

9-2022

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Recommended Citation

L. Danielle Tully, What Law Schools Should Leave Behind, 2022 ULR 837 (2022). <https://doi.org/10.26054/0d-hdrt-5c61>

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WHAT LAW SCHOOLS SHOULD LEAVE BEHIND

L. Danielle Tully*

*It is one thing to understand what ought to be done, quite another thing to do it. Doing entails an act of will and may require courage and perseverance.*¹

INTRODUCTION

Legal education is at a crossroads, again.² Perhaps the more apt transportation metaphor is that legal education is stuck in a roundabout. Crossroads require introspection and decision-making. You can't move past a crossroad without making an affirmative choice. Roundabouts provide the illusion of movement while keeping you in one place. But don't be fooled; staying in the roundabout is still a choice.

Legal education has been in a roundabout for a while.³ The last foundational changes came in the 1970s and 1980s with the rapid expansion of clinical education⁴ and the requirement, added in 1981, that law schools offer a rigorous writing experience for law students.⁵ After that, not much changed. Then, in the early

* © 2022 L. Danielle Tully. Associate Professor of Legal Writing, Brooklyn Law School. I dedicate this Essay to the legal education visionary, Judith Welch Wegner. For critique and camaraderie, I am grateful to Renée Nicole Allen, Mary Bowman, Heidi Brown, Alexa Chew, Leslie Culver, Rachel Gurvich, Joan Howarth, and Suzanne Rowe. I thank Sekai Tully Carr for meticulous research on law school grading policies and Zachary Elvove for excellent editorial assistance. For providing space for this work, I thank the *Utah Law Review* and the 2021 Symposium: #IncludeTheirStories: Rethinking, Reimagining, and Reshaping Legal Education. Finally, for inspiring me to keep asking *why*, *how*, and *when*, I thank my students.

¹ Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1611 (1986).

² Various scholars have approached how to navigate the crossroads. See, e.g., Robert F. Boden, *Legal Education at the Crossroads*, 2 COLO. LAW. 15 (1972); Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735 (2011); Karen Tokarz, Antoinette Sedillo Lopez, Peggy Maisel & Robert F. Seibel, *Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!*, 43 WASH. U. J. L. & POL'Y 11 (2013).

³ See L. Danielle Tully, *The Cultural (Re)Turn: The Case for Teaching Culturally Responsive Lawyering*, 16 STAN. J. C.R. & C.L. 201, 202–03 n.2 (2020) (discussing legal education reform critiques stretching back to 1948).

⁴ See Minna J. Kotkin, *Clinical Legal Education and the Replication of Hierarchy*, 26 CLINICAL L. REV. 287, 289–91 (2019) (describing the history of legal education reform efforts).

⁵ STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS. & INTERPRETATIONS Standard 302(a)(ii) (AM. BAR ASS'N 1981); see also Leslie M. Rose, *Norm-Referenced Grading in the Age of Carnegie: Why Criteria-Referenced Grading Is More Consistent with Current Trends in Legal Education and How Legal Writing Can Lead the Way*, 17 LEGAL

aughts, the Carnegie Foundation's *Educating Lawyers* and the Clinical Legal Education Association's *Best Practices* reports offered law schools an off-ramp.⁶ The visionary impulses captured by these reports, and the reform efforts behind them, fashioned a window through which to reimagine legal education.⁷ From the roundabout, law schools looked out that window and made some changes. Still, most refused to exit. As Professors Minow and Rakoff noted in 2007:

The plain fact is that American legal education, and especially its formative first year, remains remarkably similar to the curriculum invented at the Harvard Law School by Christopher Columbus Langdell over a century and a quarter ago. Invented, that is, not just before the Internet, but before the telephone; . . . not just before *Brown v. Board of Education*, but before *Plessy v. Ferguson*.⁸

WRITING: J. LEGAL WRITING INST. 123, 132 (2011) (discussing the expansion of legal writing courses in the 1980s).

⁶ WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007); ROY STUCKEY, *BEST PRACTICES FOR LEGAL EDUCATION* (2007), https://www.cleaweb.org/Resources/Documents/best_practices-full.pdf [<https://perma.cc/R45X-8ZJJ>]; see also *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSION TO THE BAR.

⁷ Following the 2007 publications, law schools held conferences addressing the need for change and stirring reform winds. See *Past Events*, BEST PRACTICES FOR LEGAL EDUC. BLOG, <https://bestpracticeslegaled.com/events-presentations-2/past-events/> [<https://perma.cc/KC3D-769S>] (last visited Jan. 30, 2022) (cataloging conferences sponsored by the Institute of Law Teaching and Education of Gonzaga University School of Law, University of Maryland School of Law, University of Washington School of Law, University of New Mexico School of Law, American University Washington College of Law, Georgia State Law School). In addition, the 2008 Association of American Law Schools (AALS) Annual Meeting featured a plenary session on “Rethinking Legal Education for the 21st Century.” *Raw Outline of “Rethinking Legal Education for the 21st Century,”* LAW SCH. INNOVATION BLOG (Jan. 5, 2008), <https://lsi.typepad.com/lsi/2008/01/raw-outline-of.html> [<https://perma.cc/E44U-SQWR>]. Finally, law schools held symposia and law review journals published scholarly articles on legal education reform. See, e.g., Nicholas S. Zeppos, *2007 Symposium on the Future of Legal Education*, 60 VAND. L. REV. 325 (2007) (introducing and summarizing the articles included in Vanderbilt Law Review’s 2007 Symposium on the Future of Legal Education); *Symposium: The Opportunity for Legal Education*, 59 MERCER L. REV. 821 (2008) (publishing two articles on legal education and transcripts from symposium sessions); Judith Welch Wegner, *Reframing Legal Education’s Wicked Problems*, 61 RUTGERS L. REV. 867 (2009) (lead article in Rutgers Law Review: 2009 Symposium: *A Legal Education Prospectus: Law Schools & Emerging Frontiers*).

⁸ Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 597 (2007).

Since then, that visionary window has become a mirror: merely reflecting and validating the slightly altered form law schools have taken.⁹ For example, the 2014 amendments to the ABA Standards on the Program of Legal Education (“Standards”) portended seismic changes, but the results have been underwhelming.¹⁰ These proposed Standards aimed to close the long-recognized gap between what law schools teach and what lawyers need to know to practice law ethically in the face of ever-changing social, economic, and cultural forces.¹¹ Much like before, the revised Standards seemed promising. In addition to requiring two writing experiences and minimum credit hours for both professionalism and experiential coursework,¹² the revised Standards also required law schools to adopt specific learning outcomes and to assess demonstrated student competencies,¹³ using both formative and summative assessments.¹⁴ These revisions, while significant, were still insufficient.¹⁵ Like the *Educating Lawyers* and *Best Practices*

⁹ The metaphor of windows and mirrors has a long history in multi-cultural education theory. Described by educator Emily Style in 1988, a mirror is meant to reflect and therefore validate one’s existence, while a window is meant to provide fresh air and fresh perspectives, particularly on the lived experiences of historically marginalized voices. Emily Style, *Curriculum as Window and Mirror*, NAT’L SEED PROJECT, <https://nationalseedproject.org/Key-SEED-Texts/curriculum-as-window-and-mirror> [<https://perma.cc/4W4A-CFD3>] (last visited Jan. 30, 2022). While law schools need both windows and mirrors, now is the time to build new windows.

¹⁰ More conferences and symposia tackled legal education reform before the ABA formally adopted revised Standards in 2014. *See, e.g., Symposium: Perspectives and Distinctions on the Future of Legal Education*, 38 OHIO N.U. L. REV. 847 (2012) (publishing four articles on the topic); *Symposium: The Lawyer of the Future*, 40 PEPP. L. REV. 337 (2013) (publishing eight articles on the topic); *Symposium: The Future of the Legal Profession*, 24 STAN. L. & POL’Y REV. 309 (2013) (publishing nine articles on the topic).

¹¹ The ABA Council on Legal Education and Admission to the Bar began a comprehensive review in 2008 and approved revisions in June 2014. The House of Delegates concurred in August 2014. *See generally* A.B.A. TASK FORCE ON THE FUTURE OF LEGAL EDUC., REPS. & RECOMMENDATIONS (2014), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf [<https://perma.cc/H7XS-5NUT>] (examining current challenges in American legal education and making recommendations for change). For a summary of the efforts leading to these changes, *see* Anthony Niedwiecki, *Law Schools and Learning Outcomes: Developing a Coherent, Cohesive, and Comprehensive Law School Curriculum*, 64 CLEV. ST. L. REV. 661, 668–73 (2016).

¹² *See* STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF L. SCHS., Standard 303 (AM. BAR ASS’N 2020–2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf [<https://perma.cc/4GJ7-S4H5>] [hereinafter ABA STANDARDS 2020–21].

¹³ *Id.* at Standard 302.

¹⁴ *Id.* at Standard 314.

¹⁵ *See* Tully, *supra* note 3, at 220–33 (discussing revised Standards 301 and 302 and arguing that by allowing law schools wide latitude to adopt learning outcomes and

reports that kicked off Standards reform, the 2014 revisions offered an off-ramp.¹⁶ Law school committees convened, they studied, they reported, they tinkered. Yet, by and large, law school curricula remained stuck in the roundabout, particularly the 1L year.¹⁷

Then, 2020 disrupted this lull. Amid a polarizing political climate, state-sanctioned violence, and the coronavirus pandemic, students said *enough*.¹⁸ They were right: Enough. Staying in the roundabout right now, choosing the status quo, might be expedient; but it's also the wrong answer. After thirty-some-odd years of law review articles and conferences filled with "tipping-points," "crossroads," and "crises," it's time to make significant changes. These changes should start with the 1L year.¹⁹ We know that first-year curriculum socializes future lawyers and shapes the legal profession.²⁰ As a result, law schools must reconstruct the first year and

assessment methods the ABA did not address the enduring critique that law schools fail to integrate skills, values, and knowledge in the first year).

¹⁶ Numerous scholarly articles heralded the changes and offered pathways for reform. See, e.g., Andrea A. Curcio, *A Simple Low-Cost Institutional Learning-Outcomes Assessment Process*, 67 J. LEGAL EDUC. 489 (2018) (describing a model to meet ABA-required institutional outcome-measures assessments); Niedwiecki, *supra* note 11, at 688–92 (describing the curricular planning and development process used by The John Marshall Law School and suggesting a process that complies with new ABA standards); Abigail Loftus DeBlasis & Elizabeth Adamo Usman, *Unrealized Potential: How Shifting the Focus to Student Learning Outcomes Could Reduce Law Student Distress*, 95 U. DET. MERCY L. REV. 179 (2018) (identifying opportunities presented by Standards 302, 314, and 315 and offering a "solutions" toolkit).

¹⁷ See Jamie R. Abrams, *Legal Education's Curricular Tipping Point Toward Inclusive Socratic Teaching*, 49 HOFSTRA L. REV. 897, 900 (2021) (noting that the Socratic method, in particular, still dominates first-year classes); Joan W. Howarth, *What Law Must Lawyers Know?*, 19 CONN. PUB. INT. L.J. 1, 7 (2019) ("The remarkable staying power of the Langdellian first year curriculum rests on the usefulness of these doctrinal subjects as platforms for teaching and learning methods of analysis, not the necessity for or even likelihood of using the doctrinal knowledge in practice.").

¹⁸ See, e.g., Tyler Ambrose, Zarinah Mustafa & Sherin Nassar, *Law Schools' Complicity on Racism Must Be Challenged*, THE APPEAL (June 24, 2020), <https://theappeal.org/law-schools-racism/> [<https://perma.cc/NG6U-JP7H>]; Ronald Weich, *Student Demands: How Should Law Schools and Their Deans Respond?*, 52 U. TOL. L. REV. 343 (2021); Sarah J. Schendel, *Listen!: Amplifying the Experiences of Black Law School Graduates in 2020*, 100 NEB. L. REV. 73 (2021).

¹⁹ This argument has also been made before. See, e.g., Rakoff & Minow, *supra* note 8, at 600–03 (critiquing the enduring power of the Langdellian case method, which is backward looking from the perspective of the edited appellate case, and arguing for a "facts-forward" approach based on problem-solving); THE NEW 1L: FIRST-YEAR LAWYERING WITH CLIENTS (Eduardo R. C. Capulong, Michael A. Millemann, Sara Rankin & Nantiya Ruan, eds., 2015) (arguing that the 1L year must integrate theory and practice and discussing a range of models that meet this proposal).

