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THE DECLINE OF LAW SCHOOL PROFESSIONALISM

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History thrives in measure as the experience of each historian differs from that of his fellows. It is indeed the wide and varied range of experience covered by all the days of all historians that makes the rewriting of history—not in each generation but for each historian—at once necessary and inevitable.

—J. Hexter, *Reappraisals in History*

INTRODUCTION

Let us think of the law school as a professional community. As

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members of this community, law professors and their students share a common set of values, methods, and attitudes about how the study of law should be conducted.¹ Although this is a relatively accurate description of the way American law schools have operated throughout most of the twentieth century,² today this professional community is in decline. Structural changes within the law school combined with several external factors are eroding our traditional sense of common methods and common values, and this erosion has important implications for the future study and practice of law. Already, law teachers are losing some of their traditional cultural authority to private law firms, university bureaucracies, other academic disciplines, and even their students.³ New,

¹ See Goode, *Community within a Community: The Professions*, 22 AM. SOC. REV. 194 (1957). One could think of the law school from other perspectives, of course, and this would yield different conclusions. These other perspectives might include looking at the law school as an economic enterprise, as an organization of competing interest groups, or as an agent of the legal profession. See, e.g., Ackerman, *The Marketplace of Ideas*, 90 YALE L.J. 1131 (1981) (an economic model of legal scholarship); First, *Competition in the Legal Education Industry (II): An Antitrust Analysis*, 54 N.Y.U. L. REV. 1049 (1979) (an economic model of legal education); First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311 (1978) (an economic history of legal education); Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695, 931-51 (an interest group model of law schools); *Final Report of the Advisory Committee on Proposed Rules for Admission to Practice*, 67 F.R.D. 159 (1975) (proposing rules for law school courses that the Committee believed would improve lawyers' trial advocacy skills). Furthermore, sociologists have developed various models of professional education that may yield conflicting conclusions when applied to law school practices. See M. LARSON, *THE RISE OF PROFESSIONALISM* 166-77 (1977); Atkinson, *The Reproduction of the Professional Community*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* 224, 224-34 (R. Dingwall & P. Lewis eds. 1983). These models include a "functionalist" model, which focuses on the internalization of professional values by professional trainees, see M. LARSON, *supra*, at 166; Atkinson, *supra*, at 224-26; a "symbolic interaction" model, which views professional education as less unusual and more conflict-ridden than the functional model—as more a matter of learning by getting along, of hidden curricula, and of separate faculty and student cultures, see Atkinson, *supra*, at 226-29; and a "Marxist" model, which emphasizes the role of professional education in defining a distinct service that can be sold in capitalist markets, see M. LARSON, *supra*, at 9-10. Rather than choosing one model, I will borrow from whichever model seems appropriate to the feature of legal education under discussion. For example, the notion of a common set of values, methods, and attitudes shared by law professors and their students is consistent with both the functionalist and Marxist models of professional education, see *id.* at 9-10, 166; Goode, *supra*. Although the symbolic interaction model suggests less commonality within the law school community than do the other models, the common values and attitudes that I shall focus on in this essay need not be defined with much specificity.

² See R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* 20-247 (1983) (describing the development of American law schools).

³ Cf. P. STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* (1982) (In recent decades, American physicians have been losing their economic independence and cultural authority to the state, the private drug industry, health insurance carriers, and hospitals.); Starr, *Medicine and the Waning of Professional Sovereignty*,

formal controls over law faculty and students are being substituted for older, less formal methods of professional self-regulation. These new controls are reallocating power within law faculties and, more importantly, influencing the way in which law professors and students perform their daily work.⁴ At the same time, this combination of external and internal changes is promoting a new diversity in teaching methods and legal scholarship, a diversity that is also influencing the way in which law professors and their students perform.

The purpose of this Article is to explore the nature and consequences of the changing social structure of the contemporary American law school. The decline of law school professionalism and the gradual abandonment of traditional values that have long characterized American legal education have created a void for new values and traditions to fill. It is up to those of us in the law school community to decide which new values and traditions legal education will adopt. So far, the immediate consequences of the decline of law school professionalism include a new emphasis on formalism in many law schools, subtle shifts of power within these schools, a transfer of power from law schools to external organizations, and—in contrast to these developments—a new pluralism of methods and values both in the classroom and in legal scholarship. Ultimately, either a “new formalism” or an intellectual and methodological “pluralism” (or some combination of the two) will emerge as the new pattern in legal education.

