WEAK LAW TEACHING, ADAM SMITH AND A NEW MODEL OF MERIT PAY

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How good is American law teaching? Even if some law professors are very effective teachers, is there a seemingly simple, often ignored, and surprisingly ancient strategy for improving the average quality of American law teaching? More specifically, will law teaching, and legal education, be improved if law student-consumers have the power to compensate their teachers directly?

The following article addresses a very important, if not central, problem in American legal education: the failure of many law professors to work to their teaching potential. While American legal education has long been the object of professional and even popular scrutiny, much of the critical commentary fails to address the issue of weak law teaching directly. Though the overall quality of modern legal education is related to a variety of institutional factors including sensible curriculum and course design, efficient teaching methods and materials, and appropriate student preparation for law school, it depends, first and foremost, on individual law professors as teachers.[1]

Part I of this article describes the problem of weak law teaching, largely by examining a voluminous historical literature on legal education; much of it by law professors, themselves, writing in a traditionally critical if sometimes evasive and self-protective spirit. While, of course, some commentators disagree, there may be good cause to describe law teaching (and consequently legal education) as unhappily impractical, frequently boring, fragmented if not incoherent ideologically and morally confused, and ultimately damaging in important emotional and even intellectual terms.

Part II of this article explores a key contribution by Adam Smith to the continuing debate over the quality of modern legal education. Though Smith never encountered modern American law schools in all their mixed glory, his work is nonetheless very suggestive and surprisingly relevant to the modern conditions of legal education. Unknown to most lawyers and law professors, Smith offers an especially illuminating analysis of pedagogical failure. In Book V. of WEALTH OF NATIONS he both describes the teaching failures of the Oxford University faculty of his day and explains these failures by developing a theory with important psychological and institutional elements. Smith's

[1] A focus on the behavior of individual teachers, as opposed to more depersonalized, institutional or "global" analysis, is encouraged by the old remark: "As the schoolmaster is, so will be the school. . ." JOHN STUART MILL, REPRESENTATIVE GOVERNMENT, 40 GREAT BOOKS OF THE WESTERN WORLD 327, 424 (2d ed. 1990).

coherent and compelling theory of pedagogical failure, so often slighted in both the economics and education literatures, also leads him to prescribe a simple remedy. He argues persuasively for a system where faculty compensation is importantly, if not entirely, determined by student consumers. At the very least, Smith's relevant analysis, in both the WEALTH OF NATIONS and other of his important writings, suggests the continuing utility of economic reasoning in addressing problems of modern legal education.

The third and final part of this article seeks to apply Smith's institutional remedy to modern legal education. After describing a voucher proposal that will allow student-consumers to distribute dollar rewards to worthy teachers, the article analyzes various plausible benefits from such a proposal in terms directly related to contemporary legal education. Drawing both upon certain aspects of Smith's theory of failure and extending beyond that theory, the article considers whether a new student power, to directly reward and punish law teachers with dollars, will help us cope with monopoly law teachers, passive law students, monitoring limitations, current mis-allocations of academic resources, and, finally, with the proverbial "fading" law teacher. In addition, this Part III also examines various problems with any such proposal. This concluding portion analyzes and responds to the predictable charges that a system of student determined rewards will expose law teachers to the incompetent and sometimes unfair judgments of student evaluators, while impairing the overall quality of legal education.

I. THE PERSISTING PROBLEM OF WEAK LAW TEACHING

If, as some maintain, much law teaching is relatively "effective" teaching, there may be little need to consider dramatic or arguably radical changes in the institutions and conventions of modern legal education. If, in fact, our contemporary law schools are truly the last bastions of good university teaching, why risk compensating law teachers in a strikingly new and certainly controversial way?

Conversely, if law teaching and, by extension, legal education leave much to be desired, there may be a strong case for allowing disappointed student consumers a new form of reward power. Despite certain arguable successes, law teachers, and the law schools they maintain, may still be prone to varying degrees of operational failure. Law teachers, like many other economic actors, may be "ordinarily far from doing as well as they might."[2]

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[2] For a very suggestive vocabulary and relevant economic analysis, see the very influential ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY; RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 13 (1970). Harsh and exhaustive criticism amounting to a seri-

A. MIXED EVALUATIONS

With some notable exceptions, early commentators on legal education were often more inclined to praise American legal education on balance, sometimes reflecting considerable professional self-satisfaction. In 1914, for example, Joseph Redlich praised the skilled use of a relatively new case method for formal law school instruction. He was especially impressed by "the general intense interest displayed by . . . [a] whole class in the [case] discussion, even by those who did not take part in it themselves."[3] During the '30s, Professor Joseph Beale, an influential member of the Harvard Law Faculty, expressed pride in the pedagogical achievements of law professors. In praising the contributions of four important faculty members (Langdell, Gray, Thayer and Ames) to the early development of the Harvard Law School, Beale asserted that "[s]uccess in any school of law must be determined by the effect of the instruction upon the minds and actions of the students." For Beale, "[s]uccess in teaching must be judged by the enthusiastic response of those who are taught." Whatever the differences in experience, methods and abilities of the four law professors he was discussing, Beale noted that "[t]hey did. . .all possess this one quality of arousing enthusiasm in their students."[4]

Justice Arthur Vanderbilt, serving as President of the American Bar Association in 1938, was equally explicit in his praise, "Nowhere in this country is there better teaching than in our professional schools, and nowhere in our professional schools than in our great law schools, and nowhere more eager students."[5]

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ous indictment of university legal education has become a staple of the professional literature. *See generally* Andrew J. Pirie, *Objectives in Legal Education: The Case for Systematic Instructional Design,* 37 J. LEGAL EDUC. 576, 576-577 (1987).

[3] JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS 27 (1914). Redlich, an experienced Professor of Law at the University of Vienna, was hired by the Carnegie Foundation for the Advancement of Teaching to impartially investigate the relatively new case method of instruction that had polarized American law professors prior to the First World War. Redlich, while sensitive to certain instructional limitations, praised the case method as "not merely a very practical one in its results, but that it is essentially empirical [or]. . . scientific." *Id.* at vi-vii.

[4] Joseph H. Beale, *Langdell, Gray, Thayer and Ames-Their Contribution to the Study and Teaching of Law,* 8 N.Y.U. L. REV. 385 (1931). For a brief summary of Beale's distinguished academic and professional career, including service as the founding dean of the University of Chicago Law School, see FRANK L. ELLSWORTH, LAW ON THE MIDWAY 55-57, 61-77 (1977).

[5] Arthur T. Vanderbilt, *Some Convictions as to Legal Education,* 24 A.B.A. J. 717, 718 (1938). Vanderbilt's distinguished career also included service as the Chief Justice of the New Jersey Supreme Court and as the Dean of New York University Law School. *See generally* ARTHUR T. VANDERBILT II, CHANGING LAW; A BIOGRAPHY OF ARTHUR T. VANDERBILT (1976).

While commentators like Vanderbilt also discussed various problems with legal education, very few specifically faulted the behavior or professional commitments of law professors. Even unusually insightful critics, like Brainerd Currie, could concede "the essential sameness of legal education" while celebrating a quiet diversity and more subtle forms of useful innovation.[6] Writing in 1956, Currie concluded that few epochal changes had occurred in the history of legal education. Nonetheless, he:

> [had]. . .not the slightest doubt that. . .[since the turn of the century] legal education has changed profoundly, and for the better. It has gained in depth, in breadth, in dignity, in perceptiveness, and in humaneness. It has grown in this way largely because of countless developments and influences too small to be caught in the historian's net - most of them having to do with the dedication of individual law teachers.[7]

As late as the early '60s, Professor David Cavers of Harvard noted that "the lack of imagination and diversity among law faculties. . .reflect the satisfaction with which, in general, American legal education has been viewed by the bar and by educators alike."[8] While the American law school was hardly beyond criticism, some commentators still regarded it as "one of the more exciting places on the American campus. . . ."[9]

Relatively early, if limited, empirical efforts to study various problems of legal education seemed to confirm a high, if qualified, degree of student satisfaction. Surveys in the early '60s led investigators to conclude that first-year law students of the era "overwhelmingly endorse the caliber of classroom teaching to which they are exposed."[10] Robert

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[6] Brainerd Currie, *Law and the Future: Legal Education,* 51 Nw. U.L. Rev. 258, 259 (1956). Currie, a Professor at the University of Chicago Law School, had previously been the Dean of the Law School at the University of Pittsburgh and Editor of the Journal of Legal Education. *Id.* at 258.

[7] *Id.* at 263. Nonetheless, Currie also predicted, according to Francis A. Allen, *The New Anti-Intellectualism in American Legal Education,* 28 MERCER L. REV. 447, 448 (1977):

> [T]hat there would be no dramatic changes in law school training in the half-century following 1956. The changes, he thought, would be "molecular" rather than "molar;" they would be the cumulative product of individual efforts, not the results of institutional upheaval.

[8] *Recent* Issues *in Legal Education (A Survey),* 11 CLEV.-MARSHALL L. REV. 385, 386 (1962). Despite recognition of the classic inertia of legal education, an experienced legal academic like Professor Currie also noted both his satisfactions with the state of legal education and his suspicion of many reform measures. *See* Currie, *supra* note 6, at 261-63.

[9] Ralph Slovenko, *Boredom in Legal Education,* 9 CLEV.-MARSHALL L. REV. 374, 375 (1960).

[10] SEYMOUR WARKOV, LAWYERS IN THE MAKING 73 (1965). While Warkov expresses "distinct surprise" over the differential approval of teaching quality by entering law students as

Stevens, while reporting various forms of law student discontent and "wide variety in the [surveyed] reactions of students to the teaching experience,"[11] offered a somewhat surprising report of law student opinion from the late '60s: "Overall more than eight in ten [third year] students had a high opinion of the quality of teaching to which they had been exposed."[12]

At the same time, the professional literature also reflects other more critical themes. From the earliest days of organized legal education, practitioners, judges, law professors, and, more recently, law students have contributed to a voluminous literature that both faulted various aspects of legal education and offered numerous reform suggestions.[13] In 1880, for example, Oliver Wendell Holmes, Jr. attacked the premises of Langdell's famous contracts casebook. While something of an admirer of the new case method of law teaching, Holmes expressed impatience with Langdell's single-minded striving for logical integrity in the law, seemingly above all else.[14]

Of course, the case/Socratic method was an early subject of controversy and debate. Redlich's famous 1914 investigation of the use of the case method in American law schools noted the early and passionate student opposition to the new method: "At the first class held by Langdell in Contracts, the students all gradually dropped out, with the exception of seven, who were called Langdell's freshmen."[15] In fact, Langdell's col-

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compared with other graduate students, he also notes less law student satisfaction over access to faculty outside class: "only one in three students in the top eight schools considered their contacts with faculty as 'excellent' or 'good' in contrast with over one in two students enrolled in Stratum III law schools." *Id.* at 74.

11 Robert Stevens, *Law Schools and Law Students,* 59 VA. L. REV. 551, 640 (1973).

12 *Id.* at 665. The same sample of third year law students also had a generally favorable comparative opinion:

> Asked whether they found the quality of teaching at their law schools to be generally better, the same, or worse than at their colleges, over half of the total sample, 54 percent, responded that it was "better." However, when asked whether during their years as law students, their esteem for law professors at their schools had increased, decreased or remain constant, the percentages reporting increases and decreases were about equal, 37 percent and 35 percent respectively, with 28 percent reporting no change.

Id. at 665-66.

13 Dean Erwin Griswold of Harvard reminds us of the "healthy" and longstanding tradition of "self-criticism" in legal education, prominently honored, if not established, by law teachers. Erwin N.Griswold, *Report of the National Law Student Conference on Legal Education; Foreword,* 1 J. LEGAL EDUC. 64 (1948). For a sample of critical literature spanning much of the modern history of American legal education, see Pirie, *supra* note 2, at 577 n.14. Modern researchers may underestimate the volume of older critical professional literature on legal education because both the Lexis and Westlaw data bases for law journal articles and professional newspapers only include items published during the early 1980s or later.

14 JOEL SELIGMAN,THE HIGH CITADEL; THE INFLUENCE OF HARVARD LAW SCHOOL 47-49 (1978).

15 REDLICH, *supra* note 3, at 13 n.1.

leagues joined bewildered students in characterizing the new teaching method as an "abomination." Lawrence Friedman succinctly describes the aftershock of the Langdell "bombshell": "The students were bewildered; they cut Langdell's classes in droves. . .Enrollment at Harvard fell precipitously. Langdell's colleagues. .o.continued to teach in the old way. The Boston University Law School was founded in 1872 as an alternative to Harvard's insanity."[16]

More broadly, Alfred Z. Reed observed, in a prominent 1921 report, that legal education "is generally recognized to be defective in many respects."[17] Reed was puzzled by the lack of fruitful reforms since the key questions about the quality of legal education were hardly new.[18]

Even non-lawyers offered criticism. A withering and famous early attack on the law schools came from the acid pen of Thorsten Veblen. While Veblen recognized the connection between the university-based law schools of the post-World War I era and the great medieval European universities, he still argued in 1918 that:

> [I]n point of substantial merit the law school belongs in the modern university no more than a school of fencing or dancing. This is particularly true of the American law schools, in which the Austinian conception of law is followed, and it is more particularly true the more consistently the "case method" is adhered to. These schools devote themselves with great singleness to the training of practitioners, as distinct from jurists; and their teachers stand in a relation to their students analogous to that in which the "coaches" stand to athletes. What is had in view is the exigencies, expedients and strategy of successful practice; and not so much a grasp of even those quasi-scientific articles of metaphysics that lie at the root of the legal system. What is required and inculcated in the way of a knowledge of these elements of law is a familiarity with their strategic use."[19]

Prominent advocates of "legal realism," during the twenties and thirties, were only slightly less unsparing of the law schools from within the profession. Robert M. Hutchins, Dean of the Yale Law School at twenty-eight, complained about a curriculum all too likely to be "composed of footless and trivial subjects."[20] He concluded that the typical

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16 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 615 (2d ed., 1985).

17 ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 3 (1921).

18 *Id.* at xvi.

19 THORSTEN VEBLEN, THE HIGHER LEARNING IN AMERICA 211 (photo. reprint 1954) (1918).

20 Robert M. Hutchins, *The Current of Legal Education,* 1929 Ky. B. Assoc. J. 258, 267.

law professor "has never thought about legal education. He has thought about law."[21] Jerome Frank was equally blunt: "It is presumptuous of me to talk about what constitutes a good legal education. I know no lawyer who had one. Certainly I have not."[22]

The prize for flaming critical rhetoric among the legal realists, however, goes to the redoubtable Karl Llewellyn.[23] Unlike much of the relevant law journal literature to this day, Professor Llewellyn attacked not only the depersonalized institutions of formal legal education but the failing law professors themselves. In terms resembling and surpassing Adam Smith's frontal attack on the university dons of his day, Llewellyn speaks passionately about "the existing bankruptcy of legal education." He very sharply criticized legal education as all too often "shabby and silly."[24] Even at law schools like Harvard, Yale and Columbia, "training. . .is . . . blind, inept, factory-ridden, wasteful, defective, and empty."[25] Moreover, "[o]ur teachers teach wastefully, and are content."[26] "[N]ot one percent of instructors know what. . .they are really trying to educate for."[27] For Llewellyn, much of "[t]he trouble lies with the instructor" and his "inertia."[28] Faculty inattention to teaching methods, lack of faculty cooperation and analysis of pedagogical issues constitute "idiocy, plain and drooling."[29] In sum, legal education, even at the best schools, "is. . .so inadequate, wasteful, blind and foul that it will take twenty years of unremitting effort to make it half-way equal to its job."[30]

If latter day critics of legal education have generally been more decorous and restrained, they have still joined the critical chorus in impressive numbers. More recently, younger law professors, and even a few disaffected law students, have made noteworthy contributions to the literature. Some such critics of legal education, particularly in the late '60s and early '70s, were doubtless influenced by the political environment and social problems of a particularly contentious period in recent Ameri-

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21 *Id.* at 271. For reflections on the remarkable career of Hutchins, appointed Chancellor of the University of Chicago at age 30, see MILTON MAYER, ROBERT MAYNARD HUTCHINS: A MEMOIR (ed. John H. Hicks, 1993).

22 Roscoe Pound et al., *What Constitutes a Good Legal Education,* 7 AM. L. SCH. REV. 887, 894 (1933).

23 For perspective on the influential and colorful Karl Llewellyn, see WILLIAM TWINING, THE KARL LLEWELLYN PAPERS 5-23 (1968).

24 Karl N. Llewellyn, *On what is Wrong with So-Called Legal Education,* 35 COLUM.L. REV. 651, 657, 652 (1935).

25 *Id.* at 652-53.

26 *Id.* at 666.

27 *Id.* at 653.

28 *Id.* at 671, n.1.

29 *Id.* at 677.

30 *Id.* at 678.

can history.[31] Then Yale law student, now Harvard Professor, Duncan Kennedy, for example, offered a polemic about law school failure. Seeking to "add depth to. . .a disappointingly shallow debate about legal education," he spoke in 1968 to the then current "malaise" in the law schools. While faculty and students were equally affected, "neither [group] seems able to express its feelings in any way except indirectly in moments of bitterness or disillusionment, in lethargy or a febrile verbalism." As a result, Kennedy proclaimed his lack of embarrassment over his inescapable and necessary tone of moral exhortation.[32]

Somewhat ironically for a self-declared advocate of "leftism,"[33] Kennedy begins his unsparing analysis by describing his law teachers with a tone reminiscent of Adam Smith's sharp criticism of the university teaching of his day. Kennedy expressly criticizes both a faculty smugness and a perceived faculty hostility towards students.[34] While he notes that hostile law teachers are not generally dull, many are still "insufferably so." While some law teachers "may be greatly loved by their students . . .[and] may be. . . unusually effective pedagogues," many "very often are not."[35]

Such intense criticism of legal education and law professors was also imaginatively supplemented, during the seventies, by unflattering book length treatments of the law school experience. John Jay Osborne's 1971 novel "Paper Chase," featuring the unforgettable Professor Kingsfield, and Scott Turow's 1977 account of the Harvard Law School in "One L" are popular landmarks of the relevant critical literature.[36] In addition, various law professors and social scientists made more systematic empirical efforts to survey aspects of the law school experience, par-

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31 *See generally* TODD GITLIN, THE SIXTIES: YEARS OF HOPE DAYS OF RAGE (1987); DAVID FARBER, THE AGE OF GREAT DREAMS: AMERICA IN THE 1960S (1994); and DAVID BURNER, MAKING PEACE WITH THE 60S (1996).

32 Duncan Kennedy, *How the Law School Fails: A Polemic,* 1 YALE REV. L. & SOC. ACTION 71 (1970).

33 For a description of now Professor Kennedy's commitment to leftism in the context of American critical legal studies, see DUNCAN KENNEDY, A CRITIQUE OF AJUDICATION 5-13 (1997).

34 Kennedy, *supra* note 32, at 72.

35 *Id.* at 73.

36 Some published criticism of legal education and law teaching by young law teachers and even by law students, during the '70s, is especially noteworthy for its unprecedented sharpness of tone. In addition to the Kennedy "polemic," *id.*, see Paul N. Savoy, *Toward a New Politics of Legal Education,* 79 YALE L.J. 444 (1970); Anthony J. Mohr & Kathryn J. Rodgers, *Legal Education: Some Student Reflections,* 25 J. LEGAL EDUC. 403 (1973); Mark Wood, *Teaching as Torture,* STUDENT LAW., Feb. 1979, at 28; and Christine Coven, *Some Random Thoughts on the Rights and Status of Law Students,* STUDENT LAW., Sept. 1973, at 14. For a more decorous tone from an important "realist" critic of an earlier era, *compare* Robert M. Hutchins, *The Autobiography of an Ex-Law Student,* 7 AM. L. SCH. REV. 1051 (1934).

ticularly those educational factors most likely to contribute to the worrisome student alienation and malaise of the early to mid-'70s.[37]

While these limited surveys continued to reflect predictably mixed student opinions about the quality of legal education, law students of the late '60s and early '70s were often described as sharply critical and deeply skeptical of the values of their legal education in general and the teaching commitments of law faculty in particular.[38] Despite a market-validating surge in demand for legal education, with a seventy-one percent increase in the number of law students from 1969 to 1975,[39] even the most measured assessments of the student opinion of the day noted the growing "feeling of malaise and discontent. . . among students and faculty at [especially] the nation's elite law schools."[40] Though commentators often reflected on the impact of broader social and cultural influences, many still expressed concern over student alienation that manifested itself in "disinterest" or "disengagement." A noteworthy number of students, whose opinions were surveyed, were "not hostile so much as uncaring [about their legal education] or 'turned off'."[41]

Some of these surveys also revealed disquieting criticism of the quality of classroom instruction. Professor Carl Auerbach, for example, reported thato

> Only 17 percent of the law students in 1969 and 7 percent in 1975 rated the quality of their classroom instruction as excellent; 7 percent in 1969 and 9 percent in

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37 Robert Stevens observes that "[u]ntil the late 1960s, there was surprisingly little serious analysis of legal education. . .little was known of the history of legal education. . .little data had been collected about legal education or, indeed, about the legal profession. In particular, law professors seemed almost anxious to remain ignorant of the history of legal education." ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S xiii-xiv (1983). For a useful sample of more systematic efforts, in the '70s, to study legal education, with certain empirical components, see Stevens, *supra* note 11; HERBERT L. PACKER & THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION (1972); Ronald M.Pipkin, *Legal Education: The Consumers' Perspective,* 1976 AM. B. FOUND. J. 1161; Paul D. Carrington & James J. Conley, *The Alienation of Law Students,* 75 MICH. L. REV. 887 (1977); and Frances K. Zemans and Victor G. Rosenblum, *Preparation for the Practice of Law-the Views of the Practicing Bar,* 1980 AM. B. FOUND. RES. J. 1.

38 While Pipkin reports that law student opinion generally inclined "toward accepting and approving the [law school] institution and its product. . .law school pedagogy and practice preparation were less accepted." Pipkin, *supra* note 37, at 1189. Though first year student-consumers "evaluated faculty in general very highly as teachers," second and third year students were increasingly skeptical "about the quality of the faculty and the applicability of institutionally endorsed pedagogical norms." *Id.* at 1172. Carrington & Conley, *supra* note 37, at 887 reported that data "indicate the possibility that roughly one in seven Michigan law students now drops out emotionally and intellectually, without formally withdrawing from the school."

39 Carl A. Auerbach, *Legal Education and Some of Its Discontents,* 34 J. LEGAL EDUC. 43, 48 (1984).

40 PACKER & EHRLICH, *supra* note 37, at 21.

41 Carrington & Conley, *supra* note 37, at 890.

> 1975 rated it poor. .αStudents in the top twenty schools were as likely as students in the other law schools to rate their classroom instruction as poor, but twice as likely to rate it as excellent (25 percent to 12 percent in 1969 and 13 percent to 5 percent in 1975). Yet only 13 percent of the students in the top twenty schools rated their classroom instruction as excellent in 1975.[42]

Even after the end of the War in Vietnam and the post-Watergate period of the mid-to-late '70s, student opinions about formal legal education have remained decidedly mixed, even into the nineties. Though many law students "see their law school training as personally and professionally empowering," others continue to reflect what one commentator has more recently described as the "special sadness" of those who "become increasingly alienated, progressively isolated and chronically distressed."[43] Increasingly, all too many law teachers are perceived as preferring scholarly research and writing to teaching. This ordering of academic priorities may often lead law professors to view their teaching as an "unpleasant chore," "a burden, [and] an unavoidable distraction." Such professors are all too "likely to teach in a desultory and dispirited fashion. . ο."[44] The visible disinclination, if not disdain, of many legal scholars, for both law teaching and the practice of law, has led some commentators, like Professor Mary Ann Glendon, to recently and bluntly ask, "Why have so many legal educators lost interest in teaching law."[45]

Whether or not law professors as teachers are all too inclined to cover up their "confusion, arrogance, distraction, excitement, feelings of mediocrity, boredom, ignorance, distaste. .α ,"[46] their efforts continue to be both generally criticized and specifically characterized in terms of

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42 Auerbach, *supra* note 39, at 55.

43 ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 42, 40-41 (1992). Alienation among female law students is thought to be a particular problem. *Id.* at 41. For a recent study of the disappointments of female law students "as they enter previously male-dominated institutions and, to a surprising extent, remain isolated, marginalized, and dissatisfied," see LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 2 (1997).

44 ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 268 (1993).

45 MARY ANN GLENDON, A NATION UNDER LAWYERS 175 (1994). Professor Glendon recalls the vivid example of Karl Llewellyn and his obvious commitment to the craft of law teaching at the University of Chicago Law School during the '50s and very early '60s:

> Professors who share Llewellyn's enthusiasm for training competent practitioners are becoming harder to find. . .Legal scholars, of all intellectual persuasions, have never been more disdainful than they are at present concerning legal traditions, nor more detached from the practice of law.

Id. at 178.

46 Toni Pickard, *Experience as Teacher: Discovering the Politics of Law Teaching,* 33 U. TORONTO L.J. 279, 281 (1983).

several different, if connected, categories of failure or pedagogical problem. In addition to the law students themselves, members of the bench and practicing bar, as well as a noteworthy number of law professors fault contemporary law teaching as insufficiently practical, boring and unstimulating, fragmented if not incoherent, unduly insensitive to "values" or conversely too ideological, and, finally, all too damaging in both emotional and intellectual terms. Bluntly put, the persisting failures of many, if not most, law teachers may be specified with relative ease.[47]

B. SPECIFYING THE COMPLAINTS

1. *Impractical Teaching?*

The single most persisting criticism of formal legal education is that it is somehow not "practical" enough. In a 1992 Report, an American Bar Association Task Force on Law Schools and the Profession (hereinafter "MacCrate Report") spoke, yet again, to the "gap" between the teaching and practice segments of the profession. Though the Task Force realistically concluded that the "[l]aw schools and the practicing bar have different missions to perform. . .," and that "the law schools cannot reasonably be expected to shoulder the task of converting even very able students into full-fledged lawyers. . .,"[48] it also reported that, "[S]urveys. . .indicate that practicing lawyers believe that their law school training left them deficient in skills that they were forced to acquire after graduation. . . ."[49]

Prominent judges, practitioners and law professors have recently joined in expressing their concern over what Judge Harry Edwards has called "the growing disjunction between legal education and the legal profession."[50] A noteworthy number of law professors, particularly at

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47 Despite an impressive volume of sharp criticism, law teaching, and teaching in general, can also be an emotionally complex, intellectually demanding and even exhausting enterprise. *See* JULIUS GETMAN, IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION 26-29 (1992). Law teachers, in their efforts to avoid the superficial, sometimes engage in very intense intellectual effort before an audience easily bored by thoroughness. *See* GILBERT HIGHET, THE ART OF TEACHING 75 (1950). Truly effective teaching usually requires thoughtful pacing, concentration and a special expenditure of energy particularly when it involves "genuine, hand-to-hand teaching, as against the giving out of predigested hokum." JACQUES BARZUN, TEACHER IN AMERICA 33, 36-37 (1981).

48 THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, A.B.A. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT-AN EDUCATIONAL CONTINUUM 3-4 (1992) [hereinafter the "MACCRATE REPORT" after its Chairperson].

49 *Id.* at 5. *See also id.* at 385-91.

50 Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession,* 91 MICH. L. REV. 34 (1992). For references to the longstanding tradition of criticizing law schools for their failure to educate students adequately for practice, see John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?,* 39 J. LEGAL EDUC. 343 n.1 (1989).

the more distinguished or "elite" schools, are perceived by contemporary practitioners as "more interested in pursuing their own intellectual interests than in helping the legal profession address matters of important current concern."[51] In even more extreme terms, law professors are increasingly charged with being "disdainful of the practice of law."[52] Surveys of law student opinion similarly suggest that "the longer students are in law school, the less they feel that their legal education prepares them to be professionally competent."[53]

This tension between the so-called "vocationalists" and the faculty "academics" has long since been reflected in the continuing debate over the strengths and weaknesses of formal legal education.[54] According to Alfred Z. Reed, practitioners in the 1870s were distrustful of the law schools primarily because of "a growing feeling in the profession that the schools were weak on the side of practice." Indeed, the large national law schools at Harvard and Columbia were perceived by the many office-trained practitioners of the period as deliberately neglectful of the need for close cooperation between law school and law office.[55] In his famous 1921 report, Reed was particularly critical of "the failure of the modern American law school to make any adequate provision in its curriculum for practical training." In Reed's view, this lapse "constitutes a remarkable educational anomaly."[56]

Some legal realists of the '20s, '30s and '40s agreed, though with varying perspectives and refinements. Most famously, Jerome Frank argued that the law schools should be "lawyer schools" and that law teachers should teach what is actually going on in the courts and law offices. He was especially critical of law teachers with "little or no experience in

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51 MACCRATE REPORT, *supra* note 48, at 5.

52 Edwards, *supra* note 50, at 35. *See also* GLENDON, *supra* note 45, at 217,"Even clinical instructors tend to look down on the many areas of legal work that do not meet their standards of social awareness. . .Professorial disdain or indifference toward the sorts of careers most of their students will follow manifests itself in myriad ways."

53 Pipkin, *supra* note 37, at 1172-73. Pipkin reports that "three of four third-year students in the sample responded that law school was not providing them with a good sense of what lawyers do and had not given (or was not giving) them the legal skills to handle simple legal problems." *Id.* at 1172.

54 Robert Stevens notes the early emergence of tensions between the vocationalists and the academics at Harvard, Chicago and other law schools of the late 19th and very early 20th centuries. The controversial 1873 appointment of James Barr Ames, with limited practice experience, to the Harvard Law faculty reflected Langdell's interest in staffing the law school with a new breed of academic lawyer. The tension between a vocational orientation and a more academic or theoretical approach, reflected in certain non-legal disciplines, was even more vividly exposed during debate over the founding of the University of Chicago Law School in 1900. STEVENS, *supra* note 37, at 38-42. For greater detail about the Chicago story, particularly as it involved Ernst Freund and Joseph Beale, see ELLSWORTH, *supra* note 4, at 30-73.

55 REED, *supra* note 17, at 260.

56 *Id.* at 281.

active legal practice."[57] Too many law teachers, in Frank's opinion, were mere "book-teachers."[58]

Robert M. Hutchins, however, was critical of both the money making orientation of the bar and a law school curriculum dominated by "subjects which look financially profitable . . .[but lead to] the further suppression of the intellectual content and intellectual tradition of the law." Even worse, "[v]ocational courses, practical courses, courses designed to make men whiz-bangs in a particular field the minute they graduate, are all a hoax."[59] At the same time, Hutchins was equally critical of excessively theoretical law teaching, unhappily divorced from economic, social and political realities and effects.[60] If Hutchins was not actually anticipating Lasswell and McDougal's later advocacy of legal education as "systematic training for policy making,"[61] he supported a form of compromise between educational extremes. The best legal education "should be both speculative and practical," though, for Hutchins, "the practical aspect. . .is the training of the students in the operations of legal thinking."[62]

Efforts to reconcile the so-called "practical" or "vocational" aspects of legal education with the so-called "intellectual" components continue, of course, to this day. A growing interest in "skills training" for law students has encouraged the development of clinical and other law school programs designed to contribute, more comprehensively, to the professional development of lawyers.[63] At the same time, the growing interest in skills training for law students competes with the increasingly

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57 Pound et al., *supra* note 22, at 895.

58 Jerome Frank, *A Plea for Lawyer-Schools,* 56 YALE L.J. 1303, 1314 (1947). Frank noted that "American legal education went badly wrong some seventy years ago when it was seduced by a brilliant neurotic. . .Langdell. .[who] was a cloistered, bookish man." *Id.* at 1303. Moreover, Frank argued that the law schools, over influenced by Langdell's "neurotic wizardry," must "unequivocally. . .repudiate Langdell's morbid repudiation of actual legal practice." *Id.* at 1313.

59 Robert Maynard Hutchins, *Legal Education,* 4 U.CHI. L. REV. 357, 360-61 (1937).

60 *Id.* at 361.

61 Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L.J. 203, 206 (1943). While Lasswell and McDougal argued that "ancient educational practices" in the law schools failed "to serve insistent contemporary needs," they also noted that most schools "by ignoring skills in negotiation, personnel management, and public relations. . .fail even to do a sound job of vocational training." *Id.* at 205.

62 Hutchins, *supra* note 59, at 367.

63 While the MACCRATE REPORT, *supra* note 48, at 234-35, recognizes the responsibility of the practicing bar as joint participants in the professional development of lawyers, the Report also recommends that the law schools assume responsibility not only for the more traditional teaching of legal analysis, reasoning, and research but for certain "skills instruction" as well, particularly through increasingly well developed clinical programs. For an overview of ten categories of fundamental lawyering skills, with commentary and selective bibliographies, see *id.* at 138-207. The ten skills categories include problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation

"theoretical" orientation of many younger law faculty members in particular. Arguably, the gap between legal theory, as offered by many law teachers, and law school preparation for practice has widened to a chasm in many law schools.[64] Notwithstanding recent efforts like the MacCrate Report," the law taught in today's law schools bears only a slight resemblance to the law practiced by graduates of those schools. Despite a century of calls for reform, the training currently received in law schools generally does not adequately prepare law school graduates to practice law."[65]

2. *Boring Teaching?*

The persisting criticism of legal education and law teaching as "impractical" is matched by the equally prominent charge that too much of legal education is simply boring. Professor Thomas Bergin has captured this critical theme perfectly: "To be mercifully brief, law school is unmercifully dull because the only skill gained after the first year is the skill of feigning preparedness for class."[66] Such characterizations are neither new nor limited to the American experience with formal legal education. Fifty years before Bergin's succinct and acid observation, Franz Kafka described his law studies to his father. In the few months before his exams, an anxious Kafka reported that he "was positively liv-

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and alternative dispute-resolution procedures, the organization and management of legal work, and recognizing and resolving ethical dilemmas.

64 Professor Glendon, *supra* note 45, at 205 notes that "as law professors increasingly come to resemble other university scholars, they have become more interested in writing for each other." Newly recruited law faculty, some with Ph.Ds in history, literature, economics and other disciplines, have "aspired to build bridges between law and other disciplines and. . .to make law more relevant to social concerns." *Id.* at 203. These scholarly, and curricular, aspirations have diverted many law professors from scholarship and service more relevant to the professional concerns of the practicing bar. A new law professorate, recruited in the '70s and thereafter, has also challenged previously mainstream academic scholarship under various ideological banners including clinical law, "advocacy" scholarship, the law-and-economics movement, and the critical legal studies, critical race and feminist movements. *Id.* at 206. *See also* Edwards, *supra* note 50; and Elson, *supra* note 50.

65 William D. Underwood, *The Report of the Wisconsin Commission on Legal Education: A Road Map to Needed Reform, Or Just Another Report?,* 80 MARQ. L. REV. 773, 775-76 (1997). The persisting impracticality problem may have much to do with what has been described as "a kind of intellectual schizophrenia. . .[that has a law professor] devoutly believing that he can be, at one and the same time, an authentic academic and a trainer of Hessians." Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself,* 54 VA. L. REV. 637, 638 (1968).

66 Bergin, *supra* note 65, at 648. Professor Bergin, however, does argue "that student boredom would come to an abrupt end the moment the students could be made to realize that what they are getting in the second and third years is (a) something they cannot as easily get in actual practice, and (b) something which truly adds to their fund of skills or human understanding." *Id.* at 649. The related criticism of formal legal education as being "too rigid, too uniform, too narrow, too repetitious and too long," has contributed to proposals for a shorter, two year law school program. See STEVENS, *supra* note 37, at 233.

ing, in an intellectual sense, on sawdust, which had, moreover, already been chewed for me in thousands of other people's mouths.'[67]

While some student consumers and commentators have described legal education, particularly during the first year, as stimulating and "intellectually eye-opening," many others have long since disagreed.[68] Legal education, prior to the Civil War, was criticized as "narrow, shallow and sluggish,' lacking "breadth,' 'depth,' and "force.'[69] Even the twentieth century popularity of the case method, with its reputation for promoting a deeper, incisive exploration of illuminating detail while discouraging the false comforts of facile generalizing, has arguably done little to alleviate student boredom. Robert Stevens, for example, commenting on the long history of dissatisfaction with formal legal education, observes that "[b]y the late 30's Harvard students were complaining of boredom in the second and third years of law school. . .[i]ndeed they questioned all the elements of the conventional Langdell model.'[70]

Legal education and law teaching have been frequently described as a dry, arid, tedious, and sterile intellectual enterprise. Numerous critics,

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67 *Letter from Franz Kafka to His Father, November, 1919, in* DEAREST FATHER: STORIES AND OTHER WRITINGS 181 (1954); *quoted in* Alan A. Stone, *Legal Education on the Couch,* 85 HARV. L. REV. 392, 409 n.62 (1971). Similarly, a Canadian law professor has observed that "we, the instructors, are not doing enough to motivate our students. The study of the law may be a serious exercise, but it does not have to be a boring one. . .The study of the law ought to stimulate and excite law students. . .and if the classroom experience is not stimulating then we have failed as teachers." Lee Stuesser, *The Need for Change in Teaching the Law,* 38 U. N.B. L.J. 55, 70-71 (1989).

68 Whether or not "the first year is still generally considered a pedagogic triumph," there is a consensus that most second and third year students find the law school experience less and less stimulating to the point of boredom. PACKER & EHRLICH, *supra* note 37, at 30-31. Some survey research, however limited and dated, indicates that even where students evaluate law school "as generally interesting,. . .the level of interest is related to the year in school." *See* Pipkin, *supra* note 37, at 1177. Student boredom may be the result of multiple factors including "the repetitive quality of the work; shortcomings in teaching methods; a tendency for law school to pale in comparison with more interesting experiences in college and elsewhere; and an unexplained 'tedium'." Stevens, *supra* note 11, at 641-42. Boredom may also be the predictable result of "learning more and more law," in short—a form of information overload for students. James P. Rowles, *Toward Balancing the Goals of Legal Education,* 31 J. LEGAL EDUC. 375 (1981). But even where students report boredom with law school class methods and the total law school experience, defenders of more traditional methods of law teaching may argue that such "classroom teaching. . .when properly done. . .challenges students to think rigorously and profoundly about solutions to legal problems. According to this argument, cultivating students' ability to analyze legal problems in a rigorous and profound way is the most valuable preparation for law practice and is what law schools are uniquely capable of doing well." Elson, *supra* note 50, at 349.

69 REED, *supra* note 17, at 274.

70 Stevens, *supra* note 11, at 552. Despite the criticism long since directed to Langdell's innovations, most commentators agree that his reforms "were salutary and necessary. He found a dead dull routine of giving and memorizing lectures. He infused life into legal education. The case method had a reality about it that texts and lectures lacked." Hutchins, *supra* note 59, at 357. For a general reevaluation of Langdell's contributions, see W. Burlette Carter, *Reconstructing Langdell,* 32 GA. L. REV. 1 (1997).

including prominent legal realists, have noted the absence of "human life interest" in much formal law study. All too often, case-centered teaching methods have failed "to appeal to the student's imagination,"[71] leaving many law students to sit passively, with minimal intellectual and emotional interest, as if they were "[d]ough without yeast."[72] In the late '50s, Professor Willard Wirtz observed that, "It is not. . .an exaggeration to suggest that the majority of students in our classrooms today find real stimulation in probably no more that 25% of the discussion in the classroom."[73]

In the late '60s and early '70s, discontented law students and younger law professors candidly criticized law school classes as too often "boring and dead." For a young and angry Duncan Kennedy, this was a predictable product of sullen, passive and apathetic students.[74] Despite predictable professional disagreements, some law professors were concerned over the growing student view that "legal education is too rigid, too uniform, too narrow, too repetitious and too long."[75] In more measured empirical terms, Professor Carl Auerbach reported that: [O]nly 15 percent of the law students in 1969, and 13 percent in 1975, described the intellectual environment of their law schools as excellent-about the same percentages that described it as poor. . .About a third of the law students in 1969 said they were bored in class often or almost always. . .only among graduate students in social work was boredom greater than in law (in 1969).[76]

While survey research conducted during the same contentious period sometimes yielded ambiguous findings about law student boredom,[77] there has been a continuing consensus over the "academic

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71 John A. Hadaller, *On Teaching Law,* 13 CAL. ST. B.J. 1, 1-2 (Dec. 1938). For various related criticism of "subject-matter concerns," see Pirie, *supra* note 2, at 578.

72 Llewellyn, *supra* note 24, at 660.

73 W. Willard Wirtz, *Legal Education: Some Problems of Ways and Means,* 11 OHIO ST. L.J. 19, 28 (1950).

74 For an analysis of distinctive student types, some of whom are driven "into passivity and cynicism," see Kennedy, *supra* note 32, at 77. Notwithstanding his analysis of the reasons for student apathy and suppressed intellectual interests, Kennedy does state unequivocally that "[t]he Law School *is* intellectually stimulating"(Kennedy emphasis). *Id.* At 80.

75 Roger C. Cramton, *Change and Continuity in Legal Education,* 79 MICH. L. REV. 460, 475 (1981). Student boredom with legal education has been connected to numerous factors including the vocational orientation of most legal education and curricular and subject matter limitations. *See id.*; Pirie, *supra* note 2, at 578.

76 Auerbach, *supra* note 39, at 54-55.

77 Robert Stevens reports, after surveying a limited amount of student opinion, that "[t]he second most frequently mentioned response [after anxiety or an emotional response] was the degree of enthusiasm or boredom in the classroom. Of the twelve students who discussed this issue, nine confessed to boredom with law school teaching." Stevens, *supra* note 11, at 641. He notes that "there was a wide variety in the reactions of students to the teaching experience. . .To some degree, this variety reflects different experiences with different teachers." For example, "seven of the 50 students. . .projected considerable discontent with the intellectual

wastelands" of large class, case instruction in the second and third years of law school.[78] Professor, later Mr. Justice, Felix Frankfurter, for example, was explicit about "the third year blahs."[79] More recently, Robert Granfield, in his book "Making Elite Lawyers," quotes a complaining third year law student to the same effect:

> It's been very boring since my first year. The topics are dull. They act like there's going to be all this interesting academic stuff, but in reality, it's all the same. Once you have the legal thinking stuff down, there isn't much else to learn. I don't think much about the law anymore.[80]

Predictably, commentators have connected student boredom to various, if sometimes competing, factors. Boyer and Cramton, for example, have observed that the case method, especially as practiced by "mediocre instructors," is all too likely to be a "repetition of these same teaching and learning patterns [the use of which] in the second and even third years numbs and bores many students. . ."[81] Even at the risk of excessive and repetitious case parsing, many law professors take understandable pride in training students "to think like lawyers."[82] According to this much expressed argument, "[C]ultivating students' ability to analyze legal problems in a rigorous and profound way is the most valuable preparation for law practice and is what law schools are uniquely capable of doing well."[83]

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atmosphere in the classroom. . .On the other hand, among the nine who found law school more intellectually satisfying than college, six traced their preference to a greater sense of purpose prevailing in the law school classroom." *Id.* at 640. Nonetheless, individual student comments, reported by Stevens, complain about repetition and describe classes as "getting progressively more boring." *Id.* at 641, n.150. At least one student explicitly faulted the law teaching methods rather than "the material that we're covering." *Id.* at 641-42, n.151. Still others described their work as "dry," "shallow," and "simplistic." "[F]requently, what goes on in classes seems to be a little pointless." *Id.* at 642, n. 153.

78 PACKER & EHRLICH, *supra* note 37, at 32. For another characterization of the second and third year problem, see Walter Gellhorn, *The Second and Third Years of Law Study*, 17 J. LEGAL EDUC. 1 (1964).

79 Gerald T. Dunne, *The Third Year Blahs: Professor Frankfurter After Fifty Years,* 94 HARV. L. REV. 1237, 1237 (1981).

80 GRANFIELD, *supra* note 43, at 65.

81 Barry B. Boyer & Roger C. Cramton, *American Legal Education: An Agenda for Research and Reform,* 59 CORNELL L. REV. 221, 277 (1974). Cramton, *supra* note 75, at 471, reminds us of the longstanding criticism of the case method as impairing "both the teaching and scholarship functions of law schools." Alfred Z. Reed, for example, in his famous 1921 report to the Carnegie Foundation, *supra* note 17, at 382, opined "that while, in the hands of a genuine scholar, skilled in the Socratic method, the case method is indubitably the best, in the hands of a mediocre man it is the very worst of all possible modes of instruction."

82 *But see* Lon L. Fuller, *What the Law Schools Can Contribute to the Making of Lawyers,* 1 J. LEGAL EDUC. 189, 190 (1948), noting that the goal of teaching students to think "has been the last refuge of every dying discipline from Latin and Greek to Mechanical Drawing and Common-Law Pleading."

83 Elson, *supra* note 50, at 349.

Other law teachers, however, speculate that student boredom may be related to the emphasis on professional and intellectual methodologies at the expense of substance. According to this theory, more intellectually stimulating law study comes from "substantive" approaches that better expose the "richness, complexity, and imaginativeness of the common law, set in its historical background, with close attention to the infinite artistry of its detail."[84]

At the same time, many experienced law teachers also know the risks of emphasizing the transmission of information with its complicating consequences. Fundamental concepts and organizing categories may all too easily be submerged in a welter of supposedly enriching and legally relevant information.[85] Nonetheless, there are also clear risks associated with excessive abstraction and "the highly conceptualistic way in which. . .[the study of law] treats personal and social experience."[86] This argument, so central to the earlier critique of the legal realists, connects student boredom to those forms of legal education and law teaching that seem "cut off from human beings and human values."[87]

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84 Charles A. Reich, *Toward the Humanistic Study of Law,* 74 YALE L.J. 1402, 1404 (1965). While Reich concedes that law school courses "are superbly adapted to the teaching of methodology," they fall short in a number of other respects. More specifically, most courses and course materials are "well suited to logical analysis but inevitably have little depth or variety of outlook." Even where course books introduce social science perspectives, such materials are both elementary and likely to consist "of truncated excerpts from secondary sources. . ." In addition, the superficiality of survey courses and the failure of the law schools "to encourage students to use initiative in educating themselves" contribute to diminishing student interest in formal law study. *Id.* at 1403. *See also* David W. Robertson, *Some Suggestions on Student Boredom in English and American Law Schools,* 20 J. LEGAL EDUC. 278 (1968).

85 Robertson, *supra* note 84, at 287 compares the informational orientation of English and American legal education. While he concedes that "[a]quisition of the kind of stylized information that legal doctrine represents is a legitimate and inevitable by-product of a university legal education, . . .it should never be permitted to become the main concern. . .The degree of boredom among law students. . .is in direct proportion to the extent to which they are permitted to see their function as the passive one of information collection. In England, providing information in this way is the acknowledged primary function, and the boredom index is high."

