> *Id.* at \_\_\_\_.

<sup>170</sup> Values, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/values> (last visited January 11, 2024) (“The beliefs people have, especially about what is right and wrong and what is most important in life, that control their behavior.”).

<sup>171</sup> Kendra Abercrombie, *Is a Misinterpretation of ‘Professionalism’ Being Used to Exclude Attorneys?* 2Civility.org, <https://www.2civility.org/is-a-misinterpretation-of-professionalism-being-used-to-exclude-attorneys/>

<sup>172</sup> *Id.*, quoting Chief U.S. District Judge Rebecca Pallmeyer.

<sup>173</sup> *Jones v. National Conference of Bar Examiners*, 801 F.Supp.2d 270, 285-6 (D. Vt. 2011).

struggle with the material on equitable terms.<sup>174</sup> To do so means that we shift from judgmental- this is how I've always done it- to curious- why have I always done it this way, is this the only way to do things? Creating an equitable learning environment does not diminish the rigor. Quite the opposite, it heightens the quality of analysis. Accessibility improves engagement with ideas and material because students do not have to devote cognitive resources towards maintaining an outward equilibrium or to suppressing anxiety.<sup>175</sup> Students expend less time learning how to access information and spend more time learning that information.

Professors should set high expectations for students and encourage them to think critically and deeply. We should expect the same of ourselves, which is to acknowledge that we need more information and be curious enough to investigate. As bell hooks wrote in *Teaching to Transgress*:

As a classroom community, our capacity to generate excitement is deeply affected by our interest in one another, in hearing one another's voices, in recognizing one another's presence. \* \* \* To begin, the professor must genuinely value everyone's presence. There must be an ongoing recognition that everyone influences the classroom dynamic, that everyone contributes. These contributions are resources. Used constructively they enhance the capacity of any class to create an open learning community.<sup>176</sup>

Just as we expect our students to reject easy answers and embrace complexity, so too should we. To be curious, our starting premise must be that we believe our students belong here and we want students to believe they belong here, too.

Agreeing with this is one thing, putting it into action is another. Why do we keep on insisting on the status quo? Partly because of ignorance, inertia, and intuition. It reflects our self-interest. But also because of confirmation bias—the tendency to search for, favor, and interpret information in ways that confirm previously held beliefs and pre-existing practices.<sup>177</sup>

It feels good to reinforce what we already know and believe as opposed to questioning ourselves.<sup>178</sup> There is a desire for “cognitive closure” which

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<sup>174</sup> Kevin Gannon, *RADICAL HOPE, A TEACHING MANIFESTO* 112 (2020).

<sup>175</sup> *Id.* at 112-113.

<sup>176</sup> bell hooks, *Teaching to Transgress: Education as the Practice of Freedom*, \_\_\_\_ (1994).

<sup>177</sup> GRANT, *supra* note 51 at 25.

<sup>178</sup> Elizabeth Griffiths *Ableism in Academia: Theorizing experiences of disabilities and chronic illnesses in higher education*, 124, \_\_\_\_ (2020) (“If we are to compete in the current version of higher education with its rival interests of excellence in teaching, research and knowledge exchange

is the desire to avoid ambiguity in favor of a definitive conclusion, even when we lack enough information for that conclusion to be accurate (or rational).<sup>179</sup> Simply put, we jump to conclusions without sufficient evidence, the antithesis of what lawyers should do. Although it can result in more accurate decisions, being curious is difficult and opens up uncertainties.<sup>180</sup> It requires us to confront ourselves with difficult questions: What do our teaching practices and classroom policies say about what we think of students? Our perception of who are students are? How accurate is this? What do I know about \_\_\_\_? What conclusions have I reached from this information?

Shifting from judgmental to curious is a process that starts with an acknowledgement of our presumptions and biases. We must recognize that our quick judgments adversely influence our thinking- we jump to conclusions, reason emotionally, overgeneralize, embrace overly simplistic dualities. The next step is to actively confront the tendency to cling to these preconceived beliefs. We do this by thinking like the lawyers we are- engage in critical thinking and the discomfort that comes with it. The same things we say to our students are also true for us- learning requires discomfort, it will feel clumsy, awkward, messy. This is part of the process.

