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NORTH CAROLINA LAW REVIEW

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Volume 83 | Number 3

Article 4

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3-1-2005

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## Recommended Citation

Robert M. Lloyd, *Hard Law Firms and Soft Law Schools*, 83 N.C. L. REV. 667 (2005).

Available at: <http://scholarship.law.unc.edu/nclr/vol83/iss3/4>

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# HARD LAW FIRMS AND SOFT LAW SCHOOLS

ROBERT M. LLOYD\*

In his acclaimed book, *Hard America, Soft America: Competition vs. Coddling and the Battle for the Nation's Future*, political analyst Michael Barone tells how the reemergence of a culture that demands performance and rewards individual initiative transformed America, lifting the country out of the malaise of the 1970s and creating the basis for the growth and prosperity of today.<sup>1</sup> Barone divides institutions into two kinds: Hard institutions and Soft institutions. Hard institutions, which Barone refers to as “Hard America,” subject individuals to competition and accountability.<sup>2</sup> Soft institutions do not—they provide for everyone.<sup>3</sup> Barone acknowledges that we need both types of institutions. Hard institutions earn the money that not only pays their own members but also supports the Soft institutions. Soft institutions provide a safety net. We need Soft institutions that can do such things as care for children and the elderly.<sup>4</sup> But when Softness begins to permeate all types of institutions, it threatens our society.<sup>5</sup>

This Essay analyzes Barone’s ideas in the context of twenty-first century law practice. It concludes that American law practice, like American business, has become Harder in recent years. At the same time, American law schools have become Softer. The result is that law schools are doing a poor job of preparing students for practice.

As Barone tells it, the social and economic history of the

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1. MICHAEL BARONE, *HARD AMERICA, SOFT AMERICA: COMPETITION VS. CODDLING AND THE BATTLE FOR THE NATION'S FUTURE* 14 (2004).

2. *Id.* at 13. Barone capitalizes “Hard” and “Soft,” and uses them almost as terms of art. For this Essay, I have chosen to do the same.

3. *Id.* at 13–14.

4. *Id.* at 15–16.

5. *Id.*

twentieth century is the story of how America, which was a Hard world at the beginning of the century, developed a destructive culture of Softness in the middle and late parts of the century, only to be saved from a looming disaster by a new Hardening toward the end of the century.

The world of 1900 was a Hard world with few safety nets. As Barone describes it:

On the farm, where most Americans still lived, you depended on the year's harvest and fluctuating crop prices. In the rapidly growing big cities you lived bunched together: in many neighborhoods there were more people than rooms. One-quarter of urban Americans never married, as compared to just 8 percent today. Many men did not marry because they could not support a family; they lived with their parents or as boarders in other people's houses and found sexual release with prostitutes.

Work was available, but difficult. Employers could dismiss you for any reason. If you were injured, there was no recourse: you could sue for damages, but courts usually found contributory negligence. The death of a breadwinner was disaster for a family . . . .<sup>6</sup>

As the century progressed, our society was able to protect its members from much of the harshness. Government programs provided a safety net.<sup>7</sup> Unfortunately, society Softened in other ways as well, ways that were less beneficial. Businesses consolidated, creating large corporations,<sup>8</sup> which quickly grew bureaucratic and demanded less of their employees.<sup>9</sup> At the time, it seemed like a good thing. Life became easier for the employees, and lack of competition allowed corporations to pass the costs of this inefficiency on to consumers.<sup>10</sup>

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6. *Id.* at 18–19 (endnotes omitted).

7. *See id.* at 29. Among these programs, which we take for granted today but which were quite controversial when first proposed, were the Social Security Act, passed in 1935, and the Fair Labor Standards Act, passed in 1938. The Social Security Act, in addition to establishing old-age pensions, provided monthly payments to single mothers with children, while the Fair Labor Standards Act established the national minimum wage and the forty-hour work week. It also outlawed child labor. *Id.*

8. BARONE, *supra* note 1, at 30–33.

9. *Id.* at 32–35.

10. *Id.* at 35, 67; *see also* BEN HAMPER, RIVETHEAD: TALES FROM THE ASSEMBLY LINE 37, 54–59 (1991) (describing widespread on-the-job drinking among auto plant workers); *id.* at 59–62 (explaining the practice of “doubling up” in which one worker did two jobs while his partner slept or left early).

The Softness spread to other parts of society. Government became big, bloated and inefficient. The public schools became undemanding, indulging in every educational fad,<sup>11</sup> while passing

Not until later did anyone other than a few economic theorists realize the consequences of what was happening. Unions forced the large corporations to pay their employees better, but for those outside the protection of the big business/big labor detente, prices rose faster than incomes. See Kay E. Anderson et al., *Measuring Union-Nonunion Earnings Differences*, MONTHLY LABOR REV. 26, 26, 28 (June 1990); *Wages vs. Inflation, 1964-92*, at [http://reagan.webteamone.com/wages\\_vs\\_inflation.html](http://reagan.webteamone.com/wages_vs_inflation.html) (last visited Feb. 5, 2005) (on file with the North Carolina Law Review). Because corporations grew Soft, producing overpriced, poor-quality goods, it was easy for foreign competitors to gain a foothold in the country. See BARONE, *supra* note 1, at 66 (describing increased competition from foreign cars in the American automobile market). What was more important for the long term was that the Softness gave people a sense of entitlement that stifled their drive for education. During the first part of the twentieth century, the dominant cultural theme had been work hard and get a good education because that was the way to lift yourself to (in the language of the time) a "better station in life."

During the fifties and sixties, a person with a high school education could go to work on an assembly line, earn more money than a college-educated teacher, and expect to retire at age fifty-five with a nice benefits package. BARONE, *supra* note 1, at 112, 149; see also HAMPER, *supra*, at 44 (recalling experience as an assembly line worker: "It seemed like every time I turned around, the paymaster was stuffin' another wad of currency into my waistband."). Young people grasped the lesson: you do not need to work in school. By virtue of being an American, you are entitled to a good job. See *id.* at 53-55 (reporting that auto workers viewed education as "crap," and college as "sissy"); *id.* at 69 (characterizing a layoff from General Motors' assembly line as loss of a "birthright" of "hefty wages for idiot labor"). This attitude has not changed, and it is one reason politicians and news commentators can excite audiences by crying about jobs going overseas but cannot arouse interest in education improvement programs that will keep us competitive. By way of contrast, a leading business magazine ran a picture of Indian outsourcing billionaire Azim Premji with a caption stating that Mr. Premji "thinks Americans need to study harder." Justin Fox, *Where Your Job Is Going*, FORTUNE, Nov. 24, 2003, at 84.

11. BARONE, *supra* note 1 at 59-60. Illustrating the point is a joke that has been circulating among those in higher education who deal with the products of this school system:

Teaching Math in 1950: A logger sells a truckload of lumber for \$100. His cost of production is  $\frac{4}{5}$  of the price. What is his profit?

Teaching Math in 1960: A logger sells a truckload of lumber for \$100. His cost of production is  $\frac{4}{5}$  of the price, or \$80. What is his profit?

Teaching Math in 1970: A logger exchanges a set "L" of lumber for a set "M" of money. The cardinality of set "M" is 100. Each element is worth one dollar. Make 100 dots representing the elements of set "M." Set "C," the cost of production, contains 20 fewer points than set "M." Represent set "C" as a subset of set "M" and answer the following question: What is the cardinality of the set "P" of profits?

Teaching Math in 1980: A logger sells a truckload of lumber for \$100. His cost of production is \$80 and his profit is \$20. Your assignment: Underline the number

students who did not perform and refusing to reward students who did.<sup>12</sup> Crime rates skyrocketed.<sup>13</sup> Welfare evolved from a safety net to a culture of dependency.<sup>14</sup> Even the military became Soft.<sup>15</sup>

Because the country was so prosperous, we were able to ignore for a time the consequences of all this Softening. But eventually they became impossible to ignore. The Soviets shocked us by outperforming us in space, first beating us to launch a satellite, then putting a human in orbit before we could.<sup>16</sup> Vietnam showed the effects of a Soft military strategy.<sup>17</sup> Crime, much of it the result of Soft welfare policies, made cities unlivable.<sup>18</sup> Most dangerous of all, our economy, which had provided the resources to sustain our lifestyle in spite of all the Softening, began to falter.

