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Douglas A. Henderson

University of Kentucky

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UNCIVIL PROCEDURE: RANKING LAW STUDENTS AMONG THEIR PEERS

Douglas A. Henderson*

Law school often is even less relevant to practice than a studio art course is to housepainting. It is more akin to requiring house painters to study art history—never picking up a brush.¹

Besides the “Socratic” method, two of the most distinctive features of the law school experience are: (1) grades based exclusively on one-time essay exams scaled to the normal curve, and (2) the end-of-term rank ordering of students based on these exams. For most students, the curriculum before law school featured evaluation through mid-terms, class presentations, take-home exams, group projects, individual feedback, and term papers. Virtually none of these, however, survive in the modern law school, where evaluation is based on fact pattern essays intended to demonstrate how well a student “thinks like a lawyer.”² Instead, law students often complain that, “Grades [are] almost totally arbitrary—unrelated to how much you worked, how much you liked the subject, how much you thought you understood going into the exam, and what you thought about the class and the teacher.”³ Empirical


I wrote this essay to stimulate discussion on an outdated educational practice. I developed most of these ideas in a transition from environmental scientist to graduate student in ecology, to teaching assistant in statistics, to law student, to law review editor, and now to practicing attorney.

I appreciate the wisdom and encouragement of several faculty members at the University of Kentucky College of Law, including John Batt, Tom Stipanowich, and Michael Healy. I also appreciate the sage advice of Gary Fowler, George W. Pack Professor at the University of Michigan School of Natural Resources and Environment. Laura W. Henderson, Ed.D., also deserves thanks for her time and effort in discussing these issues.

2. See infra note 19.
evidence supports this view, suggesting that "eggs in the supermarket still are more accurately compared than are students in the law schools."  

This Article does not argue against evaluation, testing, or assessment within law school or outside of it. Nor does it argue against the use of standardized assessment procedures. This Article attempts to discredit the institutional practice of ranking law students among their peers. Part I presents a brief overview of the present system of testing and ranking, its impact on law student careers and the present justifications for these practices. Part II evaluates ranking, and the single end-of-term essay on which it is based, according to psychometric theory, learning theory, and statistical theory. Part III justifies abandoning the system by showing some of the detrimental effects that ranking has on students. Part IV suggests performance assessment as a preferable alternative. Part V concludes that whatever "new" method is chosen, the current practices of law schools cannot continue unaltered. The system's quasi-religious adherence to ranking devalues human beings, distorts the legal system into a cultural compactor, and diverts scarce resources from truly legitimate educational goals. In short, ranking students on the curve, arguably once a useful technique for screening unprepared students, deserves a quick administrative death.

I. EVALUATION, TESTING, AND ASSESSMENT IN LAW SCHOOL

Criticism about the law school evaluation process is not a recent phenomenon. Issues of assessment in law school have

4. Steve H. Nickles, Examining and Grading in American Law Schools, 30 ARK. L. REV. 411, 455 (1977); see also Paul F. Teich, Research on American Law Teaching: Is There A Case Against the Case System?, 36 J. LEGAL EDUC. 167, 169 (1986) ("Relevant studies however, uniformly seem to conflict with long-held and cherished assumptions about the special educational value of predominant law-teaching modes.").

5. These procedures, if used properly and legitimately, provide strong contributions to learning and professional education.

6. For a general discussion of this issue, see W. Lawrence Church, Law School Grading, 1991 WIS. L. REV. 825, 826 (suggesting that law school grading may reflect writing style, organization, and persuasiveness more than it reflects mastery of the subject matter); Roger C. Cramton, The Current State of the Law School Curriculum, 32 J. LEGAL EDUC. 321 (1982) (discussing basic flaws in legal education and suggesting reforms) [hereinafter Cramton, Law School Curriculum]; Roger C. Cramton, The Ordinary Religion of the Law School Classroom, 29 J. LEGAL EDUC. 247
troubled deans, administrators, and professors as early as the 1920s. This previous research has resulted in very little innovation. The same practices continue, the same errors arise, and the same disturbing impacts remain.


8. Mudd, supra note 6, at 190 ("It is striking how effectively law schools have resisted change over the years.").
A. The Practice, Ideal, and Reality of Grading

According to one educational researcher, grading has four ideal purposes: (1) administrative, which includes record keeping, assigning credits, granting promotions; (2) informational, which communicates information about student achievement to parents and other third parties; (3) motivational, which provides positive and negative feedback; and (4) diagnostic, which identifies a particular student's difficulties or identifies groups of students in need of additional assistance.9

A professor of law at the University of Arkansas, Steve H. Nickles, conducted a survey of law school grading and presented the results in the *Arkansas Law Review*.10 He found that grading is perceived to serve many functions within the law school community, including those identified above.11 Grades are necessary to determine qualification: they measure how well an individual meets the requirements of a profession, as judged by the faculty.12 Grading law students also validates legal credentials in light of minimum legal standards.13 Law students are concerned with grades because, at least in theory, grades indicate the extent to which students have achieved their educational goals.14 Theoretically, evaluation in law school provides a feedback mechanism, highlighting the students' strengths and weaknesses in absorbing the subject matter. For many students, evaluation can serve as an incentive to work harder.15 Testing and evaluation of law students also provides a measure of the effectiveness of the institution and the professors.16 At the broadest level, grading in law school identifies those who possess the skills and abilities to contribute to society as lawyers and ultimately serves to distribute duties and responsibilities in society.17


11. See id. at 413–21.

12. Id.

13. Id.

14. Id.

15. Id.

16. Id. at 416–20.

17. Id. at 416 (suggesting that using evaluation to select certain people for certain jobs necessarily involves "de-selecting" others).
The majority of American law schools use a single, end-of-term written essay exam to assign grades. The essay question, either prepared by the instructor or drawn from the teaching manual, aims at gauging how well the student "thinks like a lawyer." Typically, the first-year legal curriculum contains neither a mid-term exam, nor written assignments, nor an evaluation of the student in terms of skills learned. Faculty can consider other factors, however, at their own discretion.

Unfortunately, as practiced, law school testing fulfills few of the purposes of grading. For instance, because anonymous grading is the norm, and professors generally do not conduct postmortems on grades or exams with either students or administrators, law school grades do not help to render

18. Nickles, supra note 4, at 432 n.61. For detailed critiques of grading and student evaluation in general, a special issue devoted to the subject in the early 1970s remains a key source. See generally Peter W. Airasian, Evaluation for Measuring, for Diagnosis, 22 IMPROVING C. & U. TEACHING 213 (1974) (suggesting methods to use ongoing evaluation of student performance); Don M. Cregier, Evaluation at the University: Yes and No, 22 IMPROVING C. & U. TEACHING 215 (1974) (arguing that grading should not be used to rank, coerce, or cull students); Palmer DePue, The Ineptitude and Inadequacy of College Grading, 22 IMPROVING C. & U. TEACHING 237 (1974) (arguing that the scale currently used in colleges is ineffective); Hobbs, supra note 3 (maintaining that grades are subjectively determined); Lanny Soderberg, Grading: An Old Problem Revisited, 22 IMPROVING C. & U. TEACHING 244 (1974) (arguing that grades must have a more consistent meaning between students and faculty).

19. See Mudd, supra note 6, at 194 ("[L]aw faculties agree that teaching students to think like lawyers is fundamental, yet law schools have few explicit goals beyond that expressed in this talismanic statement."); see also Sallyanne Payton, Is Thinking Like A Lawyer Enough? 18 U. MICH. J.L. REF. 233 (1985) (questioning whether intensive exposure to appellate opinions and the unique "narrowing of vision," (i.e. "thinking like a lawyer") is adequate preparation for professionals who will be counselors and general problem solvers).

20. Nickles, supra note 4, at 437 n.68 (finding that 83% of surveyed schools maintain a policy of anonymous grading).
feedback to anyone. Additionally, examinations rarely are used for the evaluation of course content, instructional techniques, and teacher performance.

B. Ranking Law Students: An Institutional Policy of Social Darwinism

After the end of the first term, and each term thereafter, the typical law school administration computes overall grade point averages (GPAs) and ranks students numerically within a class, or calculates the specific percentiles.

A number of reasons justify using the normal curve to rank law students. The reason most often cited is its use by potential employers. Supporters argue that employers demand student rankings to make determinations about whom they should interview, and ultimately, whom they should hire. According to one source:

The law school class ranking system provides employers with an approximate measure of the relative productivity and capacity for self learning of different students. Class ranks appear to provide a sensible means by which legal employers can screen prospective employees in ways that limit the employer’s search costs and hiring mistakes.

