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Dara E. Purvis

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LAW SCHOOL AS MASCULINE COMPETITION

Dara E. Purvis*

In 1899, Christopher Langdell of Harvard Law School famously argued that the law is "entirely unfit for the feminine mind."[1] Even at the time, his staunch opposition to providing legal education to women was a minority view among the Harvard Law faculty, and obviously his opinion has been relegated to the dustbin of history where it belongs.[2] Yet year after year, scholars and legal educators question why women law students are not yet equal, either in outcome or their experience of law school.[3] And it is not simply a question of gender—students who are members of all sorts of historically excluded groups face greater hurdles in law school.[4] Law students are famously stressed, depressed, and more likely than other graduate or professional students to turn to alcohol or engage in other unhealthy coping mechanisms.[5]

This Essay argues that the continued failure of law schools to provide equally rewarding legal education to all students is not merely slower progress than other professions or degree programs. Rather, the American system of legal education is

* Professor, Penn State Law (starting July 2024, Professor, Temple Beasley School of Law); Yale Law School, J.D.; University of Cambridge, M.Phil.; University of Southern California, B.A. Many thanks to my excellent research assistants, Muhammad Ali Ilahi and Rita Portenti.

[1] DANIEL R. COQUILLETTE & BRUCE A. KIMBALL, ON THE BATTLEFIELD OF MERIT: HARVARD LAW SCHOOL, THE FIRST CENTURY 495 (2015).

[2] *Id.* at 493.

[3] Dara E. Purvis, *Female Law Students, Gendered Self-Evaluation, and the Promise of Positive Psychology*, 2012 MICH. ST. L. REV. 1693, 1693–94 (2012).

[4] Morrison Torrey, *Yet Another Gender Study? A Critique of the Harvard Study and a Proposal for Change*, 13 WM. & MARY J. WOMEN & L. 795, 796 (2007).

[5] Jerome M. Organ, David B. Jaffe & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 117 (2016); *see also* Ann Juliano, *Privileging Scholarship and Law School Compensation Decisions: It's Time to Shine Some Light*, 61 U. LOUISVILLE L. REV. 291, 307 (2023).

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built upon a conception of masculine competition that is inherently exclusionary and harmful. This competition is at the center of modern legal education and has been from the very beginning. The first part of this Essay discusses the roots of Langdell's method of legal education and why it has always been explicitly and narrowly masculine. The second part traces how competition continues to play out, ranking individual students, professors, and law schools against each other. The Essay then explains the many negative effects of this masculine competition and introduces what an alternative might look like. Despite many efforts to reform legal education, the Langdell method of law school was and is a contest of manhood, and the result is that everyone involved is losing.[6]

I. MASCULINITIES, LAW SCHOOL, AND LANGDELL

The study of masculinities developed first among sociologists, asking how society identifies and defines what is manly.[7] There is obviously not a single answer to such a broad question, as there are many ways that people living in the same place at the same time might express, define, or value masculinity—thus the plural is used to identify the field.[8] Amidst the many ways to be masculine, however, one form of masculinity is held up as the "best" or the most "real" way to be a man.[9] This is described as hegemonic masculinity.[10]

One of the most important characteristics of hegemonic masculinity is that it is not a status, but rather a temporary victory in an ongoing competition.[11] At all times, a man is being judged by other participants in the competition and trying to prove his dominance over them as a way of proving his manhood.[12] Hegemonic masculinity thus hurts people of all genders—women and nonbinary people because they are

[6] COQUILLETTE & KIMBALL, *supra* note 1, at 497.

[7] Dara E. Purvis, *Trump, Gender Rebels, and Masculinities*, 54 WAKE FOREST L. REV. 423, 429 (2019).

[8] Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J.L. & GENDER 431, 441 (2010).

[9] Shelley Zalis, *The Future of Masculinity: Overcoming Stereotypes*, FORBES (Jan. 22, 2019, 12:13 AM), https://www.forbes.com/sites/shelleyzalis/2019/01/22/the-future-of-masculinity-overcoming-stereotypes/?sh=138c069b1af3.

[10] Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis and Feminist Theory*, 33 HARV. J.L. & GENDER 415, 418 (2010).

[11] Ann C. McGinley, *Policing and the Clash of Masculinities*, 59 HOW. L.J. 221, 238 (2015).

[12] Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 273–74 (2013).

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excluded from competition entirely, and men because they are assumed to be in the competition for peak hegemonic masculinity and are treated badly by other men if they are losing.[13]

I have previously written about legal education as an expression of hegemonic masculinity,[14] but that critique described the *current* status of legal education structured around competition. An important aspect of legal education is not simply that it is so easily cast as hegemonic masculinity's competition, but that it *has always been*.[15] The modern conception of legal education, as begun by Christopher Langdell at Harvard Law School in the nineteenth century, was hegemonic masculinity from the very beginning.[16]

Langdell became the dean of Harvard Law School in 1870.[17] A recent book describes his deanship as "a revolution at the Law School and in legal education generally."[18] Before Langdell, American law schools were run as a set of fundamental topics taught over and over in a repeating cycle.[19] Students could enroll at any point in the year to begin their studies, since they could simply sit through classes until coverage reached the point at which they began.[20] And students did sit through courses because the mode of instruction was a professor delivering lectures without student interruption or involvement.[21]

Langdell changed all of this: he restructured the curriculum into a sequence in which courses were taken in a specific order,[22] transformed examinations into difficult tests asking students to apply legal rules to hypothetical facts (instead of asking students to merely recite abstract legal rules),[23] and taught using what came to be known as the inductive or case method, requiring students to read cases before

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[13] *See* Dara E. Purvis, *Frozen Embryos, Male Consent, and Masculinities*, 97 IND. L.J. 611, 636 (2022).

[14] *See* Dara E. Purvis, *Legal Education As Hegemonic Masculinity*, 65 VILL. L. REV. 1145, 1146 (2020).

[15] COQUILLETTE & KIMBALL, *supra* note 1, at 497.

[16] *Id.*

[17] *Id.* at 307.

[18] *Id.* at 311.

[19] *Id.* at 344.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 345–47.

[23] *Id.* at 347–49.

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class and then asking questions about the cases in the classroom so students could distill the legal rules themselves.[24] He believed that his methods were uniquely rigorous, to the extent that in 1876 he argued that students should have a choice between an "[o]rdinary" program of study and an "[h]onor" program, distinguished by taking three hours of Langdell's own Equity Jurisdiction course.[25] By this logic, students who took more of Langdell's classes would receive an academic distinction even if their grades were lower than other students who did not take Langdell's classes.[26] And Langdell was certainly right that others would find his methods more successful than the traditional model; by 1915, 40% of American law schools were using the case method and another 24% were partially incorporating his techniques.[27]

In some ways, Langdell was progressive in that he was willing to include some people who had previously been excluded from legal education: "working-class, Jewish, East Asian, American Indian, [and] African American men."[28] But never, in Langdell's eyes, should women be included.[29] When the Harvard Law faculty voted in 1899 to potentially grant law degrees to women, Langdell wrote a long memorandum passionately arguing that the school should never do so.[30] He described Harvard's founding purpose as educating only men and insisted that the university had a fiduciary and possibly a legal duty to "stand *super antiquas vias*" (stand upon the old ways) and continue to provide an education to men alone.[31] Opening the door to women would put the founding purpose of "every 'new university'" at risk.[32] At the faculty meeting where the vote was held, Langdell infamously argued that "the law is entirely unfit for the feminine mind—more so

[24] *Id.* at 351.

[25] *Id.* at 416.

[26] *Id.*

[27] BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL, 1826–1906, at 310 (2014).

[28] *Id.* at 289; COQUILLETTE & KIMBALL, *supra* note 1, at 477.

[29] KIMBALL, *supra* note 27, at 289.

[30] COQUILLETTE & KIMBALL, *supra* note 1, at 487–88.

[31] KIMBALL, *supra* note 27, at 289.

[32] COQUILLETTE & KIMBALL, *supra* note 1, at 494–95.

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than any other subject."[33] He described a legal education as "not an improvement but an injury" to women.[34]

These views were not entirely the product of sexism. Langdell was set on a path towards educational achievement by his mother and older sister, read books by and about women as part of his schooling, and his wife was extremely well educated by the standards of the time.[35] An article wrote celebrating him after his death in 1906 described his "tender[,] almost feminine nature" and noted that he "enjoyed the society of ladies, though [was] never a 'ladies' man."[36]

The problem was not that Langdell saw women as categorically unintelligent—he saw them as categorically unsuited to studying law.[37] Langdell saw his philosophy and techniques of legal education as inherently manly.[38] He was the product of a Victorian society that believed women "were extinguishing the 'manliness' and 'masculinity' of American men."[39] The years immediately preceding his deanship ushered in a "marked shift" towards "'manliness': the ideal of a stronger, tougher, more physical man."[40] Langdell's legal education embodied this shift. Competitive exams were tests of manhood that proved your "scholarly manliness."[41] The case method and questioning students were verbal battles for dominance, contrasted to the lectures that another Harvard Law professor described as "not a virile system."[42] As Daniel Coquillette and Bruce Kimball described it:

> Harvard University had therefore become highly masculinized, fostering a competitive species of academic merit particularly suited to professional education conceived as preparation for the jousts of professional life. Among professional schools, none embraced more fully the masculine culture of

[33] *Id.* at 494–95.