²⁰ See SULLIVAN ET AL., *supra* note 6, at 5–6. The *Educating Lawyers* report observed that the first months of law school provide "rapid socialization into the standards of legal

provide students with opportunities to develop the mindset and skills essential not only for competent law practice but to advance equity and justice. In contrast to the status quo, a reimagined 1L year would meet our students where they are now, not where they were (and who they were) one hundred years ago.²¹ To start this project, to move toward action-oriented change that actually builds an inclusive and equitable law school for all its constituents, the first question isn't *what are we willing to add?*—ABA requirements, trainings, book groups, committees, courses—but, *what are we willing to give up?*²²

In this Essay, I argue that to prepare future lawyers to build a more equitable, inclusive, and just profession, law schools must first relinquish three things: the faculty caste system and the distinction between doctrine and skills that it reflects; high-stakes, summative exams; and the curve. Part I briefly sketches out the problem. This section is brief because every word of it has been said before. Part II describes the three structural and pedagogical choices law schools must abandon. This section asserts that without giving up all three, law schools will not exit the legal education roundabout they have chosen to remain in for so long. This Essay concludes with a plea: let 2022 be the last year filled with *we are at a crossroads* essays for a while. Let's get about the work, the real work, by ceding both space and power so that we can build something better for our students and for our collective selves.

thinking” (Observation 1) and that this socialization occurs mostly through the case method, which provides students with a “deep, largely uncritical level” of understanding (Observation 2). *Id.*

²¹ For useful context on current law students, see Tiffany D. Atkins, *#ForTheCulture: Generation Z and the Future of Legal Education*, 26 MICH. J. RACE & L. 115 (2020). For background on how K-12 curriculum changes resulting from No Child Left Behind impacted the cognitive skills of incoming law students, see Sandra Simpson, *Law Students Left Behind: Law School's Role in Remediating the Devastating Effects of Federal Education Policy*, 107 MINN. L. REV. (forthcoming 2023).

²² For suggestions on adopting *culturally responsive lawyering* as a curricular framework, see Tully, *supra* note 3.

I. WHAT'S THE PROBLEM?

Students are drained,²³ faculties are unhelpfully divided,²⁴ bar passage rates remain low,²⁵ student debt is at an all-time high,²⁶ and graduates still aren't prepared to practice upon graduation.²⁷ While law schools “work” for some students, they

²³ See LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, THE COVID CRISIS IN LEGAL EDUCATION: 2021 ANNUAL SURVEY RESULTS 11–13 (2021), <https://lssse.indiana.edu/wp-content/uploads/2015/12/COVID-Crisis-in-Legal-Education-Final-10.28.21.pdf> [<https://perma.cc/VK7Q-4LKG>] [hereinafter LSSSE 2021 SURVEY] (reflecting declining quality of life for students).

²⁴ See, e.g., Renee Nicole Allen, Alicia Jackson & DeShun Harris, *The Pink Ghetto Pipeline: Challenges and Opportunities for Women in Legal Education*, 96 U. DET. MERCY L. REV. 525 (2019) (discussing myriad unhelpful divisions among faculty); John Cook, *Taking a Shot at the (Unmodified) Title: The Value of the Title “Professor of Law” for Improving the Status of Legal Writing Faculty and ALWD/LWI Survey Trends*, 24 LEGAL WRITING: J. LEGAL WRITING INST. 65, 67 (2020) (describing the titular division among faculty and arguing that it reflects an actual division); Ted Becker, Marci A. Rosenthal, Grant Christensen, Elizabeth Fishman, Elizabeth Frost, Kimberly Holst, Gail Mullins, Meredith Stange & Carolyn Williams, *Report of the Institutional Survey*, LEGAL WRITING INST. 1, 89 (2019–2020) (describing various voting distinctions between legal writing faculty based on employment track); Meera E. Deo, *The Ugly Truth about Legal Academia*, 80 BROOK. L. REV. 943 (2015) (describing results from the Diversity in Legal Academia study and concluding that intersectional bias creates barriers to success for non-traditional law faculty, particularly female faculty of color).

²⁵ First-time bar-taker pass rates have fluctuated in the past decade between a low of 62% and a high of 85%, while pass-rates for repeat-takers has been falling. See ACCESSLEX INSTITUTE, LEGAL EDUCATION DATA DECK: KEY TRENDS ON ACCESS, AFFORDABILITY, AND VALUE 24 (Nov. 2019), https://www.accesslex.org/sites/default/files/2020-09/AccessLex_Legal%20Education_DataDeck.pdf [<https://perma.cc/CNN7-HX2N>] [hereinafter ACCESSLEX DATA DECK] (graphing bar passage rates from 2009–2018); A.B.A., *Profile of the Legal Profession 2021* 59–62 (July 2021), <https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf> [<https://perma.cc/9GDU-Z9J6>] (graphing bar passage rates from 2008–2020). For granular data on bar passage rates, see NAT'L CONF. BAR EXAMRS, <https://www.ncbex.org/statistics-and-research> [<https://perma.cc/TNF4-PU7Q>] (last visited Jan. 30, 2022).

²⁶ LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, THE CHANGING LANDSCAPE OF LEGAL EDUCATION: A 15-YEAR RETROSPECTIVE 10 (2020) https://lssse.indiana.edu/wp-content/uploads/2015/12/LSSSE_Annual-Report_Winter2020_Final-2.pdf [<https://perma.cc/FLT5-PUJM>] [hereinafter LSSSE Retrospective] (explaining dramatic debt increases and noting that students of color owe significantly more today than fifteen years ago). Additionally, a high percentage of law students enter law school with undergraduate debt. ACCESSLEX DATA DECK, *supra* note 25, at 18 (noting that nearly half of all law students entered law school with debt and in 2015–2016 the median amount still owed was \$25,500). While this data reveals that overall borrowing declined between 2012 and 2016, average borrowing for law school still exceeded \$120,000. *Id.* at 21.

²⁷ See Milan Markovic, *The Law Professor Pipeline*, 92 TEMP. L. REV. 813, 833 (2020) (noting that law students graduate “unprepared to represent lower-income individuals and to

don't work for most.²⁸ Instead, legal education is perpetuating and even building new forms of inequality while fostering profoundly unhealthy professional practices. Recent studies recount high rates of burnout, depression, and substance abuse for law students, law professors, and lawyers.²⁹

There is no shortage of evidence that law schools produce negative psychological effects for students.³⁰ After the first year, students who have lost confidence don't readily regain it. And those who didn't acquire fundamental analytical skills don't quickly recover to learn more complex material. Even with growing support for the well-being movement, which began over thirty years ago, many of traditional legal education's stressors remain. Unhealthy levels of anxiety and stress "interfere with receiving and processing information, affecting 'not only cognitive aspects of learning but emotional and attitudinal components as well.'"³¹ There are many who would say that law school stress is minimal compared to the pressures of actual practice, when the profound weight of client representation comes to bear: real deadlines, real people, real rights, real costs. Perhaps. But law school stressors—particularly in the first year—don't mimic real-life's stressors, and these law school stressors work against the goal of building a healthy, ethical profession.

address their complex mix of legal and socioeconomic needs."); Howarth, *supra* note 17, at 5 (explaining that "most law schools have been extremely focused on the academic study of law, not preparation for the practice of law."); Dyane L. O'Leary, "Smart" *Lawyering: Integrating Technology Competence into the Legal Practice Curriculum*, 19 U.N.H. L. REV. 197 (2021) (noting that students graduate without sufficient exposure to legal tech and law schools have a duty to incorporate technology competence into their required curricula).

²⁸ While data suggests most students are generally content with their educational experience, it also reveals students do not uniformly feel a sense of value and belonging in their law schools. See LAW SCH. SURV. OF STUDENT ENGAGEMENT, DIVERSITY AND EXCLUSION: 2020 ANNUAL SURVEY RESULTS 5 (2020), <https://lsse.indiana.edu/wp-content/uploads/2020/09/Diversity-and-Exclusion-Final-9.29.20.pdf> [<https://perma.cc/5GZX-Y73J>] [hereinafter LSSSE 2020 SURVEY].

²⁹ Deborah L. Rhode, *Managing Stress, Grief, and Mental Health Challenges in the Legal Profession; Not Your Usual Law Review Article*, 89 FORDHAM L. REV. 2565, 2567–70 (2021) (summarizing data on mental health issues in the legal profession and underlying causes); see generally Jonathan Koltai, Scott Schieman, & Ronit Dinovitzer, *The Status–Health Paradox: Organizational Context, Stress Exposure, and Well-being in the Legal Profession*, 59 J. HEALTH & SOC. BEHAV. 20 (2018) (discussing depression, overwork, and work-life conflict in the legal profession).

³⁰ See, e.g., Kathryn M. Young, *Understanding the Social and Cognitive Processes in Law School that Create Unhealthy Lawyers*, 89 FORDHAM L. REV. 2575 (2021) (summarizing data from a 2020 study based on interviews with fifty-three law students at thirty-six different law schools and concluding that early law school socialization has negative social and cognitive effects on students); Rose, *supra* note 5, at 140 n.106 (citing articles arguing that the negative effects on student well-being begin in the first year); Susan A. Bandes, *Feeling and Thinking Like a Lawyer: Cognition, Emotion, and the Practice and Progress of Law*, 89 FORDHAM L. REV. 2427, 2431 (2021) (arguing that law schools marginalize emotion in legal reasoning, which has "tremendous psychic costs.").

³¹ Rose, *supra* note 5, at 141–42 (internal citation omitted).

Both the curriculum students encounter and the way that professors present it to them contribute to first-year students feeling alienated from the material they are studying. Of course, the 1L curriculum has experienced some meaningful changes in recent decades. Classrooms are less authoritarian. Faculties are more diverse; more first-year “skills faculty” are hired into tenure-line or tenure-line equivalent positions.³² Law schools have adjusted credits, added courses, and expanded opportunities for experiential learning.³³ In addition, a growing number of first-year casebook professors and those teaching upper-level courses have integrated critical perspectives into their classrooms.³⁴ These changes are significant: what’s included in the curriculum and what’s omitted—whether in casebook or legal writing classes—tell law students what’s important and what’s not. Moreover, these choices tell law students whose stories are important and whose are not.³⁵ As Professor Akbar has argued: “In classrooms and court opinions, what goes named and unnamed generates a view of how the world is and how it should be—even how it *could* be.”³⁶

³² Here, I use “skills faculty” to describe those faculty who teach legal writing, as well as those who teach legal research and other experiential courses such as negotiation, mediation, counseling, drafting, and law clinics.

³³ See Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C.J.L. & Soc. JUST. 247, 256–62 (2012) (summarizing law school innovations).

³⁴ See, e.g., *Boston University School of Law Symposium on Racial Bias, Disparities and Oppression in the 1L Curriculum: A Critical Approach to Canonical First Year Law School Subjects*, B.U. SCH. L. (Feb. 28–29, 2020), <http://www.bu.edu/law/2019/12/12/racial-bias-disparities-and-oppression-in-the-1l-curriculum/> [<https://perma.cc/Q8QZ-XN25>]. This symposium brought together faculty and students to explore how to build “an inclusive, rigorous, and critical first-year legal education that empowers students to be effective legal professionals.” *Id.* Sources are being collected and shared. See, e.g., *Critical Perspectives Reading List: 1L Curriculum*, SEATTLE UNIV. L. LIBR., <https://lawlibguides.seattleu.edu/criticalperspectives> [<https://perma.cc/NBQ5-NLHW>] (last visited Jan. 30, 2022); *Diversity Readings Related to First-Year Courses*, U. WASH. SCH. L., <https://guides.lib.uw.edu/law/diversity1L> [<https://perma.cc/NZ5M-6VMV>] (last visited Jan. 30, 2022). Scholars are critiquing core 1L courses and offering new approaches. See, e.g., Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1631 (2020). New casebooks are also being published. See, e.g., BROOKE COLEMAN, SUZETTE MALVEAUZ, PORTIA PEDRO, AND ELIZABETH PORTER, *A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES* (2022).

³⁵ See Bandes, *supra* note 30, at 2427–29 (recounting the explicit and implicit messages students receive about what is important to lawyering and noting that personal experience and emotions are not valued); Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 61 (1995) (“[C]asebooks have the power to influence students’ and readers’ views beyond the closed confines of classroom black-letter law.”).

³⁶ Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 368 (2015) (emphasis in original).

Still, most first-year courses are taught from casebooks containing edited appellate decisions.³⁷ These casebooks have been tweaked and revised: new cases and concepts appear while others are erased. New and more diverse voices are being included. But by and large, casebooks and the case method remain paramount.³⁸ Students are assigned pages of edited appellate decisions to read and brief before each class. Once in their seats, first-year law professors begin some version of a Socratic dialogue to help students extract legal rules from the assigned decisions.³⁹ As Professor Jamie Abrams notes, “[t]he Socratic method . . . fortifies law school budgets in its efficiency, scalability, and its high faculty-to-student ratios.”⁴⁰ However, this same method—particularly when used in large, curve-based, first-year casebook courses with limited assessments or opportunities for constructive feedback—hinders student learning.