In addition, the normal curve historically was employed as a method for screening out students who could not perform at

23. Id. at 438 n.92 (noting that professors review exams with students in 35% of schools surveyed).
24. Id. at 438 n.93 (finding that use of exams to improve course content, instructional techniques, and teacher performance occurred in only 14% of the surveyed law schools).
25. Id. at 426 n.38 (reporting that 84% of law schools rank students among their peers). Seventy-seven percent of schools ranked students individually, and 20% ranked students only within group levels (i.e., top one-third, top half, etc.). Id. at 427 n.39.
26. Id. at 427 n.40; see also Kissam, supra note 19, at 436 (stating that ranking represents “an efficient device, or at least a rational one, for sorting students in ways that serve the hiring purposes of many law firms”).
27. Kissam, supra note 19, at 486. See infra Part III.B for a fuller discussion of the role of corporate culture in ranking.
some minimum level. The curve thus provided a post-admission screening diagnostic at a time when open admissions were the norm.

Other reasons for using normal curve ranking are more difficult to establish. Some students and professors suggest normal curve ranking "motivates" students by stimulating competition. According to this theory, when students know how well they perform relative to their colleagues, they will modify their behavior to improve their rank.

Two other reasons for ranking relate to power and inertia. Most law professors are likely to perpetuate the system because they experienced the same system and prospered under it. Broader institutional inertia probably also constitutes a significant force in the modern-day law school: ranking continues this year because ranking occurred last year.

Important consequences stem from the process of ranking law students. Empirical research confirms that employers do use class rank to select students: the firms studied consistently used ranking as the key indicator of law school success. According to one source, the emphasis on grades is not limited to employment. Grades have become "negotiable instruments" in American law schools:

[Grades] will purchase more than the expected individual pride in accomplishment which reinforces confidence and initiative. Grades will buy a spot on the dean's list, membership in honor fraternities, enrollment in specialized classes and programs, and a place on the law journal staff. Upon graduation these prizes can be exchanged for associations with the better law firms, clerkships with

28. In law schools particularly, before the Law School Aptitude Test (LSAT)/Grade Point Average (GPA) era, the normal curve provided the key way to screen out students. See, e.g., Harold Ladas, Grades: Standardizing the Unstandardized Standard, 56 PHI DELTA KAPPAN 185, 186 (1974) (noting that "when there were very limited facilities for higher education, grading on a curve served a sorting purpose for determining who would flunk out").
29. Matthews, supra note 1, at 1101.
30. Nickles, supra note 4, at 427 n.40.
31. See infra Part V.
32. Emily Campbell & Alan J. Tomkins, Gender, Race, Grades, and Law Review Membership as Factors in Law Firm Hiring Decisions: An Empirical Study, 18 J. CONTEMP. L. 211, 235 (1992). This conclusion was evident as early as the 1920s. Grant, supra note 7, at 920; see also Kissam, supra note 19, at 480–83 (arguing that too much importance is placed on the employment implications of grades and class ranks).
prestigious courts, or acceptance by the elite graduate schools. The snowball continues to roll, and these initial professional ties become cherished springboards to others that are still bigger and better.  

Without question, grades universally are perceived to determine the direction of legal careers no matter the specialty or the setting. Grades play a significant role in financial aid, and grades usually count fifty percent or more in deciding which students receive honors or participate in special programs. Law review membership generally depends at least seventy percent on grades. Other research demonstrates the important effect of grades later in life, not just in school. All of these reasons emphatically underscore that if law school grades and ranking define marketability, then the currency must be meaningfully distributed.

II. THE LAW SCHOOL CHIMERA OF NORMAL CURVE RANKING

Virtually none of the reasons set forth for ranking students, however, can withstand scrutiny in light of recent—or historical—theory and practice drawn from educational and psychological disciplines. Evidence drawn from other fields simply does not support the current law school educational evaluation process. Given that the ranking process is based on potentially ineffective instruction, and that it stimulates

33. Nickles, supra note 4, at 411–12.
34. Id. at 428.
35. Id. at 427 nn.41–43.
36. Id. at 427 n.44.
37. Thomas Doniger, Grades: Review of Academic Evaluations in Law Schools, 11 PAC. L.J. 743, 746 (1980) (“Opportunities for employment with private firms and with government agencies, as well as opportunities to continue education and teach, all depend on the student’s academic record.”).
38. See infra Part III for a full discussion of ranking’s deleterious effect on students.
39. Cramton, Law School Curriculum, supra note 6, at 325 (“The law-school world is tyrannized by a paucity of educational models.”); Nickles, supra note 4, at 412 (“[T]he typical process of evaluation in our law schools is composed of procedures and techniques which have been discredited by research in education and psychology.”).
40. Teich, supra note 4, at 185 (“A reexamination of educational theory must be undertaken. Long-held and cherished assumptions about the educational value of conventional law-teaching methods may be unfounded.”).
such anguish, damage, and discontent among students, a reevaluation of current techniques is in order.

A. The Law School Essay is Psychometrically Unsound

Although some might argue that grading is theoretically separate from the issue of ranking, any discourse on ranking must consider grading, because rank is based on grades. Therefore, the discussion must turn to the analysis of testing, evaluation and measurement, i.e., psychometrics.

The process of ranking students in law school is centered on an outdated, untested, largely invalid measure: the single, end-of-term essay exam. Judged by the standards of established psychometric theory, the law school essay is neither precise nor accurate—both of which are necessary foundations of validity. At times the essay leads to biased results, in other instances the essay produces something closer to random results. In few circumstances, however, does the essay produce a reliable reflection of student understanding. Virtually no empirical evidence, from either the psychological or legal research literature, confirms that law school exams reflect more than what a single essay can reflect. Hence, computing a three-year, let alone a one-year, GPA based on an incomplete instrument makes little sense. Deriving ranks based on this

41. See Richard A. Epstein, Grade Normalization, 44 S. CAL. L. REV. 707, 707 n.2 (1971) (pointing out that significant differences in rank may be based on insignificant differences in numerical grades).

42. See Kissam, supra note 19.

43. "Precision" refers to the similarity between successive measurements of the same event. "Accuracy" refers to the similarity between a single measurement and the event measured. Thus, a measuring tool that is both precise and accurate consistently produces results which closely correspond to the event measured, thus making that measurement tool valid. Nickles, supra note 4, at 444 n.4 (citing DICTIONARY OF EDUCATION 635 (3d ed. 1973)).

44. It is important to note, as Church does, that "very high or low averages are likely to be reliable" but "distinctions of a fraction of a point in the middle of the scale" cannot support the decisions based on them. Church, supra note 6, at 833.

45. As this Article demonstrates, grades on law school exams have almost no broader significance: their results typically cannot be reproduced or affected by changing the underlying performance they are intended to measure. See generally Pamela A. Moss, Shifting Conceptions of Validity in Educational Measurement: Implications for Performance Assessment, 62 REV. EDUC. RES. 229 (1992) (suggesting that criteria for warranting validity should be expanded to include the assessment's impact on the educational system).
measure makes even less sense. 46

1. Law School Exams Are Invalid and Do Not Test for a Full Range of Legal Skills—An early evaluation of law school grading by Professor Wood of Columbia Law School cast considerable doubt on the use of an essay exam as a valid measure of legal ability. 47 Wood discovered that the virtually same group of students received significantly different grades from one class to the next. 48 He also found that prediction of relative standing in the second and third years of law school, based upon the averages of all first-year grades, was subject to significant error. 49 At the root of the prediction problem, in Wood's opinion, was the essay. 50 Wood concluded that by focusing on the essay, the law school exam suffered from several problems: (1) subjectivity in construction, (2) subjectivity in scoring, (3) inadequacy of sampling materials from the subject matter, (4) inadequate sampling of student performance in that subject matter, and (5) the "variable and indefinite units of measurement." 51

Once a law school decides to evaluate its students with an essay exam, most professors must assign grades to those exams. 52 Determining the proper frame of reference for assigning grades remains a pressing problem in educational theory. The debate revolves around whether it is more appropriate to base students' grades on their: (1) achievements in light of absolute standards, (2) degree of growth and improvement, (3) achievement with respect to ability, or (4) relative achievement with respect to a normative reference group. 53 The reference chosen by law schools is unclear.