86 Robert S. Redmount, *A Conceptual View of the Legal Education Process,* 24 J. LEGAL EDUC. 129, 137 (1972).

87 Jack Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law,* 53 N.Y.U. L. REV. 514, 520 (1978). One premise of Himmelstein's article "is that much in legal education fails to foster, and may even demean, a professional vision sensitive and responsive to the human dimensions of 'legal' reality." *Id.* at 516. While Himmelstein's advocacy of the value of "the concepts and principles of humanistic educational psychology" for legal education may represent a minority opinion among legal educators, he joins the consensus in observing that "[l]aw students seem bored and uninspired by the present form of legal education. *Id.* at 521. For early realist criticism of the "isolated" character of law teaching, involving case teaching disconnected from "[w]hat lies behind or around" a given decision, see Hutchins, *supra* note 20, at 267-68.

For other critics, student boredom might be neutralized through greater systematic attention to the social sciences. Some, including the legal realists of the twenties and thirties, have called for "interdisciplinary insights" into "subjects not identified with current professional preoccupations."[88] This educational prescription, however, has been resisted by those who argue that contemporary legal education is sometimes compromised by various forms of mediocre social science brought to the classroom by misguided law teachers who would rather be teaching something other than law.[89]

In fact, legal education and law teaching continue to bore all too many students for a wide variety of not entirely compatible reasons. While some law students, reflecting particularly on the first year experience, have reported that they feel "regularly inspired and invigorated," many others have concluded quite the contrary.[90]

3. *Fragmented and Unsystematic Teaching?*

Student boredom, with legal education in general and law teaching in particular, may also be related to a certain typical "fragmentation" in law teaching and legal scholarship.[91] The case and problem orientations of many law teachers often lead to a kind of "atomistics" or highly analytic law study which, of course, has much to commend it. It encourages the development of intellectual rigor and key professional skills and habits. Even though much conventional law teaching is unsystematic and unstructured, many law students have somehow become artful close readers and disciplined decomposers of complex legal artifacts like extended appellate court opinions and statutes, partly as a result of the ungentle and intensely focused prodding of at least some devoted teachers.

Nonetheless, this more typically fragmentary approach to law teaching leads law teachers and students alike away from more fundamental principles with powerful unifying and simplifying potential. Whatever the virtues of the so-called case method, and its logical complements like

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88 *See* Pirie, *supra* note 2, at 580, and Reich, *supra* note 84.

89 *See* GLENDON, *supra* note 45 at 221-26. "How did we get from the old academy devoted to the law of courthouse and market to the new academy where law is often barely distinguishable from anthropology or philosophy?" *Id.* at 230.

90 *See* SCOTT TUROW, ONE-L 271-72 (1977). Even those who believe that the case method combined with dialectic discussion can be highly stimulating and rewarding often recognize that the classic method of legal instruction will probably be boring for those students who are disinclined to well prepared and full participation. John W. Wade, *Some Observations on the Present State of Law Teaching and the Student Response,* 35 MERCER L. REV. 753, 763 (1984).

91 *See* Cramton, *supra* note 75, at 471. Redmount, *supra* note 86, at 155 n. 52, observes that "[s]equence is a vitally important concept both in individual learning and in curriculum planning. . .The proper sequential arrangement of interest and involvement, fact and theory, learning skill and prior information is an important element in learning."

various problem-centered methods, there can be little doubt that such instructional strategies frequently divert attention from those powerful "general principles by which specific [legal] data can be organized and understood."[92]

Ironically, Langdell defended his case method as a means for discovering those general, "unitary" and "consistent" principles of the law that cross state and perhaps even national boundaries and fundamentally influence the substantive design and content of a wide variety of rules and doctrines. In application, however, Langdell's systematic aspirations for case study soon became entangled with that familiar question and answer technique that Robert Stevens has characterized as "the traditional law school 'quiz'." The resulting merger of case-centered study with the aggressive questioning of law students before typically large peer groups, "rather pretentiously. . .known as the Socratic method,"[93] has often produced a classroom experience that tends to submerge useful explanatory theory and explicit organizing principles, categories and suggestive intellectual structures.[94]

Whatever the early claims for the case/Socratic method as a powerful tool for exposing an impressively unitary common-law system grounded on a consistent set of principles, many law students have been left, by their law teachers, with very different perceptions of an intellectual "chaos with a full index."[95] Despite Holmes' defense of law-related theory as an eminently practical tool for "going to the bottom of the subject,"[96] the typical law school classroom, to this day, offers precious little in the way of structural guidance, especially to the large majority of less well-endowed and distracted law students. While some law teachers

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92 *See* Henry Weihofen, *Education for Law Teachers,* 43 COLUM. L. REV. 423, 429-30 (1943). Weihofen notes that thinking like a lawyer may involve the apprehension of "organizing" general principles which, once understood, are "more valuable, more adaptable to new problems, and longer lasting than learning by the absorption and memorization of specific data." *Id.* at 430.

93 STEVENS, *supra* note 37, at 53.

94 For a very early analysis of this weakness in the case method, which de-emphasizes "a comprehensive view of the permanent underlying concepts, forms, and principles," see REDLICH, *supra* note 3, at 41.

95 A conception of law which Oliver Wendell Holmes, Jr. attributed to the old-fashioned English lawyer. *See* HAROLD J. BERMAN & WILLIAM R. GREINER, THE NATURE AND FUNCTIONS OF LAW 37 (3rd ed. 1972). Stevens, *supra* note 37, at 56 observes that when Langdell "moved from examination questions in essay form, calling for the systematic exposition of rules, to a primitive problem method. . .he not only outraged many students, but ensured that American law would take the atomistic rather the unitary approach that distinguishes it from other common-law systems today."

96 "Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. The most important improvements of the last twenty-five years are improvements in theory. It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject." Oliver Wendell Holmes, Jr., *The Path of the Law,* 10 HARV. L. REV. 457, 477 (1897).

have recognized the need for organizing complex legal information in ways that both promote useful simplifications and generate new legal hypotheses and propositions, more continue to utilize teaching and examination techniques that often confuse and ultimately demotivate a majority of students.[97]

Such fragmented legal pedagogy is also attributable to more than the use of case and problem methods. Over the years, various law professors have lamented the goal-related confusion, if not aimlessness, of modern legal education. As early as the '30s, Karl Llewellyn bluntly insisted that "not one per cent of [law school] instructors, know[ ] what. . .they are really trying to educate for,ö in part because of our lack of information about what lawyers do.[98]

In a related if more charitable spirit, Professor Lon Fuller of Harvard reminded law professors, during the '50s, of the multiple reasons so many of us lose sight of "primary goals for the sake of secondary and incidental objectives.ö[99] For Fuller, and others, competing student goals and interests, the distraction of law school examinations, the inexorable growth of complex legal subject matter, and a certain kind of philosophic confusion all contribute to overly ambitious and ultimately fragmented approaches to legal education.[100] However difficult and hazardous the question: "What is legal education for?,ö the continuing lack

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97 Pipkin, *supra* note 37, at 1173, observes that "[o]n average, third year students reported that law was not taught in law school in a systematic and ordered fashion. . ." Law students also sometimes fault the "inconclusiveness" or seeming aimlessness of Socratic methods, arguing "that the lecture can provide structure to the discussion." Stevens, *supra* note 11, at 639. In addition to student pleas for more "structure," Redmount, *supra* note 86, at 140 argues that law "learnability" requires "form, sequence and organization. . ." Law students, like all students at every level, need "learning handles." Redmount relies on the work of educational psychologist and theorist Jerome Bruner who specifies one of several components of "a theory of instruction" as follows:

> [A] theory of instruction must specify the ways in which a body of knowledge should be structured so that it can be most readily grasped by the learner. "Optimal structure" refers to a set of propositions from which a larger body of knowledge can be generated. . .the merit of a structure depends upon its power for *simplifying information,* for *generating new propositions,* and for *increasing the manipulability of a body of knowledge*.i. . .

JEROME S. BRUNER, TOWARD A THEORY OF INSTRUCTION 41 (1966).

98 Llewellyn, *supra* note 24, at 653. For an equally famous criticism of the "contemporary confusion" of law professors "in refashioning ancient educational practices to serve insistent contemporary needs," see Lasswell & McDougal, *supra* note 61, at 203-04. Efforts to integrate law and social science, for example, "fail through lack of clarity about *what* is being integrated, and *how*, and *for what purposes*." *Id.* at 204.

99 Lon L. Fuller, *On Teaching Law,* 3 STAN. L. REV. 35, 44 (1950).

100 Because of the explosion of case, statutory, and administrative law, Fuller argued that "[w]e are being overwhelmed by our resources. As a result, it is becoming increasingly difficult to discern the fundamentals on which legal education ought to concentrate." Consequently, we law teachers may be "losing sight of primary goals for the sake of secondary and incidental objectives [and]. . . falling victims to what Nietzsche called the commonest stupidity, that of forgetting what we are trying to do." *Id.* at 44-45.

of clarity over "the learning objectives of legal education" is obvious.[101] Indeed, some critics have even called the few consensus judgments about the purposes of legal education into question. The much mentioned goal of teaching law students to "think like lawyers," for example, "may be merely a way of covering up the fact that we do not know specifically what we are trying to do."[102]

The longstanding controversies over the aims and objectives of legal education are also arguably reflected in the disappointing structure and substance of the entire law school curriculum.[103] Despite the widespread recognition of the need for rational sequencing, pacing and logical integration in all learning, the law school experience is often justifiably characterized as an ultimately unstimulating encounter with intellectual "bits and pieces."[104]

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101 For an effort to apply "systematic instructional design principles" to correct "the failure to identify clearly and systematically the learning objectives of legal education," see Pirie, *supra* note 2, at 577. For a student analysis of "the fundamental problem-the purpose of legal education," see Note, *Modern Trends in Legal Education,* 64 COLUM. L. REV. 710 (1964). The author reminds us, among other points, that the purposes of continental European legal education may be broader than the American preoccupation with the training of practicing lawyers, at least as of the early '60s and before . *Id.* at 710-11.

102 Weihofen, *supra* note 92, at 429-30. *See also* Fuller, *supra* note 82; Roscoe B. Turner, *Changing Objectives in Legal Education,* 40 YALE L.J. 576, 583-84 (1931), for evidence of relatively early skepticism over the law school preoccupation with training students "to think like lawyers."

103 Observations that the typical law school curriculum has a certain shapelessness or fragmented quality are nothing new. As early as 1921, Alfred Z. Reed criticized "the patchwork character of the [law school] curriculum as a whole. Formed by a rough piecing together of rather large-sized scraps, it resembled nothing so much as a crazy quilt, that most inadequately covered the body of the law." REED, *supra* note 17, at 352. He concluded that "no single school has devised its curriculum upon any reasoned plan." *Id.* at 346. Curricular fragmentation, especially in the upper class elective curriculum, is attributable to a number of factors including "the lack of a consistent intellectual structure for the law curriculum." Boyer & Cramton, *supra* note 81, at 230. *See also* Pirie, *supra* note 2, at 586. At the same time, the history of legal education does reflect certain herculean efforts to reorganize the law school curriculum, at least at the elite schools, along coherent "functional" lines. For important historical perspectives, including the development of courses and casebooks to include non-legal materials drawn principally from the social sciences, see Brainerd Currie, *The Materials of Law Study* (pts. 1 & 2), 3 J. LEGAL EDUC. 331 (1951); (pt. 3), 8 J. LEGAL EDUC. 1 (1955).

104 Redmount, *supra* note 86, at 139, reflects on the law teacher's "structural" obligations:

> This means distributing substantive materials in terms of a cohering framework. Excessive chaos is avoided if subject matter in law is ordered in terms that afford discriminative identification, possess syntactical relation and show logical progression. Materials need to be organized in terms of units of instruction whose size and relation facilitate learning and comprehension. . .Subject matter materials clearly have to be defined, sequenced, organized, related and ultimately learned in some manner.

While "coherence, continuity and progression" are important to all effective learning, *id.* at 139 n. 23, Redmount also cautions that "structure. .t.may be helpful to a degree in directing and stimulating students. Beyond a certain point, it may become stultifying." *Id.* at 177.

4. *"Value-Laden" Teaching?*

The unstimulating quality of at least some law teaching is arguably also linked to longstanding ambivalence over the role of values in law school pedagogy. Langdell's original conception of law, as a largely self-contained and logically consistent set of principles, encouraged formal law study that proudly emphasized the presumably objective, if not scientific, "discovery" of legal rules primarily through the careful analysis of case precedent. This conception of law, as a kind of science, incorporated a claim that the legal system was ideally composed of a "value-free" set of principles.[105] While the case method was purportedly a tool for the rigorous "mining" of judicial opinions, the typical law school case-centered course, prior to the 1960s at least, was probably preoccupied with matters of doctrinal explication and consistency to the substantial exclusion of explicit policy and normative concerns.[106]

Even though the legal realists of the '30s and '40s had persuasively exposed the instrumental character of legal rules and warned against taking many legal doctrines at face value, older style doctrinal conceptions of legal scholarship and formal law study continued to influence succeeding generations of law teachers and impressionable law students.[107] Professor Harry Jones, writing in 1950, observed that:

> [T]he criticism and appraisal of existing law undertaken in the traditional case method course went on almost entirely in terms of doctrinal consistency. Classroom discussions of the "soundness" of a casebook decision related, nineteen times out of twenty, to the question whether the holding of the case was supported by legal precedent and legal principle. It was the rare law teacher

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105 *See* STEVENS, *supra* note 37, at 52-53. The early versions of the case method endorsed a view of the lawyer "as an objective scientist who merely discovered legal rules" and whose principal role was "one of guiding clients through the existing thicket of legal rules rather than raising substantive questions about the rules themselves." This limited and limiting conception of the lawyers' professional role, however, apparently clashed with the dominating professional culture in Wisconsin and other states. WILLIAM R. JOHNSON, SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES xvii (1978).

106 While policy questions about legal rules are staples of most contemporary law teaching, the formal classroom emphasis, particularly during the influential first year, is still likely to be relatively "technical":

> "Thinking like a lawyer," the primary goal of the first-year curriculum at American law schools, is a narrow, craft-oriented approach that emphasizes using precedent, synthesizing cases, and manipulating legal rules. Legal educators ban consideration of questions of value or policy from much of the first year of law study in order to concentrate on craft as a foundation for later exploration.

Joseph Edward Olson, *Teaching Justice, But Whose?*, 53 N.Y.U. L. REV. 609, 610 (1978).

107 For a brief overview of the realist movement and the realist critique of "the conceptualism and abstraction in Langdellian formalism," *see* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 24-33, 28 (1995).

> who required his students to dig beneath the doctrines and concepts of the existing law to uncover the notions of expediency and judgments of value in which they were rooted.[108]

Professor Jones similarly criticized formal legal education "for the hesitant and oblique consideration which is given to the values which underlie our legal order and control the directions of its development."[109] In addition to the legal realists of an earlier generation, numerous law professors, with various professional and social perspectives, have more recently objected to "the pretense that law could be taught in a 'value-free' manner."[110] For some, modern legal education is "deeply infused with ideological assumptions. . ."[111] Even our students appear to have noticed the "dryness" and "unreality" of excessively "neutral" approaches to legal education.[112]

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[108] Harry Willmer Jones, *Objectives and Insights in University Legal Education,* 11 OHIO ST. L.J. 4, 15 (1950).

[109] *Id.*

[110] GLENDON, *supra* note 45, at 233-34. Lasswell & McDougal, *supra* note 61, at 206, argued in the '40s for a reconception of legal education as "systematic training for policy making." They criticized the contemporary confusion and limitations of professional law teachers, including even "occasional voices [that] still insist that law schools should have no concern whatsoever with policies, goals, or values-that the only proper concern of law schools is method, *science* disinfected of all preference."

[111] GRANFIELD, *supra* note 43, at 2, also argues that "[l]aw. . .is ideological, and to study law in the halls of American law schools is to engage in a course of study in ideology."

[112] Some students, at least during the early '70s, complained that the law schools "never attempt to provide the students any sort of perspective on the role of legal institutions. We learn techniques and maneuvers, but they never tell us what the law is up to." Similarly, others complained that "[t]he question of values is much more important than providing students with practical know-how" and "it is very wrong for any faculty member. . .to teach very neutral things, very dry material, without considering anything beyond the narrow range of 'this is what the law is.'" Nonetheless, while some students decried the "absence of any kind of ethic [in class discussion]," still others considered the discussion of ethical problems a waste of time. Mohr & Rodgers, *supra* note 36, at 408-09. *See also* CHRIS GOODRICH, ANARCHY AND ELEGANCE; CONFESSIONS OF A JOURNALIST AT YALE LAW SCHOOL (1991). Goodrich characterizes the pedagogy of one of his professors as follows. In discussing *Swann v. Burkett,* a housing discrimination case, during a first year civil procedure class, Professor Geoffrey Hazard's:

> approach to law seemed to empty it of moral content, made it an intellectual exercise. He glossed over the social context of *Swann;* he seemed more interested in the case's legal maneuvering than the justice of his clients' position. That wasn't only Hazard's doing, of course; Procedure, after all, is a class in methodology. But I was still surprised to the extent to which Hazard glorified technical mastery of the law. . .The ability to read the minds of judges and other lawyers seemed more important to him than the rights and values at stake.

Id. at 39.

Similarly, Ralph Nader vividly recalls the solemn ritual at Harvard where first year students were immediately "launched. . .into corridor thinking and largely non-normative evaluation." "Normative thinking-the 'shoulds' and the 'oughts'-was not recognized as part and parcel of rigorous analytic skills." Ralph Nader, *Law Schools and Law Firms,* 54 MINN. L. REV. 493, 493, 495 (1970).

Contemporary critical legal studies scholars have been particularly vigorous in arguing that apparently value-neutral law teaching may even transmit and embed strikingly negative values. Various "Crits," including proponents of critical race theory and feminist legal scholars, have sharply criticized law teaching that fails to take its responsibility for "normative jurisprudence" seriously. Such law teaching, that often avoids the explicit discussion and evaluation of values and policies, is all too likely to cultivate certain "anti-feminist" and "capitalistic values." Thus, the supposedly value-free law school classroom only reinforces certain "illegitimate hierarchies" and provides "a false legitimacy to existing social and power relations."[113]

Even those law professors who reject such charges are still likely to agree, these days, on the need to expose law students, more explicitly, to competing values. One need not be a "Crit" to feel concern over the continuing tendency of formal legal education "to produce analytic giants. .[and] moral pygmies."[114]

At the same time, there are certain risks in the regular practice of value-laden and policy-explicit teaching. Even those law teachers and legal scholars who resisted the call of Professor Herbert Wechsler and others, during the '60s, for a commitment to so-called "neutral legal principles," recognized the problem of subjectivity in legal education and, ultimately, in judicial decision making.[115] Despite deep and obvious interest in the policy dimensions of legal problems, many law professors are also well aware of the difficulties of divorcing policy from politics and the risk that explicit justice-oriented teaching may become a form of ideological inculcation or "brainwashing."[116]

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113 Pirie, *supra* note 2, at 580; *see also* Pickard, *supra* note 46, at 280.

114 STEVENS, *supra* note 37, at 121-22. *See also* Roger C. Cramton, *The Current State of the Law Curriculum,* 32 J. LEGAL EDUC. 321, 330-31 (1982); Richard Johnstone, *Rethinking the Teaching of Law,* 3 LEGAL EDUC. REV. 17, 26 (1992); Neil Gold, *A Brilliant Career: Life as a Law Teacher,* 3 LEGAL EDUC. REV. 95, 118 (1992). Professor Alan Stone, however, believes that the "Crit" position "that the classroom would be really exciting. . .if teachers would only look to the assumptions behind the law," is a facile assertion that largely ignores what law teachers "have been trying to do for half a century." Stone, *supra* note 67, at 408.

115 Proponents of the "Neutral Principles" school attempted to construct a theory of constitutional adjudication that "would establish constraints on the freedom of a judge to decide difficult legal problems based on the judge's particular policy predilections. . .The problem of 'subjectivity' in judicial decision making would. . .be avoided by the logical consistency of the 'legal reasoning' process." MINDA, *supra* note 107, at 37. For a summary of this popular form of '60s "conceptual jurisprudence," see *id.* at 37-43.

116 Few law professors have been more devoted than Karl Llewellyn to law teaching as a means "of providing the lawyer with some understanding of his public responsibility and with sufficient vision both to get perspective on his life work and to guide. . .professional judgments. . ." Nonetheless, he also recognized that the difficulty, if not impossibility, of divorcing policy from politics and the "non-political tradition" of our law schools have led both faculty and students to "join in frowning on an instructor's taking, in class, a 'preaching' or 'political' position." Karl N. Llewellyn, *The Current Crisis in Legal Education,* 1 J. LEGAL EDUC. 211,

The problem of ideological teaching, of course, is a very old one. The conventional concern applies generally to formal education of most types and at most levels. Max Weber, for example, has long since observed that the "primary task of a useful teacher is to teach. . . students to recognize 'inconvenient' facts." Though a teacher is to serve students with knowledge and experience, he (and now she) has a duty to avoid "imprint[ing] upon them his personal political views." In a word, "prophets and demagogues do not belong on an academic platform."[117]

Though most law professors would concede Weber's points in the abstract, a disquieting number of our leftist colleagues, in particular, have been recently charged with ideological zeal and political excess.[118] As one commentator has expressed it, "the crusty, demanding law teacher [Professor Kingsfield]. . . has by and large been supplanted by. . .paragons of political correctness."[119] It is also arguable that law students are often subjected to non-leftist value systems, sometimes through relatively subtle teaching. Paul Savoy, for example, has noted that we commonly reserve pejorative terms like ideology or propaganda for those value systems that we do not like. Law professors, of non-leftist persuasions, would probably not apply such terminology to the "teaching [of] American middle-class values. . ."[120]

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219 (1948). Other commentators have more recently noted and regretted that "[p]olitically charged comments are often dismissed by professors. In some cases students are chastened for raising moral or ideologically-charged issues." GRANFIELD, *supra* note 43, at 75-76. Some contemporary law professors, however, express "great uneasiness about using our privileged and secure positions for what might be deemed propagandistic purposes." *See* Robert L. Bard, *Teaching Justice,* 53 N.Y.U. L. REV. 616, 621 (1978).

117 Max Weber, ESSAYS IN SOCIOLOGY, *in* 58 GREAT BOOKS OF THE WESTERN WORLD 117-18 (2d ed. 1990).

118 Professor Duncan Kennedy, a particularly outspoken advocate of legal leftism and critical social theory, explains that "[t]he goals of the left project are to change the existing system of social hierarchy, including its class, racial, and gender dimensions, in the direction of greater equality and greater participation in public and private government." Moreover, the "left project" reflects a degree of "oppositionism" perhaps greater than the oppositionism of modernist/post-modern Liberalism and Marxism. *See* KENNEDY, *supra* note 33, at 6.

119 GLENDON, *supra* note 45, at 228. For an inquiry into "whether law professors present their political beliefs in an intolerant fashion, thereby stifling debate and the learning process," see Steven C. Bahls, *Political Correctness and the American Law School,* 69 WASH. U. L.Q. 1041, 1043 (1991). Professor Bahls reports that:

> A survey of law students recently conducted through the American Bar Association's Section of General Practice reveals that most students find some professors at their law school intolerant of political beliefs that differ from their own. Further, over half of those surveyed do not always feel free to express their disagreement with the political perspectives of their professors in class, on exams, or in papers.

Id.

For references to more popularized treatments of the "rising hegemony" of the politically correct in American universities, including but not limited to the law schools, see *id.* i.at 1041, n.2; Heather MacDonald, *Law School Humbug,* 1995 CITY JOURNAL 46 (Autumn).

120 Savoy, *supra* note 36, at 471. Because students experience propaganda regularly in law school, Savoy argues that it is "important. . .that teachers make explicit their own value

Even if this characterization of a newly politicized legal academy is much overdone, we still confront the challenge of competing educational practices. Legal education, older style, is plainly disengaging for very many professors and students with its heavy, superficial and often excessively complex doctrinal emphasis. The explicit exploration of influential unifying values and policy foundations, however, sometimes requires a certain pedagogical willingness to take various intellectual and other risks. Such value-sensitive teaching may lead to unhappy student distractions and charges that law teachers are too "political" and aggressively committed to either left or right ideological extremes.[121]

The net academic effect, therefore, may well be one of professorial retreat to a safe haven of pedagogical neutrality. Law professors, who are at least as risk averse as most other persons, may all too often avoid discussing "dangerous" problems and controversial policy considerations before diverse and often immature groups of law students who are sometimes quick to take offense in our sensitive age. When and if this happens, we law professors forfeit important and gratifying opportunities to vitalize our law teaching and to provide more useful training for future leaders.

5. *Damaging Teaching?*

An early scene from the 1971 novel "Paper Chase"[122] speaks eloquently to a final and complex category of criticism of law teachers and legal education. The redoubtable Professor Kingsfield has just called on his first student in his first contracts class of Harvard Law School's new academic year. While looking off to the right, the Professor calls on Hart, the novel's protagonist, who happens to be sitting on the left: "When Hart. . .heard his name he froze. Caught unprepared, he simply stopped

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judgments instead of dressing them up in the guise of 'rational' and 'objective' standards-a bit of semantic sleight-of-hand that makes it so much more difficult for students to reject the teacher's vision of the world and make up their own minds about how the law should deal with social problems." *Id.* For some commentators on legal education, "law schooling. . .represents a moral transformation through which students dissociate themselves from previously held notions about justice and replace them with new views consistent with the status quo." GRANFIELD, *supra* note 43, at 73. *See also* RICHARD D. KAHLENBERG, BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL (1992). Kahlenberg explains "the central purpose" of his book as an effort "[t]o try to understand why students change, and how they are able to reconcile liberal politics and the pursuit of careers in corporate law. .t." *Id.* at 6.

121 For a candid analysis of the connection between professorial politics, of the left, and student hostility, see Richard Abel, *Evaluating Evaluations: How Should Law Schools Judge Teaching?,* 40 J. LEGAL EDUC. 407 (1990).

122 JOHN JAY OSBORN JR., THE PAPER CHASE (1971). The author prefaces his work with the caveat that "[t]his is a work of fiction. The characters in this book do not have counterparts in real life." Despite guarding against accidental consistencies between his fictional characters and events and real characters and events at Harvard, the author concedes that "important attitudes ascribed to characters in. . .[his] book accurately reflect the author's experience."

functioning. Then he felt his heart beat faster than he could ever remember its beating and his palms and arms break out in sweat.[8]

Urged by the imperious Kingsfield to speak up, Hart: "tried to speak loudly, tried to force the air out of his lungs with a deep push, tried to make his words come out with conviction. He could feel his face whitening, his lower lip beat against his upper. He couldn't speak louder. . ."[123]

Every law student and lawyer recognizes this scene whether or not they survived the memorable ordeal of the first year as well as the spirited Mr. Hart. Even if Kingsfield is taken for the pompous and insensitive caricature that he really is, the scene and the book capture a certain quality of formal legal education, at least as it was often practiced in the '50s and '60s in very many law schools.[124]

The novel and a considerable professional literature, beginning in the late '60s and continuing to this day, offer an indelible image of a grim educational reality. Various commentators argue in newly explicit ways that too much of formal legal education suffers from a disparity of power between student and teacher. This disparity is often reinforced, so the argument goes, by the "gratuitous aggressions" of benighted law professors who regularly create an oppressive classroom atmosphere. More significantly, the intimidating "didactic assaults" of many professors may damage law students and lawyers in various and perhaps permanent ways.[125]

While criticism of legal education is a well established professional tradition beginning in the nineteenth century, the published argument, that law teaching actually does complex damage, is a relatively new phenomenon arguably related to American social and political conditions of the '60s and early '70s. While there are relatively few respectable empirical studies of legal education to this day, several dating from the '70s rather decorously address the various possibilities that law teachers in-

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123 *Id.* at 18-19.

124 For other memorable book length accounts, without the fictional "cover," see TUROW, *supra* note 90; GOODRICH, *supra* note 112; and KAHLENBERG, *supra* note 120. While these books describe the law school environments at Harvard and Yale, graduates of these and a few other elite law schools have occupied a disproportionate share of law faculty positions at law schools throughout the country. Data from the mid-seventies revealed "that 33.2 percent of all full-time law teachers received their J.D. degrees from one of a group of only 5 law schools [Harvard, Yale, Columbia, Michigan, & Chicago], while an additional 25.7 percent received theirs from one of another 15 law schools." Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession,* 1980 AM. B. FOUND. RES. J. 501, 507.

125 Though Professor Kingsfield may now be out of date, and a plainly offensive model for boorish, pompous and unstimulating law teaching, it is still arguable that the lingering image of his style remains influential in shaping student expectations of law professors and law school. *See* Catharine W. Hantzis, *Kingsfield and Kennedy: Reappraising the Male Models of Law Teaching,* 38 J. LEGAL EDUC. 155 (1988). For a more dated, but still classic, description of faculty hostility and indifference that, however unwittingly, may inflict emotional harm on law students, *see also* Kennedy, *supra* note 32, at 73.

flict not only emotional, but intellectual, moral and political damage as well, in part by presiding over a form of fang and claw academic competition.

Ronald Pipkin's early '70s survey of student attitudes about law school pedagogy noted, among other conclusions, that "students see law school as warping students' personalities, causing excessive anxiety, stress, boredom, cynicism, and the development of psychological defenses incompatible with later ethical practice. Law School is charged with inculcating a mindless obedience to authority as in the Watergate syndrome.ö[126]

A few years earlier, Packer and Ehrlich reported that even the widely praised first year law school program was increasingly subject to "serious and intense complaint and criticism concerning other [negative] effects of the first year. The class atmosphere is said to be a hostile one, with the hostility directed from the icily distant teacher toward the student on the spot.ö[127] Their report explained, with a measured and somewhat skeptical tone, that "[l]aw professors as a group tend to be extremely intellectual and extremely verbal, very often to the point of ignoring the emotional and connotative level of communication,ö while conceding that some law students may suffer "a severe loss in self-respect and possibly even an identity crisis.ö[128]

Still other commentators have reflected on the complex, pervasive and elusive process of "professional socialization.ö Increasingly, observers of the effects of legal education have concluded that law school leads to more than intellectual and professional skills development. Formal legal education may also influence student personalities, values, work habits, and social roles.[129] Some psychiatrists, psychologists and sociologists, with law faculty appointments, have turned their cross-disciplinary attentions to problems of law student anxieties and personality disorders, many of them arguably connected to supposedly merciless forms of Socratic teaching.[130]

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126 Pipkin, *supra* note 37, at 1163.

127 PACKER & EHRLICH, *supra* note 37, at 30. *See also* Robert Coles' succinct characterization of the Harvard Law School in the Foreward to Kahlenberg, *supra* note 120, at x. For Coles, the "central assertion" of the Kahlenberg memoir of Harvard "might be put this way: all too many distinguished legal theorists have consistently lacked the qualities any good teacher needs-a plain old interest in students; and the result can be a galling coldness, an arrogance and smugness, a psychological insularity on the part of such law school professors, no matter their brilliance."

128 *Id.* Even if the "case-Socratic method of teaching" has certain adverse impacts on student psychology, some defenders of conventional law teaching "would retort that [critical] phrases such as 'loss of self-respect, 'identity crisis', and 'psychic damage' have. .t.assumed a talismanic role." *Id.*

129 Boyer & Cramton, *supra* note 81, at 257.

130 Professsor Watson observes that law teachers are "often blind. . .to the effect their classroom technique has on students. Relying mainly on the spoken word, they do not readily

The most vivid explorations of the "law students are damaged" hypothesis, however, have come from younger law professors, often sympathetic to the critical legal studies movement, and from law students themselves. Paul Savoy, in a bitter '70s attack on legal education, reflects on the "boiling resentments" of first year law students, in particular, who are newly subjected to a Socratic dialogue that "has many of the properties of a degradation ceremony." Savoy also notes more dispassionately that the overwhelming concern of the professional literature on legal education "is with curriculum, methodology and casebooks. We rarely hear anything about teaching."[131]

In a similar critical spirit, Harvard Law School Professor Duncan Kennedy, then a Yale law student, offered what he himself characterized as a "rather grim conclusion. . .:the element of destructive aggression, of terrorism, in teaching law is a real 'psychic good' for the teacher." For Kennedy, at least in his less mature days, the faculty impulse to inflict pain on law students is unlikely to be recognized let alone criticized by law professors. Nonetheless, he finds it "incredible that anyone-and especially a teacher-should . . .[deny] that the Law School has no effect on the personalities of its students."[132]

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see all of the emotional cues of distress which emanate from their students." Andrew S. Watson, *The Quest for Professional Competence: Pyschological Aspects of Legal Education,* 37 U. CIN. L. REV. 93, 113-14 (1968). He further notes that he has:

> [N]ever seen more manifest anxieties in a group of persons under 'normal' circumstances than is visible in first year law students. . .There will be jaw clenching, fingernail biting, restlessness, blushing, blanching, absenteeism, a spate of psychosomatic illnesses, and overt and recognized anxiety. Each of these stress responses will itself create further discomfort and anxiety, which will necessitate some adaptive reaction by the student. Only rarely have I seen law teachers acknowledge these reactions. By ignoring them, the teacher not only causes the student to feel the anxiety, but creates the additional sensation within the student that he is alone in his suffering.

Id. at 121-22.

See also Stone, *supra* note 67, at 426, who reflects on the tendency of legal education to ignore a "student's sense of self-esteem." According to Stone,"[t]he critical problem facing legal education is how to mitigate the traditional syndrome of disengagement by devising educational techniques that help the student readjust his ego-ideal and reinforce his sense of self-esteem." *Id.* at 427. More recently, Granfield, *supra* note 43, at 40-41, reports that "[r]esearch on the experiences of law students has consistently noted that they become increasingly alienated, progressively isolated and chronically distressed. This has been said to be particularly evident among women." Nonetheless, student criticism of the "pointless harassment," engaged in by so-called Socratic faculty interrogators, may not speak to the longer term effects of law school stress and even the most arguable forms of faculty abuse or insensitivity. Analysis of the potentially damaging effects of legal education generally relies more "on casual empiricism rather than controlled scientific methodology." *See* Boyer & Cramton, *supra* note 81, at 257.

131 Savoy, *supra* note 36, at 460, 456.

132 Kennedy, *supra* note 32, at 75. In describing the "atmosphere of collective terror" prevailing in the first year classroom in particular, Kennedy further concludes that:

Other reports of law student opinions are equally unflattering about the damaging effects of law teaching. Even law school alumni, now well beyond the era of the civil rights movement, the Kennedy and King assassinations, the War in Vietnam, and the Watergate scandal, vividly recall the intense psychological stress of law school with one likening the experience to "three years in the dentist's chair."[133]

In fact, the "law students are damaged" hypothesis is a complex general proposition which may be analyzed in terms of more specific and distinguishable charges. First, the relevant literature has often suggested that the law school experience inflicts emotional damage on law students. Some faculty and student critics have bluntly described this damage by using colorful terminology. While good teachers, regardless of discipline, ought to avoid "pulverizing. . .ridicule,"[134] law teaching, at least at a Socratic extreme, may be unhappily unique, "because the law school is the only educational institution that officially embraces and nurtures embarrassment or humiliation as its prime pedagogical technique."[135]

Whether it is fair to describe law students as constantly subject to "teacher terror,"[136] "destructive aggression" or "dehumanizing" "degradation ceremonies,"[137] there is some basis for professional concern over "the propensity [of law teaching] to inflict psychological harm on law students."[138] Not only does the anecdotal literature suggest that legal education and law teaching impair the emotional well-being of law students, there is empirical support for the conclusion that law school pro-

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> [I]t is important that we are dealing with a particular kind of terror: that of a person who knows himself defenseless before a person who has a demonstrated desire to hurt him. The salutary feeling of tension before going into battle is notably absent during the ten minutes between classes. The fear is the fear of the victim.

Other commentators have also noted that law students may be "appreciably more hostile and cynical" about their formal education than graduate students in other disciplines. Like Kennedy, others have observed that law students often analyze their overbearing teachers in psychological rather than educational terms: This law professor "doesn't do that because he thinks it's good for our education. He does it because he loves to burn people." Jon Richardson, *Does Anyone Care for More Hemlock,* 25 J. LEGAL EDUC. 427,442 (1973).

133 Michael H. Levin, *Fear and Loathing at Harvard Law School,* HARV. MAGAZINE, Mar.-Apr. 1995, at 44, 45.

134 HIGHET, *supra* note 47, at 61. Highet reflects on the various uses for pedagogical humor while noting that irony and sarcasm imply intellectual domination. *Id.* at 59-62.

135 Richardson, *supra* note 132, at 441. For similar criticism linked to the use and abuse of so-called Socratic teaching, see Wood, *supra* note 36.

136 *See* Mohr & Rodgers, *supra* note 36, at 410-11. *See generally* TUROW, *supra* note 90; OSBORNE, *supra* note 122. Levin, *supra* note 133, at 49, concedes that the Harvard Law School has changed in significant ways. Nonetheless, he quotes a '94 graduate who referred to the Law School faculty as "mean, twisted men in tight suits berating us into oblivion."

137 *See* Kennedy, *supra* note 32, at 75; Pirie, *supra* note 2, at 579; Savoy, *supra* note 36, at 460, respectively.

138 Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship,* 40 AM. U.L. REV. 367, 394 (1990).

duces exceptional and damaging stress in many students that may last beyond law school:

> Specifically, on the basis of epidemiological data, only 3-9% of individuals in industrial nations suffer from depression; prelaw subject group means did not differ from normative expectations. Yet, 17-40% of law students *and alumni* in our study suffered from depression, while 20-40% of the same subjects suffered from other elevated symptoms.[139]

Besides depression, the same study offered evidence that law students demonstrated higher than normal symptoms of obsessive-compulsive behavior, interpersonal sensitivity, anxiety, hostility, phobic anxiety, paranoid ideation, social alienation, and isolation.[140] Even the very most able law students may be affected or at least puzzled over the emotional effects of our very demanding form of legal education. Judge, once law professor, Richard Posner, in reflecting on his own legal education in the early '60s, has observed that "The first year at Harvard was a grim year. . .[but] on balance a very good experience. The question is whether something like that inflicts psychological damage on the people that don't do well that is greater than the corresponding gain. I don't know."[141]

In addition to the possible emotional damage, it has also been argued that law teaching and legal education do intellectual damage to law students as well. Of course, legal education has a longstanding reputation for sharpening the mind by narrowing it.[142] Paul Savoy has argued, with typical intensity, that legal education and law teachers cultivate "a predilection for formalism and intolerance for ambiguity," and discourage creativity "by humiliation, criticism and punishment for failure."[143]

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139 G.Andrew Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers,* 1986 AM. B. FOUND. RES. J. 225, 247 (emphasis added).

140 *Id.* at 246. *See also* Stephen B. Shanfield and G. Andrew H. Benjamin, *Psychiatric Distress in Law Students,* 35 J. LEGAL EDUC. 65, 67 (1985), for more systematic explanations of nine symptom dimensions afflicting law students with comparatively greater levels of psychiatric distress. The authors also note that "[t]here have been few systematic studies of law student distress and much of the literature is impressionistic and anecdotal." *Id.* at 65.

141 Richard A. Posner, *Some Thoughts on Legal Education,* 19 U. CHI. L. SCH. REC. 19, 21 (1972).

142 Pirie, *supra* note 2, at 580 n.48, credits Samuel Taylor Coleridge with originating the characterization.

143 Savoy, *supra* note 36, at 484, 476. He further charges that authoritarian law teaching reflects and generates "submissiveness to authority, dependence on external judgment, contempt for idiosyncrasy, distrust of feelings, excessive control of impulses. . ." *Id.* at 484. Moreover, he criticizes the legal tradition and the classical "liberal temperament, which feeds a large part of contemporary legal theory," as being inhospitable "to the life of feeling." An excessive "predilection for rational calculation" has "a tendency to impoverish the feelings and

In more measured and skeptical terms, Packer and Ehrlich reflect on the charge that legal education "does damage to the student's intellectual initiative and imagination. The limits of the [class room] discussion are totally controlled by the teacher: his assumptions frame the discussion; his questions are considered. The student, it is claimed, is conditioned to work in a 'given' framework, not to construct his own.ö[144] At the same time, Packer and Ehrlich also observe that most law teachers would sympathize more with the charge about emotional damage than with the conclusion that law teaching and formal legal education actually impair student intellectual capacities.[145]

An even more frequently expressed criticism relates to the potential power of law professors to affect the ethical and political orientations of their students.[146] While some law teachers have merely been charged with inducing ethical insensitivity, others have been faulted for dramatically altering the moral commitments of law students by emphasizing a "rationality, skepticism, and cynicism. . .[which] dulls or destroys the law student's basic sense of fairness and justice.ö[147] For some critics, legal education, "represents a moral transformation through which students dissociate themselves from previously held notions about justice and replace them with new views consistent with the status quo.ö[148]

This purported transformation has sometimes been related to a pervasive and cynical commitment to "gamesmanshipö which leads idealistic students away from their previous aspirations of "doing goodö and towards more pragmatic ethical and political postures. Indeed, the law school "culture of cynicismö has been generally faulted for undermining student "interest in social justice,ö[149] and, more specifically, for cultivat-

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the imagination." *Id.* at 462-63. *See also* John J. Bonsignore, *At the Edge of Law,* 11 AM. BUS. L.J. 135, 144 (1973). *But see* Stone, *supra* note 67, at 418t21, for criticism of Savoy's "totally bitter indictment of legal education" and his "exaggerated emphasis on creativity in law school." Indeed,"[t]o suggest that the law school can significantly facilitate genuine creativity in a large number of law students by radically changing its pedagogical approach is certainly unproven and at best misleading." *Id.* at 421.

144 PACKER & EHRLICH, *supra* note 37, at 30.

145 *Id.*; *See also* Stone, *supra* note 67, at 421.

146 *See supra* notes 116-21 and accompanying text.

147 Murray L. Schwartz, *How Can Legal Education Respond to Changes in the Legal Profession?,* 53 N.Y.U. L. REV. 440,a445 (1978). Both law students and their teachers have noted a certain moral insensitivity if not "near paralysis in the face of moral arguments." *See* Mohr & Rodgers, *supra* note 36, at 413; GLENDON, *supra* note 45, at 230. *See also* Kronman, *supra* note 44, at 1-2, who argues that the American legal profession "now stands in danger of losing its soul." For Kronman, "[t]his crisis has been brought about by the demise of an older set of values that until quite recently played a vital role in defining the aspirations of American lawyers."

148 GRANFIELD, *supra* note 43, at 73.

149 *Id.* at 65. Granfield argues that: "cynical relativism regarding the nature of one's actions is a type of consciousness that is contrary to the pursuit of social justice. The maintenance of social justice ideals demand that a particular ideological and normative view of legal

ing resistance to "feminist perspectives" and for encouraging "patterns of thought, conduct and socio-political allegiances essential to both capitalist and patriarchal hegemony."[150]

Finally, law teachers, and the law schools they control, have been charged with encouraging destructive forms of competition. Whether or not law teachers really preside over a "savage meritocracy," it is probably true that many of us behave differently toward different students. Indeed, the scarcity of our teaching resources compels us to differentiate among numerous students in deciding who gets what portion of our pedagogical attention, particularly after formal class presentations.[151]

Especially where a student establishes a claim to intellectual ability and professional skills, in the classroom or on exams or papers, that student may be afforded more time and deference than less achieving students. Class dialogues with the better students sometime tend to leave out other students. Some law teachers, of course, express pride in teaching to the top of the class.[152] Moreover, our students are usually well aware of the significance of law journal membership and class rankings. Even where class rankings have been abolished, some students continue to feel that they are trapped in a kind of "Darwinian competition."[153]

There is, therefore, a relatively new tradition of candid and even unsparing commentary on what may be an old problem. Even if law teaching and legal education do not inflict lasting damage on impressionable students, there can be little doubt that many law students have suffered memorable kinds of anxiety, if not pain, in coping with sometimes overbearing teachers as part of their professional rites of passage.[154]

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activity be cultivated. The culture of cynicism promoted within law school produces an intellectual orientation that undermines a student's interest in social justice." *Id.*

150 Pirie, *supra* note 2, at 580.

151 For the general connections among scarcity, competition and discrimination, see ARMEN A. ALCHIAN & WILLIAM R. ALLEN, UNIVERSITY ECONOMICS 11-14 (3rd. ed. 1972).

152 *See* Watson, *supra* note 130, at 111-12, explaining and criticizing the inclination of some law professors to teach to "the upper 10 percent" as related "to the faculty's sense of impotence in dealing and communicating with the students who may be so unlike it intellectually and emotionally." *See also* Kennedy, *supra* note 32, at 73. For an overview of the "highly competitive atmosphere" in most law schools, see Boyer & Cramton, *supra* note 81, at 261-65.

153 Levin, *supra* note 133, at 47. Nonetheless, there is also evidence that many faculty members, especially in the more diverse law schools of the '80s and '90s, are reasonably sensitive and responsive to students with less distinguished records. Indeed, the trend may have started during the '70s. *See* Mohr & Rodgers, *supra* note 36, at 414-15.

154 While most faculty members may not be sadists, some may still take special pleasure in aggressively decimating the preconceptions and muddled misconceptions of first year students. *See* TUROW, *supra* note 90, at 271. He reminds us that:

> the peculiar privilege which Socraticism grants a teacher to invade the security of every student in the room means that in the wrong hands it can become an instrument of terror. I never felt that my education gained by my being frightened, and I was often scared in class. Law faculties have too long excused, in the name of academic freedom, a failure to hold colleagues within basic limits of decency.

At the same time, many law teachers have defended their methods and pedagogical styles by noting their responsibility for changing student preconceptions and misconceptions. Good teachers, after all, often "push" their students even at the risk of appearing to adopt coercive teaching methods. Truly responsible law teachers frequently try "to interfere with existing [mental] pathways and create new ones."[155] This literally unsettling process consequently creates a certain amount of student insecurity that even more mature students will often find unpleasant.[156] Students also often want contradictory things from their legal education. Professor Lon Fuller once wisely reflected on the law student who wants both "the thrill of exploring a wilderness and [the security] to know where he stands every foot of the way."[157]

Fortunately, so the argument goes, anxiety can be a stimulant as well as a deterrent to law learning. Even punishment can motivate under the right academic conditions.[158] While there may be a fine line between

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Id

See also Watson, *supra* note 130, at 109.