In most law schools, legal writing is the only first-year course that does not rely on casebooks or the Socratic dialogue. This course focuses on lawyering skills—like mastering predictive analysis and professional communication. While legal writing courses aim to prepare students for practice, concepts such as cultural sensibility, social cognition, and professional identity formation remain on the margins. A welcome movement is afoot, though, as more professors interrogate the core 1L lawyering curriculum.⁴¹

Meaningful changes are occurring in other areas as well. Across the country, law schools have created new positions and recruited faculty to serve in roles

³⁷ See L. Danielle Tully, *Professional Identity Formation as a Power Skill*, 1 PROC. ONLINE J. LEGAL WRITING CONF. PRESENTATIONS 1 (2020).

³⁸ Rakoff & Minow, *supra* note 8, at 599–600.

³⁹ Abrams, *supra* note 17, at 900.

⁴⁰ *Id.*

⁴¹ Recent legal writing conferences have focused on interrogating and expanding the discipline. For example, in 2017, the Association of Legal Writing Directors (“ALWD”) dedicated its biennial conference to diversity and inclusion, which was reflected in the theme: Acknowledging Lines: Talking About What Unites Us and Divides Us. *2017 AWLD Conference*, UNIV. OF MINN., <http://alwd.umn.edu> [<https://perma.cc/DY7D-RSJE>] (last visited Jan. 30, 2022). In December 2021, the Legal Writing Institute (“LWI”) hosted a series of one-day conferences that included sessions addressing language, professional identity formation, and cultural humility in legal writing. See, e.g., *LWI One-Day Workshop at the Brandeis School of Law, the University of Louisville*, LEGAL WRITING INST. (Dec. 3, 2021), <https://www.lwionline.org/sites/default/files/2021Louisville.pdf> [<https://perma.cc/8GDZ-F8QZ>]. Discipline-building efforts are underway in scholarship as well. See, e.g., Sherri Lee Keene & Susan A. McMahon, *The Contextual Case Method: Moving Beyond Opinions to Spark Students’ Legal Imaginations*, 108 VIR. L. REV. ONLINE 72 (2022); Leslie Patrice Culver, *(Un)Wicked Analytical Frameworks and the Cry for Identity*, 21 NEV. L.J. 655 (2021); Elizabeth Berenguer, Lucy Jewel & Teri A. McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 205 (2020).

focused on diversity, equity, inclusion, and belonging.⁴² Finally, new resources like the Law Deans Anti-Racist Clearinghouse Project, hosted on the AALS website, are being curated and shared.⁴³

Again, these changes are commendable. But even where law faculty and law schools have made such changes, they have largely ignored how their assessment structures work against inclusive and equitable learning experiences. Further, while touting the value of anti-racist education, they have ignored their own entrenched and profoundly unequal institutional hierarchies. Certainly, progress has been made since 2004 when Professor Stanchi specifically called on egalitarian and feminist law professors and deans to “fight the inequality in their own backyards.”⁴⁴ But so much more can and should be done. Because of caste-like hierarchies, many faculty who teach legal writing, research, and academic support—faculty who have a clear perspective on the skills and experiences students bring to their law study and who have well-supported ideas about what can and should be done to improve legal education—still have little to no power to make any changes on their own.⁴⁵

Meaningful, enduring change cannot occur without all law school stakeholders deeply engaging in reform efforts.⁴⁶ Like the clinical movement that transformed upper-level law school curricula, this new movement to rebuild the first year will require that law school faculties interrogate the skills, values, and knowledge future lawyers need. While bar passage and job placement will remain important, faculties must also focus on what future lawyers need to thrive in and contribute to a more

⁴² See, e.g., *Equity, Inclusion & Belonging at William & Mary Law School*, WM. & MARY L. SCH., <https://law.wm.edu/about/equity-inclusion-belonging-at-wmlawschool/index.php> [<https://perma.cc/9HBQ-UKHX>] (last visited Feb. 1, 2022) (announcing new initiatives and a new administrative position focused on equity, inclusion, and antiracism); Mary Wood, *Mark Jefferson Named Inaugural Assistant Dean for Diversity, Equity and Belonging*, UNIV. VA. SCH. L. (Mar. 8, 2021), <https://www.law.virginia.edu/news/202103/mark-jefferson-named-inaugural-assistant-dean-diversity-equity-and-belonging> [<https://perma.cc/Z7DN-6G37>] (announcing UVA law school’s first Assistant Dean for diversity, equity, and belonging); *Diversity, Equity and Inclusion*, STURM COLL. L., <https://www.law.du.edu/about/diversity-and-inclusive-excellence> [<https://perma.cc/U3WU-HSNM>] (last visited Feb. 5, 2022) (linking to efforts at University of Denver Sturm College of Law to support diversity and equity).

⁴³ See *Law Dean Antiracist Clearinghouse Project*, ASS’N AM. L. SCH., <https://www.aals.org/about/publications/antiracist-clearinghouse/> [<https://perma.cc/7WVS-QU9G>] (last visited Feb. 5, 2022). The American Association of Law Libraries revised and updated its resource page on DEI. See *Diversity and Inclusion Resource Guide: Diversity & Inclusion in Law Libraries-Resources*, AM. ASS’N L. LIBR. (May 4, 2021), <https://www.aallnet.org/about-us/who-we-are/committees-juries/diversity-inclusion-committee/diversity-inclusion-resource-guide/> [<https://perma.cc/QP9L-5YYQ>].

⁴⁴ Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 469 (2004).

⁴⁵ See Allen et al., *supra* note 24, at 541–44 (discussing how skills work is coded female, which has consequences for faculty influence in the law school environment).

⁴⁶ See discussion *infra* Section II.A (discussing the impact of faculty hierarchies on curricular and institutional reform).

healthy, equitable, and just profession. Currently, law schools are “incubators of inequality.”⁴⁷ Without concerted efforts to reimagine legal education—particularly the pivotal first year—law schools will continue to function this way.⁴⁸

II. WHAT LAW SCHOOLS NEED TO GIVE UP

Before law schools can reimagine and rebuild legal education, those who govern them must first remove the enduring obstacles that produce and reproduce unnecessary inequality: faculty caste systems, high-stakes exams, and the curve.

A. Faculty Caste Systems

Legal education is shrouded in stories of gatekeeping and exclusion. A vast and growing body of literature spanning decades captures the vagaries and vicissitudes of law school hierarchies.⁴⁹ Among full-time faculty, most schools currently maintain at least five tiers: casebook, clinical, legal writing, academic success, and law librarians.⁵⁰ Placement on a particular rung generally denotes a faculty

⁴⁷ Alexa Chew & Rachel Gurvich, *Saying the Quiet Parts Out Loud: Teaching Students How Law School Works*, 100 NEB. L. REV. (forthcoming 2022) (manuscript at 3).

⁴⁸ Much has been written about how legal education succeeds at its not-so-explicit aim of reproducing the “actual patterns of hierarchy and domination.” Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 591 (1982); see generally Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155 (2008); Teri A. McMurtry-Chubb, *Writing at the Master’s Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 DREXEL L. REV. 41 (2010); Rachel López, *Untitled: The Power of Designation in the Legal Academy*, 73 RUTGERS U.L. REV. 923 (2021).

⁴⁹ The literature on this subject is legion. For a small sampling, see, e.g., Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117 (1997); Susan P. Liemer, *The Hierarchy of Law School Faculty Meetings: Who Votes?*, 73 UMKC L. REV. 351 (2004); Kotkin, *supra* note 4; Rachel Arnow-Richman, *Integrated Learning, Integrated Faculty*, 92 TEMP. L. REV. 745, 746–47 (2020).

⁵⁰ Law school castes can be sliced in many ways. See, e.g., Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS’N LEGAL WRITING DIRS. 12, 13–16 (2002) (identifying seven castes in American law schools: tenure-line faculty, deans, clinical faculty, law library directors, legal writing directors and faculty, adjunct faculty, and professional staff); Arnow-Richman, *supra* note 49, at 758–59 (discussing legal education’s evolution and the creation of the bifurcated faculty model). Importantly, Academic Support and Bar Preparation positions are relatively new to the law faculty hierarchy. Many law schools have created or expanded these roles to address bar passage rates among other teaching and learning objectives. See Allen et al., *supra* note 24, at 537 (noting that the ABA has identified academic support as one way for law schools to demonstrate that they are offering students “a reasonable opportunity” to complete the program of legal education as required by Standard 309(b)).

member's power within the institution along with access to both monetary and non-monetary rewards.⁵¹

Law faculty hierarchies are built on biased categories.⁵² In her article, *Unentitled: The Power of Designation in the Legal Academy*, Professor Rachel López recounts the virtual “cottage industry” of labels and designations.⁵³ These labels and designations are created and supported by those who govern law schools—sometimes faculty, sometimes boards, often a mix—and they are reinforced by ABA Standards for tenure and the law school “Professional Environment.”⁵⁴ Rather than functioning as mere labels, these status distinctions are containers.⁵⁵ They limit faculty's ability to collaborate, innovate, and integrate best practices for legal education across the curriculum by reifying silos conceptualized around the arbitrary and inaccurate distinction between doctrine and skills.⁵⁶ As Professor Arnow-Richmans notes:

⁵¹ See Lucille A. Jewel, *Oil and Water: How Legal Education's Doctrine and Skills Divide Reproduces Toxic Hierarchies*, 31 COLUM. J. GENDER & L. 111, 112–13, n.2 (2015) (cataloging thirty years of scholarship on treating “skills” professors as “second-class citizens”).

⁵² See Kathryn Stanchi, *The Problem with ABA Standard 405(c)*, 66 J. LEGAL EDUC. 558, 560 (2017) (critiquing faculty hierarchies and the categorical thinking that underpins them). For a breakdown of faculty by status see J. Lyn Entrikin, Lucy Jewel, Susie Salmon, Craig T. Smith, Kristen K. Tiscione & Melissa H. Weresh, *Treating Professionals Professionally: Requiring Security of Position for All Skills-Focused Faculty Under ABA Accreditation Standard 405(c) and Eliminating 405(d)*, 98 OR. L. REV. 1, 20–26 (2020).

⁵³ López, *supra* note 48, at 925.

⁵⁴ See Mary Beth Beazley, *Shouting into the Wind: How the ABA Standards Promote Inequality in Legal Education, and What Law Students and Faculty Should Do About It*, 65 VILL. L. REV. 1037, 1039 (2020) (noting that ABA Standard 405(c) “declared that a system of tenure was *not* necessary for those full-time faculty who taught what the rule called ‘professional skills,’ stating that a law school need afford them only a ‘form of security of position *reasonably similar to tenure*, and perquisites *reasonably similar to those* provided other full-time faculty members”).

⁵⁵ See Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us about the Doctrine-Skills Divide*, 64 J. LEGAL EDUC. 181, 183 (2014).

⁵⁶ Using the term “doctrinal” to denote only those subjects taught by casebook professors is underinclusive. See Linda H. Edwards, *Legal Writing: A Doctrinal Course*, 1 SAVANNAH L. REV. 1, 4–8 (2014) (demonstrating how legal writing is “doctrinal”). The skills/doctrine divide emerged alongside the clinical movement and the expansion of experiential courses meant to get law students “practice ready.” See Jewel, *supra* note 51, at 114. Beyond the negative impact these categories have on legal education, Professor Sara Ochs argues that they also seed and nurture imposter syndrome in professors. Sara L. Ochs, *Imposter Syndrome & The Law School Caste System*, 42 PACE L. REV. 373 (2022).

[T]he bifurcated faculty is rooted in longstanding, deeply embedded stereotypes about the academic rigor of skills courses and the intellectual capacity of skills teachers. The interaction between these ingrained beliefs and the personnel practices they have engendered ensures that skills education remains segregated and devalued along with those who teach it.⁵⁷

These containers also ensure that the skills/doctrine divide dominates everything from course content to the physical law school environment. Although faculty teaching skills courses have long been lauded as essential, and their courses have been required by the ABA, most tenure-line positions are held by casebook professors (referred to by many as doctrinal or podium professors).⁵⁸ Tenure-line faculty are expected to meet standards of excellence on three pillars—scholarship, teaching, and service—but they are principally evaluated on their scholarly productivity.⁵⁹ They also function as “governing” faculty with the power to vote on matters from curriculum changes to faculty hiring and promotion.⁶⁰ Faculty who hold these positions receive the highest compensation and strongest job protection.⁶¹

Some law schools provide unitary tenure track positions for both clinical and legal writing faculty, and this number has grown in the last decade. These institutions treat faculty who teach skills courses as equal colleagues and full partners in their institutions’ missions. More legal writing professors are also becoming deans and associate deans, a testament to their institutional value. Still, these stories remain the exception. Across the country, many “skills faculty” are still hired on contingent contracts.⁶² They are evaluated primarily on their teaching and service and are often

⁵⁷ Arnow-Richman, *supra* note 49, at 758.