These consequences finally shocked Americans into action, but the reaction did not happen all at once. Instead, different constituencies attacked different aspects of the Softening with different degrees of enthusiasm and with different degrees of success. What was similar about these reforms, however, was that most of them were motivated by self-interest. People saw that the Softening was hurting them and their families, and they decided to do something about it. The Hardening process was most successful in the economy, and for this Barone gives the government a great deal of the credit. In the late 1970s the American economy was stuck in

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Teaching Math in 1990: By cutting down beautiful forest trees, the logger makes \$20. What do you think of this way of making a living? Topic for class participation after answering the question: How did the forest birds and squirrels feel as the logger cut down the trees? There are no wrong answers.

Teaching Math in 2000: A logger sells a truckload of lumber for \$100. His cost of production is \$120. How does Arthur Andersen determine that his profit is \$60?

12. BARONE, *supra* note 1, at 13–14, 24–27, 35.

13. *Id.* at 53. For example, the number of violent and property crimes per capita rose 143% from 1960 to 1970 alone. *Id.* Barone attributes this in part to Soft attitudes that failed to hold criminals responsible for their conduct, *id.* at 53–54, and in part to welfare policies that resulted in larger numbers of children growing up fatherless. *See id.* at 56 (reporting that fatherless male children were much more likely to commit crimes than those who grew up in a home with two parents).

14. *Id.* at 56 (reporting that welfare dependency approximately tripled between 1965 and 1975).

15. *Id.* at 126–31 (describing strategies without clear goals, personnel policies based on political expediency, and commanders out of touch with battlefield realities).

16. *Id.* at 45.

17. *Id.* at 123–31.

18. *Id.* at 53–56.

what economists took to calling “stagflation,” a condition by which the country suffered from both high inflation and economic stagnation, a combination traditional Keynesian economics thought could not exist. Many thought this signaled America’s fall into permanent economic decline.<sup>19</sup> After years of ineffective policies to deal with this malaise, the federal government finally moved forcefully, not only cutting taxes and expanding the money supply, but, more important for the long term, deregulating many industries.<sup>20</sup> Deregulation of industries such as trucking, airlines, and telecommunications meant that companies in those industries could no longer pass on the costs of their inefficiencies to their customers.<sup>21</sup> They had to cut the flab.

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19. *Id.* at 75. A review of contemporary books on economic policy indicates that, if anything, Barone understates how pessimistic people were. The gloom-and-doom crowd included such luminaries as Lester Thurow, Dean of the M.I.T. School of Management, who published a book in 1980 with the title *The Zero-Sum Society*. In it, he expressed the pessimism of the times: “At the end of the 1970s our political economy seems paralyzed. The economy is stagnant, with a high level of inflation and unemployment. Fundamental problems, such as the energy crisis, exist but cannot be solved. We have lost the ability to get things done.” LESTER C. THUROW, *THE ZERO-SUM SOCIETY* 24 (1980). Referring to 1979’s energy crisis, he wrote: “Seemingly unsolvable problems were emerging everywhere—inflation, unemployment, slow growth, environmental decay, irreconcilable group demands, and complex, cumbersome regulations.” *Id.* at 3. He lauded Germany and Japan as examples of economies that had outperformed the United States, not so much in spite of as because of their higher taxation rates and their more pervasive government regulation. *Id.* at 5, 7.

For an even more negative view of the American economy during the 1970s, see generally HARRY MAGDOFF & PAUL M. SWEEZY, *THE END OF PROSPERITY: THE AMERICAN ECONOMY IN THE 1970S* (1977) and EDWARD F. RENSHAW, *THE END OF PROGRESS—ADJUSTING TO A NO-GROWTH ECONOMY* (1976).

Ironically, since these books were written, the economy of the United States has grown far more rapidly than the economies of Germany and Japan. Those two nations, as well as the other nations of the original European Union, are facing long-term economic crises because their lagging economies cannot support the generous social programs their citizens have come to think of as a birthright. BARONE, *supra* note 1, at 76.

20. Although Republicans like to take credit for the benefits of deregulation, a great deal of American business deregulation took place during the Carter administration. BARONE, *supra* note 1, at 78, 80. For example, Ralph Nader and Senator Edward Kennedy were instrumental in the deregulation of the trucking industry, *see id.* at 77–80, and a federal judge appointed by Jimmy Carter was the prime mover in telecommunications deregulation. *See id.* at 80–81.

21. *See id.* at 80–82. What happened to the airlines is a good example. Prior to deregulation, all airline routes and fares had to be approved by the Civil Aeronautics Board (“CAB”). *Id.* at 78. The result was that there was no price competition. Airlines flew half-empty planes, and the CAB set fares high enough to allow them to make profits on these half-empty planes while paying wages and salaries that made their employees objects of envy. To support this, the fares had to be so high that air travel was a luxury most Americans could not afford. Many of the airlines’ current problems can be traced to the era of regulated fares. *See* Flynn McRoberts, *United’s Undoing: A War Within*, CHI. TRIB., July 13, 2003, § 1, at 1.

A new wave of entrepreneurs hardened the economy even more. Innovators like Sam Walton, Bill Gates and FedEx founder Fred Smith refused to believe the conventional wisdom that no one could challenge the dominant large corporations.<sup>22</sup> They beat their Soft competitors by creating new ways of doing business, validating Joseph Schumpeter's theory of the "creative destruction" by which the economy renews and improves itself.<sup>23</sup> But this was not all the new business leaders did. They also created within their organizations a Hard corporate culture that allowed them to stay successful long after the advantage of their initial breakthrough had dissipated.<sup>24</sup> These firms became models that other organizations, even their competitors, used to Harden themselves.

The threat of corporate takeovers, made possible by changes in capital markets, was the final blow to corporate Softness. For the first seventy years of the twentieth century, the growing trend had been for large corporations to be run for the benefit of management at the expense of the shareholders.<sup>25</sup> Rather than trying to maximize return to shareholders, management tried to minimize the hassles inherent in their jobs while they collected very comfortable salaries.<sup>26</sup> It took

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22. There is irony here. The term "conventional wisdom" was coined in the 1950s by Harvard economist John Kenneth Galbraith. See JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 6-17 (1958). Galbraith later wrote that entrepreneurs, having been replaced by large corporate bureaucracies, were no longer a factor in the economy. JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE*, 91-103 (4th ed. 1985).

23. See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 81-86 (3d ed. 1950).

24. BARONE, *supra* note 1, at 83-85.

25. Interestingly, Adam Smith had predicted this conflict two hundred years earlier. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 264-65 (Edwin Cannan ed., University of Chicago Press, 1976) (1776). Smith believed that hired managers would not bring the same "anxious vigilance" as managers who owned the company. "Negligence and profusion, therefore, must always prevail . . ." See *id.*

For a complete explanation of the way management became separated from ownership in American corporations, see generally Christian C. Day, *Partner to Plutocrat: The Separation of Ownership from Management in Emerging Capital Markets—19th Century Industrial America*, 58 U. MIAMI L. REV. 525 (2004). The classic work on the tension between the interests of corporate shareholders and those of management is ADOLPH A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

26. See, e.g., Alfred Rappaport, *Executive Incentives vs. Corporate Growth*, HARV. BUS. REV., July-Aug. 1978, at 81, 81-84 (explaining that management's incentive-based compensation plans, including bonuses, emphasized short term results at the expense of "continuing vitality," a crucial shareholder objective). Admittedly, the salaries of the time were very reasonable in comparison with the excessive compensation being awarded corporate executives at the end of the century. See *Even Higher Society, Even Harder to Ascend*, ECONOMIST, Jan. 1, 2005, at 22 (reporting that thirty years ago the top one

the takeover spree of the 1980s to Harden America's large corporations. Once this began, corporate managers were forced to trim the fat. If they did not, the stock price would be lower than it should be, and there would be others trying to take the company over and get rich on the price increase that would occur when *they* squeezed out the fat and raised profits to where they should be.<sup>27</sup>

The classic example was RJR Nabisco, described by Wall Street Journal writers Bryan Burrough and John Helyar in *Barbarians at the Gate*.<sup>28</sup> Before the buyout, the company's management was incredibly Soft. They seemed to spend more time partying, golfing, and playing office politics than actually running the company.<sup>29</sup> Management effected extravagant waste such as the RJR Air Force, a fleet of corporate jets so ostentatious that when it was sold after the buyout, potential buyers shied away because they did not want their shareholders to see them in such planes.<sup>30</sup> And there was Team Nabisco, a group of twenty-nine sports stars who received a total of seven to ten million dollars a year for doing little more than schmoozing with management.<sup>31</sup> Management intentionally wasted money this way, reasoning that if profits started to go up, shareholders would expect them to keep going up. Meeting these expectations would cut into management's comfortable lifestyle, so the easiest course was to keep profits low.<sup>32</sup> The debt load the company took on in the leveraged buyout imposed the only discipline.<sup>33</sup> Other corporations, however, saw what was coming and

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hundred chief executives were paid thirty-nine times the average worker's pay, while those today are paid more than one thousand times the average worker's pay). Barone could be criticized for presenting only the benefits of the changes in corporate culture. Those changes also led to the excesses of the late 1990s. But he probably made the right choice in his emphasis; the excesses of Tyco, Enron and the like are getting more than enough attention in other quarters. Barone is pointing out that the discipline imposed by the takeover movement helped to avoid an economic disaster that was more of a possibility than most people are aware (or at least willing to admit).

