Note

FOUR WAYS TO BETTER 1L ASSESSMENTS

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> Studies have shown that the best way to learn is to have frequent exams on small amounts of material and to receive lots of feedback from the teacher. Consequently, law school does none of this.[1]

INTRODUCTION

Before law school, I taught English as a second language for seven years. After teaching for so long, I relished the thought of being a student again, of sitting comfortably and taking notes while someone else stood before the class. I truly enjoyed most aspects of my first year of law school, especially the intellectual challenge and the camaraderie with my classmates. But viewing my law school classes through a teacher's eyes, I could not help but question the wisdom of certain first-year law school practices. The Socratic method, for example, seemed calculated to produce student anxiety rather than to teach law.[2] Also, large classes, often with more than one hundred students, discouraged student participation.[3] But no first-year law school practice perplexed me more than the nearly exclusive use of a single end-of-course exam to measure student

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1. James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1692 (1991).

2. *See* Lawrence S. Krieger, *What We're Not Telling Law Students—And Lawyers—That They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from its Roots*, 13 J.L. & HEALTH 1, 25 (1998–99) ("[T]he Socratic method, particularly if implemented by an abusive professor, can create a law school experience dominated by insecurity, anxiety, and the fear of being shamed in the presence of one's peers.").

3. *See* Barbara Taylor Mattis, *Teaching Law: An Essay*, 77 NEB. L. REV. 719, 721 (1998) ("All students in the classroom need to feel involved, not just the student who is the immediate focus of the professor's attention. This involvement is lost when the number of students is too large.").

performance.[4] Having one test determine a student's entire course grade flew in the face of everything I had learned as a teacher about designing valid, reliable, and pedagogically useful assessments.

Because I am merely a law student who has never practiced or taught law, perhaps it is presumptuous of me to suggest ways to improve first-year law school assessments. On the other hand, learning the law has been compared to learning a foreign language,[5] so maybe my background as a language teacher provides me with a useful perspective on legal education. In any event, I hope that the suggestions I put forth here are taken as intended—as a constructive call for an improved first-year assessment regimen.

This Note argues that law schools should increase the quantity, quality, and variety of first-year assessments. Part I briefly traces the origins of the current first-year assessment system and then considers the barriers to addressing the present system's deficiencies. Part II explains that improving first-year assessments is crucial because first-year grades have a profound impact on student academic and employment prospects. Part II then identifies the serious shortcomings of present first-year assessments both as measures of student performance and as pedagogical devices. Finally, Part III details how to improve the first-year assessment system and explores four ways to ensure that such improvements are actually implemented: reducing class sizes, providing professors with grading assistants, offering professors assessment training, and increasing pressure on law schools to change their assessment practices.

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4. At Duke Law School, when I was a 1L, there were some exceptions to the end-of-course examination system. A few professors gave voluntary practice midterms to afford students an opportunity for feedback prior to taking the final exam. In at least one case, a professor gave a midterm that actually counted for a small percentage of the final course grade. Some professors also reserved the right to alter the final grades slightly based on students' class participation. Finally, the legal research and writing course had four graded assessments (an office memo, a motion memo, an appellate brief, and a research exam). Interim grading, however, was the exception. The legal research and writing grade, for example, accounted for only 10 percent of students' first-year grade point averages. The remaining 90 percent depended entirely, or almost entirely, on end-of-course exam performance.

5. *See, e.g.*, Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1286 (1995) ("Learning the law is like learning . . . . a 'foreign' language . . . . First-year classes in law school have the atmosphere of a Berlitz course; exotic words such as *assumpsit* and *res ipsa loquitur* fill the air, and selected images help acclimate students to the law as a 'foreign' culture." (footnote omitted)).

I. 1L ASSESSMENTS, PAST AND PRESENT

The current practice of using single end-of-course exams to measure first-year law student performance dates back to the late nineteenth century. Prior to that time, law schools typically evaluated their students far more regularly. Thus, this Note's argument for reforming first-year assessments is, in a sense, a call to revive those original law school assessment practices.

A. A Brief History of Law School Assessments

Today, first-year law students typically receive course grades based entirely, or almost entirely, on single end-of-course essay exams.[6] Using a single exam to measure law student performance contrasts markedly with earlier practices at American law schools.[7] From the early- to mid-nineteenth century, students were generally assessed far more frequently than they are today. For example, at the Litchfield Law School, the first professional American law school, students took weekly oral exams.[8] Harvard examined students orally or in writing both weekly and "at the end of each text or topic."[9] Michigan hired recent graduates and young lawyers to oversee daily oral and written examinations.[10] Cornell, Penn, and Columbia combined frequent, often daily, quizzes with more cumulative assessments, such as end-of-term, annual, and graduation exams.[11]

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6. Linda R. Crane, *Grading Law School Examinations: Making a Case for Objective Exams to Cure What Ails "Objectified" Exams*, 34 NEW ENG. L. REV. 785, 786 (2000); Robert C. Downs & Nancy Levit, *If It Can't Be Lake Woebegone . . . A Nationwide Survey of Law School Grading and Grade Normalization Practices*, 65 UMKC L. REV. 819, 822 (1997); Steven Friedland, *A Critical Inquiry into the Traditional Uses of Law School Evaluation*, 23 PACE L. REV. 147, 155 (2002); Douglas A. Henderson, *Uncivil Procedure: Ranking Law Students Among Their Peers*, 27 U. MICH. J.L. REFORM 399, 399 (1994); Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, with a Predictable Emphasis on Law School Final Exams*, 65 UMKC L. REV. 657, 671 (1997); Christopher T. Matthews, Essay, *Sketches for a New Law School*, 40 HASTINGS L.J. 1095, 1104 (1989).

7. The current first-year law school assessment system also differs greatly from undergraduate education, in which course grades are often based on multiple assessments, including "mid-terms, class presentations, take-home exams, group projects, individual feedback, and term papers." Henderson, *supra* note 6, at 399.

8. Sheppard, *supra* note 6, at 665.

9. *Id.* at 666.

10. *Id.* at 670.

11. *Id.* at 671.

In the late 1800s, however, law schools began to use final exams as the sole measure of student performance.[12] At Harvard in the early 1870s, students were for the first time required to pass annual exams to receive their law degrees.[13] This innovation was introduced by Dean Christopher Langdell,[14] who also popularized the case study method.[15] The case method and the sole final exam allowed law professors to teach and evaluate large classes of students—and high student-faculty ratios were financially advantageous.[16] Dean Langdell's economical model was eagerly embraced by other American universities.[17] By the end of the nineteenth century, the use

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12. *See* Friedland, *supra* note 6, at 175 ("In law schools, a tradition of final exams as the sole means of evaluation developed in the late 1800s to help employers distinguish between students.").

13. Sheppard, *supra* note 6, at 672.

14. *See* Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 576 (1991) ("Examinations were not required until the end of the nineteenth century . . . . Langdell led the way by introducing the first written examinations at Harvard. Prior to this time, degrees were conferred on anyone 'who had attended the School a certain number of terms.'" (quoting 2 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 364 (1970))); *see also* Friedland, *supra* note 6, at 174–75 ("Prior to [Dean Langdell's] time, most attorneys still entered the profession through an apprenticeship, rather than formal schooling. The apprenticeship, ironically, was filled with ongoing evaluation and critique. . . . The law schools failed to similarly recognize the importance of critique." (footnotes omitted)).

15. Sheppard, *supra* note 6, at 671; Weaver, *supra* note 14, at 520–21; *see also* Angela McCaffrey, *Hamline University School of Law Clinics: Teaching Students to Become Ethical and Competent Lawyers for Twenty-Five Years*, 24 HAMLINE J. PUB. L. & POL'Y 1, 3 (2002):

> The case method is the primary mode of instruction at many law schools today, particularly in the first year classes. The case method allows students to draw out general legal principles and procedural rules through the process of reading and briefing appellate cases. As they brief cases[,] they develop the ability to determine the relevant and significant facts, the legal issues, the relevant law and how the law was applied by the judge to the facts and issues in the case they are studying.

(footnote omitted).

16. *See* John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 161 (1993) ("Langdell's method enabled the establishment of the large-size class. . . . Langdell in general managed Harvard with one professor for every seventy-five students . . . . The 'Harvard method of instruction' meant that law schools could be self-supporting." (quoting ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 63 (1983))); Panel Discussion, *Knowledge Production in the Legal Academy*, 9 J.L. & POL'Y 335, 341–42 (2001) ("The large class method of instruction is a cheap method of instruction . . . . It has really been a financial decision that has been made for a hundred years, that has created so many of the problems we face today.") (statement of anonymous audience member).

17. *See* Costonis, *supra* note 16, at 161 ("Beset with high-cost, low-return schools and programs, universities were delighted to welcome the low-cost, high-return law school."); Panel Discussion, *supra* note 16, at 341–42 ("The large class method of instruction . . . allows the

of single exams to assess student performance had become widespread among American law schools.[18]

B. Barriers to Changing the Current 1L Assessment System

Despite dissatisfaction among legal scholars and law students,[19] and despite strong support for increasing the number, variety, and quality of first-year assessments,[20] most law schools continue to base student grades primarily on end-of-course essay exams.[21] Law schools have resisted changing the first-year assessment system for many reasons. Perhaps the chief reason is that with first-year class sizes so large,[22] professors simply do not have enough time to grade multiple assessments.[23] Unlike professors in other academic fields, law professors generally do not have student assistants to help them with grading.[24] Even when assistants are available, professors may be reluctant to delegate assessment responsibilities.[25] In addition, law professors seldom receive formal training in constructing assessments, so even were they to have smaller classes, they might lack the

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universities to drain off a huge chunk of law school tuitions, anywhere from ten to forty percent to the university.") (statement of anonymous audience member).