While professors usually perceive that exams are criterion referenced, 54 Professor Kissam, one of the leading scholars on

46. A survey of the literature revealed no research contending that the single, end-of-term essay provides a meaningful measure of legal ability for later use in ranking.
48. Id. at 242–45.
49. Id. at 224.
50. Id. at 247.
51. Id.
52. There exist, of course, schools such as Yale Law School which use a limited grading scheme, awarding only pass, low pass and high pass. Further, some law schools offer pass/fail courses or have pass/fail options which students may elect.
53. Zeidner, supra note 9, at 226.
54. Criterion referenced exams measure student achievement against absolute, a priori expectations. Nickles, supra note 4, at 433 n.68.
law school evaluation, indicated that they are norm referenced.\textsuperscript{55} Neither model accurately assesses all of a student's legal abilities. Kissam states that norm referencing disadvantages students who are adept at judgment, imagination, coherence, and contextual thinking, but do not possess the relative quickness at issue spotting that essay exams demand.\textsuperscript{56} "Legal analysis," as found in essay exams, adheres to careful, precise, and comprehensive analysis of legal forms and objective authorities and avoids more abstract, more imaginative "non-legal" considerations that many students possess.\textsuperscript{57} Professor Kissam asserts: "[Law school exams] also promote the idea that quickness, precision, and correctness are the proper ideals for all lawyerly pursuits; this idea diminishes other ideals such as reflection, deliberative action, imaginative analogy, general principles, and tentative or risk-taking behavior."\textsuperscript{58} "The best lawyers," Professor Kissam maintains, "will abandon or modify the implicit messages of [essay exams] as they begin to deal with the complex requirements of practical judgment, interpretative methods, value conflicts, uncertainties, and the inherent controversies of legal practices."\textsuperscript{59}

Virtually all law professors agree that the law school essay only tests a limited set of skills, namely those relating to "thinking like a lawyer."\textsuperscript{60} Precisely because "thinking like a lawyer" does not represent all of the skills needed to practice law, the standard legal test provides an incomplete measure of legal ability.\textsuperscript{61}

2. Professors Score Exams Inconsistently, Producing Unreliable Results—The grades received on a law school essay exam may relate less to specific content than to other criteria such as "style, organization, and the overall persuasiveness of

\textsuperscript{55} Norm referenced exams compare student achievement against others within a group. Nickles, \textit{supra} note 4, at 413–14 n.5.
\textsuperscript{56} Kissam, \textit{supra} note 19, at 490.
\textsuperscript{57} \textit{Id.} at 492.
\textsuperscript{58} \textit{Id.} (citations omitted).
\textsuperscript{59} \textit{Id.} (citations omitted).
\textsuperscript{60} \textit{See supra} note 19.
\textsuperscript{61} Kissam, \textit{supra} note 19, at 445–48 (noting the essay exam does not reward students for practical reasoning, sound judgment or imaginative use of authority); Andrew S. Watson, \textit{The Quest for Professional Competence: Psychological Aspects of Legal Education}, 37 \textit{U. Cin. L. Rev.} 91, 117 (1968) (citations omitted) (maintaining that testing based on case method "does not succeed in providing students with the skills needed to handle other aspects of the professional relationship, such as ethical concerns and the ability to deal with people").
the arguments that are presented." The standards in grading law school essay exams vary between professors and between exams graded by a single professor. Little direct evidence is available to show how law professors evaluate examination answers. The murkiness of the process and grading standards underscores some of the most troubling aspects of evaluation in law school.

Several studies give weight to these concerns. For example, in an investigation of grading consistency where seventeen law professors graded eighty answers to the same contract examination question, the basis for a "good answer" could not be identified. Not only do factors other than substantive knowledge affect essay grades, but "success on an exam may turn on who the grader is and how he or she reacts to the arguments made, not just on the correctness or brilliance of the ideas expressed.

Professor Church reports the results of an unplanned experiment with law school essay grading at the University of Wisconsin Law School, when a property instructor fell ill. Professor Church and another law professor each took responsibility for preparing and grading two essay examination questions. In averaging the grades, students who received the highest grades from Professor Church received the lowest grades from the other professor. The converse also held true. This result indicates that the two graders expected different answers from students. Church concluded:

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62. Church, supra note 6, at 826. Church also notes that law school exam grades appear to be derived, at least in part, from factors not explicitly covered in the specific course, or even in law school at all. Id.
63. Nickles, supra note 4, at 444-45.
64. Kissam, supra note 19, at 445.
65. Id.
67. Klein & Hart, supra note 66, at 204.
68. Church, supra note 6, at 828–29. Because essays are attempts to persuade, grades may be as affected by the style of presentation and the grader's predisposition for the position the student adopts as they are affected by the accuracy or originality of the answer. Id. But see Klein & Hart, supra note 66, at 204 (noting that professors could not verbally define a "good answer" although papers were ranked similarly).
69. Id. at 829–30.
70. Id. at 830.
71. Id.
Most law students will have taken at least twenty different exams by the time they graduate, so relatively gross distinctions in cumulative averages definitely do retain considerable meaning, and very high or low averages are likely to be reliable. However, distinctions of a fraction of a point in the middle of the scale, long viewed with suspicion, should be regarded with even more skepticism when discrepancies among different graders are taken into account. . . . [T]he degree of attention sometimes paid to bare law school averages by both students and hiring lawyers is plainly excessive.\textsuperscript{72}

The lack of established standards\textsuperscript{73} at most law schools to guide law professors in assigning grades exacerbates this problem.\textsuperscript{74}

"[T]he overwhelming evidence based upon nearly a century of research and writing [suggests] that the essay is a highly unreliable type of examination."\textsuperscript{75} Law schools and employers should recognize it for what it is worth.

B. Learning Theory Suggests Ranking Produces Few Benefits

Ranking does not encourage law students to learn more effectively. Not only is the process of ranking law students among their peers invalid psychometrically,\textsuperscript{76} it is "anti-educational" because "[h]aving just one opportunity to demonstrate one's worth, after completion of . . . study, prevents the test from providing any educational feedback."\textsuperscript{77}

1. A Single Exam Does Not Encourage Effective Learning—Virtually all research from education and psychology

\textsuperscript{72} Id. at 833.
\textsuperscript{73} Nickles, supra note 4, at 425 n.31 (reporting that 58% of law schools have no established standards for assigning grades).
\textsuperscript{74} For example, several techniques are available to score exams. A professor using the "wholistic" approach reads the exam, and bases the grade on a subjective assessment of the answer. A professor using the "objective" approach creates a model answer and compares this against the actual answer to assign a grade.
\textsuperscript{75} Nickles, supra note 4, at 444. Nickles cites several studies in support of this contention. Id. at 444 n.107.
\textsuperscript{76} See supra Part II.A.
\textsuperscript{77} Matthews, supra note 1, at 1104 ("[T]he mechanism the school uses [to sort students] actually inhibits both learning and teaching.").
suggests that frequent examinations of students, rather than a single test, increases the overall level of academic achievement. Educational research indicates that frequent examinations increase motivation, reduce test anxiety, increase facility with course material, and stimulate student efforts. Infrequent examination is an admission that testing is used only to assess the scholastic "progress" of students, rather than to maximize the instructional possibilities.

Learning theory suggests that reflection on the subject matter—and better yet, periodic assessment combined with reflection—provides essential feedback for the learning process. Typically, however, law students ignore thinking throughout the term, substituting instead a last minute cramming process in the last week of the term. Apparently, law professors did this as students, and hence encourage their students to do the same. This view, more than any other, underscores the lack of concern for continuous learning throughout the term, and reinforces the end-of-term evaluation and ranking process. The end-of-term essay exam, which ultimately produces this result, remains standard at American law schools.

Law professors sometimes suggest that the end-of-term essay exam stimulates more integration and study than other types of testing. The research on learning theory, however, refutes this contention. Professor Nickles reviewed the educational research literature and found empirical evidence suggesting that students generally utilize the same preparation methods for the essay as for an objective test. Educational theorists suggest

78. See Nickles, supra note 4, at 461–62.
79. Id.
80. Id. at 462.
81. See Nickles, supra note 4, at 459.
82. Evidently this represents the standard view of law professors:

Many law professors believe students learn more during the final week of "cramming" before a final examination than they do in the whole preceding semester. They see the value of final examinations as being an inducement to students to engage in review, in the process of "putting it all together."

Nickles, supra note 4, at 462 n.165. My own law school professors frequently commented, "don't worry if you don't understand it all now, I didn't understand this stuff until the last week of class either."
83. See id. at 432 nn.63 & 65.
84. See supra note 82.
85. Nickles, supra note 4, at 449 n.125 and accompanying text. Nickles further cites several studies that suggest that students perform at the same level on objective
"instructors are missing a golden opportunity to increase students' learning when they give an exam only once." 86

2. Students Receive Virtually No Feedback on Performance or Understanding of the Subject Matter—Students recognize that their legal performance evaluations, namely essay exams, do not reflect their study habits, knowledge, or educational opportunities. 87 Evaluation helps students understand their progress by identifying ways that they can improve and by highlighting subject areas that need attention. Periodic examinations and grades therefore "serve as an aid in the student learning process." 88 Virtually none of these educational tools are used sufficiently in law schools. An evaluation system based on the end-of-term essay "overemphasizes memorization and internalization of doctrine at the expense of developing students' skills by providing supervised practice and feedback on the performance of these skills." 89 Students quickly find that there is nothing to take from one test to another, "besides a pen." 90

The practice of anonymous grading also is suspect from an educational point of view. According to one observer, the law school practice of anonymous grading "mirrors nineteenth century contract law by limiting review to the four corners of the document." 91 Ironically, according to one law student, the modern law of contracts recognizes the value of extrinsic evidence, while the law school does not. 92 The same observer suggests that anonymous grading denies a teacher the chance to get necessary feedback on the effectiveness of her testing, teaching, or techniques. 93 A plausible explanation may be that "[a]nonymity is used to protect the school from having [its] arbitrary decisions questioned." 94

or essay examinations and on items requiring each of the various levels of cognitive functioning. Id.