27. See BARONE, *supra* note 1, at 90-94; Frank H. Easterbrook & Daniel A. Fischel, *The Proper Role of Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1173-74 (1981).

28. BRYAN BURROUGH & JOHN HELYAR, *BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO* (Harper Perennial ed. 1991).

29. See *id.* at 73-74, 79-80, 90-98, 115, 119-21, 365.

30. See *id.* at 94-95, 210; *BellSouth Buys "Taj Mahal" of Corporate Hangars*, CHI. TRIB., Dec. 7, 1993, at Bus. 1.

31. BURROUGH & HELYAR, *supra* note 28, at 365. Team Nabisco member Jack Nicklaus received a million dollars a year, and for this he was not even willing to play golf with the company's best customers. *Id.* at 95-96.

32. *Id.* at 365.

33. *Id.* at 510.



Hardened themselves before they could be taken over.<sup>34</sup> Barone attributes much of the economy's recovery to this Hardening.<sup>35</sup>

Two important institutions that Barone does not discuss are law schools<sup>36</sup> and the practicing bar. An analysis of these institutions through Barone's Hard/Soft lens shows how law schools have lost touch with reality.

Law practice in the middle of the twentieth century was relatively Soft.<sup>37</sup> It did not seem that way to those of us who were associates at the time, but it was.<sup>38</sup> There certainly were Hard aspects to it—competition for jobs at top firms was intense,<sup>39</sup> and associates

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34. See BARONE, *supra* note 1, at 82–88.

35. See *id.* Barone could be criticized for failing to discuss the human costs of this Hardening. But that aspect of the process has received more than its share of discussion elsewhere. One can hardly watch a television news program or read a local newspaper without seeing a story about lost jobs and cast-off workers. *Exporting America*, Lou Dobbs' series decrying the loss of jobs overseas, has run on CNN so long that it has become something of a joke. A *Wall Street Journal* article pointed out that in his position as the author of an investment newsletter which retails for \$199 a year, Mr. Dobbs recommends the stocks of some of the same companies he criticizes in his role as a newscaster. James Bandler, *Is Lou Dobbs Of Two Minds On "Offshoring?"*, WALL ST. J., June 21, 2004, at B1. It appears that in his role as a newscaster Mr. Dobbs likes Soft policies, but as a financial advisor, where he is himself subject to accountability of a sort, he advises his paying clients to put their money in companies that pursue Hard policies.

36. In talking of the Softening of education, Barone states, incorrectly as far as law schools are concerned, that it has not extended to professional schools. BARONE, *supra* note 1, at 148.

37. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 36 (1991) (observing that large law firms "could all but ignore such boorish concerns as efficiency, productivity, marketing and competition" (quoting MARK STEVENS, *POWER OF ATTORNEY: THE RISE OF THE GIANT LAW FIRMS* 9 (1987))).

38. I saw the first part of the Hardening process first hand. In 1975, I joined a firm of forty-three lawyers, then considered a large firm. The firm had offices in only one city, Los Angeles. It was very much like a family. It prided itself on the fact that every lawyer in the firm had joined it directly after law school or military service. Every associate had an expectation of partnership, and for many years no partner left the firm except due to death or retirement.

I left the firm in 1983, shortly after being elected a partner. The firm then had 100 lawyers in four California cities. Associates were no longer being told that if their work was satisfactory they could expect to become partners. The firm hired partners and senior associates from other firms, and some partners left to join other firms. The firm now has more than 400 lawyers in nine cities, including New York and Washington.

Since leaving practice I have remained in contact with many of my former colleagues, some of whom have stayed with the firm and some of whom have moved to other firms, large and small. I also speak regularly with lawyers practicing in firms of all sizes. The observations I make in this Essay are based in part on my personal experience and my conversations with practicing lawyers, and except as otherwise noted, they are entirely consistent with the published accounts of law practice that I have been able to find.

39. See PAUL HOFFMAN, *LIONS IN THE STREET* 133 (1973) (describing large firm

had to perform in order to make partner.<sup>40</sup> But even so, the competition for partnerships was far less brutal than it is today.<sup>41</sup> Firms saw themselves as families (not always happy families, but families nonetheless).<sup>42</sup> They hired as associates only people they wanted to have as partners, and they expected that these people would eventually become partners in the firm.<sup>43</sup> Making partner took a lot of hard work, but if the associate performed up to expectations, he or she (usually a he) could expect a partnership at the end of six or seven years.<sup>44</sup> Once the lawyer became a partner, the pressure diminished.<sup>45</sup> In the same way, partners did not leave firms for better-paying jobs at other firms.<sup>46</sup> Work was plentiful for large firms, and clients, although they seemed demanding at the time, demanded far less than today's clients demand. They wanted high quality work, and they wanted it done quickly, but cost control was not an issue. I often had clients ask, "Can't you get more people working on it?"

Cost control was not an issue because corporate America was still Soft enough that no one was keeping a close eye on legal fees.<sup>47</sup>

recruiting).

40. See *id.* at 129–32 (describing associate workloads).

41. See, e.g., GALANTER & PALAY, *supra* note 37, at 63 (discussing study indicating more than half of lawyers joining large Chicago firms prior to 1975 became partners at original firm); HOFFMAN, *supra* note 39, at 6 (describing Cravath firm philosophy of hiring and promoting lawyers on the basis of legal ability, not business development).

42. See, e.g., HOFFMAN, *supra* note 39, at 60 (explaining that many large firms did not have written partnership agreements because partners trusted each other); MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 21 (1994) (noting that large firm partners gave up all compensation to avoid laying off associates, and partners at one firm made accommodations for an associate with an embarrassing psychiatric problem); *id.* at 26 (observing an "extraordinary sense of fellowship" in one seventy-lawyer firm); GALANTER & PALAY, *supra* note 37, at 28–29 (reporting that firms maintained ties with passed-over associates).

43. See *supra* note 38. There were exceptions, primarily in New York. But in the rest of the country, this was the norm.

44. This was not the case in the large New York firms. See, e.g., GALANTER & PALAY, *supra* note 37, at 26–27 (citing various sources estimating proportion of associates in New York firms who made partner from one in six to one in twelve).

45. See Peter W. Bernstein, *Profit Pressures on Big Law Firms*, *FORTUNE*, Apr. 19, 1982, at 84, 100 ("Partnership used to be for life . . ."). A 1989 article stated that attaining partner status "conveys lifetime tenure." Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 *STAN. L. REV.* 567, 571 (1989). This trend had already begun to change when the Gilson & Mnookin article was published, but it is clearly correct as to the way things had been in the past.

46. See HOFFMAN, *supra* note 39, at 60–61; *cf.* GALANTER & PALAY, *supra* note 37, at 54 (citing a 1998 survey of 500 largest law firms finding that at more than one-quarter of those firms, more than half the partners had been hired from other firms).

47. See GALANTER & PALAY, *supra* note 37, at 34 (attributing corporations' failure to

The people hiring the lawyers wanted the job done right—that affected their performance rating. But for the most part, nobody was looking at the way the legal fees affected the bottom line.<sup>48</sup> Some businesses, particularly closely-held businesses, scrutinized legal fees, but overall, the atmosphere was such that one lawyer could say to me: “The only clients I want are people who open my bill, write ‘pay this’ on it, and send it to the accounting department.” Another firm bragged internally that it would take on only clients who paid by return mail with no questions asked.<sup>49</sup>

Competition for clients was very low key.<sup>50</sup> Clients did not change lawyers,<sup>51</sup> and lawyers did not spend a great deal of effort trying to attract clients that were already attached to other firms.<sup>52</sup> Lawyers talked about rainmaking, but in those pleasant days, rainmaking consisted of genteelly developing personal relationships that might or might not someday develop into long-term lawyer-client relationships.<sup>53</sup> Nobody thought of approaching somebody else’s client with a proposal to do the work more cheaply. And they certainly did not worry that another firm would approach their clients with similar proposals.<sup>54</sup>

All this was, of course, too good to last. Entrepreneurial lawyers saw the opportunity and built Hard firms which took business from the Soft firms and made their founders wealthy.<sup>55</sup> For some time

question legal bills to high profit margins and lack of foreign competition).