⁵⁸ See Stanchi, *supra* note 52, at 560 (noting that “[f]aculty who teach ‘substantive’ subjects are presumed to deserve tenure; clinicians and legal writing faculty are presumed not to deserve it.”).

⁵⁹ See Arnow-Richman, *supra* note 49, at 753 (noting “[d]octrinal faculty are judged principally on their scholarship”).

⁶⁰ Liemer, *supra* note 49. As Professor Liemer noted in her 2004 article, “There seem to be almost as many ways to configure who votes on what at faculty meetings as there are law schools. At some schools, everyone votes; at others, no one off the traditional tenure track votes. At one school the clinicians vote, and the legal writing professors do not.” *Id.* at 361. For a breakdown of voting rights by legal writing employment type, see ASS’N LEGAL WRITING DIRECTORS, *LWI/ALWD Legal Writing Survey, 2019–2020*, 89 (on file with the publication).

⁶¹ See Entrikin et al., *supra* note 52, at 19, 22.

⁶² See Ruth Anne Robbins, Kristen K. Tiscione & Melissa H. Weresh, *Persistent Structural Barriers to Gender Equity in the Legal Academy and the Efforts of Two Legal Writing Organizations to Break Them Down*, 65 VILL. L. REV. 1155, 1161–62 (2020) (discussing status trends for skills faculty); Kotkin, *supra* note 4, at 297–99 (discussing employment status of full-time clinical instructors between 2010–2017). For a discussion of recent legal writing hiring trends, see Peter Nemerovski, *Help Wanted: An Empirical Study of LRW Hiring*, 24 LEGAL WRITING: J. LEGAL WRITING INST. 315 (2020).

relegated to lower-paid contract positions.⁶³ In addition, these faculty are sometimes physically segregated from tenure-track and tenured casebook faculty and may even have inferior office space and office location.⁶⁴ Even with their labor-intensive teaching loads, in some institutions, legal writing faculty are required to meet the same scholarship and service obligations as their tenure-line peers, yet they are not eligible for tenure and they are prohibited from voting on various governance matters.⁶⁵

Despite recent moves to convert limited-term contract positions into tenure-track and “tenure-equivalent” positions, skills positions continue to be plagued by inequality.⁶⁶ Instead of creating unitary systems with clear standards that all faculty can meet, many law schools have ossified tiered tracks as a way to comply with the ABA requirements for faculty tenure and security of position set out in Standard 405.⁶⁷

⁶³ Amy H. Soled, *Legal Writing Professors, Salary Disparities, and the Impossibility of “Improved Status,”* 24 LEGAL WRITING: J. LEGAL WRITING INST. 47, 48–49 (2020) (noting that the median salary for a tenure-track associate professor is \$168,840 whereas the base salary for a legal writing professor on the tenure track is \$95,664, on a long-term contract is \$72,350 and on a short-term contract is \$69,083).

⁶⁴ Faculty office integration resulted from consistent, decades-long efforts. See Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73 UMKC L. REV. 253, 257 (2004) (describing results of the 2004 ALWD and LWI annual survey and noting that 25% of legal writing faculty offices were located in less desirable areas, and 35% were smaller than non-LRW faculty offices). The 2019–2020 ALWD/LWI survey reports that 89% of LRW faculty holding universal tenure-track or tenured positions have offices integrated with non-LRW faculty offices. Becker et al., *supra* note 24, at 221–22. That percentage decreased to 67% for faculty holding full-time, long-term contracts that are not 405(c) contracts. *Id.*

⁶⁵ See Entrikin et al., *supra* note 52, at 25–26 (noting that 20% of all clinical and legal writing faculty with 405(d) status were unable to vote while, 73% of legal writing faculty on long-term contracts were expected or required to serve on committees); Allen et al., *supra* note 24, at 527 (noting that women in non-tenure track clinical and legal writing faculty positions “are second-class citizens who are often excluded from faculty governance or the full protection of academic freedom.”).

⁶⁶ See, e.g., Soled, *supra* note 63 (describing the enduring disparities in pay and status); Arnow-Richman, *supra* note 49, at 746 (noting that “[a] privileged group of elite-credentialed faculty cover the doctrinal courses, while enjoying the generous compensation and job security associated with tenure. Meanwhile an underclass of contract faculty shoulder the more labor-intensive skills curriculum, enduring lower pay and lesser status.”); Kotkin, *supra* note 4, at 297 (noting the “steady erosion in the status of clinical teachers” as more clinical professors are hired into contract-line position without equal voting rights).

⁶⁷ STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF L. SCHS., Standard 405 at 29–30 (AM. BAR ASS’N, 2021–2022), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure-chapter-4.pdf [https://perma.cc/3WC8-DWUN] [hereinafter ABA STANDARDS 2021–22]. According to a 2016–2017 study by the Center for Applied Legal Education only 34% of full-time clinical faculty hold tenure-line positions

Critiques of Standard 405 stretch back decades and have highlighted that it strengthened faculty hierarchies by specifically carving out two faculty categories that do not need access to tenure at all: clinical and legal writing faculty.⁶⁸ First, under ABA Accreditation Standard 405(c), law schools must provide clinical *faculty* with “tenure-equivalent” positions, which means the possibility for a series of long-term contracts that are presumptively renewable.⁶⁹ To be clear, equivalent is not “equal in force, amount, or value” as the Meriam Webster Dictionary definition might suggest.⁷⁰ Next, the ABA carved out a second underclass for legal writing *teachers* by requiring that law schools only provide them access to “such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well-qualified to provide legal writing instruction . . . , and (2) safeguard academic freedom.”⁷¹ Although 405(d) was nominally meant to help legal writing faculty, it instead created another acceptable sub-category onto which governing faculty could cling.⁷² And, ultimately, as Professor Entrikin has aptly argued: “405(d) provides no real protection for legal writing faculty at all[.]”⁷³ while simultaneously communicating to other law school faculty that legal writing faculty are inferior.⁷⁴ Notably, despite the essential role they play in modern legal education, there are no requirements that law schools provide any form of job security to law librarians or professors who specialize in either academic support or bar preparation.⁷⁵

with 27% of those in unified tenure positions and 12% in programmatic tenure positions. Arnow-Richman, *supra* note 49, at 750. Similarly, a 2018–2019 study revealed that most legal writing programs employ professors in either short- or long-term contracts rather than tenure-line positions. *Id.* at 750–51.

⁶⁸ See, e.g., Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools’ Dirty Little Secrets*, 16 BERKELEY WOMEN’S L.J. 3 (2001); Robbins et al., *supra* note 62, at 1156; Entrikin et al., *supra* note 52, at 15–18 (summarizing efforts to amend Standard 405 during the 2008–2014 review process and concluding that the decision to leave 405 unchanged further entrenched faculty hierarchies).

⁶⁹ ABA STANDARDS 2021–22, *supra* note 67, at 27–30.

⁷⁰ *Equivalent*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/equivalent> [<https://perma.cc/V6AN-2KT8>] (last visited May 10, 2022); see Entrikin et al., *supra* note 52, at 19 (stating that Standard 405(c) diminishes the protections of academic freedom and tenure for clinical faculty).

⁷¹ ABA STANDARDS 2021–22, *supra* 67, at 29.

⁷² See Entrikin et al., *supra* note 52, at 21 (“Standard 405 communicates a judgment that, regardless of their qualifications, legal writing faculty are somehow inferior to ‘faculty.’”); Tiffany Jeffers, *The Choice to Stay in the Pink Ghetto*, 23 LEGAL WRITING: J. LEGAL WRITING INST. 41, 42 (2019) (noting that ABA Rule 405(d) “codified the ability of the academy to maintain a system that is procedurally and substantively unequal.”).

⁷³ Entrikin et al., *supra* note 52, at 18.

⁷⁴ *Id.* at 21.

⁷⁵ Allen et al., *supra* note 24, at 537–38. The 2014 revisions to the ABA Standards relating to library directors withdrew previous language acknowledging that they generally hold tenure-track or tenured positions. Gordon Russell, *The ABA Section on Legal Education*

Through both formal and informal requirements and restrictions, and everything from workload to voting, faculty hierarchies create power structures that animate our institutions and heavily impact the reform equation.⁷⁶ Marginalized faculty without job security exercise academic freedom at a very real risk, if they exercise it at all. Additionally, faculty silos and the academic caste system continue to reproduce faculty division, which negatively impacts student learning and prevents much-needed institutional change.⁷⁷ Ultimately, the distinctions and the resulting inequality they produce devalue both skills professors and the subjects they teach. “These hierarchies, in turn, communicate problematic values to students.”⁷⁸

Race and gender further complicate law school faculty hierarchies. Despite advances in other professions, and in the admissions statistics for some law schools, law school faculties are still overwhelmingly white and male.⁷⁹ In part, that is because law school faculty recruitment functions in a relatively closed universe, and law schools hire from a well-defined and very small pool.⁸⁰ In addition, as Professor Meera Deo notes, most female professors are “accidental professors—folks with the skills and expertise to excel in legal academia who just hadn’t considered this a viable path for themselves.”⁸¹

Revisions of the Law Library Standards: What Does it All Mean? 106 L. LIB. J. 329, 353–54 (2014). After 2014, Standard 603 requires that “except in extraordinary circumstances, a law library director shall hold a law faculty appointment with security of faculty position.” ABA Standard 603(d). *Id.*

⁷⁶ See Arnow-Richman, *supra* note 49, at 756 (noting that “[f]aculty silos are artifacts limiting the type of curricular innovation and faculty collaboration that law schools most need to provide a twenty-first-century education.”).

⁷⁷ See Entrikin et al., *supra* note 52, at 12–13.

⁷⁸ Abrams, *supra* note 17, at 919.

⁷⁹ See Robert Kuehn, *Shifting Law School Faculty Demographics*, (Jan. 5, 2022), <https://bestpracticeslegaled.com/2022/01/05/clinical-legal-education-by-the-numbers/> [<https://perma.cc/H4PM-CAZD>] (last visited July 13, 2022). ABA accredited law schools are required to include faculty demographics in their annual Standard 509 Information Reports. For the searchable dataset, see *Section of Legal Education – ABA Required Disclosures: Standard 509 Required Disclosures*, ABA, <https://abarequireddisclosures.org/Disclosure509.aspx> [<https://perma.cc/84DF-DHUD>] (last visited Feb. 4, 2022).

⁸⁰ This pool has become even smaller in recent years. See Kotkin, *supra* note 4, at 294 (noting that traditional elite hiring credentials—“top-tier law degree; a law review editorship; a prestigious, preferably federal circuit or U.S. Supreme Court clerkship; and perhaps a few years at a big firm or an elite government agency”—are no longer sufficient and now “the ‘coin of the realm’ is a fellowship and/or an advanced degree, particularly a Ph.D.”); see also Carliss N. Chatman & Najarian R. Peters, *The Soft-Shoe and Shuffle of Law School Hiring Committee Practices*, UCLA L. REV. (May 8, 2021), <https://www.uclalawreview.org/the-soft-shoe-and-shuffle-of-law-school-hiring-committee-practices/> [<https://perma.cc/XRL6-4P2L>].

⁸¹ Meera Deo (@meeradeo), TWITTER (Dec. 17, 2021, 9:45AM), <https://twitter.com/meeradeo/status/1471854014727786497> [<https://perma.cc/XX6D-RXXN>]; *Cute as a Button*, STRICT SCRUTINY PODCAST (Nov. 23, 2020), <https://strictscrutinypodcast.com/wp->

In comparison to law faculties generally, women are overrepresented in skills roles and among legal writing faculty in particular.⁸² In fact, legal writing faculty work has long been considered “pink collar work,” and their members have toiled in the “pink ghetto” of law faculties.⁸³ Over the past two decades, approximately 70% of legal writing faculty have been female, whereas 40% of all law school faculty in 2020 identified as female.⁸⁴ Furthermore, for the 2019–2020 academic year, 86% of the legal writing faculty identified as white.⁸⁵ In part, the legal writing discipline has remained white because of the clear bias faculty of color face in legal academia. For example, “[w]omen of color who teach Legal Writing can be marginalized as women, as women of color, and as faculty members teaching a course almost universally less valued in the academy.”⁸⁶ In addition, “their lack of status can demean and silence them, as well as prevent their institutions from benefiting from all they can contribute as scholars, teachers, and colleagues.”⁸⁷ Some prospective Black female professors have even been encouraged to apply for tenure-track casebook positions instead of clinical, legal writing, or academic support positions because of the “multiple marginalizations” faced by women of color who teach skills courses.⁸⁸

It is unsurprising, then, that most law students largely encounter white women as their legal writing and academic success professors. Regardless of role, failing to

content/uploads/2020/11/Cute-as-a-Button- Transcript.pdf [<https://perma.cc/28K6-Q3FG>]. For a detailed exploration of the myriad barriers to entry into legal academia, see MEERA DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* (2019).