### III. SOLUTIONS- HOW TO BE CURIOUS, NOT JUDGMENTAL

Even if we embrace the process of being curious, the thought of overhauling our course or syllabus can seem daunting. Big ideas are great but law professors are busy people with multiple competing interests.<sup>181</sup> The tendency is to do nothing rather than do something. This section will identify a variety of avenues for being curious. It seeks to provide a combination of big and small ideas and actions to consider. The expectation is not to do everything but to be open to trying something, and to consider the concept of Small Teaching and the big impact it can have. In his book by the same name, Professor James M. Lang explains Small Teaching as “an approach that seeks to spark positive change in higher education through small but powerful modifications to our course design and teaching

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then higher education institutions must address the complexity and ambiguity of our experiences as disabled academics.” But You Don’t Look Disabled: Non-visible disabilities, disclosure and being an ‘insider’ in disability research and ‘other’ in the disability movement and academia.).

<sup>179</sup> Donna M. Webster & Arie W. Kruglanski, A. W. *Individual Differences in Need for Cognitive Closure*, 67 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 1049, \_\_\_\_ (1994).

<sup>180</sup> GRANT, *supra* note 51 at 28.

<sup>181</sup> JAMES LANG, SMALL TEACHING, 3 (2<sup>nd</sup> ed 2021).

practices.”<sup>182</sup> Small Teaching is effective and accessible for both students and instructors. In other words, if it is to be accessible to our students, it must also be accessible to us as professors.

A key premise to learning is that we believe our students belong here and we want students to believe they belong here. As such, don't we want our classrooms to be spaces where learning happens because we interact with ideas and think deeply about complex and important concepts? Creating accessible classrooms enhances, not inhibits, this. None of the proposed small changes diminish the content or rigor of a course. What changes is the accessibility of the material and it does so without having to provide individual accommodations as they have already been considered and implemented.

Furthermore, this article does not propose that students are passive receivers in all of this. Neurodivergent students, just as their neurotypical peers, are responsible for actively engaging in their own learning. A professor should not refrain from giving a critique or providing feedback; nor is it acceptable for a student to melt down any time they are asked a question. It is important for students to understand what is happening and why they experience such intense reactions. It is then the student's responsibility to remind themselves of this and take necessary steps to re-regulate and adjust to the circumstances. Being curious is a mechanism that allows for this to happen.

What follows are specific small shifts towards accessibility in a course syllabus, learning environments, and developing professionalism.

#### A. *The Course Syllabus*

Setting clear expectations for our core curriculum is a priority. For any student to succeed and learn, they need to know and understand what is expected and how they should demonstrate they have learned this expected learning. A starting point for accessibility is the course syllabus. Every professor should have an accessibility statement that includes the university and unit policies and contact information. It should also include the instructor's specific commitment to accessibility and information about classroom accessibility and accommodations. Including this in the syllabus is important because it demonstrates to students that the instructor is aware of and seeks to achieve accessibility in the class.

It is true that most course syllabi have become boilerplate and that many students spend only a few minutes skimming the content (if they read it at

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<sup>182</sup> *Id.* at 4.

all). However, the syllabus is a “detailed blueprint for a carefully constructed learning experience.”<sup>183</sup> So instead of being judgmental, this is an opportunity to be curious. Why shouldn’t we expect students to engage with the syllabus?<sup>184</sup> Setting clear expectations for a course is foundational for learning in general and especially important for accessibility.

While the syllabus is the entry point for a course, the typical syllabus is often too much for a neurotypical person to absorb let alone someone who is neurodivergent. Course syllabi tend to be a “kitchen sink” of information that is dumped on students at the beginning of the semester. They contain university requirements, department policies, instructor expectations, etc. Many professors have used the same format for years and simply copy and paste from one mode to the next- paper or websites. They are often recreated year to year and added to as more things become required.<sup>185</sup> The result is a bulky document that is not user friendly to anyone let alone a neurodivergent student. It is difficult to process, comprehend, or contextualize all of the information.

When a syllabus is user-friendly, all students have a better understanding of what is expected of them. Student success starts with understanding what the professor expects and how they should demonstrate their learning. One does not have to overhaul the syllabus to make it accessible. Consider supplementing it with a one page break-down of key information or create a table of contents.<sup>186</sup>

If you are integrating it into your online learning platform, don’t just upload the file or copy and paste it to a course page. Instead, consider the differences between reading a hard copy v reading on a screen,<sup>187</sup> and that students are not necessarily accessing it on full-size monitors. Break the syllabus into more manageable chunks by setting up a syllabus module with different components- University Level, College/Unit Level, Course Level.