155 Anthony D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461, 470. Professor Julius Getman notes that while the best teachers make "students feel capable when they had previously felt inadequate," it is still clear that "[r]outine encouragement is not equivalent to good teaching. Indeed, it is surprising how many people recall with pleasure a teacher who, by pushing, forced them to surpass their best previous work. ." GETMAN, *supra* note 47, at 17.

156 Boyer & Cramton, *supra* note 81, at 260, remind us that "the popular illusion of certainty, predictability, and order in the law itself is dismantled by the rigorous analysis of law teaching and the Socratic method." Commentators like D'Amato argue that a responsible teacher "must leave the students with a certain amount of *psychological* insecurity. He has to deny them. . .'comfort'. .t." because "this insecurity is what. . .[students] need if they are to sweep out cobwebbed censor-driven pathways in their minds and formulate new avenues of thought." D'Amato, *supra* note 155, at 474. Nonetheless, Professor Watson cautions that the law faculty's "holy mission to root out all ill-conceived and unreasoned [student] attitudes" may have "additional results which are highly undesirable," despite the need for "developing the student's capacity for rigorous analysis and tough-mindedness." Watson, *supra* note 130, at 109.

157 Fuller, *supra* note 99, at 42.

158 While it is only relatively recently that punishment has occupied an important place in the psychology of learning, there is longstanding recognition that punishment may be a useful educational stimulus provided it is used sensibly and in moderation. For qualified support of "correction" in the education of children, see comments attributed to Samuel Johnson *in* JAMES BOSWELL, LIFE OF SAMUEL JOHNSON, LL.D., 44 GREAT BOOKS OF THE WESTERN WORLD 199t 200 (2d ed. 1990). While fear, at least of physical blows, "blocks the movement of the mind. . .[and] produces the opposite effect to that of true education. . .," there still may be a role for punishment as a "powerful stimuli to help teachers in teaching and pupils in learning." For this impressionistic advice from a great and insightful teacher, seet, *supra* note 47, at 160, 162-63. Nonetheless, many psychologists have been skeptical of the educational value of punishment. B.F. Skinner, for example, argued that the side effects of punishment are not worth its temporary advantages. While he recognized that "most school children are still under aversive control-[this is] not because punishment is more effective in the long run, but because it yields immediate results. It is easier for the teacher to control the student by threatening punishment than by using positive reinforcement with its *deferred, though more powerful,* effects." [Skinner emphasis]. For an analysis of Skinner's relevant work, see R.L. Solomon, *Punishment, in*

demanding that students do their best and treating student efforts with contempt and cruelty, it is important for law teachers not to indulge the passing over sensitivities of professional neophytes. Educating good lawyers and leaders, many of us believe, requires law teachers to stress the development of "cognitive rationality" even at the expense of some other human attributes. A lawyer's need to process "hard facts" and appreciate "concrete realities" often requires the application of a "cold logic" that suppresses various emotional distractions.[159]

II. ADAM SMITH ON TEACHING FAILURES

Whether or not the various criticisms of law professors, and of the law schools they operate, are completely justified, there has been and still is cause for concern about the quality of American legal education. While many problems are related to a number of complex institutional factors, no one bears greater responsibility for educational quality and reform than the law teachers themselves. The ancient but telling observation, "as the schoolmaster is, so will be the school," surely applies even to the modern American law school, in all its somewhat mysterious glory.[160]

Moreover, this very simple observation, about the central importance of the teacher, invites our attention to the work of Adam Smith.[161]

READINGS IN THE PSYCHOLOGY OF LEARNING 194, 208-09 (John F. Hall, ed., 1967). Redmount, *supra* note 86, at 135-36, n.17, observed that "Student anxiety has long been recognized as an important element in the student capacity and disposition to learn. A modicum of anxiety generally acts as an incentive but intense anxiety and inordinate fear of failure have disintegrative effects on learning disposition and performance."

159 Roger Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 250 (1978). Cramton observed, at least as of the late '70s, that "Emotion, imagination, sentiments of affection and trust, a sense of wonder or awe at the inexplicable-these soft and mushy domains of the 'tender minded' are off limits for law students and lawyers."

More recently, others have observed that the law school culture, so vividly described by Scott Turow and by John Osborne (*supra,* notes 90, 122), has changed. According to one updated description of life at the Harvard Law School:

> There was little of the terror described by Turow, and certainly nothing like that fictionalized by John Osborne in the Paper Chase. Professors were, for the most part, liberal (more liberal, even, than their students) and, with one or two exceptions, benevolent and easygoing. Even the professors who tried to frighten us. . .did so more out of obligation, as of they had read the book and were trying to play the part. We soon saw through the terrorist act.

Cameron Stracher, *Buried Alive*, THE AMERICAN LAWYER, Oct. 1998, at 34, 37.

160 *See* MILL, *supra* note 1. Modern law professors have similarly agreed that "[t]he blunt fact is that a law school faculty largely determines the education that the school provides." Geoffrey C. Hazard, *Competing Aims of Legal Education*, 59 N.D. L. REV. 533, 547 (1983). From an earlier generation of law teachers, *see also* Jerome Frank, *Why Not A Clinical Lawyer School?*, 81 U. PA. L. REV. 907, 923 (1933).

161 For his masterpiece of greatest reputation, see ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R.H.Campbell & A.S.Skinner eds., Liberty Classics 1981) (1776) [hereinafter WEALTH OF NATIONS]. This Liberty Classics edition of

Despite the limitations of his eighteenth century experience, Smith was plainly interested in both lawyers and education though, of course, he wrote well before the invention of the modern American law school.[162]

Though many of Smith's educational concerns relate broadly to problems of economic productivity and the need to neutralize the adverse effects of worker specialization,[163] he also offers us a coherent and surprisingly relevant theory of pedagogical failure that has not received its

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WEALTH OF NATIONS, published in two volumes in 1981, is an exact photographic reproduction of the edition published by Oxford University Press in 1976 and commissioned by the University of Glasgow to celebrate the bicentenary of WEALTH OF NATIONS. This Glasgow Edition of the WORKS AND CORRESPONDENCE OF ADAM SMITH (A.S. Skinner, general ed.), republished in softcover by Liberty Classics, also includes the following five titles, in addition to WEALTH OF NATIONS, which reflect the extraordinary scope of Smith's published work: THE THEORY OF MORAL SENTIMENTS (D.D. Raphael & A.L. Macfie eds., Liberty Classics 1982) (1759) [hereinafter THEORY OF MORAL SENTIMENTS]; ESSAYS ON PHILOSOPHICAL SUBJECTS (W.P.D. Wightman et al. eds., Liberty Classics 1982); LECTURES ON RHETORIC AND BELLES LETTRES (J.C. Bryce ed., Liberty Classics 1985); LECTURES ON JURISPRUDENCE (R.L. Meek et al. eds., Liberty Classics 1982); & THE CORRESPONDENCE OF ADAM SMITH (EtC. Mossner & I.S. Ross eds., Liberty Classics 1987).

162 While Smith aspired to compose a systematic treatise on Government and Law, comparable in scope to WEALTH OF NATIONS, age and other projects prevented him from publishing such a comprehensive work. Student lecture notes, eventually published as LECTURES ON JURISPRUDENCE, *supra* note 161, suggest the ambitious design of this abortive undertaking. Andrew S. Skinner, *Introduction* to ESSAYS ON ADAM SMITH 1-2 (Andrew S. Skinner & Thomas Wilson eds., 1975. In WEALTH OF NATIONS itself, *supra* note 161, Smith both notes the improbability of "eminence" as a lawyer and explains why lawyers are so amply compensated. 1 WEALTH OF NATIONS I.x.b.22–24, *supra* note 161, at 122-23; & 2 WEALTH OF NATIONS V.i.f.4, at 760. He also describes the system for educating young Romans in the civil law and compares aspects of ancient Greek and Roman justice. 2 WEALTH OF NATIONS V.i.f.44, at 778–79. Smith's insights on education, including the organization of both university and religious education, are more systematic and concentrated. *Id.* V.i.f.1–61, at 758-88; *id.* V.i.g.1-42, at 788–814. In addition to his interests in jurisprudence and education, his writing is widely regarded as extending the domain of economic reasoning well beyond formal markets and explicit prices. Smith, formally a professor of moral philosophy, extended the fluid boundaries of his discipline to encompass "the study of law, history, and what we know today as psychology, political science and anthropology. Smith's works are remarkable for their range and for the linkages they establish in the histories of legal, political, economic, military, religious, and familial institutions. The richness of Smith's vision comes from his ability to illuminate the relationships among those institutions and to do so with a common method of analysis." JERRY Z. MULLER, ADAM SMITH IN HIS TIME AND OURS 4-5 (1993). *See also* Warren J. Samuels, *The Political Economy of Adam Smith*, 87 ETHICS 189, 193 (1977). Of course, WEALTH OF NATIONS, *supra* note 161, has been very widely praised as a living "masterpiece" and "a work of genius" to be contemplated "with awe. In keenness of analysis and in its range it surpasses any other book on economics." R. H.Coase, *The Wealth of Nations, in* II ADAM SMITH; CRITICAL ASSESSMENTS 284, 286, 297 (John Cunningham Wood ed., in vols. I-IV, 1984)[hereinafter CRITICAL ASSESSMENTS]. For a further characterization of WEALTH OF NATIONS as "remarkable" and "seminal," *see also* K. E. Boulding, *After Samuelson, Who Needs Adam Smith?, in* III CRITICAL ASSESSMENTS 247, 250–251. *But see* Robert L. Heilbroner, The Worldly Philosophers 46 (3rd ed. 1967) for the suggestion that WEALTH OF NATIONS is not a wholly original book.

163 The laboring poor, who are routinely employed in work "confined to a few very simple operations," are likely to suffer from diminished intellectual vigor and in other ways as well. Governmental promotion of education is particularly justified to minimize such

due in the economics and education literature, let alone in the vast commentary on legal education.[164] This explanatory theory, with prominent psychological and institutional components, leads Smith to prescribe a simple remedy. He argues persuasively for a system where faculty compensation is importantly if not entirely determined by student consumers.

A. DESCRIPTIVE SMITH

Adam Smith was an experienced and apparently effective teacher who has been consistently described as very popular with his students despite a certain idiosyncratic style. During Smith's thirteen year academic career at the University of Glasgow, he encountered a young James Boswell who described Smith's lectures in the most complimentary terms as "beautiful," "clear," and "accurate."[165] Like Boswell, less famous students were equally impressed by Smith's accessibility and engaging personality. John Millar, eventually a colleague of Smith's, described Smith as never "fail[ing] to interest his hearers." Despite his "plain and unaffected" teaching style, Smith nonetheless lectured with warmth, animation and an apparent talent for supporting his provocative general propositions with a variety of rich illustrations.[166] Keynes, in fact, once described Smith as "perhaps, the first and greatest of the teachers who have taught a modern subject in a modern way."[167]

In addition to his successful teaching career, Smith was also a skillful academic administrator who was eventually elected Dean of the

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problems. 2 WEALTH OF NATIONS, *supra* note 161, V.i.f.50, at 781-82. For Smith's analysis of various political implications of education, see *id.* V.i.f.61, at 788.

164 While some of Smith's ideas on education "made a lasting impression on the members of the classical school [of political economy]," others, like "the role of [student] fee-paying as an incentive device for teachers. . .were soon forgotten. . ." Mark Blaug, *The Economics of Education in English Classical Political Economy: A Re-Examination, in* ESSAYS ON ADAM SMITH, *supra* note 162 at 568, 573.

165 CLYDE E. DANKERT, ADAM SMITH: MAN OF LETTERS AND ECONOMIST 91 (1974). Boswell further found Smith "realy [sic.] amiable," with none of "that formal stiffness and Pedantry which is too often found in Professors." *Id.* In addition to praising Smith "for his accuracy and elegance of exposition," Boswell "noted Smith's benevolent disposition, as well as the pleasure he took in the company of his students." IAN SIMPSON ROSS, THE LIFE OF ADAM SMITH 133 (1995). For Smith's popularity as a lecturer who "taught the young people to think," see JOHN RAE, LIFE OF ADAM SMITH, 59-60 (Augustus M. Kelly 1965) (1895).

166 RAE, *supra* note 165, at 56-57. Rae, *id.* at 42, also reports that Smith viewed his thirteen year professorial career at Glasgow "'has by far the most useful and therefore by far the happiest and most honorable period' of his life." *See also* ROSS, *supra* note 165, at 126-27.

167 John Maynard Keynes, *Review of Scott, W.R., Adam Smith as Student and Professor* (Jackson, Glasgow, 1937), *reprinted in* XI THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES 542, 546 (Donald Moggridge ed., 1983). Keynes further observed that Smith "was intensely popular with his pupils," *id.* at 548, while still being regarded by some as a slightly less accomplished teacher than his predecessor Hutcheson. *Id.* at *546*. Apparently, Smith made an early mistake as a young professor in trying to emulate Hutcheson's exceptionally animated teaching style. ROSS, *supra* note 165, at 126.

Faculty at Glasgow.[168] He also regarded himself as something of a student of European Universities.[169]

As a result of this rich and extensive academic experience, Smith's unsparing criticism is all the more noteworthy. His unhappy experience as a scholarship student at Oxford led him to conclude that "the greater part of the publick professors [at Oxford] have, for these many years, given up altogether even the pretence of teaching."[170] The weaknesses in university education for young men of "some rank and fortune" had little to do with uncaring or unambitious parents:

> If [the elite]. . .are not always properly educated, it is seldom from the want of expence laid out upon their education; but from the improper application of that expence. It is seldom from the want of masters; but from the negligence and incapacity of the masters who are to be had, and from the difficulty, of rather from the impossibility which there is, in the present state of things, of finding any better.[171]

Others agreed with Smith's generally unflattering description of eighteenth century Oxford. John Rae, in his famous 1895 biography of Smith, reports the comparable disappointments of no less than Edward Gibbon and Jeremy Bentham.[172] Gibbon, who spent fourteen months at Magdalen College, characterized that time as "the most idle and unprofitable of my whole life."[173] While historians of the British university system tend to agree that there is ample evidence that the great English universities of the eighteenth century "had fallen on evil days,"[174] there

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168 William Robert Scott, ADAM SMITH AS STUDENT AND PROFESSOR 75 (1937); and ROSS, *supra* note 165, at 145.

169 Smith stated that he had "inquired very carefully into the constitution and history of several of the principal Universities of Europe." Letter from Adam Smith to William Cullen (Sept. 20, 1774), *in* THE CORRESPONDENCE OF ADAM SMITH, *supra* note 161, Letter No.143, at 173, 174.

170 WEALTH OF NATIONS, *supra* note 161, V.i.f.8, at 761.

171 WEALTH OF NATIONS, *supra* note 161, V.i.f.52, at 784.

172 RAE, *supra* note 165, at 20-21. Rae further observes that:

> Smith's residence at Oxford fell in a time when learning lay there under a long and almost total eclipse. This dark time seems to have lasted most of that century. Crousaz visited Oxford about the beginning of the century and found the dons as ignorant of the new philosophy as the savages of the South Sea. Bishop Butler came there as a student twenty years afterwards, and could get nothing to satisfy his young thirst for knowledge except "frivolous lectures" and "unintelligible disputations."

Id. at 20.

See also ROSS, *supra* note 165, at 72; and 2 WEALTH OF NATIONS, *supra* note 161, V.i.f.8, at 761 n. 6 for the pointed opinions of various noble correspondents of Smith.

173 DANKERT, *supra* note 165, at 94. *See also* ROSS, supra note 165, at 72.

174 BRIAN SIMON, STUDIES IN THE HISTORY OF EDUCATION: 1780-1870 85 (1960); CHARLES FLINN ARROWOOD, THEORY OF EDUCATION IN THE POLITICAL PHILOSOPHY OF ADAM SMITH 4-5 (1945).

were also noteworthy dissenters from this sharply critical evaluation. James Boswell, for example, strongly disagreed with Smith's criticism of Oxford, preferring to call it "the noblest university in the world."[175]

Smith's general criticism of Oxford was also informed by his own experience with and comparative research into other arguably superior educational institutions and arrangements. Writing to Dr. William Cullen, Smith noted his deep respect for the Scottish Universities which, while not perfect, were, "without exception the best seminaries of learning that are to be found any where in Europe. They are perhaps, upon the whole, as unexceptionable as any public institutions of that kind, which all contain in their very nature the seeds and causes of negligency and corruption. . . ."[176]

Smith's analysis in Book V. of WEALTH OF NATIONS also marshalled historical and contemporary examples of relatively superior forms of education, as compared to that provided by the English university teachers of his day. Smith approved both the famous efforts of ancient Greek and Roman teachers;[177] and the private preparatory schools of his day, especially insofar as they offered training in "[t]he three most essential parts of literary education, to read, write, and account. . . ."[178] At a lesser, though still noteworthy, level of instruction, Smith also approvingly describes the contemporary instruction typically provided in the practical arts of fencing and dancing.[179] Finally, he offers comparative praise for those methods used for the contemporary instruction of females outside the schools and universities.[180]

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175 DANKERT, *supra* note 165, at 93. Dankert notes that "Boswell felt that Smith's charges against the universities of England were 'certainly not well founded' and seemed 'invidious'; he declared that Smith was 'ungraciously attacking his venerable Alma Mater.'" *Id.* at 94. While Smith was deeply critical of the teaching at Oxford, he nonetheless expressed gratitude for the opportunity to "read deeply and widely. . .for six years. . ." and probably profited greatly from his Oxford stay despite the institutional flaws that he observed. RAE, *supra* note 165, at 22; & MULLER, *supra* note 162, at 18.

176 Letter to William Cullen, *supra* note 169, at 173. Smith, however, also agreed that the Scottish University system needed improving. *Id.*

177 According to Smith, ancient instruction was relatively superior to modern instruction in "gymnastic exercises and in musick [sic.]"; reading, writing, and arithmetic; "philosophy and rhetorick [sic.]," and in civil law. 2 WEALTH OF NATIONS, *supra* note 161, V.i.f.39-45, at 774-80. Privately employed and compensated teachers, in ancient Greece and Rome, "appear to have been much superior to any modern [publicly employed] teachers. . .[whose] diligence. . .is more or less corrupted by the circumstances, which render them more or less independent of their success and reputation in their particular professions." *Id.* V.i.f.45, at 780.

178 *Id.* V.i.f.16, at 764. "Those parts of education. . .for the teaching of which there are no publick institutions, are generally the best taught." *Id.*

179 *Id.* Smith concedes, however, that instruction in riding should remain dominantly the responsibility of publicly financed institutions, given the expense involved.

180 *Id.* V.i.f.47, at 781. Smith is impressed by the practical utility of the privately provided education that many females receive. In contrast, "[i]t seldom happens that a man, in any part of his life, derives any conveniency or advantage from some of the most laborious and troublesome parts of his education." *Id.*

Quite characteristically, Smith supports his more generalized criticism with important specifics. First, he describes, in some detail, the outdated university curriculum and impractical university teaching of his day that emphasized not only the study of ancient languages but suspect metaphysical studies as well. After tracing the slow evolution of the typical university curriculum, originally devoted to the education of ecclesiastics, he criticizes those who would teach "a science universally believed to be a mere useless and pedantick heap of sophistry and nonsense." Such university education was all too likely to produce a gentleman who would "come into the world completely ignorant of every thing which is the common subject of conversation among gentlemen and men of the world."[181] Even such alterations as were introduced into university philosophical studies provided little more than an "additional quantity of subtlety and sophistry" ill suited for "the education of gentlemen or men of the world, [and unlikely]. . .either to improve the understanding, or to mend the heart."[182]

Smith's complaint about the lack of academic innovation, despite certain modern improvements in the "several different branches of philosophy," has a seemingly surprising connection to university resources:

> several of those. . .[universities] have chosen to remain, for a long time, the sanctuaries in which exploded systems and obsolete prejudices found shelter and protection, after they had been hunted out of every other corner of the world. In general, the richest and best endowed universities have been the slowest in adopting those improvements, and the most averse to permit any considerable change in the established plan of education.[183]

Similarly, the richer the university, the more likely the student encounter with teachers who teach unsystematically, to say the least. "In some of the richest and best endowed universities, the tutors content themselves with teaching a few unconnected shreds and parcels of this

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[181] *Id.* V.i.f.46, at 781.

[182] *Id.* V.i.f.32, at 772. For Smith's extended explanation and criticism of the evolution of the university curriculum stressing classical languages, especially Latin, and a "corrupted" program of philosophical education, see *id.* V.i.f.18-33, at 765-72.

[183] *Id.* V.i.f.34, at 772. Conversely, the "improvements which, in modern times, have been made in several different branches of philosophy. .t.were more easily introduced into some of the poorer universities, in which the teachers, depending upon their reputation for the greater part of their subsistence, were obliged to pay more attention to the current opinions of the world." *Id.* at 772-73.

corrupted course. . . ." To compound this failure, "even these [shreds] they commonly teach very negligently and superficially."[184]

B. THEORETICAL SMITH

Smith is more than a mere observer of teaching and curricular failures. Because Smith is rarely read these days, it may be surprising to learn that WEALTH OF NATIONS, in particular, incorporates a coherent and important theory of academic failure.[185]

Smith's theory is primarily built from two conceptual foundations. First, he characteristically points to certain natural, permanent and sometimes competing human desires or propensities. Second, he links his account of relevant human psychology to certain university institutions and conventional practices both to explain various teaching and more general academic failures and to propose correctives.

In fact, Smith's obvious interest in theory instructively contrasts with much of the literature on legal education and law teaching. Despite the early realist interest in the theoretical or policy foundations of the law,[186] there is still an obvious gap in the relevant professional literature. Though most law schools are primarily teaching institutions, we continue

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184 *Id.* V.i.f.33, at 772. The connection between weak teaching and "the richest and best endowed universities" apparently applies broadly to European universities, not just to Oxford. *Id.*

185 Book V of WEALTH OF NATIONS, titled *Of the Revenue of the Sovereign or Commonwealth*, contains much of the relevant educational theory, concentrated in Article 2d (*Of the Expence of the Institutions for the Education of Youth*) of Part III, Chapter I (*id.* V.i.f.1-61, at 758-88). In addition, aspects of the relevant theory are also dispersed among other portions of WEALTH OF NATIONS and some of Smith's other works, notably THE THEORY OF MORAL SENTIMENTS, *supra* note 161, which deals more extensively with human psychology than WEALTH OF NATIONS. *See generally* R.H. Coase, *Adam Smith's View of Man,* 19 J.L. & ECON. 529 (1976). Smith, in fact, was considerably more than a writer on political economy:

> [He] undoubtedly always considered himself. . .a philosopher in a highly comprehensive sense-not as interested in epistemology as Locke, Berkelely, and Hume but penetrating much more deeply into social and legal philosophy and the psychology of ethics. Smith remained a philosopher from the beginning to the end of his life. He would never have regarded his work as a whole as primarily economic. He thought of economics-or political economy-as only one chapter, and not the most important chapter, in a broad study of society and human progress which involved psychology and ethics (in social and individual terms), law, politics, and the development of the arts and sciences.

Terence Hutchison, *Adam Smith and the Wealth of Nations,* 19 J.L. & ECON. 507, 511 (1976).

186 Writing in 1897, Holmes urged special attention to theory:

> Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. The most important improvements of the last twenty-five years are improvements in theory. It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject.

Holmes, *supra* note 96, at 477.

to lack coherent theories of law teaching and legal education in general.[187]

1. *The Psychology of the University Teacher*

Teaching, like learning itself, is a psychologically complex process.[188] Nonetheless, much literature on legal education generally and law teaching in particular seems psychologically unsophisticated or, at least, relatively indifferent to the key emotional and psychological states of both individual law teachers and students. With only a few exceptions, the relevant professional literature diverts attention from the individual law teacher as a primary unit for analysis to a more impersonal focus upon curricular problems, instructional methodologies and course and casebook contents.[189]

Smith's analytic focus is instructively different. Just as he generally focuses upon the individual as the primary element in economic sys-

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[187] Karl Llewellyn, in his typically memorable style, regrets the lack of:

> any modern *transmissible* technique of teaching to supplement the one hydra-headed but limited tradition that we know. . .We straddle, in a word, between regimentation and idiosyncrasy, both over-done. I think, because we have not taken thought. About the law, we have taken thought; and then about the judge. About the lawyer, we are beginning to. About our own [teaching] procedures, no. Each man for himself. Teachers are born, not made. Selah!

Llewellyn, *supra* note 24, at 676. *See also* Cramton, *supra* note 75, at 475.

[188] Gilbert Highet observes that:

> [T]eaching is an art, not a science. . . Of course it is necessary for any teacher to be orderly in planning his work and precise in his dealing with facts. But that does not make his teaching "scientific." Teaching involves emotions, which cannot be systematically appraised and employed, and human values, which are quite outside the grasp of science. . .Teaching is not like inducing a chemical reaction: it is much more like painting a picture or making a piece of music. .t.You must throw your heart into it, you must realize that it cannot all be done by formulas or you will spoil your work, and your pupils, and yourself.

HIGHET, *supra* note 47, at vii-viii.

For similar approaches to university teaching as a psychologically complex art form, see JOSEPH AXELROD, THE UNIVERSITY TEACHER AS ARTIST (1973); JAMES M. BANNER, JR. & HAROLD C. CANNON, THE ELEMENTS OF TEACHING (1997). For a general overview of various theories of learning, see *Human Learning and Cognition*, 22 BRITANNICA 870 (15th ed., 1994).

[189] In 1970, Paul Savoy, *supra* note 36, at 456, observed that there "has been an incredible volume of literature published in the last twenty years about law school education. The overwhelming concern, however, is with curriculum, methodology and casebooks. We rarely hear anything about teaching. . .[especially] about teaching as that 'complex and perilous relationship between a teacher and his student.'" Nonetheless, some journal and book length literature, from the late '60s and '70s in particular, offered more comprehensive accounts of the psychological dynamics of legal education. For commentary on legal education from various law faculty members with training in psychology and psychiatry, see Watson, *supra* note 130, Stone, *supra* note 67, and Redmount, *supra* note 86. More accessible and psychologically nuanced depictions of modern legal education have also been offered by John Jay Osborne, Jr. in THE PAPER CHASE, *supra* note 122, and by Scott Turow in ONE-L, *supra* note 90. For more recent accounts of the complexities of law school environments and student-teacher relations, *see also* GOODRICH, *supra* note 112, GRANFIELD, *supra* note 43, and GETMAN, *supra* note 47.

tems,[190] he also emphasizes individual teacher behavior and underlying mental states as the center piece of his theory of pedagogical failure. Whatever his popular reputation, Smith does not believe that human behavior is typically single-minded and rationally devoted to the unambiguous maximizing of a single value. Rather, he offers a more complex view of human psychology in terms of the conflicting forces that impel most human agents to predictable actions and counter-actions.[191]

University teachers, like most professional and other workers, are likely to be dominated by a powerful self-love. This foundational and dominating self-love leads to several related and sometimes competing psychological states. Even though Smith recognizes the tempering existence of altruistic impulses,[192] self-love predictably induces a complex striving for three, not entirely compatible, goals: wealth or "material betterment," reputation, and "ease" or leisure. Self-love also leads to variously useful kinds of self-deceit or self-deception.[193] Though Smith's important, if somewhat fragmented,[194] analysis of human psychology came well before the age of modern legal education, all four of these

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190 While the individual actor is "the key mechanism" or "the prime element" in Smith's account of a functioning economic system, the individual nonetheless operates within a moral, legal and socialized framework. *See* F. Petrella, *Individual Group, or Government? Smith, Mill, and Sidgwick, in* IV CRITICAL ASSESSMENTS, *supra* note 162, at 120, 123; Samuels, *supra* note 162, at 199.

191 Smith's rich account of human nature takes into account considerably more than pecuniary motives. For Smith, "honour, vanity, social esteem, love of ease, and love of domination figure alongside the more usual considerations of commercial gain as motives in economic as well as other pursuits." DONALD WINCH, ADAM SMITH'S POLITICS: AN ESSAY IN HISTORIOGRAPHIC REVISION 167 (1978). For an especially suggestive account of Smith's more elaborate conception of complex human psychology, beyond the simplistic notion of humans as rational actors, see Nathan Rosenberg, *Some Institutional Aspects of the Wealth of Nations,* 68 J. POL. ECON. 557 (1960).

192 Smith is very explicit about benevolence at the very beginning of THE THEORY OF MORAL SENTIMENTS, *supra* note 161, I.i.I.1, at 9:

> How selfish so ever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it. Of this kind is pity or compassion, the emotion which we feel for the misery of others,. .t.The greatest ruffian, the most hardened violator of the laws of society, is not altogether without it.

193 Coase, *supra* note 185, at 535, notes the dark picture painted by Smith:

Man is not without finer feelings; he is indulgent to children, tolerant of parents, kind to friends. But once this is said, it is also true that he is dominated by selftlove, lives in a world of self-delusion, is conceited, envious, malicious, quarrelsome, and resentful.

Moreover, this same selftlove, according to Smith, may lead to self-tharm. As Coase observes about Smith: "It may seem strange that selftlove sometimes results in selftharm but the reason is that selftlove leads to selftdeceit and self-deceit colours our perception of the outcomes of alternative courses of action." *Id.* at 542.

194 Coase also reminds us that, "Adam Smith does not set down in one place his views on the nature of man. They have to be inferred from remarks in *The Theory of Moral Sentiments* and the *Wealth of Nations.* Adam Smith deals more extensively with human psychology in *The Theory of Moral Sentiments.*" *Id.* at 529.

more specific psychological components may nonetheless be useful in explaining the persisting failures of most law professors as teachers, particularly given certain institutionalized characteristics of most modern law schools.

First, pervasive self-love leads to the "uniform, constant and uninterrupted effort of every man to better his condition."[195] This drive, which includes but is not limited to a desire for material goods or wealth, "comes with us from the womb, and never leaves us till we go into the grave."[196] While Smith explains in THE THEORY OF MORAL SENTIMENTS that such material desires and successes ultimately do little to enhance human happiness, he also plainly recognizes that this universal human desire for wealth "rouses and keeps in continual motion the industry of mankind."[197] Liberal rewards encourage working men and professionals alike."[198]

However powerful the desire for material betterment, Smith is equally if not more interested in a second prominent aspect of human psychology. Particularly in THE THEORY OF MORAL SENTIMENTS, he reflects on the very deep-seated and arguably non-rational desire to be admired:

> Nature, when she formed man for society, endowed him with an original desire to please, and an original aversion to offend his brethren. She taught him to feel pleasure in their favourable, and pain in their unfavourable regard.

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195 WEALTH OF NATIONS, *supra* note 161, II.iii.31, at 343. This human striving is "the principle from which publick and national, as well as private opulence is originally derived. . ." *Id.*

196 *Id.* II.iii.28, at 341. The human desire to better one's condition, however, is not simply a desire to accumulate material goods. According to Smith, wealth is desired as a means to reputation and status. THE THEORY OF MORAL SENTIMENTS, *supra* note 161, I.iii.2.1, at 50-51.

197 THE THEORY OF MORAL SENTIMENTS, *supra* note 161, IV.1.10, at 183. Nonetheless, the pleasures of wealth and greatness are ultimately a grand deception: "mere trinkets of frivolous utility, no more adapted for procuring ease of body or tranquility of mind than the tweezer-cases of the lover of toys. . ." *Id.* IV.1.8, at 181. For Smith's more extended argument, see *id.* IV.1.8-10, at 181-185.

198 Smith argues that "[t]he liberal reward of labour. . .increases the industry of the common people. The wages of labour are the encouragement of industry, which, like every other human quality, improves in proportion to the encouragement it receives." 1 WEALTH OF NATIONS, *supra* note 161, I.viii.44, at 99. While material rewards are especially powerful, if not the only, stimuli in the case of the working classes, *id.* I.x.c.14, at 139, professionals, including university teachers, are also likely to be motivated by the prospect of wealth and material gain. 2 WEALTH OF NATIONS, *supra* note 161, V.i.f.4, at 759. At the same time, it is also clear that Smith does not believe that the striving of individuals to improve their material wealth is the sole cause of economic progress. In addition to a powerful human need for the intangibles of status and reputation, the materially acquisitive impulses compete, beneficially or not, with "the passion for present enjoyment," the human appetite for indolence, and even with occasional generosity or "liberality" on the part of employers and landlords. *See* J.Viner, *Adam Smith, in* I CRITICAL ASSESSMENTS, *supra* note 162, at 111, 117.

> She rendered their approbation most flattering and most agreeable to him for its own sake; and their diapprobation most mortifying and most offensive.[199]

Smith, in his customary way, uses this basic observation about human psychology for a variety of explanatory purposes. In many circumstances, the drive for wealth or material betterment may be best understood as an instrumental psychology, as a means for generating reputation or social esteem. We tend to pursue riches and avoid poverty more for social approval than for any other reason.[200] For Smith, much like Hobbes and other seventeenth century writers, "the craving for honor, dignity, respect, and recognition is seen. . .as a basic preoccupation."[201]

The richer the man, the more he is likely to value his wealth and income for their contribution to his reputation.[202] The same pursuit of social approbation also helps to explain the energetic striving of various professionals:

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199 THE THEORY OF MORAL SENTIMENTS, *supra* note 161, III.2.6, at 116. Smith's interest in the human "pride drive" and its consequences was anticipated by earlier moralists and philosophers, including Hobbes and Bernard Mandeville in his influential THE FABLE OF THE BEES, *infra* note 204, published in 1714. *See* MULLER, *supra* note 162, at 51-52; ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 108-09 (1977). Modern exchange theory similarly assumes "that people value and work for social approval and conversely dislike and attempt to avoid social disapproval." W. Nord, *Adam Smith and Contemporary Social Exchange Theory, in* III CRITICAL ASSESSMENTS, *supra* note 162, at 295,t297. Moreover, Smith argued that the passion for social approval might actually produce decent and virtuous human behavior. *See* MULLER, *supra* note 162, at 98.

200 Smith elaborates on the vanity drive, as follows, in THE THEORY OF MORAL SENTIMENTS, *supra* note 161, I.iii.2.1, at 50:

> [I]t is chiefly from this regard to the sentiments of mankind, that we pursue riches and avoid poverty. For to what purpose is all the toil and bustle of this world? What is the end of avarice and ambition, of the pursuit of wealth, of power, and preheminence[sic]? Is it to supply the necessities of nature? The wages of the meanest labourer can supply them. . .From whence, then, arises that emulation which runs through all the different ranks of men, and what are the advantages which we propose by that great purpose of human life which we call bettering our condition? To be observed, to be attended to, to be taken notice of with sympathy, complacency, and approbation, are all the advantages which we can propose to derive from it. It is the vanity, not the ease, or the pleasure, which interests us.

201 HIRSCHMAN, *supra* note 199, at 108.

202 THE THEORY OF MORAL SENTIMENTS, *supra* note 161, I.iii.2.1,at 50-51:

> But vanity is always founded upon the belief of our being the object of attention and approbation. The rich man glories in his riches, because he feels that they naturally draw upon him the attention of the world, and that mankind are disposed to go along with him in all those agreeable emotions with which the advantages of his situation so readily inspire him. At the thought of this, his heart seems to swell and dilate itself within him, and he is fonder of his wealth, upon this account, than for all the other advantages it procures him. The poor man, on the contrary, is ashamed of his poverty.

> To excel in any profession, in which but few arrive at mediocrity, is the most decisive mark of what is called genius or superior talents. The publick admiration which attends upon such distinguished abilities, makes always a part of their reward. . .It makes a considerable part of that reward in the profession of physick; a still greater perhaps in that of law; in poetry and philosophy it makes almost the whole.[203]

Smith is equally explicit in Book V. of WEALTH OF NATIONS. Where a university professor is compensated in "greater part. . .from the honoraries or fees of his pupils," the approval of his students is obviously very important. Where a secure salary is a small part of a teacher's compensation, there is still "some dependency upon the affection, gratitude, and favourable report of those who have attended upon his instructions." The best way to such favorable student sentiments is to earn them through the exercise of genuine teaching abilities and diligence.[204]

Smith's description of this important psychological state, however, is qualified in at least two ways. First, the common human desire for reputation is distinguishable from a far more exceptional aspiration. While the "greatness" of certain goals may "sometimes animate the exertion of a few men of extraordinary spirit and ambition," Smith still argues that "[g]reat objects. . . are evidently not necessary in order to occasion the greatest exertions." The spur of competition, or in Smith's terms, "rivalship and emulation render excellency, even in mean professions, an object of ambition, and frequently occasion the very greatest exertions."[205]

Smith also distinguishes a grosser desire for praise or popular approval from a more admirable if related desire:

> To desire, or even to accept of praise, where no praise is due, can be the effect only of the most contemptible vanity. To desire it where it is really due, is to desire no

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203 WEALTH OF NATIONS, *supra* note 161, I.x.b.24, at 123. In LECTURES ON JURISPRUDENCE, *supra* note 161, (A)vi.62, at 354-355, Smith described lawyers as motivated more by "the respect, credit, and eminence. . .[law practice] gives one than the profit of it." He observed that "in the study of law not one out of 20 ever are in a way to get back the money they have laid out." *Id.* (A)vi.61, at 354.

204 WEALTH OF NATIONS, *supra* note 161, V.i.f.6, at 760. Before Smith advocated that University Professors be directly compensated by their students, Mandeville recommended a similar reform strategy that depended partly upon professorial pride and interest in reputation: "Professors should, besides their Stipends allowed 'em by the Publick, have Gratifications from every Student they teach, that Self-Interest as well as Emulation and the Love of Glory might spur them on to Labour and Assiduity." BERNARD MANDEVILLE, THE FABLE OF THE BEES 293-94 (F.B.Kaye ed., 1924).

205 WEALTH OF NATIONS, *supra* note 161, V.i.f.4, at 759-60. For a different evaluation of high ambition, see THE THEORY OF MORAL SENTIMENTS, *supra* note 161, III.6.7, at 173-74.

> more than that a most essential act of justice should be done to us. The love of just fame, of true glory, even for its own sake, and independent of any advantage which he can derive from it, is not unworthy even of a wise man.[206]

For Smith, therefore, it is important to distinguish the human desire to win the praise or approval of others from the more commendable desire to be genuinely praiseworthy.[207]

A third relevant mental condition is emphasized even more explicitly by Smith in his discussion of the failures of university teaching in Book V of WEALTH OF NATIONS. However much pedagogical achievement might be positively related to both the human striving for material betterment and the powerful desire for social or, more narrowly, professional approval, such achievement was also likely to be reduced by an arguably more powerful human impulse. Smith, like Freud after him, was much impressed by the seemingly constant and perhaps dominating human desire for ease or leisure.[208]

During his explicit discussion of university teaching in Book V of WEALTH OF NATIONS, Smith prominently observed that, "[i]t is the interest of every man to live as much at his ease as he can."[209] Paradoxically, this pervasive human impulse worked in two competing ways; first to motivate the disciplined accumulation of wealth[210] and then to eventually restrain it: "A man of a large revenue, whatever may be his profession,

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206 *Id.*, *supra* note 161, III.2.8, at 117.

207 *Id.*, *supra* note 161, III.2.7, at 117; and VII.iv.24, at 336. *See also* Viner, *supra* note 198, *in* I CRITICAL ASSESSMENTS, *supra* note 162, at 113.

208 Sigmund Freud observes that:

> [A]s a path to happiness work is not valued very highly by men. They do not run after it as they do after other opportunities for gratification. The great majority work only when forced by necessity, and this natural human aversion to work gives rise to the most difficult social problems.

SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS, 54 GREAT BOOKS OF THE WESTERN WORLD 767, 774 n.1 (2d ed. 1990).

209 WEALTH OF NATIONS, *supra* note 161, V.i.f.7, at 760. MULLER, *supra* note 162, at 18 comments on Smith's "prodigious intellectual energy" at Oxford, "fueled perhaps by his [Smith's] fear of what he imagined to be his propensity to laziness."

210 Smith in 1 WEALTH OF NATIONS, *supra* note 161, I.viii.44, at 99 observes that, "A plentiful subsistence increases the bodily strength of the labourer, and the comfortable hope of bettering his condition, and of ending his day perhaps in ease and plenty, animates him to exert that strength to the utmost." *See also* Rosenberg, *supra* note 191, at 557, who argues that:

> In addition to the well-known "constant, uniform and uninterrupted effort of every man to better his condition,"[1 WEALTH OF NATIONS, *supra* note 161, II.iii.31, at 343] Smith attached great importance to the belief that the generality of mankind is intractably slothful and prone to indolence. A major counterbalance to the desire for and the pursuit of wealth, therefore, is a love of ease and inactivity.

thinks he ought to live like other men of large revenues; and to spend a great deal of this time in festivity, in vanity, and in dissipation."[211]

Thus, large and securely prosperous landlords were unlikely to be industrious managers and risk-taking investors in improving their sizeable agricultural estates. The weak performance of such landlords was importantly connected to "[t]hat indolence, which is the natural effect of the ease and security of their situation."[212]

Similarly, capital accumulation and substantial profits had equally corrupting or countervailing effects on members of the business class: "The high rate of profit seems every where to destroy that parsimony which in other circumstances is natural to the character of the merchant. When profits are high, that sober virtue seems to be superfluous, and expensive luxury to suit better the affluence of his situation."[213]

Working men were also vulnerable to the same disease of indolence under certain conditions. Particularly where work was done with little or no division of labor, "the habit of sauntering and of indolent careless application" persists according to Smith. A worker, frequently obliged "to change his work and his tools," is "almost always slothful and lazy, and incapable of any vigorous application even on the most pressing occasions."[214]

Even clergymen are likely to be affected by this pervasive human condition. Clergymen, with secure incomes, "repos[e] themselves upon their benefices" and are all too likely to give "themselves up to indolence." This, Smith ingeniously explains, accounts for the clergy of the well endowed and established churches neglecting the "arts of popularity" and the "arts of gaining proselytes," while effectively ceding moral authority and popular influence to the less secure and striving clergy of newer sects.[215]

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211 WEALTH OF NATIONS, *supra* note 161, V.i.g.42, at 813-14.

212 WEALTH OF NATIONS, *supra* note 161, I.xi.p.8, at 265. *See also* Joseph Spengler, *Adam Smith and Society's Decision-makers, in* ESSAYS ON ADAM SMITH, *supra* note 162, at 390, 406.

213 WEALTH OF NATIONS , *supra* note 161, IV.vii.c.61, at 612.

214 WEALTH OF NATIONS, *supra* note 161, I.i.7, at 19. E.G.West, *Adam Smith's Two Views on the Division of Labour*, *in* III CRITICAL ASSESSMENTS, *supra* note 162, at 162, 164 observes that Book I of WEALTH OF NATIONS offers the opinion "that workers become 'slothful and lazy' *without* the division of labour. . ." while, in Book V, Smith maintains to the contrary "that workers become 'stupid and ignorant' *with* [such a division of labor]."

215 WEALTH OF NATIONS, *supra* note 161, V.i.g.1, at 788-89. Smith further elaborates by arguing that:

> teachers of new religions have always had a considerable advantage in attacking those antient and established systems of which the clergy. . .had neglected to keep up the fervor of faith and devotion in the great body of the people; and having given themselves up to indolence, were become altogether incapable of making any vigorous exertion in defense even of their own establishment.

Id.

This powerful, perhaps dominating, human inclination for "ease" particularly helps to explain the failings of university teachers when it is connected to the predictable psychology of self-deception. Particularly in THE THEORY OF MORAL SENTIMENTS, Smith analyzed self-deceit as a general and important barrier to our ability to judge the propriety of our own conduct. As such, "[t]his self-deceit, this fatal weakness of mankind, is the source of half the disorders of human life."[216]

Among its other effects, this human talent for self-deception helped Smith to explain why so many persons apparently overrated the advantages of wealth and rank.[217] Smith similarly used this inclination to self-deceit to explain why many persons engaged in certain high risk ventures including gambling through lotteries, military service, smuggling and gold mining.[218] Moreover, Smith attributed the arduous preparation of many for demanding professions like the law to self-deception over professional prospects.[219]

Presumably, university teachers are part of this larger universe of self-deceivers. While observant professors might detect student neglect of or even contempt for weak lectures, the self-deceiving teacher has a conspicuous psychological advantage. Through various expedients, the artfully self-deceiving professor may indulge both a taste for a relatively easy professional life and a simultaneous desire to teach in a reasonably well regarded way. In effect, the human capacity for self-deception mediates between competing psychological imperatives.[220]

Because the clergy of established and well-endowed religions gradually lose "authority and influence with the inferior ranks of people," they eventually "have commonly no other resource than to call upon the civil magistrate to persecute, destroy, or drive out their adversaries, as disturbers of the public peace." *Id.* For further commentary on Smith's advocacy of the merits of competitive religious markets and his qualified support of a system of private contributions providing the clergy with both good and bad economic incentives, see Charles G. Leathers & J. Patrick Raines, *Adam Smith on Competitive Religious Markets*, 24 HIST. OF POL. ECON. 499, 501-02 (1992).

216 THE THEORY OF MORAL SENTIMENTS, *supra* note 161, III.4.6, at 158. Nature, however, has not "abandoned us entirely to the delusions of self-love." *Id.* III.4.7, at 159.

217 A.W.Coats, *Adam Smith's Conception of Self-Interest in Economic and Political Affairs, in* II CRITICAL ASSESSMENTS, *supra* note 162, at 135, 136-37.

218 WEALTH OF NATIONS, *supra* note 161, I.x.b.26-33, at 124-28. Self-deception may not make the ambitious man happy but it does arouse the industry of mankind to cultivate, build houses, found cities and commonwealths, and to invent and improve all forms of science and the arts. Self-deceit, therefore, may generate social benefits. *See* Coase, *supra* note 185, at 542.

219 WEALTH OF NATIONS, *supra* note 161, I.x.b.22-23, at 122-23. A law professor may suffer from self-deception as a way of compensating for certain information deficiencies. *See* Paul D. Carrington, *The University Law School and Legal Services*, 53 N.Y.U. L. REV. 402, 422-23 (1978).