⁸² See generally Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000).

⁸³ See *id.*; Lorraine K. Bannai, *Challenged X 3: The Stories of Women of Color Who Teach Legal Writing*, 29 BERKELEY J. GENDER L. & JUST. 275, 278–79 (2014); see also Mary Nicol Bowman, *Legal Writing as Office Housework?*, 69 J. LEGAL EDUC. 22 (2019) (using the office housework frame to demonstrate how and why legal writing professors’ work, which is labor-intensive, individualized, and often requires heavy learning-centered service loads, is devalued in law schools).

⁸⁴ Becker et al., *supra* note 24, at 68 (noting 69.8% of 557 legal writing professors surveyed identified as female in the 2019–2020 ALWD/LWI Legal Writing Survey).

⁸⁵ Becker et al., *supra* note 24, at 69. In comparison, law school ABA 509 reports for 2020 indicate that 17% of all faculty and 21% of full-time faculty identify as “minority.” See *Section of Legal Education*, *supra* note 79.

⁸⁶ Bannai, *supra* note 83, at 279.

⁸⁷ *Id.* at 276; see also Allen et al., *supra* note 24, at 543 (“[A]s women in skills positions attempt to move up the academic ladder, they encounter resistance from other faculty members: devaluing their scholarship, service, and even the intellectual stimulation of the work they do.”).

⁸⁸ See Bannai, *supra* note 83, at 276, 288 (“As a result of the low status accorded to Legal Writing faculty, women of color are counseled to avoid—or asked why they want to continue—teaching Legal Writing.”); McMurtry-Chubb, *supra* note 48, at 45 (discussing how the status of legal writing within law schools deters women of color from becoming legal writing professors and acknowledging that mentors “unanimously warned [her] not to take a job as a legal writing professor.”).

actively recruit, hire, and nurture faculty who have been historically marginalized and kept off law faculties limits what students learn and how they experience their legal education.⁸⁹ But, so long as status hierarchies remain, efforts to diversify casebook tenure-line positions will negatively impact hiring faculty of color for clinical, legal writing, and academic success positions.

ABA accrediting Standards, and the profession more generally, already require that law schools restructure the pillars of teaching, scholarship, and service to place greater weight on student learning and assessment. New amendments to the Standards now also require that law schools provide “substantial opportunities” in “the development of a professional identity”⁹⁰ and education “on bias, cross-cultural competency, and racism.”⁹¹ In addition, legal employers seek new graduates who can demonstrate a broad range of legal skills to adeptly navigate the dynamic legal field.⁹² This shift toward experiential learning and learning outcomes that address the nuanced and complex skills required of new graduates is at direct odds with current faculty hierarchies and the siloed structure of legal education.⁹³ With faculty (and course) silos in place, “[s]tudents have not been guided toward an understanding of the intricate relationships among doctrinal, strategic, interpersonal, and ethical analysis.”⁹⁴ Furthermore, these siloes “impede[] faculty development of the cross competencies needed to deliver an integrated curriculum.”⁹⁵

Law schools can finally commit to diversifying all aspects of faculty hiring by dismantling the extant silos, abandoning the hierarchal tracks, and replacing the faculty structure with a unified tenure system.⁹⁶ This system should be grounded in standards for teaching, service, and scholarship that adequately reflect twenty-first-century standards of excellence and impact. For example, assessing excellence in

⁸⁹ See Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective*, 96 IOWA L. REV. 1549, 1556–65 (2011) (summarizing educational benefits of faculty diversity); see also Abrams, *supra* note 17, at 919–20 (summarizing barriers faced by faculty of color in recruitment and retention and noting that progress in diversifying faculties has languished).

⁹⁰ ABA STANDARDS 2020–21, *supra* note 12, at 303(b)(3).

⁹¹ *Id.* at 303(c).

⁹² See generally Susan C. Wawrose, *What Do Legal Employers Want to See in New Graduates?: Using Focus Groups to Find Out*, OHIO N.U. L. REV. 505 (2013); Mark A. Cohen, *What’s a Lawyer Now? Law’s Shift from Practice to Skill*, FORBES (Sept. 23, 2019), <https://www.forbes.com/sites/markcohen1/2019/09/23/whats-a-lawyer-now-laws-shift-from-practice-to-skill/?sh=19af8094745b> [<https://perma.cc/3APP-MH7E>] (last visited July 13, 2022).

⁹³ See Jewel, *supra* note 48 (discussing how the teaching hierarchy inhibits law schools’ ability to prepare the new generation of attorneys to be critical thinkers who create legal reform).

⁹⁴ Peggy Cooper Davis, *Slay the Three-Headed Demon! Radical Proposals to Reform Legal Pedagogy*, 43 HARV. C.R.-C.L. L. REV. 619, 621 (2008).

⁹⁵ Arnow-Richman, *supra* note 49, at 748.

⁹⁶ The call for unitary employment standards is not new. See, e.g., *id.*, at 763, n.112 (calling for unitary tenure standards and citing other scholars who argue for same); Allen et al., *supra* note 24, at 547.

teaching would require law schools to evaluate whether faculty have mastery of various teaching and assessment approaches and adequately deploy them in their courses to maximize learning within a diverse and dynamic student body.⁹⁷ Such a change would require law schools to truly prioritize student learning by investing in on-going teacher training and mentorship.

Assessing excellence in service should also focus on the student. Of course, faculty members should have numerous avenues to match their skills/interests with areas to serve. For example, some may demonstrate excellence through creating innovative teaching resources that can be shared with and used by other faculty. Some may demonstrate excellence through chairing or serving on time-intensive faculty committees. Still, others may demonstrate excellence in service by participating in a local access-to-justice task force. However, law schools should place more value on the particularly time-, labor-, and emotion-intensive work relating to student learning and advancement.⁹⁸

Finally, excellence in scholarship must expand to reflect the various ways in which scholarship is produced and consumed.⁹⁹ Although traditional law review articles play an essential role in the professoriate's conversations with one another and other key players in the legal profession, amicus briefs, blog posts, and even podcasts disseminate legal theories and narratives that impact the legal profession as well. Law professors have the mental acuity and intellectual flexibility to evaluate their peers in sources other than traditional law reviews. Additionally, law faculty must expand the definition of what counts as worthy of scholarly exploration. Faculty must finally abandon the tired refrain that they just don't know how to evaluate legal writing, clinical, and academic success scholarship. Such narrow thinking merely entrenches already suspect divisions.

Unified standards based on the same criteria can support increased faculty diversity along with curricular integration and innovation, so long as those unified standards recognize the importance of skill development and transformational practices. Unified standards cannot simply mean that faculty who teach skills courses are expected to do all the things they currently do and meet the unitary tenure standards, with no more support or pay. Instead, unitary standards should ask all professors to advance student learning, the law, and the profession. Doing so might take various forms, but any form must value the labor-intensive work that skills faculty already contribute and require casebook faculty (if such designation continues to exist post-reform) to engage in more student-centered, skills-building, labor-intensive work as well.¹⁰⁰

⁹⁷ Arnow-Richman, *supra* note 49, at 763; Allen et al., *supra* note 24, at 547–48 (arguing for reevaluating the value assigned to teaching and assessment efforts in faculty reviews).

⁹⁸ See Allen et al., *supra* note 24, at 544 (noting that law schools should “start assigning more value to the work done in skills positions”).

⁹⁹ See Arnow-Richman, *supra* note 49, at 763.

¹⁰⁰ See Allen et al., *supra* note 24, at 548. For suggestions on appropriate pedagogical changes to enhance flexible, higher-order thinking, see Simpson, *supra* note 21.

The barriers to reform are both high and evident. First, negotiating any reapportionment is a little like trying to shift power in a gerrymandered map. First-year courses are taught by a mix of faculty. Some have job security after a long road to tenure, others hope to have it and may alter their teaching and lower their institutional heads while on the road toward that vote, and still others have no status, no vote—they have influence only in proximity to power. These institutional dynamics impede reform.¹⁰¹ Second, flawed and enduring biases prevent governing faculty from embracing “skills” professors as their equals, even when legal writing and experiential courses are the only courses affirmatively required by the ABA outside of professional responsibility.¹⁰² These same biases prevent governing faculty from embracing an entirely new paradigm in which such divisions disappear.

While reforms should be cultivated by faculty in individual law schools, such efforts will likely be insufficient. It is no surprise that the last significant changes to status hierarchy resulted from a combination of push and pull forces, including changes to the ABA standards for security of position.¹⁰³ New reforms will likely require similar dynamics. As is already evident, faculty have been actively working to dismantle these silos for decades, but more widespread progress in this area will require much broader, profession-wide commitment.¹⁰⁴

Ultimately, from the faculty caste system to the curve, law schools have made themselves into “bias-reinforcing structure[s].”¹⁰⁵ Now that the hierarchies are

¹⁰¹ See Kotkin, *supra* note 4, at 297 (noting that status erosion for clinical professors results in them having less influence at their schools and on legal education more generally).

¹⁰² See, e.g., Mary Beth Beazley, “Riddikulus!”: *Tenure-Track Legal-Writing Faculty and the Boggart in the Wardrobe*, 7 SCRIBES J. LEGAL WRITING 79 (1998–2000) (dispelling various biases and describing how these biases “shape-shift” to ensure legal writing professors are kept in subordinate roles including that legal writing is so “easy” that it is not “intellectual” and so “hard” that tenure is inappropriate because burn-out is inevitable); see generally Edwards, *supra* note 55 (detailing the trouble with categorizing law school professors); Allen et al., *supra* note 24, at 526–27 (describing the work traditionally performed by women as “pink-collar work” and noting that women are more likely than men to participate in uncompensated work that does not lead to promotion); Bowman, *supra* note 83, at 24–25 (noting the disparity between “importance” of legal writing and how professors of those courses are treated under the ABA standards).

¹⁰³ See Melissa H. Weresh, *The History of American Bar Association Standard 405(d): One Step Forward, Two Steps Back*, 24 LEGAL WRITING: J. LEGAL. WRITING INST. 125 (2020) (discussing the history of changes to Standard 405 including efforts to refine and revise standards 405(b), 405 (c), and 405 (d) and the most recent review period between 2008–2014 during which status hierarchies based on position were maintained).

¹⁰⁴ See, e.g., Teri A. McMurtry-Chubb, *Toward a Disciplinary Pedagogy for Legal Education*, 1 SAVANNAH L. REV. 69 (2014) (calling for law schools to adopt a writing-centered pedagogy across the curriculum); Mary Nicol Bowman & Lisa Brodoff, *Cracking Student Silos: Linking Legal Writing and Clinical Learning Through Transference*, 25 CLINICAL L. REV. 269 (2019) (discussing how to teach skills for transfer across the curriculum).

¹⁰⁵ Arnow-Richman, *supra* note 49, at 758 (“In the case of the bifurcated faculty, however, the problem is one of the academy’s own making.”). *Id.* at 762.

obvious, the question is: Will those who govern have the desire, courage, and perseverance to dismantle them?

B. High-Stakes Summative Assessments

*Unlike the periodic, criterion-based systems used in most professional training, the law school exam serves virtually no pedagogic function; its only function is ranking.*¹⁰⁶

*Beginning with a student's first semester, and especially following the first year, final exam grades place students on a particular track. A student's track determines the ease with [which] she is able to 'win' at law school.*¹⁰⁷

At their best, assessments are part of an ongoing educational process in which students acquire, practice, and evaluate skills.¹⁰⁸ Assessments can either be formative or summative. Formative assessments provide students with feedback about their strengths and weaknesses while learning new content and skills. Summative assessments evaluate cumulative student learning at the end of a learning cycle. Effective assessments—whether formative or summative—are teaching tools, providing knowledge, motivation, and feedback to students and their teachers.¹⁰⁹

Single, end-of-the-semester exams are rarely teaching tools.¹¹⁰ These exams don't reliably measure what a professor has taught, nor are they a fair indicator of student effort or ability.¹¹¹ More importantly, most don't reflect or assess the cognitive skills lawyers use in practice.¹¹² Writing over one hundred years ago, after conducting a six-year study at Columbia Law School in the 1920s, Professor Ben Wood concluded that while a single final exam was the most common form of law school assessment, the “English prose answers to legal problems, written under

¹⁰⁶ Cooper Davis, *supra* note 94, at 623.