87. See supra note 3 and accompanying text.

88. Nickles, supra note 4, at 459; see also Airasian, supra note 18, at 214 ("If the evaluation is intended to direct teaching and learning activities, prior to grading, evidence about students' ability to perform the prerequisite skills must be gathered.").

89. Kissam, supra note 19, at 489.
90. Matthews, supra note 1, at 1104.
91. Id.
92. Id.
93. Id. at 1105.
94. Id.
Moreover, while professors think students are satisfied with the examination process in law schools, empirical research shows that the majority of students are not.\textsuperscript{95} Empirical research also indicates that students and professors differ in their views of what the law school exam seeks to measure. For example, in a survey of 100 law schools in the late 1970s, Professor Nickles found that most law faculty believe examinations are criterion-referenced, while most students perceive law school exams are norm-referenced.\textsuperscript{96}

The confusion over norm referencing and criterion referencing sends students the wrong message about their grades and subsequent rank. Students believe exams evaluate not what they know in terms of minimum competence, but what they know in relationship to the class.\textsuperscript{97} Kissam states: "In other words, B, C, D, and F grades today are not determined by reference to external standards of performance or professional promise, but instead are determined by the relationships between the points earned by A papers and the points earned by all other papers on a particular examination."\textsuperscript{98}

Determining class rank with a single end-of-term essay exam also generates a psychological barrier to teacher-student interaction. Although "students are free to ask faculty members for instruction on examination skills and more substantive feedback on their examination performances," in fact, "relatively few law students ask . . . for this . . . ."\textsuperscript{99}

This behavior is consistent with the law school tradition of substantial student deference to law professors, and with the psychological need of many students to guard against the demonstration of any "unprofessional" lack of expertise. This situation is also consistent with the intuitive sense of many students that the basic examination skills rest mostly on natural talents and that these skills are not directly important to the practice of law.\textsuperscript{100}

\textsuperscript{95} Nickles asked: "Do you think students in your law school are satisfied with the grading process?" Seventy-six percent of the faculty responded affirmatively, while just over 50% of the law review staff and the student bar association agreed. Nickles, supra note 4, at 439 n.96.

\textsuperscript{96} Id. at 432–33 n.68; see also Nickles, supra note 4, at 413–14 n.5.

\textsuperscript{97} Nickles, supra note 4, at 433 n.68 and accompanying text.

\textsuperscript{98} Kissam, supra note 19, at 489–90.

\textsuperscript{99} Id. at 472.

\textsuperscript{100} Id.
In response to any complaints, or even simple questions on the examination process, the professor can answer, “your grade was determined in relationship to other students’ performance.” This professional curtness frequently saps whatever inquiry the student might have had. Psychologically, students may begin to believe they are incapable of writing “correct” answers to essay exams despite many professors’ contention that “there is no right answer.”

3. Students Are Not Motivated to Increase Their Educational Investment—If the ultimate goal is to encourage law students to learn the law, the normal curve method of evaluation is a poorly suited means to this end. The curve slashes inspiration in several ways. After two semesters of being placed in the bottom third of the class, statistically there is little chance that a student will reach the top half of the class. Students learn that the normal curve virtually preempts this possibility. Thus, the drop-off in student class participation that law professors observe after the first year ultimately may be attributable to ranking based on the curve. For a select few at the margins of the major cut off points—i.e., at the top fifty percent or the top thirty-three percent—the ranking process may provide some small stimulus. Generally, however, knowing one’s class rank probably provides very little stimulus for improvement. For most, the curve dampens enthusiasm not only for law school, but, more seriously, for the law as well.

The end-of-term essay exam provides little motivation for learning. According to Professor Watson, retired professor of law and psychiatry at the University of Michigan, “the ‘prize’ of good grades at the end of the year is probably too remote for many law students to use as a motivation to full application throughout the school year. This method should be questioned seriously as a good teaching technique.”

The use of the essay exam also provides a poor proxy of the various kinds of learning that occurs in law school. The results of an experiment conducted by Professors Hartwell and Hartwell at the University of San Diego Law School illustrate this point. Their research sought to investigate the differences in instructional methods for law students. In the

101. See infra Part II.C.
102. See Gee & Jackson, supra note 6, at 473; text accompanying infra note 113.
103. Watson, supra note 61, at 123.
104. Hartwell & Hartwell, supra note 6.
study, all students attended two hours of lecture per week, taught by the same professor. For an additional hour per week, students were divided into four groups: the first wrote a weekly essay, which was briefly graded and discussed; the second took multiple-choice, true-false quizzes every week, which were also graded and discussed; the third met and discussed the week's lectures with the instructor; and the fourth was a control group which received no direct intervention. After all the students took the same essay exam, graded by the same professor without knowledge of the student's group, the results were "surprisingly inconclusive." The groups did not differ significantly on the final exam performance: none of the interventions affected the exam score significantly.

This study underscores the traditionally narrow focus of law school testing and assessment. All of the educational interventions were evaluated using the same outcome measure: the essay exam grade. Virtually no weight was given to other skills that may have been shaped in the various interventions. In short, it is possible that the essay could not distinguish the various levels of learning that occurred because of the interventions. This result should worry law professors. If exams do not detect increased study time, it is not surprising that students are not encouraged to spend additional time on the material—they receive no beneficial reward for doing so.

Learning theory also questions the time constraints placed on law school exams. Time limits set by professors for the total examination answer and for particular questions square poorly with learning theory. According to one law professor, the arbitrary assignment of time limitations introduces factors and variables not intended to be measured in the work of law students. The time constraint on law school exams probably

105. Church, supra note 6, at 825–28. Church notes that exams may test for analytic skills and communication ability, but may not detect differences in absorption of course content. Id.
106. Id. at 825.
107. Id.
108. Teich, supra note 4, at 186 ("The most successful [law] students in the Loftman study reported an average of 177 study hours per course, while average students reported 173 hours, and poor students, 168.").
109. Nickles, supra note 4, at 453.
110. Id. Nickles also notes that "[e]ducators have been forewarned that disregarding the influence of time limitations in student evaluation may discourage the explorer of new ideas, the creator of artistic expressions, and the dreamer of great dreams." Id.
has more to do with reducing the number of words a professor must read than with any educational theory. Nevertheless, these time constraints have become standard procedure in law schools, and their negative impact surfaces in the curve computed on its basis when students cannot produce quality work because of inadequate time allotments.

The ranking process and the essay procedure produce at least one other serious impact. For many law students, the single essay exam does not translate into a meaningful grade. The lack of a reward for good performance in other professional and substantive areas stimulates little interest in a total understanding of legal practice and procedure. According to Professors Gee and Jackson, this also explains why satisfaction of law students peaks during the first year, and declines rapidly thereafter. "By the fifth semester of law school, many law students have the equivalent of a two-day work week and discuss their studies rarely, if at all." According to one education scholar, "[i]f students believe that the exams in a course do not allow them, for whatever reason, to demonstrate their command of the material being asked about, then motivation to prepare for exams in that course, or to prepare in meaningful ways, will be severely eroded."

Roger Cramton, former Dean of Cornell Law School, makes a similar observation:

The incentive and reward mechanism of law school turns almost entirely on first-year performance. The evaluation of a student’s worth in the first-year essay examinations, stressing an ability to perform under time pressure certain forms of legal diagnosis and analysis, is repeated in examination after examination in subsequent years. It is not surprising that performance remains much the same, especially since this type of examination gives little weight to hard work, acquisition of information, or other abilities.

111. See supra Part II.A.
112. Watson, supra note 61, at 123.
113. Gee & Jackson, supra note 6, at 473.
114. Id. at 474 (quoting Robert B. Stevens, Law Schools and Law Students, 59 VA. L. REV. 551, 653 (1973)).
116. Cramton, Law School Curriculum, supra note 6, at 328.
The ranking process is, therefore, remarkably short-sighted in its educational scope.

C. Ranking Makes Little Statistical Sense

Finally, law school insistence on forcing students into the mold of the normal curve receives no support from the field of statistics.