This Article will explore the various changes in the structure of law schools that are promoting the “new formalism” in legal scholarship and teaching. The new formalism places an excessive emphasis on two related phenomena: the clear demonstration of “right answers” in legal analysis; and the limitation of legal analysis to conventional legal forms, such as “the relevant facts,” the express language of judicial opinions, the individual terms in statutory texts, and the express language of committee reports, legislative debates, and other evidence of “legislative history.” Superficially, this formalism is not unlike the legal formalism of the late nineteenth and early twentieth centuries. The new formalism differs, however, in that it is based more on social structure than on a coherent or widely accepted theory of law.⁵ This new

107 DAEDALUS 175 (1978) (same).

⁴ See generally Freidson, *The Changing Nature of Professional Control*, 10 ANN. REV. SOC. 1 (1984) (Contemporary professions have developed formal methods of professional self-regulation that have the consequence of reallocating power within these professions.).

⁵ For discussions of legal formalism in the late 19th century, see M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 253-66 (1977); Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nine-*

formalism, therefore, is more subtle and perhaps more deeply entrenched in our law school practices than the earlier versions of legal formalism.

At the same time, the dominant ideology of the traditional law school community is fraying at the edges. This development makes it more probable that some desirable reformations in law school methods, legal theory, and legal practice may actually take place. These reformations could move legal inquiry beyond formalism—and even beyond legal realism—toward a more contextual and more critical study and practice of law. Significant expansion of clinical training and a greater emphasis on history, the social sciences, and legal theory in traditional law school curricula and scholarship would be effective first steps to take in developing a more contextual and more socially responsive legal education.

This Article is primarily descriptive and interpretive, and will not attempt to determine the ultimate effects of these two contradictory tendencies; I shall try instead to document their presence and to specify the considerable and varied opportunities that they offer for change in law school methods, legal theory, and even legal practice. There is, however, a normative theme that runs throughout these pages. I believe that the study and practice of law would be improved by a more contextual approach to legal education, an approach that places a greater emphasis on both the application of law to concrete situations and the understanding of how law serves or fails to serve conflicting social values. This approach would improve professional education by initiating future practitioners into the uncertainties, complexities, and value conflicts of the "practice situation."⁶ It would also promote a legal system that is more self-consciously "responsive to social needs."⁷ In my view, the erosion of traditional law school values and the development of a pluralistic approach to legal education provide an invaluable opportunity for the widespread establishment of a more contextual and more critical approach to legal studies. On the other hand, the retention of traditional practices and the entrenchment of a new formalism in law schools will tend to retard or defeat the values of any contextual approach. Given this rather complex situation, I shall not advocate a

teenth Century America, 87 HARV. L. REV. 513, 547-66 (1974); Note, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CALIF. L. REV. 119 (1985).

⁶ See generally D. SCHON, *THE REFLECTIVE PRACTITIONER* 14-18 (1982) (Uncertainty, complexity, and value conflicts pervade the practice situation of all professionals.).

⁷ Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORNELL L.Q. 568, 586 (1932). See generally P. NONET & P. SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* (1978).

revolution in educational practices but rather urge that a richer, more diverse, and more critical inquiry could be achieved within the walls of most American law schools through the integration of several curricular, attitudinal, and philosophical changes.⁸

Part I of the Article discusses "law school professionalism," a concept that will be useful in presenting both the traditional ideas and beliefs of the law school community and the common methods and values of law teaching. Parts II and III consider the changes that are occurring in American law schools and the impact of these changes on law school methods and legal theory. Part IV outlines some steps that might be taken to respond to several problems that are related to the decline in law school professionalism. These issues deserve recognition and remedy by individuals who are a part of the law school process and by any organization—say a law school administration, university, or bar association—that is concerned about the quality of legal education. These problems, often attributed to different and separate causes, can usefully be explained and in some cases mitigated by treating them as