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<sup>183</sup> James M. Lang, The 3 Essential Functions of Your Syllabus, Part 2, *The Chronicle of Higher Education* (Mar. 30, 2015), <https://www.chronicle.com/article/The-3-Essential-Functions-of/228909>.

<sup>184</sup> See, Jennifer Sheppard, *Creative Strategies to Get Students to Read Your Course Syllabus*, *The Second Draft*, Vol. 33, No 2. Here is the link: <https://www.lwionline.org/sites/default/files/2020-09/Sheppard%20Article%20formatted%20%28pp.%2054-62%29%20%288.15.2020%29.pdf>

<sup>185</sup> For example, adding COVID-19 polices in 2020 included university health requirements, class attendance policies, etc.

<sup>186</sup> See *supra* at note 171 for additional ways to get students to read the syllabus.

<sup>187</sup> See, Mary Beth Beazley, *Writing for a Mind at Work: Appellate Advocacy and the Science of Digital Reading*, 54 *DUQ. L. REV.* 415, 427-28 (2016) “Many active reading tasks are more difficult on the digital platform because the active reader moves from seeing a desk full of different documents (or stacks of documents) to seeing one or at most two screens.”



For each component/page, list the topics at the top of that page so students can quickly identify and navigate the content. If you read this and thought, “this seems like a lot of work,” or “I don’t know how to do any of this,” don’t immediately dismiss the idea. Instead, consider asking your research assistant to do it. You could also provide an additional mode of access with a short (10 mins) video “syllabus tour” and highlight main topics and key points. Again, if creating the video tour is beyond your bandwidth, ask your research assistant to do it. For larger classes<sup>188</sup>, consider administering an anonymous accessibility survey. This can be used as a guide to determine specific requirements for learning and practicalities.

### B. Learning Environments

As law professors, we do not want to see an exam response or writing assignment where the student has jumped to conclusions without explaining the process or examining plausible ambiguities. We teach our students to think critically and to explain why. As such, we should approach our class practices and policies similarly. To be curious about our teaching creates opportunities to improve the learning environment.

In recent years, there has been an increased use of formative assessment and other feedback opportunities for students, especially in the 1L year.<sup>189</sup> Although this is in response to ABA requirements<sup>190</sup> and not because of internal acceptance of evidence-based learning strategies, it has fostered more accessible learning environments. All students benefit from feedback and being able to make low-stakes mistakes as it provides opportunities to correct and adjust before the summative assessment of the final exam. To be clear, feedback does not have to be a formal assessment, require extensive work for the professor, or even take up class time. Legal education publishers have quizzing programs that are correlated to the casebook<sup>191</sup>, and the Center for Computer-Assisted Legal Instruction (CALI) has online lessons with short quizzes. These can be assigned throughout the semester as part of class participation.

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<sup>188</sup> To ensure anonymity, an accessibility survey would not work for classes where individual students are easily identifiable, regardless of anonymity.

<sup>189</sup> Payne-Tsoupros *supra* note 39 at 11, citing Duhart, Rothstein, Wegner.

<sup>190</sup> American Bar Association (2019b). Standards and rules for approval of law schools. §§ 314, 315. Here is the link: [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2019-2020/2019-2020-aba-standards-chapter3.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-chapter3.pdf)

<sup>191</sup> See, e.g., Aspen Publishing’s Connected Quizzing <https://aspenpublishing.com/pages/connected-quizzing>

Furthermore, there are simple strategies that create a more effective learning environment without sacrificing quality or academic rigor. There is no expectation to change the course content, just make one small actionable change per class or semester. First, if you use slides or other class materials, make it available to students before and after class. This is one of the simplest accessibility tools but it also seems to receive the most resistance. Professors are concerned that students will either not come to class or will not pay as much attention.<sup>192</sup> But instead of withholding access as a way to control attendance, incorporate access to material into professional expectations of attendance. Explicitly establish that supplemental material is just that, a supplement, not a substitute. It is also an understandable concern that students could over-rely on Powerpoint slides or handouts instead focusing on the more valuable class discussions. However, by not providing access during class, it is more likely that students are frantically trying to type the information that is on the screen instead of engaging in the class dialogue. Furthermore, in the high-stakes law school environment, is it fair to presume that students are looking for shortcuts or ways to avoid paying attention in class? While this might be true in some instances, most students are seeking to improve their ability to comprehend material and concepts.<sup>193</sup>