1. Unstandardized Standard Deviations Destroy the Underlying Foundation of Ranking—If ranking is to make any sense from a statistical point of view, then the underlying instrument must be valid. As discussed in Part II, the single, end-of-term essay examination fails on this criterion. Although law school class ranks are based on essay exam grades, few law schools mandate how those essays should be scored or graded. On the other hand, the law school administration or faculty often does mandate or recommend a mean or a range of means for student grades, typically ranging from a 2.6 to a 3.0. No measure of the standard deviation is given or required as part of the testing process in most American law schools. Statistically, the lack of an institutionally required standard deviation for the various classes means that using the normal curve lacks any theoretical basis whatsoever for ranking. As the following section shows, the lack of a mandated standard

117. See supra Parts II.A.1., II.A.2.
118. For example, in 1985 the law faculty at the University of Kentucky adopted a recommended average grade of 2.6 to 2.8 for first-year courses and 2.7 to 3.0 for upper-level courses and seminars. SELF STUDY REPORT: COLLEGE OF LAW, UNIVERSITY OF KENTUCKY V-26 (1992) [hereinafter SELF STUDY REPORT]. According to the report, a professor whose average grade is outside the recommended guidelines is required to provide a written explanation of the circumstances justifying the variation to the dean's office. Id. The single best source on grading policies and procedures at law schools in the United States is a two volume study: MICHAEL JOSEPHSON, LEARNING & EVALUATION IN LAW SCHOOL: VOLUME 1, PRINCIPLES OF TESTING & GRADING LEARNING THEORY INSTRUCTIONAL OBJECTIVES (submitted to the Association of American Law Schools, Annual Meeting, Jan. 1984) [hereinafter JOSEPHSON, VOLUME 1] and MICHAEL JOSEPHSON, LEARNING AND EVALUATION IN LAW SCHOOL: VOLUME 2, TEST CONSTRUCTION SCORING, GRADING AND RANKING INSTITUTIONAL POLICIES (submitted to the Association of American Law Schools, Annual Meeting, Jan. 1984) [hereinafter JOSEPHSON, VOLUME 2]. For a detailed description of the grading policies at several law schools, see JOSEPHSON, VOLUME 2, at 559–605 app. L.
119. See JOSEPHSON, VOLUME 2, supra note 118, at 559–605. But see id. at 584–604 (listing 15 grade distribution policies, many of which indicate the appropriate shape of the grading curve).
deviation adds yet another fundamental problem to the process of ranking law students.

The normal curve used to set first-year grades and ultimately class ranks represents a general set of similar curves. Only two parameters of the equation can change: the mean and the standard deviation. The mean controls the shift of the curve left and right, while the standard deviation controls the overall shape governing the stretch of the curve. Because certain assumptions arise when the curve is used to assign grades, the results are dramatic where these are violated, or misunderstood. Few law school administrators apparently recognize these implications. In higher education, such issues are not discussed because “the exact specifications of curve grading are not to be mentioned in genteel academics.”

A few law schools do realize the essential unfairness of mandating means for the law school curriculum, but not mandating standard deviations. In the early 1980s, the law school at Loyola University of Los Angeles imposed a forced curve on individual classes, implementing a true normal curve approach, with grades determined on a standard deviation approach. The law school implemented standardized means and standard deviations to resolve the problem of unfairness.

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120. The equation for the normal curve is:

$$Z = \frac{1}{\sqrt{2\pi}} e^{-x^2 / 2}$$

where

- $Z$ = the height of the curve for any given value of $X$ in the distribution of scores;
- $\pi$ = (pi) the mathematical value of the ratio of the circumference of a circle to its diameter (3.1415);
- $e$ = the base of the system of natural logarithms, approximately equal to 2.7183;
- $\mu$ = the parametric mean of the distribution of scores;
- $\sigma$ = the standard deviation of the distribution of scores.

A basic explanation of the normal curve is provided by Robert R. Sokal & F. James Rohlf, Biometry 101–09 (2d ed. 1981).

121. The standard deviation is simply a measure of dispersion around the mean. A large standard deviation results in a curve that is stretched on both sides of the mean. See id. at 101.

122. Ladas, supra note 28, at 186.

123. David C. Tunick & Dan S. Schechter, Normalization of First Year Law School Grades, 58 C. & U. 159, 159 (1983) (“[G]rades should be normalized so that there is no advantage or disadvantage to being slotted into a particular section as far as grades are concerned.”). Similarly, the University of Wisconsin Law School, “expects mean grades for large first-year sections to stay within a point of one another and to keep within a range of not less than 17 or more than 27 points.” Church, supra note 6, at 826.
An even worse practice arises when a range of mean GPAs is institutionally mandated for instructors to follow. Here the difficulties of ranking are manifold. For example, if the institutional range for GPAs is 2.6 to 2.8 and one instructor consistently aims for a 2.6 mean, while another aims for a 2.8 mean, then the student confronts both differing standard deviations and differing means. Students suffer because at least four different normal curves from the two professors using different means and different standardized deviations are at work in the overall ranking. These statistical implications can be stated without numbers:

Law school policy which permits the standards to vary from teacher to teacher causes its evaluation process to be grossly misleading to the public and arbitrarily discriminatory to its students. These consequences are contrary to the theories of justice and fair play which the law school teaches as being obligatory in all affairs of law and society.

Certain professors, recognizing these damaging effects on the legal profession and law students, abhor the normalized approach of law school evaluation. In an attempt to blunt the damaging effects, some professors assign a high mean with little or no variance in the grades. These professors believe that assigning a higher mean with little or no standard deviation produces more just results than following the normal curve, which allows some students to receive lower grades in the class than were actually deserved. Oddly enough, this seems to be an example where the ranking process actually encourages less discrimination from a certain group of professors.

2. Practical Sampling Considerations Also Undermine the Foundations of Ranking—The normal curve was originally developed by Abraham de Moivre to reflect observations on the outcomes of a simple game of flipping a coin. He wanted to

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124. See Sokal & Rohlfs, supra note 120, at 101 ("Thus there is not just one normal distribution, as might appear to the uninitiated who keep encountering the same bell-shaped image in elementary textbooks; rather, there is an infinity of such curves, since these [two] parameters can assume an infinity of values.").
125. Nickles, supra note 4, at 457–58 (citations omitted).
126. See generally Sokal & Rohlfs, supra note 120, at 3, 101–09 (providing a general introduction to the normal curve).
address the basic problem of tallying all the possibilities of flipping five coins simultaneously. If the procedure was carried out several hundred times, a plot of these probabilities formed the normal curve. If simple random sampling were in effect, and the underlying data is measured without error, a plot of the sampled units would theoretically approximate a normal curve. In order for the theory to be applicable to real data, however, a sufficient sample of the data must be used. Although subject to debate in the discipline, statisticians typically assume that when the number of items sampled is greater than thirty to forty-five, the samples from most populations would include a wide enough range of samples to approximate a normal curve.\textsuperscript{127} Below this number, statisticians would conclude that the sample would be insufficient to produce a normal distribution. Labelling such a data sample as if it were normally distributed, therefore, would be a grave error.

The implications of this are critical in the law school context. In classes of less than thirty to forty-five students, the use of the normal curve may be statistically meaningless. Nevertheless, the normal curve is applied routinely to law school classes where less than forty-five students are in the course—and where the professor has not checked to see if the underlying distribution is approximately normally distributed. Technically, this means a non-normal distribution is forced into a normal curve. Grading on the normal curve in these situations is an injustice to students.\textsuperscript{128} A scholar of educational measurement points out:

Grading on a curve presupposes that achievement is normally distributed in a given classroom. However, the assumption of normality is highly unlikely given the small size of most classrooms, coupled with the fact that students in a particular classroom are not randomly selected subgroups from the larger population.\textsuperscript{129}

In this situation, an instructor relies on the meaningless assumption that the students in the course are a representative sample of the overall law school population when assigning grades to comply with the mandated class mean.

\textsuperscript{127} See, e.g., id. at 145-46.
\textsuperscript{128} While probably not legally arbitrary and capricious, this practice certainly seems morally bankrupt.
\textsuperscript{129} Zeidner, supra note 9, at 228.
The second manifestation of the problem is more sophisticated, but nevertheless harmful to the student. Certain classes possess different distributions, a result of the composition of the student body. Suppose one section of a particular course contains twenty-four students with twelve law review members (the law review section), and another section of the same course contains twenty-four students with four law review members. Assume that students could choose in which section they would enroll, and that both instructors adhere to the 2.7 required mean.

It is unfair to use the imposed mean to assign grades to students in each of these sections. The underlying distribution for the law review section probably will not be approximately normally distributed. The standard deviation in the law review section probably will be, on average, smaller than for the other class, and the overall mean probably higher. Arguably, an instructor will be impressed—and grade accordingly—in the law review section because nearly half of the students answered all the questions at the level sought. Basic mathematics suggests that if a 2.7 mean is required institutionally for the section as a whole, the rest of the section must receive lower grades to balance the higher grades. Effectively, a student in the law review section who writes an “above average” examination will receive a below average grade because of the relatively superlative performance of the rest of the class. If the same instructor taught the other section, the mean would still be 2.7. The underlying curve, however, would be different, because the curve would be less skewed toward higher grades. In that case the right-hand skew would not have to be balanced against the mean.

If students could not select their own courses, this concern might be alleviated by the randomness of the course selection process. Random assignment to sections would reduce the skewed distributions of students in any one class. Not allowing students a choice, however, would also be wrong, especially where the sections are taught by professors with varying standards and abilities. A law professor concerned with this topic concluded:

Whether a student remains in school, makes the law review, or receives any of the rewards associated with “good” grades depends on a large degree upon the grades he receives in his first year of law work; and his first year
grades depend to some extent, due to varying standards among teachers upon the accident of mandatory course selection assignments.\textsuperscript{130}

Upper-class students, aware of the differences in professor grading, engage in “forum shopping” to improve the vagaries in course selection and improve the basis of their grades, and therefore rank.\textsuperscript{131} Thus allowing such choice is a superficial solution to the deeper problem of unfair grading and ranking.