⁸ See generally Reich, *Toward the Humanistic Study of Law*, 74 YALE L.J. 1402 (1965) (arguing that legal education must change as society changes); Note, *Legal Theory and Legal Education*, 79 YALE L.J. 1153, 1155 (1970) (stating that a proper legal education should address contemporary social problems). I should note at this point several other perspectives that may influence (or bias) my study of law school methods. First, I have taught mostly at what one of my colleagues once called a "great regional" (as in "varietal") law school, and the tendencies that I perceive in American legal education may be emphasized or manifested differently at other types of schools. Second, in previous articles I have displayed considerable skepticism about the alleged values of "professionalism" in other kinds of professional work. See, e.g., Kissam, *Antitrust Law and Professional Behavior*, 62 TEX. L. REV. 1, 5 (1983). Third, I have an admitted predilection for "theoretical" or "philosophical" approaches to the law, in both the classroom and my scholarship. See, e.g., Kissam, *Antitrust Boycott Doctrine*, 69 IOWA L. REV. 1165, 1167 (1984); Kissam, *Antitrust Law and Professional Behavior*, *supra*. Fourth, I teach and write in the areas of antitrust and constitutional law, subjects that are notably open-ended and perhaps especially suited to the kinds of interdisciplinary and advocacy-oriented inquiry that I shall emphasize in these pages. Finally, I have never been very pleased with student assessments of my teaching as measured by formal student evaluations. This condition of apparent unpopularity places me, I suppose, in one or more of three categories. One is that of the teacher in "the middle ranges of performance" who strives to be a "tough, demanding" teacher in terms of student work. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 332 (1982). A second category is that of the teacher who works with open-ended, policy-oriented subjects that arguably do not satisfy the taste of many law students for doctrinal formalism. See Schlegel, *Searching for Archimedes—Legal Education, Legal Scholarship, and Liberal Ideology*, 34 J. LEGAL EDUC. 103, 108 (1984) ("Take any group of middle-class, first-year law students and try any other approach than a doctrinal, rule-focused one. They hate the alternatives because the alternatives undercut the notion of law as specialized knowledge available only to, and for sale by, the professional lawyer.") (emphasis added). A third category, of course, is that of the teacher who is inadequate—or at least not sufficiently democratic or patient to communicate effectively with most students.

the more-or-less integrated consequences of a decline in law school professionalism.

I. LAW SCHOOL PROFESSIONALISM

"Professionalism" refers to a related set of values, ideas, and attitudes shared by a group of professionals that distinguishes the group from other professionals as well as lay persons.⁹ These values, ideas, and attitudes need not be well defined, nor need they be empirically accurate descriptions of what a professional group actually does in practice. However, any set of professionalism values will be widely held by a professional group and is likely to influence the individual and collective behavior of the group.

Since at least 1870 and Langdell's reign at Harvard, American law professors have exhibited a distinctive set of values, ideas, and attitudes that define them as a separate group or sub-group of professionals.¹⁰ This professionalism, which derives much of its strength from the notion of law as a unique "science," has three primary components. First, if law is a science, then the law professor has the special responsibility of initiating students into the science of law and teaching them the skills of "analysis and synthesis" on which the science is based. Second, in order to accomplish this special training function successfully, the law professor must be among the best "legal scientists" or "legal experts." Third, because of her expertise and her role as the trainer of future lawyers, the law professor must adopt the role of the ideal judge.

Training in the science of law primarily involves two operations.

⁹ See E. FREIDSON, *PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE* 151-56 (1970).

¹⁰ The following analysis of law school professionalism since the time of Langdell draws especially on Robert Stevens' recent history of American legal education, see R. STEVENS, *supra* note 2, and Calvin Woodard's earlier intellectual history of American legal education, see Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689 (1968); see also Schlegel, *supra* note 8 (explaining the current "standstill" in legal education and scholarship as the result of the "professional identity" of law professors and a "deep cultural commitment to the ideology of the rule of law"); Woodard, *Justice Through Law—Historical Dimensions of the American Law School*, 34 J. LEGAL EDUC. 345 (1984) (examining the case method in the context of the social and legal history of American society). The attitudes and practices of law school professionalism have earlier historical antecedents, perhaps important ones, but for the purposes of this paper, it does not seem necessary to push the analysis back prior to 1870. For a discussion of these antecedents, see Currie, *The Materials of Law Study*, 3 J. LEGAL EDUC. 331, 341-83 (1951); Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 70 (G. Geison ed. 1983); McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U.L.Q. 597 (1981).