¹⁰⁷ Jonathan Feingold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 71, 93 (2013).

¹⁰⁸ See DeShun Harris, *Let's Talk About Grading, Maybe: Using Transparency About the Grading Process to Aid in Student Learning*, 45 SEATTLE UNIV. L. REV. (forthcoming 2022) (providing a useful discussion of the grading process); Deborah Waire Post, *Power and the Morality of Grading—A Case Study and a Few Critical Thoughts on Grade Normalization*, 65 UMKC L. REV. 777, 794 (1997) (describing guidelines for student centered assessment).

¹⁰⁹ See Robert C. Downs & Nancy Levit, *If It Can't Be Lake Woebegone . . . A Nationwide Survey of Law School Grading and Grade Normalization Practices Academic Evaluations Focus*, 65 UMKC L. REV. 819, 822 (1997); Rose, *supra* note 5, at 137.

¹¹⁰ See Downs & Levit, *supra* note 109, at 822.

¹¹¹ See Post, *supra* note 108, at 778 (arguing that law school grading “has never been about assessment or learning.”).

¹¹² See Deborah Jones Merritt & Logan Cornett, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, INST. ADVANCEMENT AM. LEGAL SYS. 1, 82–86 (2020) (discussing current bar exam and noting that closed-book, timed, multiple-choice exams are a poor measure of minimum competence to practice law).

examination conditions, do not seem to be adequate manifestations either of knowledge or of thinking ability.”¹¹³ The same could be said today.

Designed to capture cumulative learning after the fact and to place students on a spectrum in relation to one another, many 1L exams generally provide insufficient feedback for students to learn from the assessment itself.¹¹⁴ First, such exams, particularly when curved, do not differentiate skill profiles and levels of mastery.¹¹⁵ Because of mandatory curves, discussed in the next section, students who performed very differently are still likely to receive the same or similar final score, a B.¹¹⁶ After receiving their grades, which already play an outsized role in the law student psyche, most students cannot determine from the feedback they received (if any) where they need to improve.¹¹⁷ Further, without criteria-referenced positive feedback, students have little guidance about what worked—either in their studying or in exam performance.¹¹⁸ Any utility students can glean from exam feedback often requires initiative and sometimes even persistence. Because students don’t take the same class for multiple semesters, and many never take another class from a particular professor, feedback utility may be marginal. The hurdles placed before students to revisit and reflect on their exams cause them to miss out on a key opportunity to develop both cognitive and non-cognitive skills that are essential for ethical law practice.

By and large, final exam grades from large casebook courses merely communicate rank. For students whose grades fall into the bottom two quartiles after the first semester, this message comes a little too late and often stings. As a recent AccessLex report noted:

The first year of law school typically plays an outsized role in determining eligibility for sought-after co-curricular experiences, such as law journal membership. Prestigious and lucrative internships and the jobs that often flow therefrom are typically open only to students who attained high

¹¹³ Ben D. Wood, *The Measurement of Law School Work*, 5 AM. L. SCH. REV. 338, 343 (1924).

¹¹⁴ See Kennedy, *supra* note 48, at 600 (describing the single, end-of-semester student evaluation as “silly.”); Post, *supra* note 108, at 784 (“Law school testing is neither assessment for accountability in the traditional sense nor assessment for improvement.”).

¹¹⁵ See Curcio, *supra* note 16, at 490 (noting that “in classes graded on a curve, grades may leave students with a misimpression about their overall level of mastery” and that “B students often have less than seventy percent of the total possible raw score points” in her large-section curved courses).

¹¹⁶ See Downs & Levit, *supra* note 109, at 823.

¹¹⁷ See Rose, *supra* note 5, at 137–39.

¹¹⁸ See *id.* at 137 (noting that frequent formative feedback helps students to develop into self-motivated and independent learners).

grades early on. Grades in later years are relevant but usually pale in importance to the first year.¹¹⁹

Ultimately, semester after semester, students cram during reading period and then promptly forget the subject matter, many recalling the entire exam process as traumatic. These high-stakes, winner-takes-all exams create and recreate destabilizing and destructive discomfort and foster fixed mindsets.¹²⁰ Such discomfort is felt most profoundly and most harmfully by first-generation law students and students from other historically marginalized backgrounds who often have less knowledge of and access to a law school's hidden curricula. Yet here we are. Law professors, particularly in the first year, continue to assess students using methods that are backed by little-to-no evidence that they successfully prepare students to practice law competently.¹²¹ Additionally, this single-exam, high-stakes assessment model has not kept pace with technology, learning theory, or the employment landscape.¹²² It is long past time for law schools to shift “the balance between doctrinal instruction and focused preparation for the delivery of legal services” by abandoning high-stakes summative exams and restructuring assessment in all first-year courses.¹²³

Successful, ethical lawyers must be committed to continuous professional development.¹²⁴ Such development in educational theory is called self-directedness. Self-directedness is one's ability to assess their own strengths and weaknesses and engage in growth.¹²⁵ Lawyers must also build teamwork and collaboration skills, accounting for the diversity of perspectives and experiences they will encounter

¹¹⁹ Aaron N. Taylor, Jason M. Scott & Josh Jackson, *It's Not Where You Start, It's How You Finish: Predicting Law School and Bar Success* 1, 5 (AccessLex Inst., Working Paper No. 21-03, 2021).

¹²⁰ See *id.* (“Belief in the notion of fixed intellectual capacities is common among law students. The very structure of legal education and its system of grading and sorting students is rooted in a fixed mindset premise.”) (internal citation omitted).

¹²¹ See Downs & Levit, *supra* note 109, at 824 (“It is often remarked [by professors] that students need to learn how to analyze new and unknown fact situations because that is what will walk through their doors when they are in practice.”).

¹²² See Rebecca Flanagan, *Better by Design: Implementing Meaningful Change for the Next Generation of Law Students*, 71 ME. L. REV. 103, 111 (2018).

¹²³ AM. BAR ASS'N, *Task Force on the Future of Legal Education, Report and Recommendations* (Jan. 23, 2014), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.pdf [<https://perma.cc/6PM7-U9CL>].

¹²⁴ See MODEL RULES OF PROF'L RESPONSIBILITY r. 1.1 (AM. BAR ASS'N 2016). The language in MRPR 1.1 specifically acknowledges that a lawyer owes a duty of competent representation to their client, and that this requires “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

¹²⁵ See Merritt & Cornett, *supra* note 112, at 80–82.

when practicing law.¹²⁶ Changing assessment focus away from high stakes, end-of-term exams will enable law professors to attend to the calls for skills like teamwork, cultural competence, and self-direction, which will make legal education more meaningful and practical.¹²⁷ Single summative assessments simply are not sufficient.¹²⁸

Of course, change has a price. Abandoning high-stakes exams will require law professors to reevaluate their instructional methods. It is both costly for law schools and labor intensive for faculty to change their teaching and assessment methods. In addition, tenure standards preferencing scholarship over teaching, large class sizes, and pressure to create exams that result in a natural curve all work against a law professor's desire to create meaningful assessments that gauge student learning and mastery against defined learning outcomes. These pressures also work against law professors attempting to teach and assess soft and other non-cognitive skills that are critical to ethical law practice.

Another barrier to abandoning high-stakes exams is the argument that 1L grades provide important information because they are a statistically significant predictor of bar performance.¹²⁹ While true, studies reveal that law school grades

¹²⁶ The ability to pursue self-directed learning is one of the twelve essential “building blocks” for competent law practice identified in the IAALS multi-year study. *Id.*; see also Chad Christensen, *Preparing Law Students to Be Successful Lawyers*, 69 J. LEGAL EDUC. 502, 504–07 (2020) (demonstrating that there has been very little progress in supporting law students to work effectively with others despite an increase in skills and experiential learning requirements during the period studied).

¹²⁷ See generally Marjorie M. Shultz and Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions*, 36 LAW & SOC. INQUIRY 620 (2011) (describing twenty-six factors of lawyering effectiveness); *ANALYSIS: Survey Grades Law Students' Preparedness for Practice*, BLOOMBERG LAW (Jan. 31, 2022, 3:00 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-survey-grades-law-students-preparedness-for-practice> [<https://perma.cc/WG9C-SFFS>] (identifying data literacy, client communication, and legal tech as some of the additional skills lawyers should be familiar with prior to practicing law).

¹²⁸ Summative assessments have a role to play in legal education because they both evaluate and communicate some measure of student learning. Many 1L professors go to great lengths with their final exams to prepare students for the types of multiple choice they will encounter on the Bar as it is currently structured. Some also specifically require students to write their exams using the predictive office memo style they learned in their lawyering classes, which directly supports lawyering skills. But a single summative assessment is simply not sufficient.

¹²⁹ See Taylor et al., *supra* note 119, at 17; see also Raul Ruiz, *Leveraging Noncognitive Skills to Foster Bar Exam Success: An Analysis of the Efficacy of the Bar Passage Program at FIU Law*, 99 NEB. L. REV. 141, 195 (2020) (demonstrating through data analysis that 1L grades at FIU College of Law are statistically significant in determining bar exam performance); Robert R. Kuehn & David R. Moss, *A Study of the Relationship Between Law School Coursework and Bar Exam Outcomes*, 68 J. LEGAL EDUC. 623, 635 (2019) (noting that 1L GPA “strongly signals at the end of the first year which group of students is most likely to fail the bar exam and therefore might merit additional assistance over the next two years.”).

overall—including those in skills, seminar, and clinic courses—are also a strong predictor of bar performance.¹³⁰ Since performance in courses that do not rely on high-stakes final exams also correlate with bar passage, the single, end-of-term exam does not need to be preserved merely to provide a data point. Where bar passage rates are concerned, data suggest that increases in GPA after the first semester of 1L year correlate with higher bar passage rates, particularly for those students who received below average first semester grades.¹³¹ Perhaps not surprising, how and whether a student improves matters for bar passage.¹³² Although “limited and muddled,”¹³³ taken together, these recent studies suggest that early assessment to evaluate student skills and targeted interventions to provide students with appropriate support would increase performance on the current bar exam.¹³⁴ Changing assessment modalities will also enable law schools to better prepare students for changes to professional licensing that are on the near horizon.¹³⁵ In sum, more assessments benefit students, not fewer.

With the import of assessment and grades in mind, summative assessments should be only one small part of the assessment equation. Since the 2014 changes to ABA Standard 314, law schools have been required to use formative and summative assessment methods to evaluate student work and improve student learning.¹³⁶ But again, so far, these reform efforts have been limited. In particular, Standard 314 left assessment in 1L classes relatively unchanged. That is because Standard 314 allows law schools to satisfy assessment requirements by demonstrating that they use both formative and summative assessments in the program of legal study—at some time.¹³⁷ The ABA does not require professors to use both kinds of assessment in every course.¹³⁸ While it is unlikely that the ABA will adopt more assessment edicts

¹³⁰ See Taylor et al., *supra* note 119, at 17–19, 23.

¹³¹ Ruiz, *supra* note 129, at 196–98.

¹³² This data point requires further analysis because most law schools substantially relax their grade curve policies in upper-level courses. See Taylor et al., *supra* note 119, at 17–19.

¹³³ Kuehn & Moss, *supra* note 129, at 630.

¹³⁴ See *id.* at 627–30 (summarizing studies); see also Ruiz, *supra* note 129 (discussing bar preparation support at FIU College of Law).

¹³⁵ We do not know what the NCBE NextGen will look like exactly, or which jurisdictions will adopt it, but we do know that it will attempt to assess less “content” and many more “skills” See *Snapshot of NextGen Bar Exam*, NCBEX.ORG, <https://nextgenbarexam.ncbex.org/> [<https://perma.cc/LE6X-A8L8>] (last visited May 2, 2022).

¹³⁶ Assessment of Student Learning, ABA Standard 314, AM. BAR ASS’N 24 (requiring schools to use both summative and formative assessments). For a history of efforts to adopt ABA Standard 314 (Assessment of Student Learning), see Steven C. Bahls, *Adoption of Student Learning Outcomes: Lessons for Systemic Change in Legal Education*, 67 J. LEGAL EDUC. 376, 400–02 (2018).

¹³⁷ See Bahls, *supra* note 136, at 402 (“The interpretations to [Standard 314] make it clear that the requirements for both formative and summative assessment are not applied at the course level, but must be applied at points the law school chooses over the span of a student’s education.”).

