1997

Power and the Morality of Grading - A Case Study and a Few Critical Thoughts on Grade Normalization

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Recommended Citation
65 UMKC L. Rev. 777 (1996-1997)

POWER AND THE MORALITY OF GRADING — A CASE STUDY AND A FEW CRITICAL THOUGHTS ON GRADE NORMALIZATION

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I. INTRODUCTION

There is a wonderful chapter in Jane Smiley's book Moo where a young woman reflects on the distance between the theory of economics advanced by a famous professor in whose class she is enrolled and her own life experience. She reviews mentally the behavior she has witnessed in her lifetime that disproves the very proposition she is supposed to be learning. She is not entirely convinced that capitalism produces an ultimate good if the end result is a battle over property like the one she witnessed in her own family. Nor is she convinced that acquisitiveness, the insatiable desire for consumer goods, is a virtue. She knows she does not share the ethic of the men who make up the vast majority of the class. She assumes, as does her professor, she thinks, that these men will be more successful in fulfilling the professor's expectations on the examination.[1] The chapter ends with an announcement by the Professor: "Exams will be returned in exactly one week after the date of the midterm. I remind you that exams are graded on a strict statistical curve, so seven percent of you will get F's no matter what. You may not thank me for this now, but I hope you will later, when you have attained greater wisdom."[2]

The professor, Dr. Gift, is a caricature, of course, and the chapter, the entire book for that matter, is a satire about university life. But the emotions of the woman student do not seem exaggerated or extreme. Jane Smiley's description seems pretty close to the mark. It is a fairly accurate description of a phenomenon experienced by "outsider" students in the academic community.[3]

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1. One colleague of mine asked whether I meant that the system of blind grading does not work because men on the faculty recognize the handwriting of women students and grade them down or because women faculty grade women students more liberally. The obvious answer to that is an emphatic "no" that is not what I mean.

2. JANE SMILEY, MOO 145-46 (1995).

3. *See* Lani Guinier, Michelle Fine, Jane Balin, Ann Bartow, and Deborah Lee Stachel, *Becoming Gentlemen: Women's Experiences At One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994) In this study, the authors discussed the relative performance of women in their first year of law school. Despite equivalent entering credentials, men outperformed women three to one. I undertook a study of the data at my own school with surprising results. I randomly sampled classes from the past two years, comparing full and part time students for Spring 1996 and Fall 1997. In the Fall of 1996, women made up 35.29% of the top 15% of first year full time students and 40% of the top 15% for part time students. In the Spring of 1996, women made up 45.45 % of the top 15% of the full time students and 30.76% of the part time students. Perhaps the difference in the proportion of women at the top of the class at Touro and at University of Pennsylvania has something to do with the presence of women faculty at ivy league and non-ivy league schools. Is the success of women students attributable to the presence (or absence) of women on a faculty? During the 1996-1997 academic year at Touro, there were 9 tenure track women, 7 tenured

The subject of this symposium issue is grade normalization, one example of which is the "strict statistical curve" employed by Dr. Gift, and the controversy that surrounds grade normalization generally. Grade normalization is an explicit attempt to mitigate the worst effects of the grading practices found in law schools.[4] It is inadequate as a means of ensuring equivalence among law school grades within or outside of an institution. It does nothing to curb the excesses of faculty where, as is the case in many law schools, compliance is not mandatory but voluntary.[5] Like most palliatives, it distracts us from the real problems that plague law school education.

The underlying problem is the extent to which grading in law schools is unconnected or disconnected from the ideal of education. Assessment is supportive of and crucial to the democratization of education and the politics of inclusion.[6] Grading thus conceived is an educational tool that can be used to improve teaching and learning. But in law school, grading has never been about assessment or learning. Law school is a political institution and, to the extent it replicates a system in which resources are allocated in an irrational or unfair way, it is an instrument of oppression.[7]

One problem, diagnosed long ago, is the absence of any relationship between what is taught in law school and the skills that lawyers need and use.[8] For the purposes

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and 2 untenured, 23 tenure track men: 17 tenured and 6 untenured, 2 non-tenure track clinicians and six legal methods faculty all of whom were women, one tenure track and the rest with long term contracts. At University of Pennsylvania, there are 12 women faculty: 7 tenured, 2 untenured and 3 non tenure track clinicians, and 30 men: 24 tenured, 3 untenured and 3 clinicians who are non-tenure track. There are four emeritus professors who are not included in these figures, all of whom are men. (Telephone call to Rae DiBlasi, Office of the Dean, University of Pennyslvania, July 16, 1997. If we count the legal methods faculty teaching at Touro (because they have long term contracts, serve on faculty committees and have the right to vote at faculty meetings on all issues except personnel matters, there are 14 women on the faculty. That puts the ratio of women to men at 14:23, much higher than the ratio of 12:30 at Penn. *But see* Louise Harmon and Deborah W. Post, CULTIVATING INTELLIGENCE: POWER LAW AND THE POLITICS OF TEACHING 43 (1996) (hereinafter CULTIVATING INTELLIGENCE) (referring to the legal methods faculty's lack of status); Deborah Post, *Reflections on Identity, Diversity and Morality*, 6 BERKELEY WOMEN'S L. J. 136 (1990-91) [hereinafter Reflections] (discussion of the disenfranchisement of legal methods women during debate on sexual harassment guidelines.)

4. *See* Richard A. Epstein, *Grade Normalization*, 44 S. CAL. L. REV. 707 (1971).

5. *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 U.M.K.C. L. REV. 819, 844 (1997).

6. For a more in depth discussion of the "assessment movement" in education generally see *infra* notes 12 to 48 and accompanying text.

7. Sociologists who have studied the attitudes of Americans towards inequality have concluded that structural inequalities are accepted as right and appropriate because of three important beliefs: opportunity for advancement is widespread, individuals are personally responsible for their own positions (effort and/or talent rule), and finally, the system of inequality is fair and equitable. *See* JAMES R. KLEUGEL & ELIOT R. SMITH, BELIEFS ABOUT INEQUALITY: AMERICANS' VIEWS OF WHAT IS AND WHAT OUGHT TO BE 23 (1986). A similar notion was advanced by the sociologist Peter M. Blau. PETER M. BLAU, EXCHANGE AND POWER IN SOCIAL LIFE (1964). In Blau's analysis, there are rules and social norms governing the use of power. When those norms are violated, those who must satisfy the demands of power experience the use of power in such a case as a "punishing" experience that provokes decidedly negative emotions: anger, antagonism and a desire for revenge. *See id.* at 229.

8. A great many critics of law school education refer back to an article written in 1947. *See* Jerome Frank, *A Plea for Lawyer Schools*, 56 YALE L. J. 1304 (1947). Frank traced many of the ills of legal education to a date 70 years earlier "when it was seduced by a brilliant neurotic. I refer to the well-known founder of the so-called case system, Christopher Columbus Langdell." *Id.* An interesting contrast to

of this paper, the reader should assume that the critique also reveals a similar gap between the skills that are tested in law school and the skills law students will need as lawyers.[9] The problem is compounded by the lack of attention paid by law faculty to the design of examinations.[10] More recently, attention has been paid to another problem. From a feminist or a critical race perspective, a very narrow measure of achievement is reflected in law school examinations and this narrowness advantages particular groups of students and disadvantages others.[11]

Frank's denunciation of the case law method has been advanced by a law teacher who believes the case law method teaches the right skills—verbal skills, independent thinking, and analysis. *See* Ruta K. Stopus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L. J. 449, 465-474 (1996).

9. But see the very detailed analysis of possibilities suggested by cognitive theory for teaching law students (novices) the cognitive strategies employed by experienced lawyers in Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313 (1995).

10. In a workshop on evaluation of students on July 15-16, 1994, Professor Paul T. Wangerin addressed the following issues: "(1) measurement problems with traditional grading, (2) grading essays to minimize measurement problems, and (3) writing 'objective' questions for law exams." THE LAW TEACHER, The Institute for Law School Teaching, Gonzaga University School of Law; *see also* Paul T. Wangerin, *Alternative Grading in Large Section Law School Classes*, 6 Fla. J. L. & POL'Y 53, 54 n.4 (1993) and sources cited therein.

11. *See* a discussion of the relative performance of women and men and white students and students of color in CULTIVATING INTELLIGENCE at 59. While students of color and women are further along the developmental continuum posited by cognitive theorists, they may suffer in the competition for grades. One reason why this might be so is illustrated by the excerpt from the Smiley book. Some faculty teach ideas that are contested or contestable as though they were facts. The conflict between the student's sense of reality and the theories that she is being taught may make learning more difficult. It may even suggest to these students that they are incompetent or deficient in their ability to understand and process information.

One of the most offensive statements about the relative performance of blacks and whites in law school was made by Judge Richard Posner who argued that the active recruitment of blacks to law schools in disregard of the current criteria for selection meant that blacks at elite schools would be clustered at the bottom of the class and would know that they were held in "contempt" by their white classmates. *See* Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L. J. 1157, 1159 (1990). Judge Posner makes this assumption, as he often does, without offering any evidence to support his assertion that blacks make up the bottom of the class at elite law schools or that white law students who are not in the top 15% believe that class ranking is some measure of the individual worth or intellectual capability of their black or their white classmates. Since the jobs that are awarded on the basis of academic performance usually go to students in the top 15 % of the class, the bottom 85%, white and black, are busy utilizing other strategies to obtain gainful employment. One would think that Judge Posner, who first staked out a claim to economic analysis and then converted to pragmatism, would figure out that students who have not succeeded academically in the first year are likely to engage in rational decision making. There is no marginal utility in expending extra effort to try and get an A when it will have negligible effect on a student's employment prospects. Competition for positions on student organizations and for part time employment opportunities replaces competition for grades. Students in the second and third years understand that what matters from that point on is experience and connections.

II. EDUCATIONAL THEORY AND THE ASSESSMENT MOVEMENT

An "assessment movement," as it is called in the field of education, is relevant to our discussion of grade normalization.[12] As usual, law schools have come late to the party and one suspects that quite a few law professors are reluctant guests.[13] Nonetheless, the proliferation of literature on the subject and the legitimacy conferred by publication in "mainstream" law reviews has made learning theory a popular source of new ideas for the reform of legal education.[14] Whether that interest can be sustained

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12. Patricia Cross dates the movement to the 1980s. *See* K. Patricia Cross, *Feedback in the Classroom: Making Assessment Matter*, materials prepared for the American Association for Higher Education Forum. An argument could be made that it began even earlier than that. The National Assessment for Educational Progress, a federally funded project of the Educational Commission of the States, has existed since 1969 and has been testing a cross section of U.S. students in three age groups, nine, thirteen and seventeen year-old students for almost thirty years. *See Another Bad Report Card*, THE WASH. POST, A22, Jan. 12, 1990 (Secretary of Education says American education is inadequate but story argues statistics show benefits of investment in education for poor and minority students).

13. When I began teaching in 1983, I attended a symposium for new law teachers sponsored by the American Association of Law Schools (AALS). At that symposium, we were shown various teaching strategies: the Socratic method, a problem approach and how to use video. In the summer of 1995, AALS had a very successful program for experienced law teachers in Minnesota and the next year, in January of 1996, the annual meeting of AALS was devoted to the subject of teaching. Judith W. Wegner, President of AALS, asked us whether we could learn "more about the process of learning from scholars in other fields" and whether "we can teach ourselves to be more effective teachers through collaborative experimentation with innovative pedagogical techniques." Plenary Session Program, Legal Educators in a Learning Society, Association of American Law Schools 1996 Annual Meeting.

The other major professional organization of law teachers, the Society of American Law Teachers (SALT), began a very successful series of annual teaching conferences in New York, Santa Clara and Minnesota in 1993 and 1994 that focused on the introduction of issues of gender, race, class, sexual orientation and disability in substantive courses. The next SALT conference is scheduled for September 26-27, 1997.

Gonzaga University Law School set up an Institute for Law School Teaching that has been holding conferences on law teaching since the summer of 1994. The registration fee was $375. *See* THE LAW TEACHER 6-7, vol. 1, No. 2.

In law teaching, as in many forms of enterprise, innovation doesn't necessarily begin at the largest and most prestigious institutions, but elite schools know a good idea when they see it. Harvard Law School recently offered a summer class in law teaching (modeled after its very successful two week courses for practitioners) for a not insignificant sum of $1600 for one week of classes. Harvard Law School Program of Instruction for Lawyers, June 9-13 (1997)

14. Until recently, much of what was written about law school teaching appeared in the Journal of Legal Education, a publication of the AALS. With few exceptions, the articles published in the Journal often are short and make no pretense at extensive research. As a result, writing something for this journal, even though it is edited by law professors and not law students and even though it is a "juried" journal, does not carry a lot of prestige. Tenure in law school is based almost exclusively on scholarship. The opposition between scholarship and teaching and the attempts to reconcile the two assumes that scholarship is about the subject taught, not the subject of teaching. *See, e.g.*, Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. UNIV. L. REV. 367 (1990). An opposition is also created between scholarship and practice. *See, e.g.*, Symposium Issue on Legal Education, 91 MICH. L. REV. 1921-2220 (1993) (much of which was devoted to a critique of impractical legal education); *see* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); *cf.* Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421 (1995). Recent interdisciplinary articles about teaching have drawn on

is another issue. As long as the cost is relatively low, interest in pedagogy and law school reform may remain high. It remains to be seen whether interest can be sustained when reform imposes a cost on faculty. One "cost" may be the loss of autonomy, freedom and privacy by faculty. Reform could involve limitations on the absolute discretion faculty have in deciding course content, methods of instruction and grading.[15]

As with most political movements in the United States, the assessment movement reflects the push and pull of competing ideals within the dominant culture.[16]

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the work in the field of cognitive psychology. *See* Paul T. Wangerin, *Learning Strategies for Law Students*, 52 ALB. L. REV. 471 (1988); Jay Feinman and Mark Feldman, *Pedagogy and Politics*, 73 GEO. L. J. 875 (1985); Paul T. Wangerin, *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, 62 TUL. L. REV. 1237 (1988).