3. Lack of National Standardization Negatively Affects Some Law Students More than Others—A final statistical, and partially professional, reason to stop ranking law students on the normal curve is the lack of national standardization for means and standard deviations. This problem is particularly troublesome when students try to compete for jobs. For example, suppose at law school X the institutional mean is set at 2.8, but at law school Y the mean is 3.0. Law school X ranks students, but law school Y has an institutional policy against it. After the math is completed, a student at law school X with a 2.9 GPA may be in the top third of her class, while the student at law school Y with the same GPA may be in the bottom third of his class.

The implications are critical for law students. A recruiter who looks at the resume of a student from law school X and at the resume of a student from law school Y cannot hope to compare their achievement accurately. The law student from school Y cannot use his rank on his resume because it is unavailable. A law firm hiring partner, however, may conclude that law student Y is probably in the top of his class, based on the overall impression that law student X is in the top third of her class. Many employers may not be aware of, or may not have the time to take into account, the differences in law school grading and ranking. The interschool differences in ranking works inevitably to disadvantage some students.

III. DELETERIOUS EFFECTS OF RANKING

The inherent limitations of ranking law students generates several serious problems, the most serious being that it

\textsuperscript{130} Nickles, supra note 4, at 457 (citations omitted).
\textsuperscript{131} Id.
ultimately shapes an inefficient law school culture. A system without ranking would lessen personal despair, encourage learning, and reward the multiple dimensions of human resources.

A. Ranking Devalues Student Worth and Damages Student Self-Esteem and Social Productivity

The law school experience has been described as a “trauma,” with law students receiving significant psychiatric counseling because of anxieties related to examinations and grades relative to students in other professional schools, including medical school. The ranking experience often has the effect of devaluing a student's sense of self-worth. A student who receives poor feedback or no feedback is likely to become disinterested and therefore fail to invest much effort in his education or success, which almost predetermines a continued low level of performance.

On this phenomena, one law school dean observed that students respond negatively to the first-year grading system:

First-year grades control the distribution of goodies: honors, law review, job placement, and, because of the importance placed on these matters by the law school culture, even the student’s sense of personal worth. Since the system rewards only a few, punishes the rest, and is perceived as largely unresponsive to the degree of effort devoted to study, it is not surprising that clerking in a law office, combined with a passive and limited response to the upperclass curriculum, is a frequent choice.

By classifying students as winners and losers during this ground-laying stage, it “destroys one of the purposes of the foundation it is laying. The school serves as a talent scout rather than as a teacher, and remaining study becomes less

132. Id. at 411.
133. See Nickles, supra note 4, at 411 (citing experiences of psychiatrists at Columbia University and New York University); Stephen B. Shanfield & G. Andrew H. Benjamin, Psychiatric Distress in Law Students, 35 J. LEGAL EDUC. 65, 66, 69, 72 (1985) and sources cited therein.
134. Cramton, Law School Curriculum, supra note 6, at 329.
meaningful." Matthews makes this point well. "The general law school environment is dominated by students obscenely obsessed with where they stand amongst their peers, and the school assists them by providing the essential data."

Dr. Andrew S. Watson, a leader on the interrelationship between legal ability and the psychological health of law students, concluded: "I have never seen more manifest anxieties in a group of persons under 'normal' circumstances than is visible in first year law students."

A list of the negative impacts of the Socratic method drawn from Watson's comprehensive study of the technique seems particularly applicable to the class ranking process. The system generates stress which produces anxiety in students. Anxiety, however, is not per se bad. In fact, it provides the stimulus for adaptive behavior. Stress and anxiety can be eliminated by two responses: (1) introducing realistic problem solving or (2) relying on a neurotic defense. While some students are comfortable with the socially acceptable response to both the Socratic method and ranking, others become overwhelmed by the performance expected of them, resorting to unproductive neurotic responses. Once overwhelmed, these students lose hope of ever succeeding under the system.

This hopelessness can be reinforced, according to Watson, by two things. First, by being ranked in the bottom of the class, students may receive signals that they have indeed "failed." Second, students may not receive any feedback which would give them a more correct understanding of their achievement. Both of these elements are a significant part of the law school experience, and particularly of ranking.

Once class rank is announced, some law students—by definition, at least fifty percent—will begin to believe they are

135. Matthews, supra note 1, at 1101.
136. Id. at 1103.
137. Watson, supra note 61, at 121.
138. Id. at 128.
139. Id. at 125.
140. Watson shows how individuals' attempts to control their environment are redirected into socially acceptable behaviors as they mature. Id. at 101–02. In the case of lawyering, the acceptable response to verbal challenges is a well-reasoned, articulate argument. Id. at 125–26. Theoretically, the appropriate response to a low rank would be an increased effort at learning. The law school ranking system, however, does not allow this response.
141. Id. at 125, 128.
142. Id. at 119, 130.
143. Id. at 97, 129, 130.
not as smart or effective as half of their peers. Becoming wise to the ways of weighted averages and large numbers, students learn that after one or two semesters little will change their rank.\textsuperscript{144}

Watson describes Cannon's Law, which reflects the principle of "fight-flight," as one law student response. According to this theory, an animal confronted with stress "will either aggressively remove the stress by some fighting tactic, or he will run away from it to protect himself."\textsuperscript{145} As Watson suggests, students learn to get by with a minimal amount of work, targeting the pace and cases professors cover in class.\textsuperscript{146} Students may begin to take courses on the basis of their expected grade and its impact on their rank, not what they might learn from the course or the professor, or from reading law on their own. Professors not concerned about rank become lightning rods for students seeking a more interactive, less threatening approach to education. Students flee the rigors of law school and of learning the law precisely because of the evaluation methods of the law school.

Dr. Watson describes another psychological impact, flight by incapacitation, contending that "law school education explicitly shapes the character development of law students in certain ways which are detrimental to efficient professional performance."\textsuperscript{147} Law students become "unemotional," developing a cynical outlook, a characterological defense to avoid caring about people as a defense to protect themselves from recurring anxiety.\textsuperscript{148} Such an attitude may neglect the development of "people handling skills."\textsuperscript{149} The examination process also produces a "strong sense of individualism and isolation\textsuperscript{150} and devalues teamwork.\textsuperscript{151} On a similar theme, Professor Cramton notes:

\begin{itemize}
  \item \textsuperscript{144} See supra Part II.
  \item \textsuperscript{145} Watson, supra note 61, at 100.
  \item \textsuperscript{146} Id. at 129. Although Watson describes incapacitation as dropping out of law school, reduced participation could be one manifestation. See id. at 111.
  \item \textsuperscript{147} Id. at 131.
  \item \textsuperscript{148} Id.
  \item \textsuperscript{149} See id. at 133. For other impacts of the examination process on law students, see Kissam, supra note 19, at 479–83 (asserting that the examination process fosters competitive isolation and a tendency to base ideas about self-worth on exam grades, also noting that many students focus on the effect their grades will have on their employment prospects).
  \item \textsuperscript{150} Kissam, supra note 19, at 481; see also Watson, supra note 61, at 111–13 (discussing the psychological distance between faculty and students).
  \item \textsuperscript{151} One psychometrician concluded: "Instead of cooperation, extreme individualism, competition, and even secrecy rule the student community. Papers and examinations
Professional work involves cooperative activity, but law school does little to assist a law student to work effectively as a member of a team. The competitive environment of law school tends to pit each student against all others and, not surprisingly, feelings of isolation, suspicion, and hostility develop among students.

Knowledgeable observers comment that law students become more isolated, suspicious, and verbally aggressive as they progress through law school; their aptitude for verbal articulation increases, but they rarely stop to listen to others. Students learn from the essay exam and the ranking process that a very narrow set of skills are required for success, and, by implication, that these skills should be developed at the expense of other skills. The importance placed on ranking makes students forget that grades reflect only one narrow range of the skills required for legal practice. This is important because research shows that psychological variables such as confidence, satisfaction, and participation are strongly associated with academic success.