18. Sheppard, *supra* note 6, at 676.

19. *See infra* notes 55–64 and accompanying text.

20. *See infra* notes 65–69 and accompanying text.

21. *See supra* note 6 and accompanying text; *see also* Henderson, *supra* note 6, at 400–01 ("Issues of assessment in law school have troubled deans, administrators, and professors as early as the 1920s. This previous research has resulted in very little innovation. The same practices continue, the same errors arise, and the same disturbing impacts remain." (footnote omitted)).

22. *See* Bethany Rubin Henderson, *Asking the Lost Question: What Is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 64 (2003) ("First-year classes almost uniformly are taught in large sections."); Patricia Mell, *Taking Socrates' Pulse: Does the Socratic Method Have Continuing Vitality in 2002?*, MICH. B.J., May 2002, at 46, 46 ("[F]irst-year class sizes rang[e] from sixty students to more than 100 students . . . ."). Some first-year courses are smaller; in particular, legal writing classes likely have fewer than forty-four students. *See infra* notes 101–02 and accompanying text.

23. *See* Sheppard, *supra* note 6, at 693 ("The exam as the sole method of grading has led to some obvious advantages, particularly in reducing faculty work-load.").

24. *See* Dennis R. Honabach, *Precision Teaching in Law School: An Essay in Support of Student-Centered Teaching and Assessment*, 34 U. TOL. L. REV. 95, 103 (2002) ("We can provide additional teaching assistant support to faculty members to help them implement interim assessments of their students."); Martha C. Nussbaum, *Cultivating Humanity in Legal Education*, 70 U. CHI. L. REV. 265, 273 (2003) (suggesting that enabling instructors to assign papers in basic law courses would require either much smaller class sizes or teaching assistants to help with grading).

25. *See* Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 495 (1989) ("[M]any faculty may be unwilling to delegate their teaching function to teaching assistants . . . .").

expertise needed to design alternatives to the traditional essay exam.[26] Professors may also be concerned that time spent assessing students is time better spent on instruction.[27]

Along with lack of time, support, and training, professors may have several other reasons for adhering to the single end-of-course exam. For example, the "publish-or-perish" mentality that pervades the contemporary legal academy[28] may discourage the use of other, more time-consuming assessment methods. Because law professors' careers advance largely on their publishing records, they may feel compelled to concentrate on scholarship, to the detriment of their responsibilities to students.[29] Alternatively, some professors simply may not recognize flaws in the assessment system because they themselves succeeded within it.[30] Others may view the single end-of-course exam as a form of ritual hazing that previous generations of law students endured and that toughens students being initiated into a demanding profession.[31] Some professors may actually have a more

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26. *See* Crane, *supra* note 6, at 801 ("Law professors receive little, if any, training or guidance for teaching, drafting, and grading exams in other than the 'traditional' ways."); Friedland, *supra* note 6, at 178–79 ("The lack of training in the creation of valid and reliable examinations contributes to the overvaluation of examinations as a measuring device." (footnote omitted)).

27. *See* Friedland, *supra* note 6, at 192 ("Many professors claim that . . . . [t]ime spent on evaluation could be put to good use covering additional cases or analyzing the existing cases in a more comprehensive manner.").

28. *See* Arthur Austin, *The Law Academy and the Public Intellectual*, 8 ROGER WILLIAMS U. L. REV. 243, 254 (2003) (explaining that by 1990, "the ascendancy of a publish or perish requirement was forcing a deluge of manuscripts on the student-run law reviews"); Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 763 (2004) ("Once they are hired, law professors are rewarded primarily for scholarship.").

29. *See* Friedland, *supra* note 6, at 179 ("Time spent on evaluation is time that could be spent on the more highly rewarded activities of teaching and scholarship."); Philip C. Kissam, *Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education*, 60 OHIO ST. L.J. 1965, 1974–75 (1999):

> One consequence of [law schools'] new commitments to research, of course, is the diminished time, if not also the diminished interest, that law faculty have to commit to their teaching. In this environment, the simple replication of case method teaching and traditional examinations, with perhaps even less attention to feedback to students, seems inevitable.

(footnote omitted).

30. *See* Henderson, *supra* note 6, at 405 ("Most law professors are likely to perpetuate the [ranking] system because they experienced the same system and prospered under it.").

31. *See* Lila A. Coleburn & Julia C. Spring, *Socrates Unbound: Developmental Perspectives on the Law School Experience*, 24 LAW & PSYCHOL. REV. 5, 14 (2000) ("Law school may be a kind of middle class military, its hazing rituals viewed as vital strengthening exercises leading to superior preparedness and fitness for life."); Morrison Torrey, *You Call That Education?*, 19

self-serving motive for wishing to retain the current assessment system: students generally evaluate professors before taking final exams[32]—in other words, they grade their professors before the professors grade them. If midterm assessments were given, students unhappy with their scores might submit negative evaluations.[33]

The demands of legal employers may also help explain why end-of-course exams generally serve as the sole measure of student performance. End-of-course exams tend to disaggregate student data, helping employers distinguish among students.[34] In contrast, multiple, varied assessments tend to offset one another,[35] producing less-differentiated distributions of course grades[36] and grade point averages.[37] With many students clustered in the middle of the class,

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WIS. WOMEN'S L.J. 93, 104 (2004) (comparing law professors' subjection of first-year students to the "so-called 'rigors' of the Socratic Method . . . . to the bizarre male bonding experience of fraternity/military hazing: 'I lived through it, and it made a *man* of me!'").

32. Kissam, *supra* note 25, at 495.

33. *Id*.

34. *Id*. at 436.

35. Students are unlikely to score equally well on three assessments—especially if the assessments are of different types. For example, a student who received an A on the first assessment might receive a B– on the second assessment and a B+ on the third assessment. That student, who would have received an A in the course were the grade decided entirely on the basis of the first assessment, would instead receive a B+. Similarly, a student who scored poorly on the first assessment might improve on the second and third assessments. Such a student would thus receive a better final course grade than if the first assessment were also the last.

36. The aggregating effect of having multiple and varied assessments could be offset by a course curve. Take, for example, a course with three equally weighted assessments, in which the highest possible grade on each assessment was an A+ and the lowest possible grade was a C–. If the highest-scoring student in the course received one A+, one A, and one A–, that student's final grade, calculated by averaging the three scores, would be an A. In the same way, if the lowest-scoring student received one C+, one C, and one C–, that student's final grade would be a C. But if an A+ to C– curve were then imposed on these averaged grades, the highest-scoring student in the course would receive an A+ course grade and the lowest-scoring student would receive a C–.

37. Class ranking is likely to offset the aggregating effect of having multiple and varied assessments because it tends to exaggerate the differences among students with similar grade point averages. *See* Kif Augustine-Adams et al., *Pen or Printer: Can Students Afford to Handwrite Their Exams?*, 51 J. LEGAL EDUC. 118, 121 (2001) ("Because the largest group of students tends to cluster around the median, a 0.1 difference in a student's overall first-year grade point average can make a significant difference in his rank within the class."). For example, a student at the University of Utah S.J. Quinney College of Law with a grade point average of 3.31 ranks in the top 25 percent of the class, whereas a student with a grade point average of 3.12 ranks only in the top 50 percent. BCG ATTORNEY SEARCH, BCG GUIDE TO CLASS RANKINGS: UNIVERSITY OF UTAH 189 (2003), *available at* http://www.bcgsearch.com/crc/book/utah.html. Although these students' grade point averages are less than two-tenths of a point apart, the top 25 percent student might appear twice as talented as the top 50 percent student.

employers would have more difficulty making hiring decisions.[38]

Finally, both the way that law schools are ranked and the nature of the bar exam may contribute to the entrenchment of end-of-course exams. Because law school rankings either ignore teaching quality altogether[39] or purport to measure it without accounting for assessment quality,[40] law schools may feel little pressure to improve the current assessment regimen. To the contrary, the obligation to prepare students for the bar may impose pressure on law schools to provide experience in taking high-stakes exams.[41]

II. DRAWBACKS OF THE CURRENT 1L ASSESSMENT SYSTEM

Current first-year assessments are both poor measures of student performance and poor pedagogical tools. These shortcomings are especially unfortunate given the tremendous impact that first-year grades have on law students' academic and employment opportunities.

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38. Making it more difficult for employers to distinguish among students probably benefits students. If many students were clustered in the middle of the class, employers would be forced to look to factors arguably more important than grade point averages, such as students' work and volunteer experiences prior to law school, writing samples, and intellectual and personal qualities that emerge during interviews.

39. *See, e.g.*, Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 56 n.281 (2002) ("U.S. NEWS & WORLD REPORT'[s] rankings . . . do not consider quality of teaching as a factor worth evaluation."); *see also infra* notes 140–41 and accompanying text.

40. *See, e.g.*, ERIC OWENS ET AL., THE PRINCETON REVIEW: BEST 117 LAW SCHOOLS 46, 55 (2005 ed. 2004) (ranking law professors based on how interesting and accessible they are).

41. Kissam, *supra* note 25, at 463. Still, it is not clear that students need to practice taking high-stakes exams during law school. For one, bar review courses provide students with opportunities to take simulated bar exams. *See, e.g.*, BAR/BRI Bar Review, BAR/BRI's Bar Review Workshops, *at* http://www.barbri.com/states/nc/mbe/workshops.shtm (last visited May 10, 2005) (on file with the *Duke Law Journal*) (describing a workshop that includes a simulated multistate bar exam administered under actual, timed conditions). Moreover, bar exams may be just as invalid and unreliable as law school exams, and for many of the same reasons. *See generally, e.g.*, Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363 (2002) (criticizing the bar exam for testing skills unrelated to legal practice). Rather than tailoring law school exams to deficient bar exams, law schools should model excellent assessment practices while simultaneously advocating for bar exam reform.