220 WEALTH OF NATIONS, *supra* note 161, V.i.f.14, at 763.

2. *Influential Academic Institutions*

Smith's theory of teaching failure has two basic and interacting components. Supplementing his rich account of a complex human psychology, Smith also analyzes various institutional impediments to effective university teaching and academic excellence. In Book V. of WEALTH OF NATIONS, Smith succinctly examines at least three basic categories of institutional arrangements: the prevailing system used to compensate English university professors; the extent to which professorial behavior is influenced by competitive pressures and monopoly conditions; and prospects for the monitoring of professorial behavior by academic peers and authorities external to the universities. Smith forcefully argues that a number of well-established university conventions and "institutionalized" academic arrangements interact in unhappy ways with predictable human psychology to produce the widespread academic disease: weak and ineffective university teaching.[221]

First, where the salaries of professors are assured, regardless of teaching performance, the all too human interest in leisure induces professors to relax their teaching efforts:

> It is the interest of every man to live as much at his ease as he can; and if his emoluments are to be precisely the same, whether he does, or does not perform some very laborious duty, it is certainly his interest, at least as interest is vulgarly understood, either to neglect it altogether, or, if he is subject to some authority which will not suffer him to do this, to perform it in as careless and slovenly a manner as that authority will permit.[222]

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[221] Until forty years ago, commentary on Adam Smith de-emphasized or ignored Smith's interest in institutional influences on human behavior. Despite such prolonged critical and scholarly neglect of the institutional context, Smith was intensely interested in the ways in which various institutions contribute to the productivity of the human agent. Some institutions, according to Smith, increase both human motivation and capacity while others inappropriately detract from these things. Rosenberg, *supra* note 191, at 557, 560-561. *See also* MULLER, *supra* note 162, at 5-6, 8; WINCH, *supra* note 191, at 176; Wolfram Elsner, *Adam Smith's Model of the Origins and Emergence of Institutions: The Modern Findings of the Classical Approach*,23 J. ECON. ISSUES 189, 190-91 (1989); N. Rosenberg, *Adam Smith on the Division of Labor: Two Views or One?*, *in* III CRITICAL ASSESSMENTS, *supra* note 162, at 171, 173. Smith is now credited with trying to "bring about improvement not through preaching but through designing institutions which would strengthen the incentive to act in a socially beneficial manner." MULLER, *supra* note 162, at 198. Smith is also recognized as someone who treats institutions, within certain limits, as subject to redesign and change rather than as inevitable. In short, he "did not revere the institutional status quo." Samuels, *supra* note 162, at 201.

[222] WEALTH OF NATIONS, *supra* note 161,V.i.f.7 at 760. Smith further observes that:

"If he [a teacher] is naturally active and a lover of labour, it is his interest to employ that activity in any way, from which he can derive some advantage, rather than in the performance of his [already compensated teaching] duty, from which he can derive none." *Id.*

Insofar as professors are prohibited from receiving compensation from students directly, their subsistence will be "independent of their success and reputation" as teachers. Conversely, where professorial compensation depends at least in part on student fees or "honoraries," there is likely to be a teacher's "dependency upon the affection, gratitude, and favourable report" of students. The surest way, of course, to earn a reputation as an excellent instructor is through diligent teaching efforts.[223]

Thus, Smith criticizes academic compensation arrangements, in the English universities, for their disincentive effects. Where large and secure salaries, regardless of teaching performance, are paid to professors, such a compensation practice is, in effect, a form of "income insurance."[224] Such a securely compensated professor, striving for both "material betterment" and relative "ease," may largely satisfy both desires simultaneously. Even a third desire for academic reputation is accommodated by this salary system. Given the university teaching materials of Smith's day and the relative immaturity of many English university students, Smith's professors were often able to maintain their academic reputations with minimal exertion:

> The teacher, instead of explaining to his pupils himself, the science in which he proposes to instruct them, may read some book upon it; and if this book is written in a foreign and dead language, by interpreting it to them into their own; or, what would give him still less trouble, by making them interpret it to him, and by now and then making an occasional remark upon it, he may flatter himself that he is giving a lecture. The slightest degree of knowledge and application will enable him to do this without exposing himself to contempt or derision, or

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Smith also criticized the principal European universities because of similar secure salary arrangements for professors. In a letter to William Cullen, dated September 20, 1774, he noted that:

> I have satisfied myself that the present state of degradation and contempt into which the greater part of those societies have fallen in almost every part of Europe, arises principally, first, from the large salaries which in some universities are given to professors, and which render them altogether independent of their diligence and success in their professions.

THE CORRESPONDENCE OF ADAM SMITH, *supra* note 161, at 173, 174-75.

223 WEALTH OF NATIONS, *supra* note 161, V.i.f.5-6, at 760. Mandeville, in THE FABLE OF THE BEES, had previously advocated student fees as a spur to diligent teaching. *Id.* at n.5.

224 The current salary for most law professors is largely assured regardless of teaching effectiveness. This form of assured income or "income insurance" poses a "moral hazard" problem. The "insured" law professor has less incentive to teach well and may actually have a tendency to relax his or her pedagogical efforts. For a suggestive analysis of the moral hazard problem that Smith addresses, without use of the modern terminology, see RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 121, 181-82 (5th ed., 1998)

> saying any thing that is really foolish, absurd, or ridiculous.[225]

Professors were shielded from the meaningful evaluations of student consumers by the endowments of most of the leading European universities of Smith's time. In addition to government revenues, the leading universities often supported professorial salaries through publicly and privately funded endowments. Smith observes that such endowments do little to "encourage the diligence and to improve the abilities of the teachers.8[226] In addition to corrupting the diligence of individual professors, such endowments also negatively affect academic innovations at the university level:

> In general, the richest and best endowed universities have been the slowest in adopting. . .[curricular] improvements, and the most averse to permit any considerable change in the established plan of education. Those improvements were more easily introduced into some of the poorer universities, in which the teachers, depending upon their reputation for the greater part of their subsistence, were obliged to pay more attention to the current opinions of the world.[227]

In effect, Smith argues that university endowments have unanticipated negative or, what we moderns might call, counterintuitive effects. Where philanthropists endow professorships, they very likely intend to improve the quality of university education. Smith argues that quite the opposite occurs. Given the predictable psychology of professors seeking both material comforts and leisure, the assured income from such endowments logically tends to reduce a professor's incentive for fine teaching.[228]

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225 WEALTH OF NATIONS, *supra* note 161, V.i.f.14, at 763. Law teachers similarly engage in comparable feats of self-deception through modest translation strategies and occasional remarks.

226 *Id.* V.i.f.2-3, at 759. Smith argues that:

> The endowments of schools and colleges have necessarily diminished more or less the necessity of application in the teachers. Their subsistence, so far as it arises from their salaries, is evidently derived from a fund altogether independent of their success and reputation in their particular professions.

Id. V.i.f.5, at 760.

227 WEALTH OF NATIONS, *supra* note 161, V.i.f.34, at 772-73.

228 Smith argued that endowments corrupted the diligence of good teachers by freeing them from the need to depend on student fees. *See* EDWARD C. MACK, PUBLIC SCHOOLS AND BRITISH OPINION; 1780-1860 132-33 (1939); MULLER, *supra* note 162, at 91-92. John Stuart Mill, however, "championed endowment as a means of assuring against education falling into the hands of 'an absolute majority' when what was required was 'variety, not uniformity'. . ." SAMUEL HOLLANDER, II THE ECONOMICS OF JOHN STUART MILL 728 (1985).

These prevailing compensation arrangements also contributed, in Smith's view, to an important absence of academic competition. In general, Smith believed that the force of market competition led producers, merchants and even laborers to "an unremitting exertion of vigilance and attention."[229] The academic exertions of university professors, in Smith's opinion, also depended on competitive pressures:

> In every profession, the exertion of the greater part of those who exercise it, is always in proportion to the necessity they are under of making that exertion. This necessity is greatest with those to whom the emoluments of their profession are the only source from which they expect their fortune, or even their ordinary revenue and subsistence. In order to acquire this fortune, or even to get this subsistence, they must, in the course of a year, execute a certain quantity of work of a known value; and, where the competition is free, the rivalship of competitors, who are all endeavoring to justle [sic] one another out of employment, obliges every man to endeavour to execute his work with a certain degree of exactness.[230]

Even though "unrestrained competition" among professors might bring academic talent, including teaching talent, to a very "high degree of perfection," such academic competition was most unlikely given the assured and substantial compensation available to most English university professors of Smith's day. Moreover, the protected income of such professors, regardless of teaching effectiveness, also substantially insulated them from the competition of privately compensated teachers teaching outside the universities on a fee for service basis.[231]

The lack of academic competition for income, among professors, was further compounded by a form of monopoly leverage enjoyed by most professors as a result of various university and other conventions. While Smith does not actually use the term monopoly in offering his theory of pedagogical failure in Book V. of WEALTH OF NATIONS, he

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229 WEALTH OF NATIONS, *supra* note 161, V.i.e.30, at 755. *See* MULLER, *supra* note 162, at 78.

230 WEALTH OF NATIONS, *supra* note 161, V.i.f.4, at 759. Smith also argues in *id.* V.i.f.4t 5, at 759-60, that:

> Rivalship and emulation render excellency, even in mean professions, an object of ambition, and frequently occasion the very greatest exertions. . .
> The endowments of schools and colleges have necessarily diminished more or less the necessity of application in the teachers. Their subsistence, so far as it arises from their salaries, is evidently derived from a fund altogether independent of their success and reputation in their particular professions.

231 *See* 2 WEALTH OF NATIONS, *supra* note 161, V.i.f.45, at 780.

explicitly analyzes various constraints on the university student consumers of his day.[232] Indeed, if a monopoly enterprise is one that exclusively or almost exclusively controls the supply of a commodity or service, the English professors of Smith's time, and their employer universities, were effectively monopoly providers of academic services. In a more contemporary vocabulary, few English university students of Smith's era had realistic "exit" powers.[233]

Scholarship students, for example, lacked the opportunity to choose their own college affiliations. Were such subsidized students free to choose the college they liked best, "such liberty might perhaps contribute to excite some emulation among different colleges."[234]

All university students, moreover, were largely deprived of the power to choose the tutor with whom they would work. Rather, tutors were assigned by the head of each student's college. Smith notes the negative effects quite explicitly:

> [I]f, in case of neglect, inability, or bad usage, the student should not be allowed to change [his tutor] for another, without leave first asked and obtained; such a regulation would not only tend very much to extinguish all emulation among the different tutors of the same college, but to diminish very much in all of them the necessity of diligence and of attention to their respective pupils. Such teachers, though very well paid by their students, might be as much disposed to neglect them, as those who are not paid by them at all, or who have no other recompence but their salary.[235]

Even the predictable desire of prideful university teachers to avoid the neglect, if not active contempt of students is "blunted" as effective "incitements to diligence" in part by the ease of appealing to immature students and in part because of various college and university discipli-

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232 While Smith never uses the word "monopoly" in his explicit education analysis: *Id.* V.i.f.1-49, at 758-81, he does explicitly refer to the evils of monopoly elsewhere in WEALTH OF NATIONS. *See* 1 WEALTH OF NATIONS, I.vii.26-28, at 78-79; I.xi.b.5, at 163-64; and 2 WEALTH OF NATIONS, IV.vii.c.89, at 630. Smith also uses the "monopoly" vocabulary explicitly in a letter to William Cullen of September 20, 1774. In CORRESPONDENCE OF ADAM SMITH, *supra* note 161, at 173, 174, Smith observes that "Monopolists very seldom make good work, and a lecture which a certain number of students must attend, whether they profit by it or no, is certainly not very likely to be a good one." Smith further connects, *id.* at 177, monopolies to "[b]ad work and high price.h .[q]uackery, imposture, and exorbitant fees. . ."

233 For a succinct introduction to the monopoly concept and vocabulary, see JACOB VINER, *Monopoly and Lassez Faire, in* ESSAYS ON THE INTELLECTUAL HISTORY OF ECONOMICS 63 (Douglas A. Irwin, ed., 1991). For a contemporary introduction to the concept of consumer exit, see Hirschman, *supra* note 2, at 3-5, 21-29.

234 WEALTH OF NATIONS, *supra* note 161, V.i.f.12, at 762-63.

235 *Id.* V.i.f.13, at 763. *See also* Ross, *supra* note 165, at 73.

nary rules. Even where an instructor delivers "sham-lectures," such an instructor may still be given the authority "to force all his pupils to the most regular attendance. . ., and to maintain the most decent and respectful behaviour during the whole time of the [disappointing or even deplorable academic] performance."[236]

In fact, Smith is uncompromising in his condemnation of those academic regulations that have the effect of both immobilizing disappointed student consumers and discouraging student criticism of professorial incompetence:

> The discipline of colleges and universities is in general contrived, not for the benefit of the students, but for the interest, or more properly speaking, for the ease of the masters. Its object is, in all cases, to maintain the authority of the master, and whether he neglects or performs his duty, to oblige the students in all cases to behave to him as if he performed it with the greatest diligence and ability. It seems to presume perfect wisdom and virtue in the one order, and the greatest weakness and folly in the other.[237]

Even the boldest, most critical students must quietly tolerate their academic disappointments; not only to avoid university disciplinary action, but because the eighteenth century English universities, like their modern counterparts, provided something other than learning opportunities. Even students appalled by incompetent instruction needed a university degree as a necessary certification of supposed competence, providing access to a professional career: "The privileges of graduates in arts, in law, physick and divinity, when they can be obtained only by residing a certain number of years in certain universities, necessarily force a certain number of students to such universities, independent of the merit or reputation of the teachers."[238]

In short, Smith concluded that many of the leading universities of his day were effective "monopolists of learning" staffed by faculty who could indulge their predictable taste for leisure without jeopardy to their

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236 WEALTH OF NATIONS, *supra* note 161, V.i.f.14, at 763.

237 *Id.* V.i.f.15, at 764.

238 *Id.* V.i.f.11, at 762. The degraded and contemptuous condition of English universities was exacerbated by:

> [T]he great number of students who, in order to get degrees or to be admitted to exercise certain professions, or who, for the sake of bursaries, exhibitions, scholarships, fellowships, etc., are obliged to resort to certain societies of this kind, whether the instructions which they are likely to receive there are or are not worth the receiving.

Letter from Smith to William Cullen, *in* CORRESPONDENCE OF ADAM SMITH, *supra* note 161, 173, 175.

income. Spared the rigors of competition, and charged with educating students having few if any consumer options, such professors predictably provided, in Smith's view, an "education" where "learning was bogus and the teaching a farce."[239]

Third, and finally, in institutional terms, Smith considers the possibility that various forms of monitoring or scrutiny of academic behavior might discourage otherwise predictable pedagogical failures. Even monopolies, of course, may be restrained by enlightened regulation.

Smith, however, was generally suspicious of competition-restraining collusion by tradesmen and professionals: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the publick, or in some contrivance to raise prices."[240] Even though universities are not formally profit-making institutions, utility maximizing professors predictably comprise what one modern commentator has characterized as "a kind of syndicalism club to pursue common ends."[241]

Smith, himself, is particularly dismissive of the prospects for collective faculty or internal university restraints on weak teachers:

> If the authority to which. . .[a professor] is subject resides in the body corporate, the college, or university, of which he himself is a member, and in which the greater part of the other members are, like himself, persons who either are, or ought to be teachers; they are likely to make a common cause, to be all very indulgent to one another, and every man to consent that his neighbour may neglect his duty, provided he himself is allowed to neglect his own.[242]

Even though Smith bluntly concludes that most of the Oxford professors of his day "have. . .given up altogether even the pretence of teaching,"[243] he is equally suspicious of regulatory alternatives. Generally powerful authorities, external to the university, are no more likely to be effective in deterring weak teaching:

> If the authority to which. . .[a professor] is subject resides, not so much in the body corporate of which he is a member, as in some other extraneous persons, in the bishop of the diocese for example; in the governor of the province; or, perhaps, in some minister of state; it is not

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239 JOHN VAIZEY, THE ECONOMICS OF EDUCATION 16 (1962).
240 WEALTH OF NATIONS, *supra* note 161, I.x.c.27, at 145.
241 Blaug, *supra* note 164, at 570.
242 WEALTH OF NATIONS, *supra* note 161, V.i.f.8, at 761.
243 *Id.*

> indeed in this case very likely that he will be suffered to neglect his duty altogether. All that such superiors, however, can force him to do, is to attend upon his pupils a certain number of . . .lectures. . .What those lectures shall be, must still depend upon the diligence of the teacher; and that diligence is likely to be proportioned to the motives which he has for exerting it.[244]

Moreover, such external monitoring may well result in the "arbitrary" exercise of regulatory power that is "exercised both ignorantly and capriciously" by authorities who may censure professors or even fire them "wantonly, and without just cause." Ultimately, such undesirable threats to academic freedom may "degrade" professors who are likely to seek protection against such abusive powers through "obsequiousness to the will of . . . superiors," rather than through diligent teaching or professional work.[245]

Smith's specific and impressive theory of pedagogical and academic failure reflects his general affinity for what can be described, in more modern terms, as a theoretical model. In both WEALTH OF NATIONS and other work, he reflects on the "beauty of a systematical arrangement of different observations connected by a few common principles."[246] For Smith, theory building generally consisted of consecutive arguments grounded deductively upon a relatively small number of relatively simple

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244 *Id.* V.i.f.9, at 761.

245 *Id.* V.i.f.9, at 761-62. T.J. Lewis, *Adam Smith: The Labour Market as the Basis of Natural Right,in* I CRITICAL ASSESSMENTS 656, 674-75, *supra* note 162, explains why external authority is unlikely to check academic ineptitude. Professors, according to Lewis, have deliberately and correctly weakened external scrutiny.

246 WEALTH OF NATIONS, *supra* note 161, V.i.f.25, at 768-69. Smith is similarly committed, in *id.* V.i.f.25, at 769, to systematic inquiry and exposition in pursuing moral philosophy:

> Something of the same kind was afterwards attempted in morals. The maxims of common life were arranged in some methodical order, and connected together by a few common principles, in the same manner as they had attempted to arrange and connect the phenomena of nature.

Some of Smith's friends and correspondents commented on the systematic character of THE WEALTH OF NATIONS, 2 WEALTH OF NATIONS, V.i.f.25, at 768-69 n.16. Smith also advocated the Newtonian method, in LECTURES ON RHETORIC AND BELLES LETTRES, *supra* note 161, ii.133-34, at 145-46, that allowed us to:

> [L]ay down certain principles known or proved in the beginning, from whence we account for the several Phenomena, connecting all together by the same Chain. . .It gives us a pleasure to see the phenomena which we reckoned the most unaccountable all deduced from some principle (commonly a well known one) and all united in one chain. . . .

For a description of Smith's "theory of theorizing" that bestows "order on the succession of our ideas" and "is expressed in the form of a system, defined as an 'imaginary machine' invented to provide a coherent pattern of cause and effect in phenomena," see Ross, *supra* note 165, at xix. Smith incorporates, in all his works, "systems. . .in which a connecting principle-in particular, sympathy in ethics and division of labour in economics-binds together discordant phenomena with explanatory force." *Id.* at xx.

foundation principles. As a result of such theorizing, Smith was able to do more than simply describe university-level failings; he was able to powerfully account for such failings as well.

C. PRESCRIPTIVE SMITH

Smith not only logically explains slack university teaching and other academic failures as the predictable effects of specified components of human psychology, interacting with certain important institutional influences, he also recommends explicit remedies. These remedies assume that the striving for material betterment, reputation and ease will remain constants of human nature. As a more realistic alternative to reforming the human condition, Smith very simply proposes to induce more effective university teaching by changing a few academic conventions or institutionalized practices.

First, he argues for increased student options by sharply criticizing the immobilizing effects of student financial aid arrangements, centrally directed tutorial assignments and rules requiring student attendance at useless lectures and deference to ineffective teachers.[247] Invoking the example of the ancient Greek teachers of philosophy and rhetoric, Smith notes the desirable effects of student power to pick instructors. In the ancient Greece of Plato, Aristotle, Zeno of Citta and Epicurus:

> There was nothing equivalent to the privileges of graduation, and to have attended any of those schools was not necessary, in order to be permitted to practise any particular trade or profession. If the opinion of their own utility could not draw scholars to them, the law neither forced any body to go to them, nor rewarded any body for having gone to them. The teachers had no jurisdiction over their pupils, nor any other authority besides that natural authority, which superior virtue and abilities never fail to procure from young people, towards those who are entrusted with any part of their education.[248]

In the more contemporary terms of Albert O. Hirschman, the "exit" power of student-consumers works as a disciplining force in cases where a teacher-supplier of educational services provides a disappointing academic performance. Moreover, student exiting also informs academic or university managers of consumer unhappiness.[249]

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247 WEALTH OF NATIONS, *supra* note 161, V.i.f.10-15, at 762-65.

248 *Id.* V.i.f.43, at 778.

249 HIRSCHMAN, *supra* note 2, at 4, succinctly explains the powerful potential of the exit option:

> Some customers stop buying the firm's products or some members leave the organization; This is the exit option. As a result, revenues drop, membership declines, and

Smith also plainly endorses the concept of merit pay for professors; merit pay provided, not by some professionally distant and uninformed authority, but by "the honoraries or fees" from a teacher's student-consumers. As a result, professors will be dependent upon "the affection, gratitude and favourable report" of their students, which can be best earned "by the abilities and diligence with which [a teacher]. . .discharges every part of his duty."[250]

Like Mandeville before him, Smith predicted that university teaching would improve where naturally self-indulgent teachers are stimulated, by variable pecuniary rewards, to greater academic exertions. In teaching, as "[i]n every profession, the exertion of the greater part of those who exercise it, is always in proportion to the necessity they are under of making that exertion."[250]

Characteristically, Smith supported his proposal for student-administered merit pay with examples drawn from various educational contexts. While he conceded that the Scottish Universities had their failings, they were nevertheless "the best seminaries of learning. . .any where in Europe," in part because professors there depended upon student fees for much of their income.[252] Similarly, Smith notes that the English private schools below the university level are "much less corrupted than the universities." In such institutions, as well as for teachers of subjects like fencing or dancing, "[t]he reward of the schoolmaster in most cases depends principally, in some cases almost entirely, upon the fees or honoraries of his scholars."[253]

Even if parish or district schools are desirably established to provide elementary education for the children of low-income workers, it is still important that the teachers at such schools be only partly paid by the public treasury. However meager the resources of the student body, teachers who are paid only government salaries, with no compensation whatsoever from students, "would soon learn to neglect . . .[their] business."[254]

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management is impelled to search for ways and means to correct whatever faults have led to exit.

250 WEALTH OF NATIONS, *supra* note 161, V.i.f.6, at 760. Smith immediately suggests the potential of fees or honoraries, paid by students to teachers, as revenue "sufficient for defraying" educational expenses. *Id.* V.i.f.1, at 758-59.

251 *Id.* V.i.f.4, at 759. For the coinciding opinions of Smith and Mandeville, see *id.* at n.2.

252 Letter from Smith to William Cullen, *in* CORRESPONDENCE OF ADAM SMITH, *supra* note 161, 173, 175. *See also* 2 WEALTH OF NATIONS, *supra* note 161, V.i.f.6 n.4, at 760; RAE, *supra* note 165, at 48 and E.G. WEST, EDUCATION AND THE STATE 121 (2d ed. 1970) who observed that Smith favored "a fee-paying system" which produced the following desirable effect: "the higher the proportion of the total reward made up in fees the more the security against pedagogic inertia."

253 WEALTH OF NATIONS, *supra* note 161, V.i.f.16-17, at 764.

254 WEALTH OF NATIONS, *supra* note 161, V.i.f.55, at 785.

Smith also carefully explains that most ancient Greek and Roman teachers, of subjects ranging from music and military exercises to philosophy and rhetoric, received no public or government salaries. Rather, what income such teachers earned came entirely from privately financed student fees.[255] Such ancient student demand for private instruction still:

> [P]roduced, what it always produces, the talent for giving it; and the emulation which an unrestrained competition never fails to excite, appears to have brought that talent to a very high degree of perfection. In the attention which the antient philosophers excited, in the empire which they acquired over the opinions and principles of their auditors, in the faculty which they possessed of giving a certain tone and character to the conduct and conversation of those auditors; they appear to have been much superior to any modern teachers. In modern times, the diligence of publick teachers is more or less corrupted by the circumstances, which render them more or less independent of their success and reputation in their particular professions.[256]

Smith also argues, just as explicitly and persuasively, that fee-paying consumers in non-educational contexts have a similar direct power to induce a better supply of quality services. For a first, somewhat surprising, example, he prefers that judges be directly compensated for their services by fee-paying litigants. Despite the obvious risk of corrupting the administration of justice, Smith remains interested in the desirable incentive effects of such a compensation arrangement:

> Where the fees [paid by litigants]. . .are precisely regulated and ascertained, where they are paid all at once, at a certain period of every process, into the hands of a cashier or receiver, to be by him distributed in certain known proportions among the different judges after the process is decided, and not till it is decided, there seems to be no more danger of corruption than where such fees are prohibited altogether. Those fees, without occasioning any considerable increase in the expence of a lawsuit, might be rendered fully sufficient for defraying the whole expence of justice. By not being paid to the judges till the process was determined, they might be some incitement to the diligence of the court in examin-

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255 WEALTH OF NATIONS, *supra* note 161, V.i.f.43 at 778. *See generally id.* V.i f.38-46, at 774-81.

256 WEALTH OF NATIONS, *supra* note 161, V.i.f.45, at 780.

> ing and deciding it. . .Publick services are never better performed than when their reward comes only in consequence of their being performed, and is proportioned to the diligence employed in performing them.[257]

Smith, again like Mandeville, is also persuaded that if practicing lawyers were not paid directly by their clients, "they would perform their duty still worse than they actually perform it."[258] Even the clergy are predictably influenced by how they are compensatedo

> The teachers of [religious] doctrine. . .in the same manner as other teachers, may either depend altogether for their subsistence upon the voluntary contributions of their hearers; or they may derive it from some other fund to which the law of their country may entitle them; such as a landed estate, a tythe or land tax, an established salary or stipend. Their exertion, their zeal and industry, are likely to be much greater in the former situation than in the latter.[259]

In general, consumers of most goods and services have considerable power to stimulate suppliers by wielding dollar-power directly. For Smith, the encouragement of most arts and professional services may be largely lefto

> [T]o the individuals who reap the benefit of it. The artizans finding their profits to rise by the favour of their customers, increase, as much as possible, their skill and industry; and as matters are not disturbed by any injudicious [government] tampering, the commodity is always sure to be all times nearly proportioned to the demand.[260]

Nonetheless, Smith also suggests a system of consumer-determined compensation might create certain problems. While he expresses few reservations about a market-driven or student-fee system in those pages most expressly devoted to his theory of pedagogical failure, he does note, mostly elsewhere in WEALTH OF NATIONS, certain relevant concerns.

First, Smith recognizes that impressionable student-consumers may be all too easily deceived by their teachers. While students who have the power to reward or to penalize their teachers directly may stimulate better teaching, many teachers may still "effectively blunt the edge of all

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257 WEALTH OF NATIONS, *supra* note 161, V.i.b.20, at 719.

258 WEALTH OF NATIONS, *supra* note 161, V.i.b.18, at 718; and V.i.f.4 n.2, at 759. *See also* Rosenberg, *supra* note 191, at 564.

259 WEALTH OF NATIONS, *supra* note 161, V.i.g.1, at 788.

260 *Id.* V.i.g.3, at 790.

those incitements to diligence." With minimal knowledge and effort, a self-protective teacher may favorably impress students who are likely to be very, perhaps naively, grateful even for a teacher's routine translation of arcane texts and merely occasional interpretive remarks.[261]

Smith also reflects on a certain risk of "corruption." While he is most explicit about the corrupting influence of consumer payments as he discusses the administration of justice and the behavior of judges,[262] he also concedes that a fee-based system probably encouraged the sophistry of certain teachers who unscrupulously promised to teach the young men of ancient Athens "to be wise, to be happy, and to be just. . .[all] in return for. . .[a] paultry [monetary] reward. .o ."[263]

Smith further notes that many of the most eminent Athenian teachers were handsomely compensated by fee-paying students and "appear to have acquired great fortunes." The standard of living of the most popular ancient teachers was "splendid even to ostentation."[264] For Smith, there was a significant risk in two opposing compensation extremes, regardless of profession or vocation. Teachers, as well as clergymen and common laborers, might be all too easily demotivated:

> The proper performance of every service seems to require that its pay or recompence should be, as exactly as possible, proportioned to the nature of the service. If any service is very much under-paid, it is very apt to suffer by the meanness and incapacity of the greater part of those who are employed in it. If it is very much over-paid, it is apt to suffer, perhaps, still more by their negligence and idleness.[265]

Apart from the perils of extreme under- and over-compensation, Smith also warns about the risk of fee-induced overwork, at least among the working classes and the military. While the "liberal reward of labour. . .increases the industry of the common people," workmen and soldiers who "are liberally paid by the piece, are very apt to over-work themselves, and to ruin their health and constitution in a few years."[266] While Smith does not explicitly extend this particular argument to university professors, he is plainly concerned at various points in WEALTH

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261 *Id.* V.i.f.14, at 763.

262 *Id.* V.i.b.20, at 719-20.

263 WEALTH OF NATIONS, *supra* note 161, I.x.c.39, at 149.

264 *Id.* I.x.c.39, at 149-50.

265 WEALTH OF NATIONS, *supra* note 161, V.i.g.42, at 813.

266 WEALTH OF NATIONS, *supra* note 161, I.viii.44, at 99t100. Clerical zeal or overwork is similarly related to the promise of generous contributions from devout believers. 2 WEALTH OF NATIONS, *supra* note 161, V.i.g.1, at 788-789.

OF NATIONS with a variety of negative consequences from certain fee-based compensation arrangements.

Notwithstanding such few reservations, the power of Smith's analysis has been widely acknowledged, at least in principle. Among classical economists of the eighteenth and early nineteenth centuries, McCulloch, Malthus and Say noted, however briefly, the likely improving effects of a fee-driven and competitive compensation system for teachers.[267] Much later, Keynes offered very high praise of Smith's "magnificent first chapter of the Fifth Book of the WEALTH OF NATIONS. . .which contains passages which ought to be pre-fixed to the Statutes of every University and College."[268]

More modern commentators have also observed that Smith's arguments for the improvement of university teaching, along with other educational ideas, are receiving renewed attention after being ignored for too many years. Despite the difficulties of measuring teaching outputs, and understandable reservations over the competency of student evaluators, Smith's argument is surprisingly relevant to modern conditions. Contemporary concerns over various agency problems and monitoring costs have been appropriately connected to Smith's analysis of professorial shirking in slack university environments.[269]Though some commentators characterize Smith's direct-payment proposal as "radical,"

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267 WEST, *supra* note 252, at 122 concluded: "Most of the later economists upheld Adam Smith's principle. Thus Malthus argued that if each child had to pay a fixed sum, 'the school master would then have a stronger interest to increase the number of his pupils. . . . Similarly, McCulloch thought that the maintenance of the fee system would . . .[motivate teachers to teach and perfect their art]. . . and to attract the greatest number of scholars. . ."

While James Mill shared their reasoning, John Stuart Mill was more hesitant: "According to [John Stuart] Mill, education was one of those exceptional cases in which the *laissez faire* principle broke down because of the lack of adequate judgement on the part of the purchaser."

Say was also most complimentary to Smith's "highly ingenious disquisition on public education." DANKERT, *supra* note 165, at 158.

268 Keynes, *supra* note 167. *See also* DANKERT, *supra* note 165, at 158.

269 M. Blaug, *University Efficiency and University Finance: Discussion, in* ESSAYS IN MODERN ECONOMICS 189, 191 (Michael Parkin & A.R. Nobay eds., 1973). Richard Layard & Richard Jackman, *University Efficiency and University Finance, in* ESSAYS IN MODERN ECONOMICS 170, 170 (Michael Parkin & A.R. Nobay eds., 1973) observe that:

> Universities are often inefficient. . .But the question is why the inefficiency occurs and how it can be reduced. It seems mainly caused by the difficulty of measuring the output of individual teachers and of institutions, and thus of paying them appropriately. We therefore explore the efficiency effects of different ways of paying teachers . . . and of financing institutions.

Layard & Jackman add, *id.* at 178, that the problems of insufficient incentive might arise in any organization. While the authors never mention Smith or his WEALTH OF NATIONS, they also observe that "[T]he difficulty is probably more acute in universities, because the problem of policing the individual worker is greater due to the individualistic and non-cooperative nature of the basic production process, which at present depends critically on the face-to-face interaction between the lone teacher and his students."

They further propose, *id.* at 178, to turn teachers into entrepreneurs in a way similar to the proposals of Smith:

"contentious," with "very obvious dangers," and as "wholly impracticable,"[270] his ideas nonetheless suggest an important question. Might law teaching, and legal education in general, be improved if law student-consumers had the power to compensate their teachers directly?

III. APPLYING SMITH TO MODERN LEGAL EDUCATION

Smith's strategy is hardly a panacea; however, it may be a useful innovation that will eventually promote better teaching and more effective legal education despite differences between 18th century English universities and our contemporary law schools. Consider the following outline for a practical program of student-administered rewards, adapted to certain contemporary conditions of modern legal education.

A. A MODERN PROGRAM FOR STUDENT-ADMINISTERED REWARDS

Upon payment of a semester's tuition, in a conventionally pre-paid lump sum at a semester's start, each student will receive a certain modest amount of dollar-denominated vouchers for subsequent use in one of two basic ways. Each law student will receive about $500 per semester in $50, $20 and $10 vouchers that may be used to reward law faculty members, at the student's discretion, subject to the following requirements.

First, vouchers may be transferred to any particular professor, at the end of a semester or course, in any amount selected by the student consumer. As a second option, that can be mixed with the first, the student may transfer vouchers, in any amount, to his or her own voucher account for eventual distribution by that student within a designated period, say

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> All payments for teaching services would be made directly by the consumers to the teachers, who would rent their rooms from the university. The function of the university would be to provide capital facilities, to certify the teachers and to provide the necessary informational and administrative services to establish effective contacts between students and teachers. If a coordinated teaching programme were felt to be necessary, teachers could bid for the right to give particular courses but they would collect their fee at the door.

See also EDWIN G. WEST, ADAM SMITH AND MODERN ECONOMICS: FROM MARKET BEHAVIOR TO PUBLIC CHOICE 49, 51-52 (1990); and Sherwin Rosen, *Some Economics of Teaching*, 5 J. LAB. ECON. 561, 561-563 (1987). Highet, *supra* note 47, at 85, reflects on a teacher's occupational disease: "Because their careers are not devoted to making quick profits and getting immediate results, they are apt to become ditherers."

[270] For a generally approving description of "Smith's radical ideas about the payment of teachers," see Rosen, *supra* note 269, at 561-62. For similar praise that nonetheless characterizes "consumer [student] sovereignty" as a "contentious suggestion," see D.W. VERRY, UNIVERSITY INTERNAL EFFICIENCY *in* Economics of Education: Research and Studies 65, 70 (George Psacharopoulos ed., 1987). DANKERT, *supra* note 165, at 160 is more critical as he describes Smith's reward method as having "very obvious dangers" and being "wholly impracticable." Charles Arrowood is similarly critical: "With the passage of time, however, weaknesses have been revealed in Smith's theories. His notion that the buyer-seller relation between teacher and pupil is almost an all-sufficient guarantee of the quality of instruction is perhaps the easiest of his positions to overthrow." ARROWOOD, *supra* note 174, at 31.

five years, after course completion. All vouchers, which will be coded by student, must be used each semester either to currently reward teachers or as a contribution to a student's voucher account for future distribution.[271] This second option allows a student to defer a final evaluation of teaching quality, until a student or alumnus/a has the additional perspective of future academic offerings or even post-law school professional experiences.[272]

Each student, therefore, will have relatively unconfined discretion to use his or her vouchers in a variety of conceivable ways for reward purposes. For a rather extreme first example, student Jones may decide to use his semester's total voucher allotment of $500 to immediately reward Professor Adams for what, Jones decides, has been a very outstanding course in, say, Torts. None of Jones' other professors in this semester, in this first case, will receive any vouchers from Jones at the end of the semester or at a later date since Jones will have expended his entire voucher allotment in immediately rewarding Professor Adams.

In a second extreme case, Jones might have reservations about the quality of all the teaching that he has been exposed to in a particular semester; or he is puzzled about how to allocate the vouchers in that semester. As a result, Jones decides to entirely defer his voucher backed evaluation of teaching quality, for that semester, until later in his academic career (perhaps at graduation) or even until he has practiced for three or so years. In this case, none of Jones' current professors will receive any voucher income now, but at least some may benefit at a later date when a better informed Jones makes more seasoned evaluations of teaching and academic quality in the context of additional professional experience. On the other hand, an undecided student Jones may choose to reward other professors who inspire Jones at a later date. If, for example, Jones "banks" his entire voucher allotment from his third semester of law school, he may eventually decide to distribute all or part of this accumulated amount to a teacher that he encounters for the first time during his fifth semester of law school.

Of course, numerous other reward options are available to student Jones in this highly discretionary program. Jones, for example, may prefer to avoid more extreme judgments. He may simply decide to share his vouchers equally among all his professors in a particular semester. If he has difficulty drawing distinctions among his teachers, he may decide that each of his semester's five professors should currently be rewarded

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271 Coding of vouchers might be done in a way that would both confidentially link particular vouchers to particular students and preserve anonymity simultaneously. Student anonymity is likely to be as important to participating students as anonymity in most forms of grading.

272 Anthony D'Amato suggests that alumni fill out student evaluation forms. D'Amato, *supra* note 155, at 492 n.59.

with $100 in cash-convertible vouchers. Jones may also mix his options. He may decide to spend only $300 of his total $500 in available vouchers, for the semester, for current rewards to his two favorite professors while reserving the other $200 in vouchers for future distribution after he has reflected on the quality of particular teaching efforts in the broader context of his later academic or professional career—-and so on, with a variety of allocation possibilities.

While this system for student-administered rewards is quite simple in bare outline, there will be a need for certain administrative guidelines. First, the incentive goals of the new program must be carefully explained. The purpose is to reward and encourage effective or quality law teaching and all members of the law school community should know about this objective.[273] Second, students, who fail to distribute all their allocated vouchers either currently or eventually from an individual voucher account, will be liable for any undisbursed vouchers. This assures that the faculty will eventually receive the total dollar benefit of an academic year's voucher allocation.[274] Third, the voucher distribution from student, or alumnus/a, to individual teacher will be anonymous though the vouchers will be confidentially coded to assure that each student/alumnus/alumna eventually disburses all allotted vouchers. Fourth, and most complex, some system must be created to allow for the creation and administration of individual voucher accounts for future distributions within, say, five years of a particular course completion. Despite the need for such bookkeeping, the opportunity for a deferred, and perhaps improved, evaluation in broader context probably justifies the administrative cost and complexity. Fifth, and finally, there should be an annual report that provides the entire law school community with accurate information about the annual voucher incomes of each faculty member. This form of student evaluation ought to be made public to maximize incentive effects and identify problems with the new system.

At the same time, it is important to note that this form of voucher/reward system, unlike Adam Smith's proposal, will not provide for all or even most of a particular law professor's compensation. In fact, the system should not reduce a professor's baseline annual salary by more than 20-25% even in extreme cases where a particular professor receives no voucher income at all.

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273 Student distribution of vouchers might be accompanied by a required written evaluation or explanation to the faculty recipient.

274 In cases where a student fails to disburse vouchers within the required period, say five years from the completion of a particular semester, such a student might be billed for the undisbursed voucher amount. Collection of such bills, however, might be difficult since students would be liable for undistributed vouchers and thus obligated for a second payment of a part of tuition initially paid. Nonetheless, the small voucher amounts may make the burden bearable.

Consider the hypothetical case, in quantitative terms, of the Paducah University Law School. This case is designed as fairly typical at least insofar as it roughly reflects partial, if dated, real world data about a number of the fifteen accredited law schools in New York State, available from various if limited sources.[275]

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275 Periodic and non-confidential data about American legal education is largely limited to two annual dated sources: A.B.A., Sec. Legal Educ. and Admissions to the Bar, *A Rev. of Legal Educ. in U.S.* [hereinafter 19__ A.B.A. Review]; and *19__-__ SALT Salary Survey*, THE SALT EQUALIZER (____ 19__)[hereinafter 19__ Salt Survey]. The range of relatively recent data re: New York State law schools is taken from the Fall 1994 A.B.A. Review and the 1994-95 Salt Survey. The following data range reflects the various products of law professors. In addition to teaching, law professors also produce research and professional writing including books, articles, reports, briefs, and statutes; law reform activities; committee, administrative and university service; and community service. Law deans and university administrators also provide a centralized source of professorial compensation for law professors. A conversion of law school salary systems to mixed voucher/salary systems also allows certain concessions to political realities and an opportunity to correct misguided or wrong student judgments. Where a colleague is ignored or unjustly criticized by voucher-empowered students, a law school dean and central university administrators may have resources, within limits, to mitigate certain unfair student judgments.

The fulltime tuition rank for New York State's thirteen private law schools, during '94-95, ranges from N.Y.U.'s $22,090 to Touro's $15,965. The median tuition for this group is about $18,000 while the median tuition for the two public law schools is considerably less. Full-time enrollment ranges from N.Y.U.'s 1,655 to Pace's 477. The median private school full-time enrollment is about 900. Full-time faculty, in the private schools, ranges from N.Y.U.'s 58 to Albany's 30 with the median number at about 38.

Salary data is selectively available for only seven of the thirteen private law schools from the annual Salt Surveys. A.B.A. salary and some other data, available to law school deans prior to 1998, is confidential and not widely distributed even to interested law faculty members. To estimate the percentage of all tuition revenue that will be used for the new student discretionary vouchers, I assume that the median salary equals the average salary for all professors of whatever rank. The product of the total number of professors, regardless of rank, multiplied by the average salary may then be expressed as a percentage of total tuition revenue for each of the 1994-95 SALT Survey sample's seven private law schools. I further assume that each student at a private law school receives an annual total of $1,000 in vouchers for discretionary use during each academic year, exclusive of summer sessions.

In the group of seven private law schools reported in the 1994-95 SALT Survey (Albany, Brooklyn, Pace, St.John's,Syracuse,Touro, and Cardozo/Yeshiva), the percentage of total tuition, including substantial part time student tuition at Brooklyn, Pace, St. John's, and Touro, used for full-time faculty salaries ranges from Pace's 38.58% ($4,930,401/ total tuition of $12,779,610) to Syracuse's 23.36% ($3,346,250/total tuition of $14,323,680). The median ratio of full-time faculty salaries to total tuition is about 25%-30%. The percentages of total tuition used for full-time student vouchers($1,000 X total full-time enrollment divided by total tuition) range from Touro's 6.81% ($847,000/$12,443,955) to Syracuse's lowest percentage of 5.66% ($811,000/$14,323,680). The median proportion for the seven private law schools is about 6.12%. Voucher allocations, as a percentage of total salaries, range from 24.26% at Brooklyn ($1,476,000/$6,046,600) to Pace's lowest percentage of 17.02% ($839,000/ $4,930,401). The median proportion, for the seven private law schools, is 21.96%. Finally, the percentage of total faculty salaries available for lump sum, non-vouchered allocation ranges from a high of about 83% at Cardozo/Yeshiva and Pace to a low of about 76% at both Brooklyn and Syracuse. The median percentage for our limited group of seven private law schools in '94-'95 is about 78%.

These figures, limited and dated as they are, suggest that the student voucher proposal is, in several ways, a quantitatively modest experiment though the new program also may produce

Assume Paducah is a private university-based law school. It employs thirty-five fulltime faculty members who service a fulltime equivalent enrollment of 850 law students in a basic J.D. program. Paducah has no graduate programs. Each Paducah student pays, or has paid on his or her behalf, annual tuition of $18,500. Assume further, that base faculty salaries at Paducah average $110,000 immediately prior to instituting the voucher/reward program. Previously, salaries have been determined at Paducah, as at most law schools, by the Dean in consultation with the university's central administration. Such centrally determined salaries may or may not have included a very modest amount reflecting the Dean's judgment of faculty "merit."[276]

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very large differential compensation for some law professors of comparable age and service. First, only a small proportion of each tuition dollar will be available for voucher distribution at student discretion. Even though each full-time student will receive an annual $1,000 in discretionary vouchers, this amount will be only 5.5%-7% of a student's annual tuition bill, at each private law school, depending on different tuition levels. Students at the two public law schools at SUNY/Buffalo and CUNY/Queens will receive a much larger percentage of their annual tuition in discretionary vouchers assuming that they receive the same annual $1,000 in vouchers for discretionary distribution. Second, while centrally administered salaries will be reduced under the new voucher program, the reduction will only range from 20%-25% at the private schools. 75%-80% of a law professor's total compensation will still be distributed in the conventional way unaffected by student discretion. A law professor who makes a current total of $100,000 will still receive a minimum of $75,000 to $80,000 regardless of student voucher judgments. For the especially favored, of course, total compensation may increase well beyond the current $100,000. Third, the amounts are still significant enough to capture the attention of both newly empowered students and some law professors who may risk a decline of 25% of current annual compensation. Still other favored law professors may also find themselves the beneficiaries of new dollar increases in compensation because of student approval. Despite the percentages suggested above, the new program offers noteworthy positive and negative incentives to law faculty members.

276 Very little useful literature, on law faculty pay systems, exists. One dated exception offers some provocative generalizations but little quantitative detail. *See* Joseph W. Little, *A Plan for Setting Law Teacher Salaries,* 31 J. LEGAL EDUC. 1 (1981). Little notes that "law teachers have little to say in public about their pay." *Id.* at 2. He suspects that pay distributed to law professors is likely to be "out of kilter" with merit criteria and doubts that "professional pay is set on the merits and that the decision-makers are in a good position to measure the merits." He further tries to account for "pay imbalances that are not easily squared with equal pay and merit criteria" by noting the frequency of initial mistakes of worth, squeaky wheel demands, the extent to which administrative and political desire for easy decisions leads to across-the-board increases, and, finally, plain inertia. Little further identifies institutional factors that lead to questionable pay decisions such as the absence of articulated standards, information problems about how well a teacher does his or her job, and, of course, the habit of academic secrecy. He further notes a law dean's information limitations: "In any sizeable faculty I doubt that any dean could come close to carrying out a comprehensive, annual evaluation. . . ." *Id.* at 5-6. Little finally offers a pay plan for teachers to stimulate discussion, but does "not propose criteria for measuring job content, seniority and merit. . ." *Id.* at 7,9,10. Nonetheless, Little does suggest that a faculty pay plan ought to be an "iterative" process with periodic judgments responsive to periodic shifts in performance. Little's proposed pay plan is to rest on a series of rank categories and will incorporate certain presumptions. He urges us to "measure [actual performance] to the extent that. . h[the pay system] can." *Id.* at 10, 12-15. For similar doubt over "the uncertainty of merit," see MULLER, *supra* note 162, at 59 (quoting David Hume's ENQUIRY CONCERNING THE PRINCIPLES OF MORALS).