Withholding material creates suspense<sup>194</sup> while making class material accessible promotes predictability and prevents distractions. Students can better engage with the discussion instead of spending time frantically trying to type all of the information from a slide (especially if they don't know how long that slide will be on the screen). Students will take better notes because they can fill in their understanding as part of the already provided framework in a PowerPoint.<sup>195</sup> Providing access to a PowerPoint or handout gives students a framework on which they can build which facilitates

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<sup>192</sup> Samuel P. Leon & Immaculada Garcia-Martinez, *Impact of the Provision of PowerPoint Slides on Learning*, 173 *Computers & Education* (2021) (“With respect to the relationship between slide provision and student attendance, previously conducted research has proved to be equivocal with some students showing no effect and others showing significant reductions in attendance following slide provision.”).

<sup>193</sup> *Id.* See also, Mohammed H. Abdulla & Eleanor O’Sullivan, *The Impact of Supplementing PowerPoint with Detailed Notes and Explanatory Videos on Student Attendance and Performance in a Physiology Module in Medicine*, *Med Sci Educ* 2029, Published online 2019 Aug 1. doi: [10.1007/s40670-019-00780-8](https://doi.org/10.1007/s40670-019-00780-8) (students take notes to make sure they do not miss important information but in doing so, miss critical information).

<sup>194</sup> MARY BETH BEAZLEY & MONTE SMITH, *LEGAL WRITING FOR LEGAL READERS* (3rd ed. 2021) “Suspense is the enemy of the legal reader.”

<sup>195</sup> Sally Sambrook & Jennifer Rowley, 8 *J. INTERNATIONAL JOURNAL OF MANAGEMENT EDUCATION* 31, \_\_\_ (2010) (Providing notes in advance can address cognitive processing problems and working memory overload students face when trying to listen and take notes.).

mindful learning instead of apprehension.<sup>196</sup> Students know what is next so they can focus on what is in front of them.

Consider using metacognitive wrappers to start and end class as a way to explicitly activate prior knowledge and focus on the specific topic while also creating connectivity from class to class and signaling the relationships between cases and concepts. This helps all students develop metacognitive skills, especially neurodiverse students with executive dysfunction. Simply put, a cognitive wrapper is an activity that “wraps around” the existing material at the start and end of class and can be done in less than a minute. For a neurodiverse student, it is a cognitive scaffold that helps them organize information.<sup>197</sup> At the start of a class, give a short recap of the prior class (or call on a student to do it); at the end of class, do a recap and perhaps include a short preview of what is to come. For example, an end of class wrapper could be as simple as, “We’re at the end of class so let’s recap- we’re in the middle of discussing the intent required for a tort in general, next class we will continue to build on this concept and likely move on to specific torts and what intent looks like for each.” You could also incorporate feedback by having students jot down 2-3 takeaway points from class and then at the start of the next class, give a recap so students could compare what they wrote. This type of self- feedback allows students to monitor the accuracy of their perceptions.<sup>198</sup> In addition, it provides an underlying foundation for legal principles so that students are better able to analyze new and different problems.<sup>199</sup>

In addition to scaffolding metacognition, scaffolding critical thinking also creates an accessible learning environment. A neurodivergent student is trying to create steps for how to think through questions and this might take a little longer. When feasible, allow students to externalize the problem-solving and critical thinking process. For example, posing a question to the class and giving students a few minutes to jot down their thoughts and then calling on a student to answer it out loud. This is not to say that professors should stop using cold-calling or other types of verbal question and answer

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<sup>196</sup> This also applies in the legal writing context. See, Jennifer Kindred Mitchell, *Teaching to Neurodiverse Law Students*, 29 PERSPS 7 (2021) (“Breaking the writing structure up early in the student’s writing journey lays the groundwork for the student to develop effective processes to analyze and draft legal writing problems, regardless of their complexity.”).

<sup>197</sup> Alexis Reed, *Ask an Expert: Scaffolding for Executive Function Skills*, Kennedy Krieger Institute <https://www.kennedykrieger.org/stories/linking-research-classrooms-blog/ask-expert-scaffolding-executive-function-skills> (November 28, 2017, last accessed January 9, 2024).

<sup>198</sup> Marsha C. Lovett, *Teaching Metacognition*: Presentation to the Educause Learning Initiative Annual Meeting, Jan. 29, 2008.