[34] *Id.*

[35] KIMBALL, *supra* note 27, at 290.

[36] Samuel F. Batchelder, *Christopher C. Langdell*, 18 GREEN BAG 437, 442 (1906).

[37] COQUILLETTE & KIMBALL, *supra* note 1, at 495.

[38] *See id.* at 497.

[39] *Id.* at 496.

[40] *Id.*

[41] *Id.* at 496.

[42] KIMBALL, *supra* note 27, at 293.

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> competition and struggle than law schools. Among law schools, none more fully embraced that culture than those that adopted [the] case method.[43]

The hegemonic masculinity, and specifically the structuring of legal education as constant competition, is a feature of legal education, not a bug. The next section turns to what that competition looks like today.

II. LEGAL EDUCATION AS COMPETITION

From the moment that a student contemplates attending law school, it becomes apparent that legal education is centered on competition, particularly students competing against each other for a prize—be that class ranking, law review membership, or prestigious employment. The schools themselves are even ranked against each other on a single scale, which drives not only students' choices about where to enroll, but also administrators' choices about how to run their schools.[44] The constant core drive of legal education is competition—an education based on masculine battle that Christopher Langdell would recognize.

A. Grading on a Curve

From the moment they arrive to begin their legal education, students are thrown into competition with one another. Sometimes the competition is explicit, like class rank that appears on transcripts and either grants or denies access to desirable jobs and postgraduation opportunities such as clerkships.[45] Other times the competition is talked around, such as the mandatory curve in most classes that means students earn a grade not by learning the material but by performing better than their classmates.[46] But whether or not an individual student is aware, they are being set against their classmates from day one.[47]

Law students have uniformly achieved some measure of success in their undergraduate education, or else they would have not been admitted to law school.

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[43] COQUILLETTE & KIMBALL, *supra* note 1, at 497.

[44] *See* Juliano, *supra* note 5, at 307.

[45] Douglas A. Henderson, *Uncivil Procedure: Ranking Law Students Among Their Peers*, 27 U. MICH. J.L. REFORM 399, 405–06 (1994).

[46] 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 WRITING 123, 124 (2011).

[47] *See id.*

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At elite law schools, *all* of the students likely had high undergraduate GPAs. Grading policies at most law schools, however, are different than undergraduate grading standards, both in terms of how students are graded and more importantly how the letter grades are decided. In most law school classes, a single exam at the end of the semester is the source of the majority—sometimes the entirety of a student's grade.[48]

Furthermore, most law schools have formal grading policies that impose norm-referenced grading rather than objective levels of mastery.[49] The difference is a simple one: in both methods, professors are free to choose what kind of exam they write, whether it be multiple choice questions with correct versus incorrect answers or essays with some kind of grading criteria. For example, when I write my exam questions, I also write a grading rubric with an outline of what I expect to see on a perfect exam, including corresponding possible points for each part.[50] Often at some point during the semester I use a past exam question and rubric as a practice question for my students and an opportunity for them to see exactly how I will assess their work. If I were using objectively-referenced grading, I would choose numbers of points that would earn an A exam, an A- exam, and so on.[51] But because my law school has guidelines requesting norm-referenced grading, the grading method suggested to me is to draw lines between exams based on the number of exams above and below each line: for example, 15% of my final grades should be an A or an A-.[52]

There is flexibility within these guidelines, of course. At my law school, the website that gives the grading norms explicitly notes that the policy is "suggested guidelines as opposed to rigid requirements."[53] The guidelines also vary depending on whether a course is a required class, an elective with over thirty students enrolled,

[48] *See* Robert C. Downs & Nancy Levit, *If It Can't Be Lake Woebegone . . . A Nationwide Survey of Law School Grading and Grade Normalization Practices*, 65 UMKC L. REV. 819, 822 (1997).

[49] Rose, *supra* note 46, at 126.

[50] I also include lines at the bottom of each rubric in case a student includes material that I had not intended to ask about, but agree upon reviewing that the topic was reasonably prompted by my question, in which case I add points.

[51] Rose, *supra* note 46, at 127–28.

[52] *Id.* at 124–26; *Grading Norms*, PENN STATE L., https://pennstatelaw.psu.edu/current-students/student-academic-handbook/grading-norms (last visited Sept. 27, 2023). The author moved from Penn State Law to Temple Law in the summer of 2024, and these descriptions were written solely about Penn State Law.

[53] *Grading Norms*, *supra* note 52.

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or an elective with under thirty students enrolled.[54] Notably, the guidelines for LLM students are objectively-referenced rather than norm-referenced.[55]

Grading curves were not part of the history of legal education, although they have come to represent some of the most explicitly competitive aspects of law school. A survey of the 102 accredited law schools in 1976 found that only 9% had mandatory grade distribution policies,[56] whereas by the mid-1990s, about 84% of law schools had such policies.[57] The percentage has fallen slightly in recent years, as some of the most elite law schools now give coded categories of grades (high pass/pass/low pass/fail, in Yale's case),[58] but the vast majority of schools still maintain written norm-referenced grading policies.[59]

Curved grading has rational reasons behind it, chiefly its standardization of grades. Professor Joshua Silverstein wrote an article with a comprehensive explanation of the benefits of such policies, quite directly titled, "In Defense of Mandatory Curves."[60] Professor Silverstein uses his own school, the University of Arkansas at Little Rock William H. Bowen School of Law (Bowen), as an example of why grading curves are necessary since the school did not have formal grading curve policies until 2011.[61] The article highlights significant disparities in the grades given by different professors prior to the curved policy implementation, specifically highlighting the disparity amongst professors who taught different sections of the same course.[62] As he argues:

> The problem with the *absolute* performance argument is *conceptual*. To establish that mandatory curves stop teachers from awarding the "correct" grade, there must be an independently valid or shared concept of desert that consistently establishes

[54] *Id.*

[55] *Id.*

[56] L. Danielle Tully, *What Law Schools Should Leave Behind*, 2022 UTAH L. REV. 837, 863 (2022).

[57] *Id.* at 863; *see also* Downs & Levit, *supra* note 48, at 835–36 (discussing the study and its methodology in more detail).

[58] Rose, *supra* note 46, at 129–30.

[59] Tully, *supra* note 56, at 863–64.

[60] Joshua M. Silverstein, *In Defense of Mandatory Curves*, 34 U. ARK. LITTLE ROCK L. REV. 253, 255 (2012).

[61] *Id.*

[62] *Id.* at 259–63.

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> when a student deserves an A, a B, or some other grade. But no such concept exists. Professors have substantial disagreements regarding the standards that should be used to assess student performance. And, more specifically, we have different understandings of what constitutes "A work," "B work," and "C work." These designations are used in dramatically varying ways by (1) different academic fields, (2) different schools within the same field, (3) different professors within the same school, (4) different professors within the same department, and (5) even different professors who teach the same class.[63]

Professor Silverstein is undoubtedly right that professors disagree about all of those things, and he concludes that norm-referenced grades are "a crucial element of fair grading."[64] But it is difficult to understand why, to again use my own guidelines as an example, fair grading means that 15% of each large class at Penn State Law should fairly receive an A or an A-.[65] Silverstein argues that exams naturally fall into a bell curve, and he cites some other professors who agree with him.[66] But anecdotally, that has not been my experience, at least not consistently—I recall one semester in which two students in my Contracts class wrote exams so far above the rest of the class that I sought permission to award both a CALI award[67] and I had to take their exams out of the curve to construct something that looked like a bell.

Moreover, the costs of norm-referenced grading are clear. Many of the harms are felt directly by students, who quickly learn that law school is about learning your place in a hierarchy[68] and the only way to achieve a high rank is to do better than your classmates.[69] Seeing your peers as competition can make students isolate during a stressful time, as collaborating with classmates might hurt their final grade if they

[63] *Id.* at 272.

[64] *Id.* at 256.

[65] *Grading Norms*, *supra* note 52.

[66] Silverstein, *supra* note 60, at 287.

[67] A "CALI Excellence for the Future Award" is an award given to the highest scoring student in each law school class at many law schools. CALI Awards are sponsored by The Center for Computer-Assisted Legal Instruction. For more information on these awards, see CALI (Nov. 5, 2023, 10:07 PM), https://www.cali.org/content/cali-excellence-future-awards#:~:text=The%20CALI%20Excellence%20for%20the,them%20post%20award%20recipients%20here.

[68] *See* Barbara Glesner Fines, *Competition and the Curve*, 65 UMKC L. REV. 879, 896 (1997).