These figures yield the following important quantitative conclusions about the operation of our new Paducah voucher program. First, the total full-time instructional payroll amounts to $3.85M or about 24.5% of annual tuition revenue of $15.725M. If each of the 850 Paducah students receives $1000 in vouchers for the year, this means that the total annual voucher power of the student body amounts to $850,000 or 5.4% of the total student body tuition for the year. Most important, the same $850,000 in vouchers amounts to only little more than 22% of the total salary ($3.85M) budgeted for Paducah's fulltime faculty of thirty-five.

Given these figures, focus on Professor Arnold, who makes exactly the average baseline salary of $110,000. The new voucher/reward program implemented at Paducah will initially reduce Arnold's salary by 22% to a new base of $85,800. This newly lower amount will come to Arnold in the conventional way, typically through semi-monthly payments from Paducah University.

While Arnold certainly notices the decline in her assured academic compensation, she also knows that she, at the least, has an opportunity to compete for a share of the $850,000 in voucher income available, during this particular academic year, at the discretion of Paducah's student consumers. Arnold understandably hopes that her annual income will exceed her previously determined base salary of $110,000. She anticipates dollar rewards for good teaching from her current students and, perhaps, from past students and even alumni who conclude that Arnold made important contributions, after all, to their legal education and eventual professional success.[277]

This form of mixed compensation, therefore, serves multiple goals. The voucher/reward program, as sketched in the Paducah case, does not alter the school's total annual expenditure for faculty salaries; therefore avoiding any need for any increased allocation of total law school tuition revenue to faculty compensation. The same total salary budget of $3.85M is now divided between a much larger amount for conventional and assured salaries ($3M or 78%) and a smaller total ($850,000 or 22%) to fund the new voucher/reward system.

As a result of these figures, faculty members are both assured of a predictable base income and stimulated to exert their best pedagogical and academic efforts to increase their pecuniary income. Participating students will also recognize that they now control substantial dollars that

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277 Arnold needs a minimum of $100 in voucher income from each of 240 students to reach her old base salary of $110,000. She may also hope for greater generosity from a smaller number, as well as contributions from former students and alumni/ae. If each of 100 students or alumni/ae distribute an average of $300 in vouchers to Arnold, she will exceed her old base salary by several thousand dollars. These figures may provide an incentive for large class teaching though Arnold may be concerned that her large scale teaching produces a very modest average allocation of discretionary vouchers.

will be used for incentive purposes. At the same time, no member of the faculty need starve as the result of student judgments about the quality of their professor's work.[278]

Moreover, the continuing assured compensation from the University recognizes several important academic realities relating to both the complexity of academic work and the deeply embedded traditions of academic democracy and faculty governance. Faculty members, who do more than "merely" teach, are assured that their research, writing, consulting, committee and law school administrative work entitle them to a secure minimum income regardless of student judgments about the quality of their teaching. Faculty members, with special research or public service interests, may continue to receive research grants, released time and sabbaticals as well as other support for a variety of worthy professional work outside the classroom.

While many law faculty members will doubtless reject the new voucher/reward program as a needless and radical innovation, many may recognize and approve its net beneficial potential particularly when it takes the form of a rationally mixed compensation system with both conventional and discretionary components.[279] Indeed, those law faculty members still impressed by precedent may be interested to learn of certain historical academic experiments with student-administered merit pay. Adam Smith, himself, reminds us that the Scottish university professors of his day were importantly compensated by their students directly.[280] Other European universities, notably in Italy and Germany, also once experimented with systems like the one Smith so forcefully recommends.[281] Indeed, more recent proposals, to imaginatively alter

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278 Of course, numbers may have to be adjusted in the case of public law schools or where there is desire to moderate the effect of the new system. Consider halving the total discretionary component to $425,000 and initially reducing faculty base salaries by only 11%. Arnold's income would then initially decline from $110,000 to $97,900. She would need only $12,100 in voucher income to equal this old salary. 121 law students, each contributing an average $100 in voucher income, would bring Arnold back to the $110,000 level. Of course, each student might also have only a total of $500 in vouchers for the year, instead of $1,000.

279 One notable effect of the new mixed system is to allow merit determinations to be decentralized and allocated to a large number of evaluators. Given the difficulty of defining and detecting merit, there is special faculty security in being evaluated by a sizeable number of student evaluators in addition to a single law school dean or a small group of colleagues. .

280 Rosen, *supra* note 270, at 562.

281 Hastings Rashdall concedes that:

> We know. . .very little of the teaching system of the university [at Bologna]. . .in the thirteenth century. But enough evidence has come down to us to make it clear that the teacher was absolutely dependent for support upon his *collecta,* i.e. the fees paid to him by his pupils. The ordinary practice was for a professor to employ a couple of scholars to negotiate with the other students as to how much each was to pay; but at times a large body of students would make their own terms with the professor, and divide the cost among themselves. The amount of the honoraria was not even approximately fixed by custom, and at times we find learned professors of the highest

academic compensation, continue to reflect the durable wisdom of Adam Smith.[282]

Nonetheless, such a voucher/reward program is both certain to provoke intense controversy on law faculties and is likely to produce at least some unanticipated effects. Such a program, therefore, ought to be carefully evaluated so that its predictable benefits and equally predictable problems can be fairly taken into account.

B. CONCEIVABLE PROGRAM BENEFITS

The benefits of a voucher/reward system like the one discussed above are numerous, variable and somewhat speculative based on program design. Of course, program details might be altered to reduce both positive and negative impacts. If, for example, students were only given the power to disburse $250 in vouchers annually, instead of $1,000, this would confront Professor Arnold, from Paducah, with a base salary reduction of only 5.5%, leaving her with an assured annual salary of $103,950. This initial reduction of a little more than $6,000 from her previous assured salary of $110,000 would be noticeable but considerably less alarming to Arnold. This is especially likely if Arnold is insecure about her teaching ability or teaching personality, as many law teachers are in reality.[283] At the same time, the Paducah student body would retain an aggregate dollar power of $212,500 that it could annually disburse in a discretionary way to those law teachers judged particularly effective.

Whatever the program's design, however, such a new system usefully responds to a number of important impediments to effective law teaching. In short, the reform in professorial compensation, suggested by Smith, may offer overdue if partial correctives to a number of longstand-

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reputation haggling with their scholars over these payments in a highly sophist-like and undignified manner.

HASTINGS RASHDALL, I THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES 208 (F.M. Powicke & A. B. Emden, eds., 1936).

Rashdall further notes that a salary system emerged at Bologna and other Italian universities during the fourteenth century. *Id.* at 209-212. Daniel Fallon observes that nineteenth German universities permitted some teachers to function as *Privatdozent.* A *Privatdozent* was a private instructor who "received no salary from the state and was, in fact, not a member of the faculty, but he was permitted to collect the fees paid by students attending his lectures." DANIEL FALLON, THE GERMAN UNIVERSITY 43 (1980). *See also* Alexander Busch, *The Vicissitudes of the Privatdozent: Breakdown and Adaptation in the Recruitment of the German University Teacher*, I Minerva 319 (1963) for a description of the growing numbers of such teachers in the late nineteenth and eary twentieth centuries.

282 *See* Layard & Jackman, *supra* note 270, at 178.

283 Julius Getman observes that,"[G]reat teaching is rare and great teachers who can sustain their interest, enthusiasm, and commitment over a long period of time are even rarer. . .It also requires a special combination of learning, dedication, and imagination."

GETMAN, *supra* note 47, at 15.

ing barriers to more effective law teaching. These barriers may be called "structural" or "institutionalized" because they are generally, if not universally, characteristic of legal education. Regardless of certain significant differences among law schools, these barrier factors have persisted almost everywhere for a very long time.

A persuasive benefits analysis requires the examination of relevant monopoly problems, the passive character of law students, the dilemma of high monitoring costs, and the need for greater efficiencies in allocating professorial resources and in responding to high levels of instructional cost in law school environments. A new voucher/reward program, whatever its detailed design, both needs and may contribute to clarified norms and the increased information relevant to the evaluation of teaching quality. The net effect of enhancing law student power to evaluate law professors may be a legitimizing one. One need not be a passionate member of the Critical Legal Studies Movement, or its feminist or race-related variations, to conclude that legal education will benefit from a reordering of the power relations between law faculty members and their students.

1. *Coping with Monopoly Teaching*

The irresistible conception of legal education as a form of market enterprise leads naturally to a consideration of supplier and consumer powers. If law teachers exercise certain forms of monopoly power, this complex reality may help to partially explain certain perceived and long-standing weaknesses in law teaching. It is also arguable that the student power to reward individual teachers is a useful, if partial, corrective to such important monopoly conditions.

American legal education, in aggregate national terms, has sometimes been characterized as a cartel of law schools that produces classic and damaging anticompetitive effects.[284] Recently, the federal govern-

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284 Harry First, *Competition in the Legal Education Industry (I),* 53 N.Y.U. L. REV. 311 (1978), argues that the antitrust laws ought to apply to the law schools as well as to the legal profession in general, *id.* at 312-13, for a variety of reasons. First, legal education has a long history of a noncompetitive structure. *Id.* at 313. Second, "[t]he classical profit-maximizing firm seeks monopoly power - the power to control price and exclude rivals." *Id.* at 324. Third, firms in a highly concentrated industry with high entry barriers can be expected to behave noncompetitively respecting the pricing of output and further exhibit a lack of innovation. *Id.* at 326. Fourth, the A.A.L.S. prescribes a variety of institutional characteristics for an acceptable law school. *Id.* at 360-61. Widespread acceptance of various standards "can be understood as the predicted result of a cartel attempting to suppress competition." *Id.* at 367.

Similarly, Paul Carrington reminds us of George Bernard Shaw's famous dictum that "All professions are conspiracies against the laity" and further notes that one mark of monopoly abuse is that the cost of providing a good rises "in disproportion to the benefit of improved quality." Carrington, *supra* note 220, at 402 (quoting G.B. SHAW, THE DOCTOR'S DILEMMA, Act I, at 116 (Penguin ed. 1954)). Pipkin, *supra* note 37, at 1189, also observes that "Legal education is currently more analogous to the position of monopoly producers in a laissez faire

ment sued the American Bar Association charging violations of federal antitrust laws and alleging certain anticompetitive effects from the ABA's accreditation standards. While this suit has been settled by consent decree, at least one new law school has also sued the ABA making similar charges, after failing to gain accreditation.[285]

Whether or not American legal education is truly a form of national cartel, or whether particular law schools, as individual firm-like entities, do in fact exercise anticompetitive or monopoly powers at least in some markets, our first concern is with individual law teachers.[286] Some commentators have noted the special leverage that most law professors, as teachers, exercise over their students. Many who engage in variously aggressive forms of teaching occupy a protected position, largely insulated from student counter attacks. Moreover, we law professors are said to share certain characteristics of an "entrenched bureaucracy."[287] In

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market than to other competitive contexts where consumer opinion can affect the quantity and quality of what is produced."

285 On November 23, 1993, the Massachusetts School of Law ("MSL") sued the A.B.A. in U.S. District Court in Philadelphia (E.D. Pennsylvania) charging that the use of the accreditation process for law schools inflated the cost of legal education by as much as $450 million annually in excess tuition payments. More specifically, the suit brought by MSL, after being denied A.B.A. accreditation, charged that the A.B.A. "operates as a cartel that dictates, among other things, faculty salaries, the number of professors. . .[and] the number of hours those professors may teach. . .t." Ken Myers, *Law School Files Antitrust Suit Against Accreditation Officials,* NAT'L L.J., Dec. 6, 1993, at 4. *See also* Margot Slade, *A Little Law School Does Battle with the A.B.A.,* N.Y. TIMES, Feb. 4, 1994, at A19. While the federal courts denied relief to MSL, with a final appeal denied in 1997, Chris Klein, *Law Schools,* NAT'L L.J., May 26, 1997, at A16, MSL's complaint about accreditation did draw a federal antitrust inquiry by the Justice Department. Ken Myers, *Complaint About Accreditation Draws Federal Antitrust Inquiry,* NAT'L L.J., March 28, 1994, at A6. On June 27, 1995, the A.B.A. and the federal government filed a consent decree that required certain changes in the A.B.A. accrediting process. Steven A. Holmes, *Justice Department Forces Changes in Law School Accreditation,* N.Y. TIMES, June 28, 1995, at A1; and Max Boot, *Rule of Law: Education Cartels Get the "Bingaman Treatment,"* WALL ST. J., July 5, 1995, at A9. For a general overview of the various cartel-related charges and the federal government's scrutiny of antitrust violations by institutions of higher education, see DEAN LAWRENCE R. VELVEL ET. AL., MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, THE DEEPLY UNSATISFACTORY NATURE OF LEGAL EDUCATION TODAY (1992); Douglas R. Richmond, *Antitrust and Higher Education: An Overview,* 61 UMKC L. REV. 417 (1993); and Judith Welch Wegner, *Two Steps Forward, One Step Back: Reflections on the Accreditation Debate,* 45 J. LEGAL EDUC. 441 (1995).

286 JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 1 (1990), observes that:

> A central problem in social science is that of accounting for the functioning of some kind of social system. Yet in most social research, observations are not made on the system as a whole, but on some part of it. In fact, a natural unit of observation is the individual person. . .Much of contemporary social research focuses on explaining individual behavior.

Coleman's qualified theoretical commitment to "a variant of methodological individualism. .t.is. . .not unique among social theories in taking individuals as its starting point." *Id.* at 5.

287 Professor Hazard concludes that "[t]he faculty has all the powers of an entrenched bureaucracy. Only the faculty has continuity in the enterprise, indeed tenured continuity." Hazard, *supra* note 160, at 548. Similarly, Professor Watson observes:

fact, it is conventional wisdom that most economic actors and agents, presumably including law professors, have a natural propensity to monopoly.[288]

If a monopoly actor is one who exercises exclusive or almost exclusive control over the supply of a commodity or service, individual law professors, as teachers, often fit the classic definition.[289] Though many of our law schools are currently competing for qualified students in conditions of stabilized and even declining demand for legal education,[290] important changes occur in the marketplace for legal education after student matriculation.

Once a law student enrolls in law school, this student is usually formally connected to teachers from whom the student cannot easily escape. Certainly during the first year, student-consumer Jones may have little or no practical opportunity to substitute the services of Professor B for Professor A, or to substitute course Y for course X. Adapting the useful terminology of Albert O. Hirschman, it may be said that individ-

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> [T]hat one of the characteristics of the role of law professor is that it provides a position from which one can be aggressive. This can be done without much counter-attack since the rostrum affords great protection. In contrast with the adversary situation of a courtroom, the professor may carry on an essentially one-sided battle, always able to be the ultimate judge and decision-maker.

Watson, *supra* note 130, at 114.

288 Adam Smith generally observes that "Monopoly of one kind or another. . .seems to be the sole engine of the mercantile system." 2 WEALTH OF NATIONS, *supra* note 161, IV.vii.c.89, at 630. More recently and specifically, James Coleman concludes that:

> The overall level of grades allocated by a teacher is often referred to as the teacher's 'ease of grading.' Insofar as the teacher is in a monopolistic position with respect to the students, the teacher has control of the ease of grading within a certain range, just as does a monopolist in an economic market. If the teacher is in competition with other teachers or with nonscholastic activities for student time, that monopoly is broken, of course.

COLEMAN, *supra* note 286, at 132.

289 *See* ALCHIAN & ALLEN, *supra* note 151, at 121: "A monopolist is sometimes said to be the only seller of a good, as if he faced no competition from close or distant substitutes." VINER, *supra* note 233, at 63 adds:

> The concept of monopoly as the exclusive or almost exclusive control over the supply of a commodity or service by a single firm or person and of such control giving its possessor arbitrary power over the price of the monopolized commodity is ancient. . .The word 'monopoly' apparently made its first appearance in the English language around 1600, but the idea was much older. . . .

POSNER, *supra* note 224, at 128 confirms that "Under monopoly, by definition, the buyer has no good alternatives to dealing with the seller, who is therefore in a position, within limits, to compel the buyer to agree to terms that in a competitive market would be bettered by another seller."

290 The A.B.A. reports an increase in the number of A.B.A. accredited law schools from 175 in 1990-91 to 181 in 1998-99. *See* A.B.A., OFFICIAL A.B.A. GUIDE TO APPROVED LAW SCHOOLS 450 (2000). Total J.D. enrollment declined from 127,261 in 1990-91 to 125,627 in 1998-99.

ual law students often lack "exit power."[291] Unlike paying customers in other markets, the displeased law student-consumer is often barred from substituting teaching from another professor. Even if student Jones is successful in substituting preferred Professor B for A, this formal substitution may have minimal to no consequences for tenured Professor A, who benefits from a largely assured and often reliably increasing salary. If this is true, even a successful substitution will provide A with little incentive to change the professional behavior that stimulated student Jones' escape or exit.

A few more specific examples illustrate the frequent law school reality. The typical first year student, for example, takes a largely required program with little or no formal opportunity either to select first year teachers or to escape those who do not fulfill student expectations. Even during the second and third year, particularly at smaller law schools, a student may have very limited exiting powers. A particular school may offer only a single annual opportunity to take courses in international law, antitrust law, or a new seminar in bioethics. Even the so-called staples of the current advanced curriculum, like Tax, Administrative Law, Corporations, and Criminal Procedure, are sometimes in relatively short supply in any given academic year. Even if multiple sections of Commercial Law or Wills are offered, the initial choice of instructor may be both relatively uninformed and constrained by scheduling complications and various credit or course load requirements. Many schools, of course, limit student power to drop and add courses even if there is a substitute instructor available.[292]

In short, the typical law school significantly reduces the ability of dissatisfied student consumers to replace one teacher or course with another. At the same time, some relevant student options plainly survive the more formal barriers to true exit. Even if a dissatisfied student cannot drop a course, he may regularly skip class, choosing instead to rely on an increasing variety of study aids, commercial outlines and horn-

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291 HIRSCHMAN, *supra* note 2, at 15 defines "exit" and notes its association with the discipline of economics:

> The customer who, dissatisfied with the product of one firm, shifts to that of another, uses the market to defend his welfare or to improve his position; and he also sets in motion market forces which may induce recovery on the point of the firm that has declined in comparative performance.

See also Hirschman, *supra* note 249.

292 Hofstra University School of Law, for example, restricts second and third year student ability to add or to withdraw from a course to the first five class days of a semester. While withdrawal is permitted after this limited period, a notation of "W" is entered on the withdrawing student's transcript. For a description of the Hofstra drop/add period, see HOFSTRA UNIVERSITY SCHOOL OF LAW, FALL SEMESTER 1999, CLASS SCHEDULE FOR SECOND AND THIRD YEAR COURSES 7. First year students, who take an entirely required schedule, have no such option.

books as a substitute for unhelpful live encounters with an indifferent or ineffective instructor. Indeed, such study aids may have been authored by this frustrated student's teacher or a distinguished law professor at another law school.

Even if class attendance is mandatory, or excessive absence penalized, many law students may, in effect, "exit in place" by "tuning out" consistently. While some teachers are skilled at prodding law students to attention and embarrassing the unprepared, many others do not bother much in these permissive times, at least regularly, with the inattentive. Students, therefore, who conclude that the benefits of live in-class encounters with Professor Fuzzy do not justify the costs of regular class attendance and active participation, often develop compensating strategies.

Nonetheless, such strategies, which stop short of a formal substitution of one teacher or course for another, rarely function effectively to discourage careless, ineffective or abusive teaching. Self-deceiving law teachers, particularly the tenured ones, may be very imaginative at rationalizing and explaining low levels of class attendance, weak student preparation and inattention. Even formal student exit, involving teacher or course substitutions, is rarely effective as a "forcing device," in Hirschman's terms, that genuinely stimulates significant changes in teaching behaviors.[293]

In fact, most law professors function as a kind of living monopoly, albeit of a relatively "loose" rather than "tight" kind.[294] Even where a teacher faces a form of competition from colleagues teaching the same subjects, such competitors may be relatively few in number and relatively gentle in the battle for students. Even the most aggressive profes-

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293 As Hirschman explains, agitated student-consumers would make more trouble for weak, ineffective or uncaring teachers "if there were no possibility of exit." A disappointed student who can successfully exit to another teacher, rids that first disappointing teacher of a potentially troublesome student-consumer. Somewhat counter-intuitively, weak teachers can successfully avoid trouble in more competitive academic markets where students have genuine options to sample other more effective teachers. HIRSCHMAN, *supra* note 2, at 27. Hirschman elaborates on the relationship between exit and voice as forcing mechanisms. Voice is defined, *id.* at 30, as:

> [A]ny attempt at all to change, rather than to escape from, an objectionable state of affairs, whether through individual or collective petition to the management directly in charge, through appeal to a higher authority with the intention of forcing a change in management, or through various types of actions and protests, including those that are meant to mobilize public opinion.

As a result, voice is a so-called residual of exit: "The voice option is the only way in which dissatisfied customers or members can react whenever the exit option is unavailable." *Id.* at 33.

294 VINER, *supra* note 234, at 63 reflects on the logical distinction between degrees of monopoly and competition. HIRSCHMAN, *supra* note 2, at 47 introduces and argues for a form of "tight monopoly" as a preferable way of increasing the likelihood of effective consumer voice.

sorial competitors may send ambiguous information about their own talents and teaching effectiveness.[295] Even in the largest law schools, with the greatest variety of course options and learning experiences, most students are discouraged by law school rules and practical constraints from sending an effective message of dissatisfaction, through true exit, to a teacher-supplier of supposed academic goods. Unlike many other markets, even an actual student exit, that replaces an unsatisfactory teacher or course with another presumably better choice, is unlikely to penalize the first teacher in pecuniary or other concrete ways.[296]

It also should not surprise us if such monopolizing law teachers, servicing largely immobilized student consumers, behave in certain predictable and classically negative ways.[297] First, the monopolizing law

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295 ALCHIAN & ALLEN, *supra* note 151, at 120 note the prospects for a world of imperfect information: "For many goods the buyer never knows exactly what he gets until he has purchased and used the good. Not even the seller knows exactly how his product will perform in the hands of each buyer."

296 Law professors who benefit from largely assured and slowly growing compensation are currently not likely to lose either their jobs or dollar benefits simply because of student unhappiness with their teaching. This form of academic job security is particularly likely in cases of professors who are protected by tenure or engaged in other commendable forms of academic work like research, writing , volunteer public service or valuable committee or administrative work within a law school or parent university. HIRSCHMAN, *supra* note 2, at 58-60 argues that:

> Exit-competition is a case in point. While of undoubted benefit in the case of the exploitative, profit-maximizing monopolist, the presence of competition could do more harm than good when the main concern is to counteract the monopolist's tendency toward flaccidity and mediocrity. For, in that case, exit-competition could just fatally weaken voice. . . .without creating a serious threat to the organization's survival. . .But there are many other cases where competition does not restrain monopoly as it is supposed to, but *comforts and bolsters* it by unburdening it of its more troublesome customers. As a result, one can define an important and too little noticed type of monopoly-tyranny: a limited type, an oppression of the weak by the incompetent and an exploitation of the poor by the lazy which is the more durable and stifling as it is both *unambitious and escapable*.i. .In the economic sphere such "lazy" monopolies which "welcome competition" as a release from effort and criticism are frequently encountered. . .Ifi, as is likely, the mobile customers are those who are most sensitive to quality, their exit, caused by the poor performance of the local monopolist, permits him to persist in his comfortable mediocrity. . .Those who hold power in the lazy monopoly may actually have an interest in *creating* some limited opportunities for exit on the part of those whose voice might be uncomfortable.

297 Smith is explicit in 1 WEALTH OF NATIONS, *supra* note 161, I.vii.26-27, at 78-79:

> A monopoly [may be] granted either to an individual or to a trading company. . . The monopolists, by keeping the market constantly under-stocked, by never fully supplying the effectual demand, sell their commodities much above the natural price, and raise their emoluments, whether they consist in wages or profit, greatly above their natural rate.

The price of monopoly is upon every occasion the highest which can be got. The natural price, or the price of free competition, on the contrary, is the lowest which can be taken, not upon every occasion, indeed, but for any considerable time together. The one is upon every occasion the highest which can be squeezed out of the buyers, or which, it is supposed, they will

teacher may be predictably insensitive to the "implicit prices" that he charges, and often collects, from his students. Such a teacher may sincerely believe that heavy assignments, supplemental reading beyond the required casebook, and even extra classes will enrich the academic experience of his students. Such seemingly respectable academic demands, however, may ignore the variable opportunity costs for students already burdened by competing and heavy demands on their scarce time.[298] Teachers imposing heavy workloads, inconvenient class schedules, and, of course, threatening personalities on students, with limited exit options, are effectively charging those students a price for particular faculty services beyond the allocated share of regular tuition. Teachers who give grades that are low in absolute or relative terms are also engaged in a form of non-pecuniary "pricing."[299]

The monopoly teacher may be not only inclined to overcharge for her services; she may also provide ineffective teaching absent the disciplining effect of a market where consumers can realistically punish the professor-supplier of disappointing academic services via substitution. Nonetheless, a monopoly supplier of a relatively inferior good may still be concerned over slackening consumer demand.[300] Smith, though he

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consent to give: The other is the lowest which the sellers can commonly afford to take, and at the same time continue their business.

Smith further suggests that monopoly power destroys frugality, 2 WEALTH OF NATIONS, *supra* note 161, IV.vii.c.61, at 612, is an enemy to good management, I WEALTH OF NATIONS, *supra* note 161, I.xi.b.5, at 163, and encourages the overpricing of questionable quality goods. LECTURES ON JURISPRUDENCE, *supra* note 161, ii.35, at 84. *See also* HIRSCHMAN, *supra* note 2, at 4 n.1, and 58; and THE MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, *supra* note 285, at 242-243.

298 First, *supra* note 284, at 316 reflects on the obstacles to rational student planning:

> [T]he lack of information would appear to remove the possibility of [a student] making an informed decision: It is difficult [for a student] to measure costs, particularly when opportunity costs of foregone income are included. Indeed, consumers may be unaware of the necessity of including the latter costs.

Layard & Jackman, *supra* note 270, at 178 also conclude that, "[p]ricing problems also arise over the teachers' use of students' time." A teacher "has little incentive to economise in the use of his students' time. This is one of the main reasons why syllabuses become overloaded. . .the problem of effectively coordinating the institution's use of students' time remains a severe one."

299 POSNER, *supra* note 224, at 5 observes that: "The law of demand doesn't operate just on goods with explicit prices. Unpopular teachers sometimes try to increase class enrollment by raising the average grade of the students in their courses, thereby reducing the price of the course to the student."

300 POSNER, *supra* note 224, at 128, further observes:

> Under monopoly, by definition, the buyer has no good alternatives to dealing with the seller, who is therefore in a position, within limits, to compel the buyer to agree to terms that in a competitive market would be bettered by another seller. It does not follow that the buyer will be indifferent to the terms of the contract offered by the seller. On the contrary. . .[t]he consumer must still decide whether to buy the product or do without. The fact that a product is monopolized does not make it a necessity of life. The effect of monopoly. . .is to reduce the demand for a product,

never uses the term "monopoly" in Part V of WEALTH OF NATIONS where he expressly analyzes the failings of university professors, plainly believed that a monopoly-professor was more likely to produce disappointing academic goods: "Monopolists very seldom make good work, and a lecture which a certain number of students must attend, whether they profit by it or no, is certainly not very likely to be a good one."[301]

Smith's approach to the pervasive monopoly problem also incorporated a related prediction that monopolies tend to restrict output, among other negative effects.[302] If output is limited by a monopoly-supplier, student frustration may predictably follow.

Of course, many law professors would passionately argue that student academic wants and preferences are often uninformed and misguided; and that is precisely why students ought not to get "their way." Nonetheless, there is cause for concern over slack teaching efforts to respond to legitimate student confusions and learning difficulties. Law teachers who are relatively and consistently indifferent to diverse student desires for clarification, amplification in concrete terms, and teacher patience may all too often be indulging their monopoly privileges. Many law teachers may defend their unresponsiveness as a deliberate and responsible effort to stimulate student self-help through that fabled teaching strategy fondly known as "hide-the-ball."

The frequently expressed complaint about the lack of innovation in law teaching and legal education may also be monopoly related, though the "theoretical basis for this view is obscure."[303] While some commentators have attempted to explain why monopoly factors have created legal education as a form of "nondynamic industry, slow to change, and short on innovation,"[304] it is also possible that the slow pace of change in

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implying that some customers prefer to do without it rather than pay the monopoly price. So a consumer facing a monopolized market has a real choice, and he will want it to be an informed choice.

301 Letter from Smith to William Cullen, *in* CORRESPONDENCE OF ADAM SMITH, *supra* note 161, at 173, 174. *See also* Gary M. Anderson, *Mr. Smith and the Preachers: The Economics of Religion in the Wealth of Nations,* 96 J. POL. ECON. 1066, 1080 (1988), who observes that "Smith did not present a notion of monopoly welfare loss in precisely modern terms. But he did argue that monopoly leads to restrictions on output, or declines in quantity, combined with increases in price, and therefore harms consumers." Richard Posner, in questioning the effects of monopoly on product quality and variety, is more troubled. Questions about such adverse effects of monopoly "are immensely difficult." *See* POSNER, *supra* note 224, at 305 n.7; and RICHARD A. POSNER, TEACHER'S MANUAL FOR ECONOMIC ANALYSIS OF LAW 42 (5th ed., 1997).

302 *See* Anderson, *supra* note 302.

303 For competing arguments, see POSNER, *supra* note 224, at 304-05.

304 First, *supra* note 284, at 314.

legal education is explained by high information costs and an academic "copycat" tradition.[305]

Finally, the monopoly position of many law teachers in many, though not all, academic circumstances increases the risk of strained academic relations and threatens to reduce the demand for law teaching and legal education. Even basically caring and conscientious law teachers may sometimes take certain monopoly liberties. Student charges of academic duress and authoritarian teaching are ugly reminders of the delegitimizing risks taken by some well-intentioned law teachers who regularly flex their monopoly muscle over relatively powerless students.[306] Whether or not student critics are actually justified in criticizing various pedagogic abuses and failings is besides the point. Sincere student perceptions of real academic power disparities tend to compromise academic relations and reduce fruitful opportunities for cooperative law learning.

One corrective is to utilize a form of the reward system endorsed by Smith and adapted to modern law school conditions, as above. So long as the size of most law schools and faculties remains relatively small, with explicit credit and course load requirements and academic tenure systems in protective place, students will continue to have limited forms of exiting power that can actually influence teacher behaviors. Even in such a persisting academic system, however, a skillfully administered system of student-determined rewards may have the healthy effect of stimulating useful forms of pedagogical change. While such a contribution to student power is certain to be controversial, it offers a realistic if partial response to the problems posed by monopoly teaching.

2. *Coping with Passive Students*

Even without effective exiting powers, it is still conceivable that critical and articulate law students might voice their complaints in ways that induce important changes in teacher behaviors. "Voice," as defined by Albert Hirschman, is "any attempt at all to change, rather than escape

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305 The self study report of the Massachusetts School of Law discusses monopoly as a factor at "the root of turgidity and stagnation" in legal education:

> Nobody should be surprised that monopoly (or more accurately, shared monopoly) has led to stagnation that refuses to recognize the need to teach realities. Not only is stagnation always the result of monopoly, but law schools are not alone among academic departments in ignoring realities because of possession of monopolistic power. The same problem afflicts departments such as economics.

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, *supra* note 285, at 169-70.

The same report, *id.* at 138, also reflects on the "copycat world" of legal education.

306 POSNER, *supra* note 224, at 126 reminds us that "[d]uress is also used as a synonym for monopoly."

from, an objectionable state of affairs.ö[307] In the context of profit-driven firms, consumers sometimes "kick up a fussö to "forceö "improved [product] quality or service upon delinquent management.ö In addition to individual or group petitions to management directly in charge, effective consumer voice may also involve appeals to higher authorities or even efforts to mobilize public or external opinion. Complaining consumers, therefore, may be said to use a form of change strategy or "forcing mechanismö that occupies a kind of reform niche somewhere between total consumer acquiescence and outright exit.[308]

More specifically, the exercise of voice by law student-consumers may often be superior to exit as a practical strategy for inducing improvements in the quality of law teaching. Of course, where formal exit is barred or discouraged by academic circumstances, a complaint or, in the extreme, "raising hellö may be the only practical recourse available to a disappointed student-consumer who refuses to settle for a kind of dumb consumer passivity in the face of weak teaching. Where student exits or desertions from particular courses or teachers do actually occur, such formal exiting behavior tends to have few if any consequences for teachers protected by tenure or by conventional rationalizations about why students drop courses or avoid certain teachers.[309]

Formal exits by student consumers, unaccompanied by explanation, also may offer little more than ambiguous signals to teachers and deans. Students, who withdraw from a course or who avoid a particular teacher, may have a number of motivations. Practical scheduling constraints, job and family considerations, unexpected course content, overreaction to teacher personality, anxiety over work load, class attendance requirements and grading practices, may all be factors influencing student exit decisions. Even the most observant law teachers may not know why their students leave or never arrive to taste presumably rich instructional fruits.

Articulate student complaints, in contrast to ambiguous exiting behavior, may actually specify the influential factors accounting for consumer unhappiness. Most law schools even provide students with a formal opportunity to evaluate their teachers in writing, often by filling out a questionnaire. Where similar student complaints are periodically directed to deans or senior faculty leaders, and avoid rhetorical and impassioned excess, they may eventually create widespread skepticism over

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307 HIRSCHMAN, *supra* note 2, at 30 elaborates on the forcing potential of voice: "voice is nothing but a basic portion and function of any political system, known sometimes also as 'interest articulation.' "

308 *Id.* at 30-31. Voice, like exit, can be overdone.

309 HIRSCHMAN, *supra* note 2, at 74 explains circumstances where voice is a more powerful forcing mechanism than exit.

the quality of a professor's teaching. Even relatively senior faculty members, protected by tenure and perhaps scholarly or other professional distinctions, may still value their academic reputations as teachers. If it is true that most law professors primarily function as law teachers rather than publishing, practicing law or serving as consultants, student complaints that identify real pedagogical weaknesses are bound to be noted. Telling student complaints that recur over time may even affect merit raises and other forms of professional compensation including the so-called psychic income that helps to sustain the morale of at least some law professors.

Moreover, law students seem particularly well suited to using critical voice to induce academic change. Many law students, for example, may be blessed or burdened, as the case may be, by relatively aggressive and competitive personalities even before their formal training commences. That training, whatever its weaknesses, not only reinforces these tendencies but increases student communication and critical skills as well.

Nonetheless, the reform prospects for truly effective student voice may be surprisingly limited by a number of academic and more fundamental conditions. Though law teachers may often function as living academic monopolists, their monopoly powers are often loosely exercised. The system of upper class electives, adopted at most law schools, permits students certain formal, if somewhat restricted, course options. Even in smaller law schools, thoughtful and potentially critical students may avoid courses offered by teachers with mixed or negative reputations. "Administrative law would be nice except for Professor Disaster," thinks student Jones, "but perhaps other courses like labor or land-use regulation will help my appreciation of administrative due process and regulatory issues." The professional convention of self-teaching, supported by written and other learning aids, may also ironically work to shield a weak teacher from aggressive student critics who seek their law-learning elsewhere.

In fact, some law teachers may actually protect their reputations from the cumulative damage of plausible student complaints by tolerating certain forms of more subtle exiting behavior. A very permissive professor, who neither insists on regular class attendance and student participation nor responds to student slackness and lack of class preparation, may actually be protecting his reputation from student complaints by tolerating a quiet kind of "exiting in place." A weak teacher's most able students, and most likely critics, may be just the ones to distract themselves with other non-course responsibilities. Law journal work, moot court, student government, other extra-curricular activities and, of course, outside employment may leave many of the better, self-confi-

dently articulate, students with little time for or interest in exercising critical student voice. In some profit-driven markets, certain monopoly enterprises may actually welcome limited competition because it reduces the volume of the most threatening consumer complaints by diverting those troublesome consumers to other suppliers.[310]

Even where a student is extremely disappointed, and does not formally or subtly exit, she may still be discouraged from complaining. First, a student who contemplates complaining about Professor Disaster is naturally interested in the advantages or benefits of exercising critical voice.[311] Most students are aware that any particular student criticism, even if it comes from a group, is unlikely of itself to cure inept teaching. Self-protective law teachers, wed to certain failing teaching strategies, may stubbornly resist change. Even numerous complaints from regularly confused and bored students, over an extended period, may not induce a self-deceiving law teacher to abandon deeply ingrained pedagogical habits, especially those seemingly endorsed by conventional professorial wisdom and hoary academic tradition. After all, Socrates never answered questions either!

Law school deans may be equally reluctant to respond, for different reasons. While some deans control, or at least influence, faculty salary increases and the distribution of some other perquisites like sabbaticals, research grants, and academic chairs, many will seek to avoid controversial and partly informed judgments about the quality of faculty teaching in particular. Even the boldest law school dean recognizes the difficulties of evaluating teaching output in a market where such academic services are not now sold for explicit prices.[312]

Of course, even where student criticism persuades a decisive dean to act, the primary student beneficiaries may not be the currently complaining students. Where most of the benefit accrues to students other than the critics themselves, there is understandably less incentive to complain.[313]

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310 *See* HIRSCHMAN, *supra* note 297, for the observation that student exit may have the effect of reducing the corrective power of critical student voice.

311 HIRSCHMAN, *supra* note 2, at 39 quotes from Edward Banfield's book POLITICAL INFLUENCE (1961): "The effort an interested party makes to put its case before the decisionmaker will be in proportion to the advantage to be gained from a favorable outcome multiplied by the probability of influencing the decision."

312 POSNER, *supra* note 224, at 670 observes that: "the output of an [administrative] agency is not sold in a market and is therefore difficult to evaluate. . . ."

313 POSNER, *supra* note 224, at 439 reflects on the problem of agency costs where business corporate control is given to the shareholders :

> No individual shareholder may have an incentive to spend time and money on monitoring the performance of the people managing the company because the benefit of his efforts would accrue mostly to the other shareholders. This would matter even if the cost of monitoring were slight, for although in that event the benefit to a single

Moreover, student critics may have something to lose. Even an individual student critic, operating as part of a group of student consumers, risks being identified as a troublemaker.[314] Faculty targets of student criticism may still be prideful and self-deceiving about their teaching. Even if they are not inclined to counterattack, a much criticized law teacher may still elicit sympathy from some colleagues who are, themselves, a conspicuous distance from master-teacher status.

Risk averse student critics may further understand that relevant information is in unhappy short supply and that inexperience poses certain risks for even the most determined consumer voice. Though student Jones, and others, are regularly bored, confused and intimidated by Professor Craven's seemingly inept deployment of what he proudly calls "pure Socratic teaching," Jones knows that he lacks reliable information about the external professional worlds of practitioners, government officials, and business clientele. Who is Jones to say that Craven's teaching strategies are ineffective as preparation for the longer professional term? How many law students are genuinely confident in their knowledge of a very complex and changing professional culture? What do Jones, and his critical fellow students, really know about the practice of law, or about educational psychology and learning theory? Student Jones' self-recognized lack of information and necessarily limited professional experience surely discourage him from using his critical voice, except perhaps in the very most extreme cases.[315]

> shareholder might exceed that cost, each would be tempted to hang back in the hope that another would step into the breach. The free-rider problem is exacerbated if the costs of monitoring exceed the benefits to any one shareholder but are lower than the benefits to all. And this is likely to be the case, since the costs of monitoring the managers of a large corporation are substantial.

314 HIRSCHMAN, *supra* note 2, at 15-16 distinguishes the "impersonal," "neatd" and "indirect" impact of the exit mechanism from the messier voice option:

> [Voice] is a far more "messy" concept because it can be graduated, all the way from faint grumbling to violent protest; it implies articulation of one's critical opinions rather than a private, "secret" vote in the anonymity of a supermarket; and finally, it is direct and straightforward rather than roundabout. Voice is political action par excellence.

Scordato, *supra* note 138, at 392-393 also offers the insight that law students have "little practical incentive. . .to complain openly [about teaching quality]" and "might understandably feel reluctant to openly and explicitly voice complaints regarding the quality of classroom instruction."

315 Scordato, *supra* note 138, at 392 argues that:

> the primary audience for law school classroom teaching, law students, are in the first three or four years of their exposure to the law and legal practice and thus are not in a position to determine easily the degree to which the instruction that they are receiving is effectively preparing for a life in the law.

Law students who suffer from this kind of professional information asymmetry are not likely to have "much personal confidence in their evaluations" of law teaching quality. *Id.* at 393.

Student reluctance to aggressively voice complaints about their law teachers is not only explained by such information costs but by other forms of transaction cost as well. Even if Jones seeks protective cover, and enhanced credibility, by organizing a group of like-minded student critics, he or someone must shoulder the burdens and costs of organizing the group. If Jones decides to wait until after graduation to offer his pointed criticism, he further risks impairing the reputation of the law school at little direct gain to himself and some risk of unpleasant interactions with faculty and alumni/ae who may not share his negative evaluations of Professor Disaster.[316]

In short, the corrective potential of law student voice is compromised by both likely student perceptions of minimal benefits and understandable student concerns over the costs of complaining. Despite occasionally pointed and sometimes published student criticism, particularly during the '70s, most law students are members of a passive tribe while they are quickly passing through law school.[317] Many students may also have come to law school, initially, by default. Many may be more committed to preserving options than in pursuing a lawyer's professional career.[318] Despite our law school training and a pervasive professional culture that encourages aggressive criticism, determined advocacy, reform impulses and self-help, it may be unrealistic to expect more.

Allowing law students concrete power, to directly reward and penalize their teachers, may make a considerable difference. Students, understandably restrained in their criticism, may be newly motivated to evaluate their teachers' services once they have the power to deliver concrete incentives immediately without academic delays and the need for unusual decanal or administrative initiatives. The occasional risk-taking and publicly vocal student critic need not be the only agent of academic change. Naturally cautious but critical students may welcome an opportunity to directly reward their best teachers, while penalizing their worst. This form of direct student action also has the virtue of the protective anonymity normally associated with relatively trouble-free forms of student exiting. Particularly if the delivery and withholding of dollar rewards, at student discretion, were accompanied by mandatory written but

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316 *See* Scordato, *supra* note 138, at 393.

317 *See* PACKER & EHRLICH, *supra* note 37, at 93, 135-136 app., which observes that:

"Law teachers have themselves long decried the passive and doctrinaire qualities of many second and third year students." *See also* Dunne, *supra* note 79 at 1240.

318 Stevens, *supra* note 11, at 623 quotes Mr. Justice Frankfurter's assertion that law students "on the whole. . .come by default." Stevens also notes, *id.* at 623 n.131 that:

"A similar notion was presented by Edward Levi and David Reisman in characterizing law as a 'career for the uncommitted.' It is a career that preserves options rather than requiring them to be taken up."

anonymous evaluations, law teachers might be regularly treated to the real opinions of their student consumers.[309]

3. *Coping with Monitoring*

It should be no surprise that monopoly teachers, of largely passive student consumers, tend to provide over-priced law teaching of questionable quality. In the absence of market or consumer restraints connected to truly effective exit and voice powers, only a kind of monitoring authority, external to the law teachers themselves, can check or regulate predictable monopoly abuses.[320]

In fact, the problem of monitoring the teaching output of law teachers raises classic forms of agency problems, some of which were clearly anticipated and partially addressed by Adam Smith.[321] While profit-driven firms may provide adequate monitoring incentives to in-firm supervisors,[322] managers of non-profit entities in general, including universities, may be especially challenged in regulatory roles. In law school circumstances, in particular, it may be very costly to detect and deter outright malingering let alone merely weak teaching.[323]

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319 Abel, *supra* note 121, at 453 recommends mandatory evaluations as "a course requirement" despite his concerns over student biases in the evaluation process.

320 Roger Bowles, *Economics and Law, in* COMPANION TO CONTEMPORARY ECONOMIC THOUGHT 781, 792 (David Greenaway et al. eds., 1991) observes that,"Traditional welfare economics had long known about the social costs of monopoly power, and government action to prevent or reduce its abuse was generally viewed in a fairly benign way."

Nonetheless, new law and economics scholarship is more critical of government and external regulation:"[A] great deal of regulatory work is intrinsically difficult and costly. . .[and] very often benefits certain producer groups even if it is intended to protect consumers." *Id.*

321 Rosen, *supra* note 269, at 562 interpreted WEALTH OF NATIONS as follows:

> In what would be recognized as an agency problem today, . . .[Adam Smith] advocated a method that tied a teacher's income to teaching quality as assessed by students***Compensation by annual salary was seen to affect adversely teachers incentives to give time and attention to their students. Directly rewarding superior teaching would increase its supply.

322 ALCHIAN & ALLEN, *supra* note 151, at 282 conclude that:

> The business firm is a means of organizing and monitoring team production. In this sense it is a substitute for competition in markets. The disciplinary efforts of competition are carried on within the firm. Monitors or 'supervisors' watch the team members at work and direct them (by contractual agreement) to perform in ways that will reduce the possibility of shirking.

323 In 2 WEALTH OF NATIONS, *supra* note 161, V.i.f.4-9, at 759-762, Adam Smith identifies certain institutionalized features of university life that tend to encourage professorial slackness and to discourage effective monitoring of teaching performance. One of the most influential factors, of course, relates to the typical way in which university professors are compensated through fixed salaries and endowment earnings. WEST, *supra* note 269, at 51-53 discusses Smith's approach to agency problems in universities and other donor-financed non-profit organizations. *See also* Layard & Jackman, *supra* note 269, who criticize, like Smith, university inefficiencies "mainly caused by the difficulty of measuring the output of individual teachers and of institutions, and thus of paying them appropriately." *Id.* at 170.

Nonetheless, a law teacher is theoretically and often nominally subject to the monitoring or scrutiny of faculty peers, law school deans, university administrators, and professional associations like the American Bar Association and the American Association of Law Schools. In public sector law schools, the state legislatures and other government agencies also have a certain potential power to scrutinize legal education, including teaching quality. This theoretically shared responsibility for the detection and correction of weak teaching, however, suffers from both certain fundamental and pervasively obstructing factors and from certain particularized monitoring barriers that are specific to certain monitoring agencies.