48. See Nat Slavin, *The Never-Ending Quest for Legal Alternatives*, CORP. LEGAL TIMES, Feb. 2004, at 4 (reporting that corporations demanded the best legal services money could buy and were willing to pay the rates charged).

49. Cf. JAMES B. STEWART, *THE PARTNERS: INSIDE AMERICA’S MOST POWERFUL LAW FIRMS 376–77* (1983) (describing large law firms of the time setting billing rates by fiat, as opposed to the way they are set in competitive markets).

50. See HOFFMAN, *supra* note 39, at 71–72 (noting that talking about clients and fees was considered ungentlemanly, and that one firm considered business cards unethical).

51. See *id.* at 72 (“In the blue-chip bar client shifts are rare.”).

52. See *id.* at 61 (describing clients as “locked in” to law firms).

53. See *id.* at 87–93 (describing rainmaking in the Soft era).

54. Discussing the way things have changed, a partner in a large firm wrote:

[There is a] tendency for firms to become much more competitive and aggressive in looking for new client opportunities. Lawyers today are doing things that not many years ago arguably could have landed them squarely before bar association disciplinary committees. All of us are looking for new ways to market our legal services.

James F. Fitzpatrick, *Legal Future Shock: The Role of Large Law Firms by the End of the Century*, 64 IND. L.J. 461, 466–67 (1989).

55. See, e.g., PAUL HOFFMAN, *LIONS OF THE EIGHTIES 109–12* (1982) (describing the rise of Skadden, Arps, Slate, Meagher & Flom); cf. HOFFMAN, *supra* note 39, at 53 (1973 book by same author quoting lawyers on how easy it is to make money as a partner in a

now, law firms have been competing for clients in a manner that the partners of the Softer times would describe as vicious.<sup>56</sup> To meet competition, firms have to make associates pay for themselves right from the beginning. Firms expect associates to come in the door with the knowledge and skills to handle business deals and litigation matters with minimal supervision.<sup>57</sup> Associates are expected to understand that meeting deadlines is not optional—performance, not excuses, is required.<sup>58</sup>

Unfortunately, today's Soft law schools do not prepare their graduates for this reality. In most law schools, performance is optional. While the practice of law has been getting Harder, law schools have been getting Softer.

American law schools have Softened themselves in a variety of ways. Most obviously, they have softened the curriculum. In many

large firm, but stating that partners' incomes are low in comparison to those of business people).

The classic account of the Hard law firm culture is Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999).

56. See, e.g., Schiltz, *supra* note 55, at 888–89 (describing an “increased pressure to attract and retain clients in a ferociously competitive marketplace”). Lawyers even use vicious language to describe their competition. Many law firms pride themselves on having an “eat what you kill” compensation system, meaning that the partners who bring in the business get the money. See, e.g., GLENDON, *supra* note 42, at 24 (noting the significance of the language); GALANTER & PALAY, *supra* note 37, at 52 (describing how “eat what you kill” is replacing compensation systems based on equality or seniority).

Law firms are hiring sales professionals and setting up sales departments (usually, but not always, calling them business development departments, rather than using “the unsettling S-word”). Marie Beaudette, *The Sales Call*, LEGAL TIMES, May 24, 2004, at 1; see also GALANTER & PALAY, *supra* note 37, at 53 (reporting that in 1989 almost 200 firms had marketing directors).

57. See William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 225 n.113 (1996); GLENDON, *supra* note 42, at 27 (attributing decline in training to competition for clients and higher starting salaries). Although most law firms claim to provide training for associates, the kind of one-on-one mentoring that was common in the past is disappearing from large law firms. In the past, time spent training associates was “written off” or hidden in the time billed clients on large matters. In today's competitive environment, this can no longer be done. See Schiltz, *supra* note 55, at 926–28. Moreover, what training is given is not allocated uniformly. A disproportionate share goes to those associates who have already shown themselves to be partnership material. *Id.* at 928 n.301.

58. See GLENDON, *supra* note 42, at 28. It is not only associates who are expected to perform. Today's law firms place incredible pressure on partners and sanction those partners who fail to perform. One large law firm was even investigated for age discrimination after it demoted thirty-two partners for shortcomings in performance. See *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 698 (7th Cir. 2002); see also GALANTER & PALAY, *supra* note 37, at 67–68 (noting that partners who fail to perform may be “de-equitized,” “departnerized,” or “pushed off the iceberg”).

schools, courses which emphasize political and cultural trends, not legal analysis, constitute a large portion of upperclass offerings.<sup>59</sup> Law schools give students incentives to prefer these Soft courses. The Soft courses are usually taught in small sections, so a student who wants to take a course in Dickens and the Law<sup>60</sup> gets the opportunity to interact with a professor in a small group, whereas a student who wants to learn income tax or business associations is stuck in a large class.<sup>61</sup> The Softer courses usually have papers or take-home finals, so the students are not actually forced to learn a body of material. And the average grades are higher in the Softer classes.<sup>62</sup> With so many

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59. See, Trail & Underwood, *supra* note 57, at 214–17; James J. White, *Letter to Judge Harry Edwards*, 91 MICH. L. REV. 2177, 2182–83 (1993); see also GLENDON, *supra* note 42, at 202 (asserting that many new courses as well as “lite” versions of standard items” are being added to “the old menu of heavy legal dishes”); cf. *id.* at 217–18 (finding that many candidates for law teaching positions took few “law courses” in law school beyond the required first-year curriculum).

Much of the growth in Soft courses is due to a system of “academic courtesy” that allows professors to design courses to fit their own interests and social agendas. See Trail & Underwood, *supra* note 57, at 214. Professor James J. White explains: “Particularly at elite law schools the curriculum fits the fancy—some might say the whim—of the faculty. I perceive no particular political bias in our selection of courses, only laissez-faire carried to the point of irresponsibility.” White, *supra* note 59, at 2181.

This trend has been noted even outside the legal community. See Charles Rothfeld, *What Do Law Schools Teach? Almost Anything*, N.Y. TIMES, Dec. 23, 1988, at B8 (highlighting a Yale Law School course described as “an investigation of disputing, dispute processing and social structure in Iceland of the saga age, with side glances at contemporary kin-based cultures”). The situation has progressed to the point that while the curriculum of national law schools is not tied to the law of any particular state, the curriculum of elite law schools “is not tied to the law of any particular planet.” James D. Gordon, III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1684 (1991). While Professor Gordon is obviously joking, the joke is funny only because it contains an element of truth.

60. This was the title of a course offered at Harvard Law School. RICHARD D. KAHLBERG, *BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL* 134–43 (1992). Most law schools have similar courses. Whether any of them serve beer as was done at Harvard, see *id.* at 138, 141, is not clear.

61. See, e.g., University of Tennessee College of Law, Spring 2003 Grade Distribution Report (July 9, 2003) [hereinafter Tennessee Grade Report] (listing 82 students in Commercial Law, 55 in Business Associations, 18 in Women and the Law, and 14 in Jurisprudence) (on file with the North Carolina Law Review); University of Nebraska College of Law, Grade Distributions (Spring 2004) (listing 77 students in Wills & Trusts, 7 in Jurisprudence, and 8 in Topics in Law and Psychology) (on file with the North Carolina Law Review). The tradition of teaching the more substantive upperclass courses in large sections apparently began when these courses were required of all students. See PETER DEL SWORDS & FRANK K. WALWER, *THE COSTS AND RESOURCES OF LEGAL EDUCATION: A STUDY IN THE MANAGEMENT OF EDUCATIONAL RESOURCES* 177 (1974) (reporting that until the early- to mid-1970s most law schools required a number of non-elective upperclass courses such as Commercial Transactions and Federal Income Taxation).

62. At my institution, a report showing the average grade in each course is circulated

Soft courses available, professors in these courses are in the position of having to compete for students. These courses, which most often center around the professor's research or social agenda, face cancellation if they do not attract enough students.<sup>63</sup> So professors compete with high grades and low demands.