[69] Jennifer Jolly-Ryan, *Promoting Mental Health in Law School: What Law Schools Can Do for Law Students to Help Them Become Happy, Mentally Healthy Lawyers*, 48 U. LOUISVILLE L. REV. 95, 108 (2009).

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help other students to do better.[70] Norm-referenced grading undermines lessons from the movement to humanize legal education, as a grading curve "not only fosters a stress-inducing competitive atmosphere, but it also interferes with the deep learning created by intrinsic motivation, autonomy support, and self-efficacy."[71] Students who realize that their grade depends as much on the performance of their classmates as it does on their own work lose a sense of "academic self-efficacy" and evaluate themselves not by whether they feel mastery over a subject but by whether they think they have learned more than others.[72] Trying to learn in order to achieve an external marker, such as a grade, is different and often less satisfying than trying to learn out of an intrinsic motivation, such as curiosity.[73] One might argue that few law students will be curious enough about the Statute of Frauds or the Rule Against Perpetuities to engage in the dedicated reading and studying to master them, but that lets professors off of the hook for failing to make subjects interesting for students and for relying on fear about future job prospects to hold students' attention. Furthermore, as Professor Jay Feinman has pointed out, evidence shows that once students receive their first set of grades (and class rank), many students begin to think of their place in the hierarchy as fixed and lack motivation to improve in future semesters where upward movement seems unattainable.[74] Barbara Glesner Fines writes eloquently about the harm of norm-referenced grades:

> Justifications for institutional grading policies can mask some very potent judgments about ourselves and each other: unspoken judgments about the honesty or competency of our colleagues, or judgments about the arbitrary nature of grading in general. Required norm-referenced grading is a politically acceptable but logically unresponsive solution to the problems identified in these judgments. The solution to arbitrary grading, to incompetence and to dishonesty, is not to distribute the arbitrariness, incompetence or dishonesty. In some of the arguments over grade normalization I feel as though we have devised a system in which we

[70] Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735, 754 (2011).

[71] Rose, *supra* note 46, at 142.

[72] Kathryne M. Young, *Understanding the Social and Cognitive Process in Law School that Creates Unhealthy Lawyers*, 89 FORDHAM L. REV. 2575, 2587 (2021).

[73] Glesner Fines, *supra* note 68, at 899–900.

[74] Jay M. Feinman, *Law School Grading*, 65 UMKC L. REV. 647, 650 (1997).

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> distribute wealth to those who are struck by [lightning] and are simply arguing about whether we should give everyone an equal chance to stand under a tree.[75]

There seems to be little question that grading on a curve fosters competition between students, since the real answer to "how do I do well on your exam" is "do better than your classmates."[76] The schools that abandoned traditional grading systems may recognize this, although they may have other reasons for finding norm-referenced grading less important. But as pointed out by a recent article, law schools had an opportunity to experiment with jettisoning grades entirely in the spring of 2020 when the COVID-19 pandemic forced law schools to shift with no warning to online education.[77] Some law schools switched to pass/fail grades for the spring 2020 semester, with no expectation of any curve guaranteeing a proportion of failing scores.[78] It is likely too early to fully assess the effects of a single pass/fail semester—particularly for students who were first-years at the time—but both students and professors reported similar performances on spring 2020 exams as in years when students knew they would be graded on a curve.[79]

Norm-referenced grading is very good at one thing: sorting students into a hierarchical order.[80] The next component of legal education makes that order explicit, by assignment of numerical rank.

B. Class Rank

After grades come out each semester, most students receive not only a GPA for their performance but also a numerical rank that specifies exactly where they fall within their year's cohort (both for that semester and for their law school studies to date).[81] There is no pedagogical reason to know numerical rank—the justification for ranking is that there are various honors and opportunities for which students should be sorted. For example, at graduation schools typically recognize the top 10–15% of

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[75] Glesner Fines, *supra* note 68, at 892.

[76] *Id.* at 896.

[77] John Bliss & David Sandomierski, *Learning Without Grade Anxiety: Lessons from the Pass/Fail Experiment in North American J.D. Programs*, 48 OHIO N.U. L. REV. 555, 556 (2021).

[78] *Id.*

[79] *Id.* at 557.

[80] Rose, *supra* note 46, at 124–26

[81] Henderson, *supra* note 45, at 404.

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the class with some kind of academic honor such as Order of the Coif.[82] But much of class rank ordering is actually driven by the marketplace in that sorting students makes it easier for potential employers to decide whom to interview and hire.[83]

Professors Anne M. Coughlin and Molly Bishop Shadel describe ranking as "teaching the 'inevitability and also the justice of hierarchy.'"[84] Students hoping to do well in law school subconsciously adopt a zero-sum perspective toward their classmates—as one student interviewed by Kathryne Young reported, "I noticed myself, like, almost *excited* when people get things wrong, which is not . . . actually a normal thing."[85] Just as a grading curve undermines support between students, a rank undermines support and community throughout a class.[86]

Decisions about what should "count" in class rank also contribute to a marginalization of certain skills and coursework. As Professor Lucille A. Jewel points out, classes that focus on contextualized communication such as client counseling, alternative dispute resolution, and negotiation, are often "considered non-rigorous and graded on a pass/fail/no-credit basis."[87] This prioritizes certain skills above others, since a student who struggles with timed written essays but excels at interpersonal interactions will not receive the "reward" of their client counseling or negotiation skills translated into their class rank.[88] This is despite plenty of evidence that legal education does not equip students with many of the skills that legal employers want.[89] Whether it is because such skills have historically been undervalued in classical legal education or because legal practice has changed to include new skills, the classical curriculum and emphasis on doctrinal subjects

[82] *History*, ORDER OF THE COIF, https://orderofthecoif.org/history (last visited Dec. 16, 2023).

[83] Glesner Fines, *supra* note 68, at 886.

[84] Anne M. Coughlin & Molly Bishop Shadel, *The Gender Participation Gap and the Politics of Pedagogy*, 108 VA. L. REV. ONLINE 55, 62 (2022) (quoting Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 600 (1982)).

[85] Young, *supra* note 72, at 2586.

[86] *See id.* at 2585.

[87] Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1187 (2008).

[88] *See id.*

[89] *See* Rachel Gurvich, L. Danielle Tully, Laura A. Webb, Alexa Z. Chew, Jane E. Cross & Joy Kanwar, *Reimagining Langdell's Legacy: Puncturing the Equilibrium in Law School Pedagogy*, 101 N.C. L. REV. F. 118, 150 (2023).

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provide tangible benefits to only a subset of what makes a "good" lawyer.[90] Furthermore, the sense of "real" law as masculine competition is underscored by the undervaluing of experiential courses that teach practical skills.[91]

C. Other Student Competitions

Plenty of other experiences within legal education become competitions in other ways. One of the more implicit competitions is one common to all law students: speaking in class. The modified Socratic dialogue of most law school classes is famous for many things: giving "gunner" students a chance to show off, making many students feel bad about themselves, and disproportionately silencing members of historically excluded groups.

Students typically speak in the law school classroom in one of two ways: being cold-called for a modified Socratic dialogue or volunteering an answer, either because a fellow student has been unable to answer the professor's question or because the professor asked a question or posed a hypothetical to the class.[92] Professors generally use a cold-call system that results in equal participation by students, but a stark difference emerges as to who *voluntarily* speaks in class. Students from historically excluded groups can be less likely to volunteer because they are aware that every other student like them may be judged based on their performance.[93] This is doubly true if the topic of discussion directly affects the student—as Scott Ihrig put it, he did not want to become "the gay student" in his classroom.[94]

The verbal sparring that takes place in a law school classroom has a particularly silencing effect on women students, who are socialized to avoid being seen as overly aggressive in their language.[95] Observers have tracked volunteered contributions to law school discussion and repeatedly found women underrepresented relative to their

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[90] *See* Beth Hirschfelder Wilensky, *Dethroning Langdell*, 107 MINN. L. REV. 2701, 2710–11 (2023).

[91] *See* COQUILLETTE & KIMBALL, *supra* note 1, at 497; Jewel, *supra* note 87, at 1187.

[92] Jeannie Suk Gersen, *The Socratic Method in the Age of Trauma*, 130 HARV. L. REV. 2320, 2324 (2017).

[93] *See* Juliano, *supra* note 5, at 307.

[94] *See* Scott N. Ihrig, *Sexual Orientation in Law School: Experiences of Gay, Lesbian, and Bisexual Law Students*, 14 L. & INEQ. 555, 577 (1996).

[95] *See* Emily A. Kline, *Stolen Voices: A Linguistic Approach to Understanding Implicit Gender Bias in the Legal Profession*, 30 UCLA J. GENDER & L. 21, 35 (2023).