First, the students must be trained in the careful, precise reading and analysis of judicial opinions and statutes, facilitating the reduction of cases and statutes into component parts much as chemical substances are analyzed and reduced in the laboratory.¹¹ Second, legal rules must be synthesized from numerous cases or other legal authorities and subsequently applied to concrete situations, an operation similar to the synthesis of chemical substances.¹² Mastery of these operations by students is considered necessary to the development of their capacity for "critical thinking"—that is, their ability to construct authoritative legal standards independently and to criticize alternative formulations of such standards from a vantage point that lies outside the express language of judicial opinions and other legal texts.

Training in legal analysis and synthesis has been implemented through a variety of teaching methods consisting primarily of subtle yet significant variations on the "case method."¹³ The purposes and theories of legal training through the case method have varied considerably over time and among law schools. At Harvard, Langdell promoted training in case analysis and synthesis in order to subject legal doctrines to a "scientific inquiry" that would disclose their "conceptual order."¹⁴ His successors at Harvard, especially Ames and Keeler, promoted the case method for the rather different purpose of training lawyers in the instrumental skills of courtroom advocacy.¹⁵ More recently, the influence of the legal realist movement on legal education has encouraged many professors to adapt the general notions of legal analysis and synthesis to the broader purpose of training students more generally in "legal" or "social" problem solving.¹⁶ Notwithstanding this variety of

¹¹ See, e.g., K. LLEWELLYN, *THE BRAMBLE BUSH* 55-57 (1930) (discussing the technique of case briefing used by law students).

¹² See *id.* at 49-51. Strictly speaking, lawyers typically distinguish between "synthesis"—the process of extracting a general and consistent rule from a line of decided cases—and "application"—the process of arguing from some rule to a legal conclusion in a specific dispute. For the purpose of defining major professionalism values in law school practices, however, this distinction is unimportant.

¹³ See generally R. STEVENS, *supra* note 2, at 51-64 (describing the origins of the case method); Morgan, *The Case Method*, 4 J. LEGAL EDUC. 379 (1952) (describing the type of legal instruction required by the case method).

¹⁴ For discussions of Langdell's notions of law as science, see L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 531-37 (1973); R. STEVENS, *supra* note 2, at 52-54; Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1 (1980).

¹⁵ See R. STEVENS, *supra* note 2, at 54-57.

¹⁶ See Goldstein, *The Unfulfilled Promise of Legal Education*, in *LAW IN CHANGING AMERICA* 157 (G. Hazard ed. 1968) (arguing for increased lawyer specialization and more narrow role definition in order to accomplish the goals of legal realism); Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211

theories, goals, and methods, it remains fair to say that American law professors have concerned themselves primarily with training their students in something that may appropriately be called the analysis and synthesis of legal doctrine.¹⁷

The second component of law school professionalism is the ideal that only the best "legal scientists" or "legal experts" are qualified to execute the special training function. This ideal, first promoted by Langdell in his recruitment of new faculty at Harvard, was an essential part of his plan to transform law into a scientific search for conceptual order.¹⁸ Since Langdell saw scientific inquiry as a new methodology to which all lawyers must be converted, he naturally wanted to have the best scientists available to implement this conversion. Today, we have largely abandoned Langdell's theory of a scientific order in law, and thus the notion that law professors should be among the best legal experts may seem rather strange. After all, the function of law schools is to train beginners or generalists in the law; the professional specialist develops the specific knowledge and skills of her specialty only after years of practice and on-the-job training.¹⁹ Yet the ideal of the law professor as the best legal expert remains in force to this day. Loyalty to this ideal is demonstrated by the emphasis that faculty recruitment committees place on a candidate's law school grades, law review membership, judicial clerkship experience, and prestige of both the law school she attended and the law firms at which she worked.²⁰

The ideal of the law professor as expert lawyer may be related to a more general professionalism value—that every professional owes the highest quality service to her client.²¹ The practicing bar's fealty to the ideal of highest quality service may explain the continuing vitality of the highest expertise value in the legal academy. The bar today is trained by law professors and may feel that its credibility as the pur-

(1948) (advocating a broader approach to legal education that would supplement the case method); Morgan, *supra* note 13, at 385-87 (advocating use of the case method to help teach legal advocacy and problem solving).