¹³⁸ *Id.*

in the short term, it is possible that new studies will confirm a positive correlation between the use of more frequent assessment and bar passage, which could encourage law faculty to include more formative assessments in their courses. Already one study has shown that performance in legal writing has a statistically significant impact on bar passage.¹³⁹ Such evidence suggests that law schools should encourage law professors to develop and use pedagogically appropriate formative assessments, like those used in legal writing courses, and rely less on high stakes summative assessments whether the ABA makes them do so or not.

Changing assessment practice is also important because it can re-center student voices and student learning even in large enrollment courses.¹⁴⁰ All 1L professors should adopt formative assessments and embed them in learning experiences that cultivate constructive discomfort—that tactile space where deep learning occurs.¹⁴¹ Practice, assessment, and feedback should be the norm rather than something reserved for one week each semester. Through iterative, multi-dimensional learning modules based in a problem-solving model, students can develop into adept learners and exceptional lawyers.¹⁴² In such a model, skills, values, and knowledge are purposefully, constantly, and transparently intertwined.

By moving student focus away from end-of-term exams, law professors can also slow down a bit on the march through doctrine and black letter law. To be frank, it's impossible to get through one-hundred pages of a torts textbook in a single class while also grappling with narrative backstories, rhetorical moves, how culture both produces and shifts legal meaning, and how power is allocated in the law. Slowing down allows professors to meet students where they are while also encouraging them to take up the “ambitious reinvestigation of the law[.]”¹⁴³ one that reveals the “porousness of the barrier between the law and the world”¹⁴⁴ It also allows both professors and students to investigate and cultivate their roles and identities in the

¹³⁹ Kuehn & Moss, *supra* note 129, at 629 (discussing results from Texas Tech study).

¹⁴⁰ See Abrams, *supra* note 17, at 929–34 (calling on law professors to abandon their reverence for the professor-centric Socratic method and create a skills-, student-, client-, and community-centered Socratic method grounded in formative assessment).

¹⁴¹ See generally Elizabeth M. Bloom, *Creating Desirable Difficulties: Strategies for Reshaping Teaching and Learning in the Law School Classroom*, 95 U. DET. MERCY L. REV. 115 (2018) (providing helpful suggestions on designing courses with effective formative and summative assessments); Sarah J. Schendel, *What You Don't Know (Can Hurt You): Using Exam Wrappers to Foster Self-Assessment Skills in Law Students*, 40 PACE L. REV. 154 (2019) (describing strategies to improve student self-assessment and learning).

¹⁴² For suggestions on how to incorporate the service-learning, experiential model into the 1L year, see THE NEW 1L, *supra* note 19. For suggestions on redesigning legal education to focus on authentic lawyering assignments—both simulated and live client—and embedding legal writing in every course, see Flanagan, *supra* note 122, at 106–07. For a visionary law school where learning and assessment are based on proficiency for competent law practice and advancing justice, see Claudia Angelos, Mary Lu Bilek, & Joan W. Howarth, *The Deborah Jones Merritt Center for the Advancement of Justice*, 82 OHIO ST. L.J. 911 (2021).

¹⁴³ Akbar, *supra* note 36, at 370.

¹⁴⁴ *Id.* at 369.

legal profession. As Professor Cooper Davis convincingly argues, “[p]racticing lawyers do not just play logic games. We serve our clients and the larger society in quests that test us in logic, psychology, public policy judgment, self-awareness, performativity, and ethics.”¹⁴⁵ Law students deserve opportunities in their first year to build these skills.

As a result, first-year courses should include, and first-year assessments should capture, more of what practicing lawyers actually do. This approach requires a mental shift away from focusing on what professors are teaching and a turn toward focusing on what students are learning. Along the way, assessments can and will remain particular to the professors who create them. Similarly, assessing student performance will remain subjective. Some professors will prioritize issue spotting, others the ability to sort through a tangle of facts and extract relevant facts from irrelevant. Still, others will style their problems to reflect law practice and the types of documents lawyers produce. But by emphasizing metacognition—through iterating, reflecting, and calibrating—law schools will be able to graduate more self-directed and fulfilled lawyers.

C. *Hiding Behind the Curve*

*“Grading as practiced teaches the inevitability and also the justice of hierarchy, a hierarchy that is at once false and unnecessary.”*¹⁴⁶

*“Either [students] worked hard (high curve) or they didn’t (low curve) or they were generally superior in aptitude (high curve) or they were not (low curve).”*¹⁴⁷

Curves are the norm, and they should be abandoned.¹⁴⁸ In 1976 only 9% of 102 ABA-accredited law schools surveyed had adopted mandatory grade distribution for at least some of their courses.¹⁴⁹ By 1995, this number had jumped dramatically, with 84% of 116 ABA-accredited law schools reporting that they had some form of grade normalization policy in place.¹⁵⁰ Of those schools with grade normalization policies, 78% of schools described them as formal, written policies.¹⁵¹ As of January

¹⁴⁵ Cooper Davis, *supra* note 94, at 623.

¹⁴⁶ Kennedy, *supra* note 48, at 600.

¹⁴⁷ Downs & Levit, *supra* note 109, at 830.

¹⁴⁸ In this section, “curve,” “grade normalization,” “grade norming,” “mandatory grade distribution,” and “norm-referenced grading” describe a grading practice where grades are standardized and reflect how a student performed in relation to other students. In practice, law school grading policies use means, medians, and prescribed distributions. Sometimes they use all three.

¹⁴⁹ *Id.* at 820.

¹⁵⁰ *Id.* at 836. See also Nancy H. Kaufman, *A Survey of Law School Grading Practices*, 44 J. LEGAL EDUC. 415 (1994) (describing results of a 1993 study of law school grading policies).

¹⁵¹ Downs & Levit, *supra* note 109, at 836.

2022, there are 196 ABA-accredited law schools that confer a J.D.¹⁵² Of those schools, 191 had grade policies publicly available on the internet and 144 of them explicitly acknowledge that 1L courses must follow specific grade normalization policies.¹⁵³ Even many first-year legal writing courses are now curved.¹⁵⁴

Certainly, curves have their benefits.¹⁵⁵ Paramount is that they create greater consistency among professors and across sections.¹⁵⁶ Grade normalization can serve as an equity measure to address widespread grading disparities among professors.¹⁵⁷ The theory goes, law schools cannot control whether law professors are skilled at teaching or assessment.¹⁵⁸ What they can control though, is whether generally equivalent student groups dispersed to various sections receive a reasonably similar grade distribution.

¹⁵² *List of ABA-Approved Law Schools in Alphabetical Order*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/in_alphabetical_order [<https://perma.cc/D448-CNWM>] (last visited May 2, 2022) (excluding three law schools identified as on Teach-Out plans).

¹⁵³ L. Danielle Tully, Law School Grading Policies (May 16, 2022) (unpublished spreadsheet) (on file with author) [hereinafter Tully, Grading Policies]. Twenty-eight publicly available policies do not explicitly state whether the law school requires grade norming. Sixteen schools explicitly “suggest” or “advise” faculty to norm grades in various ways. Only three law schools specifically state that professors are not required to normalize grades: Liberty University Law School, University of Wyoming College of Law, and Yale Law School.

¹⁵⁴ Rose, *supra* note 5, at 131. The history of legal writing courses adopting both grades and curves is intertwined with the status movement and is beyond the scope of this essay. However, from a statistical standpoint curving classes with thirty students or fewer is problematic because the sample size is too small. From a pedagogical standpoint, courses focused on individual growth and skills mastery are an odd fit for curves that compare students to one another rather than to mastery of established learning outcomes. Theoretically, every student, particularly in a small course, should be able to demonstrate competency with enough motivation and support.

¹⁵⁵ See generally Joshua M. Silverstein, *In Defense of Mandatory Curves*, 34 UALR L. REV. 253 (2012).

¹⁵⁶ Rose, *supra* note 5, at 127. For example, in Professor Woods’ six-year study of Columbia Law School courses he determined that both course material and instructional methods were fairly consistent across classes, but that grades varied dramatically from one professor to the next. Wood, *supra* note 113, at 351. He suggested that law professor subjectivity rather than student acumen lay at the heart of the grading discrepancy. *Id.*; see Downs & Levit, *supra* note 109, at 825 (discussing wide-ranging grade disparities in the first year at UMKC before the faculty adopted a required curve).

¹⁵⁷ See Downs & Levit, *supra* note 109, at 843 (highlighting that 69% of responding law schools stated that they adopted grade normalization policies because of “fairness, equality among sections, or fears of inequitable grading”). Unfortunately, legal writing courses adopted grades and curves to be taken seriously by students and other faculty and to be more fully integrated into the first-year curriculum. See Rose, *supra* note 5, at 133.

¹⁵⁸ A discussion of the “teaching” pillar, namely law professor training in pedagogy and assessment, is beyond the scope of this Essay.

Students, however, don't generally experience fixed curves as an equity measure. Instead, "[s]tudents generally experience these grades as almost totally arbitrary—unrelated to how much [they] worked, how much [they] liked the subject, how much [they] thought [they] understood going into the exam, and what [they] thought about the class and the teacher."¹⁵⁹ Additionally, the notion that student groups across sections are "generally equivalent" because students within those sections have similar undergraduate GPA distributions ignores the fact that individual students carry with them very uneven burdens and benefits, particularly as they enter law school.¹⁶⁰

Also, law school grading policies and curves vary wildly from institution to institution.¹⁶¹ Only a few law schools have dispensed with letter grades entirely, but even they have maintained mechanisms to rank students.¹⁶² Those with grades retool their curve from time to time to realign themselves with peer schools and labor

¹⁵⁹ Kennedy, *supra* note 48, at 600.

¹⁶⁰ See Feingold & Souza, *supra* note 107, at 92–102 (discussing "racial unevenness" and how it impacts students of color before, during, and after exams). Feingold and Souza's observations can be extended, albeit differently, to students who face uneven burdens due to work and family obligations or other factors that impact exclusive focus on law study. See also Shaun Ossei-Owusu, *For Minority Law Students, Learning the Law Can Be Intellectually Violent*, A.B.A. J. (Oct. 15, 2020, 11:23 AM), https://www.abajournal.com/voice/article/for_minority_law_students_learning_the_law_can_be_intellectually_violent [<https://perma.cc/HG6H-9JH5>]; Christopher Williams, *Gatekeeping the Profession*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 171, 175–79 (2020) (explaining the impact of social stratification and how it serves as a gatekeeping function for Black law students).

¹⁶¹ See Tully, *Grading Policies*, *supra* note 153. For example, California Western grading policies for the first trimester of the 1L year include an "allowable range" of 5–10% for A to A+ grades and 5–10% for D+ to F grades. CALIFORNIA WESTERN SCHOOL OF LAW STUDENT HANDBOOK 2021–2022, CALIFORNIA WESTERN SCHOOL OF LAW 1, 24–25 (2021–2022). In comparison, UCLA's 1L grade curve mandates that the median cannot be above a 3.3 and sets the following grade distribution ranges: A or A+ (15–20%), A- (20–25%), B+ (30–35%), B and below (25–35%). *Academic Standards and Related Procedures*, UCLA SCHOOL OF LAW, <https://libguides.law.ucla.edu/c.php?g=843027&p=6027635> [<https://perma.cc/9F5P-YJ82>] (last visited July 1, 2022).

¹⁶² See Rose, *supra* note 5, at 130 (noting that Harvard, Yale, and Stanford have a modified pass/fail system). For example, Harvard Law School grades are Honors, Pass, Low Pass, and Fail. HARVARD LAW SCHOOL HANDBOOK OF ACADEMIC POLICIES 2021–2022, HARVARD 1, 34 (2021–2022). These marks convert into a standard GPA. *Id.* at 36. In addition, "Deans Scholar Prize" can be awarded in certain classes and this grade counts as 5 when calculated into GPA. *Id.* at 34, 36. In comparison, Northeastern University School of Law (NUSL) does not award alpha numeric grades and instead students receive narrative assessments. While students may still earn honorifics (high honors or honors), NUSL does not calculate GPA or class rank. *Degree Requirements*, NORTHEASTERN LAW, <https://law.northeastern.edu/academics/programs/jd/degree-requirements/> [<https://perma.cc/SQ3R-7AWN>] (last visited May 2, 2022).

markets.¹⁶³ Arguably such retooling is meant to support students, whether by lowering toxic competition and fostering a more collegial educational environment or by helping students to compete on more equal footing with students in similar grade bands at different schools. Both aims are laudable, but the result—healthier law schools and high post-graduation employment rates—is possible without any curve at all.