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numbers in the room: Stanford students in 1988,[96] Berkeley law students in 1988,[97] students at nine Ohio law schools in 1993,[98] Brooklyn Law School students in 1995,[99] Yale Law School students in 2002,[100] Harvard in 2005,[101] Boston College in 2012,[102] Yale in 2012,[103] and the University of Chicago in 2017.[104] Explanations for this disparity often focus on the clash between the confrontation and immediate response necessary to joust with the professor and one's classmates versus the social expectation that women should not be excessively aggressive.[105]

No matter the explanation, speaking in class is the earliest signal of intelligence and advocacy skills among classmates who are about to be graded against one another.[106] Because of the public nature of classroom participation, it is in some ways

[96] Janet Taber, Marguerite T. Grant, Mary T. Huser, Rise B. Norman, James R. Sutton, Clarence C. Wong, Louise E. Parker & Claire Picard, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1242 (1988).

[97] Suzanne Homer & Lois Schwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1, 29, 50 (1989).

[98] Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 325–26 (1994).

[99] Marsha Garrison, Brian Tomko & Ivan Yip, *Succeeding in Law School: A Comparison of Women's Experiences at Brooklyn Law School and the University of Pennsylvania*, 3 MICH. J. GENDER & L. 515, 524–25 (1996).

[100] Sari Bashi & Maryana Iskander, *Why Legal Education Is Failing Women*, 18 YALE J.L. & FEMINISM 389, 403–09 (2006).

[101] Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 AM. U. J. GENDER SOC. POL'Y & L. 511, 530–31 (2005).

[102] Lauren A. Graber, *Are We There Yet? Progress Toward Gender-Neutral Legal Education*, 33 B.C. J.L. & SOC. JUST. 45, 67 (2013).

[103] YALE L. WOMEN, YALE LAW SCHOOL FACULTY AND STUDENTS: SPEAK UP ABOUT GENDER: TEN YEARS LATER 13–14 (2012).

[104] Mallika Balachandran et al., *Speak Now: Results of a One-Year Study of Women's Experiences at the University of Chicago Law School*, 2019 U. CHI. LEGAL F. 647, 657 (2019).

[105] *See* Molly Bishop Shadel, Sophie Trawalter & J.H. Verkerke, *Gender Differences in Law School Classroom Participation: The Key Role of Social Context*, 108 VA. L. REV. ONLINE 30, 48–49 (2022); Jamie R. Abrams, *Legal Education's Curricular Tipping Point Toward Inclusive Socratic Teaching*, 49 HOFSTRA L. REV. 897, 911 (2021); Daniel E. Ho & Mark G. Kelman, *Does Class Size Affect the Gender Gap? A Natural Experiment in Law*, 43 J. LEGAL STUD. 291, 293 (2014).

[106] *See* Heidi K. Brown, *The "Silent But Gifted" Law Student: Transforming Anxious Public Speakers into Well-Rounded Advocates*, 18 LEGAL WRITING 291, 308 (2012).

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the best fit for a contest of masculinity—what could be more masculine, after all, than proving one's superiority in front of an audience of women?

One of the other well-known activities in which law students may engage is joining a law review. Although the work of law review editors often feels mundane—checking the format and accuracy of footnotes for much of the first year—it has been described as "the most exclusive extracurricular activity" and is seen as extremely prestigious.[107] One of the reasons that law review membership is prestigious is because membership is generally a proxy for high grades.[108] Students cannot simply sign up for law review membership. Instead, members are typically selected by "grading on," or earning membership solely through high grades; "writing on," succeeding in a school-wide writing competition, or "publishing on," which hinges membership on writing a publishable piece of student scholarship.[109] In all versions, membership is won by doing something better than one's classmates, whether that is the same class ranking described above or a writing competition that explicitly pits students against one another to be judged by older law review members.[110]

D. Ranking Schools: U.S. News

Law schools also compete with other law schools on an institutional level. Since 1987, this competition has been almost entirely captured by a ranking of law schools published by the magazine *U.S. News & World Report*.[111] The earliest versions of the ranking merely surveyed law school deans, asking what schools they would list as the top twenty nationwide.[112] In 1990, the magazine performed its own analysis of information about schools to list a top twenty-five, and in 1992 expanded the ranking to its current broad coverage.[113]

The present methodology by which schools are ranked is a subject of obsession for law school administrators. There are four general categories examined by *U.S.*

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[107] Gregory S. Parks & Etienne C. Toussaint, *The Color of Law Review*, 103 B.U. L. REV. 181, 205 (2023).

[108] *See* Megan S. Knize, *The Pen Is Mightier: Rethinking the "Gladiator" Ethos of Student-Edited Law Reviews*, 44 MCGEORGE L. REV. 309, 323 (2013).

[109] Parks & Toussaint, *supra* note 107, at 206.

[110] *See* Knize, *supra* note 108, at 326.

[111] Juliano, *supra* note 5, at 307.

[112] Richard Schmalbeck, *The Durability of Law School Reputation*, 48 J. LEGAL EDUC. 568, 571 (1998).

[113] William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the* U.S. News *Rankings Era*, 81 IND. L.J. 163, 167 (2006).

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News.[114] Selectivity primarily looks at the Law School Admission Test (LSAT) scores and undergraduate GPAs of each school's incoming class, as well as the acceptance rate of all applications.[115] Placement success asks about employment status and bar passage for the school's J.D. graduates.[116] The category of "Faculty, Law School and Library Resources" is just what it sounds like: an accounting of resources held by the law school such as number of books in the library.[117] Finally, 40% of the *U.S. News* ranking is taken up in a "Quality Assessment," determined by two surveys: a peer assessment score and an assessment by practicing lawyers and judges.[118] These surveys form what is often referred to as the "reputation" score, since the surveys simply ask respondents to rate schools on a scale from one to five.[119] Three years of the survey scores are averaged for a school's Quality Assessment number.[120]

These rankings, described by one critic as a system "created by a mostly has-been news magazine,"[121] have become incredibly central to legal education. Prospective students use the *U.S. News* ranking to decide what school to attend.[122] Potential faculty members gauge how prestigious a position will be based in large part on the school's rank.[123] Schools regularly tout their rank—and more

[114] *Id.* at 168 ("Since 1992, *U.S. News* has consistently published four input variables for all ABA-approved law schools: (1) reputation among academics, (2) reputation among lawyers and judges, (3) acceptance rate, and (4) student LSAT scores (median or 25th and 75th percentiles).").

[115] Bruce M. Price & Sara Star, *The Elephant in the Admissions Office: The Influence of* U.S. News & World Report *on the Rise of Transfer Students in Law Schools and a Modest Proposal for Reform*, 48 U.S.F. L. REV. 621, 628 (2014).

[116] *Id.* at 627 n.8.

[117] *See* Geoffrey Christopher Rapp, *Fraud on the Rankings*, 74 BAYLOR L. REV. 583, 607 (2022).

[118] Price & Star, *supra* note 115, at 628.

[119] Schmalbeck, *supra* note 112, at 569.

[120] Andrew P. Morriss, *Legal Education Through the Blurry Lens of* U.S. News *Law School Rankings*, 20 GREEN BAG 2D 253, 254–55 (2017).

[121] Lucille A. Jewel, *Tales of A Fourth Tier Nothing, A Response to Brian Tamanaha's Failing Law Schools*, 38 J. LEGAL PROF. 125, 127 (2013).

[122] *See* Price & Star, *supra* note 115, at 622.

[123] Olufunmilayo B. Arewa, Andrew P. Morriss & William D. Henderson, *Enduring Hierarchies in American Legal Education*, 89 IND. L.J. 941, 1010 (2014).

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problematically, make basic decisions about the business of the law school to boost their rank.[124]

The reputation score, or "Quality Assessment" in the language of the ranking itself, is difficult for schools to shift.[125] It is also such a bizarre enterprise to rate every accredited law school in the country that eccentricities creep in. For example, in 2017, Theodore Seto found that law schools based in the Central time zone tended to be over-ranked, whereas schools within one hundred miles of New York City were under-ranked.[126] The nearly fifty-place discrepancy between Howard Law School's peer ranking and its ultimate ranking in *U.S. News* also prompted an entire law review piece discussing various possibilities explaining the gap.[127]

By contrast, the Selectivity score—looking at LSAT, undergraduate GPA, and acceptance rate—is a metric that law schools have more control over.[128] As a result, the pressure to beat other schools to a better *U.S. News* ranking exerts incredible control over how law schools evaluate applicants and who they ultimately admit.[129] Even though one survey of admissions deans found that 70% were unhappy that the rankings existed at all, a majority said the rankings played a major role in admissions decisions.[130]

One consequence of the rankings is the near-determinative effect of the LSAT.[131] The importance of the LSAT to prospective students' applications increased significantly after the *U.S. News* rankings began to incorporate LSAT

[124] *Id.* at 1008.

[125] Price & Star, *supra* note 115, at 627–28; *see* Robert L. Jones, *A Longitudinal Analysis of the* U.S. News *Law School Academic Reputation Scores Between 1998 and 2013*, 40 FLA. ST. U. L. REV. 721, 726 (2013).

[126] Theodore P. Seto, *Understanding the* U.S. News *Law School Rankings*, 60 SMU L. REV. 493, 518 (2007).