15. *But see* Thomas Doniger, *Grades: Review of Academic Evaluations*, 11 PAC. L. J. 747, n. 28 (1980) and sources cited therein (arguing that academic freedom does not mean "freedom from accountability"); *see also* Lovelace v. Southeastern Mass. Univ., 793 F.2d 419 (1st Cir. 1986); Parate v. Isibor, (M. D. Tenn. 1987), unpublished opinion *reprinted in* MICHAEL OLIVAS, THE LAW AND HIGHER EDUCATION (1989) (holding that grading policy is not constitutionally protected under the rubric of the first amendment or academic freedom); Daniel L. Kain, *Looking Beneath the Surface: Teacher Collaboration through the Lens of Grading Practices*, 97 TEACHERS COLLEGE RECORD 569, 570 (1966) (discussing the relationship between autonomy, privacy and grading). Kain discusses the literature in grading practices (among primary and secondary, not college or university level teachers) that shows that teachers "guard" grading practices "with the same passion with which one might guard an unedited diary or ...'sacred ground.'" *Id.* Further, "a teacher's grading practices constitute a private and autonomous domain." *Id.*

16. Political movements often fail precisely because they contain the seeds of their own destruction. Obvious examples are populism in its earlier version (1890s) and in the latter day Pat Buchanan variety. In both centuries, populism included both class consciousness and racist and anti-Semitic sentiment. *See* RICHARD HOFSTADER, THE AGE OF REFORM (1955); *see also* Robert J. Bresler, *The Roots of Conservative Populism*, USA TODAY, A7, May 1, 1996 (comparing Pat Buchanan to William Jennings Bryan, Huey Long, and Joe McCarthy, among others). The environmental movement has spawned its own nemesis, the property rights movement. *See, e.g.*, Susan Zakin, *New Mexico: Conflict in Catron County, Struggle Over Grazing on Public Lands*, WILDERNESS, Dec. 22, 1995, at 22 (describing conflict between environmentalists and ranchers over grazing rights in the Gila watershed); William E. Riebsame, *Ending the Range Wars?*, ENVIRONMENT 3, July 17, 1996, at 3 (describing three "movements," the "wise use" movement, which is actually about privatization or secure tenure for ranchers and extractive users (mining operations), the "sagebrush revolt" which advocates more local control over the use of public lands, and the original environmental movement). Within the educational field, some of the people who argue for the democratization of education also see themselves, the educators, as an elite class. *See, e.g.*, Lee Knefelkamp, *Faculty and Student Development in the 80s: Renewing the Community of Scholars*, CURRENT ISSUES IN HIGHER EDUC. 2(5) 13-26 (1980) (discussing the "new students" in the university community, white students from lower socio-economic families having no previous history with higher education whose academic ability is in the lowest third as measured by "all measures of student ability") (hereinafter Knefelkamp). The differences between faculty and students are matters of class, culture, and age. In law school teaching, a warning was issued recently about the quality of the current applicants for admission. *See* Edward A. Adams, *Law Schools Warned of Dip in Quality of Admittees*, N.Y.L.J., Dec. 18, 1995, at 444. With a smaller pool of applicants, law schools would have been forced to accept students with lower credentials to fill existing slots. Jana Cardoza, *LSAC Report: Applicants to Law School Down for Fifth Consecutive Year*, SYLLABUS, Fall 1996 at 7. Currently the "quality" of a law school is measured in terms of the LSAT scores of students. U. S. NEWS AND WORLD REPORTS 77 March 10, 1997 (the five criteria used to rank 179 schools began with selectivity – a measure that weighted median LSAT scores more heavily than median GPA. If a school takes part time or night students its score also dips. But see *Magazine Revises Law School Rankings*, THE NEWS AND OBSERVER, March 8, 1997 (U.S. News and World Reports revised rankings because there was an error in ranking 33 of the top 50 schools.) Rather

Assessment has two aspects — a duality in purpose. One purpose is public, the other private.[17] The public sphere is the place where social policy is debated, where citizens worry about the value they receive for their tax dollar and where legislators enact laws designed to hold educators accountable.[18] The private sphere is the classroom, the place where teachers worry about their responsibility to their students.

In the public debate over assessment there is a further duality.[19] One group of proponents identifies educational reform with autonomy and individual creativity; the other sees reform as something that is linked to economies of scale, professionalization and standardization. The data produced by the accountability movement is used both by those who support local or individual control of education and those who advocate national standards.[20]

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than risk their ranking by institutions such as U.S. News and World Reports, in an era of declining enrollments, many law schools have "downsized" the first year class. *See* Patricia G. Barnes, *Cutting Classes*, A.B.A. J., Dec. 1995 (seventy-six of the ABA's 177 accredited law schools reduced class size between the years 1993 and 1994). A similar decline in the applicant pool occurred in the years 1982-1986 as did the credentials of those in the applicant pool. *See* David H. Vernon and Bruce I. Zimmer, *Symposium: Legal Education in an Era of Change: The Size and Quality of the Law School Applicant Pool: 1982-1986 and Beyond*, 1987 DUKE L. J. 204 (1987). The authors argued against wholesale reduction of the size of law school classes as long as "the academic abilities of its student body are sufficient to permit the faculty to teach at an in depth level and if the grading standards applied weed out students who fail to demonstrate competence." *Id.* at 238.

17. *See* Cross, *supra* note 12 at page 4.

18. Legislators began to think in terms of assessment in the 1970s. Legislators passed "educational accountability" laws which were designed to measure "minimum competency." *See* Blaine R. Worthen, *Critical Issues That Will Determine the Future of Alternative Assessment*, PHI DELTA KAPPAN, Feb. 1993, at 444. The beginning might be the report of the National Commission on Excellence in Education, "A Nation At Risk," issued in 1983. This report warned that there was a "rising tide of mediocrity that threatens our very future as a nation and a people." *Id.* In 1986, then President Bush convened a summit conference on education with the National Governors Association, which issued its report called "Time for Results" which advocated assessment for public education. National Governors' Association (Washington D.C. 1986).

19. Once you find one duality, is it a law of physics that one must continue to uncover further dualities in a kind of infinite regression? *But see* Greg K. McCann, David J. Tarbert and Michael S. Lenetsky , *The Sound of No Students Clapping: What Zen Can Offer Legal Education*, 29 U.S.F. L. REV. 313, 322 (1995) (discussing ability of Zen to "break through to [n]onduality").

20. The discussion of school accountability has grown more voluble over the years and culminated in a national debate over the appropriateness of national standards. The failure of the ambitious plan of the Goals 2000: Educate America Act, 20 U.S.C.A. § 8857 (1994) which proposed a federal role in developing uniform standards, did not signal the end of this debate. See discussion of America 2000, in Audrey M. Kleinsasser, *Assessment Culture and National Testing (Educational Assessment: Local and National Changes)*, THE CLEARING HOUSE, Mar. 13, 1995, at 205. It continues today in President Clinton's advocacy of national standards of educational achievement.

> I have a plan, — a call to action for American education based on these ten principles. First, a national crusade for education standards — not federal government standards, but national standards, representing what all of our students must know to succeed in the knowledge economy of the 21st century. Every state and school must shape the curriculum to reflect these standards, and train teachers to lift students up to them.

President Clinton, *1997 State of the Union Address*, (visited July 8, 1997) <http://www.whitehouse.gov/WH/SOU97>. Explicit in the advocacy of national standards is the recognition that students will be "vying with graduates from other states and nations for jobs." Editorial, *Clinton's Education Pulpit; Annapolis Speech: Setting National Standards and High Expectations for School*

Both aspects of the assessment movement are about improving the quality of education students receive. The concern with public assessment, the politics of accountability, has produced legislative responses on the state and federal level. The result is a system of "report cards" or data production that is meant to be comparative and usually is also competitive.[21] Assessment in the public sphere utilizes standardized tests in the form of machine graded, mass produced and publicly administered multiple choice tests.[22] Performance on these tests has become a matter of "high stakes." As one reporter pointed out in a story about the movement, test scores of students in public schools mean a great deal to educators. "It can mean the difference between keeping and losing their jobs, obtaining or missing out on a raise, or even maintaining and ceding control of their school."[23] Incentives are tied to the test scores of students in a school district — bonuses or their converse, sanctions. Even the property value of homes in a school district can be affected by the way a school district is rated.[24]

Private Assessment, assessment for improvement, is described and promoted as a mechanism for teacher self-examination and self-improvement. It assumes that teachers take pride in what they do; that teaching is a vocation as well as a profession.[25]

Children, BALT. SUN, Feb. 11, 1997, at A10.

We are as divided over education as we are over many other issues that juxtapose individualistic solutions against more efficient but essentially normative and bureaucratic solutions. *See* Chester E. Finn Jr. & Diane Ravitch, *Efforts to Reinvent U.S. Education Rate a 'B'*, CHRISTIAN SCI. MONITOR, Sept. 1, 1995, at 19 (discussion of the two "paradigms" for U.S. education: decentralized (grass roots or bottom up reform), including charter schools, vouchers, home schooling, and "systemic" reform which is "top down" reform, featuring a national curriculum or national standards.).

21. In the 1990s the state legislatures continued to debate and adopt "report card" laws for schools. *See, e.g.*, Rebecca Buckman, *Despite Changes, A 'Report Card' Law Will Make Schools Easier To Compare*, INDIANAPOLIS STAR, Jan. 29, 1996, at A1. Some states monitor the performance of local schools and if minimum standards are not maintained, the state takes over the schools. *See, e.g.*, Jim Bencivenga, *New Jersey Law Allows Takeover of Troubled Schools*, CHRISTIAN SCI. MONITOR, Feb. 8, 1988, at 19 (quoting Head of Education Commission of the States which noted that Georgia , Kentucky and South Carolina passed similar statutes before New Jersey). In Texas the Texas Educational Agency devised something called the AEIS accountability rating. It is a statistical profile of Texas public schools. It is based on the Texas Assessment of Academic Skills test given to students in the third through the eighth grades, dropout rates and attendance records. Schools are rated Exemplary, Recognized, Acceptable, Low-performing. An affiliate of a group calling itself the Greater Houston Partnership devised its own rating system called STARS. Schools are rated against state norms and against comparable schools. *See Studying Our Schools: How Does Yours Rate?*, HOUS. CHRON., Oct. 13, 1996, at 1. *See also* results of the Illinois Goal Assessment Program adopted in a school reform bill in 1985 "to make public education more accountable to taxpayers." Every public school must issue a report card each year on test scores, demographic information and how much money is spent per student in the school district. *See* Stephen Lee, *McHenry Schools Top State Average IGAP Scores Belie Low Spending Levels*, CHI. TRIB., Nov. 14, 1996, at 1.

22. One author has pointed out that the use of standardized tests during the period before the accountability movement did not have the same consequences. The tests administered by the National Assessment of Educational Progress program are not general achievement tests like the SAT and PSAT, for instance, because they test specific course curricula like math, reading, geography and history, but the source of the test is the same — the Educational Testing Service. *See* Worthen, *supra* note 18, at 5.

23. Bill Ziatos, *Testing, Scores that Don't Add Up*, N.Y. TIMES, Nov. 6, 1994, at 28.

24. *See id.*

25. Some have argued that a vocation is more than a profession because a person is "called" to it. *See, e.g.*, John Murphy, *What's In, What's Out? American Education in the Nineties*, PHI DELTA KAPPAN

If we have students who do not thrive and who do not learn what we try to teach them, we have to find a way to change that result. Proponents assume that if assessment is effective, if it allows the teacher to improve or change her strategies in the classroom to the end that a greater number of students learn more and do better, assessment will not be rejected out of hand.[26] At least it cannot be rejected without admitting that one is opposed to teaching particular classes of individuals even if they can be taught.[27]

Assessment within a classroom, within a course, is supposed to be a diagnostic tool that allows the faculty member to measure the quality of his or her own teaching. Exploration of assessment as a tool for instruction often leads away from standardization towards alternative forms of assessment. Testing the relationship between teaching and learning has resulted in a number of different strategies: a return to oral examinations, the creation by students of portfolios or exhibits, and creation of tests that simulate "real life" tasks.[28] The benefits are undeniable when assessment techniques focus attention on competency and on the development of higher order skills (analysis, synthesis, complex problem solving and effective communication, both oral and written).[29]

Law school testing is neither assessment for accountability in the traditional sense nor assessment for improvement. Law school examinations are seldom treated as a diagnostic tool for the student or teacher. They are not used routinely as instructional devices. They are not the method by which law schools are held accountable,[30] but they

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641 (1993). *See also* the discussion of the professional status of teachers (referring to those who do not teach at the University level) and the fact that while they are "known by their command of a special body of knowledge and skills, by the unique contributions they make," teachers "feel " more like blue collar workers because they do not have the autonomy and freedom to organize their own time or to "direct their own work." *Id.* Law teaching, however, has all of those attributes that are associated with professional status of teachers including the duty to stay informed about one's profession. *Id.* This is a duty often neglected or ignored by many law teachers who continue to identify themselves as lawyers, not teachers. Law professors may teach and model the ethics of lawyers, but they must also satisfy their ethical obligation as teachers. *See infra* notes 50-69 and accompanying text for a discussion of ethical obligation of teachers with respect to grading.

26. Apparently the response to workshops on classroom assessment has been remarkable. One article cited a study in which 88% of the faculty in a community college changed their teaching behavior after using classroom assessment techniques they learned in a workshop. Robert B. Barr & John Tagg, *From Teaching to Learning — a New Paradigm for Undergraduate Education*, CHANGE, Nov. 1995, at 12. The authors wonder that "such small amounts of information [could] produce such large changes in teacher behavior," and conclude that "[g]iven information that their students were not learning, it was obvious to these teachers that something had to be done about the methods they had been using." *Id.*

27. This would be the argument of Daniel Seligman, "Egalitarian America wants its children told, 'You can be anything you want to be.'" Daniel Seligman, *Is America Smart Enough, IQ and National Productivity*, NAT'L REV., Apr. 15, 1991, at 24. "The message from testers is that this is pious baloney. This message is especially unwelcome because it disproportionately affects blacks and Hispanics, whose IQs on average are significantly lower than those of whites," and "[o]n average, the rich are more intelligent than the middle class. And the middle class are more intelligent than the poor." *Id.*

28. Six alternative assessment techniques have been discussed, including, (1) performance assessment, (2) authentic assessment, (3) portfolios, (4) journal or learning log, (5) interview, and (6) attitude inventory. *See* Jon E. Travis, *Meaningful Assessment: Alternative Student Assessment Methods*, CLEARING HOUSE, May 1966, at 308. The article also suggests that there should be four criteria groups that are tested in a holistic approach: knowledge, skills, attitudes, and behavior. *Id.*

29. *See* Worthen, *supra* note 18, at 6.

30. Generally, two tests are used to rate or grade law schools. One is the bar examination. *See, e.g.,*

are "high stakes" examinations. Law school grades hold students accountable. The

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Call for Disclosure of the Bar Passage Rate of Law Schools: Emperors Clothes, NAT'L. L. J., July 17, 1989 (reporting on the proposal by Roger C. Cramton, Cornell Law school and former AALS president for the disclosure of these scores). The suitability of the bar examination as a measure of accountability for law schools has been undermined by the wild swing in bar passage rates in almost every jurisdiction. A performance that would have meant a passing grade one year (and the admission of someone deemed to be "qualified" to practice law) will not be passing in a year when the pass rate plunges. One suspects that "wild swings" signal a decision by bar examiners to limit admission and control the supply of lawyers in a particular market. *See generally* Chris Klein, *Illinois Deans' Dilemma — Is Bar Exam (A) Sentry or (B) Aptitude Test?*, NAT'L L. J., Dec. 30, 1996- January 6, 1997; Mary Ann Galante, *Was Grading Unfair? Bar Passage Rate Plunges in Washington*, NAT'L L. J., Nov. 11, 1985; David Berreby, *The Rates of Passage: Surviving a Bar Examination Getting Harder in Key States*, NAT'L L. J., Apr. 11, 1983. The cure, for some, was a process of standardization — the multistate bar examination was supposed to stabilize the fluctuations. *Id.*

Bar passage rate has tremendous significance for schools in the bottom tiers of the law school hierarchy. There is a correlation between low bar passage rate and low status or prestige. Low bar passage rate puts one at risk of violating "minimum ABA . . . standards." Ken Myers, *Low Grades from the ABA Spur Unique School to Traditional Path*, NAT'L L.J., May 6, 1996, at A12 (describing the experience of CUNY); Edward A. Adams, *New CUNY Dean to Face Pressure To Move School Into the Mainstream*, NAT'L L.J., June 8, 1987, at 4. One way to keep bar passage rate high is to limit the number of people who graduate. The emphasis on bar passage rates has been particularly difficult for schools that have either a significant number of minority students, innovative curriculum or a public interest perspective. For an exhaustive discussion of the bar passage rate for African Americans, see Cecil J. Hunt, II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721 (1996). There are many in law teaching who believe they are protecting the status of a law school by weeding out the unworthy, flunking out those who will not be able to pass the bar examination. *See generally* the discussion of "rigor," *infra* note 94 and accompanying text.

There may be alternatives. If the recent performance of students from Texas Southern University Thurgood Marshall School of Law, an historically black institution that still attracts large numbers of students of color with relatively low LSAT scores, is any indication the correlation between LSAT score and bar passage rate may be severed. TSU had the second highest bar passage rate in Texas on the February 1996 bar examination. In 1994, the *Houston Post* reported that 69% of the graduates of Thurgood Marshall taking the bar for the first time passed, a percentage that reflected a sixteen point increase over the prior year. The year before, the bar pass rate was 52.6 %, up from around 30%. *See* Tessie Bordon, *Passing Rate of TSU Students Taking Bar Reaches New Height*, HOUS. POST, May 11, 1994. In February of 1996, the bar passage rate was over 92%, higher than that of the University of Texas. The median GPA for Thurgood Marshall was reported to be 2.6 and the median LSAT score was 140 compared to 3.6 and 160 for Baylor and University of Texas. *See* Todd Ackerman, *TSU Law Students Take Big Stride in Passing Bar Examination*, HOUS. CHRON., May 4, 1996, at 29.