The Soft courses allow students to use what Mary Ann Glendon has referred to as "verbal acrobatics,"<sup>64</sup> rather than Hard legal analysis, and we have to accept the fact that law schools attract people who prefer verbal acrobatics to rigorous analysis. Medical schools, business schools and graduate programs in engineering and the physical sciences attract many of the college graduates with the analytical skills prized by law firms. So they are not in the law school applicant pool. A huge percentage of students applying to law schools come out of undergraduate programs that have been dumbed down to make it easier for their graduates to get into law schools.<sup>65</sup> Perverse incentives abound here. Many colleges and universities

to the faculty at the end of each semester. These show the grade disparity very clearly: in Spring 2003, 14 of 18 upperclass exam-graded courses had a mean grade below 3.3, while only one of 16 paper-graded classes had a mean grade below 3.3. See Tennessee Grade Report, *supra* note 61. All of the anecdotal evidence from other law schools confirms that higher average grades in Softer courses is a universal (or near universal) phenomenon in American law schools. For example, one *U.S. News* top-fifty law school provided me with a semester grade report listing two seminars in which all students received A's (confidential report on file with the North Carolina Law Review). While some of this grade disparity is due to schools giving more grading discretion in smaller classes and non-exam-based classes, many schools have actually mandated higher mean grade ranges in "seminars." See, e.g., *William and Mary School of Law Grading Policy* (last visited Feb. 23, 2005) (exempting classes of fewer than thirty students from mandatory grading curve), <http://www.wm.edu/law/academicprograms/regulations/grading.shtml> (on file with the North Carolina Law Review). A great deal of hard data show that this is also the case in undergraduate courses. See Valen E. Johnson, *An A Is an A . . . And That's the Problem*, N.Y. TIMES, Apr. 14, 2002, at 4A-14. One study showed that the average grade in elective courses was 3.54 in humanities, 3.40 in social sciences, and 3.05 in natural sciences and math. *Id.* This actually understates the difference in grading standards because the departments that gave the highest grades attracted the least qualified students (as measured by SAT scores and high school grade point averages). See *id.*

63. The professor whose Soft course is canceled will often have to teach a Hard course, which usually takes more work and is less interesting to the professor. See GLENDON, *supra* note 42, at 222-29 (noting trend toward hiring and promoting law professors whose primary interests are in fields other than law).

64. The term Professor Glendon uses is "verbal acrobats," describing those who engage in the practice. GLENDON, *supra* note 42, at 203. Those who are less charitable call it "bullshit."

65. A paper published by the American Academy of Arts and Sciences noted that "institutions that resisted grade inflation found that their graduates had a more difficult time being accepted into graduate programs." See HENRY ROSOVSKY & MATTHEW HARTLEY, *EVALUATION AND THE ACADEMY: ARE WE DOING THE RIGHT THING?* 10 (2002).

have departments that depend for their viability on students planning to attend law school.<sup>66</sup> Demanding courses will scare away students; they might hurt the grade point average. So these departments are under pressure to lower the demands on their students. Students in the natural sciences and other rigorous disciplines we might like to see better represented in law schools are not given this easy pass. Not only are the courses they take more rigorous, but there is less grade inflation in the natural sciences.<sup>67</sup> The result is that the numbers-driven admissions policies most law schools use<sup>68</sup> screen out the very students we need to give our classes a better leavening of people with strong analytical skills.<sup>69</sup>

This leads to a vicious cycle. The admissions process fills law schools with students who have weak analytical skills. Because these people prefer Soft courses, student demand allows law schools to offer more Soft courses.<sup>70</sup> What is worse, it puts pressure on professors to water down previously Hard courses, turning courses that once required (and therefore of necessity, taught) analytical thinking into courses that require nothing more than an exercise of memorizing majority and minority rules. All of this makes law school

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66. Political science produces far more law school applicants than any other undergraduate major. In the 2002–03 academic year, more than 15,000 political science majors applied to law schools. This was almost as many as the combined total of the next three most common majors: English (6,300), Psychology (5,200) and History (4,800). See LAW SCHOOL ADMISSION COUNCIL, NATIONAL STATISTICAL REPORT: 1998 THROUGH 2003, A-6 to A-8 (2004).

67. See *supra* note 62.

68. See LAW SCHOOL ADMISSION COUNCIL & AMERICAN BAR ASSOCIATION, ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS (2004) (featuring charts showing likelihood of acceptance at law schools on basis of LSAT scores and undergraduate grade point averages).

69. The composition of the LSAT contributes to this as well. As Professor Glendon notes, all of the math questions have been eliminated from the LSAT, and the number of questions testing logical-analytical skills has been reduced. GLENDON, *supra* note 42, at 202. The result is that “the LSAT ignores certain types of intelligence that become increasingly important when law graduates take their places in a society that has more urgent need for creative problem solvers than for verbal acrobats.” *Id.* at 203.

Others have noted a lack of analytical skills among law students. See, e.g., Michael Jordan, *Law Teachers and the Educational Continuum*, 5 S. CAL. INTERDISC. L.J. 41, 69 (1996) (noting that “high level analytical skills are presently in short supply in law schools”).

70. Another reason there is such demand for Soft courses is that many law school students come to law school not out of a passion to practice law, but simply because they do not know what else to do with their undergraduate liberal arts or social science degrees. See GLENDON, *supra* note 42, at 200–01; see also John M. Conley, *How Bad Is It Out There?: Teaching and Learning About the State of the Legal Profession in North Carolina*, 82 N.C. L. REV. 1943, 1978 n.201 (2004) (stating that, in the author’s experience, all medical students want to be doctors but many law students do not want to be lawyers).

more attractive to people who have not developed their analytical skills.<sup>71</sup>

The first year curriculum is supposed to overcome the fact that incoming students have weak analytical skills and to teach them to “think like a lawyer.”<sup>72</sup> It no longer does this. The traditional Socratic method, where the professor not only questioned the student on the material he was to have read but questioned the assumptions underlying the material and even the assumptions behind the student’s own belief system, has vanished from American law schools.<sup>73</sup> Critics have attacked it as too intimidating, too adversarial, and too demeaning,<sup>74</sup> ignoring the fact that the practice of law, for which law school is supposed to prepare its graduates, has become more intimidating, more adversarial, and, for those who cannot meet the new demands, more demeaning.<sup>75</sup>

71. An often-ignored side effect of the failure to teach hard analytic skills is that lawyers will no longer ascend to positions of leadership in business and community activities in the way they once did. In the past, lawyers were sought out for positions of leadership because they had the Hard thinking skills that others lacked. See, e.g., David C. Hardesty, Jr., *Leading Lawyers: An Essay on Why Lawyers Lead America*, W. VA. LAWYER, Apr. 1997, at 26 (claiming that lawyer skills “translate themselves into marketable skills for the leader”), available at <http://www.wvbar.org/barinfo/lawyer/april97.htm> (on file with the North Carolina Law Review); cf. GLENDON, *supra* note 42, at 280–88 (stating that lawyers are no longer as capable as leaders but attributing it to other factors). We could truthfully tell students contemplating law school that their legal education would be valuable to them in any business or social endeavor. But the more we soften the curriculum, the more difficult it is to make this sales pitch with a clear conscience. See GLENDON, *supra* note 42, at 201 (noting that for many who came to law school without definite plans to practice law “the vaunted flexibility of their degrees is not flexible enough,” and that some become “discontented practitioners” while others continue to “drift”).

72. “Analytic skills are typically taught at law school, and in the aggregate, constitute what is commonly referred to as ‘thinking like a lawyer.’” James R.P. Ogloff et al., *More Than “Learning to Think Like a Lawyer”: The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73, 227 (2000). A survey of lawyers who graduated from law school in the 1960s and 1970s found that respondents considered analytical thinking the most important skill taught in law school. Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 593 (1973).

73. See *infra* note 76 and accompanying text.

74. See, e.g., Jennifer L. Rosato, *The Socratic Method and Women Law Students: Humanize, Don’t Feminize*, 7 S. CAL. REV. L. & WOMEN’S STUD. 37, 42 (1997) (reporting critics’ conclusions that the Socratic method makes classroom experience “traumatizing, painful and humiliating to all students”); Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 407–08 (1971) (summarizing views of students and other writers).