A. The Importance of 1L Grades

An assessment is "valid" if it "accurately reflect[s] the knowledge, ability or other construct" that it is designed to measure.[42] It is "reliable" if "the same students, taking the test multiple times with no change in preparation, receive corresponding scores."[43] Because first-year law school assessments are invalid and unreliable measures of student performance,[44] inevitably some students receive grades that do not reflect their efforts and abilities. This might be only a minor concern were it not for the extremely high importance placed on first-year grades.

Students with good first-year grades are more likely to receive summer clerkships with prestigious law firms,[45] and these clerkships generally lead to offers of full employment after graduation.[46] Given

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42. Arthur L. Coleman, *Excellence and Equity in Education: High Standards for High-Stakes Tests*, 6 VA. J. SOC. POL'Y & L. 81, 104 (Fall 1998).

43. *Id.* at 105 n.77.

44. *See* Friedland, *supra* note 6, at 177 ("[T]he single essay final examination is invalid, unreliable, and even 'anti-educational.'"); Henderson, *supra* note 6, at 407:

> The process of ranking students in law school is centered on an outdated, untested, largely invalid measure: the single end-of-term essay exam. Judged by the standards of established psychometric theory, the law school essay is neither precise nor accurate—both of which are necessary foundations of validity. At times the essay leads to biased results, in other instances the essay produces something closer to random results. In few circumstances, however, does the essay produce a reliable reflection of student understanding.

(footnotes omitted); *see also infra* Part II.B.1.

45. *See* Roger C. Cramton, *The Current State of the Law School Curriculum*, 32 J. LEGAL EDUC. 321, 329 (1982) ("First-year grades control the distribution of goodies: honors, law review, job placement, and, because of the importance placed on these matters by the law-school culture, even the student's sense of personal worth."); Mark A. Godsey, *Educational Inequalities, the Myth of Meritocracy, and the Silencing of Minority Voices: The Need for Diversity on America's Law Reviews*, 12 HARV. BLACKLETTER L.J. 59, 61 n.7 (1995) ("Law firms and corporate law departments in every major city screen job applicants on the basis of first-year law school grades and membership in law reviews . . . ." (quoting John G. Ives, *Questionable Role of Law Reviews in Evaluating Young Lawyers*, N.Y. TIMES, Mar. 22, 1981, at E18)).

Even small differences in grade point average can lead to significant differences in second-summer job opportunities. *See* William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975, 982 (2004) ("[N]umerous academic and career opportunities often hinge on relatively small variations in law school grades . . . .").

46. Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 898 (1995); Amanda DeVincentis, Note, *Navigating the Borders: A Proposal for General Civility Legal Ethics on Sexual Harassment*, 13 GEO. J. LEGAL ETHICS 521, 522 (2000); *see Summer Associates See Slight Thaw in Hiring: Survey Also Shows Uptick in Number of Permanent Spots Offered by*

the high cost of legal education,[47] many students feel tremendous pressure to secure well-paid employment to pay back large loans.[48] Even students who choose to bypass the lucrative large-firm jobs and apply for summer internships with government and public interest employers may find that good first-year grades are essential, especially for the most highly coveted positions.[49] Indeed, law professors themselves are hired, in part, on the basis of their first-year law school grades.[50]

First-year grades may also factor heavily in determining which students receive such honors as membership on law reviews and moot court.[51] The continuation of merit-based scholarships for the second

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Firms, NAT'L L.J., Apr. 18, 2005, at 6 (reporting the results of a survey of 478 law firms nationwide conducted by the National Association for Law Placement, which found that 91 percent of 2004 summer associates received offers of full-time employment following graduation).

47. For the 2004–05 academic year, tuition and fees at thirty-three private law schools exceeded thirty thousand dollars. U.S. NEWS & WORLD REPORT, AMERICA'S BEST GRADUATE SCHOOLS 2006: COMPLETE GUIDE TO LAW SCHOOLS: WHO'S THE PRICIEST? WHO'S THE CHEAPEST?: PRIVATE SCHOOLS, *at* http://www.usnews.com/usnews/edu/grad/webextras/brief/sb_law_cost_private_brief.php (last visited May 10, 2005) (on file with the *Duke Law Journal*). Seven public law schools also charged tuition and fees of over thirty thousand dollars to their out-of-state students. U.S. NEWS & WORLD REPORT, AMERICA'S BEST GRADUATE SCHOOLS 2006: COMPLETE GUIDE TO LAW SCHOOLS: WHO'S THE PRICIEST? WHO'S THE CHEAPEST?: PUBLIC SCHOOLS, *at* http://www.usnews.com/usnews/edu/grad/webextras/brief/sb_law_cost_public_brief.php (last visited May 10, 2005) (on file with the *Duke Law Journal*). Once room and board, books, and other expenses are included, even the in-state students at the country's cheapest law school, the University of Wyoming, paid $17,255. *Id.*

48. *See* John E. Moye, *Colorado Bar Association President's Message to Members: To Borrow is Necessary, to Forgive, Divine*, COLO. LAW., Mar. 2003, at 31, 31 ("Law school debt prevented 66 percent of student respondents from considering a public interest job or government job.") (quoting Equal Justice Works et al., *Paper Chase to Money Chase, Law School Debt Diverts Road to Public Service*, *at* http://www.equaljusticeworks.org/choose/lrapsurvey.php (last visited May 10, 2005) (on file with the *Duke Law Journal*)).

49. *See* Bryant G. Garth, *Noblesse Oblige as an Alternative Career Strategy*, 41 HOUS. L. REV. 93, 99 (2004) ("Most lawyers would admit that there are relatively few attractive and prestigious public interest positions, and they are quite difficult to obtain."); *see also, e.g.*, U.S. Department of Justice, Summer Law Intern Program: Frequently Asked Questions, *at* http://www.usdoj.gov/oarm/arm/sp/spfaqs.htm#a (last modified June 2, 2004) (on file with the *Duke Law Journal*) (explaining that the Department considers a candidate's academic achievement and membership on law review and moot court, among other factors).

50. *See* Schuwerk, *supra* note 28, at 762 ("Law professors are a self-perpetuating elite, chosen in overwhelming part for a single skill: the ability to do well consistently on law school examinations, primarily those taken as 1L's . . . .").

51. *See* Downs & Levit, *supra* note 6, at 819 ("Grades will buy a spot on the dean's list, membership in honor fraternities, enrollment in specialized classes and programs, and a place on the law journal staff." (quoting Steve H. Nickles, *Examining and Grading in American Law Schools*, 30 ARK. L. REV. 411, 411–12 (1977)); Friedland, *supra* note 6, at 153 ("Evaluations

and third years of law school may be tied to first-year grades.[52] Finally, students who perform poorly on first-year exams may find themselves on academic probation or even dismissed from law school altogether.[53] Given the crucial importance of first-year grades, improving first-year assessments is imperative.[54]

B. Current 1L Assessments Are Invalid, Unreliable, and Pedagogically Suspect

A single end-of-course exam is unlikely either to accurately measure student performance or to serve as a useful teaching tool.

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create the successful student, the one invited for further honor and attention through law review, the one who will work for professors and judges, and the one who will obtain the most competitive jobs."); Henderson, *supra* note 6, at 406 ("Law review membership generally depends at least seventy percent on grades."); Kissam, *supra* note 25, at 463 ("Law school grades and class ranks are used to select students for the law school's prestigious extracurricular activities such as law review, moot court programs, and clinic directorships."); *see, e.g.*, *Duke Law Journal,* Information for Prospective Editors, *at* http://www.law.duke.edu/journals/dlj/jinfoForProspEd.html (last visited May 10, 2005) (on file with the *Duke Law Journal*) (explaining that eighteen of twenty-seven members are chosen annually either wholly or partly on the basis of first-year grades); *Houston Law Review*, About the Review, *at* http://www.houstonlawreview.org/about.html (last visited May 10, 2005) (on file with the *Duke Law Journal*) ("One way to obtain membership is by grading on. . . . Another way to become a member . . . is to write on during the annual Write-On Competition. This competition is open to all students who have completed their program's first-year requirements . . . and [are] in the top 30% of the student's class.").

52. *See* Downs & Levit, *supra* note 6, at 819 ("[G]rades often are important in the determination of which students receive scholarships or other forms of financial aid."); *see, e.g.*, Baylor Law School, Scholarships at Baylor Law School, *at* http://law.baylor.edu/FinancialAid/law_scholarships.htm (last visited May 10, 2005) (on file with the *Duke Law Journal*) ("The initial scholarship is awarded for the student's first three quarters of law school. Importantly, these scholarships are renewable at the same level, as long as the student maintains a 2.75 GPA or above."); BROOKLYN LAW SCHOOL OFFICE OF FINANCIAL AID, HOW TO FINANCE YOUR LEGAL EDUCATION: A FINANCIAL AID HANDBOOK FOR BROOKLYN LAW SCHOOL STUDENTS 27 (2005–06) ("[O]riginal merit scholarships are renewable for each subsequent year of enrollment, provided that the students maintain a cumulative academic rank within the upper 33% of their graduating class . . . ."), *available at* http://www.brooklaw.edu/financialaid/howtofinance.pdf.

53. *See* Downs & Levit, *supra* note 6, at 819 ("Dismissals for academic deficiency depend solely on grades."); *see, e.g.*, University of Missouri-Kansas City School of Law, Scholastic Probation and Dismissal, *at* http://www1.law.umkc.edu/academic/ScholasticProbation.htm (last modified Oct. 14, 2004) (on file with the *Duke Law Journal*) ("A student who obtains a grade-point average below 1.8 in his/her first semester will be automatically dismissed from law school. . . . A student will be placed on academic probation if his/her cumulative grade-point average falls below 2.0.").