[127] Michael Conklin, *The Curious Case of Howard Law School's Peer Ranking*, 23 RUTGERS RACE & L. REV. 299, 301–02 (2022).

[128] Darren Bush & Jessica Peterson, *Jukin' the Stats: The Gaming of Law School Rankings and How to Stop It*, 45 CONN. L. REV. 1235, 1271, 1274 (2013); Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309, 311 (2006).

[129] Johnson, *supra* note 128, at 312.

[130] Anahid Gharakhanian, Natalie Rodriguez & Elizabeth A. Anderson, *"More than the Numbers": Empirical Evidence of an Innovative Approach to Admissions*, 107 MINN. L. REV. 2431, 2439 (2023).

[131] Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 IND. L.J. 229, 233 (2006).

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scores.[132] One 1998 study found that 90% of differences in school ranks could be explained solely by the differences in their students' LSAT scores.[133] Schools are well aware of the significance that gaining or losing a point on median LSAT scores makes for their ranking and make admissions decisions accordingly.[134] This is particularly problematic since studies show that members of groups historically excluded from law school, most notably students of color, score lower on the LSAT.[135] One report in the 1990s found that if LSAT scores were removed from admissions decisions and only undergraduate GPAs were evaluated, twice as many Black and Puerto Rican students would be admitted.[136]

This is not to say that undergraduate GPA evaluation does not have problems itself as well. Students who majored in subjects that tend to have lower GPAs, or who attended schools with less grade inflation, are less likely to be admitted to law schools even if their programs were more rigorous than applicants with higher GPAs.[137] This can be particularly difficult for J.D. students from countries in which grading norms are lower than American universities. One of my students who attended college in Pakistan earned a GPA of 3.35, which while impressive in Pakistan is on the lower side for students admitted to the school at which I teach. By the time he applied to law school, he had earned a Master of Public Administration (MPA) at Cornell with a GPA near 4.0—but because undergraduate GPA is the reported statistic, it remained the determinative GPA for his applications (and scholarship offers).

The *U.S. News* ranking system has created incredible competition with high stakes for schools, yet some of the largest components of a school's evaluation, such as the reputation scores, are difficult to move. As Rachel Moran pointed out, schools are also prevented from making bigger changes to curriculum or educational programs because of the "standardization and uniformity" created by the

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[132] *See* James S. McGrath & Andrew P. Morriss, *Assessments All the Way Down*, 21 GREEN BAG 2D 139, 140 (2018).

[133] Henderson & Morriss, *supra* note 113, at 165.

[134] Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN'S L. REV. 41, 46, 66 (2006).

[135] Gharakhanian et al., *supra* note 130, at 2460; *see also* Johnson, *supra* note 128, at 332.

[136] Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN'S L. REV. 107, 107–08 (2006); *see also* Johnson, *supra* note 128, at 314.

[137] *Id.* at 232.

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accreditation that law schools must retain.[138] The result is what is diplomatically called "gamesmanship,"[139] which has risen in at least some cases to something fairly described as cheating. For example, one way that law schools secure enrollment from applicants with high LSAT scores is to offer those applicants scholarships—but such scholarships mean fewer tuition dollars coming in, which could ultimately add up to a budget shortfall.[140] Former Minnesota Dean Alex M. Johnson explained the "explosion" of Master of Laws (LLM) programs—offering one-year degrees to lawyers from other countries—in part as a response to this dilemma, since LLM students typically pay closer to full ticket price and do not affect a school's LSAT scores as reported to *U.S. News*.[141]

Another strategy to boost a school's numbers is to rely on transfer students to fill out classes.[142] Transfer students' LSAT scores and GPAs are not included in the *U.S. News* ranking, which only examines statistics relating to the first-year class.[143] Students with the same LSAT scores and GPAs might be rejected for admission as an incoming first-year student, yet accepted as a transfer student once those figures no longer affect the median statistics reported to *U.S. News*. Students with lower LSAT scores who perform very well in their first year of law school also help the budget of the schools to which they transfer, since transfer students rarely receive any kind of merit scholarship.[144] One dean even referred to such transfer students as "cash cows."[145] The students themselves receive the prestige of a higher-ranked law school on their ultimate degree, and the rank of the school to which they transfer is

[138] Rachel F. Moran, *Of Rankings and Regulation: Are the* U.S. New & World Report *Rankings Really A Subversive Force in Legal Education?*, 81 IND. L.J. 383, 391 (2006); *see also* Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359, 366 (2006).

[139] *See* McGrath & Morriss, *supra* note 132, at 140.

[140] *See* Michael I. Krauss, *The Ethics of Law School Merit Scholarships*, FORBES (Apr. 3, 2014), https://www.forbes.com/sites/michaelkrauss/2014/04/03/the-ethics-of-law-school-merit-scholarships/?sh=69b1cd4b4932 ("Law Schools always want to attract the 'best' students, and one way to attract them is to price discriminate, i.e., to offer discounts").

[141] *See* Johnson, *supra* note 128, at 313.

[142] Bush & Peterson, *supra* note 128, at 1252.

[143] Price & Star, *supra* note 115, at 628; *see also* Henderson & Morriss, *supra* note 113, at 181.

[144] Price & Star, *supra* note 115, at 634.

[145] *Id.* at 631.

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often determinative in whether an individual student transfers.[146] The cost of law school may be significantly higher if they give up existing scholarships, and transfer students often miss activities like law review write-on competitions and on-campus interviewing.[147] For higher-ranked schools, however, accepting transfer students can reinforce their high ranking, as they effectively poach students from lower-ranked schools who have performed well in law school and will presumably pass the bar and secure legal employment.[148]

Law schools also employ a variety of techniques to artificially boost their Selectivity score. Some of the more licit methods include waiving application fees to encourage as many applications as possible and waitlisting or rejecting students with scores so far above the school's median that the chances of the applicant actually attending seem close to zero.[149] Part-time students are not included in a school's general numbers, so Professors William Henderson and Andrew Morriss describe admitting students with lower LSAT and GPA numbers only to a part-time program as a "well-known strategy."[150] The University of Illinois College of Law created a program admitting undergraduates at the university with high GPAs without their even taking the LSAT, which might sound like a laudable way to extend educational opportunities until one reads an email from the administrator who started the program saying that it allowed him to "trap about 20 of the little bastards with high GPAs that count and no LSAT score to count against my median."[151]

Beyond such misleading but permissible tricks, Professors Henderson and Morriss wrote that "[s]ince the advent of the rankings in 1992, the legal academy has consistently demonstrated that it cannot be trusted to provide consumers with honest, reliable data."[152] Professor Tamanaha wrote in *The Daily Beast* about artificially improving graduate employment numbers, confessing that he had joined in the common technique of hiring graduates without real jobs into "sham" positions with

[146] *Id.* at 622.

[147] *Id.* at 651.

[148] *Id.* at 624.

[149] Bush & Peterson, *supra* note 128, at 1251.

[150] Henderson & Morriss, *supra* note 113, at 181.

[151] Brian Z. Tamanaha, *Law Schools Fudge Numbers, Disregard Ethics to Increase Their Ranking*, THE DAILY BEAST (July 13, 2017, 7:35 PM), https://www.thedailybeast.com/law-schools-fudge-numbers-disregard-ethics-to-increase-their-ranking.

[152] Henderson & Morriss, *supra* note 113, at 201.

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the law school so that they could be listed as employed.[153] Post-graduation employment numbers were misrepresented so badly that about ten years ago, law school alumni brought a series of lawsuits alleging fraud against the schools they attended.[154] Since one number incorporated by *U.S. News* is the per-capita expenditures made by the law school, one year the University of Illinois reported not the flat fee that it (and every other law school) paid for access to the Lexis Nexis and Westlaw databases, but the market value of $8.78 million that their access would have cost; eighty times more than what they actually paid.[155] And, of course, there is always the effective but risky strategy of simply lying about LSAT and GPA scores, as both Villanova and the University of Illinois were caught doing.[156]

The overreliance on the LSAT and questionable strategies to gain a competitive edge are widespread, but also understandable from the point of a law school locked into a zero-sum game with its peers. As Professor Tamanaha wrote, "[o]nce a few deans began to aggressively game the ranking, it was inevitable that nearly all law schools would follow suit."[157] But the gamesmanship focusing on how to go up in rank means that law schools do not devote as much time or resources to unquantifiable characteristics such as faculty efforts towards supportive environments for their students.[158]

There is of course resistance to the *U.S. News* ranking system, which has long been broadly criticized.[159] Dean Johnson wrote in 2006, "I am always asked why deans, as a group, continue to cooperate with *U.S. News* when most of them, but not all, vehemently object to the rankings and believe they undermine our educational mission."[160] In 2022, Dean Heather Gerken of Yale kicked off a wave of schools

[153] *Id.*; Tamanaha, *supra* note 151. Once *U.S. News* discovered the practice, it tweaked the guidelines about what type of employment counted for purposes of the rankings.

[154] Rapp, *supra* note 117, at 585, 591.