75. For a number of reasons, the discussion above has focused on large firms. My experience has been with large firms, published accounts usually deal with large firms, and large firm practice provides a certain anonymity which makes its veterans more willing to talk openly. Nevertheless, the available data, as well as anecdotal evidence, indicate that practice in small and medium-sized firms, corporate law departments, and even government and public interest law offices has hardened as well. See GALANTER &



Few professors question students rigorously anymore.<sup>76</sup> Most allow them to slide by with answers from one of the commercial products that provide “canned briefs”—analyses of the cases and problems in the leading casebooks—or from a set of course notes prepared by prior years’ students.<sup>77</sup> Sets of course notes with analyses

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PALAY, *supra* note 37, at 18–19; GLENDON, *supra* note 42, at 87. It could hardly be otherwise, given that large firms and small firms often compete for the same clients as well as for the same legal talent. Professor John Conley’s study of North Carolina firms demonstrates this very well:

While large firms are but one segment of the legal community, the way that they conduct their business may have a ripple effect that is felt throughout the profession. A partner in a [North Carolina] statewide firm captured the point nicely. She observed that until the last few years, the pace of practice in her city had been somewhat more sedate than in Charlotte, a difference that could be tolerated within a multi-city firm. Now, however, she believes that banking practice in Charlotte has reached levels of onerousness and profitability that are unprecedented for this state. Consequently, she reported, big-firm banking lawyers are demanding increases in compensation that are equally unprecedented (and that apparently go beyond simply eating more of what they kill). To meet these demands, her firm now requires more work from all its lawyers, even in the formerly sleepy provincial offices. The implication is that in the end, lawyers in all kinds of firms must work harder to compete. When big firms sneeze, in other words, the whole profession catches cold.

Conley, *supra* note 70, at 1986 (footnote omitted); see also GALANTER & PALAY, *supra* note 37, at 2, 40 (stating that large firms are receiving an increasing share of legal services expenditures and are setting standards for other firms). Moreover, it has been predicted that professional services firms combining legal services with other business services are “compet[ing] fiercely with small and regional law firms.” Mary C. Daly, *The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization*, 52 J. LEGAL EDUC. 480, 485 (2002). But see Carol M. Sánchez & Patrick E. Mears, *How the Mid-Sized Survive*, 11 BUS. L. TODAY, Sept./Oct. 2001, at 45 (noting increased competitive pressure on mid-sized firms but opining that such firms can remain competitive by adopting softer firm culture thereby attracting top legal talent at lower cost), available at <http://www.abanet.org/buslaw/blt> (on file with the North Carolina Law Review).

In-house counsel jobs used to be perceived as bastions of softness for those who could not make it in law firms, but in recent years the quality and variety of legal work done in-house has increased dramatically and the prestige of in-house lawyers has risen along with it. See Conley, *supra* note 70, at 1997–98. Not surprisingly, the demands on in-house lawyers have increased proportionately. See *id.* at 2009.

76. See Roger C. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 328 (1982) (criticizing prevalence of the “avuncular Socratic method” in which professors lecture after making pretense of asking questions); Robert M. Lloyd, *Consumerism in Legal Education*, 45 J. LEGAL EDUC. 551, 555 (1995) (describing a similar phenomenon as well as increasing use of lectures).

77. See Christian C. Day, *Law Schools Can Solve the “Bar Pass Problem”*—“Do the Work!”, 40 CAL. W. L. REV. 321, 344 (2004) (stating that *The Princeton Review* advises “using commercial outlines from Day One, avoid briefing cases, and preparing only for the final exam”). While one might argue that the fact that *The Princeton Review* recommends this practice is not evidence that it is actually successful, the continued prosperity of its

of all the cases and answers to all of the problems circulate at most law schools<sup>78</sup> and there is little acknowledgment of the ethical or pedagogical problems these present. At my own institution, the Student Bar Association, the school's student government, openly solicits and distributes these materials.

In many courses, even this minimal preparation is no longer required on a daily basis. To avoid the frustration and embarrassment of dealing with poorly-prepared students, many professors have gone to a system whereby students are told in advance who will be called on each day and for which material they will be held responsible.<sup>79</sup>

Because of these things, students do not find it necessary to be engaged while they are in class, which they often attend only because attendance is required. Professors at a number of law schools have complained that students use their laptops to play solitaire or surf the Internet during class.<sup>80</sup> One professor at another law school told me students there routinely watch DVD movies on their laptops during class. When he asked one of them how they dealt with the fact the movies last longer than the classes, the student replied that they just paused the movie between classes.

A major catalyst for this Softening is law schools' reliance on

publisher indicates that students do not think they are suffering by taking its advice.

78. Dorothy H. Evensen, *To Group or Not to Group: Students' Perceptions of Collaborative Learning Activities in Law School*, 28 S. ILL. U. L.J. 343, 384 (2004) (describing transmission of course outlines). Many outlines and sets of class notes circulate via the Internet. See, e.g., *4LawSchool Case Briefs Bank*, at <http://www.4lawschool.com/contracts/contracts.htm> (last visited Feb 5, 2005) (offering case briefs of commonly-taught contracts cases) (on file with the North Carolina Law Review); *Mike Shecket's Notes on Dawson, Harvey, and Henderson's Contracts*, at <http://lawschool.mikeshecket.com/contracts/casebooknotes.html> (last visited Feb. 5, 2005) (providing notes to accompany the reading of a popular contracts case book) (on file with the North Carolina Law Review).

79. Variations of this method are common at the school where I teach, and it is my understanding that they are common at many other law schools as well.

80. See John Schwartz, *Professors Vie With Web for Class's Attention*, N.Y. TIMES, Jan. 2, 2003, at A1. The article quotes Ian Ayres as saying: "When you see 25 percent of the screens playing solitaire, besides its being distracting, you feel like a sucker for paying attention." *Id.* It also reports how a professor at another law school climbed a ladder to disconnect the wireless transmitter in his classroom. *Id.* Another solution may be banning or threatening to ban laptop use in the classroom altogether. For example, several Duke Law School professors' course syllabi prohibit laptop use, while others explicitly warn that activities such as instant messaging and playing video games may result in revocation of in-class computer privileges. See *Course Homepages*, at <http://www.law.duke.edu/curriculum/courseHomepagesSpring.html> (last visited Feb. 13, 2005) (on file with the North Carolina Law Review).

student evaluations in hiring, tenuring, and compensating faculty.<sup>81</sup> This creates tremendous pressure to dumb down courses<sup>82</sup> to avoid upsetting those students who do not want to have to work and who will blame the professor's teaching if the material is too hard for them to understand on the first reading. In fact, it starts a general race to the bottom to become less demanding.<sup>83</sup>

Part of the reason that administrators continue to rely on student evaluations is that they have closed their eyes to the economic reality of the way students perceive legal education. Administrators base their thinking on a model where the student is a customer, buying an education with her money.<sup>84</sup> Using this model allows administrators to believe that by giving the customers what they want, they (the administrators) are doing their jobs. In fact, however, most law students are not in law school to get an education. They are in law school to get a credential. They are paying for it in part with money, but the major cost of the credential is the work they do over the three years of law school.<sup>85</sup> For the typical law student, the way to maximize utility is to get a degree with the highest possible grades while doing the least possible work. Like all economic models, this one oversimplifies. There are students, a small minority, whose goal is to get the best possible education, and most students will take a few

81. See Jordan, *supra* note 69, at 42 (referring to law school student evaluations as a "popularity contest" and stating that some very good teachers have been denied tenure because they were unpopular with students). The same thing is of course occurring at the undergraduate level. See Robin Wilson, *New Research Casts Doubt on Value of Student Evaluations of Professors*, CHRON. HIGHER EDUC., Jan. 16, 1998, available at <http://chronicle.com/colloquy/98/evaluation/background.htm> (on file with the North Carolina Law Review).

82. These have been referred to as "lite" versions of the courses. "The manner of presentation was spiced up for the TV generation." GLENDON, *supra* note 42, at 202; see also Philip C. Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251, 273-74 (1986) (claiming that student evaluations reward those who spoon feed and discourage teaching analytical skills).

Reports of studies of teaching evaluations at the undergraduate level "say professors who want high ratings have learned that they must dumb down material, inflate grades, and keep students entertained." Wilson, *supra* note 81.

83. Professor Glendon relates that a *Wall Street Journal* article reported on professors hiring professional joke writers in an effort to improve their student evaluations. GLENDON, *supra* note 42, at 202.

84. See ROSOVSKY & HARTLEY, *supra* note 65, at 9-10.

85. See Lloyd, *supra* note 76, at 551-52. Eighty years earlier, Thorstein Veblen discussed the same problem from a slightly different perspective. He saw universities as setting up course requirements and grades in order to coerce performance from "a large body of students, many of whom have little abiding interest in their academic work, beyond the academic credits necessary to be accumulated for honourable discharge—indeed their scholastic interest may fairly be said to centre in unearned credits." THORSTEIN VEBLEN, *THE HIGHER LEARNING IN AMERICA* 103 (1918).

challenging courses because they think what they learn will be useful in practice.<sup>86</sup> Nevertheless the best-credential-for-the-least-effort model approximates reality far better than the conventional model, and as long as administrators base their decisions on the conventional model, they are going to encourage faculty to make courses less challenging.