54. *See* Downs & Levit, *supra* note 6, at 820 ("Given the overwhelming importance of grades in determining professional success and influencing personal esteem . . . , it is essential that law schools design grading systems that are scrupulously fair.").

1. *Current 1L Assessments Are Poor Measures of Student Performance.* The single end-of-course exam is an invalid and unreliable measure of student performance.[55] With only one opportunity to demonstrate achievement, students who do not perform to the best of their abilities on an exam have no second chance to improve.[56] Also, when one assessment determines an entire course grade, many students experience significant stress that hampers their performance.[57] Another problem with the current assessment system is that there is typically only one type of assessment—an essay exam.[58] As a result, students who perform better on other types of assessments, such as papers and oral presentations, may receive lower grades than their overall abilities merit.[59]

In addition to being objectively poor measures of student performance, end-of-course exams also lack "face validity"[60] with students. Students may lose faith in an assessment system when they notice that their grades, and those of their peers, vary considerably, and inexplicably, from one course to the next.[61] Indeed, the

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55. *See supra* note 44 and accompanying text.

56. *See* Downs & Levit, *supra* note 6, at 823 ("A one-shot examination highlights inaccuracies in evaluation that may result from student illness or personal troubles, or imbalances between student coverage and selective testing."); Friedland, *supra* note 6, at 195 ("A sufficiently large number of tests serve to promote validity by decreasing the likelihood that a single, end-of-the-course exam excluded or distorted appropriate test topics. Multiple evaluations also minimize the likelihood of students suffering from an 'off-day' during testing." (footnote omitted)).

57. Sheppard, *supra* note 6, at 693–94; *see* Schuwerk, *supra* note 28, at 777–78 (listing the fact that "[t]he entire grade for the course rides on a single final examination" as one factor that heightens student anxiety); *see also* Henderson, *supra* note 6, at 424 ("The law school experience has been described as a 'trauma,' with law students receiving significant psychiatric counseling because of anxieties related to examinations and grades relative to students in other professional schools, including medical school." (footnote omitted)).

58. *See supra* note 6 and accompanying text.

59. *See* Kissam, *supra* note 29, at 2009 ("[L]aw students have diverse learning styles, backgrounds, perspectives, interests, and talents, and the case method/final examination practices barely recognize this diversity. Instead, they tend to impose a fundamentally homogenous analytical, rapid-response, nondeliberative method upon everyone.").

60. *See* ARTHUR HUGHES, TESTING FOR LANGUAGE TEACHERS 33 (2d ed. 2003):

> A test is said to have face validity if it looks as if it measures what it is supposed to measure. . . . A test which does not have face validity may not be accepted by candidates, teachers, education authorities or employers. . . . [T]he candidates' reaction to it may mean that they do not perform on it in a way that truly reflects their ability.

61. *See* Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 881 (1985) (relating their law students' tales of how they "followed the same approach to every course but

perception that the assessment system is so deeply flawed leads students to circulate myths, often only half-jokingly, about professors' arbitrary methods of assigning course grades.[62] The perceived arbitrariness of first-year law school grades leads many students to believe "that harder work will [not] produce higher grades."[63] Often, it also leads to resentment: in at least one case, a student actually sued her law school over grades that she deemed unfair.[64]

2. *Current 1L Assessments Are Poor Pedagogical Tools.* In addition to poorly measuring student performance, the single end-of-course exam leaves much to be desired as a teaching tool. Educational research suggests that frequent assessments throughout a course increase academic achievement by affording professors more opportunities to provide valuable feedback to students.[65] More

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got wildly inconsistent grades"). In the spring of 2004, a classmate and I conducted an anonymous survey of our fellow second-year law students that provides further anecdotal evidence that first-year assessments lack face validity. The survey was designed to measure, among other things, the extent of student satisfaction with first-year grades and the range of first-year grades that individual students received. Forty-five percent of the students who completed the survey felt that their first-year grade point averages were either "somewhat lower" or "significantly lower" than their talents and efforts deserved, whereas 7 percent felt that their first-year grade point averages were "somewhat higher" than they deserved. The remaining 47 percent believed that their grade point averages were "about what" they deserved. The mean difference between these students' highest and lowest first-year grades was nearly a full grade point, with several students reporting a difference of nearly two grade points.

62. *See, e.g.*, Thomas D. Griffith, *Dave Carroll: A Special Friend and Colleague*, 67 S. CAL. L. REV. 3, 4 n.2 (1993) (describing a mythical grading technique, the "staircase method," in which higher grades are assigned to those exams that land on the higher steps); Kevin H. Smith, *"X-File" Law School Pedagogy: Keeping the Truth Out There*, 30 LOY. U. CHI. L.J. 27, 73 n.57 (1998) (explaining an alternate version of the "stairs" method, in which a professor tosses the exams down a flight of stairs, and the ones that fall further down the staircase are awarded higher grades because they are "weightier").

63. Kissam, *supra* note 25, at 477; *see* Henderson, *supra* note 6, at 399 ("[L]aw students often complain that, 'Grades [are] almost totally arbitrary—unrelated to how much you worked, how much you liked the subject, how much you thought you understood going into the exam, and what you thought about the class and the teacher.'" (second alteration in original) (quoting Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 600 (1982))).

64. *See* Susan M. v. N.Y. Law Sch., 557 N.Y.S.2d 297, 300 (1990) (rejecting a law student's challenge to her dismissal for academic deficiency).

65. *See* Downs & Levit, *supra* note 6, at 823 ("A single examination followed by a course grade prevents professors from giving students repeated feedback, which many theorists say is essential to deep learning."); Henderson, *supra* note 6, at 412 ("Learning theory suggests that reflection on the subject matter—and better yet, periodic assessment combined with reflection—provides essential feedback for the learning process."); *see also id.* at 403–04 ("[B]ecause anonymous grading is the norm, and professors generally do not conduct postmortems on grades or exams with either students or administrators, law school grades do

frequent assessments also increase student motivation and effort.[66] When course grades are derived from a single final exam, "the 'prize' of good grades at the end of the year is probably too remote for many law students to use as a motivation to full application throughout the school year."[67] Finally, because typical law school essay exams emphasize certain skills (i.e., issue spotting and legal analysis),[68] students may fail to develop other skills (e.g., interviewing and researching) that may be equally important to the practice of law.[69]

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not help to render feedback to anyone." (footnote omitted)); Kissam, *supra* note 25, at 471 ("Law students receive little feedback about their performance on law school examinations, and they receive almost no feedback about how they might be able to spot issues, specify rules, and apply rules more effectively and more quickly on future examinations."); Sheppard, *supra* note 6, at 681 ("[P]rofessors still very rarely provide feedback or evaluation of the final examination essay. Indeed, in many schools, return of the students' examination answers to the students is rare."); Torrey, *supra* note 31, at 98–99 ("[S]tudents receive no feedback, except at the student's initiative to review graded exams after a course has ended."); Matthews, *supra* note 6, at 1104:

> Having just one opportunity to demonstrate one's worth, after the completion of the study, prevents the test from providing any educational feedback. Since each course is a discrete event, and each professor an idiosyncratic judge, students find there is nothing to take from one test to another besides a pen.

66. *See* Henderson, *supra* note 6, at 412 ("Educational research indicates that frequent examinations increase motivation, reduce test anxiety, increase facility with course material, and stimulate student efforts. Infrequent examination *is* an admission that testing is used only to assess the scholastic 'progress' of students, rather than to maximize the instructional possibilities." (footnote omitted)).

67. *Id.* at 415 (quoting Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 123 (1968)).

68. *See id.* at 409:

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

(footnote omitted); Daniel Keating, *Ten Myths About Law School Grading*, 76 WASH. U. L.Q. 171, 172 (1998) ("While law school tests attempt to measure issue-spotting and legal analysis—two skills that are certainly important to the practice of law—real law practice generally allows a lawyer the luxury to ruminate on a client's problem for more than just three hours.").

69. *See* Lawrence M. Grosberg, *Should We Test for Interpersonal Lawyering Skills?*, 2 CLINICAL L. REV. 349, 365 (1996):

> [T]raditional written exams do not assess the skills of interviewing or counseling a client, negotiating with an adversary, or cross-examining a witness. They do not address the important skill of problem-solving. Nor do they typically call for the drafting of various kinds of documents that lawyers are called upon to prepare, such as motions or opinion letters or statutes.

Keating, *supra* note 68, at 172 ("[F]actors such as interpersonal skills, perseverance, rain-making, and attention to detail—all of which are crucial to the success of any lawyer—are either not measured effectively or at all by law school exams."); Adam G. Todd, *Exam Writing as Legal Writing: Teaching and Critiquing Law School Examination Discourse*, 76 TEMP. L. REV. 69, 72 (2003) ("There is a multiplicity of skills not assessed on a blue book exam that can be

III. A BETTER FIRST-YEAR ASSESSMENT SYSTEM

To improve the validity, reliability, and pedagogical utility of the first-year law school assessment system, law schools should increase the number, variety, and quality of first-year assessments. Barriers to implementing such an improved assessment system can be overcome by reducing class sizes, providing professors with grading assistants, offering professors assessment training, and increasing pressure on law schools to change their assessment practices.

A. Making 1L Assessments More Valid, Reliable, and Pedagogically Sound

The nearly exclusive reliance on single end-of-course essay exams in the first year of law school should end. Each first-year course should, instead, have an increased number, variety, and quality of assessments.