Embraced during a period where law students descended from a fairly homogenous group and where legal education was viewed as a scientific inquiry, curves are now perhaps far less equitable than previously believed. Coupled with the high-stakes, end-of-term assessment discussed above, fixed curves reward students who have entered law school with particular backgrounds, experiences, and demonstrated skills and bestow upon them additional grade wealth.¹⁶⁴ In so doing, law schools prioritize a narrow set of skills over the intellectual, emotional, and interpersonal versatility that ethical lawyering requires.¹⁶⁵ As Professor Peggy Cooper Davis notes:

At the end of a first semester or year, the fixed curve sets students on rank-ordered tracks. Track mobility is always possible, but it is not easy. Ranking well in the first year boosts confidence and provides easier access to mentoring and to collegial learning on journal boards and in selective courses. Ranking poorly reduces confidence and inhibits access to important forms of collegial learning.¹⁶⁶

What began as an effort to achieve some measure of grade fairness has gone terribly wrong. Curves increase student stress, foster an unhealthy competitive atmosphere, and interfere with deep learning.¹⁶⁷ In addition, rather than communicating to students whether and to what extent they can demonstrate

¹⁶³ For example, New York University School of Law changed its grading policies in 2020 after the SBA submitted a proposal to amend the curve. Starting with Fall 2020, the 1L grading curve no longer requires any grade lower than a B. *Academic Policies Guide: Grading System and Academic Standards*, NYU LAW, <https://www.law.nyu.edu/academic-services/academic-policies/grading-system-academic-standards> [https://perma.cc/53XG-VTY2] (last visited May 2, 2022). Columbia Law School’s 1L curve also does not require any grade lower than a B. REGISTRATION SERVICES, GRADING CURVE FOR FIRST-YEAR COURSES, COLUMBIA L. SCH. 1, 1 (2012).

¹⁶⁴ See Feingold & Souza, *supra* note 107, at 93–94 (describing first-year grades as gatekeepers and arguing the “resources and rewards” that come with grade wealth “become immediately self-perpetuating”).

¹⁶⁵ See Cooper Davis, *supra* note 94, at 619 (law schools “sharpen[] minds by narrowing them”).

¹⁶⁶ *Id.* at 622; Kennedy, *supra* note 48, at 600 (“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.”).

¹⁶⁷ See Rose, *supra* note 5, at 124; Cooper Davis, *supra* note 94, at 622 (“The fixed curve interferes with learning. It motivates students to work for grades rather than for comprehension or skill development.”).

competency in course learning outcomes, curves merely communicate to students where they sort in relation to their classmates.¹⁶⁸ In fact, the 2007 *Best Practices* report went so far as to say that “[a] bell curve outcome actually reflects a failure of instruction.”¹⁶⁹

Ironically, as faculties embraced grade normalization, the ABA pushed toward assessing competency-based outcomes that are seemingly at odds with norm-referenced grading. As mentioned earlier, every law school is now required to publish explicit learning outcomes, develop assessment measures to determine whether students are meeting those outcomes, and regularly retool what and how law is taught. While these assessment requirements are geared towards evaluating the effectiveness of the program of legal education rather than individual student performance, there is a significant tension between the ABA’s new assessment requirements and traditional adherence to grade curves. This tension exists because competency-based instruction shifts the focus away from assessing what professors have taught, to evaluating what students have learned. This shift, and the underlying goal of graduating students prepared for competent law practice, suggests that law professors must spend more effort helping individual students improve their knowledge and skills.¹⁷⁰ If the new focus on assessment works as intended and student competency levels increase as a result, grade normalization policies should not prevent communicating to students that they have met or even exceeded target competencies—even if that means they all have.

Mandatory curves are also not compatible with aspirations for a healthy and ethical profession. Rather than sorting students, faculty should be focused on criteria-referenced grading where they evaluate a student’s performance in relation to well-defined competencies, not on how the student’s performance stacks up against another student’s performance.¹⁷¹ As *Educating Lawyers* noted in 2007, “the implicit pedagogical philosophy underlying criterion-referenced assessment is that the fundamental purpose of professional education is not sorting but producing as many individuals proficient in legal reasoning and competent practice as possible.”¹⁷²

Writing almost forty years ago, Professor Duncan Kennedy argued that “the process of differentiating students into bad, better, and good could simply be

¹⁶⁸ See Rose, *supra* note 5, at 143.

¹⁶⁹ STUCKEY, *supra* note 6, at 182.

¹⁷⁰ See Downs & Levit, *supra* note 109, at 856 (noting incompatibility of grade normalization policies and competency-based curricula). *But see* Silverstein, *supra* note 155, at 284–96 (arguing against the critique that curves are incompatible with criterion-referenced grading).

¹⁷¹ See Rose, *supra* note 5, at 124; see John Bliss and David Sandomierski, *Learning Without Grade Anxiety: Lessons from the Pass/Fail Experiment in North American J.D. Programs*, OHIO NORTHERN UNIV. L. REV. (forthcoming) (documenting results from empirical study examining whether pass/fail grading diminishes student learning and concluding that alternate grading policies tend to alleviate anxiety with limited negative impact on student motivation or learning).

¹⁷² SULLIVAN ET AL., *supra* note 6, at 168.

dispensed with, without the slightest detriment to the quality of legal services.”¹⁷³ He further suggested that law schools “could graduate the vast majority of all the law students in the country at the level of technical proficiency now achieved by a small minority in each institution[.]”¹⁷⁴ if they focused on skills training and provided frequent detailed formative feedback to students while they were learning the skills. The reforms Kennedy called for match those echoed many times since, yet even the drive toward outcomes-based assessment and preparing practice-ready lawyers doesn’t seem to have affected the beloved and reviled curve. Instead, law schools publish learning outcomes and professors include them on their syllabi, but by and large 1L courses still issue grades based on a single, high stakes, curved, final exam.

There are risks to abandoning the curve. The original opposition to grade normalization—that it is an incursion on academic freedom—fails whether you are on the side of keeping or throwing out the curve.¹⁷⁵ Academic freedom is intended to protect intellectual freedom around teaching, research, and scholarship from institutional or governmental manipulation or censure.¹⁷⁶ But, few professors would be likely to point to a political or ideological principle they are attempting to espouse or protect through their current grading policies.¹⁷⁷ Even if academic freedom is invoked, freedom—particularly in the educational setting—is not absolute. This privilege comes with responsibilities, particularly responsibilities to our students.

Grade subjectivity also remains a real concern, but it should not stand in the way of abandoning the curve. Even with a fixed curve, numerous “accidental factors” impact grades: language usage preference, where a student’s paper was graded in reference to others, time of day, grader interruptions; the list goes on.¹⁷⁸ Ultimately, the only thing we know for sure right now is that different professors grade differently. If law schools want to address grading practices, they can through faculty development workshops.¹⁷⁹ Such training would be useful whether faculties opt to jettison the curve or not. In addition, rather than trying to flatten this subjectivity by stacking students up against one another, law professors should be

¹⁷³ Kennedy, *supra* note 48, at 600.

¹⁷⁴ *Id.*

¹⁷⁵ Downs & Levit, *supra* note 109, at 848–52 (discussing the academic freedom critique against mandatory curves).

¹⁷⁶ *See id.*, at 849–50 (describing academic freedom concept and noting “[t]he only real infringement is that a normalization system deprives the professor of a modest amount of power to coerce his or her ideas.”).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 825–26; see Linda R. Crane, *Grading Law School Examinations: Making a Case for Objective Exams to Cure What Ails “Objectified” Exams*, 34 NEW ENG. L. REV. 785, 789–91 (2000) (noting that professors will grade exams that are easier to read more favorably, particularly if they do not use an answer key, which results in professors grading based on how they “feel” about an answer).

¹⁷⁹ *See Harris, supra* note 108 (noting that law professors receive minimal training on how to create or grade assessments and that faculties should both discuss grading in their institutions and engage in specific faculty development workshops focused on grading and assessment).

accounting for the subjectivity in their assessments and putting in guard rails to minimize accidental factors. Criterion-referenced assessment is one such guardrail where professors tie their assessment of student work to specific and transparent competency standards. Anonymous grading, a long-standing practice in large-enrollment classes, is another such guardrail. This practice should also be adopted by professors teaching skills classes wherever possible.¹⁸⁰

Finally, abandoning the curve may, in the short-term, impact job placement.¹⁸¹ It is no secret: Grades, and accompanying class rank, are used as a confidence decoy—signaling to would-be employers that a particular individual is “safe” to hire.¹⁸² Law students are hired for coveted summer positions by demonstrating that they rank higher on the sorting ladder than their peers after the first semester of law school.¹⁸³ Many employers may be unwilling to familiarize themselves with different grading systems and, because they compare candidates against one another, it is unclear whether they would take the time to ascertain a specific applicant’s competencies.¹⁸⁴ Refusing to sort, then, I suspect, would likely be most detrimental to students attending law schools ranked lower than the T14.¹⁸⁵ It may also unfairly burden historically marginalized students at any law school whose grades, rather than historic networks, may open previously closed doors.¹⁸⁶ This particular risk requires both further study and careful planning to ensure that any grade policy

¹⁸⁰ For suggestions on debiasing feedback where anonymous grading may not be feasible see Anne D. Gordon, *Better than Our Biases: Using Psychological Research to Inform Our Approach to Inclusive, Effective Feedback*, 27 CLINICAL L. REV. 195, 236–48 (2021).

¹⁸¹ See Post, *supra* note 108, at 798–99 (discussing student concerns about competing for jobs as a factor favoring grade normalization).

¹⁸² See LANFORD WILSON, SYMPATHETIC MAGIC 71 (1998) (“Don: Mrs. Melon says they’re considered an arbiter of taste or something. If they take a piece, several other museums will follow suit. They’re a kind of confidence decoy. Barbara: I don’t know what that is. Don: You’ve seen the big white swan decoys? They’re called confidence decoys. Hunters use them on ducks. Swans won’t swim somewhere that’s dangerous. So [sic] a confidence decoy makes the ducks believe the lake is safe.”).

¹⁸³ See Silverstein, *supra* note 155, at 291 (noting that students’ grades are always going to be used comparatively).

¹⁸⁴ See Downs & Levit, *supra* note 109, at 824.

¹⁸⁵ See Feingold & Souza, *supra* note 107, at 93 (“Since GPA is often the first thing a potential employer looks at, perhaps in conjunction with the student’s law school, final exams heavily determine a student’s initial career opportunities.”).

¹⁸⁶ See John Bliss and David Sandomierski, *Pass for Some, Fail for Others: An Empirical Analysis of Law School Grading Changes in the Early Covid-19 Pandemic*, (under peer review) (on-file with author) (documenting results from empirical study examining whether pass/fail grading achieved intended equity goals and noting that the results for historically underrepresented groups were mixed with many students from historically underrepresented groups initially preferring an option for pass/fail because they wanted the opportunity to demonstrate academic achievement to future employers). See also Williams, *supra* note 160, at 193–96 (discussing how gates operate at every level of obtaining a law degree, and how those gates impact post-graduation employment).

changes account for and mitigate possible harm to historically marginalized students.

Abandoning the curve is not the same as abandoning assessment or grading for that matter. Rather, in conjunction with abandoning high-stakes, winner-takes-all exams, abandoning the curve is a call to invest more thought and energy into equitable, consistent, and effective assessments that communicate to students and to their would-be employers where students excel and where they need to grow. For the last forty years, scholars have been critiquing the gap between what is being taught in law school and what is required for law practice. As law schools move toward more dynamic, integrated, and transformative legal education, their assessment measures and how they communicate mastery must keep pace. Neither high-stakes exams nor mandatory curves should make the cut in a twenty-first-century law school.

CONCLUSION

Legal education reform is glacial. But merely tinkering around the edges is not only insufficient it can be detrimental. With each new tinker, constituencies coalesce around a new status quo, making further progress more challenging.

Even so, there is new momentum. Coalitions within and across schools are forming and calling for institutional and system-wide change. The question is, will they do more than listen, convene, and report? Will they vote to make change? Will they allow their peers the same right to vote? Then, collectively, will they bring about more robust and equitable curricular and assessment reform for their students?

If, as I suggest, we must remake the first year (and perhaps all three years), such a project will require a power shift in institutions that have long been loath to add seats at their decision-making tables. It will take courage to cede space and reapportion everything from credit hours and assessments to hiring and admissions targets. Ultimately, it will require both questioning and disrupting the processes and structures—from required course sequences to faculty hierarchies—that continue to reproduce inequality in the legal academy, in law practice, and in the law.

Law schools were not designed for our present moment, but we can meet the challenge if we have the courage to ask: what am I, what are we, willing to give up? To me, the answer is clear: we must first give up the faculty caste system, high-stakes exams, and the curve.