¹⁷ See Schlegel, *supra* note 8, at 103-09.

¹⁸ See R. STEVENS, *supra* note 2, at 38-39. Perhaps these two operations should be collapsed into a more general and more sophisticated notion of legal training as training in the "skill of advocacy." See Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 959 (1981).

¹⁹ See generally D. SCHON, *supra* note 6 (The best practitioners in various professions develop their skills through continual reflection about the uncertainties, complexity, and value conflicts that confront them in practice situations.).

²⁰ See Fossum, *Law Professors: A Profile of the Teaching Branch of the Profession*, 1980 AM. B. FOUND. RESEARCH J. 501, 507, 527-28; Zenoff & Barron, *So You Want to Hire a Law Professor?*, 33 J. LEGAL EDUC. 492, 495, 504 (1983).

²¹ On this more general professionalism value, see E. FREIDSON, *supra* note 9, at 152; T. PARSONS, *THE SOCIAL SYSTEM* 428-79 (1951).

veyor of high quality legal services depends on the legal academy's reputation as the purveyor of high quality legal training. Conversely, law professors are also lawyers, sometimes practicing ones, who probably are quite capable of transferring the practitioner's ideal of highest quality service to clients into the educational setting.

The third basic component of traditional law school professionalism is the law professor's role as an ideal judge, positioned by reason of her expertise to deliver judgment on the correctness of past judicial decisions and on the resolution of future issues. This ideal is manifest in the common use of classroom dialogue to "lead" students to "correct answers" in understanding and applying legal rules, as well as in the traditional forms of doctrinal scholarship done by most law school professors.²² The ideal is also manifest in the traditional law school examination, which typically requires the professor to establish multifarious grade distinctions based on the "right answers" to apparently open or complex problems.²³ This ideal is perhaps most manifest when, as detached and reflective observers of the judicial process, law professors demonstrate wisdom and foresight that those on the bench apparently lack. Thus, the law professor frequently teaches legal doctrine by criticizing it; from the classroom podium, she elicits from students not only the actual holding and reasoning of the case under discussion, but also what, in her view, the holding and reasoning should have been.

Many law students share with the faculty the values of law school professionalism. The behavior of most of these students may change dramatically in practice; however, as long as they remain in school they have little choice but to emulate their faculty, at least in terms of the more rudimentary features of law school professionalism. For example, success in law school discussions and on examinations is generally predicated on a close reading of cases or statutes and the careful or quick application of narrow holdings or rules to new factual situations. Similarly, law review work induces (and generally forces) the student writer to assume the position of an ideal judge in writing a note or comment on a recent opinion.²⁴ Law students have not necessarily en-

²² On traditional classroom dialogue, see Rutter, *Designing and Teaching the First-Degree Law Curriculum*, 37 U. CIN. L. REV. 7, 26-36 (1968). On traditional doctrinal scholarship, see Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1113-19 (1981).

²³ See Cramton, *supra* note 8, at 328-30; Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1, 19-20 (1951). The "right answers" on law school examinations may take different forms, of course, including right results, right statements and applications of rules, or a right reasoning process.