Ultimately, students learn that ranking determines power, and when their rank falls below their peers they have no access to power. In this situation, "students focus solely on the employment dimension of grades, experience large amounts of stress (no matter what their grades are), and implicitly misinterpret their law school grades and indicated professional roles as measures of personhood and self-worth." Kennedy further concludes:

In communicating class-rank information to each student, law schools convey the implicit corollary that place is individually earned and therefore deserved. The system...
tells each student that he learned as much as he was capable of learning. If he feels incompetent or that he could have done better, it is his own fault. Opposition is sour grapes. Students internalize this message about themselves and about the world and so prepare themselves for all the hierarchies to follow.\textsuperscript{157}

\textbf{B. Normal Curve Ranking Unfairly Caters to Corporate Culture as the Ideal}

A ranking system based on an end-of-term essay exam ultimately shapes the legal profession and the career choices of law students. The value of a class rank system is probably much greater for large corporate firms than for other legal employers.\textsuperscript{158} Large firms engage in "extended hiring practices, which require general screening methods."\textsuperscript{159} These firms also place premium importance on complex, but routine cognitive work by younger associates, and the essay exam along with ranking arguably provides a useful measure for this.\textsuperscript{160} Unfortunately, smaller firms may suffer from the class rank system because it reduces the legal skills and abilities of students in a measure that evaluates limited skills.\textsuperscript{161} The energy put into the ranking system is not devoted to the total evaluation of the panoply of skills and abilities these smaller firms need.\textsuperscript{162}

The ultimate "pecking order" largely occurs on the basis of first-year grades.\textsuperscript{163} After that, students learn quickly that

\begin{itemize}
  \item \textsuperscript{157} Kennedy, \textit{supra} note 3, at 600–01.
  \item \textsuperscript{158} Kissam, \textit{supra} note 19, at 486.
  \item \textsuperscript{159} \textit{Id}.
  \item \textsuperscript{160} \textit{Id}.
  \item \textsuperscript{161} See \textit{supra} Part II.A.1.
  \item \textsuperscript{162} Kissam, \textit{supra} note 19, at 486.
  \item \textsuperscript{163} The categorization of students based on rank apparently emerges in faculty perceptions of the student body. At the University of Kentucky, a self study report concluded:

  The faculty is slightly more definitive about the qualities of the current classes. Seven members of the faculty believe that the 'bottom of the class' can absorb a legal education, and six have no position on the issue, but eight members of the faculty believe and two others strongly believe that those students [in the bottom of the class] cannot absorb such an education.
\end{itemize}
they will spend the rest of their professional lives marked by the curve:

After classification based on first year performance, a student spends the next two years in one of two parallel universes. . . . The school ends up judging only how easily one can slip into the school’s mental uniform and look comfortable, rather than what one has learned through three long years of professional study. 164

After being labelled by class rank, according to this view of the process, “students often tune out and merely go through the motions.” 165 According to Professor Kennedy,

[the system generates a rank ordering of students based on grades, and students learn that there is little or nothing they can do to change their place in that ordering or to change the way the school generates it. Grading as practiced teaches the inevitability and also the justice of hierarchy, a hierarchy that is at once false and unnecessary.] 166

Another scholar also interpreted the award and allocation of power and status accompanying ranking:

[The existing system of university evaluation and grading, as well as the sifting and grading process in the lower schools upon which it builds, is not primarily intended to serve an educational purpose but rather, in the words of social anthropologist David Reisman, is aimed chiefly at “servicing the status hierarchy and providing graded access to ‘achievement’ and power in the social system.” Schools, colleges, and universities have become the agencies in modern technocratic society through which persons are selected for occupational roles and their life chances are thereby largely determined.] 167

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164. Matthews, supra note 1, at 1102.
165. Id. at 1101–02; see also supra notes 140, 141 and accompanying text (discussing students who lose hope after doing poorly in their first year).
166. Kennedy, supra note 3, at 600.
167. Cregier, supra note 18, at 215 (citations omitted).
The use of grades for an ostensibly educational but actually commercial function is culturally alienating: it "misshapes the minds, and distorts the souls" of those whom it touches.\textsuperscript{168}

IV. A PREFERRED ALTERNATIVE: A PERFORMANCE-BASED APPROACH

In counting only the final examination, law school administrations disregard other criteria that should be part of a fair evaluation.\textsuperscript{169} A former Dean of the University of Montana School of Law concluded:

[L]aw professors have mistaken one aspect of lawyering, the cognitive or rational dimension, to be the whole of lawyer performance, and they have structured legal education accordingly. To overcome this conceptual barrier requires looking beyond the curriculum to the world of lawyering in all its dimensions as the proper starting point for evaluating a law school's academic program.\textsuperscript{170}

Another professor considered the system of instruction: "[I]t puts a premium on verbal manipulation and encourages a tendency to look inward at the consistency of the system rather than outward at the relation of the system to the real world, and at its impact on people and events."\textsuperscript{171}

Some law professors might argue that, with time and resources currently in short supply, the traditional law school exam works as well as anything, and ranking on this basis makes some sense even if only to placate employers. Few educational theorists and psychometricians, however, would agree with this assessment. Several methods that would cost about the same have been put in place in other disciplines with resounding success. Professor Nickles declares that objective exams can test, with greater reliability, the qualities that essay exams have been used to evaluate:

\textsuperscript{168} Id. at 216 (quoting Pitirim A. Sorokin, The Reconstruction of Humanity 152–53 (1948)).
\textsuperscript{169} Matthews, supra note 1, at 1104. Matthews asserts that some recognition of verbal skills seems appropriate in the study of law. Id.
\textsuperscript{170} Mudd, supra note 6, at 191.
\textsuperscript{171} Erwin N. Griswold, Intellect And Spirit, 81 Harv. L. Rev. 292, 299 (1967).
[E]xperimentation has revealed that objective tests can require the same thought and organization required of essay examinations and that abilities tested by objective tests often are similar to those which essays aim to measure. In addition, objective tests usually are superior because they can sample a wider area of subject matter in an equal amount of time and invariably are more reliably scored.172

Professors who combine short-answer with essay and objective questions, while simultaneously giving credit for in-class participation and term papers, are on the right track. Intuitively, these professors realize that trying to assess student skills from multiple perspectives makes more sense educationally.

Although they are off to a good start, these professors do not go far enough. A performance-based approach would discriminate more accurately between law students on the basis of their legal ability. As one authority wisely concluded: "To orient students toward the real world they will encounter, law schools must take their reference points from lawyer performance."173 Another professor argues that first-year law courses "should provide exposure to methods of analysis as well as argumentation and communications skills. To be useful, exams will have to reflect these broader purposes of legal education."174

The leading edge in education theory suggests that performance assessment provides the most legitimate method for assessing students.175 Performance assessment is not a

172. Nickles, supra note 4, at 447 (citations omitted).
173. Mudd, supra note 6, at 197.
174. Church, supra note 6, at 832.
175. The literature on testing and evaluation is vast. For recent discussions, see Cirn, supra note 115 (reviewing true/false and short-answer tests); LaMar P. Miller, Alternatives to Norm-Referenced Testing for Assessing Student Achievement, 10 ERS SPECTRUM 3 (1992) ("An era of testing is ending"); Murry, supra note 86 (reviewing innovative testing methods); Zeidner, supra note 9 (reviewing the purposes of grading); see also Thomas H. Arcy, Philosophies of Grading Systems, 13 C. STUDENT J. 310 (1979) (asserting that grades are only as valuable as the meaning imparted to them); Judith G. Lambiotte et al., Cooperative Learning and Test Taking: Transfer of Skills, 12 CONTEMP. EDUC. PSYCHOL. 52 (1987) (finding that use of cooperative study and test-taking methods led to improvement in individual study and test-taking); Livengood, supra note 154 (examining students' psychological processes, including satisfaction and participation, as a predictor of academic success); Howard R. Pollio et al., Components of Contemporary College Grade Meanings, 14 CONTEMP. EDUC. PSYCHOL. 77 (1989) (attempting to ascertain "what grades mean" to students,
rejection of legal theory or of legal analysis. Performance assessment calls on examinees to apply the skills and knowledge they have mastered.176 Demonstration of these skills and knowledge can take place during the normal course of everyday events or in response to specific, structured exercises provided by the examiners.177 For most using the technique, performance assessment provides much richer information than standardized, norm-referenced testing.178 Such a revised evaluation and assessment program includes several dimensions.179 Evaluation would occur early in the semester, provide individualized feedback, and identify accurate and precise legal theories along the way. Students would receive practice during the semester. An evaluation system should assess skills, knowledge, and performance.180

faculty, parents and corporate personnel directors); Larry J. Weber et al., Take Home Tests: An Experimental Study, 18 RES. HIGHER. EDUC. 473 (1983) (comparing take-home tests with conventional tests).

176. See Mudd, supra note 6, at 189 (summarizing performance-referenced instruction); see generally Moss, supra note 45 (reviewing validity in performance assessment).

177. Miller, supra note 175, at 4.

178. Id. at 5.

179. For example, the Keller plan can be described as follows:

(a) The subject matter of a course, normally readings from standard texts, is broken up into twenty to thirty small units.

(b) Students progress through units of material as they demonstrate mastery of each unit.

(c) Mastery of a unit is demonstrated by a student’s answering of questions on a unit quiz at a certain level of accuracy, usually 100 percent.

(d) Quizzes are administered in interviews between an individual student and an instructor. Instructors may be professors, teaching assistants, or, as in many studies, students who have already passed the Keller course involved. Quizzes are written or oral, and, upon the completion of the quiz, the student receives immediate feedback about the level of his or her performance. Answers judged as incorrect by the instructor can be explained or defended by the student. No penalties are assessed for incorrect answers, and the student is allowed to study further and to retest until mastery is obtained.

(e) Lectures and demonstrations are used as “vehicles of motivation” and are available to the student only upon mastery of several units of material.

(f) Grading is based on the number of units completed rather than on exam scores.