The other standardized test used to hold law schools "accountable" is the LSAT. See discussion of U.S. New and World Report rankings *supra* note 16. See also Donald J. Weidner, *The Crisis for Legal Education: A Wake Up Call for Faculty*, J. LEG. ED. 92, at 93, n.6 (discussion of the use of LSAT scores of entry level students to decide on funding for public law school.) One of the reasons for limiting the size of the entering classes is "Because of the 'strong correlation' between LSAT scores and the chances of passing the bar exam, the anticipated lower LSAT and GPA numbers of . . . 1996 entering class will likely translate into . . . lower bar passage rate around the turn of the century." Adams, *supra* note 16 (quoting Philip D. Shelton, President of the LSAC). It seems to me that the "high correlation" would be the natural outcome of using the same institution to create both the law school admissions test and the multistate bar examination, but then I am not a psychometrician.

If we measure our success in terms of students who pass the bar examination, but we took in only those who would pass it anyway or we flunk out those whom we suspect will fail it, what success are we measuring?

debate about grade normalization is not about the competency of teacher or student. It is about "fair competition." The classic description of the rationale for grade normalization is found in an early article by Richard Epstein:[31]

> In our discussion of grade reform, much concern was expressed over the different distributions of grades from one course to the next. The problem was most acute in the first year . . . . Since every effort was made at the outset to equalize the strength of the sections, it was hard to believe that the differences in results were attributable to differences in levels of student performance.[32]

Epstein observed, however, that some faculty were "high" or "low" graders.[33] In other words, the differences were not attributable to differences in students, but to differences in the instructors.

The current controversy over grade normalization has migrated beyond the walls of individual law schools. Because of the downsizing by law firms, government agencies and legal departments of major corporations, there are more students competing for fewer jobs. Students at regional law schools are aware of competition not only with their classmates but also with the students from other schools. Grades, they have divined, play a large part in the competitive process.[34] The solution most students have proposed is Epstein's argument removed one level of abstraction. Within law schools, the desire for a "common measure" and "uniform interpretation" led to "collective control over grades."[35] Students are proposing that in the absence of any mechanism for collective control, law schools in the same market should act voluntarily to ensure uniformity of grading practices.

One writer in the field of assessment has suggested that it is difficult to construct an assessment method that is appropriate for both public and private purposes. Any method that is "differentiated" and "tailored to individual students" is not likely to meet the tests of interrater reliability and validity that are needed for comparison in high stakes settings.[36] In legal education, we use tests that are not standardized, exams that

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31. *See* Epstein *supra* note 4.

32. *Id.* at 707-08.

33. *Id.* at 708.

34. A national magazine for law students discussed the "grade inflation" that occurs when schools respond to competition in the job market. The student magazine describes this process in terms of "grade inflation" and the demise of academic standards; it attributes this "inflation" and ascribes blame to the administrators at law schools who are accused of "bending over backwards to make sure" their students get high grades. Shanie Latham, *Easy A's*, THE NAT'L JURIST 20, Feb/Mar. 1996. It is, as in the case of Touro, highly likely that proposals for grading reform begin with students, not administration. *See* Henderson, *infra* note 40 (discussing the case of Vanderbilt Law School); *see also infra* note 88 and accompanying text (discussing the pressure placed on the faculty by Touro students).

35. Epstein, *supra* note 31, at 708.

36. In the jargon of psychometricians, reliability refers to the ability of more than one grader to produce the same results (is my answer the same as your answer? Is your B the same as my B?) and validity refers to the predictive aspects of a test. See John W. Young, *Statistical Adjustments of Law School Grade Point Averages*, LAW SCH. ADMISSIONS COUNCIL STATISTICAL REPORT 93-02, March 1994. (hereinafter LASC REPORT 1994) *See also* Worthen, *supra* note 18. Worthen also cautions those proponents of alternative assessment that the movement will not succeed unless it is acceptable to the "stakeholders" in education — legislators, school boards, parents, teachers, students, associations of professional educators. *See id.* at 12.

have not been subjected to any sort of testing for reliability or validity, and we use them in a high stakes context.

Law school exams are better suited to alternative assessment. They are often performance based, even if the performance we test is narrower and more restricted than the skills lawyers actually use and need in practice.[37] The traditional law school test, the essay examination,[38] and a variety of other techniques that are employed as well, test higher level thinking and are performance tests.[39] Law professors may well have the skills and the tools that are used in the alternative assessment movement. What is missing is the knowledge of how to use them effectively. We have muddled the categories and we have not bothered to read the literature on educational theory. What law professors have done with assessment is analogous to a law student arguing that there is no liability for breach of contract in a case because the non-performing party did not have the requisite *mens rea.* We are guilty of the kind of error that would cause many law professors to say that a law student did not have the intelligence required to be a lawyer.[40]

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37. Strategic reports on law school education have focused on the narrowness of law school training and suggested that students need more training in the skills associated with practice including "interviewing, counseling, negotiation and organization and management of legal work. To that many contemporary critics would add the need for a grounding in ethics." *See* Robert B. McDay, *The Identity Crisis in Legal Education Today*, NAT'L L.J., Jan. 9, 1984 (discussing 1979 report of the ABA Section on Legal Education report Task Force on Lawyer Competency: The Role of the Law Schools). The debate on the decline in professional value in lawyers can be found in a number of books and articles including, ANTHONY T. KRONMAN, THE LOST LAWYER (1993), SOL M. LINOWITZ, THE BETRAYED PROFESSION (1994), and MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994); American Bar Association Commission on Professionalism, *"In the Spirit of Public Service," A Blueprint for Rekindling of Lawyer Professionalism*, Chicago, 1986; Eleanor W. Myers, *"Simple Truths" About Moral Education*, 45 AM. U. L. REV. 823 (1996) and sources cited therein; Michael I. Swygert, *Striving to Make Great Lawyers — Citizenship and Moral Responsibility: A Jurisprudence for Law Teaching* 30 B.C. L. REV. 803 (1989).

38. *See* Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433 (1989).

39. Admittedly, many of the alternative assessment techniques seem to be coming from clinicians who have an opportunity to see law students perform the law. *See, e.g.,* Lawrence M. Grosberg, *Should We Test for Interpersonal Lawyering Skills?*, 2 CLINICAL L. REV. 349 (1996); Kimberlee K. Kovach, *Virtual Reality Testing: The Use of Video for Evaluation in Legal Education*, 46 J. LEG. EDUC. 233 (1996). Performance assessment should have the following characteristics: students should be presented with a concrete meaningful task; the assessment should include a response format with which students communicate their findings; and the "scoring system should capture not just the 'right' answer but the reasonableness of the procedure used to determine the answer." Janet H. Brown & Richard Shavelson, *New Ways to Measure What Students Know and Can Do*, INSTRUCTOR (1990), Mar. 1994, at 58. *But see* discussion of reliability study of grading written essays. Rene Williams, Julie Stanford, Paul W. Shatford, Anne Newman, *Grading Written Essays: A Reliability Study*, 71 PHYSICAL THERAPY 679 (September 1991). Believe it or not the authors concluded that although there was consensus on the D paper, and moderate variability on As and Bs, there were far greater differences of opinion on C papers *Id. See also* Kissam, *supra* note 38 and discussion of the "deep structure" of blue books.

40. *See* Douglas A. Henderson, *Uncivil Procedure: Ranking Law Students Among Their Peers*, 27 U. MICH. J. L. REFORM 399, 428 n.163 (1994) (quoting from a self study by the University of Kentucky Law School in which some faculty felt that the "bottom half" of the class did not have the ability to learn law). For a student's comment to the effect that "what goes around, comes around" see Alan R. Dayton, *Rankings are as Fair to Schools as to Students*, NAT'L L. J. A14, June 23, 1997.

Reform in law school grading could move us in either of two directions. Law professors could abandon the first year curriculum to the psychometricians in much the way we have ceded control over entrance criteria and the bar examination. Only then would there be the kind of public, standardized test that some would say justifies the use of examinations for high stakes.[41] Or we could abandon ranking altogether and focus on the diagnostic and instructional uses of law school assessment methods.[42]

The disincentives to the latter kind of reform are predictably the resistance that can be expected from the law firms and other legal institutions,[43] the 'stakeholders' in legal education, and resistance on the part of the faculty because of competing demands of scholarship. But faculty can also be expected to resist because of the risk inherent in such reform. Assessment for improvement works two ways. It is feedback for students and it is feedback for teachers. The risk of failure flows both ways.

Currently the rate at which students fail an examination is not a measure of the faculty member's competence, but of the diligence and intellectual capacity of the students. The prevailing wisdom, at least in some quarters, is that we can't define good teaching. Successful teaching is "serendipitous" at best.[44] Under a system of assessment for improvement, that would change principally because we would have a measure of success. Assessment is normative. Competency — in teaching or lawyering — cannot be judged without reference to some external standard.[45] The rate at which students pass or fail examinations would also be a measure of a faculty member's competence or the utility of the teaching strategies she is using.[46]

Any critique of this description of the assessment movement, and I do not count myself a critic, would point out the obvious. The duality that has been constructed, the division between public and private assessment, fails. Even within the intimacy of the

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41. For purposes of this argument, I have dispensed with my normal criticism of standardized tests including the various ways in which they are misused. See CULTIVATING INTELLIGENCE supra note 3 at 191,222 n.14. "Fair" in the area of public assessment means treating everyone the same in spite of their differences (unless here is a disability that must be accommodated.. The examinations also do not measure the wider set of competencies that should be required to decide who the "most qualified" candidate is for a job. See ROBERT CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 71-82 (1975)(describing the meticulous way in which Moses constructed a standardized method of evaluating civil service employees that reduced every imaginable aspect of job performance to a mathematical grade.)

42. *See* Henderson, *supra* note 40, at 436 n.200 (describing the argument that led Vanderbilt Law School to abandon ranking). While the argument was made by students, I suspect it was the status of institutions leading the way in this movement that was also persuasive. Yale, Virginia and New York University restrict rankings to less specific class wide information. I am not sure what that means. I was informed by the registrar at Harvard that the school stopped ranking in 1968. (Telephone call to registrar's office at Harvard Law School, July 17, 1997)

43. *See* Worthen, supra note 36. See also Henderson, *supra* note 40, at 428-30 (discussing corporate culture and the uses of ranking).

44. *See, e.g.*, Peter A. Alces, review of Julius Getman, *Education and Practice: Toil of the Firestarters: In the Company of Scholars: The Struggle for the Soul of Higher Education*, 92 MICH. L. REV. 1707 (1994).

45. *See* Cross, *supra* note 12 at 4.

46. "Another form of student to teacher feedback that is most central to the current assessment movement is the feedback on student learning outcomes. Learning outcomes for individual college courses are usually assessed by final exams or term papers at the end of the course. Although feedback comes too late to do much about improving learning for that term, it may help the teacher for subsequent courses." Cross, *supra* note 12, at 4.

classroom, assessment has a political meaning.[47] The duality itself has a political dimension.[48] For some, like me, the politics of higher education is the struggle to achieve a particular result — the success of those who otherwise might have been excluded from law school, law teaching or the practice of law because of race, gender or class.[49] Assessment is a political issue because it involves relationships of inequality — between students and faculty members — and the power that inheres in that relationship of inequality. My interest and political commitment compels me to participate in the current debate about assessment — whether the methods of assessment employed are objective or subjective; whether assessment techniques can be evaluated in terms of rationality and reasonableness; and finally what are the standards of competence for students and faculty?

III. THE ETHICS OF GRADING

As is often the case, political issues and moral issues in this matter are linked inextricably. The assessment movement has prompted explorations of the ethics of grading. Of interest to those of us in law school teaching, perhaps, is the analysis by Randall Curren of the extent to which grading infringes the liberty of a student.[50] It is assumed for purposes of his analysis that students have rights to intellectual self-determination.

There are many who would laugh at that suggestion, but I am not one of them. In my own adolescence, I found secondary school confining. At my twentieth high school reunion, my gym teacher, Viola Kratz, asked a friend whether he knew how "revolting" I had been in high school. While I think Ms. Kratz's malapropism reveals more about the school I attended than it does about me, I am willing to concede that by the prevailing standards in Auburn, New York, I was a bit of a rebel. In my senior year, I had a first period study hall that I did not attend. I signed out to go to the library and then spent the forty five minutes or so having tea and donuts at a local diner with a classmate and co-conspirator, Carole McLaughlin. Normally cutting class is not considered a form of political protest, or at least it wasn't in the late sixties unless you

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47. See discussion of the political implications of the pedagogy in Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 Geo. L. J. 875, 926 (1985) and the consequences that flowed from their "consciousness-confronting" politics. The authors attempted to "challenge the dominant perception of law practice and the law schools' relation to it, of the nature of legal reasoning, and of student capacity to learn," which they regarded "as distorted at best, false and manipulative at worst." *Id.*

48. The distinction between the private and the public is one that is used to achieve certain goals. It is the distinction that drives the individualistic assumptions about contract law. *See* Amy Kastely, *Cogs or Cyborgs?: Blasphemy and Irony in Contract Theories*, 90 N.W. U.L REV. 132 (1995) (discussing the failure of collectivist notions of responsibility, principally the reliance and restitutionary theories for recovery in contract, to restrain the individualistic property of contract law); it was the distinction that shielded men from punishment for the violence done to women. *See, e.g.*, Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991) (discussing the violence done to battered women). For a summary and critique of feminist scholarship in this area see Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992).

49. For an insightful discussion of the failure of programs that treat minority students as though the issue were remediation because they have low LSAT scores, see Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51 (1994).

50. *See* Randall R. Curren, *Coercion and the Ethics of Grading and Testing*, 45 EDUC. THEORY 145, Fall 1995.

were attending a peace vigil in opposition to the Viet Nam war. But if we apply Curren's theory in this case, an argument might be made that I was exercising my right to intellectual self determination. At 8 A.M. each morning, I had no homework to do. Nor did I wish to engage in research or sit reading in the library. I wanted to drink tea and discuss Sartre or Camus (who was unknown to our English teacher) or gossip with my friend Carole. When we were discovered, the school punished Carole by stripping her of her badge of achievement, the scarf members of the honor society wore over their graduation robes. I was not punished because it would have looked strange for the Valedictorian to appear without the scarf. I deserved the punishment I did not receive because I engaged in purposeful deception. And so I received an important lesson on the power of status and the freedom it buys you.

In law school, we limit the intellectual self determination of people who are acknowledged to be adults; who normally would be presumed competent to make decisions about their own intellectual development.[51] The power we have over them is justified either in terms of contract (they voluntarily surrender their autonomy)[52] or in terms of a faculty's superior knowledge and duty to protect the public from incompetent lawyers.[53] Generally speaking, the ideal of intellectual self determination does not have many proponents in law school education, although there are some who would agree that grading, as it is practiced, needs reform.

Bad grades are coercive, according to Curren, because they punish those who are intellectual nonconformists with both "disapproval and reduced life prospects."[54] Mere acknowledgment that there are consequences that flow from low or failing grades, however, is not a particularly compelling moral critique. The immorality of grades is contingent on proof that the grades are undeserved, that the loss experienced by the student cannot be justified. In other words, a student's invocation of freedom, autonomy or self determination cannot prevail when the advocate of grading employs the language of merit. The idea of merit is so compelling because we assume the need for a process of selection; because the idea of merit expresses a preference for competition as the most rational or the fairest way of allocating resources. But merit also directs our attention to the methodology of grading Grading is not justified if it produces either false positives or false negatives in judging the quality of a student.[55]

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51. The author adapts an argument taken from the field of medical ethics and discusses the ethics of grading in terms of the competence of the student to make decisions and the need for "substituted judgment." He acknowledges, however, that there is " a general presumption of global decisional competence" where adults are concerned. *See* Curren, *supra* note 50 at 431.