At a more fundamental level, law professors are likely to remain committed to a concept of professionalism that stresses the virtues of professional self-discipline, self-regulation of professional outputs, and peer review systems. These professional norms both discourage external regulation and arguably protect against improvident forms of crude or uninformed external interference with professional productivity or, more particularly, academic freedom.[324]

The conventional nature of the law professor's work as teacher also poses a kind of structural barrier to all external monitoring, regardless of the identity of the monitoring agency. The typical law teacher works alone and apart from other law professors. Even taking certain experiments in joint teaching into account, most law teachers regularly engage in a rather extreme form of "individualistic and non-cooperative. . .production process."[325] While, of course, some colleagues do communicate about pedagogical problems, many work in conditions of semi-secrecy. Most of us ply our teacher's trade using our cherished

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324 Smith, in 2 WEALTH OF NATIONS, *supra* note 161, V.i.f.9, at 761 reflects on the risk that "extraneous" persons such as a bishop, governor of a province or minister of state may exercise their monitoring jurisdictions "ignorantly," "capriciously" and in "arbitrary and discretionary" ways. These external authorities are "seldom capable of. .t.[monitoring] with judgment." Rather, "the insolence of office" leads such external monitors to exercise their powers in "indifferent" ways "and are very apt to censure or deprive. . .[a professor] of his office wantonly, and without any just cause." Abel, *supra* note 121, at 417 observes that "hLaw teachers view themselves as 'professionals,' one meaning of which is that only peers are qualified to evaluate performance." Carrington, *supra* note 219, at 402 also argues that the label "professional" is:

"[P]roperly worn with pride, [and] means that we [professionals] are entitled to inclusion among an elite selected on merit and that we have assumed rather specific obligations to consumers of our services, one of which is the duty to regulate ourselves in the public interest."

325 Layard & Jackman, *supra* note 269, at 178, also observe that the basic university "production process. . .at present depends critically on the face-to-face interaction between the lone teacher and his students."

professional discretion almost entirely outside the view of our colleagues and academic managers.[326]

Such academic conventions mean that most of us have only limited knowledge of how our colleagues teach and, even, think. Put another way, the frequency of solo teaching increases the costs of acquiring even the most superficial information about teaching quality. If, for example, some monitoring agency inquires about the quality of Professor Craven's teaching, this will require various intrusions into the normal relationship between Craven and his students. Classes must be observed and student opinion must be investigated in one way or another. To minimize the risk of misjudging Craven's teaching performance and ability, a conscientious monitor may feel obliged to visit multiple classes in all of Craven's courses and to investigate student opinion by both examining written evaluations and by speaking with a fairly selected sample of Craven's students.

Obviously, this may mean a considerable commitment of monitoring resources even if we limit our investigation only to the quality of Craven's teaching at a single point in time. A continuing monitoring effort that involves numerous investigations of both Craven's teaching and the teaching of his thirty-seven colleagues, of course, is very costly in terms of real academic resources.

This is especially the case because of the difficulty in evaluating the quality of teaching outputs.[327] What, after all, does Craven really do for the law learning of his students even over the short term during law school, let alone over a longer professional career of uncertain and varying direction? Is student Jones really going to develop into a better contracts drafter, because Professor Craven has artfully stimulated a thorough investigation of the doctrine of promissory estoppel? Will Jones be a better litigator because Craven explores the rule against hearsay evidence at some length? Can we even be sure that Craven's emphasis on professional thinking and distinctive problem solving strategies materially advances the rate or depth of student Jones' intellectual growth?

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326 For a consistent history of complaints about the secrecy surrounding law teaching , see Llewellyn, *supra* note 24, at 666; Cramton, *supra* note 114, at 327; and MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, *supra* note 285, at 276.

327 Layard & Jackman, *supra* note 269, at 175 reflect on the difficulty of measuring teaching outputs. Because university teachers "are not paid for their outputs, there is no automatic mechanism" that assures allocative efficiencies over the long run. Scordato, *supra* note 138, at 393t394 also observes that:

> [A]part from bar examination passage rates, there is a dearth of quantitative techniques available to measure the effectiveness of law school instruction. Further, the current lack of consensus regarding the practical skills that newly graduated students should possess means that even the employers of law school graduates are not in a good position to evaluate the quality of a given law school's classroom instruction.

In fact, our ability to gather reliable information about the effects or real consequences of law teaching is severely limited by our crude measuring tools and by the complexity of both law learning and a changing profession. As a result, a reasonable cost investigation of teaching quality may be largely limited to acquiring information that is mostly about teaching "inputs." We reduce or avoid impossibly high information costs by investigating the more observable teaching habits and behavior of Professor Craven. For example, we can observe, at a reasonable cost, that Craven does or does not use a problem method; that he does or does not call on students; that he does or does not assign supplemental social science readings; or that he does or does not lecture extensively, whatever that means.

Such high information costs, or relatively stubborn information barriers, have a number of interesting implications. First, it is quite clear that the assessment of law teaching quality is ultimately dependent on risky inferences to and assumptions about the effects of teaching behavior. We may assume, for example, that by leaving a certain number of relevant questions unanswered, our students will be stimulated to self-instruction by their puzzlement and desire to ease intellectual frustration and insecurity. Do we really know that this actually happens? Based on what evidence? Since it is often too expensive to investigate such effects directly, we economize by assuming the existence of the desired effects even without much evidence. This uncertainty about complex law learning, of course, is one good reason to be charitable in evaluating the quality of law teaching, especially when the objects of our scrutiny happen to be our professional friends.

High information costs also help explain why the monitoring of teaching quality is done very selectively in most law schools. Though there has been some movement towards post-tenure review in recent years, usually only untenured law professors are exposed to peer scrutiny of their teaching and then only occasionally during a relatively short probationary period.[328] The high cost of acquiring truly meaningful information about law teaching also helps to account for the popularity of mandatory retirement rules prior to their federal invalidation.[329] Such

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328 *See* Michael Swygert & Nathaniel Gozansky, *The Desirability of Post-Tenure Performance Review of Law Professor*, 15 STETSON L. REV. 355 (1986). For recent efforts to adopt various forms of post-tenure review, particularly in the public universities of Minnesota, Texast, and Arizona, see Richard Edwards, *Can Post-Tenure Review Help Us Save the Tenure System?*, 83 ACADEME 26 (MaytJune 1997); and Chris Klein, *Tenure Is No Longer Untouchable At the University of Minnesota,* NAT'L L.J., Feb. 3, 1997, at A20.

329 POSNER, *supra* note 224, at 368 supplies detail about the federal Age Discrimination in Employment Act which, with a few exceptions, "forbids public and private employers to fix a mandatory retirement age. . .or to use age as a criterion in hiring or firing." While Posner recognizes the arguments supporting this federal legislation, he also observes that:

information costs may also help to partly explain the emphasis many faculties and law school deans place on published scholarship for a variety of purposes, including promotion, tenure, salary increases, leaves, and special honors like academic chairs.[330]

Of course, the evaluation of teaching quality requires more than information. Even if we know a good deal about Professor Craven's teaching methods and style, the content and coverage of his new course in law and literature, and the student responses to his teaching, we still need to evaluate what we observe, and guess about, by applying a comprehensible set of respectable standards.

In short, any external monitor of a law professor's teaching faces more than the problem of high information costs. A disquieting lack of consensus over what makes for good law teaching only increases evaluation risks and discourages monitoring efforts.[331] The oft-repeated professional jingle, that "good teachers are born not made," succinctly reflects our longstanding normative insecurities over the meaning of the concept "effective teaching."[332] While professional disagreement over quality-related standards is common to all of academic life, such normative con-

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> The use of a single, readily determinable characteristic such as age as the basis for an employment decision economizes on the costs of information. . .The employer's objective is to minimize the sum of the costs of suboptimal retention decisions resulting from lack of individualized assessment of workers' abilities and the information costs of making such assessments.

Id.

330 Scordato, *supra* note 138, at 399t400 concludes that:

> At many . . .[law schools], the production of scholarship has become the preeminent faculty value, far outweighing any other consideration factored formally into the promotion and tenure calculus. . . aOne critically important reason why classroom teaching is not valued as highly as legal scholarship is the enormous difficulty involved in evaluating the teaching effectiveness of law school faculty. Several reasons why it is so difficult to evaluate the effectiveness of a professor's teaching include: the excessive consumption of institutional resources, the qualitative difficulty of evaluation, the inherently personal nature of evaluation, and the difficulties associated with student evaluation.

See also Robert L. Bard, *Scholarship,* 31 J. LEGAL EDUC. 242, 243 (1981); D'Amato, *supra* note 155, at 491; and Layard & Jackman, *supra* note 269, at 177 who observe that:

"It is widely believed that teaching capacity is more difficult to evaluate than research capacity and that an academic's accumulated research is often used as a proxy measure of the potential value of his current teaching and research output."

331 BANNER & CANNON, *supra* note 188, at 3, observe that: "[w]e think we know great teaching when we encounter it, yet we find it impossible to say precisely what has gone into making it great." Jerome Bruner is similarly perplexed by normative challenges, "Finally, one is struck by the absence of a theory of instruction as a guide to pedagogy -a prescriptive theory on how to proceed in order to achieve various results. . .a lack of an integrating theory in pedagogy, that in its place there is principally a body of maxims." BRUNER, *supra* note 97, at 31.

332 Llewellyn, *supra* note 24, at 676t77, vehemently criticizes the oft repeated proposition that "teachers are born, not made."

flicts are particularly embarrassing for an academic specialty that prides itself on its collective commitment to good quality teaching.

Finally, and of equally fundamental importance, the external monitoring of law teaching quality, from all sources, is further discouraged by the institution of academic tenure. Whatever the costs of monitoring the pedagogy of law teachers, these costs must be justified by discernible benefits. If the quality of Professor Craven's teaching is to be carefully investigated and evaluated, to what end? If Craven is protected by enforceable contractual rights to permanently continuing employment, there may be little point to gathering extensive information about his teaching for a costly and contentious process of evaluation. While an adverse judgment of tenured Craven's teaching may, in theory, affect merit pay, leave opportunities and other perquisites, there are multiple reasons for decanal discretion in such matters to be exercised with extreme caution in most law schools.

Even if Professor Craven is not yet protected by tenure, the consequences of a tenure denial may be so extreme in current market conditions that some monitors may hesitate at executing an academic death sentence, at least for weak teaching alone. While some younger teachers who are denied tenure may still find other law school employment, the decline in law school applications, current no-growth conditions in legal education, affirmative action in faculty hiring and the abolition of mandatory retirement are factors converging to reduce employment options for many. For those suffering a tenure denial these days, prospects for another teaching job may be very dim.

The institution of tenure, therefore, probably provides extended refuge for at least some mediocre teachers. The same high information costs and normative puzzles predictably encourage charity at the point of tenure, increased emphasis on publications, and the avoidance of meaningful post-tenure reviews of teaching effectiveness.

In short, the external monitoring and regulation of teaching quality is discouraged by a variety of quite fundamental obstacles regardless of the identity of the monitoring agency. Such an evaluative process, moreover, is also discouraged by certain more particularized elements distinctively associated with specific monitoring mechanisms.

Peer review, for perhaps the most prominent example, is a sometimes compromised process. Law Professors who investigate and judge the teaching of other law professors must cope with more than the variously high information costs and normative insecurities that pervade any effort to sit in judgment on the teaching of colleagues. As Smith suggested long ago, professors, among others, "are likely to make a common

cause, to be all very indulgent to one another. . ."[333] While law professors may not think of themselves, in Shavian terms, as a professional "conspirac[y] against the [student] laity," there is abundant, if anecdotal, evidence that we are not immune from the mutual back scratching, professional jealousies and political concerns of an "inherently personal" peer review process.[334]

Decanal efforts to monitor and evaluate law teaching, of course, suffer from even more extreme information costs. Because a modern dean's job has grown in complexity, and often lasts only a few years, it is difficult, if not impossible, for most to devote enough time and energy to monitoring faculty teaching.[335] While all deans say that they are devoted to encouraging good law teaching, there may be only a weak connection between the quality of teaching and a dean's discretionary distribution of academic rewards. Indeed, if weak law teaching is as widespread as relevant theory and anecdotal evidence suggest, deans who aggressively try to penalize the pedagogically underachieving might find themselves "politically" challenged. Few, if any, modern deans can continue to serve effectively without the confidence and cooperation of faculty colleagues.

Neither central university administrators nor agents of the A.B.A or A.A.L.S are in any better position to evaluate the quality of law faculty teaching. Indeed, the relative autonomy of most law faculties within larger university environments may be desirable, on balance, as a way of protecting law professors from the uninformed judgments of professionals from other academic disciplines. While the accreditation standards of the A.B.A. mention teaching, the emphasis of the formal reaccreditation process has been elsewhere. The formal reassessment of a particular law school program is not only infrequently scheduled by the A.B.A., every seven or so years; it also focuses on a variety of institutional conditions like faculty-student ratios, library specifics, faculty salaries and support for research, etc.[336] Continuing concern that costly and restrictive accreditation standards may violate antitrust laws is a further impediment to external monitoring by the A.B.A. and other professional trade associations.[337]

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333 WEALTH OF NATIONS, *supra* note 161, V.i.f.8, at 761. Blaug agrees with Smith. He characterizes as broadly predictable "[t]he behavior of university teachers as utility maximizers gathered together in a kind of syndicalist club to pursue common ends. . . ." Blaug, *supra* note 164, at 570.

334 *See* Carrington, *supra* note 219, at 402 for the Shaw dictum; and Scordato, *supra* note 138, at 404 for a description of the various reasons that "faculty members might be reluctant to evaluate candidly and vigorously a colleague's classroom teaching performance."

335 *See* Little, *supra* note 276.

336 *See* AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS (August 6, 1997).

337 *See supra* note 285.

In various degrees, therefore, all the potential monitoring agencies suffer from both fundamental and particularized barriers to the effective evaluation and correction of weak or suspect law teaching. While I do not suggest that we dispense with peer or decanal monitoring efforts, a system of student administered pecuniary rewards and punishments may usefully supplement a necessarily imperfect monitoring system. In fact, it is possible that the voucher/reward system, sketched above, will help these more traditional efforts to identify and check disappointing teaching.

Though law student-consumers surely suffer from certain information disadvantages and relevant normative confusions that may affect their money-backed evaluations, they also have important relative advantages. At the very least, they have the unique information that comes from observing their teachers over many hours. Unlike a law professor's colleagues or deans, students actually experience, from a neophyte's viewpoint, a range of teaching strategies and styles.[338] Because students take multiple courses at the same time, they may also be relatively better able to make comparative judgments about the relative degree of teaching competencies demonstrated by their several teachers, even if they lack perfected definitions of effective law teaching. Even if students lack important information about the skills demanded in complex and changing law practices, they certainly know more about their own boredom and confusions than most monitoring faculty members and deans.[339] While students may not fully appreciate their own intellectual growth, and the contributions of their teachers to that growth, they are still capable of judging whether particular teaching efforts stimulate them to useful self-instruction, and add important professional perspectives beyond the obvious.

In short, students may often have information advantages over the other potential monitors of teaching quality. Even if they are less experienced in evaluating teaching, students, as a group, may also be less en-

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338 Abel, *supra* note 121, at 454 faults the lack of "extensive faculty observation." Most faculty observers of classroom teaching "attend just one class." This handicaps faculty ability:

> [T]o make judgments about such essential matters as coverage, accuracy, familiarity with the relevant literature, originality, and . . . depth of analysis. . .Such extensive faculty observation should be supplemented by intensive scrutiny by instructors who know the subject matter, attend a reasonable sample of classes throughout the semester, read the assigned materials, examine the syllabus, and review the written and oral assignments.

339 Professor Harry Roberts from the University of Chicago Business School offers the following: "Notice that students can't tell much about *what* to teach, but they can tell very accurately when they are confused, bored, or skeptical about the value of the course." Interview by Debra Shore with Professor Harry Roberts, *Style and Substance*, 89 U. CHI. MAG. 28, 31 (June 1997).

cumbered by biases and political distractions in evaluating their professors as teachers.[340]

Voucher-wielding students, moreover, may supply useful information to both other monitoring agencies and to their law professors. The dollar signals sent by students as a group may supply a new kind of convincing evidence of student responses, particularly if participating students are required to prepare thorough written evaluations and the voucher income of teachers is made public.[341] While some individual students may be casual sometimes in making dollar rewards, there is still reason to expect that dollar-backed evaluations will be taken more seriously by student participants as a group. A real and direct ability to reward and penalize may stimulate students, previously indifferent to the evaluation process, to pay more attention to their monitoring responsibilities.

The new voucher/reward system may also stimulate professors. First, professors may well provide more useful information to student consumers about course and pedagogical goals and objectives.[342] Since student learning motivations and evaluations of their teachers are likely

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340 Abel, *supra* note 121, at 453 is more suspicious of student limitations in evaluating law teaching:

> [Student] evaluation should be a course requirement, like the final examination. Students should be asked to describe specific good and bad qualities of the teaching, not to indulge in global judgments. They should be encouraged to reveal their political agreements and disagreements. . .Only by eliciting the hidden biases toward women, racial minorities, and political dissidents can we control for them.

Abel, *id.* at 438-442, is especially critical of student evaluations that reflect student political judgments and orientations.

341 Because law students now lack the ability to cast dollar votes for preferred teaching, they have diminished "consumer sovereignty." Their law teachers also lack information about student preferences and may overproduce unwanted teaching services while under-producing other more desired academic goods. *See* ALCHIAN & ALLEN, *supra* note 151, at 128 for suggestive theory. Despite the widespread criticism of the formal student evaluation process, by law professors, there are numerous suggestions for improvement. *See* Abel, *supra* note 121, at 451-455; and William Roth, *Student Evaluation of Law Teaching,* 17 AKRON L. REV. 609 (1984). Roth, *id.* at 612, notes considerable disagreement over the characteristics of effective law teaching. Nonetheless, "[w]hile we cannot yet accurately say what are the precise components of good teaching, studies show that students seem to know it when they see it." *Id.* at 619.

342 Llewellyn, *supra* note 24, at 653 is characteristically unsparing of muddled or distracted law professors:

> [N]o faculty, and, I believe, not one per cent of instructors, knows what it or they are really trying to educate for. . . .The objectives of that [legal] education are a product of historical conditioning and chance. . . .[The faculty] miss most of what needs doing. They do not know what they miss, nor greatly care. Often they are plain wrong, plain vicious.

Lasswell & McDougal, *supra* note 61, at 204 also criticize contemporary professorial and academic confusion as plainly visible: "Heroic, but random, efforts to integrate law and the other social sciences fail through lack of clarity about *what* is being integrated, and *how*, and *for what purposes*."

to be affected by student perceptions of course and teaching purposes, the new system may stimulate law professors to more explicit and meaningful descriptions of their academic objectives.[343] Teachers may even be moved to advertise their academic wares in newly imaginative and informative ways.[344]

Of course, law professors who are stimulated to new levels of explicit communication about goals and purposes are all the more likely to be thoughtful about those goals. While this pressure to explain goals and even to advertise is bound to be resisted by some as unseemly, if not worse, it may not only enhance student monitoring capacities, but the ability of reviewing peers and deans to better judge the quality of law teaching.

Finally, the new system may make important normative contributions, thereby improving the total effort to monitor law teaching. While those of us who are now charged with evaluating the work of our academic colleagues often puzzle over the criteria of good or effective teaching, most faculty members devote little reflection and professional energy to such normative matters. All too many of us continue to believe that it is difficult, if not impossible, to ascertain the criteria for good teaching.[345]

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343 Weihofen, *supra* note 92, at 427 relates student knowledge of academic goals to student incentive:

> The best study of incentives in college is probably that of Crawford of Yale. His conclusion emphasizes the importance of making clear to students the purpose of academic work and its relation to their central objective. "Purpose, appreciable by the student, strongly influences his academic motivation and, thereby, his accomplishment."[quoting Crawford] Starting a course in real property with an extended examination of the feudal rules of tenure, and waiting until later to develop the significance (if any) of these rules in modern law, disregards this dictum.

344 ALCHIAN & ALLEN, *supra* note 151, at 56 generally observe that:

> To facilitate market activity, people resort to advertising-publicly informing other people-to help find potential sellers or buyers. And that, despite all the criticism of advertising, is its major role: to call attention to the fact that one is prepared to exchange certain described items. This way of identifying sellers and buyers reduces the cost of searching for information of exchange opportunities.

POSNER, *supra* note 224, at 123 also reminds us generally that:

> [W]ith the increasing complexity of products and services, businesses have sprung up whose function is to inform consumers about the merits of particular goods. The department store is an important example. . .it helps the consumer choose sensibly among competing products.

345 Johnstone, *supra* note 114, at 20, discusses myths held by law professors about legal education, particularly the Australian version:

> The first myth is that it is difficult to ascertain criteria of "good teaching". Consequently, teaching skills have been largely ignored in decisions about the recruitment and promotion of academics and there have been very few attempts to provide academics with the means to improve their teaching. Law teaching seems to have somehow ignored developments in educational theory, particularly in instructional psychology.

In reality, however, we may know a good deal about what makes for effective teaching. A strong law teacher, like all valuable teachers, should help people learn how to think, first and foremost. The need for organized attention to powerful simplifying principles and generative intellectual foundations, in sequenced progression, is hardly limited to law teaching. The good teacher's commitments to variety, structure, and direction are hardly any secret in a rich and suggestive literature that spans much of the history of Western Civilization's fascination with teaching and education.[346]

Johnstone, *id.* at 28t29, further explores the insights of another Australian law professor by the name of Ramsden:

> Ramsden argues that "[t]here is a cherished academic myth that good teaching in higher education is an elusive and ultimately indefinable quality. The reality is that a great deal is known about its characteristics." So far I have suggested that "good teaching" begins with clearly defined and comprehensive teaching objectives that are based on the competencies we want our students to achieve before they leave law school.

See also Roth, *supra* note 342, at 619 for the proposition that students have a capacity to recognize good teaching even absent the ability to accurately identify "the precise components of good teaching."

346 *See* ALFRED NORTH WHITEHEAD, THE AIMS OF EDUCATION AND OTHER ESSAYS 13 (1949), which offers important educational commandments such as "Do not teach too many subjects" and "What you teach, teach thoroughly. . ." Whitehead, *id.* at 61t62, also recommends the curricular interaction of the inductive and the deductive: "It is merely a barren game to ascend from the particular to the general unless afterwards we can reverse the process and descend from the general to the particular, ascending and descending. . . ."

Whitehead, *id.* at 90, offers further insight into the training of a student's intellectual ability:

> The art of reasoning consists in getting hold of the subject at the right end, of seizing on the few general ideas which illuminate the whole, and of persistently marshaling all subsidiary facts around them. Nobody can be a good reasoner unless by constant practice he has realized the importance [of big ideas].

Robert Hutchins, quotes Whitehead as follows:

> The way in which a university should function in preparation for an intellectual career, such as modern business or one of the older professions, is by promoting the imaginative consideration of the various general principles underlying that career. Its students thus pass into their period of technical apprenticeship with their imaginations already practiced in connecting details with general principles.

Robert M. Hutchins, *The Autobiography of an Ex-Law Student,* AM. L. SCH. REV. 1051, 1056 (1934).

Hutchins, *id.*, also adds that the best lawyers benefit from a special kind of training that rests "not on. . .[the] recollection of a mass of specific items, but on a grasp of *fundamental ideas.*" [emphasis added] BRUNER, *supra* note 97, at 73, 76, stresses "the pedagogical aim of forming the intellectual powers of. . .[students]"; and "[t]he need for general principles. . .lest we be overwhelmed by the richness of historical record."

BARZUN, *supra* note 47, at 25, 29, also notes that:

> [J]ust as a complex athletic feat is made possible by rapid and accurate co-ordination, so all valuable learning hangs together and *works* by associations which make sense. . hThe pace, the concentration, the output of energy in office work are child's play compared with handling a class, and the smaller the class, the harder the work.

It is conceivable that our new system of student-administered rewards may work to stimulate renewed attention to the comprehensible and truly meaningful, near consensus standards of good teaching. Surely, law professors will have a new interest in guiding dollar-backed student evaluations with clarified standards and continuing discussion of the various law teacher's arts. Some law professors will doubtless continue to maintain that teaching is a profoundly mysterious art that largely defies analysis and explanation. Others, however, may be stimulated to engage their students, and each other, in a newly serious effort to discuss and define the characteristics of effective law teaching.[347]

In short, a new voucher/reward system offers a promising complement to the current monitoring reality, now so dependent on the handicapped agencies of peer and decanal review. While the process of evaluating or regulating the quality of law teaching remains a complex matter that plainly poses information, normative and political challenges, it may benefit from newly empowered student consumers. Our students sometimes stimulate us substantively. By joining in a new monitoring partnership, they may also stimulate law professors to better judge and improve themselves as teachers.

4. *Re-allocating Academic Resources*

The new voucher/reward system may also improve the allocation of various academic resources. Law professors, seeking to maximize their voucher incomes flowing directly from approving students, may choose to spend their time and energies differently.

Conventional academic wisdom holds that law professors have multiple duties. In theory, the typical full-time, tenure-track professor is usually obliged to divide his or her time and professional resources among teaching, scholarship and service.[348] In fact, it is arguable that the typical professor is not only a weak teacher but does relatively little scholarly work, regardless of quality. If this is true, then legal education is obviously an inefficient enterprise. While there are notable exceptions to this grim reality in virtually every law school, and some law faculties seem to function better than others, it is clearly important to ask: What accounts for the disappointing aggregate performance of law professors as a national group of underachievers?[349]

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347 Abel, *supra* note 121, at 431-432 argues that the reliability of student evaluations of law teaching can be improved by training students, even briefly, to describe specific teacher attributes and behaviors rather than offering global and personal judgments about the overall quality of law instruction.

348 GETMAN, *supra* note 47, at 110 n.32.

349 Rosen, *supra* note 269, at 574, asks: "A salary system. . .[as opposed to a system of student fees like the one proposed by Smith] promotes the free exchange of ideas that produc-

One rather compelling account relies heavily upon certain familiar concepts. Like most people, law professors try to maximize the net returns to their professional resources. Of course, this means that the most rational faculty maximizers will make professional choices by comparing expected returns and costs.[350] Whether or not they are consciously rational, most law professors have considerable discretion to respond to various benefits and costs in designing their own professional lives, at least after receiving tenure. Professor A may choose to emphasize research and publication of a particular kind, while her colleagues Baand C may choose to emphasize teaching and lucrative private-sector consulting, respectively.

Despite such discretion, however, many law schools, especially at major research universities, seem especially inclined to encourage faculty research and publications.[351] We know, for example, that faculty members at the more distinguished law schools are more likely to publish their scholarly efforts.[352] They are also more likely to be sought after as expert consultants by government, private business, non-profit organizations and the media.[353] In addition to the external rewards for regular publication of well-regarded scholarship, law school deans and faculties often provide impressive internal incentives to productive legal scholars. This is increasingly true even at the non-elite law schools that

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tive research demands. But does it promote the most efficient allocation of a professor's time between teaching, research, and leisure?"

See also VERRY, *supra* note 270, at 69, who considers the incentive problem produced by the method of payment used to compensate university professors. Where professors are not paid directly for what they produce, they are more likely to be compensated for research rather than teaching outputs.

350 POSNER, *supra* note 224, at 662, discusses a public law enforcement agency's resource decisions:

> An enforcement agency's decision as to where to concentrate its resources is of interest because of the monopoly position in law enforcement that public agencies so frequently occupy. The question is explored here on the assumption that the agency acts as a rational maximizer, comparing the expected returns and expected costs of alternative uses of its resources.

351 The MACCRATE REPORT, *supra* note 48, at 5, states unequivocally that:

> Laws schools achieve national status in large part because of the scholarly reputations of their faculties. Such reputations help attract the best students who, in return, have the best job opportunities upon graduation. Inevitably, law schools tend to seek out, as new faculty members, those who show promise of high-level scholarship.

Elson, *supra* note 50, at 378, is similarly skeptical about the linkage between the quality of law school teaching, on the one hand, and law school prestige and student placement on the other.

352 GETMAN, *supra* note 47, at 110, states that: "Most institutions claim that teaching and scholarship are of comparable importance, but in the past two decades the balance has steadily shifted toward giving greater weight to scholarship. Despite official rhetoric to the contrary, scholarship is almost always given greater weight at the most prestigious schools."

GETMAN, *id.* at 283-284 n.33, also reports "that Yale Law School tenure decisions during the period that I was on the faculty focused primarily and sometimes exclusively on scholarship."

353 GETMAN, *supra* note 47, at 209.

tend to copy the more prestigious schools by awarding tenure, promotions, chairs, merit pay, research grants and support funds, and stipends for special lectures.[354]

Such attractive returns to research output tend to encourage still more research for publication purposes, even if the professional or social contributions of such work are problematic.[355] In turn, the law professor who is well rewarded for scholarship has less incentive to engage in teaching unless the returns to teaching are equally impressive.[356] Of course, many deans and productive legal scholars argue that teaching and scholarship are not only compatible, but mutually reinforcing if only because, "producing scholarship serves as a kind of investment in the human capital of the faculty member, an investment which pays dividends in the classroom through the development of a more substantively knowledgeable instructor."[357]

It is also arguable that legal scholarship is more likely to be well rewarded than quality teaching because it is simply easier to evaluate. Both the costs of acquiring reliable information about teaching, and the difficulties in identifying evaluation criteria, help to explain academic compensation systems that tend to encourage research and publications, relative to teaching, particularly at the more distinguished law schools.[358]

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354 Professor Roger Cramton reflects on the "copycat world" of legal education "in which the limited goal of academic prestige seems to be the dominant value everywhere". Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 13, (1986).

355 Scordato, *supra* note 138, at 395, quotes Fred Rodell's famous and scathing criticism of modern legal scholarship. Elson, *supra* note 50, at 368,371, is also skeptical of the practical utility of legal scholarship. *See also* GLENDON, *supra* note 45, at 205 for further criticism of the new scholarship.

356 Layard & Jackman, *supra* note 269, at 184, observe that:

> [T]he difficulty of measuring individual teaching output leads to teachers being paid largely for their past research. This greatly raises the value to them of their own current research output, and in turn reduces the incentive to introduce new teaching methods and materials, since the institution gains more from these than the individual teacher.

357 Scordato, *supra* note 138, at 371. For criticism of the argument that teaching and scholarship are mutually reinforcing, see Marc Rohr, *A Law School for the Consumer*, 13 NOVA L. REV. 101, 103 (1988).

358 Layard & Jackman, *supra* note 269, 176-177, reflect on the information problems that affect the actual payment of university teachers:

> Pricing problems also seem to explain many of the problems. . .First, there is the alleged lack of concern about the quantity and quality of teaching output as opposed to research. A possible explanation is as follows. The university will wish to pay its members on the basis of their expected productivity. But how is this to be assessed: It is widely believed that teaching capacity is more difficult to evaluate than research capacity. . . .

Scordato, *supra* note 138, at 399-400, also notes the reasons for scholarly production becoming "the preeminent faculty value, far outweighing any other consideration. . . [for promotion and tenure purposes]":

> One critically important reason why classroom teaching is not valued as highly as legal scholarship is the enormous difficulty involved in evaluating the teaching effectiveness of law school faculty. Several reasons why it is so difficult to evaluate

Nonetheless, a puzzle remains. Despite the promise of supposedly handsome rewards for successful scholars, most law teachers do not do much scholarship, particularly after tenure. Most mature law professors concede that they are first and foremost teachers.[359] In fact, a current compensation system that seems to favor scholarship over teaching may not be producing the desired effects.[360]

This may have something to do with the real rewards of scholarship for most law professors, particularly outside the relatively few elite schools. Both the tangible and intangible returns to most forms of law-related scholarship may be relatively disappointing. While the genuinely talented and productive legal scholar, particularly at a distinguished school, may reap both pecuniary rewards and the benefits of a noteworthy professional reputation, most of us are cut of different cloth. Most law professors are neither trained for nor very successful at producing noteworthy or genuinely useful scholarship. Moreover, most of us know it.[361] Even the scholarly leaders of the profession, while doubtless cherishing their worldly rewards and scholarly reputations, may still be often

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> the effectiveness of a professor's teaching include: the excessive consumption of institutional resources, the qualitative difficulty of evaluation, the inherently personal nature of evaluation and the difficulties associated with student evaluation.

For the comparative difficulty of evaluating teaching rather than scholarship, *see also* Abel, *supra* note 121, at 411.

359 Swygert & Gozansky, *supra* note 329, at 357-59, note the lack of scholarly publication by tenured professors in particular. Auerbach, *supra* note 39, at 70, found that about 75% of surveyed law professors, in 1969 and 1975: "[S]tated that their interest leaned toward teaching rather than research; only 2 percent leaned heavily toward research. Professors in the top twenty schools were much more likely to lean toward research than those in the other law schools."

360 Scordato, *supra* note 138, at 375, reminds us that the special rewards for published scholarship create:

> [A]n incentive for law school faculty to make only a minimal personal investment in classroom teaching. . .Law professors. . .are indirectly encouraged to minimize personal investments in course preparation and to avoid the use of teaching techniques that do not yield long-term dividends. . .A law professor following these incentives is likely to: first, stress the underlying theory and public policy aspects of the law covered in the course rather than focusing on current doctrinal development and the most recent court decisions in the area; second, rely more on straight lecture presentations rather than on interactive or dicussion-based examinations of the material. . .; and third and most especially, avoid giving students practice hypotheticals, practice exam questions, small paper assignments, or any other exercise generating written work that would require individual grading and feedback.

361 BARZUN, *supra* note 47, at 183 calls the convention of requiring "scholarly competence" from every university teacher an "inhuman scheme":

> It ought not to have to be said that no specialized skill implies the possession of any other, that the ability to discover new knowledge is extremely rare, and the power to put it into writing rarer still. Compared with this, the ability to teach is relatively widespread and ought to be used to the full.

skeptical of the utility of their scholarly work.[362] Even if research grants and chairs are now widely available at many, if not most, American law schools, these may make only modest marginal additions to largely uniform and relatively substantial salaries in most law schools. In short, the special rewards of scholarship are easy to exaggerate and are not readily available to most law professors at most law schools.

The costs of doing legal scholarship are also relevant. Sustained creative research and professional writing require an uncommon exertion and the right perfectionist temperament.[363] Devoted scholars may also pay a high opportunity cost in the form of foregone consulting and practice opportunities, not to speak of the toll on one's personal life. Moreover, such opportunity costs may increase as a professor matures and develops a more substantial professional reputation and heavier family responsibilities. For most law professors, therefore, variously heavy costs may combine with limited rewards to discourage scholarly output.

At the same time, this does not assure that law professors will devote their professional resources to teaching. Return and cost factors predictably influence our teaching behavior as much as they affect our scholarly output.

Many law professors, of course, point to the rewards of law teaching. Though it is very difficult to prove, skilled law teaching may make an important contribution to student law learning and even to longer term professional growth and achievement. Certainly, some of us earn significant psychic income, as teachers, if only from student compliments and sometimes heartfelt expressions of gratitude from alumni/ae.

There is, however, a competing point of view. Many of us practice a form of student-centered teaching (usually misnamed Socratic) precisely because we are persuaded that law learning occurs principally because of student exertions and self-help. While law teaching, so the argument goes, is not quite trivial, it probably makes only marginal contributions to a learning experience which is mainly the responsibility of the law student. We law teachers do not really teach. Rather, our main responsibility is to create the right environment for student self-learning.

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362 For a critical description of new academic resistance to traditional legal scholarship, see GLENDON, *supra* note 45, at 203–215. Glendon, *id.* at 205, observes that "as law professors increasingly come to resemble other university scholars, they have become more interested in writing for each other."

363 *See* Stone, *supra* note 67, at 403 on law professors who:

> [H]ave internalized a legal standard of perfection which requires that they anticipate every possible counterargument before they advance a positive thesis of any sort. It would seem that their critical skills have so hypertrophied that their productive potential has been nearly extinguished. Thus professors of law are often cut off from one of the important scholarly satisfactions that their colleagues elsewhere in the university enjoy.

At the very least, many law teachers eventually recognize how little we truly know about the effects of our efforts as teachers. This recognition makes it more difficult to persuade ourselves that our teaching really makes a difference. As a result, this information barrier tends to reduce teaching satisfactions. It also may help to account for the lack of innovation in teaching techniques.

The scale of much law teaching, for example, is relevant in assessing the consequences of our pedagogy. Law teaching to large and increasingly diverse student groups compounds the uncertainty surrounding even our most devoted efforts. Even when the typical law school class was largely composed of middle-class white males, more likely to share the same background and pre-law preparation, there were significant barriers to gauging the impact and effects of our various teaching methods. We have never really known very much about who learns what and why. Rather, most of us guess a lot about what works and what doesn't, relying less on real information about teaching impacts and more on intuition and perhaps self-deceiving guesswork.

Even if we law professors were trained to teach, most of us would still lack the ability to reliably identify different effects from various teaching methods and styles. In fact, what little empirical evidence exists, specific to law teaching, suggests that most teaching methods, styles and strategies produce comparable aggregate results so long as we continue to engage in group rather than individualized instruction.[364]

Our teaching behavior is also affected by various cost considerations. Whatever the rewards of or returns to teaching, important cost factors help to account for relatively weak or compromised law teaching. Particularly if the rewards from teaching are often speculative, sustained devotion to a high-cost teacher's calling is all the more unlikely.

At least one kind of opportunity cost is relevant. Even if a law professor is relatively uninterested, as many of us are, in scholarship, the larger professional world offers a menu of other options. Consulting and practice opportunities have been particularly widespread during the '70s and '80s. Even the now vanished recession of the early '90s, and the temporary retrenchment at major law firms, government agencies, and non-profit organizations, have probably not significantly reduced the rich

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364 *See* Paul F.Teich, *Research on American Law Teaching: Is There A Case Against The Case System?,* 36 J. Legal Educ. 167, 167-168 (1986)., concluding that: "[E]mpirical evidence is accumulating that suggests that *none* among the most widely debated law-teaching systems is uniquely effective. Evidence of parity in the overall teaching effectiveness of traditional instructional methods is emerging from experimentally generated data."

While Teich notes that while group law-teaching systems seem to function equivalently, he is also of the opinion, *id.* at 169, that, "[I]ndividualized systems have been shown to significantly improve the learning process. Little discussed and little debated individualized teaching systems therefore appear to hold the most promise for improving law teaching."

variety of interesting and lucrative opportunities that compete for the scarce time and talents of at least some law professors.[365]

The appeal of professional work, outside the law school, is also increased by a variety of more direct costs. In a word, consistently good law teaching is a high cost activity involving complex learning transactions between teacher and students. Such costs are predictably discouraging to rational cost-minimizing professors and probably reduce the quality of law teaching in the aggregate.[366]

The best law teachers are more than masters of their subject matter, though most good teachers are at least that. Very good teachers first engage in course and class planning that is coherently connected to important professional and instructional goals.[367] Clarified goals help the law

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365 Adam Smith is attentive to the opportunity costs of university employment where church compensation is relatively substantial:

> In countries where church benefices are the greater part of them very moderate, a chair in a university is generally a better establishment than a church benefice. . .Where church benefices, on the contrary, are many of them very considerable, the church naturally draws from the universities the greater part of their eminent men of letters. . . .

2 WEALTH OF NATIONS, *supra* note 161, V.i.g.39, at 810.

366 BARZUN, *supra* note 47, at 33 captures the teacher's exertion metaphorically: "Progressive education in this country, if it has done nothing else, should forever be honored and given thanks for insisting on genuine, hand-to-hand teaching, as against the giving out of predigested hokum." In addition to Barzun's reflection, *id.* at 36, on the pace, concentration and energy necessary for successful teaching, BANNER & CANNON, *supra* note 188, at 68, observe that a successful teacher's imagination must be assisted by:

> [R]ecollections of their own struggle to learn, [and]. . . recall [of] their own frustrations and failures to grasp their teachers' lessons when they were at their students' own stage of learning. Imagination must also be complemented by compassion, by a teacher's understanding of the energies students expend and the risks to the accustomed ways of thinking they assume in gaining any knowledge.

BANNER &CANNON also observe that:

> [F]ew who have taught will deny that teaching can be fiendishly difficult and draining; those who have not taught in any sustained and continuous fashion are unlikely to know its exactions, its requisitions on one's inner resources, any more than they are likely to know its joys and satisfactions;. .t.Few other human activities require of their practitioners so much in application, awareness, and energy that must be maintained from day to day, week to week, month to month, and year to year. Just getting the job done moderately well each day requires all that many teachers can bring to the task.

Id. at 136-137.

367 Gilbert Highet is sharply critical of:

> [M]any teachers who neglect to plan their work [and] are, I believe, suffering from an occupational disease. Because their careers are not devoted to making quick profits and getting immediate results, they are apt to become ditherers. Sometimes they plan neither their work nor their lives. Nearly all other vocations demand something more closely resembling individual initiative and the balancing of expenditure and returns. . .But teachers and scholars, who receive regular though meager salaries and have long vacations, sometimes drift from month to month, from year to year, on the little breezes and ripples of class routine, without setting their course in any direction or pulling steadily at the oars.

teacher to select teaching materials, to effectively order the sequence of cases and problems, and to make key decisions about emphasis, de-emphasis, classroom coverage and pacing. In the beginning, good teaching requires at least provisional answers to the following types of basic questions. Why am I teaching this material? What will my students be doing with their professional education? How does my teaching contribute to their likely professional futures? How does my particular teaching relate to my colleagues' efforts, now and in the future?

At a second more instrumental level of responsibility, the best teachers also understand the need to employ various teaching methods. Despite early claims, in American legal education, for the superiority of something called the case/Socratic method, the most successful teachers are masters of more than one teaching method and especially skilled at creatively mixing instructional techniques. While interactive teaching of the so-called Socratic kind, emphasizing the thought-provoking questioning of students, remains an important if arduous law teaching tool, it is not the only one.[368] Close case reading, so important to many courses in the first year, may yield to certain statute-based problem methods in, for example, more advanced courses in commercial law and tax. Different subjects may also demand more teacher-centered teaching in the form of informative and creative lectures that expose unexpected intellectual connections and imaginative hypotheses in engaging ways. In other offerings, experiments with newer forms of video and computer assisted instruction may seem appropriate. Most important, a law teacher's ability to command a wide variety of teaching methods not only reduces the risk of student boredom but is more likely to reach a variety of law students who learn most effectively in different ways.[369]

HIGHET, *supra* note 47, at 85.

368 STEVENS, *supra* note 37, at 121, reports on Alfred Reed's early, if qualified, criticism of "the homogenization of legal education through the pervasiveness of the Harvard case method."

369 BARZUN, *supra* note 47, at 346 quotes Rousseau's first principle:

> Look at the child, and see what he is like. He is not a miniature adult, and your efforts will go to waste if you begin where you, the teacher, stand instead of at the point which the child has reached. Cut your cloth to fit the pupil and not the other way around.

Freud is similarly explicit, "[I]t must further be considered that the children have very different constitutional dispositions, so that the same educational procedure cannot possibly be equally good for all children."

Sigmund Freud, NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS, 54 GREAT BOOKS OF THE WESTERN WORLD 807, 870 (2d ed., 1990).

More specifically, Watson, *supra* note 130, at 137, discusses the impact of problem courses and seminars in the last two years of law school:

> These presentations seem to serve at least two functions. They liven up student interest and stir them out of their intellectual doldrums. They also provide diversification. It has been said by many that after the first, and at most after the second year

Finally, the better law teachers also understand the benefits from various "feedback mechanisms," even if they resist acting on their understanding. Many of us recognize the likely benefits from more frequent exams, spot quizzes, paper and drafting assignments, group role-playing and problem exercises, and a regular program of individual student conferences. Even the most cost conscious teachers should recognize the benefits of more informal feedback mechanisms. Regular office hours, and a little more informal interaction with our students, may offer lower-cost alternatives to more formal feedback mechanisms. Clearly, teachers benefit from more reliable and timely information about student confusions and misconceptions. Just as clearly, students benefit when they are informed of their learning problems in a timely way. Law students, like students generally, are also likely to be more motivated by the personalized attention of their teachers and by the prospect of more frequent academic rewards and penalties.

The costs of improving our teaching, however, may be unhappily high. In each of the three basic categories of teaching responsibility specified above, most of us encounter quite fundamental barriers and costs. The academic planning, teaching methods, and feedback mechanisms used by most law professors, for example, are all influenced by stubborn scale and information factors.

While most law schools now offer more opportunities for small group and even individualized law learning, the dominant academic scale still involves teaching to relatively large groups of students. These groups are also likely to be more diverse than ever with, for some of us, an invigorating but complicating mix of students of different sexes, races, ages and backgrounds.

This reality, of diverse group instruction, increases the costs of acquiring reliable information about both different student learning styles and aptitudes, and about widely varying student ambitions and goals. In turn, this impedes a professor's ability to plan course work and to flexibly employ various teaching methods that are truly and specifically responsive to complex student learning needs and preferences. Drafting and grading more exams and spot quizzes will also be more burdensome in large groups, especially where group members expect individualized feedback.

In short, a teacher who is determined to teach effectively should ideally be prepared to expend considerable time and energy in acquiring and processing important information about her numerous students, their learning problems and progress, and the complex connections between

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of law school, the Socratic Method is no longer productive, and the fruits to be gained are too wizened to justify its continued use.

her particular teaching outputs and their current academic and eventual professional work.

This ideal, of course, is rarely if ever realized among understandably cost-conscious and distracted law professors. Most of us practice our ferociously difficult art form by making a number of conventional compromises and usefully economizing, if frequently self-serving, assumptions.

Many law professors frequently use casebooks prepared by others, for one conspicuous cost-reducing example. We often do this even though we know that a particular case book, and the course structure and content that it reflects, was prepared with another, or "typical," student audience in mind that may be very different from our particular student-consumers. Despite our recognition that a particular case-book driven course may not be entirely appropriate for our distinctive student audience, the speculative benefits and high costs of preparing a more customized offering tend to discourage innovation; and so we teach a conventional course, planned by others, in a relatively conventional way.

Despite such cost/benefit disincentives to good teaching, however, there is reason to believe that the voucher/reward system, described above, may help to change the current academic reality. While the plan to modestly modify the way in which law professors are compensated is no panacea, it does have a certain potential for inducing a larger amount of better quality teaching.

Obviously, the plan will increase the rewards for some teachers. Even if most law teachers do not teach primarily for money, many are still likely to be influenced by their pecuniary compensation.[370] Not only does one's salary assure a certain kind of material comfort, it symbolizes the regard that we are held in by our academic employer and our professional peers. In short, maximizing law professors, perhaps increasingly puzzled about the rewards of teaching, may find additional reason to exert themselves as teachers. More of us may be prepared to engage in higher cost teaching if we receive noteworthy income supplements directly from student-consumers, who evidence their appreciation for our efforts in newly tangible ways.

Viewed another way, the voucher/reward proposal, inspired by Smith, at least defrays the special costs of atypical teaching exertions and academic innovations. For those convinced that law professors are rarely motivated by money rewards, the plan described above may be characterized as mere compensation for the extra costs incurred by the very most diligent and effective teachers. At the very least, it is appropriate to

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370 *See* Rosen, *supra* note 269, at 574, for the suggestion that "personal financial gain" is not the only or primary motivation for professors. Nonetheless, Rosen concludes that it is "an important factor".

compensate the truly devoted and successful teacher for the income and other rewards available, but foregone, from scholarship, publishing contracts, consulting opportunities, and practice.