[155] Bush & Peterson, *supra* note 128, at 1255–56

[156] Ben Trachtenberg, *Law School Marketing and Legal Ethics*, 91 NEB. L. REV. 866, 867–68 (2013).

[157] Tamanaha, *supra* note 151.

[158] Barbara Glesner Fines, *Fundamental Principles and Challenges of Humanizing Legal Education*, 47 WASHBURN L.J. 313, 318 (2008).

[159] *See, e.g.*, Bush & Peterson, *supra* note 128, at 1241–50 (detailing the "problems with [the] USNWR"). Of course, the ranking system does have its defenders. *See, e.g.*, Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403 (1998).

[160] Johnson, *supra* note 128, at 354.

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announcing they would not report data to *U.S. News* anymore.[161] But even in 2006, Dean Johnson pointed out that due to reporting requirements to the ABA, *U.S. News* could easily obtain the data anyway, since it was public,[162] which is exactly what happened.[163]

III. THE HARMS OF COMPETITION

The exhaustive nature of the competition within legal education has myriad negative effects. There is significant literature demonstrating the negative emotional and mental effects that law students suffer, for example. It is not selection bias, as students at the start of their law school education have the same levels of psychopathological symptoms as average people their age.[164] Yet during law school, this changes. Surveys tracking law students through their time in law school found "significant declines in well-being, positive affect, life satisfaction, and significant increases in negative affect[,]" comparing individual students' responses over time.[165] A survey of law students from 2014 was described as a "harrowing wake-up call" by one scholar flagging high numbers of law students struggling with their mental health and substance use.[166] A 2021 survey had similar results, particularly reports of depression and anxiety, although the timing during the COVID-19 pandemic likely exacerbated such problems.[167] The stress and workload of law school means that students lack sufficient rest, both literal and metaphorical. Jonathan Todres published recently in this law review about "the need to give law

[161] *Dean Gerken: Why Yale Law School Is Leaving the* U.S. News & World Report *Rankings* (Nov. 16, 2022), https://law.yale.edu/yls-today/news/dean-gerken-why-yale-law-school-leaving-us-news-world-report-rankings; Nick Anderson & Susan Svrluga, *Law School Revolt Against* U.S. News *Rankings Gains Steam*, WASH. POST (Dec. 3, 2022, 7:00 AM), https://www.washingtonpost.com/education/2022/12/03/law-schools-protest-us-news-rankings/.

[162] Johnson, *supra* note 128, at 355.

[163] Anemona Hartocollis, *Elite Law Schools Boycotted the* U.S. News *Rankings. Now, They May Be Paying a Price*, N.Y. TIMES: U.S. (Apr. 21, 2023), https://www.nytimes.com/2023/04/21/us/21nat-us-news-rankings-law-medical-school.html.

[164] Young, *supra* note 72, at 2577.

[165] Andrea M. Flynn, Yan Li & Bernadette Sánchez, *Law School Stress: Moving from Narratives to Measurement*, 56 WASHBURN L.J. 259, 261 (2017).

[166] Jordana Alter Confino, *Where Are We on the Path to Law Student Well-Being?: Report on the ABA Colap Law Student Assistance Committee Law School Wellness Survey*, 68 J. LEGAL EDUC. 650, 653 (2019).

[167] David Jaffe, Katherine M. Bender & Jerome Organ, *"It Is Okay to Not Be Okay": The 2021 Survey of Law Student Well-Being*, 60 U. LOUISVILLE L. REV. 439, 450, 483 (2022).

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students a break," explaining that the competitive culture of law school pressures students to spend all of their time working.[168] As he points out, in a 2021 survey conducted by The Law School Survey of Student Engagement (LSSSE), almost half of law students reported that they averaged five or fewer hours of sleep per night.[169]

Susie Salmon also highlights a specific negative effect on law students' mindsets.[170] People with fixed mindsets believe that people have an inherent natural ability, and such abilities are largely unchangeable.[171] By contrast, people with a growth mindset believe that even traits like intelligence can be developed over time.[172] As Salmon notes, a fixed mindset is probably over-represented among law students, as students who did well enough in their undergraduate studies to pursue and be admitted to law school have likely been praised throughout their childhood and young adulthood for intelligence.[173] But a study of law students assessing their mindsets during law school showed that the fixed mindset became stronger and more common as law school progressed.[174]

Some of the fixed mindset is baked in before law school even begins. As Salmon explains, the Law School Admissions Council (LSAC)—which administers the LSAT that determines so many students' admissions—believes that the LSAT measures innate abilities so strongly that the LSAC advises students not to bother taking the test more than once.[175] If a student does repeat the test and scores higher, the LSAC may open an investigation suspecting that the student cheated.[176]

This fixed mindset fits right alongside the practice of ranking students cumulatively over their law school career. As discussed above, law school is extremely different than almost all students' undergraduate studies, and students

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[168] Jonathan Todres, *Work-Life Balance and the Need to Give Law Students A Break*, 83 U. PITT. L. REV. ONLINE ED. 1, 3–4 (2022).

[169] *Id.* at 5.

[170] *See* Susie Salmon, *Reconstructing the Voice of Authority*, 51 AKRON L. REV. 143, 164 (2017).

[171] *Id.*

[172] *Id.* at 167.

[173] *Id.* at 165.

[174] Sue Shapcott, Sarah Davis & Lane Hanson, *The Jury Is in: Law Schools Foster Students' Fixed Mindsets*, 42 LAW & PSYCH. REV. 1, 27 (2018).

[175] Salmon, *supra* note 170, at 165–66.

[176] *Id.* at 166.

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typically have only one chance during the final exam to earn their grade.[177] Taking law school exams is a skill that they have never tried before, and many students are disappointed in their first semester grades.[178] It should be unsurprising that some students who do not perform well on the first semester's exams improve their test-taking abilities and improve their grades as time goes on. Yet early grades continue to impact success throughout law school—a bad first semester can lead to difficulty securing employment between their first and second year or prevent them from joining law review.[179] Lacking those credentials, they may have further difficulty finding employment for their second summer, which often turns into their post-graduation employment.[180] And even if their grades improve significantly in later semesters, their class rank will include the first semester's grades, possibly preventing them from receiving graduation honors like Order of the Coif because of a single early semester.[181]

Law students who belong to groups that were historically excluded from law school face even more negative effects.[182] Students of color remain underrepresented in law schools, in which whiteness is treated as the norm.[183] Learning how to think like a lawyer is typically presented as learning to think like a White male judge, which can be particularly alienating when students of color read and discuss cases that involved nonwhite parties and are, as Professor Etienne C. Toussaint puts it, "made to see themselves through the gaze of White male judges."[184] Students of color, and particularly women students of color, are less likely to say that they feel part of their law school community and more likely to say that they feel uncomfortable "being themselves" while at law school.[185]

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[177] *See supra* text accompanying notes 45–48.

[178] *Id.*

[179] Stephanie Francis Ward, *Hiring Decisions Based on First-Year Grades Miss "Exceptional Students," According to New Paper*, A.B.A. J. (Mar. 24, 2021, 11:07 AM), https://www.abajournal.com/news/article/hiring-decisions-based-on-first-year-grades-miss-exceptional-students-according-to-paper.

[180] *See id.*

[181] *See supra* text accompanying notes 81–82.

[182] *See generally* Renee Nicole Allen, *From Academic Freedom to Cancel Culture: Silencing Black Women in the Legal Academy*, 68 UCLA L. REV. 364, 373 (2021).

[183] *Id.*

[184] Etienne C. Toussaint, *The Purpose of Legal Education*, 111 CALIF. L. REV. 1, 16 (2023).

[185] Bennett Capers, *The Law School as A White Space*, 106 MINN. L. REV. 7, 24–25 (2021).

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The experience of women law students is similarly negative. A 1998 article titled *What Every First-Year Female Law Student Should Know* starts: "women can expect a hostile environment while attending law school."[186] Twenty years ago, Professor Nancy Levit described a "cascade of reports" about how women's experiences in law school are different and worse than the experiences of male law students.[187]

It is worth explicitly noting that one way that some women are harmed as law students is particularly resonant when seen through a lens of hegemonic masculinity. Hegemonic masculinity assumes competition with other men and dominance of women, particularly if one can prove dominance through sexual conquest.[188] This show of dominance plays out as the phenomenon of professors "dating" students.[189] Despite the clear power differential between a professor and student, especially given the importance of recommendations and networking, there are scores of examples of male professors beginning sexual relationships with female students.[190]

Legal education asks young people to ignore their own background and values, as well as specific facts about litigants in service of the idea of neutral principles of law.[191] Professor Rebecca Flanagan describes thinking like a lawyer as a form of dehumanization, as law students learn to see other people as "enemies deserving of torment."[192] The competition and need to win fostered in hegemonic masculinity thus

[186] Morrison Torrey, Jennifer Ries & Elaine Spiliopoulous, *What Every First-Year Female Law Student Should Know*, 7 COLUM. J. GENDER & L. 267, 267 (1998).