52. Most libertarians subscribe to the view that "freely negotiated contracts" can be made to limit one's own freedom. The problems raised by this concession concern the meaning of "freely negotiated" and the appropriateness of allowing an individual to make harmful contracts. It is a topic that usually comes up when we reach the doctrine of unconscionability in contract. *See* Anthony Kronman, *Paternalism in the law of Contracts*, 92 YALE L. J. 763 (1983)

53. Here we would be relying on the general presumption of competence to make judgments "of the kinds that (only) those who have mastered an academic subject can make." Curren, *supra* note 50 at 435. The duty to protect the public has been argued in the negative and the positive — that is the duty to "weed out" those who are not qualified to be lawyers and the duty to grade accurately. One author argued that the public interest in accuracy justifies a grade appeal process. *See* Doniger, *supra* note 15.

54. Curren, *supra* note 50 at 427.

55. Id. at 436.

Grading can only be justified when it measures the right thing in a valid and reliable way.[56]

Curren also presents an alternative argument that justifies coercion in terms of the ends that are achieved. If the ultimate good is freedom, then temporary deprivations of liberty can be justified if they make one more free in the long run. In other words, the 'F' I give you today ultimately makes you a freer person than you were before you received it. You are more free because the grade gives you information that enhances your ability to make decisions or choices.[57] The coercion may be justified by linking merit with self-determination.

The relationship between merit and self-determination is described in terms of the ability of the student to make judgments.[58] According to Curren, what grades should measure is the ability of the student to exercise good judgment, however that may be defined, in the subject area being taught.

A couple of years ago, I got into a discussion with two first year law students while we were standing in the cafeteria line. We began by establishing who each of us preferred in a political campaign. One student supported a candidate because he was in favor of the death penalty and the other because he was opposed to abortion. I always find it odd when someone calls abortion "murder" but does not view the death penalty in the same way. I understand the distinction. It is about innocence. Convicted murderers are not innocent; even children are not innocent. We try them as adults and condemn them to the realm of the unredeemable almost as quickly as we do their parents. Only the unborn are truly innocent.

But the students did not offer an explanation for the difference in the way life was valued in the two contexts. I cannot criticize their arguments because they did not have any. They retreated quickly and defiantly into the realm of absolute relativism. The only response to every provocative statement I made was "Well, I have my opinion" or "Well, I am entitled to my opinion." I was quite appalled that two first year law students would be unwilling to debate two of the hardest and most troubling issues they would face as law students, lawyers or human beings. Finally, I did something I had never done before. I gave up. "Well, that's just *stupid.*" I said. That conversation changed the way I teach forever. I now understand Curren's argument in support of a "decision-relative standard of competence;" the advocacy for a system of grading that evaluates process – the quality of a student's understanding of material and her ability to reason through a problem and make a decision.[59] The grade, in other words, is a measure of a student's competence in a particular field.

The competence to which we refer in law school is both the student's ability to reason through a legal problem and his or her ability to make mundane or pragmatic choices. Law is both intellectual and practical (another duality?). It is a matter of specialized knowledge and common sense.[60] The purpose of legal education is to teach

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56. See discussion of validity and reliability *supra* note 36.

57. *See id.* "[S]tudents need to make practical choices about how much to study, what assistance with their studies they should obtain, and what courses of study to pursue; and they are more, not less, free in being able to make those choices in light of the information provided by grades." Curren, *supra* note 50 at 428 (describing the response in *Assigning Grades;* an article by James Terwilliger, to the humanistic critic of grades. The humanistic critique is also concerned with the freedom of children.).

58. *See id.*

59. *Id.* at 433.

60. Howard Gardner has described common sense as a higher order intelligence that is, in sum, the

students how to make practical judgments — to understand the alternative courses of action available to them or their clients — but also to teach them how to evaluate and assess knowledge claims and the justifications offered in judicial or administrative opinions or in support of legislation.[61]

We spend a lot of time in the first year of law school teaching students how to make the latter judgment. Is a case on point? Is the decision "right" or "wrong"? There are several criteria we can and do point out to them -- the well reasoned argument that relies on formal logic or analogical reasoning;[62] the appropriate use of authority or evidence to support an argument; the existence of apriori assumptions (economic, social, political or moral); the effective use of narrative and rhetorical skills.[63] We are teaching students a process that should allow them to make wise choices although we do not discuss it in those terms.

It is hard to disagree with an argument that ethical grading is grading that tests students as novices — lawyers in training — in order to judge their competence.[64] The idea that we are testing competence is strangely comforting. If competence is the ability to make good judgments and wise choices, those who receive an 'F' have been forewarned: practice in this subject area at your own risk. And when a marginal student does not succeed in practice, it is not an occasion for surprise, guilt or blame. The teacher is reassured that it was not the grades, but the lack of competence, that limited the student's life chances.

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ability to exercise good judgment. How one learns to make good judgments or what process is involved in making good judgments is a different issue. Gardner defines common sense as "the ability to deal with problems in an intuitive, rapid and perhaps unexpectedly accurate manner." HOWARD GARDNER, FRAMES OF MIND 287 (1993). He also lists the abilities that are subsumed under this category: the ability to plan ahead, to exploit opportunities, to guide their destinies and those of others in a prudent way. In summary, Gardner concludes that the intellectual strength of a person with common sense may be his or her "capacity to bring together a wide amount of information and to make it part of a general and effective plan." *Id* at 287. It may well be that common sense is called "wisdom" in other contexts or integrative intelligence in others. *See* CULTIVATING INTELLIGENCE, supra note 3 at 143.

61. *See* Curren, *supra* note 50 at 59. *See also* CULTIVATING INTELLIGENCE *supra* note 3 at 116-117 (discussing the critical thinking (Bloom's Taxonomy) and Commitment (Perry's developmental scheme)). Each of these involves judgments and a movement beyond complete and total relativism.

62. Cass R. Sunstein, Commentary, *Analogical Reasoning*, 106 HARV. L. REV. 741 (1993); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996). My favorite piece on legal reasoning remains the classic, KARL LLEWELLYN, THE BRAMBLE BUSH (1981).

63. The most well known article is probably James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985). *See also* Linda Levine & Kurt M. Sanders, *Thinking Like a Rhetor*, 43 J. LEGAL EDUC. 108 (993) and the sources cited therein. Narrative has been hotly debated in the law reviews and critiqued in a variety of ways, but I doubt that even the most vociferous critics doubt the logic of narrative or its power. *Compare* Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971 (1991), *with* the critique offered by Daniel Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 503 (1994), *and* Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993). There is so much criticism that in fact one is tempted to describe the phenomenon as something of a cottage industry in legal scholarship.

64. *See*discussion, *infra* note 118 (discussing the standards proposed by one faculty member at Touro). *But see* Feinman & Feldman, *supra* note 14, at 919, ("The standard should be capable professional work or, more realistically, work that shows promise of the student's becoming a capable lawyer.").

Curren's discussion of ethics includes an indictment of objective tests, but his approach to grading would seem more, not less, consistent with the idea of ranking on the basis of grades. The success of this kind of moral critique in the law school setting is assured for two reasons. First, law school grades do produce false positives and false negatives. And second, law faculty are uninterested in educational theory in general and assessment theories in particular.[65] Grading in law schools violates ethical norms and ranking in law schools without any attempt to insure comparability must be some sort of ethical violation. According to the standards that have been adopted by psychometricians, at the very least, the rankings convey misinformation to the public and to the various constituencies that care about grades.

Is this the argument for reform that I wish to advance? If I could satisfy the prerequisites for ranking, would I still feel uncomfortable as a law professor with the idea that my act of grading had reduced the life prospects of a student? Could I accept this as a consequence of a student's lack of knowledge – she did not know the definition of an offer as it appears in the Restatement Second of Contracts or he was unfamiliar with the Rule Against Perpetuities? Would I be less troubled if the exam were designed to measure the student's ability to make lawyer-like judgments?

No I would not. It is the use to which the grade is put and the time at which this is done as well as the economic structure created by grades that disturbs me. I rebel at the suggestion that one can define merit on a one-time basis at such an early stage in a student's intellectual development. I am opposed to holding students accountable before they have had a chance to learn what they need to know to be an effective member of this profession. Ranking in the first year of law school is premature.

Although I subscribe to the idea that there is an order that must or should be imposed on one's thoughts, a discipline that allows one to work through problems, I also recognize the potential in chaos for creativity.[66] When I read law school exams, I can see the minds of my students working. They write their way through problems, exploring possibilities, abandoning them, moving on, backtracking. It is like looking at minds in motion, represented by words on paper put there during a brief but intense four hour period. Some students seem to work their way to a solution with a minimum of effort. For others the signs of the arduousness of the journey can be seen in desperate scrawls clutching at ideas that are almost within their grasp, then slip away. Theirs is a desperate attempt to find the order that they know has to be there. Which of these students ultimately will be more competent to make wise decisions? I don't know.

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65. *See* Paul Wangerin, *"Alternative" Grading in Large Section Law School Classes*, 6 U. FLA. J.L. & PUB. POL'Y 53, n.4 (1993) for a list of literature on teaching and testing. The problem with law school grades, other than the totally subjective nature of the grading, is the "inaccuracy in grading" when "final grades generated by the grading system do not accurately reflect student's abilities." Id.

66. Gregory Bateson describes a dialectic in thinking—movement between what he called "loose" and "strict" thinking. *See* GREGORY BATESON, STEPS TO AN ECOLOGY OF MIND 86-87 (1972). In another essay he argues that art, or grace, in human beings is achieved when "reasons of the heart must be integrated with reasons of the reason." *Id.* at 129. Order often is something that is imposed after the original thinking has occurred. That is my experience and it is the experience that Bateson describes as well. It is part and parcel of this dialectic that mistakes should be made in the first instance and that many false starts might occur in the second. In one three hour law school examination, what should we reasonably expect from our students?

I work at teaching my students how to make judgments about ideas, knowledge claims, justifications for beliefs. But I see the danger in this. I see that the connection that is made between merit and epistemic rationality is potentially more coercive than an obsessive concern with the *content* of a student's thoughts.[67] This is a risk I am willing to take. Oppression, you will remember, was defined in terms of the absence of a reasoned argument, a justification, for coercive acts.

My ambivalence about grading and its uses is assuaged by the literature that refers to the ethics of grading, and by the guidelines for student centered assessment. Assessment must (1) be grounded in the kind of learning we want to take place, (2) permit accurate diagnosis of the learner's strengths and weaknesses, (3) help students to take responsibility for their own learning, (4) monitor progress with a broad range of methods, (5) provide for timely feedback to the student, and (6) be holistic and consider affective as well as cognitive development. As a matter of professional ethics, a teacher must be knowledgeable about the developments in the field of assessment.[68]

So why has there not been some quantum change in law school grading policies? What follows is an ethnographic account of the deliberations of one faculty on the issue of grade normalization. It is a case study.[69] But the problems and the issues raised on this one faculty have arisen on many other faculties in recent years.[70] I begin by noting

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67. Generally the discussion of competing epistemologies arises in connection with a critique or the creation of a counter hegemonic argument about objectivity, neutrality, rationality in the law. *See, e.g.*, Susan H. Williams, *Legal Education, Feminist Epistemology, and the Socratic Method*, 45 STAN. L. REV. 1571 (1993). For a view on the other side of the debate, standing up for Western epistemology, see Suzanna Sherry, *infra* note 69. It may be that we are not arguing about epistemologies, but about the relationship between ontology and epistemology. Again, to quote Gregory Bateson:

> In the natural history of the living human being, ontology and epistemology cannot be separated. His (commonly unconscious) beliefs about what sort of world it is will determine how he sees it and acts within it, and his ways of perceiving and acting will determine his beliefs about its nature. The living man is thus bound within a net of epistemological and ontological premises which — regardless of ultimate truth or falsity — become partially self validating for him.

BATESON, *supra* note 66, at 314.

The epistemology used by whites and blacks, for instance, may be the same in some instances. We both know what we see, what we live and what we read to be true if it is consistent with our underlying belief system. The fact that some white men cannot or will not see oppression is not attributable to a faulty epistemology, but to a particular ontology. That is not to say that there are not other epistemologies at play in our lives. Some of those epistemologies involve the unconscious mind and intuition.

68. *See* Dennis R. Ridley & Joseph D. Novak, *Assessing Student Learning in Light of How Students Learn*, AAHE Assessment Forum, American Association for Higher Education (1988).

69. For a discussion of qualitative research and the current problems and criticisms, see generally MARTYN HAMMERSLEY, WHAT'S WRONG WITH ETHNOGRAPHY (1992). While ethnography and anthropology are no longer as controversial as they once were, there has been an upsurge in skepticism about any research or field of study that is not quantitative or scientific that discredits and discounts the analyses and conclusions of scholars in the social sciences. *See, e.g.*, Irving Louis Horowitz, Searching for Enemies; Sociological Theories at the End of the 20th Century, SOCIETY, Nov. 1995 (it seems the author is incensed that sociology has turned its attention to issues of race and gender and class); John R. Searle, *Rationality and Realism, What is at Stake?*, DAEDALUS, Sept. 22, 1993; Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453 (1996) (Suzanna Sherry criticizes what she perceives to be the abandonment of the Western rationalist tradition.).

70. One of the common questions asked in connection with ethnographic studies concerns their relevance or the generalizable aspect of ethnography. One answer, the one applicable here, is that this one

that during the five years the faculty debated grade normalization, we did not discuss the assessment movement or the ethics of grading. To understand why requires a qualitative analysis of both the social organization of a law school and the world view of its members.

IV. A CASE STUDY IN GRADE NORMALIZATION

Grade normalization was not a matter of controversy in the beginning. There has to be a certain amount of support for an idea before opposition and controversy can exist. I found an old memorandum in the files given to me by one faculty member that proposed a "suggested grading pattern" some years before grade normalization became an issue for the faculty.[71] The memo was addressed to the first year faculty and was dated December 1984. The Academic Policy Committee voted on the issue in 1985 and the vote was tied, three in favor and three against. Apparently the issue never made it to the faculty that time or if it did, there is no record of a significant debate on the issue. But in the Spring of 1990, the faculty took an extraordinary step. After tabling the issue of grade normalization at several prior faculty meetings, the faculty agreed to put off the issue of grade normalization and grade appeals until a faculty retreat in May.[72] Then we considered and adopted a policy called the Second Chance Option (Option) and made it retroactive.[73]

The Option allowed students to drop a C-, D, D+, or F for purposes of computing their cumulative grade point average. The old grade remained on the transcript and the student was required to retake the course. The Option, and its retroactivity, was a direct response to the grading practices of one member of the faculty, although it was justified to the faculty (by two white men on the faculty) as a matter of saving worthy minority students. I too thought the learning curve might be a little longer for students of color and an F received in the first semester of law school could be fatal. But there was no doubt in anyone's mind, let alone the faculty member whose grading had precipitated

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case is representative of a larger population of cases. *See* HAMMERSLEY, *supra* note 69, at 85-95.

71. Memorandum from Dean Kirk Grant to the First Year Faculty and Legal Writing Instructors of Touro College School of Law (Dec. 27, 1984) (all cited memorandum and meeting minutes are on file with the author).

72. Minutes of Faculty Meeting, Touro College School of Law, Mar. 14, 1990 [hereinafter Minutes of March 14, 1990].

73. The faculty resolution reads as follows.

> RESOLVED that the faculty adopt the Second Chance Option which will permit students on one occasion during their law school careers to drop one grade from their record for purposes of calculating their cumulative grade point average. Students who wish to take advantage of this option must do so during the semester following the semester in which the course was taken which they want to retake. The Administration will determine the time frame within which a student must decide whether he/she will drop a grade and retake a course. Students must retake the course dropped within three semesters following the semester during which the student was enrolled in the course to be retaken. If the course is not expected to be offered during this period of time, or is offered but not retaken by the student, the original grade and credits will be restored. The option is effective immediately and is retroactive to the Fall 1989 semester grades. Credits for the course dropped will not be counted. Credits will count the second time the course is taken. A notation will be made on the student's transcript indicating that the course was dropped and retaken.