<sup>199</sup> PETER C. BROWN, HENRY L. ROEDIGER III, MARK A. DANIEL, MAKE IT STICK, 4 (2014).

discussions.<sup>200</sup> It means that you are allowing everyone space to process and making it explicit that this is the expectation. Simple examples include repeating a question asked and repeating a student response to make sure everyone hears and understands; establish and maintain that students should not raise their hand while a classmate is thinking; when you see that a student feels stuck, prompt them with “think it through, you will get there.” Doing all of these things at the point of performance is important because it is challenging to manipulate complex mental information, but students need practice opportunities.<sup>201</sup>

For a particularly challenging concept or case, you can scaffold collaborative reasoning by using Socratic Method and cold-calling. Split the class into pairs or small groups and pose a series of questions (that you have already planned to ask) for each pair or group to work through.<sup>202</sup> Students gain more by explaining their reasoning to their peers than they do by explaining to the professor.<sup>203</sup> It creates a space where they struggle with their own understanding as they try to explain and- importantly- hear from and respond to others as they process.

When doing short individual activities in class, give a range of time and provide scaffolding. This creates space and normalizes the idea that not everyone processes thinking at an identical speed and that faster does not mean better. Instead of saying, “take 5 minutes to do X,” say “take about 5-7 minutes to externalize your thoughts on this.” When time is almost up, set a boundary by saying, “Take one more minute to wrap up your current thoughts, make a note of where you are now and what your next steps are.”

For a longer in-class activity, create space and set boundaries by giving a marker about 2/3 of the way through the time provided. This is more helpful than saying where the students should be at a certain time. For example, if students have 30 minutes in class to do an activity, instead of

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<sup>200</sup> Quite the opposite- unless a student has an accommodation to not be cold called, using some type of cold call method is beneficial to learning because it promotes class preparedness. When students know when they will and when and won't be on call, they tend to only be prepared for that material. Even the most diligent students are less prepared because they are preparing for passive learning rather than having to actively engage. *See*, GRANT, *supra* note 53 at 191. (“Despite enjoying the lectures more, they actual gained more knowledge and skill from the active-learning session. It required more mental effort, which made it less fun but led to deeper understanding.”).

<sup>201</sup> Lang, *supra* note 172 at 117; “Students should have frequent opportunities to practice *in class* whatever cognitive skills that you want them to master and that you will be assessing for a grade.” (emphasis in original). *See also*, BARKLEY, RUSSELL A., MANAGING ADHD IN SCHOOL: THE BEST EVIDENCE-BASED METHODS FOR TEACHERS, 22 (YEAR).

<sup>202</sup> Wilinsky, *supra* note 60 at 2725.

<sup>203</sup> Lang *supra* 172 at 149, citing Bain, K., SUPER COURSES: THE FUTURE OF TEACHING AND LEARNING, 89 (2022).

saying, “It’s been 10 minutes you should be here,” say “you have about 10 more minutes. Think about where you are now and what you can reasonably do in the remaining time. Start moving towards that goal.” The reason for this is that the neurodivergent student often needs more time to organize, plan, and coordinate their cognitive skills.<sup>204</sup> They likely are not going to be able to complete the activity in the standard time so you want them to do the most important part in class- organize the cognitive process. They will have to complete the remainder later, outside of class.

Low-tech is more accessible than high-tech because using a visual timer or an audible countdown is distracting to a neurodivergent student. If you use a quizzing app like Kahoots or Quizzez, or TopHat, consider muting the music or sounds that often accompany the thinking/count-down time. This is distracting and interrupts thinking. It can also be stressful for a student who is autistic as it causes sensory overload.

We engage in analytical dialogue in our classes to give students opportunities to practice and develop this skill.<sup>205</sup> When the professor explicitly reinforces that the purpose is to build skills, it results in a more productive discussion where students feel safe taking risks instead of worrying about being wrong.<sup>206</sup> Creating an accessible learning environment makes this possible for all, not just some, students.