The net general effect may be to improve a current academic salary system that has too many of the negative characteristics of a form of income insurance. Though reliable data is unavailable, it is still likely that most law school professors are paid largely uniform base salaries with modest differentials influenced primarily by seniority and, to a lesser extent, by scholarly output and professional reputation. At the same time, most centrally administered salary systems are probably only weakly related to differential teaching effectiveness. The effect is a predictably inefficient one, at least insofar as our goal is to encourage more teaching of higher quality. The current system very likely overcompensates numerous weak and ineffective law teachers while under-compensating a probably much smaller number of truly effective teachers.[371]

In addition to generally enhancing the returns to law teaching and minimizing the costs of higher quality instruction, there are still other more specific effects that may influence the allocation of academic resources, perhaps for the better. The new voucher/reward system may stimulate more thoughtful rationing of a law professor's scarce professional time and energy. It may also lead to important specialty tracks for law professors who choose to emphasize teaching, scholarship or public service.

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[371] Layard & Jackman, *supra* note 269, at 175, offer the following:

> [B]ecause they are not paid for their outputs, there is no automatic mechanism such as that which ensures that classical labour-managed enterprises in perfectly competitive industries free of external effects will in long-run equilibrium be allocatively efficient. Instead universities may receive their incomes in a block grant, or in the form of a per student fee or in many other ways. This inevitably makes possible a divergence between the university choice of inputs and outputs and what the rest of society would like, since in a labour-managed enterprise the preferences of the teachers will play a preponderant role.

VERRY, *supra* note 270, at 69 also argues that:

> A final aspect of the incentive problem within universities considered here. . .is the method by which the academic staff of universities are paid.***the question . . .is whether the system of remuneration provides incentives to produce the efficient mix and quality of outputs. There is at least a prima facie case for believing that the payment system does not provide such incentives, the general problem being that university teachers are not paid directly for what they produce. More particularly the amount and effectiveness of the individual's teaching effort generally has little effect on his or her hiring or promotion prospects. This is due in part to the genuine difficulty of measuring teaching outputs. . .It is of course true that research is a major output of universities and it is right that research achievements should be rewarded. But teaching is also fundamental to a university's function and it is surely wrong that financial incentives on the research side are generally not matched by equivalent incentives to discharge teaching obligations with the same diligence.

Scarcity, of course, implies discrimination. With numerous student-consumers competing for a law teacher's scarce time and professional resources, it is certain that some law students will receive more and some less of a law teacher's professional attentions. The classic preference, of most rationing law teachers, has traditionally been for the relatively more able law students.[372]

Of course, it is easier to imagine our better students in influential professional roles. They are also more fun to engage in professional dialog. Our better students seem quicker to process concepts and information, and to make important connections. They seem more likely to appreciate our best intellectual efforts and imaginative commentary on both legal and more broadly social and political issues. Our very best students are also likely to impose fewer instructional costs upon us unlike their more mediocre classmates who may require more of our time and energy to reach relatively lower levels of comprehension and professional skill. Small wonder that so many law professors have preferred to focus their attentions on the very best students.[373]

At the same time, the very best account for a relatively small proportion of our student population. They also may be the least likely to benefit from our teaching exertions given their demonstrated capacity for self-instruction that probably reflects superior reading and reasoning skills. While even the most outstanding law student is understandably flattered by the special attention of Professor Topdog, we professors may offer the least to the very best. In fact, the less gifted student may benefit far more, in the learning struggle, from the focused attention of an experienced and articulate law teacher who combines subject matter mastery with useful knowledge of how fruitful law learning occurs.

While a new voucher/reward system, with its confidential aspects, will not allow students to explicitly bid a certain sum for a particular teacher's attentions, the effects may still be noteworthy. Teachers, con-

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372 Watson, *supra* note 130, at 112, states:

> It is not uncommon to hear faculty members arrogantly state the fact that their teaching is primarily directed toward the upper 10 percent of the class. . .Personally, I would tend to relate this comment to the faculty's sense of impotence in dealing and communicating with the students who may be so unlike it intellectually and emotionally.

373 Professor Richard Powell noted a number of major dissatisfactions with legal education:

> Coming now to the actual contacts with the student in the school, we found the wide diversity in the mental ability of the classes in a large law school required our teaching to be pitched too low for the best men, and yet too high for many in the group. The effort to carry along this large lower group retarded the progress of the rest of the group, and thereby diminished the accomplishment within the three-year limit.

Robert M. Hutchins et. al., *Modern Movements in Legal Education*, 6 AM. L. SCH. REV. 402, 406 (1924)

templating their supplemental voucher income, may still be induced to allocate more of their scarce professional skills to a newly empowered, if less well endowed majority. As a result, more law students, in greater need of a law teacher's skills, are likely to be more adequately serviced.

The new system also offers hope for another useful innovation in legal education. Since law professors have different aptitudes, skills and professional interests, a more efficient system of legal education would better recognize certain key differences among faculty members.

Why, for example, should our most accomplished, creative and productive scholars be regularly assigned the same teaching responsibilities as other colleagues? Some of this small minority of scholarly producers may not be very skilled at teaching professional neophytes. Others, while potentially capable teachers, may divert much of their professional energy to scholarly production. In either case, Professor Real Scholar may not be very well rewarded by law student consumers allocating dollar rewards in the new system. As a result, why not take maximum advantage of his unusual skill by relieving him of some of the normal teaching load? His base salary could still be supplemented by regular research grants and other special subsidies administered by a Dean to compensate for a minimal voucher income.

Professor Real Scholar's colleague, Professor Real Teacher, may also benefit from a system that flexibly encourages academic specialization. An equally small number of especially talented and effective teachers may choose to accept unusually heavy teaching assignments in return for being relieved of any responsibility for publishing or even for burdensome committee work. Along with such a clear understanding, of course, comes the prospect for earning a potentially large supplemental income in the form of vouchers collected from enthusiastic student consumers.

Such a specialty system, therefore, would maximize the opportunities for especially talented and productive faculty to focus on what they do best while increasing both quality scholarship and quality teaching for the benefit of us all. Of course, no professor would be compelled to choose either the scholarly or teaching track. A degree of desirable flexibility would also allow for specialty choices to be made one year and abandoned the next. No law professor need be permanently anchored to her specialty choice of the moment.

Such a system would also incorporate a third choice. The vast majority of us, who are neither especially talented scholars nor exceptional teachers, are likely to remain committed to dualist academic careers. At least for a time, many law professors will continue to combine teaching with other professional activity while experimenting with various working combinations and professional compromises. For some of us, in this

third category, the new voucher/reward system may eventually stimulate our recognition of both our limitations and our professional prospects. Previously casual teachers may decide that they are capable of considerably more as teachers given new tangible reasons for pedagogical exertions. Conversely, those who are consistently disappointed by the negative dollar signals, sent by voucher-wielding law student consumers, may decide that more scholarship, public service or even private practice are advisable professional alternatives.

In sum, the new voucher/reward system may usefully offset the arguable overcompensation of scholarly output, including some mediocre or near useless work. It may also induce professors to emphasize the kind of work they do best, benefiting both students and faculty alike.

5. *Coping with the Fading Law Teacher*

Once productive law professors sometimes "fade" over time. While not every law teacher lapses into a twilight zone of half-hearted professional effort, many suffer a productivity decline after a certain age or time in service. Of course, law professors are not the only professionals to suffer from a gradual kind of "functional decay" defined most simply as an increasing gap between actual and potential performance.[374]

Ironically, even the most accomplished law teacher may unwittingly sacrifice some of her teaching effectiveness as her subject matter mastery increases. William James has offered a particularly compelling account of a special risk connected to growing expertise. As James describes the psychological mechanism, a teacher's increasing "intellectual cultivation" may lead to the habit of "conceptual condensation" which is:

> a genuine dropping out and throwing overboard of conscious content. Steps really sink from sight. An advanced thinker sees the relations of his topics in such masses and so instantaneously that when he comes to explain to younger minds it is often hard to say which grows the more perplexed, he or the pupil. In every uni-

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374 Redmount, *supra* note 86, at 161 notes that, "The quality of teaching motivation may also shift or change in time and a shift or loss of interest may occur. Teaching may become more mechanical and attitudes may become more cynical." More generally, HIRSCHMAN, *supra* note 2, at 14-15:

> [T]akes a. . .more radical step in recognizing the importance and pervasiveness of slack. It assumes not only that slack has somehow come into the world and exists in given amounts, but that it is *continuously being generated* as a result of some sort of entropy characteristic of human, surplus-producing societies. "There's a slacker born every minute," could be its motto. Firms and other organizations are conceived to be permanently and randomly subject to decline and decay, that is, to a gradual loss of rationality, efficiency, and surplus-producing energy, no matter how well the institutional framework within which they function is designed.

> versity there are admirable investigators who are notoriously bad lecturers. The reason is that they never spontaneously see the subject in the minute articulate way the student needs to have it offered to his slow reception.[375]

Even if a law teacher successfully resists this economizing habit of mind while actually teaching, the prospects for continuing good quality teaching may still be threatened by passing time and the growing distance between student and faculty experiences. As a young teacher matures, the initial learning struggle may recede from his or her view. While some teachers retain the sympathetic ability to reconstruct the learning process and its difficulties, as if they were neophytes, more do not. Good teaching, of course, requires active recollection of learning obstacles and a willingness to point them out to students.[376]

The better teachers are also curious about the learning process and take satisfaction in observing student learning problems and progress. Over time, however, most of us find law students making the same mistakes; earlier teaching challenges become predictable routines and the rewards of teaching are reduced for many of us with advancing age.[377]

The various intangible rewards of teaching are also diminished by the growing recognition of certain information needs and costs. Ideally, law teaching benefits from lots of information about student pre-law training and life experiences, student learning styles and preferences, student professional goals and learning experiences elsewhere in law school. Information about the effects of particular teaching is also important to a teacher who is experimenting with various teaching methods. Similarly, it is very useful for a law teacher to understand a good deal about a quickly changing legal profession. However much we pride ourselves on our theoretical approaches and emphasis on basic skills, law

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375 WILLIAM JAMES, PRINCIPLES OF PSYCHOLOGY, 53 GREAT BOOKS OF THE WESTERN WORLD 1, 692 (2d ed., 1990).

376 BANNER & CANNON, *supra* note 188, at 68 reflect on the ways in which good teachers help students:

> [I]magination has to be assisted by memory. Teachers must summon recollections of their own struggles to learn, must recall their own frustrations and failures to grasp their teachers' lessons when they were at their students' own stage of learning. Imagination must also be complemented by compassion, by a teacher's understanding of the energies students expend and the risks to the accustomed ways of thinking they assume in gaining any knowledge. It is thus imagination, above all other elements of teaching, that requires teachers to see themselves again at another, earlier stage in life with lesser, because comparatively less formed, intellectual powers-a stage now occupied by their students.

377 BARZUN, *supra* note 47, at 25 concludes that "young teachers are best; they are the most energetic, most intuitive, and the least resented."

teachers are still responsible for helping to prepare our students for practice and beyond, even if many of us depreciate such vocational duties.

As time passes, a reasonably reflective law teacher recognizes the magnitude of the information poverty that compromises teaching efforts in so many important ways. How is a teacher to identify pedagogical goals and select efficient teaching methods when he knows so little about so much? Without good information, the typical law teacher over-relies on intuition, tenuous conventional wisdom and obvious guesswork, while spending little time discussing her mysterious craft with colleagues. This, in turn, leads many teachers to puzzle over the real contributions made by their teaching.[378] The lack of information also motivates under-informed and increasingly frustrated law professors to make very basic, often repetitive and sometimes self-deceiving choices as teachers. Of course, we all teach close reading, problem solving and how to think like a lawyer; or, at least, most of us say we do.

Even as the rewards of teaching tend to diminish over time, certain opportunity costs may actually increase over the course of many academic careers. A fifteen-year law teacher may have publishing, consulting, and practice options less available to relative youngsters or neophyte professors. Changing family responsibilities and a growing taste for leisure may further increase the costs of maintaining the same energetic commitment to one's teaching. Declining health, with age, may also reduce both capacity and enthusiasm for the hard work of teaching. Instead, many of us become cost-minimizing creatures of academic habit, cutting teaching corners regularly while barely aware of our compromises. As teachers, too many of us become depreciating academic assets.[379]

Finally, various institutionalized features of a law professor's professional life are relevant. Even the most committed teachers are likely to be affected by working in highly privileged circumstances. While law professors are technically employees, they are well protected by tenure, substantially free from competition and scrutiny that counts, and often well compensated especially if non-pecuniary considerations are taken into account. The early beginning to many law teaching careers combines with a new freedom from mandatory retirement rules to assure, for most, very extended careers that are largely free from many tensions and

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[378] *See* GETMAN, *supra* note 47, at 42.

[379] ALCHIAN & ALLEN, *supra* note 151, at 271, define depreciation as "[T]he predictable reduction in the value of an asset caused by physical deterioration and wear and anticipated improvements in new competing goods. . . .In contrast to depreciation are the reductions in value caused by *unanticipated* developments."

problems afflicting practicing lawyers and most other kinds of non-academic professionals.[380]

The blessing, however, is a mixed one. Notwithstanding the exceptional professional discretion and resources available to the typical tenured or even tenure-track law professor, many seem to waste all too much of their human capital. All too many law teachers use only a declining fraction of their potential as they age, at relative professional ease, reaping the virtually assured benefits of a remarkably good lifestyle.[381] The natural human propensities for self-interest, leisure and self deception, so much discussed by Adam Smith and others, are reinforced by professional conditions that many law professors, themselves, regard as simply too easy.

Given the factors that explain the fading law teacher, therefore, how useful will the voucher/reward system, sketched above, really be? Once again, the plan is clearly no panacea. It offers little for the aging law teacher who is now firmly uninterested in the challenges of learning and the intangible satisfactions of teaching, well done. It similarly offers little to those teachers who are less effective because of health problems or those who are distracted by other work than teaching.

At the same time, the plan may offer pecuniary incentives for those teachers, regardless of age and experience, who are at the margin. These professors, who may be a sizeable number, occupy ambiguous professional territory. While recognizing and regretting their own declining pedagogical interests, they still remain puzzled over the diminishing rewards from and growing costs of committed teaching. Such professors may be usefully stimulated by the promise of new dollar rewards for

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380 For recent compensation trends, see Ken Myers, *Some Academic Salaries Have Increased 50 percent. Is It Too Much?,* NAT'L L.J., Oct. 18, 1993, at 1. POSNER, *supra* note 224, at 499, notes that an important part of a teacher's compensation is nonpecuniary because they "receive a big part of their income in the form of long vacations." He also implies, *id.* at 648, that the job satisfaction of law professors has improved comparatively since "[j]ob satisfaction, especially among younger [practicing] lawyers, has declined. . ."

381 HIGHET, *supra* note 47, at 85, notes that academics "are apt to become ditherers." He also, *id.* at 9, observes that:

"[l]eisure is one of the three greatest rewards of being a teacher. It is, unfortunately, the privilege which teachers most often misuse."

See MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, *supra* note 285, at 11-12 for the conclusion that full-time law professors, if not slothful, are likely to suffer from a diminished work ethic. Learned Hand quotes Stuart Sherman but without approval:

> I am acquainted with no more essentially sluggish, improvident, resourceless, and time-wasting creature than the ordinary professor of forty; nor anything more empty of adventure or hope than the future years of his career, daily to be occupied in matching his wits with the flat mediocrity of successive generations of adolescent students, and patiently waiting till the death of some better man, hardy and long-lived, allows him to slip into a larger pair of old shoes.

Learned Hand, *Have the Bench and Bar Anything to Contribute to the Teaching of Law,* 5 AM. L. SCH. REV. 621, 630 (1926).

effective teaching even if they are relatively uninterested in more pecuniary income. Even for those who are relatively indifferent to material inducements, dollar-backed student evaluations are likely to send important and clarified signals of consumer approval and disapproval. In short, the new plan may motivate a noteworthy number of seasoned teachers, otherwise inclined to take it increasingly easy as time goes by.[382]

C. CONCEIVABLE PROGRAM PROBLEMS

Despite the conceivable benefits of a new voucher/reward program for law professors, the plan is certain to arouse the opposition and perhaps even the hostility of law professors nationwide.[383] Such predictable opposition has much to do with a general resistance to change in legal education, skepticism over the competency and fairness of student consumers, and concern that the plan will actually impair the quality of legal education in a variety of ways. Finally, some are likely to doubt that law teaching can be materially improved by any such new compensation arrangement.

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382 Professors who are disappointed in the amount of their voucher income may conceivably be motivated to consider retirement provided they have alternative work or decent retirement benefits or both.

383 In a letter to Smith from Hugh Blair, Blair both reports on controversy and compliments Smith:

> By your two Chapters on Universities and the Church, you have raised up very formidable adversaries who will do all they can to decry you. There is so much good Sense and Truth in your doctrine about Universities, and it is so fit that your doctrine should be preached to the World, that I own I would have regretted the Want of that Chapter.

Letter from Hugh Blair to Adam Smith (April 3, 1776), *in* CORRESPONDENCE OF ADAM SMITH, *supra* note 161, Letter No. 151, at 187, 188.

Mark Blaug, *supra* note 164, at 568-569, reports on a 1968 National Board for Prices and Incomes Report [hereinafter PIB] on the pay of British university teachers. The PIB "found that the salary structure was biased towards research":

> To counter this bias, the PIB proposed a system of discretionary payments to those members of staff who taught either more or better than the average, where 'better' was judged at least in part by students responding to 'a carefully drafted questionnaire'. Although the use of student assessments is a familiar feature of American higher education, the PIB proposal was greeted in Britain with jeers about 'gearing salaries to popularity polls' and soon came to be rejected first by the universities and then by the government. The participants in this acrimonious controversy, virtually all of whom rejected the notion of relating salaries in any way to student opinions, divided neatly into a minority who flatly denied that the quality of teaching could be objectively assessed and a majority who asserted that it was already being assessed informally by heads of department as an essential element in deciding on promotions.

1. *General Aversions to Change*

While American legal education has changed over time, these changes have typically occurred at a relatively glacial pace. New innovations have tended to be less radical and more marginal in character.[384] This generalized resistance to change may be accounted for in a number of ways.

First, there is considerable pride, among law professors, in the various achievements of American legal education. Apart from the larger contributions that the law schools arguably make to American society, many law professors are convinced that their law school teaching is much superior to university teaching in other disciplines. Both the difficulties of assessing the marginal contributions of various educational innovations, and the natural conservatism of many law professors, have also probably discouraged dramatic changes in legal education. In short, "if it ain't broke, why fix it?"

More specifically, law professors and law school administrators are particularly likely to oppose any plan that provides law students with new power to directly reward, and punish, their teachers.[385] Opposition is especially likely to come from those who are generally, and perhaps viscerally, opposed to the use of economic concepts and reasoning for the analysis of many legal problems, especially including the problems of legal education. All too many otherwise intelligent and conscientious commentators and intellectuals are seemingly offended by analytic efforts that begin by characterizing a teacher as a provider of goods and services to student consumers.[386]

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384 John Wigmore ironically makes the essential point:

> Every century or two, during the past millennium, a new method in the teaching of Law has appeared, to supplant or to modify the hitherto accepted system. The new method may not have been, in an absolute sense, an advance. Progress is always relative,-relative to the conditions and needs of the time. New conditions require changed methods. And so, in the ripeness of time, some new method has arisen, to supply an apter tool for newly felt needs.

John Wigmore, *Nova Methodus Discendae Docendaeque Jurisprudentiae*, 30 HARV. L. REV. 812 (1917).

For more contemporary criticism of "the sameness of instruction with its constant discussion of borderline cases and problems," see the quote of Derrick Bok in John Wade, *Some Observations on the Present State of Law Teaching and the Student Response*, 35 MERCER L. REV. 753, 756 (1984). *See also* Cramton, *supra* note 75, at 460; and Boyer & Cramton, *supra* note 81, at 229, for the resistance of American legal education to radical change despite rapid social and legal transitions.

385 For a description of British hostility to student evaluations, see Blaug, *supra* note 384. *See also* Abel, *supra* note 121.

386 POSNER, *supra* note 224, at 29 observes:

> Economic analysis of law has aroused considerable antagonism, especially but not only among academic lawyers who dislike the thought that the logic of the law might be economics. We have already examined the criticisms that economics is reductionist (a criticism not limited of course to economic analysis of law) and that law-

Max Weber, for a noteworthy example, was critical of certain American conceptions of higher education. He objected to characterizing a university teacher as someone who "sells me [as student] his knowledge and his methods for my father's money, just as the greengrocer sells my mother cabbage."[387] Other commentators of lesser stature have criticized "the use of financial incentives to manipulate a person's behavior [which] may be objectionable and ultimately ineffective precisely because it reduces the psychology of human motivation to a branch of economics."[388]

However much the new voucher/reward plan may be justified through the reductive use of economic concepts and analysis, law professors are also likely to generally oppose the new plan because it may threaten longstanding faculty prerogatives. As professionals, we are apparently entitled, by our education, experience and well-informed perspectives, to be suspicious of misguided and impeding forms of consumer sovereignty. Professionalism, after all, implies a duty and capacity for self regulation. To the extent professional behavior needs monitoring, it is best accomplished through a process of expert and well-informed peer review.[389]

For this reason, perhaps, many law professors continue to criticize the now entrenched convention of permitting our students the formal opportunity to evaluate our teaching.[390] Almost all law schools, since the '70s, have regularly provided students with a written questionnaire for every course or seminar. Such questionnaires typically allow for both

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yers and judges do not speak its language. Another common criticism is that the normative underpinnings of the economic approach are so repulsive that it is inconceivable that the legal system would embrace them.

387 WEBER, *supra* note 117 at 108, 119.

388 ALFIE KOHN, PUNISHED BY REWARDS 123 (1993). *But cf.* Eleanor Fox, *The Good Law School, The Good Curriculum, and the Mind and the Heart*, 39 J. LEGAL EDUC. 473, 473-474 (1989); and THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, SCHOOL CHOICE 5 (1992) (quoting Chubb and Moe). Both employ economic concepts and terminology.

389 Carrington, *supra* note 219, at 402, identifies a key characteristic of professionalism as involving self-regulation in the public interest. Abel, *supra* note 121, at 417, argues that the concept of professionalism implies peer review and insulation from consumer judgments. First, *supra* note 284, at 324, similarly argues that non-accountability to students is one elite faculty preference. HIRSCHMAN, *supra* note 2, at 93, is equally though generally explicit: "While feedback through exit or voice is in the long-run interest of organization managers, their short-run interest is to entrench themselves and to enhance their freedom to act as they wish, unmolested as far as possible by either desertions or complaints of members."

390 Abel, *supra* note 121, at 407, 417, argues that evaluation procedures invite error and indulge student bias with student opinion often colored by inappropriate and extrinsic variables. GETMAN, *supra* note 47, at 155, is similarly skeptical of the utility of student evaluations and doubtful that weak teachers can be helped by evaluations. D'Amato, *supra* note 155, at 462 n.4, also argues that student evaluations inflict psychological damage upon the learning process whatever benefits may accrue for pay and promotion purposes. Roth, *supra* note 342, at 609, observes that "no one really believes that the [evaluation] process does much good."

specific student responses to more focused questions and for a more general opportunity to express a consumer opinion in narrative form.[391]

Even conceding the flaws in some questionnaires, the misguided emphasis on numerical rankings, and the various risks of unfair evaluations, however, something more fundamental may explain the widespread faculty hostility to this process. Even this modest and imperfect method of surveying student opinion reveals a basic truth about human nature. Law professors, like most other people, are basically self-interested. Despite our formal fiduciary duty to serve student interests first, many of us simply do not, at least some of the time. Small wonder that we are defensive when we are caught in the self-regarding act.[392]

Nonetheless, there are still quite respectable grounds for criticizing the new voucher/reward plan inspired by the redoubtable Adam Smith. Even though the plan is appealing, on balance, there is still cause for good faith concerns over certain student limitations and certain risks to the quality of legal education.

2. *The Incompetent Student Consumer*

Critics of the new voucher/reward system are certain to argue that many, if not most, law students lack the ability to judge the quality of the law teaching that they consume. Like consumers in many other markets, buyers of educational goods and services, at almost every level of schooling, plainly suffer from important informational and normative handicaps that impair their ability to evaluate teaching quality. Educational services generally are of only indirect rather than direct use to students. Obviously, the real importance of one's education, as well as a

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391 Despite his various concerns and criticisms of the evaluation process, Abel, *supra* note 121, at 431, is of the opinion that, "It is possible to increase the accuracy and reliability of evaluations by asking students about specific attributes and behaviors, requiring them to make the minimum number of inferences in moving from observation to judgment."

392 Adam Smith is characteristically perceptive:

> The discipline of colleges and universities is in general contrived, not for the benefit of the students, but for the interest, or more properly speaking, for the ease of the masters. Its object is, in all cases, to maintain the authority of the master, and whether he neglects or performs his duty to oblige the students in all cases to behave to him as if he performed it with the greatest diligence and ability. It seems to presume perfect wisdom and virtue in the one order, and the greatest weakness and folly in the other.

2 WEALTH OF NATIONS, *supra* note 161, V.i.f.15, at 764.

Stone, *supra* note 67, at 403, reflects on the super-critical scholarly habits of law professors that induce "a startling lack of productivity." This stunting of scholarly potential leads law faculty members to invest more of themselves in teaching and accounts for the fact that attacks on teaching are particularly threatening to a professor's self esteem. First, *supra* note 284, at 322, identifies law professors as the group in whose interest the law school is principally operated.

particular teacher's contributions, can only be completely evaluated in terms of future events that may occur over a very extended time.[393]

In fact, the numerous skeptics of student abilities to evaluate teaching in general, and law teaching in particular, will find impressive authority for their position. Many of the classical economists, of the 18th and 19th centuries, addressed the issue of student and parental competency during important debates over the wisdom of compulsory education and government intervention in educational markets. While Smith and others, of course, believed that teachers should depend primarily upon student fees for a good part of their compensation, John Stuart Mill argued that education represented a case of market failure. Despite Mill's general desire to maximize civil liberties and human autonomy, he doubted that uneducated parents were qualified to make important educational choices for their own children:[394]

> The uncultivated cannot be competent judges of cultivation. Those who most need to be made wiser and better, usually desire it least, and if they desired it, would be incapable of finding the way to it by their own lights. It will continually happen, on the voluntary system, that, the end not being desired, the means will not be provided at all, or that, the persons requiring improvement

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393 Joseph J. Spengler, *Economic Malfunctioning in the Educational Industry*, 31 AM. J. ECON. AND SOC. 225,227 (1972):

> Discontinuity dominates the supply of "education" much as it does that of medical and hospital care. For each is a service and hence subject to discontinuity in "quality," "cost," and "price;" it differs in this respect from goods, especially from durable goods. . . . The purchaser of services, in contrast with a buyer of durables, not only is likely to be less informed regarding the utility or serviceability of that which he seeks; he also lacks lower-priced alternatives comparable to *used* durables. The shopper for educational services as for medical services is at even greater disadvantage than the shopper for most services. Reliable-information is less easily to be had respecting the quality of educational and medical services, the costs therewith associated, and the alternatives available. Moreover, consumers of these services are likely to have less experience of the sort flowing from repeated use of more common services.

394 *See* DENNIS P. O'BRIEN, THE CLASSICAL ECONOMISTS 282 (1975):

> From Smith onwards the Classical economists advocated state provision of education on the lines of parochial education in Scotland. Smith and McCulloch believed that the teachers should however depend for a good part of their remuneration on fees, as complete state endowment was a sure method of developing sinecures, idleness, and useless subjects. Senior and J. S. Mill believed in having a system of free or nearly free education and this was true also of J.B. Say. There was a significant divide here between the two groups of economists. In making the income to teachers depend upon fees the first group were arguing for the market test applied to education. J.S. Mill and Senior were on the other hand arguing that education was a case of market failure as uneducated parents were not qualified to select educational sources for their children.

See also Blaug, *supra* note 164, at 585-586; and WEST, *supra* note 252, at 123-124.

> having an imperfect or altogether erroneous conception of what they want, the supply called forth by the demand of the market will be any thing but what is really required.[395]

Even relatively mature law students, most in the final phase of their formal education, may be similarly "uncultivated." More specifically, most law students are clearly inexperienced consumers of the services provided by law teachers and the law schools. However intelligent and conscientious, most law students lack important information and perspectives about legal subject matter, law teaching, practice and other professional roles.

The typical student, for example, is limited by his or her imperfect appreciation of legal problems and knowledge of the law. This makes it more difficult to evaluate a teacher's coverage decisions, as well as a teacher's decisions to organize materials in a certain sequence with varying emphasis upon more fundamental principles or higher order complexities.[396] Is it really important to spend four weeks on the doctrine of consideration in the first year contracts course when the law of contractual assignments is given especially short shrift despite its clear connection to advanced courses? Just how wise is it to study the law of wild animals at the very beginning of the first year property course? And should the *Erie* doctrine be covered at all in first year civil procedure?

Law students are equally, if not more, handicapped by their inexperience with certain conventional pedagogical practices and teaching philosophies. While a law student may recognize, in the abstract, that the best teaching has a certain unsettling quality, actually experiencing a pointed public interrogation may be quite another matter.[397] The interac-

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395 JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 953 (W.J. Ashley, ed., 1915). *See also* EDWIN G. WEST, EDUCATION AND THE INDUSTRIAL REVOLUTION 158-159 (1975).

396 Scordato, *supra* note 138, at 406-410, discusses various difficulties associated with student evaluation and briefly reviews relevant professional literature. He specifies five categories of factors that converge to create enormous difficulties in relying on student evaluations of law teaching.

397 Gilbert Highet reflects on the several kinds of resistance to teaching:

> Consider how many different kinds of resistance the teacher has to overcome. To begin with, the young do not like work. . .and to teach them that work is unnecessary or avoidable is to deform their characters. . .Nor do the young like authority. They are natural anarchists. . . .Also, the young hate concentration. It is an effort, an unfamiliar and painful effort. . .Concentration must be learnt. . .It should not be imagined as nothing but an effort of the will. . .Many youngsters also resent the domination of one mind. . .So then, the young naturally resist the domination of their elders' minds. It is good that they should do so. It is one of the aims of teaching to provoke their resistance, and then to direct it into the right channels. But when they are lively and energetic, or when their resistance is particularly strong, their teacher needs a great deal of solid will-power to control them and to retain his own independence.

tive teaching that occurs in many law school class rooms not only usefully exposes student misconceptions and intellectual sloppiness but has a considerable potential for embarrassing many relatively young and insecure students. Students, themselves, may not fully understand their competing desires for both intellectual security and adventure simultaneously.[398]

As a result, various learning transactions are complicated by a certain noteworthy personal dynamic that we have all experienced. When an intellectually secure, logically rigorous and verbally aggressive law teacher meets an anxious and overworked law student, something other than learning may occur. Even the best intentioned and most effective teachers sometimes elicit hostile and distracted responses from resentful students. As a result, students come to value more pleasant, perhaps less demanding teachers who are especially successful at communicating sympathy for the complex circumstances of the beleaguered law student. In short, even very good students may respond more to the style than to the substance of a teaching effort.[399]

HIGHET, *supra* note 47, at 67-70.

D'Amato, *supra* note 155, at 493-494, more particularly concludes that:

> [L]aw schools owe to these consumers of legal education a program of instruction that gives them the mental agility to cope with legal problems. A student's mind can only improve if he learns new pathways to conceptualize, analyze, and solve problems. His mind will not improve if it becomes a warehouse for the storage of legal rules. We owe him a lot more. . .even if he then kicks and screams through three years of the learning process.

398 Fuller, *supra* note 99, at 42-43 observes that:

> The good student really wants contradictory things from his legal education. He wants the thrill of exploring a wilderness and he wants to know where he stands every foot of the way. He wants a subject matter sufficiently malleable so that he can feel that he himself may help to shape it, so that he can have a sense of creative participation in defining and formulating it. At he same time he wants that subject so staked off and nailed down that he will feel no uneasiness in its presence and experience no fear that it may suddenly assume unfamiliar forms before his eyes.
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> No teacher is skillful enough to satisfy these incompatible demands. I don't think he should try. Rather he should help the student to understand himself, should help him to see that he wants (and very naturally and properly wants) inconsistent things of his legal education.

399 Veblen and Max Weber offer general observations of relevance. Veblen reflects on:

> [W]hat happens in the purchase of any article of consumption by a purchaser who is not an expert judge of materials or of workmanship. He makes his estimate of the value of the article chiefly on the ground of the apparent expensiveness of the finish of those decorative parts and features which have no immediate relation to the intrinsic usefulness of the article; the presumption being that some sort of ill-defined proportion subsists between the substantial value of the article and the expense of adornment added in order to sell it.

THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS, 57 GREAT BOOKS OF THE WESTERN WORLD 1, 167 (2d ed., 1990).

Similarly, Weber agrees that:

Law student evaluations of teaching quality may also be compromised by a lack of knowledge about the demands and characteristics of law practice and other professional roles.[400] If one standard is preparation for future practice, how is a student to judge teaching that leaves many seemingly interesting legal problems unexplored so that a few may be emphasized? Shall a student simply accept a professor's sincere assurance that it is somehow more "practical" to emphasize fundamental concepts and principles in a course, even though much enriching and seemingly useful professional information will never be transmitted much less absorbed?

If, for example, a student imagines a future career as a criminal prosecutor, how useful will a teacher's exhaustive treatment of the concept of mens rea really be, when property crimes are barely covered in the first year criminal law course? Is it really necessary for a teacher of real estate transactions to spend several classes focusing on the ethical problems of real estate lawyers, especially as they interact with brokers and mortgage bankers? And what of Professor Bigthink? Will it be truly useful, at least in some larger civic or social sense, for students to be exposed at length to legal history and highly abstract nuggets of jurisprudence and legal philosophy when the so-called practical agenda grows so long and complex for so many practicing lawyers? It may or may not be clear that many lawyers become community and political leaders after graduating from the Podunk Law School, located a good way from Harvard and Chicago. Surely even law students, from lower-tier schools, need to be prepared for larger futures in business and government, or do they?

In sum, it is quite clear that critics of student evaluations, whether dollar-backed or not, are right in observing that student judgments are bound to be impaired by a certain lack of information. Student evaluators may also be handicapped by a certain "normative" inexperience. After all, isn't it too much to expect law students, mainly in their twenties, to fully understand and reliably apply the right standards for teaching quality, given their professional and personal distractions as law students passing quickly through law school? Even the best students

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> It is a fact that whether or not the students flock to a teacher is determined in large measure, larger than one would believe possible, by purely external things: temperament and even the inflection of his voice. After rather extensive experience and sober reflection, I have a deep distrust of courses that draw crowds, however unavoidable they may be.

Weber, *supra* note 117, at 110.

Abel, *supra* note 121, at 423 also concludes that "Much of the concern about student evaluations expresses the fear that students will confuse style with content, showmanship with substance. There is good reason for this concern."

400 Scordato, *supra* note 138, at 407.

may have predictable trouble distinguishing professionally enriching forms of legal education from the merely trivial.

Nonetheless, it is arguable that such unflattering judgments of student critical capacities are both wrong and arrogant in their assumptions.[401] While some law students surely lack certain relevant information and intimate familiarity with some standards of excellence, many are better equipped for judgment, on balance, than the critics believe. In fact, while student evaluations are hardly perfect, they may be the very most reliable indicators of teaching quality, provided certain problems are minimized.[402]

Whatever critical disabilities they have, law students plainly have certain informational advantages. Only they are in a position to regularly observe a teacher's efforts at length and in intended sequence. More important, only law students have a neophyte's perspective.[403] While many faculty colleagues actually observe classes of their peers, particularly during promotion and tenure season, none can really duplicate the developing state of a law student's mind. While it is common for many law faculty colleagues to forgive dear Professor Subtle for his excessively nuanced teaching, the reality for his law students is a problematic one. Even if Subtle commands a remarkable mastery of his subject and the creative supremacy of a truly brilliant mind, he fails as a teacher if he consistently talks above the heads of the vast majority of his students. However accomplished a scholar and contributor to public policy debates, Subtle has no choice but to connect with his audience of neophytes if he wishes to be called a true teacher.[404]

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401 Gilbert Highet generally observes that some teachers suffer from an affliction as severe as poverty: "They say the boys and girls hate them; and often they hate the boys and girls. Over a period of years, their hatred becomes known and builds up a barrier which they can never break down."

HIGHET, *supra* note 47, at 11.

More particularly, GETMAN, *supra* note 47, at 262, notes the pride of the Yale law faculty in the scholarly achievement of their students: "At many schools, however, members of the faculty acted as though the students were unworthy of them This was true at Indiana and even at Chicago, where the students were academically gifted."

Similarly, Karl Llewellyn, *supra* note 24, at 666, observes that: "[o]ur teachers teach wastefully, and are content. . .Moreover, in sublime conceit, we [law] teachers attribute all failure to the student."

402 Even Abel, *supra* note 121, at 431-432, concedes that the student evaluation process can be usefully improved despite its shortcomings.

403 Gerald M. Gillmore, *Student Ratings As A Factor In Faculty Employment Decisions And Periodic Review,* 10 J.L.C. & U.L. 557, 558 (1984) observes that "[S]tudents, by their very nature, are the most extensive viewers of the instruction, and, therefore, are in a unique position to judge the quality of the course and the instructor's performance."

See also Scordato, *supra* note 138, at 406; and Abel, *supra* note 121, at 452.

404 Douglas Newell, *Ten Survival Suggestions for Rookie Law Teachers*, 33 J. LEGAL EDUC. 693 (1983).

As one distinguished senior professor has recently put it, with reference to university teaching in general, there is good reason for faculty to accept student teaching evaluations as useful and valid in many cases. Despite the unpopularity of many evaluation systems among university faculty, students actually have superior information about key matters. Even if students don't know *what* we faculty should be teaching, "they can tell very accurately when they are confused, bored, or skeptical about the value of the course."[405]

Even student skepticism about matters of substantive emphasis and course coverage may more worthy of respect than first appears. Despite the short three-year tours of student duty, many neophytes grow quickly in professional terms. A third year law student has not only acquired new skills but has probably accumulated considerable experience as a regular consumer of law teaching. Many law students also quickly acquire new information and useful perspectives about the demands of the profession through summer and other professional employment, participation in clinics and exposure to adjunct instructors with important practice experience. While even an accomplished third year student is not fully equipped to evaluate course coverage with its subject matter rationing and sequencing, surely many are far better equipped for the task than first year beginners.

It may also be possible to train law students as better evaluators of faculty teaching by explicitly exposing certain widely respected standards that apply to teaching in and out of the law schools. While some faculty members remain convinced that effective law teaching is a mysterious exercise that defies our best efforts to articulate useful guidelines and norms, a considerable literature suggests otherwise. While law teaching has its distinctive qualities, our best law teachers have much in common with good teachers everywhere. Authority for this global proposition may be found, not only in the works of educational and cognitive psychologists and various professors of educational practices and policies, but in the "wisdom literature" of the Western tradition produced by intellectual leaders from Plato and Aristotle to William James, John Dewey and beyond.[406]

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405 Shore, *supra* note 340, at 31 (quoting Professor Harry Roberts).

406 BANNER & CANNON, *supra* note 188, at 3, offer a contemporary perspective:

> So while we cannot predict the outcome of teaching from its ingredients, we can isolate these ingredients, much as we can those of any art, in order to examine and understand them What ground, medium, color, form and implements are to the visual arts, so certain constituents—learning, authority, ethics, order, imagination, compassion, patience, character, and pleasure— are to teaching. Just as all artists learn, know, select, and employ varieties of each of the constituent elements of their craft in creating their distinct works, so teachers use the components of their own art to teach in ways as distinctive as each teacher is unique. For this reason, teaching has always defied strict and agreed-upon definition. We think we know great teaching

Though there is room for disagreement over priorities and language, most effective teachers certainly believe that good teaching does not regularly bore or confuse students; that it reflects a certain logical coherence or structure; and that it emphasizes fundamental concepts and foundational principles more than the communication of information. Moreover, the best teachers especially understand that the best teaching encourages the development of student cognitive and mental faculties first and foremost. While this in not the occasion for exhaustively completing the list of standards, law students are more than capable of understanding and applying these and other equally unremarkable standards of excellence.

In sum, it is likely and important that law students have more strengths than weaknesses as judges of law teaching quality. Like most consumers in most markets, individual law students will sometimes puzzle over inadequate information and relevant standards. Nonetheless, compared to other evaluators of law teaching, our students as a group are often relatively better informed and able to sit in collective judgment of our teaching services.[407] Law students who have a new opportunity to reward good teaching may be stimulated to develop a new capacity for making sensible distinctions based on merit. New power may encourage many previously disengaged students to learn to appreciate the characteristics of a good legal education. Where individual and group student judgments are seriously and consistently mistaken, the continuing scrutiny of faculty colleagues, deans, university administrators and professional accreditation agencies may provide a useful balance. Even though students may be relatively well equipped to judge their teachers services, other academic agents will continue to function as monitors of quality as well.

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when we encounter it, yet we find it impossible to say precisely what has gone into making it great.

407 Gillmore, *supra* note 404, at 562, observes: "As more students rate a given class, the reliability of the average rating for that class increases in a systematic way." FRANK KNIGHT, FREEDOM AND REFORM 2 (1947) reflects on the concept of relative competency. Even if law students lack perfect knowledge and capacity to evaluate their teachers' performances, they are still relatively better judges than any agency external to the intimate relationship between law teacher and law student. Edwin West quotes Robert Lowe, a nineteenth century financier, economist and follower of Adam Smith, for the concession that parents were likely to make mistakes in choosing educational options for their children. Nonetheless, Lowe agreed with Smith that the parental judgment was still to be preferred to some minister of education or some educational board. Despite the frequency of parental mistakes, Lowe still knew "no alternative":

> I myself see nothing for it but to make the parents of the children the ministers of education, and to do everything you can to give them the best information as to what is good education, and where their children can be well taught, and to leave it to work itself out.

Edwin G. West, *Private Versus Public Education; A Classical Economic Dispute*, 72 J. POL. ECON. 465, 473 (1964).

Finally, it is appropriate to note an abiding irony about legal education and the continuing debate over the evaluative competency of law student consumers. Though law faculty suspicion of student limitations is a continuing staple of most faculty lounges, it is quite clear that we already trust at least our better students to make judgments that may more truly test the limits of law student competency. While this is not the occasion to describe the remarkable institution of the student-edited law review, can anyone deny a revealing inconsistency? If we allow student law review editors to judge our published scholarship, sometimes with career-affecting results, surely we ought to tolerate student evaluation of our teaching in a way that counts.[408]

3. *The Unfair Student Consumer*

Even if law students have enough information and comprehensible standards for evaluating law teaching, they may still be distracted by various prejudices. Law student evaluators may sometimes alternate between critical extremes. Some law teachers may be the beneficiaries of positive student prejudices while others may suffer more negative evaluations at the hands of equally, if differently, prejudiced students.

Student judgments of teaching quality, at many educational levels including law school, may be all too easily distracted and clouded by a special kind of exaggerated respect. Though few would admit it, some law students may be over persuaded, if not deceived, by especially articulate and seemingly energetic professors.[409] Even relatively mature law students may view some of their favorite professors, in Veblen's terms, as representatives of a "priestly class," especially skilled at mediating between important mysteries and the common folk.[410] In some circumstances, excessively deferential students may crave more than a professor; they may, in Max Weber's terms, crave nothing less than a leader.[411]

Predictably, such exaggerated student respect for at least some law teachers, especially in the first year of law school, may produce unfairly favorable formal evaluations even where the teaching in question is quite mediocre.[412] Student preferences for expressive and enthusiastic teach-

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408 Scordato, *supra* note 138, at 408 n.116 comments on the inconsistency.

409 For the observations of Veblen, Max Weber and Abel about student confusion of style and substance in evaluating their professors, see *supra*, note 400.

410 *See* VEBLEN, *supra* note 400, at 154-155.

411 WEBER, *supra* note 117, at 119.

412 Roth, *supra* note 342, at 611 observes that "[s]tudents are generally lenient in their judgments and only 12% of teachers receive less than average ratings." JOHN A. CENTRA, DETERMINING FACULTY EFFECTIVENESS 153 (1979) also reports that "because students are generally lenient in their judgments, student ratings may be misleading about the effectiveness of some teachers." Adam Smith is similarly impressed by:

> [T]he generosity of the greater part of young men, that, so far from being disposed to neglect or despise the instructions of their master, provided he shows some serious

ing may offer some undeserving teachers a practical opportunity to exploit student opinion for substantial income supplements through the new voucher/reward program.[413] Some teachers may also be over-rewarded because students of the same gender, race or ethnic group feel a special and all too human affinity for someone just like them.

The opposite situation, however, is even more worrisome. Female and minority teachers, especially, may be penalized by intolerant students who exercise their reward-related discretion in prejudiced ways. While more overt forms of gender bias and crude racism may be rare occurrences in most American law schools, our female and minority colleagues continue to report a disquieting amount of student hostility, some of which may escape the observation of even sympathetic white male professors. For example, many more female and minority professors, than white male colleagues, believe that they must constantly prove their competency to classes still dominated by skeptical white male students.[414]

> intention of being of use to them, they are generally inclined to pardon a great deal of incorrectness in the performance of his duty, and sometimes even to conceal from the publick a good deal of gross negligence.

2 WEALTH OF NATIONS, *supra* note 161, V.i.f.15, at 764.

413 Hazard, *supra* note 160, at 546 concludes that "[t]he law school student body is uninformed and transitory, and also generally young. That describes an easily exploited clientele."

414 Richard A. White, *The Gender and Minority Composition of New Law Teachers and AALS Faculty Appointments Register Candidates*, 44 J. LEGAL EDUC. 424, 424-25 (1994) offers interesting data on female and minority law professors:

> More than half (52.8%) of the new law teachers who began teaching in 1993-94 were women. In the previous two years, that percentage was slightly less than half: 46.4 percent in 1992-93, and 48.1 percent in 1991-92. . . .Between one-fifth and one-fourth of the new law teachers for whom ethnic/racial information is available belong to a minority group: 24.6 percent in 1991-92, 20.2 percent in 1992-93, and 25.0 percent in 1993-94. In contrast to women new law teachers, the percentages of minority lecturers and instructors are lower than the percentages of minority assistant and associate professors.

Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311 (1994) reports that most members of a special committee on gender issues in Ohio law schools " 'knew' that women students and faculty experienced law school differently from men and that women felt disadvantaged because of their sex." More specifically, *id.* at 313, a substantial number of women experienced various disadvantages in law schools. Significant numbers of females reported that they experienced sexual harassment, sexual discrimination and were disadvantaged by the lack of female role models, available mentors and because their law school administration perceived them as aggressive. Significant numbers of women also believed that "female professors, more than male professors, must prove their competence to their students" and "that students do not assume female professors to be competent." In addition, "one-half of minority women report racial discrimination" and "64 percent of minority women feel deprived of role models by the limited number of women professors."

Judith G. Greenberg & Robert V. Ward, *Teaching Race and Law Through Narrative*, 30 WAKE FOREST L. REV. 323, 324 (1995) also note: "[T]he importance of a place where students of all colors can talk openly about issues relating to race. Without such a place, students of

Atypical teaching strategies, inspired in some cases by feminist and critical race theories, may only increase student doubts about the professional competency of at least some female and minority professors. Quickly forming, and unbending, student assumptions about the ability of such faculty members may also be related to academic hiring patterns. Many largely white male law faculties have demonstrated hiring preferences for female and minority colleagues in recent years. The prejudices of some law students may be reinforced by the perception that so-called affirmative-action hiring necessarily means an easing of normal hiring standards.[415]

Even law students who are relatively free from gender and racial prejudice may be intolerant in another way. Students, like other people, may be devoted to certain ideologies or deeply committed to certain political or moral principles and positions. Because of the political and moral content of some law teaching, it is easy for students to misunderstand and take offense at a professor's real or imagined politics and moral perspectives on a variety of law-related issues. Regardless of race or gender, an articulate law professor, who dares to make his or her political and social views explicit, may be quickly classified by students as excessively political, offensively moralizing, or simply hostile to differing, more "politically correct" student views. Such professors may be especially vulnerable to student punishment, particularly in the new form of diminished voucher income.[416]

Some law professors, therefore, may be at risk in the new system for the wrong reasons. While some law professors may be guilty of suspect forms of ideological teaching, others may unwittingly elicit the mistrust and hostility of students during well intentioned discussions of various issues. In the extreme, both agitated student ideologues and hyper-sensi-

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color often feel isolated, and without such a place, white students are often complacently unaware of the racism directed at students of color."

Greenberg and Ward specify, in some detail, the educational disadvantages of students of color at the New England School of Law. While such students are "[r]arely . . .confronted with overtly racist comments," their majority "classmates often snicker and make belittling comments" when students of color dare to ask classroom questions.

See also Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J. L. & FEMINISM 333 (1996); and Cynthia Cotts, *Study Tracks Race and Gender Dynamics at Eight Law Schools*, NAT'L L. J., Sept. 21, 1998, at B4.

415 Increasing faculty diversity, incorporating a growing number of female and minority law professors, has been accomplished "by hiring policies that preferred minority candidates and, to a lesser degree, female candidates for academic appointments." Paul D. Carrington, *Diversity*, 1992 UTAH L. REV. 1105, 1126-27. For demographic data, see White, *supra* note 415.

416 For an illustration of student hostility to the leftist politics of a law professor, see Abel, *supra* note 121, at 441-42. Carrington, *supra* note 416, at 1114-15 also reflects on the "ideological intolerance" so "characteristic of contemporary political correctness" in the legal academy and so much a "fashionable instrument of academic politics."

tive students from diverse backgrounds may threaten the academic freedom of their teachers and fellow students, who may be more tolerant of departures from politically correct views about race, gender and other important matters.

Remedies, for the various forms of student prejudice and intolerance, are imperfect in the context of our new compensation program. By increasing student power, to directly and anonymously reward and punish law teachers, we necessarily increase the risk that some professors will be abused by some students in unseemly, if not ugly, ways.

Nonetheless, several factors may reduce the risks of unfairness. No law professor, for example, will starve even in the face of savagely unfair student evaluations that offer little or no supplemental income from the voucher program. All professors will continue to receive substantial base salaries determined and administered by deans and university administrators. Vigilant deans and faculty colleagues also will retain the power to take corrective action if prejudiced or intolerant students unfairly penalize particular colleagues. In fact, a special fund, established at the outset of the program, may be used by enlightened administrators to remedy the student inflicted damage, at least in dollar terms.

While some individual students may indeed act on their prejudices and intolerance, more are likely, in a sizeable total group, to be aware of the need to resist their darker impulses. Our student population in the aggregate, given new power to encourage better law teaching, may well demonstrate a heartening collective fairness and responsible self-control even if there are some depressing individual exceptions. Perhaps, we on the faculty side ought to resist the temptation to assume the worst of our students. After all, it is possible to be prejudiced about prejudice. Too many law professors may mistakenly assume, on very slim evidence, that intolerant student behavior, en masse, is simply inevitable.

In addition, there is an offsetting and related consideration. Even if the new voucher/reward program actually encourages some students to indulge their prejudices against disfavored professors, it also provides a new form of corrective power to still other victims of academic prejudice and intolerance. Many female law students and students of color complain about a special kind of pain, frustration and isolation. Whether or not it is true, many perceive the law school environment as particularly hostile and unwelcoming to female and minority "outsiders."[417] While

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417 Lani Guinier et. al, *Becoming Gentlemen: Women's Experiences At One Ivy League Law School*, 143 U. PA. L. REV. 1, 2 (1994) conclude from various survey and other data "that the law school experience of women in the aggregate differs markedly from that of their male peers." The authors, *id.* at 19, report that "[m]any women students expressed intense feelings of pain, frustration, and isolation." For further specific female complaints about the masculine-oriented environments of most law schools, see GRANFIELD, *supra* note 43, at 105-108. *See also* note 415 *supra*.

many of the charges of harassment and discrimination are more directed to the majority of white male law students in most law schools, some law professors are also faulted for racial and gender insensitivity at the least. Subtle and not so subtle forms of faculty prejudice may be deterred by conferring voucher power on female and minority students. Such student reward power may also slow the occasional faculty ideologue who may be too inclined to use the classroom as a bully pulpit for the advocacy of radical social and political reform.

4. *Impairing the Quality of Legal Education*

Some critics of our new voucher/reward program are very likely to view it as a threat to academic quality. An opportunity for students to support their evaluations with dollar rewards, and penalties, is certain to be connected to what some have called the excessive "consumerism" of contemporary legal education. Since the '70s, numerous law professors, and some practicing lawyers and judges, have complained about the apparent easing of grading standards, the dilution of traditional course content, the introduction of trendy new electives, and the retreat from the rigorous law teaching methods of glorious yesteryear.[418]

If, in fact, such trends have occurred in many law schools, it is possible to explain them through an elementary exercise in economic reasoning. As law teachers, and their deans, grow more concerned over individual and institutional popularity with law students, their attention understandably shifts to the determinants of the demand for legal education. Demand for any commodity or educational services, of course, is importantly related to both price and non-price determinants.[419]

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418 For concern over the academic consequences of a "consumerist" orientation that panders to student opinion and preferences, see Cramton, *supra* note 114, at 332-333 where he criticizes the law school curriculum as "not always sufficiently demanding" with second and third year students allowed "to get away with poor or no preparation, inadequate class participation, terrible examination papers, and shoddy written work." Professor Cramton faults "the elective curriculum and the misuse of students evaluations of teacher performance" for producing "an analog of Gresham's law in which cheap teaching drives out good teaching." He also blames: "[T]he omnipresence of student culture [which] inhibits some forms of desirable [curricular] change. Students are herd-like, and the herd may be distracted by a short-run consumerism that is not in their long-term interest."

For other academic criticisms, see Carrington, *supra* note 219, at 430 for concern that student consumerism leads professors to tolerate law student passivity; Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1066 (1986) for concern that catering to student consumerism has lowered academic standards; D'Amato, *supra* note 155, at 461 for concern that law student consumerism is accelerating the decline of teaching quality; and Rohr, *supra* note 358, at 104 for the concern that a consumer orientation will compromise legal scholarship.

419 POSNER, *supra* note 224, at 3-4 initially conceives of economics, for purposes of his text book, as:

> [T]he science of rational choice in a world– our world– in which resources are limited in relation to human wants. The task of economics, so defined, is to explore the

As among the various demand determinants, law professors and law school administrators may find it easier to change the prices charged for both particular courses and ultimately for a law degree. The cost of legal education, of course, includes more than the direct tuition price nominally charged to students but often paid by others at least initially. It also includes the income-generating opportunities foregone by law students, during law school, and the implicit cost of a particular course in terms of grading practices and the demands that a teacher makes upon his or her students.[420]

Where a teacher seeks to encourage more demand for his new course, she may grade more permissively, lighten assignments, and revise course content to make it more "accessible" to distracted students

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implications of assuming that man is a rational maximizer of his ends in life, his satisfactions– what we shall call his "self-interest.". . .

The concept of man as a rational maximizer of his self-interest implies that people respond to incentives– that if a person's surrounding changes in such a way that he could increase his satisfactions by altering his behavior, he will do so. From this proposition derive the three fundamental principles of economics.

The first is the inverse relation between price charged and quantity demanded (the Law of Demand). If the price of steak rises by 10¢ a pound, and if other prices remain unchanged, a steak will now cost the consumer more, relatively, than it did before. Being rational and self-interested, the consumer will react by investigating the possibility of substituting goods that he preferred less when steak was at its old price but that are more attractive now because they are cheaper relative to steak. Many consumers will continue to buy as much steak as before; for them, other goods are poor substitutes even at somewhat lower relative prices. But some purchasers will reduce their purchases of steak and substitute other meats (or other foods, or different products altogether), with the result that the total quantity demanded by purchasers, and hence the amount produced, will decline.

MARK SEIDENFELD, MICROECONOMIC PREDICATES TO LAW AND ECONOMICS 5 (1996) is similarly explicit about the conventional wisdom related to consumer choice and demand:

> The primary decision-makers in economic markets are consumers and producers. We begin our study of economics by modeling how consumers make economic decisions. We do so for several reasons. First, laws often restrict consumer choice or raise prices to consumers. We would like to know how consumers will react to such restrictions or price increases. . . .
>
> Second, the theory of consumer choices will also illuminate how individuals might interact outside of a market transaction.

John B. Taylor, Principles of Microeconomics 69 (1995) observes that:

> [P]rice is not the only thing that affects the quantity of a good that people buy. . . . There are many reasons the demand curve may shift. Most of them can be categorized into several sources: *consumers' preferences, consumers' information, consumers' incomes, the number of consumers in the population, consumers' expectations of future prices,* and *the price of related goods.*

For an older approach to the various determinants of the demand curve, *see also* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 62 (12th ed., 1985).

420 HENRY N. BUTLER, ECONOMIC ANALYSIS FOR LAWYERS 929 (1998) defines "opportunity cost" in his glossary as "The highest valued alternative that must be sacrificed as a result of choosing among alternatives. The value placed on opportunities forgone in choosing to produce or consume scarce goods." For more extended explanation of the concept, see POSNER, *supra* note 224, at 6-10.

with increasingly diverse backgrounds. A law professor anxiously seeking more student consumers may also adopt permissive policies regarding class attendance, student preparation and class participation. Finally, a teacher may maximize course appeal by regularly displaying his sense of humor and her real sympathy for student learning and other problems. The regular deployment of a teacher's pleasing personality may reduce the total price a student consumer "pays" for a particular course.

While a demand-maximizing teacher may also try to improve the quality of his teaching and course, such quality improvements tend to be more costly to make, more uncertain in effect, and more likely to be unappreciated by many students who may have much better information about an offering's total price. As a result, a rational teacher, who is concerned with student enrollment and approval, is more likely to emphasize the cost determinant of student demand.

This kind of elementary analysis, particularly in a period of stable if not declining law school applications and growing criticism of lawyers at many levels of American society, also provides a basis for criticizing the new voucher/reward program inspired by Smith. Given the incentive effects of the new program, won't some law professors be increasingly tempted to lower academic costs by tolerating an even greater decline in academic standards? An appropriate answer to such a worrisome general question requires more specific analysis of particularized charges.

First, many law professors have long since noted, or at least guessed, that course enrollments have some relationship to grading. Colleagues who distribute uncommonly large numbers of honor grades rarely seem to lack for students, while those of us who develop reputations as hard graders may be forced to settle for smaller student audiences. Surely, some law professors will be all the more tempted to grade permissively in return for larger dollar rewards from students who understand the deal.[421]

Several factors, however, may protect the new program from this form of corruption. If large numbers of students are truly ready to over reward those teachers providing "A's" grades, we can predict, on this depressing analysis, that a significant number of income-maximizing professors will be tempted to cooperate. Of course, the larger the number of professors selling grades to high bidders, the smaller the rela-

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421 POSNER, *supra* note 224, at 5, is also explicit about the application of the Law of Demand to educational services when he states that "The Law of Demand doesn't operate just on goods with explicit prices. Unpopular teachers sometimes try to increase class enrollments by raising the average grade of the students in their courses, thereby reducing the price of the course to the student." Cramton, *supra* note 114, at 332 similarly observes that, "The pressure for high student enrollments and the desire to be popular may sometimes lead to easy grading or relaxed standards of performance and make it more difficult for tough, demanding teachers to make their way."

tive competitive advantage of those professors. More fundamentally, deep concern over grade peddling reflects a rather extreme assumption about the low integrity of law professors and students alike.

The real risk-minimizing answer, however, may be relatively simple. The use of "grade standardization" mechanisms or mandatory grading curves should largely avoid the risk that certain faculty will regularly "earn" high supplemental dollar incomes by corruptly trading grades for dollars. Of course, grading curve policies, in various forms, are already used in a majority of American law schools.[422]

Even if grade related corruption is avoided, under the new program, what will prevent law teachers from diluting course content, reducing the size and complexity of class assignments, and surrendering more rigorous teaching methods? Such efforts to make legal education less demanding or, in economic terms, less costly, however, may backfire. Unless most students are simply fools, they are likely to prefer more useful to more trivial forms of legal education. Even if students lack much information about the future demands of a changing profession, they do know something about the characteristics of real learning. Real learning, it is no secret, often requires exertion and discipline.[423] Easier teaching, therefore, is not necessarily the certain route to a reasonable student's heart. In fact, many students and alumni/ae seem to prefer and remember, with gratitude, their more demanding teachers.[424]

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422 Nancy H. Kaufman, *A Survey of Law School Grading Practices*, 44 J. LEGAL EDUC. 415, 417-18 (1994) reports on a survey of accredited law school grading practices:

> The item on the questionnaire that elicited the greatest amount of information related to the use of grading curves to standardize the grading practices of individual faculty members. Of the 119 schools responding to this question, 79 (66.4%) indicated that some form of curve is in place for at least some classes.
>
> While some of the grading curves in use were voluntary rather than mandatory, one school that had recently adopted a curve "noted that the effect of the grading curve had been to decrease the tendency of some law students to select their courses on the basis of teachers' past grading practices."

Id. at 422.

423 *See* Allen, *supra* note 7, at 460, who observes:

> Surely not only history but contemporary experience reveal that profound learning is possible in conditions of considerable pressure and that this is so much the normal mode that pressures at some level, whether engendered internally or externally, may be seen as indispensable conditions of the learning process. When Dr. Samuel Johnson was asked how he came to acquire his command of Latin, he replied: " My master whipped me very well. Without that, Sir, I should have done nothing.". . .Learning, in fact, is pain, at least in those aspects of it concerned with the indispensable discipline of basic drill. Paradoxically, learning confers profound satisfactions, and the intellectual life is a kind of play. The pleasures, however, cannot be achieved without experiencing the pains. Modern technology has not discovered a sort-cut to Parnassus.

424 Abel, *supra* note 121, at 420-421 observes that:

> [s]tudents do not reward "easy" instructors; on the contrary, there is some evidence of a direct correlation between the amount of effort the instructor demands and stu-

At the same time, there is benefit in stimulating law teachers to examine and re-examine the content and complexity of their courses, the length of their assignments, and the all too casual use of teaching methods and strategies that may be more conventional than effective. Is it possible, for example, that an exhaustive survey of new and very complex doctrinal developments distracts student attention from more useful fundamental concepts and principles? Is it possible that longer reading assignments actually tend to weaken a student's learning experience by promoting superficiality? Shouldn't law professors encourage more reflective or deeper law study, even if we "cover" less material?[425]

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dent ratings. . . .Evaluations also may favor courses whose content is "hard" and easily quantified (number of rules mastered) over those that are "soft" or convey a more nuanced view of the world (uncertainty, contradiction).

Stuart Sherman offers detail about the irascible professional behavior of Harvard Professor George Lyman Kittredge who taught English literature:

> Perhaps the technique of terror is a "trade secret," too, but it is also a rich legend recited by every group of men that have studied English at Harvard. After the lapse of a good many years we can call up with perfect distinctness some of the Black Fridays when there was great slaughter of the Innocents. A pretty abrupt hush follows his [Kittredge's] rapid footsteps up the aisle, deepens as he seats himself sidewise, and menaces us thunderously from behind the formidable blue glasses, becomes painfully intense as he rises to stride to and fro the length of the platform in a kind of tiger tread, and the blackboard pointer, overstrained by his nervous fingers, breaks with an electrifying snap. We are about to enjoy a bad quarter of an hour. . . .Like many other of the great experiences of life, it was a rigorous ordeal while one was undergoing it, but it was pleasant to look back upon years afterward, and, like Purgatory, it was very salutary.

Stuart P. Sherman, *" Kitty" in* GREAT TEACHERS 253, 255-256 (Houston Peterson ed., 1946).

BANNER & CANNON, *supra* note 189, at 52-53, also endorse discipline as a necessary key to classroom order. Discipline, generally:

> [D]oes not deserve its negative reputation, for it means much more than punishment or rules. In teaching, as in so many other things, discipline connotes the kind of training that molds and perfects knowledge and character. It also connotes the very qualities of orderliness, self-control, and good conduct that are essential to learning. Thus, discipline is a positive force, not a mere limitation on behavior.***Discipline is therefore the means teachers must use to impose necessary organization on the potential chaos of all classrooms, and they must do so to create an atmosphere favorable to learning.

[425] D'Amato, *supra* note 155, at 462 n.4 reports:

> A college professor of philosophy writes that the real evil comes from faculty members' *thinking* that they will get better student evaluations if they reduce course content or lower the intellectual level of their lectures. . . The result is that the faculty will live out that belief by lowering standards.

Scordato, *supra* note 138, at 409 n.120 also notes that law professors, concerned about low student evaluations, might be tempted to curry student approval at the expense of certain pedagogical objectives:

> The faculty member. . .[subject to student evaluations] might be tempted to require relatively light reading loads of students, require relatively little or relatively easy in-class participation by students, rarely impose sanctions on students for not performing adequately in class or for not being adequately prepared, or cultivate a reputation for giving high grades relative to other faculty members.

And what of that course, or course component, unsparingly devoted to the old time religion? How many of us, uninspired by the 7th edition of ye olde casebook, have raised searching questions about conventional subject matter, taught and organized in much the same way since the '40s or '50s?

More specifically, must we continue to teach the system of estates in land and future interests for four or eight of the scarce weeks in the first year property law course? Is it still necessary to spend so much time, or any time, on the mail box rules or the doctrine of consideration in the basic contracts course? In the advanced curriculum, just how useful or illuminating is that arcane course in negotiable instruments? Must the very popular course in criminal procedure incorporate every new development and refinement in the law of the cops?

Obviously, such suggestive questions, about the content and structure of law courses, may be multiplied to a large number. The basic point is very simple. While there is some risk that new courses, course supplements and exotic seminars will divert student attentions from core disciplines, transferable intellectual skills and basic foundation concepts, the new voucher/reward program may not weaken the demanding substantive content of the conventional curriculum. Rather, the new program may work to stimulate useful substantive re-considerations by inspiring reward-driven professors to experiment with new approaches to old issues.[426]

Professorial respect for conventional teaching methods may also be too unbending. While everyone endorses discipline, rigor, and innovation in the abstract, the consistent utility of conventional forms of "interactive teaching" may be open to question. Such student-centered teaching, usu-

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See also Rosen, *supra* note 269, at 567 who argues that direct student compensation of teachers gives incentive to "teachers to increase course enrollments by adulterating course content" whereas a conventional salary system provides a teacher with incentives "to reduce enrollments by making courses excessively difficult and boring."

[426] Some commentators disagree and pessimistically conclude that extrinsic rewards inhibit academic risk-taking by maximizing professors. KOHN, *supra* note 389, at 63 observes that:

> The underlying principle can be summarized this way: *when we are working for a reward, we do exactly what is necessary to get it and no more.* Not only are we less apt to notice peripheral features of the task, but in performing it we are also less likely to take chances, play with possibilities, follow hunches that might not pay off. Risks are to be avoided whenever possible because the objective is not to engage in an open-ended encounter with ideas; it is simply to get the goody. One group of researchers explained that when we are motivated by rewards, "features such as predictability and simplicity are desirable since the primary focus associated with this orientation is to get through the task expediently in order to reach the desired goal." Another psychologist was more succinct: rewards, he said, are the "enemies of exploration."

Similarly, Abel, *supra* note 121, at 451 n.124 agrees that "[t]here is evidence that *any* extrinsic review and reward may inhibit creativity."

ally dignified by the label Socratic, sometimes degenerates into an anti-Socratic quiz that distracts and intimidates all too many students.[427]

Similarly, who says that lectures ought not to be an important tool in even a law teacher's arsenal? The best lectures, like the best books, are intellectually provocative and suggest more questions than answers. A lecture, without student interrogation or interruption, can be a very useful teaching strategy particularly for certain complex subject matter that especially benefits from structured and logically coherent presentations.

To the extent, therefore, that the new voucher/reward program will stimulate the re-examination of tried and not-so-true teaching methods, it may actually help to improve legal education rather than threatening its quality. Though some older conventional teaching methods remain effective tools in the hands of experienced teachers, there is still good reason to consider less traditional methods for the instruction of a newly diverse and increasingly complex student population.

It is also possible that our new program will stimulate more large class teaching at the expense of seminars and small group instruction generally. The potential for a higher supplemental voucher income, in fact, may grow significantly as a teacher's student audience grows in size. Even if the average reward offered by students in a certain larger course declines dramatically from, say, $200 to $100, the total income advantage from a class of 75 rather than 25 will still be great. Enterprising law teachers, preoccupied with maximizing voucher income, will obviously prefer total larger class voucher income of $7,500 to the smaller group alternative reward of $5,000. For merchants of all kinds, including

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[427] Cramton, *supra* note 327, at 328 makes the point:

> The case-class discussions that begin in the first term with discipline and rigor sometimes degenerate in later terms into loose dialogues following what I call the "avuncular Socratic method." The teacher asks a question about a particular case. There is a prolonged silence. He then refines the question, suggesting the direction in which he is moving. A bold student, departing from the passive mold characterizing most of the class, makes a half-hearted pass at the second question. Then the teacher, his conscience satisfied, gives a five-minute lecture in which he gives his own answer to the question. The process then repeats itself with a new question. The avuncular Socratic method is not the hard-nosed Socratic method of the first term; nor is it the more explicit lecture or discussion which one frequently finds in the law-school classroom. It is neither fish nor fowl, neither rigorous Socratic technique nor careful lecture, just poor teaching.

For a description of an arrogant and insensitive Labor Law professor who attempts to "hide the ball" and, in reality, generates considerable student frustration, see Thomas L. Shaffer & Robert S. Redmount, *Legal Education: The Classroom Experience*, 52 NOTRE DAME L. REV. 190, 206-207 (1976). *See also* PACKER & EHRLICH, *supra* note 37, at 32 who conclude that, "Already in the first year many students find the effort to be "Socratic" with 75 to 100 people in a class very questionable, and in the last two years what rapidly becomes a watered-down of the Socratic technique is deadly."

sellers of educational services, the sensible dollar goal is to maximize total rather than per customer profits.

Moreover, the new program, with its arguable large class bias, may only reinforce historical and existing economic pressures for larger law classes. In fact, one of Langdell's more noteworthy contributions came from his successful effort to legitimize large law classes, thus distinguishing the new law schools from other more expensive forms of university-based graduate and professional instruction, with much lower student/faculty ratios. In theory, Socratic methods capture many of the advantages of individualized instruction in the context of a larger group of students who supposedly benefit from the illuminating interaction between Socratic teacher and interrogated student.

If the historic prevalence of large-class law instruction is actually reinforced by the new voucher/reward program, will this impair the quality of law school education? While no survey evidence persuasively distinguishes the quality of large law class from small class instruction, there can be no doubt which our students prefer. Law students, and many of their professors, often prefer smaller class experiences, probably for several reasons.[428] Though large law classes may be efficient in terms of student-faculty ratios, or in terms of measurable output per unit of teaching input, large group instruction creates the need for a number of unhappy academic compromises.

The large class teacher obviously faces serious information and other cost-related problems. In a larger group, it is more costly for a teacher to assess individual learning styles and progress. This in turn affects a law teacher's choices in designing a course, the content and size of assignments, mechanisms for personalized feed back and two-way communication, and teaching methods. Even the most conscientious teacher may be forced to assume the existence of a "mythical middle" in larger classes, while designing course content and teaching strategies for an imagined average student. In the alternative, some teachers may decide to emphasize the better students in the class, allocating more teach-

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[428] Pipkin, *supra* note 37, at 1184 reports that the educational change judged by student respondents as "most desirable" is one that, like smaller classes, "would individualize the educational experience." Somewhat speculatively, Carrington & Conley, *supra* note 37, at 899 n.13 point to CARTWRIGHT & ZANDER, GROUP DYNAMICS: RESEARCH AND THEORY (1968) which:

> [S]ummarizes [focusing on laboratory situations or industrial work groups] the general effects of large group size as reduced communication among individual group members, less satisfaction with the group, more impersonal communication of group rules and polices, and less group cohesiveness. It is possible that more small-group instruction would reduce not only alienation but dissatisfaction as well; indeed, the more marked effect might well be the area of satisfaction, since our data suggest that aspects of the student experience in law school already have a perceptible effect on the level of satisfaction.

ing time and feed-back to the apparently more able while de-emphasizing service to the more mediocre majority.[429]

In fact, large scale law teaching may significantly impair the quality of legal education and account for some of the most important student disappointments with legal education. Whatever the economic justifications for continuing the hoary tradition of large law class instruction, there is little dissent from the proposition that more individualized instruction is more effective for a number of reasons.[430]

But if this is so, can we not predict that students will continue to demand more opportunities for small group and individualized law learning? Even if we unrealistically posit the most single-minded kind of law professor, concerned only with maximizing voucher income, such a teacher should respond to the dollar-backed preferences of student consumers. If the advantages of small classes are as great as many of us believe, shouldn't we predict that newly empowered student-consumers will demand, and get, more of such a good academic thing?

Current law school trends offer ample evidence of our growing commitment to law learning in smaller scale academic environments. Most contemporary law schools now offer a combination of clinics, small first year sections, legal research and writing programs, seminars of all kinds, and a growing number of small group opportunities for students to practice litigating, drafting, negotiating and counseling. In important part, this trend toward smaller-scale legal education has been stimulated by the creative efforts of law professors who often take special professional pleasure in such teaching options. As a result, it is particularly difficult to believe that the new voucher-reward program will significantly reduce the number of small classes and individualized learning options. Indeed, students may be prepared to spend the larger portion of their annually allotted vouchers to handsomely reward those

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[429] Rosen, *supra* note 269, at 571-572, observes:

> [T]hat the most important constraint in the economics of the education industry is the student-teacher ratio. It is the media aspect of teaching that enables a teacher to serve many students at once and allows the ratio to exceed one. . .Effective teaching requires teacher-student interchange and becomes increasingly difficult as class size increases. In addition, large-scale production degrades the signal content of teaching. A teacher produces a uniform message, and that message becomes garbled as class size and student diversity increase. Teaching a large class compels one to broadcast to the median student, lending a certain mediocrity to the end product, which is a phenomenon that will be well known to television viewers. Judging from what one sees on television, it just does not seem possible to transmit most difficult and abstract ideas on a mass scale through the air waves, and that state of affairs is unlikely to change in the foreseeable future.

[430] PACKER & EHRLICH, *supra* note 37, at 32, conclude that "[t]he plain fact is that large classes after the first year (and sometimes even then) tend to be an academic wasteland." For additional detail, see *supra* notes 429 & 430.

teachers who best resist the unappealing compromises of large class instruction.

At the same time, the new program may still stimulate a healthy re-examination of at least some small group offerings. While many law professors have been enthusiastic promoters of smaller-scale experiments, other colleagues, and even some students, may have important and lingering questions about the real utility of certain clinics, seminars, and other relatively new curricular experiments. Not every new innovation, of course, may be said to improve legal education.[431] Where it exists, such faculty skepticism is only increased by the recognition that smaller scale legal education is more costly. Even those professors who claim that they are interested only in academic quality, regardless of institutional costs, may be newly motivated to focus on the real merits of various new innovations by their new personal stake in the issue. If teaching a seminar to seven students will materially reduce a teacher's dollar income, we can expect that teacher to revisit the decision to indulge his or her more exotic professional interests of the moment. While some may regret this pecuniary distraction as a corrupting threat to cherished academic values, others may welcome it as a useful antidote to professorial self indulgence in an age of rapid curricular diversification.

The quality of legal education may be further impaired by the new voucher/reward program because it diverts professorial energies from scholarship and service in various forms. Even if doing legal scholarship, for publication, contributes indirectly but importantly to both student consumers and to the larger social welfare, some scholars may be tempted by the prospect of new rewards to do less scholarly work and more direct teaching of law students.

At the same time, it is very unlikely that the world will lose very valuable scholarship because some law professors are induced to spend more of their time and energy teaching. The few genuinely productive and consistently creative legal scholars among us are unlikely to be significantly diverted from their important work. These law professors, primarily members of a relatively few elite law faculties, are already handsomely compensated in pecuniary and non-pecuniary terms for their creative efforts. It is unlikely that the new program will mean a radical shift in career direction for these highly productive and privileged few.

But what of the rest of us who have most of the law faculty appointments at the 160, or so, accredited law schools of non-elite status? Don't

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431 Bergin, *supra* note 65, at 647 is unusually forthright in both criticizing his own experiment with a third-year seminar on urban development and reflecting more broadly his: "[S]ecure. . .belief that other seminars in my law school and in other law schools are hopelessly fraudulent affairs– not because the teachers are congenital frauds, but because they lack the solid training to make them work."

we sometimes publish too and won't we be induced to do less of that, post-tenure, and more teaching by the new program of student-distributed dollar rewards? The answer may well be yes; but the whole point of the new proposal is to induce a greater allocation of academic human capital to the teaching function in the aggregate. In truth, the new program implies that law teaching commitments need to be encouraged.[432]

This does not mean, however, the total extinction of all legal scholarship save the most handsomely rewarded efforts by elite faculty members. Rather, the new program poses a challenge to those of us lucky enough to have a professional choice. If legal scholarship, for publication, will cost a professor significant dollar income under the new program because he diverts his energies to his important article in progress on "The Hermeneutics of Corporate Law,ö it can only be because the value of his article, for him, exceeds the value of additional dollar rewards for more teaching. Whatever this professor decides, in allocating his human capital, will certainly be influenced and disciplined by the prospect of new pecuniary rewards for teaching, as one choice among several.

Law school deans and university administrators may also be confronted with new and healthy challenges by our new voucher/reward program. If the new program really does deter published legal scholarship, and that is judged undesirable, there is a management option available. Law school and university administrators, with faculty approval of course, are free to increase current dollar rewards for scholarly work and publications. At the least, the new program should stimulate greater critical scrutiny of such complex "efficiencyö issues.

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[432] Rohr, *supra* note 358, at 102ł104 addresses the basic question, "why are law professors *obliged* to engage in legal scholarship?" He raises serious questions about the usefulness of the average law review article and wonders whether professors are presently "striking the proper balance" between teaching and published scholarship. While he describes an academic system as a mistake when it hinges "salary increases or professional advancement largely upon popularity with students. . .," he also describes another kind of academic system that stresses scholarly publication as "[e]qually questionable. . .and arguably perverse. . ." He asks his readers to "[c]onsider . . .all the energy that could be re-channeled to the direct benefit of students if the 'Hessian-trainers' were truly liberated from the task of compelled article production." *Id.* at 104. He concludes, *id.* at 103-04:

> My judgment is that we could be doing much more for our students than we presently tend to do, and that our "obligation" is to do so, if for no other reason than that *they* pay our salaries. . . .If effective teaching is to be our paramount goal, as I think it should be, then scholarship ought to be regarded simply as one approach among many to the successful achievement of that goal.

Rosen, *supra* note 269, at 574 agrees:

> There is no question that total investment in the creation of new knowledge would be much smaller if it were financed only through personal student fees compared with our existing institutional setup. . . .A salary system. . .promotes the free exchange of ideas that productive research demands. But does it promote the most efficient allocation of a professor's time between teaching, research, and leisure?

There is, however, a slightly more compelling version of the same "diversion" problem with respect to the many services that law professors now render to their law schools, parent universities and to larger communities, pro bono publico. The new program may mean less professorial interest in and willingness to serve on faculty and university committees. While some professors will heartily welcome reduced committee service, important values of academic democracy and freedom may be compromised where there is less professorial time and energy for issues of academic governance and policy.

The threat to the pro bono work of many law professors is even more serious. Because the new program may offer significant dollar rewards for successful and more time-consuming teaching, some of us may reduce our professional contributions to various community organizations and causes. At the same time, it is clear that certain forms of psychic income and non-pecuniary forms of compensation will still be available to those who are inclined to allocate their skills in this public-spirited way.

Finally, the new program may be faulted for encouraging competitive excess. Though each law student will have only an annual total of $1,000 in discretionary vouchers to distribute, the aggregate total for an entire student body is large enough to stimulate real competition among personally aggressive and naturally competitive law professors. Obviously, the new program may tempt some professors, competing for student audiences and rewards, to carry more respectable forms of academic competition to backbiting and destructive extremes. As a result, important forms of professorial collaboration and professional cooperation may be discouraged. In addition, an intensely competitive environment may divert the energies and attentions of students as well as the professors most directly engaged in turf battles and special efforts to impress student consumers.[433]

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433 John Stuart Mill disagreed with Adam Smith's endorsement of a system that allowed students, and their parents, to compensate professors and other teachers directly through the payment of fees transmitted from student- consumer to instructor. Mill was skeptical of such a fee system, as a way of assuring efficient teaching, because he believed that parents could be easily fooled. Samuel Hollander, *supra* note 228, at 716 quotes Mill both about the basic flaws of the fee system and about the risks of destructive competition:

> [Is] there any one so blind to the realities of life as to imagine that the emoluments of a private schoolmaster have in general any substantial connection with the merit and efficiency of his teaching? In the first place, he has a direct pecuniary interest in neglecting all studies not cared for by the general public, or by the section of it from whom he hopes for patronage. In those which they do care for, a little trouble goes much further in aiming at a mere appearance of proficiency, than at the reality. . .It is difficult to see, in the operation of the trading principle, any tendency to make these things better. When the customer's ignorance is great, the trading motive acts much more powerfully in the direction of vying with one another in the arts of quackery and self-advertisement than in merit.

Despite the risks, however, there is still a real prospect of net gain from a new degree of competition among law teachers. Law professors all too often reap the maximum monopoly profitoa very quiet life. While no seller relishes the pressures, if not pain, of a very competitive market, consumers in such a market still may realize important benefits.[434] No one has really improved on Adam Smith's central observation. In competitive academic markets, student consumers have a much better chance to benefit from higher quality teaching at reasonable prices.

While fang and claw competition surely has its negative human consequences, there may be practical ways to moderate the most destructive possibilities. Capping the amount of the annual dollar reward, for any single teacher, may help reduce the problem of income extremes. As Smith wisely observed, compensation extremes are equally de-motivating. The very most successful law teachers, who might receive tens of thousands of voucher dollars annually, may eventually lose interest in the incentive program. At the other extreme, those law teachers who regu-

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WEBER, *supra* note 117, at 110 also disapproved of the fee system, as it was used in Germany, in part because "German universities, especially the small universities, are engaged in a most ridiculous competition for enrollments." More recently, John Mixon & Gordon Otto, *Continuous Quality Improvement, Law, and Legal Education*, 43 EMORY L.J. 393,a479 (1994) quote W. Edwards Deming, one of the American founders of the Continuous Quality Improvement movement, as follows: "Evaluation by performance, merit rating or annual review of performance. The effects of these are devastating–teamwork is destroyed, rivalry is nurtured. Performance ratings build fear and leave people bitter, despondent, beaten. They also encourage defection in the ranks of management." Finally, KOHN, *supra* note 389, at 54-55 objects to a reward system for much the same reason, among other considerations:

> At best, rewards do nothing to promote this collaboration or a sense of community. More often, they actually interfere with these goals: an undercurrent of "strife and jealousies" is created whenever people scramble for goodies. . ."Complaints of unequal treatment" and "playing favorites" are common. . .If the reward system sets people up as one another's rivals, the predictable result is that each will view the others with suspicion and hostility and, depending on their relative status, perhaps with contempt or envy as well.

KOHN, *supra* note 389, at 137 elaborates :

> [C]ompetitive recognition programs and other contests persist, despite evidence of the harm they do. For each person who wins, there are many others who carry with them the awareness of having lost, and who "come to feel that regardless of their efforts they will remain outside the winners' circle." The more these awards are publicized, through the use of memos, newsletters, and award banquets, the more detrimental their impact. Furthermore, contest, rankings, and competition for a limited number of incentives cause each employee to see every colleague as an obstacle to her own success, which in turn discourages collaboration and erodes the social support and sense of belongingness that makes for secure employees and an effective organization. In fact, these results can attend any use of rewards; introducing competition into an incentive program just makes a bad thing worse.

[434] RICHARD A. POSNER, OVERCOMING LAW 92 (1995) notes:

> The practice of law has become more competitive. . . .Naturally it is less fun. Competitive markets are no fun at all for most sellers; the effect of competition is to transform most producer surplus into consumer surplus and in more or less time to drive the less efficient producers out of business.

larly receive very low amounts from their un-admiring students may be even more inclined to stop competing for a prize that never comes.[435]

Moreover, the real success of a healthy competitive program may ultimately depend on the self-restraint and collective common sense of the academic players. In a modern law school, we may hopefully rely on vigilant deans, senior faculty and university administrators to recognize and discourage destructive competitive extremes. Even if courageous academic leadership never materializes, law teaching is still a largely individual sport. While academic cooperation may be important in the rational planning of a curriculum and the development of certain new programs, effective law teaching does not usually depend on the regular and amicable cooperation of academic team players.

The same basic human and professional factors, that potentially restrain destructive competition, are also more generally significant. Though the new program may tend to encourage grade inflation, dilute course content, ease usefully rigorous teaching methods, create pressure for more large classes, divert law professors from useful scholarship and service, and even generate an ugly new degree of academic competition, there is still reason to hope for the best on balance.

While law professors do suffer from human weaknesses like sloth, selfishness and self-deception, many of us also honor and apply a number of commendable academic values that may reduce the risks to academic quality inherent in the new program. For example, many law professors do not live by bread alone. Though many of us earn relatively high academic dollar incomes, a significant number of us truly value the opportunity to learn and contribute to the learning of others, regardless of how we are compensated in hard cold dollars. Many of us care more for the intangible rewards of a law professor's life than for our pecuniary income.

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435 Adam Smith, 2 WEALTH OF NATIONS, *supra* note 161, V.i.g.42, at 813-814 elaborates:

> The proper performance of every service seems to require that its pay or recompence should be, as exactly as possible, proportioned to the nature of the service. If any service is very much under-paid, it is very apt to suffer by the meanness and incapacity of the greater part of those who are employed in it. If it is very much over-paid, it is apt to suffer, perhaps, still more by their negligence and idleness.

See also Rosenberg, *supra* note 191, at 568; and FRITZ K. RINGER, THE DECLINE OF THE GERMAN MANDARINS: THE GERMAN ACADEMIC COMMUNITY, 1890-1933, 37 (1969) who noted:

> The income of a German university professor was derived from two sources. He had a basic salary from the ministry. In addition, students paid fees when enrolling in his "private" lectures or after passing important qualifying examinations with him. During the nineteenth century, as enrollment increased and the distinction between private and unremunerated public lectures lost much of its original meaning, men who "privately" taught basic courses in popular fields could earn huge amounts from students' fees. As a result, regular salaries declined in relative importance, and differences between the incomes of professors became disturbingly large.

Many of us really do care about books and ideas, and about helping future lawyers to maximize their professional potential. As a result, many of us recognize and resist certain academic temptations and corrupting influences. While some law professors clearly try to curry favor with students through easy grading and slack teaching, more of us recognize the essence of our professional responsibilities. In return for the extraordinary privileges of faculty life in a modern law school, many of us may be counted on to exercise professional discipline, self-restraint and common sense, at least as a group if not as individuals.

In short, most law professors do not promiscuously give away honor grades to the undeserving. Many of us really do understand our dual obligation to reward student achievement and to penalize demonstrated professional weaknesses. This difficult job, of differentiating talent on the merits, is central to our core duty as law professors. We must help to prepare lawyers for the uncertain future demands of our extremely competitive society and to identify future leaders, to the best of our imperfect ability. Many of us certainly know that learning is hard and sometimes stressful. This means that, under some circumstances, we must inflict pain and suffering on student consumers who look to us for honest yet sympathetic guidance at a formative period in their lives. It also means that many law professors recognize the intersection between their professional and moral responsibilities.

In addition to the restraining influence of a thoughtful and responsible majority of professors, the new program will also avoid destructive excess because law students are, themselves, better than their press notices in the faculty lounges. While many professors complain about lazy and irresponsible law students, and a few actually seem to hate them, more will concede the better qualities of law students, at least as individuals.

Even though many students are professionally and personally immature, all are experienced consumers of teaching and educational services. Many are very skilled at detecting and discarding academic nonsense, and plainly able to recognize the more useful and conscientious contributions of their teachers. A significant number also understand that law learning is sometimes an extraordinary exertion that must often be stimulated by the efforts of caring professors who, being human, sometimes make mistakes in practicing the teaching arts. In short, the good sense of the student consumers, themselves, offers important added protection against the possibility that the new voucher/reward program may actually impair the quality of American legal education.

IV. CONCLUSIONS

While all law professors are likely to concede that law teaching and legal education are imperfect human enterprises, many are just as likely to pridefully defend their pedagogical efforts on balance, particularly in comparison to teaching elsewhere in most universities. Even if law teaching is sometimes impractical, sometimes boring and fragmented, sometimes conflicted in its approach to values and policy, and often anxiety-inducing, we have gradually improved our teaching methods and law school programs, haven't we?

Indeed, many law professors would fiercely defend the modern American law school as, on balance, a very successful enterprise. Many would still agree with an important conclusion of Herbert Packer and Thomas Ehrlich. In their 1972 Report to the Carnegie Commission on Higher Education titled "New Directions in Legal Education," Packer and Ehrlich conceded that "a feeling of malaise and discontent has been growing among students and faculty at the nation's elite law schools." They also noted that serious problems with legal education really did exist. This honest recognition, however, particularly compelled them to prominently record their conviction "that taken as it operates at its best, legal education is a good thing."[436]

If this is still true, why risk radical change in legal education? Why adopt a new form of compensation system that allows law students to directly reward, and punish, their teachers? The short answer is to recall some new developments and some near truisms.

Whatever else has happened, the number of law schools, law students and law professors has grown dramatically. In little more than thirty years, from the mid-'60s to the late '90s, legal education has more than doubled in national scale.[437] The total enterprise has also become more complex in a number of ways. Our student bodies, our faculties, our teaching methods and our menu of professional goals are more diverse than ever.[438] Consequently, law teachers are more challenged than

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436 PACKER & EHRLICH, *supra* note 37, at 21.

437 AMERICAN BAR ASSOCIATION, *Legal Education and Bar Admission Statistics, 1963-1999*, *in* OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 450 (2000 ed.) notes that the number of A.B.A. approved law schools has increased 34% from a '63-'64 total of 135 to a '98-'99 total of 181. Total J.D. enrollment has similarly increased 169% from 46,666 in '63-'64 to 125,627 in '98-'99 despite a slight enrollment decline from a high of 129,580 in '91-'92.

POSNER, *supra* note 435, at 65 observes that, among other developments, the creation of new law schools, the expansion of existing ones, and the reduction in the rate of flunking out students have contributed to "an enormous increase in the size of the legal profession, which grew from 213,00 lawyers and judges (mostly of course the former) in 1960 to 772,000 in 1991."

438 *Survey of Minority Group Students Enrolled in J.D. Programs in Approved Law Schools, 1971 to Present*, *in* AMERICAN BAR ASSOCIATION, *supra* note 438, at 451 shows a

ever and more vulnerable to failure in various degrees. All of this, of course, has also occurred in an age of heightened skepticism, if not deepening cynicism, over the social roles of lawyers and legal institutions. Finally, we law professors may be facing a new market reality. A declining number of applications to our law schools confronts legal education with an unaccustomed challenge, at least during the late '90s.[439] Simply put, the market may now demand special attention to the quality of the work that we law professors say we do.

While modern law teaching doubtless has its strengths, the very extensive literature still richly testifies to numerous problems. While relevant professional opinions and the necessarily partial evidence are indisputably mixed and often support competing conclusions about the quality of law teaching, who among us can deny the risk of professional self deception? Surely, few believe that our law teachers and law schools are all that they might be. Even if we do not believe, as Adam Smith did, that most of our teachers "have. . .given up altogether even the pretence of teaching,[8] surely there is room for considerable improvement. Defenders of legal education and law professors would do well to listen closely to student opinions. While not all students agree, enough of us have encountered the following kind of judgment, if not recently as law professors or lawyers, then surely during our student days:

> Why is law school such a psychologically difficult experience? Do you know people who really *like* law school? I have friends in medical school and elsewhere who work longer and harder than we ever would think of doing; yet none of them criticize their schools the way people do here and in other law schools across the country. Professional education is not an inherently bad experience. But as an academic situation, law school has been the worst sustained period of my life.[440]

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total minority enrollment increase of a little more than 353% from a '71-'72 total of 5,568 to a '98-'99 total of 25,266.

439 The number of LSAT Administrations has declined every year from a '90-'91 high of 152, 685 to 103,990 in '97-'98. *See* AMERICAN BAR ASSOCIATION, *supra* note 438, at 450.

440 *See* statement of student Leinwand *in* Mohr & Rodgers, *supra* note 36, at 426. For an exploration of the special sadness of the American law student who is "increasingly alienated, progressively isolated and chronically distressed," see GRANFIELD, *supra* note 43, at 40-41.