(g) Class time becomes largely study time, as lecturing is greatly reduced. Instructors are formally available during study time to answer individual questions.

Teich, supra note 6, at 183 n.65 (citing Fred S. Keller, Good-bye Teacher, 1 J. APPLIED BEHAV. ANALYSIS 79 (1968)).

180. A leading review of legal education concludes that skills such as interviewing, counseling, and negotiating should be part of the required legal curriculum. Gee & Jackson, supra note 6, at 504.
Other methods of transmitting legal knowledge also deserve consideration. For example, law professors should consider the problem method, lecturing, group projects, adversary debates, role playing, and several other techniques that have been found successful in imparting knowledge in other fields. Law students, like any other students, "should be evaluated on a more varied and frequent basis than the traditional, end-of-course, essay examination."\textsuperscript{181}

**CONCLUSION**

Ranking is not inherently evil. As practiced in the majority of American law schools, however, it is manifestly erroneous and an unwise use of resources and human potential. Unfortunately, its place in legal education is firmly entrenched despite the long list of disadvantages associated with the normal curve. For reasons of institutional inertia, faculty insecurity, and professorial arrogance, few schools will move to reduce the emphasis placed on ranking. The few schools that have abandoned ranking deserve considerable praise.

Why the continued embrace of ranking? One reason is the perceived need of employers. Rightly or wrongly, employers use grades and class rank to make decisions about interviews, summer clerkships, and third-year hires and bonuses.\textsuperscript{182} The second and larger reason for the curve is the intransigence of law professors. According to one former dean:

Since the national law schools are also sprinkled with teachers who are threatened by anything new, disdainful of the practice of law, and inclined to be intolerant of any research other than the manipulation of doctrine or abstract theory, progress has been slow.\textsuperscript{183}

Ranking thus survives because of the institutional inertia of law schools and their administrators. According to another observer:

\textsuperscript{181} Cramton, *Law School Curriculum*, supra note 6, at 329.
\textsuperscript{182} See supra notes 26-27 and accompanying text.
\textsuperscript{183} Cramton, *Law School Curriculum*, supra note 6, at 326.
Legal education is predicated upon unexamined assumptions that survive only through the loving conservatorship of the institution that depends upon those assumptions for its survival.

The school and the profession remain closed systems, blind to the possibilities of change, locked in congratulatory and exclusive self-perpetuation.¹⁸⁴

Law faculty worship the essay exam as the sole measure of law student legal ability:

The allegation now so firmly embedded as to give the appearance of a truism is that the essay examination has superior power to expose organizational, integrational, and synthesizing abilities of students, which are the abilities to be assessed above all others in students' answers to law school examinations.¹⁸⁵

That law school essay exams are easy to construct remains a final reason for their use in law schools.¹⁸⁶ As one student concluded: "'Legal education' is neither sufficiently legal nor sufficiently educational."¹⁸⁷

Several studies have investigated the effectiveness of the Socratic method, lectures, the problem method, the case method, and other interventions to assist traditional learning in evaluating law school performance.¹⁸⁸ Others have examined class size in relationship to examination performance.¹⁸⁹ These interventions, however, were compared against the final law school essay examination, the only outcome measure. Judging from the available research, changing from five essays to four essays and one short answer, or adding a few true/false questions represents the level of

¹⁸⁴. Matthews, supra note 1, at 1095–96.
¹⁸⁵. Nickles, supra note 4, at 446–47. In my first year of law school, in response to a question whether pencils could be used for the essay, a professor responded, "hey, by the time I read 20 blue pen essays, one written in pencil certainly strains my eyes, and . . . you know the result."
¹⁸⁷. Matthews, supra note 1, at 1095.
¹⁸⁸. See, e.g., Hartwell & Hartwell, supra note 6 and material cited therein.
¹⁸⁹. See, e.g., Church, supra note 6, at 828 (discussing Hartwell & Hartwell's conclusion that a small section may not be much better than a large one as a method for instruction).
innovation in most law professors' arsenal of educational and psychometric weapons. Such a small improvement makes little sense when these essays are used to rank students, which imprints an entire set of characteristics and dispositions on the student.\textsuperscript{190} As research demonstrates, exposure to teaching and essay grading does not translate into student learning.\textsuperscript{191}

Professor Kennedy likewise concludes that the religion of ranking is unjustified.\textsuperscript{192} It is largely irrelevant to what students will do as lawyers, and employers looking at ranking based on one essay alone makes little sense.\textsuperscript{193} Additionally, ranking is a poor measure because the process of differentiating students into bad, better, and good could be ended with no loss of legal skill.\textsuperscript{194} If law schools redirected the money spent on the traditional methods they could graduate the vast majority of all law students at the level of technical proficiency now achieved by a small minority in each institution.\textsuperscript{195}

American law schools have become an organization performing a convenient grading, sorting, and labeling function for some legal employers rather than an educational enterprise.\textsuperscript{196} The end-of-term essay and the resultant ranking system reflects a concern neither for whom will be the best lawyer, nor a concern for learning, nor a concern for innovative thinking, nor a concern for society. In the words of one student, the process of "'thinking like a lawyer' is [only] straight-forward when no one is playing mind games with you."\textsuperscript{197}

A law school without ranking would provide a better culture for learning and education. First, a law school without ranking may in fact lead to better recruitment. For example, at the University of Virginia Law School, employers are told only that the mean score is a B.\textsuperscript{198} The Assistant Dean for Placement noted that the students appreciate the lack of detail. "One of the strengths of Virginia is the actual or perceived

\textsuperscript{190} See supra Part III.
\textsuperscript{191} See Ladas, supra note 28, at 185.
\textsuperscript{192} Kennedy, supra note 3, at 600.
\textsuperscript{193} See supra Part II.A.
\textsuperscript{194} Kennedy, supra note 3, at 600.
\textsuperscript{195} Id.
\textsuperscript{196} Cramton, Law School Curriculum, supra note 6, at 325.
\textsuperscript{197} Matthews, supra note 1, at 1102.
lack of deleterious competition." Other schools could learn from this. If all schools reject the ranking of law students, on educational grounds, employers more likely will look at students as humans. Rather than judging law students on the basis of a system based on inaccurate or incomplete information, they will evaluate the strengths and weaknesses of a student. If ranking must continue, then it should be used for only internal purposes, perhaps to award scholarships as several schools have done.

Law schools need to revise and legitimate their perspectives on evaluation and assessment. Law school professors should realize that testing is not a full evaluation, but only part of the process. Law school professors should realize the end-of-term essay examination is incompatible with educational theory and statistical practice. Ranking law students on the basis of these exams is improper since the ultimate goal of legal education should be to prepare lawyers, not to give a grade. Although receiving a grade based upon a single examination may give some students an estimate of their standing relative to other classmates, this should not be the sole purpose of examinations. As made clear by Professor Church, law students' futures are affected so strongly by law school averages that they can ill afford to be complacent about the chance that those averages are unreliable or misleading.

Unfortunately, producing grades for external consumption, not teaching the law or explaining the legal process, has become the central purpose of law school. As suggested by Erwin Griswold, former Dean of Harvard Law School,

199. Id. (quoting a student); see also Hobbs, supra note 3, at 241 ("Graduate schools and employers would probably be satisfied with the more revealing evaluations of the student and his teachers, even if they were fewer than the some forty grades we now compile for a transcript."); Michael E. Leving, Toward Descriptive Grading, 44 S. Cal. L. Rev. 696, 699–702 (1971) (supporting and describing descriptive grading).

200. Students at Vanderbilt Law School successfully argued this point to the faculty, which then voted to stop ranking students. Markoff, supra note 198. The article further states that the faculty was strongly influenced by the fact that other schools—notably, Yale, Virginia and New York University—restrict rankings to less specific classwide information. Id. Florida State University also does not reveal rank. Josephson, Volume 2, supra note 118, at 564.

201. Nickles, supra note 4, at 464; see also Phyllis Zatlin Boring, Dialog: Does Standard Grading Encourage Excessive Competitiveness?, CHANGE, Sept. 1975, at 44, 45 ("Testing and grading have an educational value, but not if the final grade is based solely on a final exam.").

202. Church, supra note 6, at 826.

203. Nickles, supra note 4, at 475; see Kissam, supra note 19, at 465.
“[t]raditional methods of law school instruction may be dangerous and destructive in their results when used without adequate understanding; and this may be no less disastrous because it was wholly unintended. . . . [L]egal education sharpens the mind by narrowing it.”204 The ranking of law students among peers is apparently a recognition that law school is more a sorting process than an educational experience.

The fundamental contradictions of the current system arise when law school administrators suggest grades are highly arbitrary, yet continue to rank students in order to encourage them to improve their class standing. The two concepts cannot coexist simultaneously. If grades and grading are indeed arbitrary, then a ranking of law students among their peers should not occur on these bases. If, on the other hand, ranking students among their peers is critical, then the basis of the ranking must be valid.

204. Griswold, supra note 171, at 299 (emphasis added).