Minutes of March 14, 1990, *supra* note 70.

the crisis, what the real reason was for this proposal.[74] The semester before there had been a massive protest by students when two faculty members failed or gave Ds to a very large percentage of the students in their classes. These grades were inconsistent with the grading practices of the rest of the faculty.[75] The Option was adopted only after an acrimonious debate, by secret ballot, with a majority supporting it while a substantial number of faculty were opposed.[76]

At the retreat the faculty discussed grade normalization, standards for grading, and grade appeals.[77] The faculty took no action on any of these issues. Maybe they were worn out from the battle that preceded the retreat; maybe they didn't want to think about anything else that could be divisive.

For approximately ten years, grade normalization was an issue or policy that did not command the support of a majority of the faculty; a procedure about which there was little or no consensus. By 1993, after the Option had been in operation for almost three years, grade normalization was a matter about which many on the faculty felt some urgency. As early as the Spring of 1992, the Option was under attack. The Registrar was opposed to the policy and with his support, the Academic Policy Committee repudiated the Option in the Spring of 1992. Questions were raised about the use of the Option and whether it allowed marginal students to remain in school and whether this might have an adverse effect on the school's bar passage rate.[78] A report

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74. The real issue, I suspect, is the implementation of the D and F grades. This varies greatly among faculty members. Some never or almost never give an F grade and rarely give a D grade. Others, like myself, see it as an essential part of the teacher's obligation to (1) distinguish those who earned credit for the course and those who did not, i.e. the F versus non-F and (2) distinguish those above and below the C (minimum 2.00) standard for retention. Others apparently don't see it that way. My reading of our grade distribution sheets for the past several years indicates that it is the administration (or lack thereof) of the D and F grades that presents the single most grading variant on the faculty.

Memorandum from Professor "X" to the Faculty and Administration of Touro College School of Law (Feb. 21, 1990)(names withheld at the author's request). Note should be made that the median grade for this professor's class the prior semester had been 1.690 while the other section had a 2.527. As noted by the authors of the Option "It is almost a statistical impossibility for the grade distribution to be the result of the chance assignment of good students to one section and poor students to the other." Memorandum from Professors Subotnik and Scherer to the Faculty and Administration of Touro Law Center (Mar. 12, 1990). Of course, this reasoning echoes the argument made by EPSTEIN, *supra* note 31, but it was all the more compelling because of the disparity and the fact that one faculty member had graded students so that his average was below the grade that defines average for most of us — the C.

75. One faculty member analyzed the past grading practices of the faculty and found that with few exceptions, the average grades were between 2.2 and 2.5. It was not clear from the memorandum whether he was talking about the median or the mean grade for classes. The exception was contracts, the only class divided into small group sections with no more than forty students in each class. The variation in grades were most extreme among contracts classes. See Memorandum from Professor Gary Shaw to the Faculty and Administration of Touro Law Center (May 10, 1990). In a second memorandum dated May 15, 1990 Professor Shaw then analyzed the distribution of grades and noted the disparities that existed among faculty members and then concluded that most professors' grades (in the percentage in each grade category) "fell within a relatively close range." Memorandum from Professor Gary Shaw to the Faculty at Touro Law Center Re: Grading Patterns (May 15, 1990)

76. The vote was 19 in favor, 12 against. *See* Minutes of Faculty Meeting dated March 14, 1990, *supra* note 71.

77. Faculty Advance Agenda, May 16, 1990.

78. Memorandum from the Academic Policy Committee to Dean Glickstein (Feb. 6, 1992) (but the

by an ABA Inspection Team suggested the Option might be a violation of Standard 304: "The law school shall maintain and adhere to sound standards of legal scholarship, including clearly defined standards for good standing, advancement and graduation."[79] In the summer of that year, the Dean asked the chair of the Academic Policy Committee to investigate the effect of the Option. In November of 1992, the Registrar sent a memorandum to the Academic Policy committee and attached the part of the ABA report that voiced concern that the Option "would distort the record of a student's academic achievement."[80]

Finally, in January of 1993, the Academic Policy Committee reported on the way the Option was used. The Chair wrote that he saw no problem with Standard 304. It turned out, not unsurprisingly, that students were using the Option strategically.[81] Very few of the students exercising the Option were in academic trouble.[82] Of the students who were in academic difficulty, most were dismissed or withdrew from the law school. Many students using the option had averages over 2.5. Students were eliminating the lowest grades on their transcripts to raise their overall GPA. Worse than that, it appeared that they would elect the Option for a semester and then, when they did not retake the course, by "operation of law" the old grade would reappear and their grade point average would be adjusted accordingly.

The other concern of the faculty was the effect the Option had on bar passage rate. Although more students exercising the Option failed the bar than passed it (43% passed and 57% failed) most of the students exercising the Option were not in academic difficulty and would have taken the bar anyway.

This time the faculty put aside the issue of the Option until they could vote on the grading curve. In effect, the faculty acknowledged that the problem addressed by the

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unanimity of the decision was disputed by at least one faculty member who remembered the meeting in a different way).

79. Criticisms from the ABA for deviations from the traditional approach to various issues is not uncommon at Touro. We received criticism as well for our decision to abandon the up or out rule or to review tenured faculty. *See* Post, *Critical Thoughts About Race, Exclusion, Oppression and Tenure*, 15 PACE L. REV. 69 (1994). We were also unconventional in our decision to add untenured faculty to the promotion and tenure committee. *See id.*

80. The ABA Inspection Team 's conclusions were based, it seems, on incorrect data. See Memorandum from the Dean to the Academic Policy Committee (noting that the Inspection team received a report that "grossly exaggerated the number of occasions in which the Second Chance Option had been utilized"). Memorandum from Dean Howard Glickstein to the Academic Policy Committee dated August 28, 1992.

81. The committee reported that while 209 students used the Option, only sixteen used it to avoid academic probation or dismissal. Fifteen students who used the Option ultimately were dismissed and nine withdrew. It was unclear whether these students were the same students who avoided academic probation and dismissal. There was also an attempt to consider the effect on bar passage rate. Apparently the results were pretty evenly split. One year seventeen had GPA's of less than 2.5 but only four passed the bar while seven failed (there was no indication of what happened to the other six people). In the next year, twelve students passed the bar and eleven failed. With this analysis of the facts, the Committee stated the issues before it in the following terms: the school's poor bar passage rate; the public perception of Touro's academic status; the utility of the Option to minority students; and, the use to which the Option was being put. *See* Report of Judge Leon Lazer for the Second Chance Option Committee (undated but marked Jan. 1993).

82. The complaints of the registrar, however, focused on the possibility that some student who ought to have been dismissed was not. It was the marginal students that he complained about although when all was said and done, only a small fraction of those who used the Option were in academic difficulty.

Option could also be handled by grade normalization. At the faculty meeting in April of 1993, the vote was 26 to 6 in favor of grade normalization. It was not unanimous, but the vote reflected substantial support for the idea. Even so, the curve adopted was considered an experiment and the faculty included a sunset provision. In two years the faculty would revisit the issue and consider whether it was happy with the results.

After the grade normalization proposal was adopted, the Academic Policy Committee changed its recommendation from one that suggested modifications to the Option to one that suggested the outright abolition of the Option.[83] The committee assumed that the faculty had traded a self-regulatory regime, not mandatory but recommended, for the self help remedy given to students by the Option. The faculty did not agree. The motion of the committee for abolition of the Option was defeated.[84] Only five faculty members voted for the recommendation, 18 voted against it.[85] The faculty limited the availability of the Option, however. Only students in specifically named required courses could exercise the Option.[86] The Option was preserved for first year students, but this meant that both of the courses taught by one of the persons who caused the initial crisis would not be subject to the Option.

The next semester, Fall of 1994, the faculty member whom I have since come to think of fondly as the "rogue grader" exceeded his own record. He gave Ds and Fs to approximately one third of his class. The mean average for the entire class was again less than 2.0 — 1.963 to be exact.[87] The Option was unavailable as a remedy to these students. As a result, fewer students elected to take his course.[88] In the Spring of 1995, the faculty made the second year elective course he taught mandatory.[89]

In the academic year 1995-96, the sunset provision in the resolution adopting grade normalization meant the issue was back before the faculty again. So was the Option. The faculty approached the meeting at which the recommended curve and the Option were to be reconsidered with some trepidation. But each year brings a new crop of students who have no knowledge of the history of the institution. Unlike the faculty, they have no collective memory to haunt them. These students approached the process of grade normalization with some enthusiasm. They had a plan, a demand. They wanted the curve "raised" from C+ to B-.

The students cited the competition among students from regional schools for a rapidly declining number of jobs. If employers were comparing the grades of students from different schools, shouldn't there be some sort of normalization among schools or at least a conscious attempt at consistency? The faculty committee's response was to increase the number of As that could be given under the recommended curve and to

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83. *See* Minutes of the Faculty Meeting (May 19, 1993).

84. *See id.*

85. *See id.*

86. Ten faculty members voted to apply the Option to all required courses but this was defeated. Fourteen members of the faculty opposed that extension. The proposal to limit the Option to a list of specific required courses was passed 23-0. Missing from the list of required courses was the required course taught by the person whose grading precipitated the crisis. *See id.*

87. *See* Grade Distribution Report (Fall 1994). His mean grade in 1995 was also below 2.0, a 1.96.

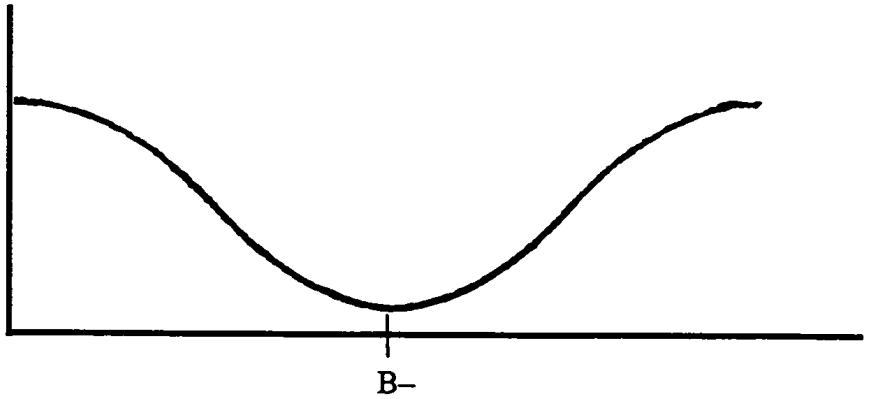
88. In the Fall of 1994, there were seventy-three students enrolled in his course and 107 in the other section. In the Fall of 1995 there were forty-nine students enrolled in his class and 106 in the other section. *Id.*

89. May 3, 1995.

balance that change, they increased the number of grades that could be given at the lower end of the curve.

The students cried 'foul' arguing that they had been hurt rather than helped by this change. The committee, they argued, had abandoned the normal curve for one that resembled an hourglass. Students drew pictures that were meant to reflect the different curves and plastered them on the walls.

Hourglass Curve



Inverted Bell Curve

There was an extraordinary meeting of the Student Bar Association at which the President was soundly reviled for supporting this plan and, as a consequence, he reversed his position and withdrew his support.[90] The faculty ultimately adopted a curve that increased the number of high grades that could be given but left the number of low grades that could be given as they were. The curve, as modified, was adopted by the faculty.

The debate on the Option did not occur until the grade normalization reform was completed. The report of the Academic Policy Committee on the Second Chance Option reaffirmed several ideas that had been expressed repeatedly in various memoranda: the description of the students at the institution as students with "borderline ability to study and practice law"; the opinion that somehow the Option was tied to bar passage rate. No new data was supplied to alter the conclusions supported by the last review of the data which showed little or no correlation between bar passage rate and the exercise of the Option. The Committee also cited the duty the law school had to the public and to the legal profession to "take steps to assure the high

90. In as meeting with the students following the faculty meeting at which the revised curve was discussed, the President of the Student Bar Association (SBA) argued that the student representatives were "strong armed" by the Grade Normalization Committee Chair. "We came in saying that we wanted to have a B- curve like all of the other area schools. They told us to take this or take nothing, and that is how all of this got rolling." Transcript of SBA meeting to discuss revised grading curve. (undated) "The SBA was strong armed. (Professor Y) told us that we would lose what we have worked for if we did not go with the hour glass curve . . . ." Id.

In response to a memorandum I circulated to our faculty asking for their comments on the faculty deliberations on grade normalization, a member of the committee, Jeffrey Morris, noted that "I felt that the student members of our committee did not act as forthrightly as they might have in defending the proposal they had joined in." Memorandum from Jeffrey Morris to the author on Grade Normalization (undated).

quality of our graduates. This includes the obligation to dismiss students who fail to demonstrate the capacity to study law, pass the bar and practice law."[91]

A. An Ethnographer's Perspective

In the examination of ethnographic material, it is important to remember that what separates data, the information recounted in a fairly straightforward way in the preceding section, from analysis, the part that follows, is the use of concepts that generally represent or are labels for the "point of view voluntarily adopted by the investigator."[92] One of the controversies in ethnography concerns the ability of the ethnographer to produce an ethnographic account that corresponds to a reality separate from her own.[93] I don't know whether that concern applies in cases where an ethnographer observes his or her own culture; I don't know whether the concern resurfaces when the observer is also a member of a subordinated community — an insider who is also an outsider. What the outsider within a culture has is the ability to view the dominant culture critically, the power to engage in "skeptical inquiry."[94] Nevertheless, I expect a contest or debate over the analysis I offer of these events and the meaning I assign to the behavior and the statements of the various participants in the process.

Grade normalization places tremendous pressure on a faculty, especially when it is forced to debate publicly its own behavior. Grade normalization is a debate about the conduct of both tenured and untenured faculty; about the way they perform one of the most significant aspects of their job. A faculty is asked as faculty to consider the consequences of their actions on the students they teach and to deliberate on the usefulness of self-regulation.

Self-regulation is not a pleasant process, particularly when there is implicit in the entire proceeding an understanding that the behavior of some of the faculty has made this self-regulation necessary. The Option had been a rather ingenious compromise, mediating the competing claims of students for justice and faculty for autonomy. But the Option lived in the memory of the faculty as a rebuke of individual faculty members. The faculty member whose grading practices precipitated the first crisis had never really forgiven his colleagues for adopting the Option. It was disloyal. It made him appear guilty of something when, in effect, he was just doing his job.[95] He was

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91. Compare the lack of discussion of the duty of a faculty to grade accurately as described in Doniger, supra note 15 or to be knowledgeable about the developments in educational theory Murphy, supra note 25.

92. BATESON, *supra* note 64, at 86. The references to "voluntariness" in Bateson's definition I will assume means the decision to use the methodology of a particular discipline, anthropology, without regard to the current debate over the requirements of objectivity associated with Classical anthropology.

93. *See* HAMMERSLEY, *supra* note 67, at 43-56. *See also* RENATO ROSALDO, CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS (1989); RUTH BEHAR, THE VULNERABLE OBSERVER: ANTHROPOLOGY THAT BREAKS YOUR HEART (1996).

94. JAMES L. KASTELY, FROM PLATO TO POSTMODERNISM, RETHINKING THE RHETORICAL TRADITION(1997). Before this book came out, Jay Kastely entertained me on a long car ride from San Antonio to Houston with the story of Hecuba and the lessons that could be learned from her situation. One lesson was the "rhetorical powerlessness of the marginalized speaker" Id. at 117. I learned a lot from the story of Hecuba and I hope that I have used this knowledge to good advantage in my own work.

95. In a memorandum to the faculty at the time the Option was first debated, he made this quite clear:

holding firm to his principles and flunking those who did not deserve to pass. The only way the Option could be cleansed of its taint, its apparent vindictiveness, was if it could no longer be used to cancel or nullify the grades given by this teacher. So the use of the Option was limited and the courses he taught were required.