[187] Nancy Levit, *Keeping Feminism in Its Place: Sex Segregation and the Domestication of Female Academics*, 49 U. KAN. L. REV. 775, 780 (2001).

[188] *See* Dara E. Purvis & Melissa Blanco, *Police Sexual Violence: Police Brutality, #MeToo, and Masculinities*, 108 CALIF. L. REV. 1513 (2020).

[189] Morrison Torrey, Jennifer Ries & Elaine Spiliopoulous, *supra* note 186, at 274.

[190] *See, e.g.*, Nick Anderson & Cristiano Lima, *George Mason Law Professor Resigned Amid Accusations of Sexual Misconduct*, WASH. POST (Sept. 1, 2023, 6:00 AM), https://www.washingtonpost.com/education/2023/09/01/george-mason-university-joshua-wright-sexual-misconduct-allegations/ (describing Joshua D. Wright's resignation from the faculty after what he described as "consensual" relationships with his students, which they described as sexual harassment).

[191] *See* Ben Gibson, *How Law Students Can Cope: A Student's View*, 60 J. LEGAL EDUC. 140, 142 (2010); *see also* Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 79 (2002).

[192] Rebecca Flanagan, *Lucifer Goes to Law School: Towards Explaining and Minimizing Law Student Peer-to-Peer Harassment and Intimidation*, 47 WASHBURN L.J. 453, 460 (2008).

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turns outward, as students learn to think of all sorts of litigants as enemies to be vanquished.[193]

The competition within law school also harms law schools as a whole, beyond its effect on individual students. One way this happens is through the cycle of who becomes professors. Since Langdell began the practice of hiring "young scholars" who had done well in law school rather than lawyers coming from practice,[194] professors are generally the people who succeeded within the existing competitive system. They are thus unlikely to question the fundamentals of the system that they excelled within.[195]

This is particularly true because so many law professors come from a handful of elite schools. At the top ten law schools according to *U.S. News*, 94% of the professors are themselves graduates of those top ten schools.[196] In one examination of professors throughout the country, over half of law professors nationwide attended the top fifteen schools.[197] And the sorting begins even before law school—a recent paper by Milan Markovic found that 40% of new law professors attended elite (what he describes as "Ivy League-Plus") schools for their undergraduate studies.[198] This channel from hyper-elite college to hyper-elite law school means that law professors are increasingly what Meera Deo terms "hypercredentialized," racking up achievement after achievement that mean the path to becoming a law professor starts before high school graduation.[199]

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[193] *See supra* text accompanying notes 9–14.

[194] Bruce A. Kimball & Daniel R. Coquillette, *History and Harvard Law School*, 87 FORDHAM L. REV. 883, 892 (2018).

[195] One interesting point about the focus on grades was raised by Professor Emily Zimmerman, who pointed out that perhaps law professors overestimate how much impact competition for grades have on law students because grades were central to the law school experiences of people who received the high grades necessary to become law professors. Emily Zimmerman, *Do Grades Matter?*, 35 SEATTLE U. L. REV. 305, 306 (2012).

[196] *Id.*

[197] Daniel Gordon, *Hiring Law Professors: Breaking the Back of an American Plutocratic Oligarchy*, 19 WIDENER L.J. 137, 149 (2009).

[198] Milan Markovic, *The Law Professor Pipeline*, 92 TEMP. L. REV. 813, 815 (2020).

[199] Meera E. Deo, *Progress and Backlash in our Unequal Profession*, 51 SW. L. REV. 310, 320 (2022).

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Unsurprisingly, a focus on credentials rather than skills, scholarly potential, or other substantive metrics also results in a lack of diversity among professors.[200] Literature abounds about the underrepresentation of historically excluded groups from the ranks of professors,[201] as well as the stifling experience of being a professor from a historically excluded group operating within the "white institutional norms" of legal education.[202] This also means that diverse students in the law school lack role models who can speak to the increased demands on lawyers who are diverse.[203] For example, Professor Todd Berger wrote an article flagging the "gender judo" that women lawyers need to zealously advocate for their clients in front of juries that may hold sexist prejudices that see advocacy as aggression.[204] Professor Berger questions whether male professors can effectively teach a "gender judo" that they have never had to engage in.[205] Furthermore, professors from historically excluded groups also face greater obstacles in networking and publicizing their work.[206] A study from 2023 using star footnotes as a proxy for the social networks of law professors found that White scholars, and particularly White men, acknowledge scholars of color at disproportionately low rates.[207]

The competition in legal education also means that law professors are often evaluated according to how their work impacts the school's *U.S. News* rank, rather than their overall value as educators. Professor Ann Juliano recently wrote about the

[200] *See* Carliss N. Chatman & Najarian R. Peters, *The Soft-Shoe and Shuffle of Law School Hiring Committee Practices*, 69 UCLA L. REV. DISCOURSE 2, 6 (2021).

[201] *See, e.g.*, Cyra Akila Choudhury & Shruti Rana, *Addressing Asian (In)Visibility in the Academy*, 51 SW. L. REV. 287, 289 (2022).

[202] Allen, *supra* note 182, at 375.

[203] *See* Amy H. Soled & Barbara Hoffman, *Building Bridges: How Law Schools Can Better Prepare Students from Historically Underserved Communities to Excel in Law School*, 69 J. LEGAL EDUC. 268, 294 (2020).

[204] Todd A. Berger, *Male Legal Educators Cannot Teach Women How to Practice "Gender Judo": The Need to Critically Re-Assess Current Pedagogical Approaches for Teaching Trial Advocacy*, 45 J. LEGAL PROF. 1, 16 (2020).

[205] *Id.* at 17.

[206] *See generally* Keerthana Nunna, W. Nicholson Price II & Jonathan Tietz, *Hierarchy, Race, and Gender in Legal Scholarly Networks*, 75 STAN. L. REV. 71, 113–14 (2023).

[207] *Id.* at 119. The authors acknowledge many explanations for the disparity, ranging from bias to wishing to flatter higher status authors in acknowledgment. *Id.* at 124–25.

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emphasis not only on being productive scholars rather than excellent teachers[208] or contributing through service, but also on publishing articles in the most prestigious law reviews (with "prestige" being determined, of course, by rankings).[209] Professor Juliano criticizes evaluation of scholarship as a qualitative rather than quantitative exercise, writing, "counting articles (and I do mean, literally counting) and ranking the journals in which these articles are placed is easier than actually digging in to assess that scholarship."[210] Such evaluations also naturally lead to the minimization of contributions of clinical professors and legal writing professors, who are typically not expected to publish law review articles and whose work is thus not easily quantified by number and prestige of articles.[211]

The competition of legal education even harms legal practice in general. Most obviously, the lack of diversity that begins among law students becomes a further lack of diversity among lawyers.[212] The same groups that feel alienated and rejected as not fitting the norm of an ideal law student continue to face disproportionate challenges.[213] For example, women are still underrepresented as lawyers[214] and make less money in practice.[215] One reason that women attorneys are paid less and are less likely to become partners in their law firms is endemic gender stereotyping that sees men as better advocates and lawyers, the same "unfit for the feminine mind" stereotyping voiced by Langdell over a century ago.[216]

Beyond individual experiences, however, the negative aspects of law school and the reputation of lawyers have prompted multiple professors to ask whether

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[208] *But see* Lucille A. Jewel, *Oil and Water: How Legal Education's Doctrine and Skills Divide Reproduces Toxic Hierarchies*, 31 COLUM. J. GENDER & L. 111, 133–34 (2015) (arguing that faculty scholarship contributes to teaching).

[209] *See* Juliano, *supra* note 5, at 292.

[210] *Id.* at 306.

[211] Nantiya Ruan, *Papercuts: Hierarchical Microaggressions in Law Schools*, 31 HASTING WOMEN'S L.J. 3, 11 (2020).

[212] Kline, *supra* note 95, at 23–24.

[213] *Id.*

[214] Christopher J. Ryan, Jr. & Meghan Dawe, *Mind the Gap: Gender Pay Disparities in the Legal Academy*, 34 GEO. J. LEGAL ETHICS 567, 581 (2021).

[215] Amanda M. Fisher, *New Beginnings: A Feminist Evaluation of Gendered Stigma in the Modern Legal Profession*, 19 RUTGERS J.L. & PUB. POL'Y 161, 164–65 (2021).

[216] Rachel G. Stabler, *All Rise: Pursuing Equity in Oral Argument Evaluation*, 101 NEB. L. REV. 438, 456–57 (2023); COQUILLETTE & KIMBALL, *supra* note 1, at 495.