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found in outstanding lawyers in practice. Key skills such as the ability to counsel troubled clients, negotiate favorable settlements, and be persuasive to a jury are not assessed.").

Students do have opportunities to develop some of these skills in first-year legal writing and in some upper-class courses. However, legal writing courses are generally devalued, so students often put little energy into developing their legal writing skills. *See* Lisa Eichhorn, *The Legal Writing Relay: Preparing Supervising Attorneys to Pick Up the Pedagogical Baton*, 5 LEGAL WRITING 143, 147–48 (1999):

> Students, who are keener observers of politics than many might believe, notice that their Contracts instructor is a "Professor," while their legal writing teacher is an "Instructor." Their Contracts professor's office is also probably bigger than the office of their legal writing instructor (if the instructor is lucky enough to have her own office at all). The Contracts course meets for a full six hours over the course of a year, while Legal Writing carries only four credits. All of these factors send a message to students: Legal writing is not as important as other courses. Thus, when time is scarce, as it always is in law school, students will spend their precious hours on courses that appear to be more important and give short shrift to those that the law school does not seem to have invested in.

(footnotes omitted). Moreover, popular upper-class courses, which generally have large enrollments, tend to use single end-of-course essay exams. *See* Paul T. Wangerin, *"Alternative" Grading in Large Section Law School Classes*, 6 U. FLA. J.L. & PUB. POL'Y 53, 53 (1993):

> An overwhelming amount of anecdotal evidence indicates that the vast majority of American law school teachers use a grading system in their large section, substantive law courses—i.e. their non-writing, non-clinical courses—that [employs] a single, end-of-the-term final exam, an exam that generates the entire grade for the course.

Also, the upper-class law school curriculum consists almost entirely of elective courses. David Thomas, *The Law School Rankings Are Harmful Deceptions: A Response to Those Who Praise the Rankings and Suggestions for a Better Approach to Evaluating Law Schools*, 40 HOUS. L. REV. 419, 437 (2003). Thus, students can obtain law degrees having taken few courses that assess non-exam skills. Finally, upper-class grades are less important than first-year grades. *See supra* Part II.A. Therefore, even when upper-class students do take non-exam courses, they may apply themselves less rigorously than they do in their exam courses; these students thus may fail to fully develop the legal skills that exams do not assess.

1. *Number of Assessments.* Although no specific number of assessments would guarantee a valid, reliable, pedagogically sound assessment system, first-year law students should probably be evaluated a minimum of three times per course, and no single assessment should count for more than half of the course grade. Having three assessments would afford students two chances to improve, and because no particular assessment would determine the course grade, it could reduce their anxiety as well.

Of course, professors could choose to assess their students more than three times per course. As a secondary school teacher, I assessed my students on a nearly daily basis, awarding grades for homework assignments, class participation, quizzes, tests, papers, group projects, and oral presentations. Daily assessment would likely be overkill in a law school setting in which, presumably, students have highly developed study skills and so do not need a teacher constantly checking to make sure that they are staying current with the material. But weekly assessments might be appropriate in law school courses; professors could combine frequent, short assignments that each constitute a small part of the grade with a few longer assignments that are each worth a larger part of the grade.[70] Although the precise number might vary, having between three and a dozen assessments would provide students with sufficient feedback to improve and sufficient opportunity to demonstrate that improvement.

2. *Variety of Assessments.* If each first-year course had at least three assessments, it would increase the validity, reliability, and pedagogical value of the assessment system as a whole. But simply asking students to take two short midterm essay exams and one long final essay exam would constitute only a half measure. That is, students would benefit from the multiple opportunities to demonstrate their essay exam competence and would become more adept at issue spotting and legal analysis, but they would not have the chance to develop, and exhibit their competencies in, other important skills. Among these skills are interviewing; researching; negotiating; making oral arguments; preparing memos, motions, and briefs; and drafting and revising legal documents (e.g., contracts, leases, wills,

70. *See* Friedland, *supra* note 6, at 195 ("Evaluation in law school would better serve its function as a measuring device if it were utilized early and often, including during the main body of a course. . . . The multiple evaluations do not have to be equivalent to several whole final examinations, but can constitute shorter tests or quizzes." (footnote omitted)).

statutes).[71] Teaching and evaluating such practical skills in first-year doctrinal courses[72] will help students develop authentic lawyering abilities.[73] Therefore, just as each course should have a minimum of three assessments, each course should also, ideally, have at least three different types of assessments. Further, because lawyers must communicate both orally and in writing,[74] at least one assessment should be oral (e.g., interviewing, negotiating, arguing) and at least one should be written (e.g., preparing memos, drafting contracts, writing essay exams).

Even within the confines of the traditional essay exam, authentic skills can be developed more effectively. For example, although many professors insist on giving closed-book exams,[75] practicing lawyers regularly consult sources when tackling legal issues.[76] Open-book exams, then, are probably more authentic than closed-book exams.[77] The time pressure of typical law school exams is also rather

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71. *See* Costonis, *supra* note 16, at 177 (listing the MacCrate Report's inventory of ten "fundamental skills" for lawyers, which are "problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas").

72. For a discussion of why teaching and evaluating practical lawyering skills only in first-year legal writing and in upper-class courses will not ensure that students develop authentic lawyering skills, see *supra* note 69.

73. *Cf.* HUGHES, *supra* note 60, at 17 ("[Language testing tasks] should be as authentic as possible. The fact that candidates are aware that they are in a test situation means that the tasks cannot be really authentic. Nevertheless every effort is made to make them as realistic as possible.").

74. *See* Danielle C. Istl, *The Law School Experience: Staying Grounded and Enjoying the Journey*, 80 U. DET. MERCY L. REV. 485, 489 (2003) ("Few would disagree that oral and written communication skills are the number one skills lawyers require and employers look for.").

75. *See* Paul T. Wangerin, *The Problem of Parochialism in Legal Education*, 5 S. CAL. INTERDISC. L.J. 441, 453 (1997) ("Most law school teachers . . . give closed book, issue-spotting essay exams.").

76. *See* Ethan Katsh, *Law in a Digital World: Computer Networks and Cyberspace*, 38 VILL. L. REV. 403, 418 (1993) ("Lawyers researching legal problems consult books, electronic sources and other lawyers.").

77. *Cf.* Curcio, *supra* note 41, at 374 (criticizing the closed-book format of the Multistate Bar Exam as "mak[ing] no sense, since it certainly is unnecessary to memorize legal rules in order to understand them").

Timed, closed-book exams may also hurt female and minority students. *See* Mary Becker, *Questions Women (and Men) Should Ask When Selecting a Law School*, 11 WIS. WOMEN'S L.J. 417, 423 (1997) (citing an unpublished study that found "some evidence that women do better on open-book than closed-book in-class exams and that women do especially well on take-home exams"); Henderson, *supra* note 45, at 983 (announcing the results of a study that "found limited preliminary evidence that the performance gap between white and minority students may be smaller on take-home exams and papers than on in-class exams").

inauthentic; although lawyers may occasionally need to provide quick answers,[78] they generally have more than a few hours to consider legal problems.[79] Professors should therefore consider allowing students to take their exams home[80] and work on them for several days or even several weeks.[81]

3. *Quality of Assessments.* Not only is it crucial that each first-year course employ numerous and varied assessments, but each individual assessment must be of high quality; each assessment, standing alone, should be valid, reliable, and pedagogically beneficial. For assessments to be valid, they must have "content validity,"[82] "criterion-related validity,"[83] and face validity.[84] Assessments are reliable[85] when they properly account for such concepts as "the

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78. *See* Henderson, *supra* note 45, at 1035:

> Time is certainly relevant in the legal profession. Lawyers bill by the hour. They are also occasionally pressed by clients to provide immediate legal advice over the phone without the benefit of any research or reflection. An objection to an evidentiary issue cannot be the subject of an appeal unless it has been *timely* raised before the trial court. Similarly, appellate judges pride themselves on raising novel and unexpected issues during oral argument.

(footnote omitted).

79. Keating, *supra* note 68, at 172; *see* Henderson, *supra* note 45, at 982 ("[I]t could certainly be argued that papers and take-home exams are a much closer analogue to the practice of law, in terms of both time pressure and the creation of a final work product that might be relied upon by a client, another lawyer, or a court.").

80. *See* Ruth Colker, *Teaching From a Feminist Perspective: An Occupational Hazard?*, 1 VA. J. SOC. POL'Y & L. 153, 169 (1993) ("I have always preferred [giving] take-home exams because they don't have the false time pressures of an in-class exam."). Take-home exams do raise concerns about unauthorized student collaboration and other forms of cheating. Kissam, *supra* note 29, at 2011. Such concerns can be addressed, in part, through the use of student honor codes. *Id.*

81. *See, e.g.*, Douglas R. Haddock, *Collaborative Examinations: A Way to Help Students Learn*, 54 J. LEGAL EDUC. 533, 533 (2004) (describing the author's attempts to craft law school assessments that "change the testing process from a three-hour essay and short-answer exam to a more creative and educational exercise that occurs over a period of several weeks").

82. *Cf.* HUGHES, *supra* note 60, at 26 ("A test is said to have content validity if its content constitutes a representative sample of the language skills, structures, etc. with which it is meant to be concerned.").

83. Criterion-related validity "relates to the degree to which results on the test agree with those provided by some independent and highly dependable assessment of the candidate's ability. This independent assessment is thus the criterion measure against which the test is validated." *Id.* at 27.

84. *Id.* at 33; *see supra* note 60 and accompanying text.