The fear of divisiveness, of one group imposing its will on another, is what makes the collective decision-making process torturous.[96] Initially, this faculty was willing to live with a provision that gave students a means to cure what they believed to be an injustice suffered at the hands of a particular faculty member, but the same faculty would not give students the right to appeal a grade. A grade appeal would require a faculty member to defend and justify his or her grading practices. Worse yet, it would require the faculty to judge each other.[97] Promotion and tenure decisions are unpleasant enough. The idea that faculty members might replicate that process in some other context was not attractive.[98] the faculty could agree on a recommended curve precisely because they were not required to do anything about it. No one was bound by it.

Now, after living with a recommended curve for two years, the faculty lacked the political will to sanction the deviant behavior that had precipitated the need for the Option. The faculty foisted this job off on the Dean when they adopted the recommended curve.[99] Nothing had changed except that at least one third of all second

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> Any suggestion that the proposed rule change be made retroactive to last semester is both ill advised and offensive to those of us who have sought to administer our grading system, which includes Ds and Fs, in a serious fashion . . . . Given the mass unrest and protest created by my (and a few others') grades last semester, any retroactive change may well be perceived as a statement that there were improprieties in last semester's D and F grades. No impropriety of any kind has ever been shown.

Memorandum from Professor X to the Faculty and Administration re: Grade Expungement Proposal dated February 21, 1990.

96. *See* Feinman & Feldman, *supra* note 14, at 927 (discussing pluralist consensus politics and the ethic of "collegiality" and the response when that ideal is threatened by innovative pedagogy).

97. But see discussion of the ethical standards for law faculty including "due process in grading" in Monroe Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 VAND. L. REV. 275 (1986). Professor Freedman avoided the risk to collegiality by establishing an appeals panel made up of students from the class.

98. In their discussion of the most recent New York Court of Appeals decision affirming judicial non-intervention in academic decisions, a law professor and a partner in the law firm representing the defendant school exhort law schools to engage in the process of self-regulation with respect to grading disputes. That done, they note that "internal review would present great potential for faculty conflict and raises issues of academic freedom. The issues posed by internal review of academic grading disputes threaten faculty collegiality and harmony," and conclude that "despite these costs, the student's interest in accountability and consistency in grading decisions may require some faculties to consider this option." Harold Weinberger & Andrew Schepard, 77 ED. LAW. REP. 1089, 1097 (1996).

99. "The grades of an individual instructor who deviates from them (the curve) will be posted after he or she consults with the Dean." Report of the Committee on Grade Normalization dated April 3, 1993. Adopted by the faculty on May 19, 1993 . Minutes of the Faculty Meeting on May 19, 1993.

The Dean did, from time to time, voice an opinion about grading. A year earlier, the Dean wrote a memorandum reporting that more members of the top half of the class had failed the bar than he had expected and this suggested a lack of "rigor" in grading by the faculty. Memorandum of the Dean to the Faculty dated August 31, 1992. What I could not quite figure out was what that meant exactly. If we grade the top half lower, they would still be the top half unless, of course, we reversed the position of those whom we had graded into the lower half of the class.

and third year students could, by random assignment, end up in the class of someone who regularly gave Ds and Fs to about one quarter of his class. The Option was undone — at least with respect to its original purpose. It was a little bit like watching a ritual sacrifice — lambs being led to the slaughter. The faculty member was appeased.

B. The Asymmetry of the Rhetoric of Oppression

In the prior sections, I related the story of the debate over grade normalization as though I were removed from the process, an "objective observer" who did not attempt to influence the outcome. Obviously this was not the case.

One of the small tyrannies of power for those who wield it is the fear that somehow you will be exposed or revealed or that something will come to light that will undermine your claim to power.[100] You will be exposed as an impostor, as someone who does not know everything there is to know in a field of claimed expertise.[101] A public discussion of the particulars of grading is problematic for that reason. Students were expected en masse for the faculty meeting at which grade normalization would be discussed, so I began a slow and deliberate process of visiting privately with my colleagues and discussing my opposition to the changes the committee proposed.

My objections were twofold. My first objection was to the committee's conclusion that faculty members should be allowed to give more Ds and Fs because this reflected the "actual practice" of the faculty. Putting aside the obvious argument that actual practice was not a reason for enacting an unjust provision, I went to the trouble of analyzing grade distributions for the two years the recommended curve had been in place. Without disclosing the identity of the offending parties, I could show that in only a few isolated cases did the faculty grading fall below the recommended mean. Deviations occurred when faculty were assigned to teach new courses and in some few cases, when faculty members were dealing with some personal crisis. Generally, the faculty member resumed normal grading practices the second or third time he or she taught a course or when the personal crisis passed. Was this a coincidence? Did faculty teaching new courses draw worse students and did the class composition change and abler and more capable students matriculate just as the faculty member became more familiar with the subject matter in a new area?

This new curve was wrong, I argued. The proposed increase in Ds and Fs was a concession, not to the will of the majority, but to the person who had opposed the grading curve in the first place. If the changes were made, his grading practices would be legitimized. I suggested that perhaps we should be discussing the relationship between student performance and teaching and between learning and our methods of assessment.

In hallway conversations, one colleague mentioned that he thought I was making this a political issue when it had nothing to do with politics. His argument that grading is neutral and objective and, therefore, not political is one that I am familiar with as a person who writes in the field of critical race theory. That I should see the issue of

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100. The relationship between fear and oppression is explored in an insightful way in a small essay by Charles R. Lawrence III, *A Dream: On Discovering the Significance of Fear*, 10 NOVA L. REV. 627 (1986).

101. See discussion of the results of a discussion of the problems inherent in admitting a mistake to a class in CULTIVATING INTELLIGENCE *supra* note 3 at 62-64.

grading as political was predictable given my interests and the focus of my scholarship in recent years. My scholarship examines the structure of social relationships, issues of power or the lack of it and the legitimacy of authority. My focus is on the barriers to inclusion and the persistent exclusion of people marginalized by the dominant culture. I see grading as part of a larger discussion of standards, and as a way of defining merit that undervalues the contributions of subordinated communities. I see it as an issue of access to information, economic inclusion, privilege, and power.

I have been confronted by the specter of objectivity before. What surprises me is the extent to which symbols override all empirical evidence to the contrary. The paradox is that an assertion of objectivity can trump the methodology which must support a claim of objectivity; symbols sometimes can defeat arguments based on empirical evidence, reason or logic.[102] This is a source of much frustration for outsiders who have gone to the trouble of learning, internalizing, and using the epistemology advocated by the dominant culture. It is a primary example of the asymmetry that is associated with oppression.[103]

In any event, objectivity is not an argument that disproves the political nature of a process, it is an assertion that the political process is fair. The relationship between fairness and justice, between process and oppression, is always problematic. In 1989 and in 1993, the students were angry and mobilized. Their behavior proved the truth of the axiom: "Collective disapproval of power engenders opposition."[104] But the students' anger was not directed at the selective process of distribution with respect to resources within the law school. Initially their anger was not even focused on the method that was used to make that distribution. The student were protesting the arbitrariness of one individual. The perception or definition of injustice was very narrow as was the demand made by those students in rebellion. The narrowness of their focus was one reason the faculty was able to act.

The second time around, the students initiated a process which they hoped would produce a different kind of result. Their attention this time was focused not just on events and conditions internal to Touro but also external events, the bigger picture. The students were not concerned with the arbitrariness of the behavior of one individual, but on the effect the entire process had on their ability to obtain gainful employment. In some respects, by demanding that the curve be raised, the students were challenging the claim that grades were or are a measure of merit. The decision of the committee made matters worse because the redistributive nature of the decision was visible - someone who might have had a C would now have a D so that someone else could have an A.

I suspect the students, many of them white and male, were surprised to find me on their "side" in this dispute. The reference group for some of these young law students is not their families (recent immigrants), nor their communities (blue collar workers), but the wealthy and prestigious lawyers they wish to emulate. Over the years I have discovered that any line of argument directly or indirectly challenging the status quo with respect to the distribution of wealth and power is an anathema to them. They use labels like "militant," "feminist," and even "socialist" to criticize faculty or policies

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102. See discussion of the relationship between ontology and epistemology in BATESON, *supra* note 66.

103. For an interesting discussion of segmentation, differentiation, asymmetry and domination as a means of understanding social organization in human society, see BATESON, supra note 66, at 6-77.

104. BLAU, *supra* note 7, at 23.

considered too radical. Among the policies provoking their anger were the *pro bono* requirement and the sexual harassment policy.

But students have a powerful sense of their own self-interest that can, at times, lead to group solidarity if not class consciousness. They had determined that faculty grading was an exercise in power that directly affected their economic choices. In order to "see" this they had to abandon two deeply held ideals. First, students had to argue that inequality was unfair and unjust.[105] The inequality they saw was the ability of students from more established or more prestigious schools to get jobs while they could not. The second challenge to the dominant culture implicit in their demand was the abandonment of individualistic explanations for the circumstances they and their fellow students found themselves in. They "saw" that there were structural, not personal, obstacles in the way of their obtaining opportunities they felt they deserved.

But while the students saw the problem of hierarchy and reacted to it, the faculty did not.

In the faculty meeting at which grade normalization was discussed, one of the faculty expressed his concern by reciting a song from Gilbert and Sullivan:

> There lived a King, as I've been told,
> In the wonder-working days of old,
> When hearts were twice as good as gold,
> And twenty times as mellow.
> Good temper triumphed in his face,
> And in his heart he found a place
> For all the erring human race
> And every wretched fellow.
>
> * * *
>
> He wished all men as rich as he
> (And he was rich as rich could be),
> So to the top of every tree
> Promoted everybody . . . .
>
> * * *
>
> Lord Chancellors were cheap as sprats
> And Bishops in their shovel hats
> Were plentiful as tabby cats --
> In point of fact, too many.
> Ambassadors cropped up like hay,
> Prime Ministers and such as they
> Grew like asparagus in May,
> And Dukes were three a penny.
> On every side Field-Marshals gleamed,
> Small beer were Lords-Lieutenant deemed,
> With Admirals the ocean teemed

105. KLEUGEL & SMITH, *supra* note 7. These authors posit that there are certain beliefs that support the assumption of most Americans that inequality is fair. One is the belief that there are opportunities which allow one to earn what he is worth; the second is the idea that achievement is correlated with individual effort. These two basic assumptions can be challenged by personal experience that reveals the structural impediments to achievement, but Kleugel and Smith, believe that the ability to generalize from one's own situation to the situation of others is very limited. *Id.*

All round his wide dominions

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That King, although no one denies
His heart was of abnormal size,
Yet he'd of acted otherwise
If he had been acuter.
The end is easily foretold,
When every blessed thing you hold
Is made of silver, or of gold,
You long for simple pewter.
When you have nothing else to wear
But cloth of gold and satins rare,
For cloth of gold you cease to care - -
Up goes the price of shoddy.

In short, whoever you may be,
To this conclusion you'll agree,
When everyone is somebodee,
Then no one's anybody![106]

For some faculty, the debate over grade normalization is about the relationship between merit and status. For others, the relationship between status and entitlement is assumed. As I listened to this song during the faculty meeting, and when I reread the lyrics for purposes of writing this article, I was confused. Had I missed something in the song — the part of the song that explains why that which is not gold or silver is simple or shoddy? It is scarcity that makes goods valuable, I will concede. But status is not manufactured from commodities found in nature, it is a cultural construct, a notion we have about the value of people who occupy certain social positions. The allocation of status was undone, as Gilbert and Sullivan point out, not by surplus production of a commodity, but by the politics of inclusion. But what had any of this to do with merit unless merit referred to a notion of the "divine right" of kings, the birthright of the English aristocracy or a British conception of good breeding.

In contrast to this position, the "rogue grader" is rhetorically an ardent individualist. He believes one cannot treat human behavior as though the laws of nature applied. It is one thing to say that the height of any randomly selected group of human beings will vary in a way that can be plotted as a normal or a bell shaped curve,[107] but it is another to say that the performance of individuals on examinations will produce the same result. Along with a great many other skeptics who object to the

106. William S. Gilbert, *The Gondoliers,* (Oct. 10, 1996) <http://www.idbsu.edu/GaS/gondoliers/libretto.txt>.

107. These examples appear in Robert Matthews, *Far Out Forecasting,* NEW SCIENTIST 37, October 12, 1996. According to author, you could "measure the heights of a stadium full of soccar fans, for example, and you'll find a few very short adults, a few long shanks, and the bulk somewhere in between. The frequency with which different heights turn up follows a bell shaped curve called the normal distribution. First derived from probability theory more than two hundred years ago, the normal distribution is now the mainstay of modern statistics." Id. According to another article, an enormous range of data is normally distributed. *See How to Pull 99.5% of Your Hat Out of a Rabbit.* ECONOMIST, Nov. 19, 1988.

use of normal curves, he argues that this is something which is imposed from the outside, not something that occurs in nature.

> There is no such thing as a normal class or a normal distribution of students in a class. Anyone with significant teaching experience knows that this is not so, that there are classes with a large number of better students and classes of an unusually large number of poorer students and everything recognizable in between. Normalization fails to give students the grades they deserve.[108]

Here's the thing. His grades have always been amazingly consistent. They are always bottom heavy. The class with a disproportionate number of good students has never existed. The classes that fall anywhere between do not exist.

I have always found that the distribution of raw scores among students clusters around a midpoint and tapers off at both ends. Like any other assumption about the application of probability theory to human behavior, (from the extremes of the mythical Harry Seldon's methodology for predicting the future to an uncritical belief in market theory), individual choices and individual differences are irrelevant to laws of nature generated from the observation of large samples.

Let me put it another way. If a community shares a belief about the kind of behavior that is acceptable, most people will try to conform to that norm. You could put our grading practices on a bell curve with "high" graders at one end and "low" graders at the other and most of the faculty would fall somewhere in between, clustered around an identifiable "median." Why would we assume that the norms that govern the behavior of students — rules about studying, for instance,— would not be reflected in examination scores? There would be students at both extremes, those who were compulsive studiers and those who studied not at all, but surely most would fall somewhere in between. This makes sense to me. But this is not what was discussed in the debate over grade normalization at the faculty meetings. The faculty instead discussed the students' lack of virtue.

My scholarship is termed "critical race theory" not only because I write about the experience of black people in the United States, but because I insist my identity is relevant to my analysis and that identity and perspective are linked in a way that distinguishes the contribution I have to make from that of other critical scholars. But I did not create the connection between asymmetry, hierarchy and the possibility of oppression. I am using concepts familiar to anyone conversant with the social sciences.[109]

I often have the feeling in faculty meetings that the discussion is off center. If we were critiquing a brief or a legal argument, we might say that the examples or analogies drawn are not quite "on point." The "off centeredness" is a reflection of the rhetorical asymmetry I associate with oppression. From my critical race perspective, I observed the discussion of the faculty. In my analysis, the students are the subordinated

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108. Response by Professor X to Author's Memorandum to Faculty soliciting their comments on grade normalization (on file with the author).

109. In analyzing the moieties of the Iatmul, Gregory Bateson used an example from natural history to think about social relationships in structural terms. He compared a lobster to an earthworm. Transversal segmentation and differentiation (the lobster) and radial symmetry and non-differentiation (the earthworm) were opposed in terms of their asymmetry and symmetry. In the social context, he thought, this asymmetrical differentiation is hierarchy *See* BATESON, *supra* note 66, at 76. For a fuller discussion of the Iatmul people of New Guinea, moiety and heirarchy, see GREGORY BATESON, NAVEN (1958).

members of the community. The oppressed confronted the oppressors. I reach this conclusion not because the faculty had the power to deny the students' requests but because the faculty used their power in a particular way. In particular, I paid attention to the use of certain symbols and the techniques associated with oppression.

Some faculty resorted to oppositional categories that contrasted the virtue of the faculty with the absence of virtue on the part of the students.[110] This is a rhetorical strategy, assertions of relative superiority and inferiority, that explains and justifies subordination. Our students were described variously as "weak" or "lazy" and generally characterized as undeserving.[111] I kept waiting for someone to call them "shiftless" or refer to the size and shape of their skulls.