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something about law school teaches students to become "selfish, arrogant, and confrontational" lawyers.[217] The query runs deeper than mere stereotypes about abrasive lawyers, although the competitive introduction to law as a field is certainly likely to contribute to the "zero-sum game adversarial model" of the world that most lawyers see.[218] Professors Henderson and Morriss argue that the ranking of law schools allows elite schools to charge significantly higher tuition, which prompts their students to take out more in loans, which then channels those students into high-paying jobs with law firms.[219] They do not make explicit the road *not* taken, as students who hoped to become public interest lawyers or take important but low-paying jobs with the government are effectively prevented from doing so because of their student debt.[220] In this way, the ranking and competition of law schools deprives society as a whole from the passion and labor of generations of law students.[221]

Instead, that passion may be turned to the ends of the highest bidder.[222] As Professor Toussaint put it, it is possible that "the dominance of legal formalism in law school curricula is amoral—producing law graduates who enter the legal profession with a blunted ethical compass and dulled sense of moral responsibility."[223]

The summer of 2023 presented a particularly galling example. Special Prosecutor Jack Smith indicted former President Donald Trump for his attempt to undermine the 2020 election, listing six unindicted co-conspirators, five of whom were lawyers.[224] Weeks later, District Attorney Fani Willis indicted Trump and eighteen co-defendants for the same actions under state law—eight of the co-

[217] *See, e.g.*, Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367, 370 (1997).

[218] Carasik, *supra* note 70, at 757; Young, *supra* note 72, at 2586.

[219] Henderson & Morriss, *supra* note 113, at 194–95.

[220] David L. Chambers, *The Burdens of Educational Loans: The Impacts of Debt on Job Choice and Standards of Living for Students at Nine American Law Schools*, 42 J. LEGAL EDUC. 187, 188, 200–02 (1992).

[221] *See id.* at 188.

[222] *See id.* at 192.

[223] Toussaint, *supra* note 184, at 23.

[224] Deborah Pearlstein, Opinion, *Why Are So Many of Trump's Allege Co-Conspirators Lawyers?*, N.Y. TIMES (Aug. 14, 2023), https://www.nytimes.com/2023/08/14/opinion/trump-indictment-lawyers .html.

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defendants were lawyers.[225] As Dahlia Lithwick and Mark Joseph Stern wrote in *Slate*, "the singular role of *lawyers* . . . should not go unremarked on."[226] As Deborah Pearlstein pointed out in *The New York Times*, legal education has been rocked by ethics scandals in the past, as when nearly thirty lawyers faced consequences for their own misdeeds during the Watergate scandal.[227] In response, the American Bar Association added a requirement that accredited law schools mandate that all students take a course on professional responsibility.[228] Yet even with that required professional responsibility class, Trump's attorneys broke ethical rules and federal and state law—if their efforts to overturn the election had succeeded, they would almost certainly be facing no consequences. Lithwick and Stern wrote of the lessons for today's law students:

> In a few weeks, a new class of students will begin law school. These 1Ls will be taught, at orientation, to conduct themselves honorably in the legal profession—then taught how to manipulate the legal system to enrich and empower their clients. These 1Ls need only glance at the news to see that there is a deep sickness in their profession, an obsession with pretending that evil deeds are not evil when done in the service of a paying customer. They will see that they are learning many of the same skills that Trump's lawyers repurposed to sabotage an election and subvert the law. They will see that, even now, only a tiny fraction of the lawyers involved in the insurrection have faced meaningful consequences. And they will have to choose which path aligns best with their ambitions.[229]

Hegemonic masculinity's pressure to win at all costs causes harm not only to the individual students whose law school experience is a battle rather than an education,

[225] Aruna Viswanatha & Sadie Gurman, *Were the People in Trump's Ear After the 2020 Election Criminals or Just Lawyers?*, WALL ST. J. (Sept. 2, 2023, 5:00 AM), https://www.wsj.com/us-news/law/were-the-people-in-trumps-ear-after-the-2020-election-criminals-or-just-lawyers-d0240e9b.

[226] Dahlia Lithwick & Mark Joseph Stern, *Jack Smith's Indictment of the Entire Legal Profession*, SLATE: JURISPRUDENCE (Aug. 2, 2023, 5:42 PM), https://slate.com/news-and-politics/2023/08/rudy-giuliani-co-conspirators-jack-smith-indictment.html.

[227] Pearlstein, *supra* note 224.

[228] *Id.*

[229] Lithwick & Stern, *supra* note 226.

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but also to the society advised and governed by lawyers whose primary lesson of legal education was that winning is everything.[230]

IV. CONCLUSION

It is tempting to engage in a thought experiment of what legal education *could* be like as a less explicitly competitive enterprise. What would it mean to value building relationships with clients, negotiation skills, and other diverse skills as much as the hand-to-hand combat of litigation? How would the work of professors and students change if students were graded using standardized, objectively-referenced grades rather than judgment against their peers? Other scholars with better creative writing skills have taken the approach of a small window into a better law school.[231] Counteracting the competition within current legal education, however, will be such a fundamental undertaking that it feels more realistic to contemplate incremental steps rather than an imagined end goal.

A few of the first steps forward seem clear. First, this is a project of law school administrators and professors, not law students. Students are working within a system that already places incredible burdens upon them such as student debt and psychological pressure, and they make rational decisions to succeed within the system that exists rather than trying to swim upstream and potentially throw away their chance at a successful legal career. For example, Professor Silverstein's defense of mandatory curves notes that students at Bowen embraced the adoption of norm-referenced grading because it eliminated the large grade disparities between professors.[232] I suspect most law school administrators and professors heard similar worries in the spring of 2020, when virtually all law school grades were replaced with pass/fail scores due to the pandemic. While overwhelmed students were in part glad to have one source of stress removed from their lives, quite a few very understandably resisted the shift to pass/fail, arguing that they had been working to improve their GPAs and therefore felt that their class rank would suffer.[233] To my mind, this is not a reason to keep mandatory curves, but a reason to question why

[230] *See supra* text accompanying notes 9–14; Carasik, *supra* note 70, at 757.

[231] Capers, *supra* note 185, at 55–57; Rebecca Flanagan, *Better by Design: Implementing Meaningful Change for the Next Generation of Law Students*, 71 ME. L. REV. 103 (2018); Nancy E. Shurtz, *Lighting the Lantern: Visions of a Virtual All-Women's Law School*, 16 HASTING WOMEN'S L.J. 63 (2004).

[232] Silverstein, *supra* note 60, at 297.

[233] Karen Sloan, *'People Are Pissed': Pass/Fail Grading Controversy Roils Law Schools*, ALM|LAW.COM (Mar. 25, 2020, 01:10 PM), https://www.law.com/2020/03/25/people-are-pissed-pass-fail-grading-controversy-roils-law-schools/.

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curves and class rank are so central to our students that they felt the pressure was necessary even in the midst of a global pandemic.

Second, for obvious reasons, the 2022 revolt against the *U.S. News & World Report* rankings is a positive sign, but it remains to be seen whether the movement will go far enough. As noted above, a school's refusal to send in data does not prevent the magazine from delivering the ranking like normal.[234] What is perhaps more significant than refusing to send the data was the storm of protest that actually pushed *U.S. News* to change the substance of how they ranked schools.[235] Schools are right to disagree with the methodology of the ranking system and should be more public about why, including for prospective students. Law schools that declined to send information to *U.S. News* should simply stop discussing the ranking and explain why—what about the school's strengths does the ranking fail to recognize? The real test will be if schools are willing to lessen their focus on LSAT scores in admissions decisions. As Professor Randall described her experience serving on the admissions committee for the University of Dayton School of Law, most applicants were sorted into "presumptive admit" or "presumptive deny" based solely on their LSAT score and undergraduate GPA.[236] Schools have been unwilling to move outside of these numbers because of their impact on *U.S. News* ranking, so the real signal of whether there is finally the will to reject the ranking monopoly will be whether schools admit classes that lower their LSAT and GPA medians.

Finally, there is the question of mandatory curves and class rank. A limited number of schools have rejected these practices, but largely only elite schools where virtually every graduating student will easily find the employment of their choice. Less elite schools have a collective action problem in that the worry is that legal employers would be less likely to interview and hire their students.[237] Class rank largely sorts for the market, to give potential employers an easy way to pick and choose among students.[238] That sorting, however, only measures one metric: how each student performs in law school classes, primarily on final exams. Surely this cannot be the best or only measure useful to employers.

Uprooting the hegemonic masculinity at the heart of legal education is a daunting enterprise; it may require a revolution at the same scale as the change

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[234] *See supra* text accompanying notes 159–63.

[235] Hartocollis, *supra* note 163.

[236] Randall, *supra* note 136, at 114.

[237] *See* Evan Jones, *Which Law Schools Are Pass/Fail?*, LAWSCHOOLI (Dec. 21, 2020), https://lawschooli.com/law-schools-passfail/.

[238] Feinman, *supra* note 74, at 650.

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sparked by Christopher Langdell. But the scale of the problem determines the scale of the solution, and law school in its current form is a structure building out from a fundamentally flawed foundation. Langdell's educational reforms were not all bad, but the core vision of law as a masculine profession—and a specific, retrograde version of masculinity at that—is simply incompatible with what should be our goal: an education that respects our students and gives them the knowledge and skills to be good lawyers, in every sense of the word.

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