### C. Developing Professionalism

Creating an accessible learning environment also develops professional skills. Students can prepare for practice and professional expectations when we make learning accessible by setting standards, not by gatekeeping. As addressed earlier, gatekeeping controls who gets access to resources, power, or opportunities.<sup>207</sup> In contrast, standards identify pathways to success, recognize there may be barriers and roadblocks preventing access, and working to clear those paths.<sup>208</sup> Professionalism should not be used as a gatekeeping function to exclude, especially when it is used to reinforce

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<sup>204</sup> Cristofori I, Cohen-Zimmerman S, Grafman J. *Executive functions*. 163 HANDB CLIN NEUROL.197, 219 (2019). Here is the link: doi: 10.1016/B978-0-12-804281-6.00011-2. PMID: 31590731.

<sup>205</sup> Elise J. Dallimore, Julie H. Hertenstein, Marjorie B. Platt, *Impact of Cold-Calling on Student Voluntary Participation*, 37 JOURNAL OF MANAGEMENT EDUCATION, 305 (2013). Here is the link ://journals.sagepub.com/doi/10.1177/1052562912446067

<sup>206</sup> *Id.* “The more a student practices participating in class discussions... the more skilled the student becomes, and the more comfortable he or she becomes when using this skill.”

<sup>207</sup> Pryal, *supra* note156.

<sup>208</sup> GRANT, *supra* note 160.

stereotypes and biases. “Professionalism shouldn’t be used as an assimilation tool by the dominant culture.”<sup>209</sup>

The values of professionalism include to conduct oneself in a way that exemplifies the ideals of the profession such as respecting yourself and others.<sup>210</sup> As Professor Elizabeth B. Cooper states in her article, “The Appearance of Professionalism,” “[a] great paradox of belonging to the dominant culture is that this belonging and its attendant privilege is often invisible.”<sup>211</sup> Those on the “outside” more easily see the markers of belonging and attempt to accommodate themselves to fit in.<sup>212</sup> What this means is that professors and administrators are not necessarily aware that we are perpetuating an exclusive environment. We teach students that when they enter the legal profession they will encounter different views, different beliefs, different identities, and will need to effectively communicate and work with each other. Communication is a key skill for lawyers so it makes sense that we can be transparent about our expectations and communicate them clearly so they are accessible to all students. We can develop professionalism and create accessible learning environments.

In general, we can do this by identifying pathways to success and recognizing that there may be barriers and roadblocks that prevent access. What are we doing to remove these barriers? When professors are transparent about expectations, it empowers students to make informed decisions. Students have agency to question- not the expectations- but how they can best meet them.

## CONCLUSION

As law professors, we have the awesome responsibility of educating our students and preparing them to enter the legal profession. We can choose to do this by creating environments where students are challenged, and all have an equal opportunity to not only rise to that challenge but thrive. We can maintain high expectations without forcing some of our students to overcome additional barriers. We can question whether our traditions perpetuate what we think are necessary legal skills and accept that success is related to access. We can acknowledge that there is a gap between what we currently know and what we can know and be open to filling that gap.<sup>213</sup>

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<sup>209</sup> Abercrombie, *supra* note 158.

<sup>210</sup> *Id.*

<sup>211</sup> Elizabeth B. Cooper, THE APPEARANCE OF PROFESSIONALISM, 71 Fla. L. Rev. 1, 27 (2019).

<sup>212</sup> *Id.* at 28.

<sup>213</sup> David Nield, *Scientists Say They’ve Found the Driver of False Beliefs, And It’s Not a Lack of Intelligence*, SCI. ALERT (Sept. 9, 2018) <https://www.sciencealert.com/feedback-study-explain>

The key to all of this is to be curious instead of judgmental. As Ted Lasso said,

You know Rupert, guys have underestimated my entire life. And for years I never understood why. It used to really bother me. But then one day I was driving my little boy to school and I saw this quote from Walt Whitman painted on the wall there that said “Be curious. Not Judgmental.” I like that.

So I get back in my car and I’m driving to work and all of sudden it hits me. All them fellas who used to belittle me, not a single one of them was curious. You know, they thought they had everything figured out. So they judged everything. And they judged everyone. And I realized that their underestimating me, who I was had nothing to do with it. Because if they were curious, they would have asked questions. You know. Questions like, have you played a lot of darts, Ted? Which I would have answered. Yes sir. Every Sunday afternoon at a sports bar with my father from age 10 to 16 when he passed away. [throws dart]

Barbeque sauce. [hits the bulls eye and wins]<sup>214</sup>

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[s-why-false-beliefs-stick](#)

<sup>214</sup> *Ted Lasso*, The Diamond Dogs, Season 1, Episode 8 (September 18, 2020) Apple+.