85. Hughes catalogued several ways that teachers can make tests more reliable, including increasing the number of questions on each test; "exclud[ing] items which do not discriminate well between weaker and stronger students"; writing unambiguous questions; "provid[ing] clear and explicit instructions"; "ensur[ing] that tests are well laid out and perfectly legible";

reliability coefficient,"[86] "the true score"[87] and "the standard error of measurement,"[88] and "scorer reliability."[89] Assessments benefit teaching and learning when they have a salutary "backwash" effect.[90] How to construct high-quality individual assessments is beyond the scope of this Note, but law schools should ensure that professors are given opportunities to develop such expertise.[91]

4. *Examples of Better 1L Assessments.* Professors who teach first-year doctrinal courses should replace or supplement traditional

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"mak[ing] candidates familiar with format and testing techniques"; "provid[ing] detailed scoring key[s]"; "train[ing] scorers"; "identify[ing] candidates by number, not name"; and employing at least two independent scorers for each assessment. HUGHES, *supra* note 60, at 44–50.

86. *Id.* at 39 ("[Reliability coefficients] allow us to compare the reliability of different tests. The ideal reliability coefficient is 1. A test with a reliability coefficient of 1 is one which would give precisely the same results for a particular set of candidates regardless of when it happened to be administered."). Although there is no precise minimum acceptable reliability coefficient for a particular assessment, "[the more important] the decisions that are to be taken on the basis of the test . . . [,] the greater the reliability we must demand." *Id.* at 39. Because first-year law school grades largely determine academic and employment success, *see supra* Part II.A, first-year law school assessments should have particularly high reliability coefficients.

87. *Cf.* HUGHES, *supra* note 60, at 40:

> [I]t is possible to estimate how close a person's actual score is to what is called their "true score". Imagine that it were possible for someone to take the same language test over and over again, an indefinitely large number of times . . . . If we had all these scores we would be able to calculate their average score . . . . It is this score, which for obvious reasons we can never know for certain, which is referred to as the candidate's *true score*.

88. *See id.* at 40–41:

> We are able to make statements about the probability that a candidate's true score (the one that best represents their ability on the test) is within a certain number of points of the score they actually obtained on the test. In order to do this, we must first know the *standard error of measurement* of the particular test. The calculation of the standard error of measurement is based on the reliability coefficient and a measure of the spread of all the scores on the test (for a given spread of scores, the greater the reliability coefficient, the smaller will be the standard error of measurement).

89. *See id.* at 43:

> It is possible to quantify the level of agreement given by the same or different scorers on different occasions by means of a scorer reliability coefficient . . . . In the case of [a] multiple choice test . . . , the scorer reliability coefficient would be 1 [because the] scoring requires no judgment . . . . But when a degree of judgment is called for on the part of the scorer . . . , perfect consistency is not to be expected. . . . While the perfect reliability of objective tests is not obtainable in subjective tests, there are ways of making it sufficiently high for test results to be valuable.

90. *See id.* at 53 ("Backwash is the effect that tests have on teaching and learning."); *see also id.* at 53–56 (listing several ways that teachers can ensure that their tests promote beneficial backwash, including: "[testing] the abilities whose development [they] want to encourage," "[sampling] widely and unpredictably," "[making] testing criterion-referenced," and "[ensuring that] the test is known and understood by students and teachers").

91. *See infra* Part III.B.3.

end-of-course essay exams with more, different, and better assessments. For example, Civil Procedure students could work in groups to draft complaints.[92] Property students could solve rule against perpetuities problems and then present their solutions to the class. Criminal Law students could write office memos on conspiracy issues. Torts students could work in pairs to interview mock car accident victims; the pairs could then use what they learned in the interviews to argue negligence claims. Contracts students could draft legally enforceable covenants not to compete.[93] Constitutional Law students could debate equal protection claims.

These assessment activities—drafting complaints and contracts, arguing claims, writing memos, solving and presenting problems—are just a few of the alternatives to taking traditional essay exams. No doubt, creative professors could devise many more excellent evaluations. Indeed, some professors are already employing innovative assessments in their smaller upper-class courses.[94] By increasing the number, variety, and quality of their assessments, these professors are crafting more valid, reliable, and pedagogically valuable assessment systems.

B. Four Ways to Institute a Better 1L Assessment System

Although law professors and administrators might like to increase the number, variety, and quality of first-year assessments,[95]

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92. This example is taken from an exercise that Professor Catherine Fisk assigns to her first-year Civil Procedure students at Duke University School of Law. *See* Duke Univ. Sch. of Law, Courses: Civil Procedure: Syllabus, *at* http://www.law.duke.edu/curriculum/coursehomepages/Fall2004/110_02/syllabus.html (last visited May 10, 2005) (on file with the Duke Law Journal) (explaining that the complaint exercise is required but is not graded).

93. *See* Henderson, supra note 22, at 77 ("[A] course in contracts could include students' drafting a contract for an actual (or simulated) client.").

94. One upper-class course offering innovative assessments is Professor Sara Sun Beale's Federal Criminal Law course at Duke University School of Law. Each of the twenty students in the course "takes part in at least two simulated appellate cases in which students play the roles of counsel for the United States and the defendant, and other students make up the court." Duke Univ. Sch. of Law, Courses: Federal Criminal Law: Course Description, *at* http://www.law.duke.edu/curriculum/courseHomepages/Spring2005/330_01/description.html (last visited May 10, 2005) (on file with the *Duke Law Journal*). These simulated cases are worth 30 percent of the final course grade. *Id*. A paper, which "usually involves the analysis of a piece of proposed federal legislation," is worth 35 percent of the grade. *Id*. Finally, a twenty-four-hour take-home exam, which can be taken "at any time during the examination period," accounts for the remaining 35 percent of the grade. *Id*. Such a system of multiple and varied assessments could be adapted for first-year criminal law classes.

95. *See supra* Part III.A.

institutional barriers may prevent them from implementing the necessary changes.[96] But there are ways to remove the barriers to better assessments, including reducing class sizes in first-year courses, providing grading assistants for first-year courses, offering professors assessment training, and increasing external pressure for change.

1. *Reduce Class Sizes in 1L Courses.* To institute a valid, reliable, pedagogically sound assessment system, first-year courses must have fewer students. Classes that can exceed one hundred students[97] are simply too large to allow adequate student participation[98] and individualized professor feedback.[99] To fully benefit from an improved assessment regimen, classes probably should not have more than forty students.[100] Indeed, some law schools, recognizing the value of smaller first-year courses, already ensure that students have at least one doctrinal course with fewer students.[101] First-year research and writing courses are also generally smaller.[102]

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96. *See supra* Part I.B.

97. Mell, *supra* note 22, at 46.

98. Mattis, *supra* note 3, at 721.

99. *See* Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 370 (2001) ("[G]iven the size of most substantive law classes, the burden on faculty of providing student practice and feedback poses difficult hurdles."). Schwartz believes that such hurdles can be overcome by, for example, using technology such as "computer programs [to] allow faculty to administer short answer and multiple-choice assessments to their students on-line," and by "us[ing] self-, peer-, and small group-grading." *Id.* at 370–71.

100. *Cf.* Thomas D. Eisele, *Bitter Knowledge: Socrates and Teaching by Disillusionment*, 45 MERCER L. REV. 587, 589 (1994) (defining large classes as those with "forty or more students").

101. *See* Bruce R. Jacob, *Developing Lawyering Skills and the Nurturing of Inherent Traits and Abilities*, 29 STETSON L. REV. 1057, 1071 (2000) ("In some law schools, each first-year student is placed in at least one small enrollment section of a basic course, e.g., Contracts, Torts, or Real Property. In a section with twenty-five or fewer students, writing assignments periodically can be given.").

102. A 2003 survey documenting the average work loads of legal writing teachers suggests—after some deduction—that the average legal writing class likely has fewer than forty-four students. According to the survey, "[i]n the 2002–03 academic year, the 'average' [legal research and writing] faculty member taught 44 entry-level students 3.6 hours per week . . . ." ASSOC. OF LEGAL WRITING DIRS. & LEGAL WRITING INST., 2003 SURVEY RESULTS 7 (2003), *available at* http://www.alwd.org/alwdResources/surveys/2003survey/PDFfiles/1coverpageadhighlights2003survey.pdf. Because the average legal writing course meets between 2.05 and 2.22 hours per week, *id.* at 5, some legal writing teachers probably teach more than one legal writing course per semester, and the average enrollment for a legal writing course is therefore probably somewhat lower than forty-four. *See, e.g.*, Lea B. Vaughn, *Integrating Alternative Dispute Resolution (ADR) into the Curriculum at the University of Washington School of Law: A Report and Reflections*, 50 FLA. L. REV. 679, 682 (1998) ("[The

Law schools' limited financial resources pose an obvious barrier to making first-year courses smaller.[103] Reducing first-year course enrollments requires increasing the number of first-year course sections. One way to avoid the expense of hiring professors to teach the additional sections would be to offer fewer electives to upper-class students and to have some of the professors who now teach electives teach first-year courses instead. Law schools typically offer numerous upper-class electives with small enrollments.[104] Eliminating some of these small electives likely would require increasing enrollments in the remaining upper-class courses because the same number of upper-class students would have to choose from among fewer offerings. Although upper-class students undoubtedly benefit from small courses, it is more important that first-year courses be smaller because of the greater emphasis placed on first-year grades and the consequent greater need to ensure that first-year assessments accurately measure student performance.[105]

University of Washington School of Law] maintains a small section program in which each first year student has a small section of approximately 25–30 students for legal writing . . . .").

103. *See supra* notes 16–17 and accompanying text.