Freedom and grade normalization were presented as ideas that existed in opposition to one another. Figuratively speaking, the students and faculty marched into the meeting carrying banners that read respectively "Fairness" or "Freedom" written in ancient script and emblazoned with heraldic coats of arms. In the discussion that followed, you could imagine faculty members choosing sides and marshaling their forces around the banner that represented the virtue they wished to defend.

After tenure most law teachers are exempt from evaluation/criticism. Except for the occasional exhortation to "rigor" that means, roughly translated, that the grades students are receiving are too high, faculty are free from the tyranny of standards. The faculty began with an assumption that we should balance 'academic freedom' against the students' demands for relief.[112] Though the reasons why the faculty might or might not grant the students the relief they sought was examined at length, no inquiry, no demand for justification was made with respect to academic freedom in the area of grading. Asymmetry at work.

In the earlier discussion of the ethics of grading, the question was posed in terms of the freedom of the student and a justification was required for the use of grades. In this case, students were asking for redistributive justice. They did not invoke their liberty interests. The discussion of grade normalization, the discussion of responsibility and freedom was one sided.

Grade normalization is to equality for students what hostile environment is to equality for blacks and women. The conflict in each case has been reduced to a competition between liberty and equality. The liberty interests that have been identified are the academic freedom of faculty in the former case, the right to freedom of speech

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110. *See* IAN HANEY LOPEZ, WHITE BY LAW (1996).

111. Concern with the "quality" of the students is a theme that accompanied the democratization of education. See CULTIVATING INTELLIGENCE, supra note 3 at 43. For an example of ambivalence about broader admissions in the law school setting, see Weidner, *supra* note 27. According to Dean Weidner, there are several problem areas in legal education today: (1) the ability of law schools to provide access to the legal profession to students who are not affluent; (2) the ability to diversify the student body (3) the risk of 'open admissions' and the law academic abilities of the unprepared students who would then be admitted. Id. at pp. 93-96. The desire to be more inclusive is tempered by a fear that this will mean a dimunition in the quality of the student body. At least Dean Weidner was politic enough to characterize the deficiencies he anticipates as lack of preparation and not lack of intelligence. Some faculty are not so circumspect.

For a discussion of the deficiencies of African Americans. see chapters "A Lazy People" and "The Black Work Ethic" in EUGENE D. GENOVESE, ROLL, JORDON, ROLL, THE WORLD THE SLAVES MADE (1976) and the discussion of myth and archetypes of blacks in DONALD BOGLE, TOMS, COONS, MULATTOS, MAMMIES & BUCKS: AN INTERPRETIVE HISTORY OF BLACKS IN AMERICAN FILMS (1996).

112. *See supra* note 15 for a discussion of the relevance of academic freedom.

for whites or men in the latter instance. What is really present in both cases is competing liberty claims. The real question is whose liberty interest will be protected? Who will be free? Free to do what?

The faculty did not equate success or failure in a course with the competence of the teacher or the usefulness of instructional techniques. There was not even an acknowledgment that as teaching professionals, we are also obligated to educate ourselves with respect to new developments in the field.[113] Nor were tenured faculty held to any sort of standard with respect to their use of assessment techniques. There are few standards against which the performance of law teachers can be measured or assessed.[114] In this law school, there is even a rule which prevents faculty from admitting their own errors. Grade changes are not allowed unless there has been a mathematical or computational error. If, bleary eyed from reading exams you skip over a very cogent discussion of a particularly important issue, if you are among the very few faculty who would be willing to admit such an error, you would not be allowed to change the student's grade in the course.[115]

	Responsibility	merit (competence)	power (freedom)
faculty	no inquiry	no inquiry	affirmation
students	inquiry	inquiry	denial

Assymetry in the Discussion of Grade Normalization

Why faculty examination preparation and grading practices should escape completely the process by which teaching is evaluated, I have no idea. There is no other aspect of teaching which is as zealously guarded as the grading process.[116] The connection between the two, academic freedom and grading, is not immediately obvious to me. I suppose that the connection is made when the content (not the form of the examination or the methodology for assigning grades) is subject to review. I probably missed the 'slippery slope' or boundary line that everyone else sees. But I have

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113. Continuing legal education is an ethical obligation of the legal profession. *See* Guy James Mangano, *Thoughts on Legal Professionalism*, N.Y.L.J., Feb. 10, 1997. It is also an obligation of the teaching profession. *See* discussion, *supra* note 86 and accompanying text.

114. One author has suggested that there has been an error in grading when the grade does not reflect the competence of the student being assessed. *See* Wangerin, *supra* note 10, at 53-54. But students have no right to challenge grades as erroneous. For a review of the relevant case law see Thomas Schweitzer, *"Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students?* 41 AM. U. L. REV. 267 (1992) (reviewing significant decisions in the area and the various legal theories used to advance the claims of students and concluding that the cases were rightly decided in that courts should defer to the univerisity on these matters but agreeing with recent case law that suggests that students have a right to be judged "fairly" and that an arbitrary dismissal or one which is not justified would be a breach of contract); *see also* Doniger, *supra* note 15 and the discussion of the public and the student's interest in accurate grading.

115. Louise Harmon, a colleague and the person who once raised the issue of the fallibility of faculty at a faculty retreat, has argued that if a faculty member does not see an argument the student has made, there has been a computational error. (conversation with Louise Harmon on July 14, 1997) I think it is fair to say that her interpretation is more expansive than the one most faculty would use.

116. *See* Kain, *supra* note 15 (describing the extreme privacy that surround the issue of grading and the difficulty faculty have in discussing the topic).

observed that no one may inquire into the way grades are assigned, although disparaging things may be said about you if your grades are too high or too late.[117]

The faculty at Touro adopted a curve even though they could not agree on the standard for measuring student performance.[118] To date, there has been little discussion of what is being measured or how to measure it. The issue of standards to which students would be held was raised at the faculty retreat in 1990. One faculty member wrote a memorandum that presented us with multiple choices: were we measuring our students against students in the same class, Touro students in general, American law students as a population or some other standard.[119] The author's conclusion was that we should measure Touro students against a national standard which would, he thought, require us to give far more Cs. But if we placed class rank prominently on the student's transcript, local employers would not be deceived by a C and read it as " a C from Touro." The fact that the students were being held to a national standard would be evident from the student's class ranking. According to this theory, the top ten per cent at Touro might all have Cs.[120] How the faculty was supposed to devine the quality of performance that could be expected from all 180 or so ABA accredited law schools was not made clear. That may be why no one endorsed the proposal at the time.

But five years later when the students argued for a B curve, at least part of this argument reappeared in another guise. The claim was made that hiring was done on the basis of class rank and not grade point average. The problem with that argument, of course, is that without some standard for grading that makes the grades of the different faculty members comparable, ranking makes no sense. It is like comparing apples to oranges. Ranking, you will remember, should not be done unless the examinations that are administered meet the dual requirements of reliability and validity.[121] How could there be either if, as far as can be seen from the faculty minutes of all meetings at which the subject was discussed, the faculty did not adopt or endorse a grading methodology or standard? The faculty was reasoning in a manner reminiscent of a perpetual loop or a mobius strip.

C. Power and Self Deception or Purposeful Ignorance

What was missing from this debate was a process of generalization that academics or intellectuals are supposed to employ. Facts were irrelevant. This was a passionate debate about different world views. This was a place where purposeful ignorance was the coin of the realm.

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117. This is the experience described by Feinman & Feldman , *supra* note 14, at 934.

118. One colleague wrote a memorandum to the faculty which described our grading system in the following way: "If a city were to operate its highway system without traffic lights, stop signs or generalized rules of the road, collisions would be unavoidable. We, I think, have been operating our grading system with analogous disorder." Ted Silver, Memorandum for Discussion at Retreat (May 16, 1990) (on file with the author).

119. This particular faculty member liked multiple choice tests.

120. *See* Memorandum of Ted Silver, *supra* note 118.

121. *See, e.g.,* John W. Young, *Statistical Adjustments of Law School Grade Point Averages*, LAW SCH. ADMISSIONS COUNCIL STATISTICAL REPORT 93-02, March 1994. (Author notes that LSAT predicts first year performance but "first year GPA is neither a sufficient nor an adequate measure of a student's overall achievement." *Id.* It is used because a cumulative GPA is a "problematic criterion." Guess why?).

Purposeful ignorance is a strategy employed by those who perceive quite clearly the advantages of ignorance.[122] Purposeful ignorance allows individuals or groups to maintain their own power and to ignore the justice claims of those who have suffered oppression at their hands. The clue that something more than mere misunderstanding was at work at the faculty meeting at which the new grading curve was discussed is found in the topics which the faculty did not discuss.

The faculty did not discuss at any length the way the market for legal services. We knew, for instance, that while we accepted students with lower LSATs, once those students demonstrated their ability to succeed at taking law school examinations, schools ranked more highly on the basis of "selectivity" (LSAT scores) were more than happy to take our students as transfers. We were all aware of the extent to which new and innovative ideas began with faculty at the smaller schools but were adopted later by the larger, more elite schools. We knew that the faculty at the more prestigious schools were still hired for entry level positions on the basis of criteria that did not adequately predict who would be productive scholars but that larger schools compensated for this by hiring laterally from lower tier schools. We had all the evidence we needed that in may ways the hierarchy among law schools reflected differences in wealth, not differences in quality. Why was the faculty unable to take its experience of hierarchy and use it to analyze the problem presented by the students? In that room discussing the issue of grade normalization sat a faculty that had experienced, I was sure, some version of the presumption of incompetence attached to those who are at the bottom of any hierarchy.

We have a private joke, Louise Harmon and I. When we attend a conference we watch the people to whom we are introduced. There are certain people from prestigious law schools whom we have met several times. Each time we meet, we are introduced again because they never remember who we are. It is as though the phrase which follows our names, "they are from Touro" triggers a neural response — a blinking light that signals the memory "Unessential information. Place in short term, not long term, memory." It is humiliating to see the look of disinterest in the eyes of "colleagues" who respond distractedly to an introduction with a remark designed to let you know they have heard of Touro, "that other Jewish school."

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122. Purposeful ignorance is similar to plausible deniability. Classic examples of purposeful ignorance include Justice Powell's assertion that he did not know what a "stigma" was in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Justice Sandra Day O'Conner's misuse of the term "stereotype" in Shaw v. Reno, 509 U.S. 630 (1993); or the patent absurdity of the term "reverse discrimination" in Piscataway Tp. Bd. of Educ. v. Taxman, 117 S. Ct. 763 (1997). Reverse discrimination sounds as though blacks are discriminating against whites. Not so in most of the cases discussing affirmative action. "Government" is a word describing a collectivity — members which are predominantly white men. Invidious discrimination is based on assumptions about superiority and inferiority that result in the oppression of one group of people by another. When the dominant group decides to redistribute resources to that subordinated community to compensate for decades of exclusion and disadvantagement, members of the majority community make sacrifices. That is not "invidious" discrimination. These "victims" are not discriminated against because they are white and whiteness has no stigma. But see cases discussing race as membership in a "ethnically and phsiognomically distinctive sub-grouping;" St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987), and conclusion of the court that while one white cannot complain that another white has discriminated against him on the basis of race, he may use 1981 to complain if a white prefers a black over a white. Discrimination by blacks against whites might be actionable, discrimination by whites against whites is not.

Social psychologists have studied phenomena like this. There are explanations for the inability of the faculty to generalize from their own experience with hierarchy. The simplest answer is that the faculty accepts the hierarchy as a measure of their own worth as well as the worth of their students. They believe themselves to be inferior to faculty who have been hired by ivy league schools but they know that they are superior to the students they teach because when they were students, they were accepted at and graduated from those ivy league schools.

Or perhaps there is another explanation. Cognitive psychologists refer to the principle of cognitive efficiency, the importance of schema to problem solving and the different ways schema function. Apparently schema vary in abstraction. A contrast is drawn between the person who can generalize and see interconnections, the contextualizer, and the person who does not generalize but responds to cues without seeing the connection between or among them.[123] If we are talking about ranking of law schools, the cognitive psychologist might explain, conceivably a faculty member might argue that such rankings are unfair and inaccurate at least as a measure of the caliber or quality of the faculty at lower ranked schools. And when the conversation turns to ranking law schools in terms of the students who attend them, the ranking of law schools is a perfect measure of quality.[124]

I am struck by the use of the term contextualizer. It is funny the way psychologists have begun to see value in a person who sees connections. For most of my life, the person who could not see an embedded figure separate from a complex design, the field dependent person, was something of a pariah — a mental deficient when compared to the far superior field independent thinker.[125] Now the competencies seem to be reversed and psychologists seem to be saying that the field dependent might be better at abstractions than those who are field independent.[126]

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123. *See* KLEUGEL & SMITH, *supra* note 7, at 14.

124. *See id.* at 29. The theories of a "divided self" of "compartmentalization" of potentially conflicting information are now part of the discourse of non-experts like myself.

125. In the summer following my first year of law school I took a non-legal job. I worked as the assistant to a psychology teacher from Teacher's College Columbia who had a research grant from Rockefeller University. He administered both IQ and field dependence tests to the children at a summer camp. The IQ test was an achievement test. Questions like "what is the circumference of the earth" and "who wrote Pilgrim's Progress" measured the content (not the quality) of the education the students had up until that point. We also tested the students for field dependence/independence. I remember being offended at the assumptions about the significance of this test. Even today, when teachers acknowledge the preference within the educational system for a particular learning style e.g. "'cognitive dissonance' or a mismatch occurs when a youth's culture is more global, holistic, and field dependent than the experiences at school" the attempts to accommodate different learning styles can sound like remediation. E.g. "Middle level teachers must realize the difficulties F and D students have with particular subjects and instructional methods because of how they perceive and process information." Judith Reiff, *At Risk Middle Level Students or Field Dependent Learners? Young Adolescents at Risk,* Helen Dwight Reid Educational Foundation, THE CLEARING HOUSE, March 1996. Why, for instance, is the field independent student, one who is better perhaps at memorizing lists and remembering detail denominated " analytical" while the field dependent student who is better at summarizing, comparing and visualizing concepts in their entirety is not?

126. I do not know whether the "global" thinker in the literature on field dependence is identical with the contextualizer used in one tract on political psychology (social psychology?). *See* KLEUGEL & SMITH, *supra* note 7. I was merely struck by the coincidence that what appears to be a skill in one context, evidence of higher level intelligence, is a deficit in the other.

Maybe, like most things in life, the competencies vary from one area of inquiry to another. And maybe many of the assumptions about the value of different intellectual capabilities were transformed during two decades while educators grappled with the consequences of the democratization of education. Legal education has also been transformed. We now provide access to education to wider segments of the population. Before the G.I Bill, education, at least at the private schools, had been a prerogative of the wealthy and the few who were both exceptionally talented and highly motivated. And it may be that the current move to restrict access to education, to reduce the financial support given to middle class students will be the means by which graduate education is recaptured as one of the privileges of wealth. But the democratic or populist notions that fueled that expansion of opportunities is threatened today, not just by the dismantling of the system of entitlements for the middle class, but also by our inability to think about education in new and creative ways.[127] Many of those of us in legal education today are the beneficiaries of the policies of inclusion. Why then are we unable to imagine or create ways to reach students who are more like us that they are like those who taught us?

If what confronts most faculty when they consider grading or grade normalization is a trick of the mind, we could devise strategies — self conscious and purposeful attempts to override our perceptions - like the person who knows that he is looking at an optical illusion. Suppose we all read The Dancing Wu Li Masters and agree that

> The importance of nonsense hardly can be overstated. The more clearly we experience something as 'nonsense,' the more clearly we are experiencing the boundaries of our own self imposed cognitive structures. 'Nonsense' is that which does not fit into the prearranged patterns which we have superimposed on reality. There is no such thing as 'nonsense' apart from the judgmental intellect which calls it that.[128]

V. DIVERSITY, COMMUNITY AND CONSENSUS

In recent discussions of normativity, distinctions have been drawn between persuasive and prescriptive normativity.[129] Grade normalization, like most attempts to regulate the behavior of any faculty on which there is a system of self-governance, falls into the category of persuasive normativity. It is not just a preference for a particular process — dialogue and consensus building — that moves law school faculty in that direction. It is a real and palpable antipathy to any form of coercion. While most faculty do conform in that they do manage to fit their grades within rather broad guidelines, each semester at Touro there are what I consider significant deviations from the norm. This was clearly a case in which the moral authority of legislation was unpersuasive. What were the reasons for this failure?