The primary brake keeping this system from going out of control is the bar exam. In most states, the bar exam tests heavily on subjects like commercial law, evidence and business associations.<sup>87</sup> For many students, the need to take these courses for the bar exam is all that makes them improve their analytical skills after they make it through the first year. Ironically, the traditional bar exam is under attack on the ground that it does not test real-world skills.<sup>88</sup> The truth is that

86. In fairness, I should point out that many more students would fill their schedules with intellectually challenging courses were it not for the fact that their future opportunities are so dependent upon their class ranks. Even students who want to get the best possible education are under pressure to take Soft courses to remain competitive.

87. A study of recent Texas bar examinations posted on the St. Mary's University website lists the law school courses most heavily tested on the Texas Bar Examination. Evidence is listed as the most tested subject, comprising 8.5% of the examination. Business Associations is tied for third place with 6.66%. Sales and Secured Transactions is listed as comprising 3.33%, as is Commercial Paper. If the two courses were combined into Commercial Law, as they are at many schools, that course would also be tied for third place with 6.66%. *Relationship of Courses to the Texas Bar Examination*, <http://www.stmarytx.edu/law/docs/RelofCourses.pdf> (last visited Feb. 5, 2005) (on file with the North Carolina Law Review). My own review of forty-eight Tennessee essay questions asked on the last four bar examinations reprinted in the most recent Tennessee bar review publication showed that ten questions were based entirely or in substantial part on material normally covered in Commercial Law courses and eight were based entirely or in substantial part on material covered in Business Associations courses. Other states' exams appear to be similar. See, e.g., *Georgia National Bar Examination Information*, [http://www.lexisone.com/legalresearch/legalguide/bar\\_association\\_resources/state\\_bar\\_exams/georgia\\_bar\\_exam.htm](http://www.lexisone.com/legalresearch/legalguide/bar_association_resources/state_bar_exams/georgia_bar_exam.htm) (last visited Feb. 5, 2005) (listing Evidence and Sales as subjects tested on the Multi-State Bar Examination and listing as subjects covered on the Georgia essay examination three Commercial Law subjects (Commercial Paper, Secured Transactions, and Sales) and three Business Associations subjects (Agency, Partnerships, and Corporations) as well as all multi-state subjects) (on file with the North Carolina Law Review); *New York National Bar Examination Information*, [http://www.lexisone.com/legalresearch/legalguide/bar\\_association\\_resources/state\\_bar\\_exams/new\\_york\\_bar\\_exam.htm](http://www.lexisone.com/legalresearch/legalguide/bar_association_resources/state_bar_exams/new_york_bar_exam.htm) (last visited Feb. 5, 2005) (listing Evidence and Sales as subjects tested on the Multi-State Bar Examination and listing as subjects covered on the New York essay examination two Commercial Law subjects (Commercial Paper and Secured Transactions) and three Business Associations subjects (Agency, Partnership, and Corporations) as well as New York distinctions for all multi-state subjects) (on file with the North Carolina Law Review).

88. According to one law school dean, "the [bar] examination is both misguided in what it purports to do, and pernicious in its effects." See Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 349 (2003); see also Andrea A. Curcio, *A Better Bar: Why and How the Existing*

for many law students the bar exam is the only thing that makes them learn what they need to know in order to practice law in the real world.<sup>89</sup> Unfortunately, however, there is no guarantee that courses on bar-tested subjects will require students to analyze cases and problems rather than merely memorize rules. While professors who teach these subjects are not under pressure to keep course enrollments up, they still have to be concerned about student evaluations.

Another factor working to Harden law schools is the often-maligned<sup>90</sup> *U.S. News* rankings of law schools. Although school administrators claim the ratings are irrelevant<sup>91</sup> (all the time working like Enron executives to make their numbers look better),<sup>92</sup> the fact

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*Bar Exam Should Change*, 81 NEB. L. REV. 363, 364–65 (2002) (noting that a number of skills required to practice law are not tested for on bar examinations); Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 28–29 (1995) (arguing against the discriminatory nature of the bar examination); Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 930 (1997) (collecting critiques of the bar examination); *Society of American Law Teachers Statement on the Bar Exam, July 2002*, 52 J. LEGAL EDUC. 446, 446 (2002) (asserting that bar examinations fail to measure professional competence).

89. As one experienced law teacher and administrator put it: “[B]ar examiners do effective and critical jobs of protecting the public from graduates who have not mastered the basics necessary to practice law.” Day, *supra* note 77, at 324. Professor Day goes on to say: “Law school educators have not been guardians of the public interest. Indeed, most do not see their charge as that—they leave it up to the bar examiners. Law school faculty know that it is almost impossible to flunk out of most law schools.” *Id.* at 332.

90. An article in the *ABA Journal* said the opposition to the rankings has “taken on the force of a jihad.” Terry Carter, *Ranked by the Rankings*, A.B.A. J., Mar. 1998, at 46.

91. More than ninety percent of the deans of ABA accredited law schools have signed a letter denouncing the rankings. Nicholas Thompson, *The Best, The Top, The Most*, N.Y. TIMES, Aug. 3, 2003, at 4A-24.

92. Under the heading “Cooking the Books to Get Ahead,” a reporter for the *ABA Journal* revealed a “little-noted scandal in which a number of law schools gave inflated figures to *U.S. News* that differed from those they submitted to the ABA’s accrediting offices.” Carter, *supra* note 90, at 50 (emphasis added). The article also reports that one law school publicized the fact that it had moved up a tier in the rankings when in fact there had been no substantive change in that particular school’s data, but only a change in the way the rankings grouped the schools. *Id.* at 48.

The shenanigans are not limited to law schools. In one poll, seven percent of university presidents admitted deliberately downgrading competing institutions when rating them for *U.S. News*. Thompson, *supra* note 91. Moreover, the *U.S. News* survey is not the only survey in which schools attempt to manipulate their rankings. After one college was listed in the Princeton Review survey as one of the twenty colleges with the least religious activity, its president sent an email to deans suggesting they encourage students to respond to the next survey with statements that they pray frequently. *See id.*

Attempting to make things look better than they are is of course not a new phenomenon. In 1918, Thorstein Veblen wrote:

Under existing circumstances of rivalry among these institutions of learning, there is need of much shrewd management to make all the available forces of the

remains that the ratings provide the primary incentive for schools to make their students and faculty accountable. The effect of the rankings goes far beyond administrators' egos.<sup>93</sup> Administrators know that the rankings are a key factor in students' choices of law schools and that schools which drop in the rankings will see a decline in the number and quality of their applicants. Rankings can also affect the job prospects of the schools' graduates.<sup>94</sup>

Just as competition Hardened American business<sup>95</sup> and Vietnam Hardened the armed forces,<sup>96</sup> the rankings have the potential to Harden law schools. Already, some law schools have started to impose discipline that would otherwise be unthinkable. Schools with low bar passage rates have been willing to flunk out students who show they cannot perform in law school.<sup>97</sup> Other schools have been willing to push students into more demanding courses to increase bar passage rates and to give merit-based financial aid to attract better students.<sup>98</sup>

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establishment count toward the competitive end; and in this composition it is the part of worldly wisdom to see that appearances may often be of graver consequence than achievement—as is true in all competitive business that addresses its appeal to a large and scattered body of customers.

VEBLEN, *supra* note 85, at 105.

93. The *New York Times* quoted former University of Pittsburgh law school Dean Peter Shane as saying that the school's fall in the rankings one year and rise the next "was treated as an enormous crisis, and then an enormous victory." Thompson, *supra* note 91.

Although there appears to be no reported instance of anything similar occurring at the law school level, the trustees of Virginia Commonwealth University have promised the university president a \$25,000 raise if the university moves up a tier in the *U.S. News* rankings. *Id.*

94. One study indicated that the average first-tier law school had nearly four times as many employer members of the National Association of Law Placement ("NALP") recruiting on campus as the average second-tier school. Third-tier schools had three times as many NALP recruiters as fourth-tier schools. Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 *TEX. L. REV.* 403, 411 (1998).

Recruiters who recruit at business schools openly admit that they choose the schools at which they will recruit on the basis of the rankings in various national publications. See Thomas Lee, *Olin School's Dean Presses for Prestige*, *ST. LOUIS POST-DISPATCH*, Oct. 20, 2002, at E1.