104. *See* Thomas, *supra* note 69, at 437 ("In the standard [law school] curriculum, which consists almost entirely of elective courses for second-and [*sic*] third-year students, courses perceived as important . . . are . . . usually taught in large sections. The class size for almost all other elective courses is usually quite small . . . ."); *see, e.g.*, The Univ. of N.C. Sch. of Law, Fall 2004 Class Schedule for 2Ls and 3Ls, *at* http://64.245.255.159/PDFs/UFall2004.pdf (last visited May 10, 2005) (on file with the *Duke Law Journal*) (listing course enrollment capacities of the upper-class courses offered in the fall 2004 term, of which two-thirds had fewer than thirty-six students).

105. *See supra* Part II.A. If law schools decided to reduce the number of upper-class course offerings, they would face some difficult choices. It might be best to keep small upper-class courses in specialized practice areas such as intellectual property or tax. Courses such as Entertainment Law or Partnership Taxation may be critical to the relatively few students who plan to enter these fields. Such students would be ill served by a law school curriculum that eliminated such courses. Other courses, however, are more esoteric and should therefore have less priority when law schools decide what to cut. For example, courses such as Animal Law, Chinese Legal History, and Law and Literature seem less important to the education of future lawyers and so perhaps should be eliminated first. *Cf.* Christian C. Day, Essay, *Law Schools Can Solve the "Bar Pass Problem"—"Do the Work!"*, 40 CAL. W. L. REV. 321, 341–49 (2004):

> [T]o prepare students for the bar exam . . . , [l]aw schools may have to eliminate some favorite courses (or offer them less frequently) to re-deploy courses and modify class size. This is an uncomfortable suggestion. Many law faculty, the author included, love to teach small, interesting, specialty classes or seminars. Indeed, professors may use those small classes to excite their own interests and support research. But many law schools may no longer be able to afford the luxury of offering "The Law of Central New Amsterdam Blood Feuds" or "Basket Weaving, Law & the Economy."

Another way to decrease first-year course sizes would be to use comparatively inexpensive adjunct instructors[106] to teach at least some first-year doctrinal courses.[107] Admittedly, although using adjuncts would allow law schools to reduce course enrollments without increasing the overall cost of educating students, schools might fear that adjuncts' teaching skills would not equal the skills of full-time professors.[108] Such educational quality concerns can be addressed, however, by appropriately selecting, training, and supervising adjuncts.[109] But even if law schools would like to use more adjuncts, both the Association of American Law Schools (AALS) and the American Bar Association (ABA) standards for law schools impose limits on the use of adjunct faculty.[110] Still, many law schools currently employ fewer adjuncts than the ABA standards permit.[111] To the extent that law schools could hire additional adjuncts and still conform to the standards, using adjuncts could help decrease class sizes in first-year courses.[112] By employing more adjuncts, and by shifting professors from some small upper-class courses, first-year courses can be made smaller without increasing costs.

2. *Provide Grading Assistants for 1L Courses.* Even with smaller classes, constructing and grading multiple assessments could

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106. *See* Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 25 (2000) ("The typical adjunct teacher is usually paid a flat fee . . . [of] $1,500 to $3,000 per course . . . . In sharp contrast, the average cost per course taught by a full professor is at least ten to twenty times more expensive.").

107. In the fall of 2002, ABA-approved law schools employed 4,649 part-time faculty, as compared to 5,997 full-time faculty. ABA/LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 824 (Wendy Margolis et al. eds., 2004). "Most adjuncts teach in clinics and skills courses, but others teach 'standard' substantive courses." Marcia Gelpe, *Professional Training, Diversity in Legal Education, and Cost Control: Selection, Training and Peer Review for Adjunct Professors*, 25 WM. MITCHELL L. REV. 193, 196 (1999).

108. *See* Gelpe, *supra* note 107, at 194 ("Many law schools have traditionally resisted use of adjunct faculty; their resistance [is] based, at least in significant part, on concerns about the quality of education delivered by instructors whose primary occupation is the practice of law.").

109. *See generally id.* at 213–21. Alternatively, the adjuncts' role could be restricted to assessing students. The adjuncts would then require training only in assessment construction and grading.

110. *Id.* at 195.

111. Barry et al., *supra* note 106, at 26.

112. Another option would be for the AALS and ABA to amend their standards to allow law schools to hire more adjuncts to teach first-year courses. This liberalization of the standards could be coupled with stringent requirements regarding qualifications, training, and oversight of adjuncts. For a discussion of the benefits of amending other ABA standards, *see infra* notes 135–38 and accompanying text.

burden professors who would remain obligated to spend considerable time researching and writing for publication.[113] Law schools could alleviate this burden somewhat by making assistants available to professors teaching first-year courses;[114] assistants could help with both the design and grading of assessments.

A relatively inexpensive talent pool of potential grading assistants exists within the confines of the law school—namely, upper-class students. Third-year students, in particular, would make excellent assistants. Third-years have completed two years of legal studies and "have mastered the basic skills of legal analysis"[115]—indeed, two years is sufficient time to acquire a masters degree in most academic fields. Moreover, third-years are often bored and disengaged from their legal studies;[116] assisting in first-year classes could help reengage these students.[117]

Fortunately, the use of upper-class students as grading assistants has been extensively pioneered by first-year legal research and writing courses;[118] this experience can inform how assistants are used

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113. *See supra* notes 28–29 and accompanying text.

114. *See* Grosberg, *supra* note 69, at 352 n.13 ("[A]djuncts or even student teaching assistants could be used to provide feedback or even a grade on a student's skills performance test."); Kissam, *supra* note 29, at 2010 ("[T]he feedback process [on writing exercises in basic courses] . . . . can be substantially enriched at relatively low cost to the law school's budget and the professor's time by hiring upper class law students as 'teaching assistants' who read, hypothetically grade, and comment on written student answers."). Another way to reduce the burden on professors would be to increase the use of objective assessments, such as multiple-choice exams, *see generally* Crane, *supra* note 6, and rubrics, *see* Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics—Explicit Grading Criteria*, 2004 MICH. ST. L. REV. 1, 6, 28 (defining rubrics as "detailed written grading criteria, which describe both what students should learn and how they will be evaluated"). This could reduce the need for student assistants because objective exams can be graded much more quickly than essay exams. However, objective exams may take more time to construct. *See* Crane, *supra* note 6, at 807 ("Many law professors just do not want to spend the time drafting objective exams. Nonetheless, there are solutions to this problem such as pooling objective questions . . . ."); Sparrow, *supra*, at 28–30 ("[W]hile the initial investment of time [in constructing rubrics] is high . . . [,] the overall time investment is less than [grading] without a rubric.").

115. Patrick Emory Longan, *Elder Law Across the Curriculum: Professional Responsibility*, 30 STETSON L. REV. 1413, 1413 (2001).

116. *See* ROBERT H. MILLER, LAW SCHOOL CONFIDENTIAL: A COMPLETE GUIDE TO THE LAW SCHOOL EXPERIENCE: BY STUDENTS, FOR STUDENTS 315 (2000) ("Many [third-years] will stop reading, and stop going to class. With a job offer in hand, many will trade in their books, laptops, and study aides [*sic*] for happy hours, road trips, and four-day weekends.").

117. *See id.* at 318 (recommending that third-year students interested in becoming professors consider assisting in first-year classes).

118. *See* Julie M. Cheslik, *Teaching Assistants: A Study of Their Use in Law School Research and Writing Programs*, 44 J. LEGAL EDUC. 394, 394 (1994) (detailing the results of a survey

in first-year doctrinal courses. Legal research and writing programs vary in the amount of grading responsibility that they give to students assistants. Some programs allow assistants to act as "the ultimate grader."[119] This can lead to several problems, including damage to "the cooperative relationship between TA [teaching assistant] and student" and "doubts and complaints about the TAs' grading abilities."[120] At the other end of the spectrum, "in some programs a TA's grade is only advisory or subject to faculty approval."[121] Intermediate approaches include allowing assistants to grade some assignments while professors grade others and granting assistants full grading responsibility but mitigating the impact of such responsibility by allowing them to assign only pass-fail grades.[122]

Student assistants in first-year doctrinal courses could perhaps be used most effectively as follows. Each course, capped at no more than forty students, would employ two assistants. Each assistant would grade each assessment independently.[123] Either the two grades could be averaged or the higher of the two grades could be awarded. The grades assigned would serve as the final grades except in three instances. First, if the grades assigned by the two assistants to a particular student's work were too far apart,[124] the professor would reevaluate the student's work. Second, if the assistants' grades were similar enough but were particularly low,[125] the professor would independently grade the student's work. Finally, even if the assistants' grades agreed, and even if the grades were not too low, a student who disagreed with the assistants' grade could receive a limited opportunity to seek an independent reassessment from the professor.[126] Absent these three exceptions, the assistants' grades would stand.

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finding that 99 of 152 law schools reported "using TAs in legal research, legal writing, or both"); Jo Anne Durako, *A Snapshot of Legal Writing Programs at the Millennium*, 6 LEGAL WRITING 95, 111 (2000) ("Sixty-seven [legal writing] programs use student teaching assistants in some capacity.").

119. Cheslik, *supra* note 118, at 398.

120. *Id*.

121. *Id*.

122. *Id*. at 399.

123. *See* HUGHES, *supra* note 60, at 50 (recommending that each assessment be graded by at least two independent scorers).

124. The two grades might be considered "too far apart" if, for example, they diverged by more than one grade unit. So a B+ and a B– would be too far apart, but a B+ and a B would not.

125. For example, grades below a C might be considered "too low."

126. For example, students could be allowed to appeal one grade per course.

Some law schools might fear that having two assistants per class would be too costly,[127] or time constraints might require that each of the two assistants be responsible for grading only half of the assignments.[128] Having only one assistant grade each student's work raises concerns about grade validity because the check of a second grader is not available; nevertheless, such worries can be addressed. For example, a professor could randomly review a handful of assignments that an assistant graded. If the grades assigned by the professor matched, or nearly matched, those assigned by the assistant, then the professor could feel confident that the assistant's grading was valid. If the marks awarded by the professor diverged considerably from those awarded by the assistant, the professor might need to reassess the entire assignment.