I have offered both a narrative and an analysis of the controversy that developed on one faculty around the issue of grade normalization. In this last section of the paper

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127. Lee Knefelkamp, *supra* note 16.

128. *See* GARY ZUKAV, DANCING WU LI MASTERS: AN OVERVIEW OF THE NEW PHYSICS (1980).

129. *See* Steven L. Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963 (1991).

I will explore some of the implications of my own participation in this debate and the effect diversity has on community, ideology and normativity.

Steven Winter has written that community is a "cognitive function" — an analysis that combines anthropology and cognitive psychology.[130] That there is a connection between culture and community is a truism in contemporary society, even though the mysteries and the complexity of cultural analysis continue to confound us. What Winter refers to is the phenomenon of shared beliefs, ideals and, most importantly, shared meanings.

Most law teachers would accept without question the idea that there is a community of law teachers and beyond that a legal community to which they belong. Both can be characterized as professional or interest communities. And while geographical proximity is not necessary for the existence of community, personal contact does change the nature of a community. It intensifies the experience. A distinction can be drawn between large and small law schools just as sociologists draw distinctions between urban and rural communities, between *gesellschaft* and *gemienschaft*.[131] Intimacy has its detractors mostly because it thwarts individualism in informal ways. At small law schools, intimacy reduces the potential for open warfare among faculty.[132]

Within the law school environment with its strong, almost overwhelming, commitment to the ideology of individualism, the absence of choice and the limits on individual behavior are often disguised.[133] The demands for conformity are most obvious when faculty are called on to make judgments about applicants for employment or candidates for promotion or tenure. The culture of an institution, any institution, is guarded by those who act as gatekeepers — the personnel committee, the Dean and the faculty — who participate in the hiring, promotion and tenuring process.[134] After

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130. *Id.*

131. "All intimate, private and exclusive living together is understood as life in Gemeinschaft (community). Gesellschaft (society) is public life — it is the world itself.... There exists a Gemeinschaft (community) of language, of folkways or mores, or of beliefs, but, by way of contrast, Gesellschaft (society or company) exists in the realm of business, travel or sciences." Ferdinand Tonnies, *The Contrast Between Gemeinschaft and Gesellschaft, in* PETER WORSLEY, MODERN SOCIOLOGY 409-10 (1985).

132. I am told that the faculty at Harvard Law School, for instance, the eighty or so faculty members have offices in five different buildings. In contrast, Touro has one building and all faculty offices are located in close proximity to one another and to the classrooms where courses are taught. The cafeteria serves both faculty and students and there is no way to avoid colleagues or students unless you have access to your own port-o-let.

133. The contrast between urban and rural communities, for instance, focused on the anonymity in the former case and the "density of interpersonal relationships" in the latter. One consequence of this density of personal relationships was the "cultural, organizational, ceremonial and ritual limits on the behavior of community members. ..individuals were not plagued by the problem of choice because little choice was allowed, and conflicts in value were limited because (of)...an overarching hierarchy of values." J. Bensman and A.J. Vidich, The Forms of Community have Radically Changed, excerpt from Metropolitan Communities – New Forms of Urban Sub-Communities, in Peter Worsley, ed. Modern Sociology, supra note 131 at 417.

134. One of the clearest descriptions of the law school hiring process is contained in an article by the same name. *See* Jon W. Bruce & Michael I. Swygert, *The Law Faculty Hiring Process*, 18 HOUS. L. REV. 215 (1981). The authors quote Dean Erwin Griswold who is reputed to have said "our faculties tend to reproduce themselves; and in the process may by the continual inbreeding that is involved be producing even narrower law students than they were themselves." *Id.* at 254 (quoting Sawyer, *Dean Griswold*

tenure, faculty are bound by norms that emphasize the need for collegiality.[135] Collegiality and Winter's cognitive function are very much related.

Winter suggests that "conditions of community . . . are everywhere in disarray."[136] Law school faculties are no exception. How "conditions" arrived at this state is not completely clear. Given the deliberate way law school communities are constructed and the complete autonomy afforded tenured faculty, how could there be discord or disagreement? But this case study is instructive on that point. More than any other issue, grade normalization posed the greatest risk of dividing the faculty at Touro.

Winter calls the process by which disagreements arise "slippage."[137] Just like families or neighbors or best friends, faculty grow apart because they choose to explore different ideas and pursue different interests. Experience and education challenge beliefs and alter perceptions. Shared meanings lose their cohesion and their shape, and in the process, there develops something Winter calls "normative space."[138]

If Winter is referring to the gradual process by which members of an institution become differentiated from one another over time, then the metaphor he has chosen is a good one. It calls up images of tectonic plates and geological shifts that are imperceptible while they are occurring — the gradual movement of the earth's surface, the shifting of continents. Slippage does not have the drama of earthquakes, tidal waves and volcanic eruptions.

On the other hand, it hardly seems possible that slippage would be capable of causing the level of disorder to which he refers. Something more dramatic must be involved; something like the effect of diversity on "tight little islands dominated by a group of like thinking individuals"?[139] When Winter refers to diversity and pluralism as a natural outcome of the process of socialization, he does not appear to be talking explicitly about culture contact: the admission of "outsiders" or the confrontation with the "other" that is a by-product of the politics of diversity. But it is diversity in the form of multiculturalism that has precipitated a crisis in legal education. Diversity has raised the hackles of those who feel that the traditional values have been undermined by the changes that diversity has wrought.[140] The normative space that is most problematic,

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Attacks 'Faculty Inbreeding,' 45 HARV. L. REV. 3 (Oct. 5, 1967)). But see Richard A. Epstein, *Legal Education and the Politics of Exclusion*, 45 STAN. L. REV. 1607 1992-93) (in which he raises objections to anti-competitive, "result oriented" recruitment that disregards "individual merit and achievement" in preferring minorities and women). The discussion of exclusion and inclusion ultimately leads back to the question of merit and how it is defined.

135. See discussion of "collegiality and the dominance of reason" as the image of the relationships in the academy supported by a process of pluralist consensus politics. Feinman & Feldman, *supra* note 14, at 926.

136. Winter, *supra* note 129, at 1001.

137. *See id.* at 996-1001. Entropy is one of those words that seems to have different meanings for different communities. Gregory Bateson often used entropy and negative entropy to refer to a process by which difference produces energy. Drawing on the meaning in thermodynamics and an analogy to the way a piston is, his use, drawing on the meaning in thermodynamics and the specific example of a heat engine, equates thought, learning and communication with the recognition and use of difference. Negative entropy is what a physicist will call the energy created by differences in temperature. *See* BATESON, *supra* note 64, at 75-77.

138. Winter, *supra* note 129, at 998-99.

139. Epstein, supra note 134 at 1607-1608.

140. One expects the academy to be a place where people feel express ideas and debate them with

it turns out, is not the space created by what happens to individual faculty members during their time at the law school, but rather the space that exists because of the socialization that took place before they ever got there.

Some "disarray" may be necessary or even desirable. The alternative, a faculty in complete agreement on every issue, suggests inbreeding and stagnation. But there is, I think, something more to diversity than matters of perspective or perception. There are real and substantial disagreements about beliefs and ideals If persuasive normativity is a dialogic process in which understanding is created, persuasive normativity doesn't happen at faculty meetings. This is not the place where faculty members build bridges across "normative space." Faculty meetings are the place where "normative space" is revealed. It is created by the confrontations that occur when members of subordinated communities refute what they have heard; when they engage in "skeptical interrogation."[141]

Outside scholars have challenged the ideas about community held by the white men who have been Deans and senior faculty for practically the entire history of legal education in the United States.[142] If you have a conception of community that recognizes inequality but is inclusive, you worry about the consequences for those without power of decisions by those who have power. The concern is not with equality, but with human dignity, human potential and human aspirations. The harm that is done by one person to another: psychic harm, economic harm or social harm, cannot be

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some passion. Recently the criticism of critical race scholarship has overflowed into the popular press. *See* Jeff Rosen, *The Bloods and the Crits*, THE NEW REPUBLIC (1996); Heather MacDonald, *Law School Humbug, Rule of Law*, WALL ST. J., Nov. 8, 1995. Attacks on scholarship that take issue with the methodology used are recurrent and generally are accepted as part of the debate. *See* sources cited in criticism of narrative, *supra* note 61. One can even understand the rush to defend the canon or the "Western Rational/Enlightenment " tradition. See Sherry *supra* note 69. There is no growth or change without opposition. But attacks on affirmative action, immigration, and gays and lesbians have assumed a place in American politics that looks a lot like scapegoating. For instance, Judge Richard Posner wrote that "[s]ome people believe that criminals, who in this country are disproportionately black, and who are, of course, the perpetrators of rape and other sex crimes, are an oppressed group" Richard A. Posner, *Only Words*, THE NEW REPUBLIC (Oct. 18, 1993). This kind of rhetoric suggests something other than a defense of the rationalism of a Western intellectual traditions is involved in this debate.

141. Jay Feinman and Marc Feldman speculate that the dominant group on a faculty have three strategies that can be employed when they experience the politics of confrontation: (1) engaging in a debate on the issues; (2) ceding part of the law school to the challengers, a process of accommodation; or (3) refusing to debate and obliterating the challenge by force. *See* Feinman & Feldman, *supra* note 14, at 926.

142. Only 16% of tenured law professors are women although women now make up close to 40% of the entering class at law schools. There are only fourteen women deans at 178 accredited law schools. *See* The report of the ABA Commission on Opportunities for Women in the Profession; *see also Women Still Face Barriers in Law School, Report Says*, ALB. TIMES UNION, Feb. 3, 1996; Matthew Goldstein, *Hostility to Women Found at Law Schools*, N.Y.L.J., Feb. 2, 1996, at 1.

Building community is one of the projects of critical scholars. *See generally* Stephanie M. Wildman, *Teaching and Learning Toward Transformation: The Role of the Classroon in Noticing Privilege, in* PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 161 (1996). Power systems interfere with building community, but "building community needs to be our life." *Id.* at 163. The debate over normativity, however, may be about assymetry and libertarianism in the company of hierarchy. One critical race scholar sees normativity as something that has been used to justify indifference or cruelty to others. *See generally* Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933 (1991).

justified by resort to a one-sided argument that focuses only on the liberty interest of a person who causes the harm.

If a harm can be avoided at little cost to the person who inflicts the harm; if the constraints on the freedom of the person are no greater than those which can be found in the vocational ethics of his or her profession, the competing liberty interests of the parties are reconciled.[143] When those who are being harmed are less powerful than those who inflict the harm; when that harm cannot be justified or when it is inflicted arbitrarily, then power has been abused. Irrational behavior by one faculty member may be an abuse of power. When irrational behavior is condoned and faciliated by the groups within a community that hold power, when abuse of power is systemic, not individualized, then the result is oppression.

Winter lists the tools he thinks we will need to build bridges that span "normative space:" empathy and identification, acts of imagination, alternative models, values and understandings. The reference to acts of imagination intrigues me. It suggests another way to look at normative space. Maybe normative space is not a gulf or chasm that divides us. Maybe it is an opening or an opportunity for invention and creativity. Normative space might be the place where we need to go to find new solutions for old problems.

The value of outsider perspectives in a community, if they are recognized as valuable, is that they light up the corners — reveal beliefs about facts as different from facts; reveal the distance between reality and the presumptions or assumptions on which the majority bases a decision. In this process, if difference is valued, change can occur and bridges can be constructed. But recalcitrant faculty members can refuse to participate in the discourse, reject all information that contradicts their positions, and if they are not made to conform, consensus is destroyed.

Of course, one could argue that nonconformity reestablishes difference and is, therefore, a source of creative energy. But some differences can be debilitating particularly when there is no movement; when you end up spinning your wheels. In the end, what radical individualism creates is the antithesis of community — a kind of coming apart or disintegration into an aggregate of individuals that "could not generate enough internal cooperation to survive."[144]

VI. CONCLUSION

Complexity, diversity, and hegemony are problems that confront institutions of higher education. The problems are present at every level in the hierarchical structure

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143. *See, e.g.*, the discussion of law professors as role models for teaching professionalism and ethics.

> The values we attend to in the classroom are apt to be individualism and autonomy, which we present as the basis for the adversary system, the Bill of Rights, and the standard of proof in criminal cases. We fail to teach our students that lawyering involves responsibility to and for others.

Report of the Professionalism Committee: Teaching and Learning Professionalism, ABA Section Legal Education and Admission to the Bar 14, Aug. 1996 (quoting from Carrie Menkel Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3, 6-8 (1991)). Among the ideals of most professionals is the need to stay current in our field of expertise. In the case of law professors, the "field" is both law and teaching. There are many faculty, however, who would not agree that the absence of knowledge about the methodologies employed by educators is a breach or violation of their ethical responsibilities as law professors.

144. KINGLSEY DAVIS, HUMAN SOCIETY 55 (1966) (chapter describing social norms).

of our institutions. The rifts that separate various segments of the diverse communities from one another have been identified in a number of ways. A rift can be described in terms of structure: power or privilege, supremacy and subordination; or it can be described in ideological terms.

This case study highlights the structural aspects of the social organization of the law school and the relationship of structure to ideology. I assume, for instance, that the students' opposition to hierarchy at Touro will be short lived. It probably will not survive their graduation from law school, and it certainly will not last much beyond their first job offer. But it might last until we move up a tier among law schools or until the current trough in the job market has passed us by. The opposition they mounted was short lived because it was instrumental or strategic.

The students could not really win any contest with the faculty as long as the faculty remained committed to their idea of academic freedom: a form of radical individualism that will not admit of the need for regulation, particularly in the area of grading, in which there is a kind of expectation of privacy. Grading is one of the areas in which faculty have complete and total discretion. The attempts by students to raise fairness issues with respect to their competitive disadvantage fell on deaf ears because the faculty was emotionally committed to the belief that grades are an objective measure of worth; and that the "quality" of the typical Touro student is inferior because Touro is a school of last resort.

The ideological rift has been described by some in terms of the competition between the requirements of liberty and equality.[145] People of color, outsider scholars, and some mainstream scholars as well, have proposed limits on some freedoms.[146] Even those who are thoroughly Eurocentric have to admit that the culture and politics of white North Americans does not comprehend a system in which individual freedom or liberty interests exist without limitation. Liberty is not an absolute right.

The relationship between structure and ideology has been explored in the discussion of the decision making process in a particular law school community, in the consideration of the attributes and the use of power. My role has been that of anthropologist – a witness and a storyteller – who is passionate, not detached and involved rather than distanced from the people and events she recounts. My opposition to the systems of oppression, unlike that of the students, will be life-long. I will remain deeply suspicious of asymmetry, in rhetoric or in the allocation of responsibility. And I will wonder at the fear and overreaction that the mere presence of outsiders and challenges to existing orthodoxies excites among the powerful. I will use the skills that I have as a lawyer and a scholar to make culture visible when it conceals acts of oppression. I will be bound, as I am in this case, to point out to those who disregard the norms and ideals of their own culture that the result is the naked use of power.

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145. See the opinion of Judge Cohn in Doe v. University of Michigan, 721 F. Supp. 852, 853 (E.D. Mich. 1989) ("It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict.").

146. The spirited debate about the limits or expanse of the First Amendment protection of Free speech can be found in MARI MATSUDA, et al., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT (1993); STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH . . . AND ITS A GOOD THING TOO (1994); KATHERINE A. MACKINNON, ONLY WORDS (1993); OWEN M. FISS, THE IRONY OF FREE SPEECH (1996).