95. See BARONE, *supra* note 1, at 76–94.

96. See *id.* at 132–41.

97. Chris Day has recommended that law schools "bite the bullet" and flunk out students who are unlikely to pass the bar. He recommends this not because it will help the schools' rankings, but because it is the best thing for students—delivering the message early before they spend more time and money pursuing a career for which they are unsuited. Day, *supra* note 77, at 347.

98. See Thompson, *supra* note 91. Anecdotal evidence indicates that most schools are steering students into courses tested heavily on the bar exam through informal counseling, while a few are simply increasing the number of required courses. Chris Day has urged

So far, however, no law school seems to have taken the aggressive approach that some undergraduate institutions have taken. Many undergraduate programs have cut back significantly on need-based financial aid in order to devote large amounts of money to attracting top students with merit-based scholarships.<sup>99</sup> By doing so, they have created a stronger core of students and the opportunity to give them a more rigorous education.<sup>100</sup> One survey showed that over a period of seven years the amount of money devoted to merit scholarships at the nation's four-year colleges and universities increased by 152%, while the amount devoted to need-based grants rose by fifty-nine percent, only slightly more than the increases in tuition.<sup>101</sup>

While the rankings and the bar exam will have their effects, it is market forces that in the long run are most likely to Harden legal education. The present situation offers a great opportunity, and some enterprising school is likely to seize that opportunity before too many years pass. If a school were to adopt higher standards and develop a reputation for turning out graduates willing and able to perform at the level law firms demand, the school's graduates would fare well in the job market. That, in turn, would allow the school to attract better applicants and thereby to toughen its standards even more. The school's success would cause other schools to toughen their standards in the same way New York's success against crime forced other cities to Harden their law enforcement programs.<sup>102</sup>

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schools to encourage their students to take these courses so that the students will not risk the personal consequences of failing the bar exam. Day, *supra* note 77, at 343.

99. Stuart Silverstein, *Ivy League Gets a Run for Its Money on Top Seniors*, L.A. TIMES, May 11, 2004, at A1.

100. *See id.*

101. *See id.*; Marcella Bombardieri, *Needy Students Miss Out*, BOSTON GLOBE, Apr. 25, 2004, at A1 (reporting that during the same period tuition and fees rose fifty percent). Schools have also offered some unusual perks to attract good students, including guaranteed admission to medical school (subject to meeting certain academic requirements) and guaranteed parking. Silverstein, *supra* note 99.

An attractive byproduct of the competition for top students is that students who excel in academics are beginning to get a little of the attention formerly reserved for athletes. Ironically, some people are criticizing the efforts to use merit-based scholarships to attract good students, *see* Silverstein, *supra* note 99, and many of the critics are faculty and administrators at other universities—universities that spend millions of dollars in scholarship money trying to attract the best athletes.

102. *See* BARONE, *supra* note 1, at 101 (noting that voters in other cities demanded results similar to those in New York). It might be that no traditional law school within striking distance of the top tier could muster the consensus necessary to effect such a dramatic change. Anecdotal evidence indicates that many law deans are aware of the need to Harden their programs but are unable to overcome faculty resistance. For an example of such a call for Hardening by a law school dean, *see* generally Donald J.

A less desirable effect of market forces would be corporations and law firms outsourcing more work to India and elsewhere. This has already begun on a small scale. General Electric Corporation estimates that its small legal department in India has saved GE more than \$2 million in legal fees that would otherwise have gone to American lawyers.<sup>103</sup> There are at least two companies in business for the express purpose of providing Indian outsourcing for American law firms.<sup>104</sup> One of these companies is headed by an Indian national who was formerly a partner in a large law firm in the United States.<sup>105</sup> A market research firm has predicted that by 2015, more than 489,000 American lawyer jobs will have moved abroad.<sup>106</sup> Another consultant estimates that twenty to twenty-five percent of all American legal work could shift abroad.<sup>107</sup> Some of this may be inevitable, simply because of the cost differential, but if foreign lawyers prove themselves to have better skills than American lawyers, the trend is sure to accelerate.<sup>108</sup>

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Weidner, *The Crises of Legal Education: A Wake-Up Call for Faculty*, 47 J. LEGAL EDUC. 92, 95-103 (1997). But there will be no faculty governance issues to impede the high quality proprietary law schools which are sure to spring up when the American Bar Association is finally forced to abandon its antiquated rules on distance education. These institutions may be what ultimately breaks the cycle of Softening in American law schools.

103. Jennifer Fried, *Law Departments Cut Costs By Sending Patent Work Abroad*, PAT. STRATEGY & MGMT., Feb. 16, 2004, at 5.

104. Websites for the companies are available at <http://www.mindcrest.com> (last visited Feb. 7, 2005) (on file with the North Carolina Law Review) and <http://www.lexadigm.com> (last visited Feb. 7, 2005) (on file with the North Carolina Law Review).

105. Ganesh Natarajan, President and CEO of Mindcrest, Inc. was formerly a partner in McGuireWoods LLP. He holds a Bachelors degree from the University of Bombay, an M.B.A. from Brigham Young and a J.D. from Washington University in St. Louis. See <http://www.mindcrest.com/who.html> (last visited Feb. 7, 2005) (on file with the North Carolina Law Review).

106. Jennifer Fried, *Foreign Outside Counsel: Law Departments Cut Costs By Sending Work Abroad*, N.Y. L.J., Jan. 22, 2004, at 5. *Business Week* is more conservative, estimating that 14,000 legal jobs will move offshore in 2005 and that the total moved offshore will reach 75,000 in 2015. See *LOMAR News Briefs*, LAW OFFICE MGMT. & ADMIN. REP., May, 2003, at 8. Even these numbers, however, will have a huge impact. Accredited law schools in the United States graduate an average of almost 40,000 students a year, so 75,000 jobs represents almost two years' production of law graduates. See *J.D. Degrees 1984-2002*, <http://www.abanet.org/legaled/statistics/jd.html> (last visited Feb. 12, 2005) (on file with the North Carolina Law Review).

107. Geanne Rosenberg, *Offshore Legal Work Continues to Make Gains; Ethics and Malpractice are Among the Key Issues that May Arise in Outsourcing*, NAT'L L.J., Mar. 29, 2004, at S3.

108. A *Wall Street Journal* article reported that German companies, long respected for their engineering prowess, have begun sending engineering work to China. The article lays part of the blame on the "lagging German education system." Matthew Karnitschnig, *Vaunted German Engineers Face Competition from China*, WALL ST. J., July 15, 2004, at A1.



Barone explains how businesses and many governmental institutions reacted to similar threats by Hardening themselves. It remains a question whether law schools will do the same. Much as they try to insulate themselves, law schools are part of a market economy, and they are being drawn deeper into it. In one of the most quoted passages in economics literature, Joseph Schumpeter says:

Capitalism . . . is by nature a form or method of economic change and not only never is but never can be stationary. . . . The fundamental impulse that sets and keeps the capitalist engine in motion comes from the new consumers' goods, the new methods of production or transportation, the new markets, the new forms of industrial organization that capitalist enterprise creates.

. . . This process of Creative Destruction is the essential fact about capitalism. It is what capitalism consists in and what every capitalist concern has got to live in.<sup>109</sup>

The practice of law has evolved. Most of us wish it had not evolved in the way it has,<sup>110</sup> but we do not have the luxury of ignoring reality. If law schools fail to evolve to meet the needs of current legal practice reality, new forms of institutions will evolve to replace us. It remains to be seen whether some entrepreneurial law school will take the lead in transforming the way we go about our business, as Harvard did in the 1880s,<sup>111</sup> or whether American law schools will continue their slide into insignificance.<sup>112</sup>

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109. SCHUMPETER, *supra* note 23, at 82–83.

110. Not everyone agrees that the changes have been for the worse. According to Richard Posner, “The increase in competition has forced lawyers to serve their clients better and so to rely less on mystique and more on specialized knowledge that has genuine value to the client.” See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 191 (1999).

111. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, 35–42 (1983); Anthony Chase, *The Birth of the Modern Law School*, 23 *AM. J. LEGAL HIST.* 329, 332 (1979); cf. Daly, *supra* note 75, at 482–83 (predicting that competition from online institutions will require law schools to make drastic curricular changes).

112. For an iconoclastic comparison of the decline of the mystique and professionalism of the legal profession to the decline of the medieval guilds, see generally Richard A. Posner, *The Material Basis of Jurisprudence*, 69 *IND. L.J.* 1 (1993).