3. *Provide Professors with Assessment Training.* Most law professors receive little or no training in how to construct valid, reliable, pedagogically meaningful assessments.[129] Such training should be provided.[130] Although any training would be welcome, the more extensive and formal the training, the more effective it likely would be. To truly maximize their abilities to assess students, professors should probably complete at least the equivalent of one

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127. However, the average legal writing assistant is paid only $8.50 per hour or $1,372 per term. Kristin B. Gerdy, *Continuing Development: A Snapshot of Legal Research and Writing Programs Through the Lens of the 2002 LWI and ALWD Survey*, 9 LEGAL WRITING 227, 249 (2003). Therefore, it does not appear that law schools would suffer undue financial hardship were they to employ two grading assistants in each first-year doctrinal course.

128. *See* Cheslik, *supra* note 118, at 413 (finding that 34 percent of supervisors were concerned with the time demands placed on their teaching assistants).

129. *See* Crane, *supra* note 6, at 804–06:

> Upon joining a law school faculty, there is very little training and no training manual. . . . [F]or the most part law professors learn the ropes by trial and error on the job. . . . Clearly, for something as important as the enterprise of training lay people to become lawyers, this is an unjustifiabl[e], unscientific, and even haphazard approach. Arguably, it is unconscionably insufficient preparation for fulfilling the part of the job that requires the drafting and the grading of a single examination upon which an entire grade is based.

130. *See, e.g.*, Friedland, *supra* note 6, at 194:

> It would not be difficult for law schools to offer some examples or tips on preparing exams from an expert in psychometrics—or even veteran law professors. . . . Outside experts could suggest different exam formats or question types. . . . [S]chools could offer informal guidance on the subject of evaluation. A school could create a web site, a library of evaluation resources . . . or simply promote informal discussions about evaluation on an institutional level, particularly involving veteran teachers.

college-level course in assessment design and grading.[131] Law schools could work together to develop such a course, thus allowing the schools to share expertise and resources. Perhaps a group such as the AALS could coordinate such an effort—the association already offers educational workshops and conferences to its members.[132]

Training in assessment construction and grading should probably be made mandatory for both new and experienced law professors, and it should perhaps even be required as a condition of law school accreditation.[133] Alternatively, the training could be kept voluntary, in which case it would be helpful to award a certificate to those who successfully completed the training. Certification would not only serve as proof that the training participants had acquired basic competency in crafting and grading assessments, but it also would provide one measure of the quality of a law school's assessments. This information would help prospective students, who might prefer to attend a school with a relatively high proportion of certified professors.[134]

4. *Increase External Pressure for Change.* A final way to bring about a better first-year assessment system would be for groups outside of the law schools to advocate for change. One organization with considerable power to influence law schools to improve is the ABA, which sets standards for approval of law schools.[135] However, the ABA's current standards for evaluating students are too general

131. *Cf.* Teachers Coll., Columbia Univ., TESOL Program: Teaching English to Speakers of Other Languages: MA Program: New York State Certification Option, *at* http://www.tc.columbia.edu/academic/tesol/MA%20Program/MAnysc.htm (last modified Jan. 2005) (on file with the *Duke Law Journal*) (listing a course in second-language assessment among the courses required "for students wishing to teach in the New York public schools").

132. Assoc. of Am. Law Schs., AALS Calendar, *at* http://www.aals.org/aalscal.html (last visited May 10, 2005) (on file with the *Duke Law Journal*) (listing a variety of workshops and conferences, including a workshop for new law professors).

133. *See infra* notes 135–38 and accompanying text.

134. *See infra* notes 143–46 and accompanying text; *cf.* Forrest S. Mosten, *Institutionalization of Mediation*, 42 FAM. CT. REV. 292, 295 (2004):

> Many states have instituted certification of mediators as a compromise between no regulation and licensure. . . . Certification generally does not bar noncertified mediators from practicing in the marketplace—rather, it accentuates the competence and credibility of certified mediators and gives them an advantage in the marketplace by allowing them to call themselves "certified."

135. *See generally* AM. BAR ASS'N, SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS (2003–04).

to provide meaningful guidance.[136] The ABA's standards for faculty qualifications are similarly broad.[137] Moreover, the ABA standards do not regulate first-year class size.[138] The ABA could amend its standards to pressure law schools to institute assessment reforms. For instance, the ABA could refuse to accredit schools whose first-year classes were overly large, provided too few assessments, or were taught by professors lacking adequate assessment training.

Another entity with considerable power to affect law school assessment practices is *U.S. News & World Report*, which produces an influential ranking of law schools.[139] The *U.S. News* ranking takes into account school quality, selectivity, placement success, and faculty resources.[140] The ranking does not consider assessment quality.[141] *U.S. News* could alter its ranking methodology to incorporate such information as first-year course sizes, total number of first-year assessments, and amount of assessment training that professors have completed. But although the *U.S. News* ranking has been criticized

136. *See id*. Standard 303(a)–(c) (mandating that law schools institute "and adhere to sound standards of scholastic achievement," evaluate students' "scholastic achievements . . . from the beginning of the students' studies," and discontinue "the enrollment of a student whose inability to do satisfactory work is sufficiently manifest").

137. *See id*. Standard 401(a) ("A law school shall have a faculty that possesses a high degree of competence, as demonstrated by its education, classroom teaching ability, experience in teaching or practice, and scholarly research and writing.").

138. The standards do require law schools to provide students with opportunities to learn in smaller settings. *See id*. Standard 302(d) ("The educational program of a law school shall provide students with adequate opportunities for small group work through seminars, directed research, small classes, or collaborative work."). However, these smaller settings need not be provided in the first year.

139. *See* David B. Wilkins & G. Mitu Gulati, *What Law Students* Think *They Know About Elite Law Firms in the Twenty-First Century: Preliminary Results of a Survey of Third Year Law Students*, 69 U. CIN. L. REV. 1213, 1232 n.30 (2001) ("[The *U.S. News*] survey . . . appears to be very influential among law students and potential law students.").

140. U.S. NEWS & WORLD REPORT, AMERICA'S BEST GRADUATE SCHOOLS 61 (2006 ed. 2005) *available at* http://www.usnews.com/usnews/edu/grad/rankings/about/05law_meth_brief.php. The ranking measures quality by surveying deans, lawyers, and judges; it measures selectivity by student LSAT scores, undergraduate grade point averages, and the proportion of applicants accepted; it measures placement success by employment rates at graduation and nine months after graduation, and by bar passage rates; and it measures faculty resources by per-pupil expenditure, student/teacher ratio, and the size of the library's collection. *Id*.

141. *See* Friedland, *supra* note 6, at 175 ("The U.S. News and World Report ranking of law schools . . . ignores the school's evaluation process.").

before for failing to take into account many factors related to educational quality,[142] it continues to neglect assessments.

Arguably the most powerful force for law school reform is prospective law students. Law students spend small fortunes on their legal education.[143] They also devote a great deal of time and energy to their studies.[144] And it is law students who suffer most because of the poor first-year assessment system.[145] Law students deserve better assessments, and they should demand them.

Although it might seem that prospective law students have little power to effect institutional change in law schools, they in fact wield tremendous influence—they can vote with their tuition fees. Of course, given the impact of law school prestige on student career prospects,[146] students would be unlikely to bypass higher-ranked schools for lower-ranked ones even if the lower-ranked ones offered better first-year assessments. However, if students were deciding between two similarly prestigious schools, they would be wise to consider attending the one with the better first-year assessment system because they would have fairer chances of succeeding to the best of their efforts and abilities. And if students considered assessment quality when deciding among law schools, the schools would be forced to improve their assessments to compete for the most talented students.

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142. *See, e.g.*, Open Letter from the Law School Admission Council to Law School Applicants (publishing an open letter from the deans of 164 ABA-approved law schools criticizing commercial rankings for excluding or undervaluing such factors as quality of teaching, size of first-year classes, and collaborative research opportunities with faculty), *at* http://www.lsac.org/LSAC.asp?url=lsac/deans-speak-out-rankings.asp (last visited May 10, 2005) (on file with the *Duke Law Journal*).

143. *See supra* note 47 and accompanying text.

144. *See, e.g.*, Jeffrey W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35, 45 (2003) (estimating that diligent Evidence students commit "200 hours or more" to attending and preparing for class and studying for and taking the final exam).

145. *See supra* Part II.A (stressing the tremendous impact of first-year grades on law students' academic and employment opportunities). Under the current first-year assessment system, employers also lose, missing talented candidates whose abilities are greater than their grade point averages would indicate, or selecting mediocre candidates whose grade point averages overstate their talents.

146. *See* Theodore V. Wells, Jr. et al., *Law and Education: Affirmative Action Under Attack*, 19 HARV. BLACKLETTER L.J. 55, 80 (2003) ("Graduates of elite law schools disproportionately fill positions in corporate law firms.").

CONCLUSION

The continuing use of single end-of-course exams to account for all, or nearly all, of law students' first-year course grades produces an assessment system that is invalid, unreliable, and of little pedagogical value. Law schools should increase the number, variety, and quality of first-year assessments. Institutional barriers to implementing an improved assessment system can be surmounted by reducing class sizes, by using grading assistants, by offering professors assessment training, and by increasing pressure on law schools to change their assessment practices. Future law students should not have their professional prospects depend so heavily on the unduly arbitrary grades that they receive on a handful of first-year exams.