²⁴ See, e.g., Note, *Unauthorized Conduct of State Officials Under the Fourteenth Amendment: Hudson v. Palmer and the Resurrection of Dead Doctrine*, 85 COLUM.

joyed their situation,²⁵ but they have generally, and understandably, acquiesced. Only recently have students forced law professors to question the value or validity of their work under the ideals of law school professionalism.²⁶

Law school professionalism influences, and is influenced by, not only specific law school practices and the expectations of professors and students, but also the broader social environment in which the law school functions. In particular, the values of law school professionalism have been determined by and support four of the primary goals or social functions of legal education in American society. These functions include the preparation of students to pass state licensing examinations; the preliminary screening and sorting of law students for prospective employers—a process that is implemented today primarily by the use of finely tuned class ranking systems; and the preparation of students to function effectively during the first years (or days) of their legal practice.²⁷ A fourth function is the inculcation of a special perspective, or perspectives, about the values to be adopted and methods to be followed by lawyers as they work at resolving legal or social disputes.²⁸

The first three functions of the American law school are surely well served by the values of law school professionalism and some related practices. The precise analysis of legal materials; the “Socratic” questioning of students about cases, other legal texts, and hypothetical problems; and law school examinations that demand the “correct” and rapid application of rules all help to ensure that students will acquire sufficient knowledge of the basic legal rules, as well as some limited skills of case analysis and synthesis, enabling them to pass bar examinations and function adequately in the first days of their practice.²⁹ In addition to testing the student’s mastery of rule knowledge, the typical

L. REV. 837 (1985); Note, *Abandonment of the Two-Pronged Aguilar-Spinelli Test: Illinois v. Gates*, 70 CORNELL L. REV. 316 (1985); Comment, *OCAW v. American Cyanamid: The Shrinking of the Occupational Safety and Health Act*, 133 U. PA. L. REV. 1167 (1985).

²⁵ See, e.g., R. STEVENS, *supra* note 2, at 137, 161, 234, 247, 268-69, 276-77.

²⁶ See, e.g., Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970) (a critique by law student Duncan Kennedy of legal education and the law school community).

²⁷ See R. STEVENS, *supra* note 2, at 155-63; see also D. JACKSON & E. GEE, *BREAD & BUTTER?: ELECTIVES IN AMERICAN LEGAL EDUCATION* 68-73 (1975) (Law students generally choose elective courses on the basis of their real or imagined advantage in preparing for a bar examination or building a record that will look good to prospective employers.).

²⁸ See, e.g., Kronman, *supra* note 18, at 955 (discussing “the role legal scholarship plays in the process of moral education that forms an indispensable part of the training law students receive”); Schlegel, *supra* note 8, at 105-09.

²⁹ On the limited nature and significance of case analysis and synthesis with regard to the practice of law, see K. LLEWELLYN, *supra* note 11, at 25-69.

law school examination—requiring a rapid application of rules to facts, like a jigsaw puzzle that can never be completed—allows for the easy application of multiple grading distinctions, thus supporting the apparently “objective” class ranking system that is essential to the law school’s sorting function.

The “special perspective” function of American law schools is more problematic. The values of law school professionalism, especially those of careful reading, precise analysis, and the highest level of expertise, surely must engender some common attitudes and methods among graduating students. Nevertheless, what these common attitudes and methods are cannot now be understood in precise fashion. Further, these attitudes and methods probably vary considerably among the graduates of different schools, influencing the practice of law in ways that remain unclear.³⁰

In addition, the focus of law school professionalism on a limited type of legal analysis may have unfortunate side effects on the perspectives developed by law students. Any appraisal of these effects will depend on the observer’s personal experience in the law, her professional and personal goals, and her political values. To some observers, the focus of traditional law school practices on a limited and formalistic analysis of appellate court opinions appears to be a dangerously misleading method for the training of competent practitioners.³¹ To others,

³⁰ See F. ZEMANS & V. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 165-71 (1981); Atkinson, *supra* note 1, at 236-39; Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551 (1973). In general, the limited resources and large classes of American law schools, the limiting perspective of a law school professionalism that concentrates on a rather narrow type of legal analysis, and the diverse and immediate social influences on contemporary legal practices suggest reasons to be skeptical about the ultimate impact of law school training on the methods and values of practicing lawyers. See K. LLEWELLYN, *supra* note 11, at 109-13, 156-64; Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612 (1984). The emphasis on the adversarial process in legal education may also substantially limit or skew the impact of contemporary legal training on the diverse methods and values of legal practices. See K. LLEWELLYN, *supra* note 11, at 107; Luban, *Epistemology and Moral Education*, 33 J. LEGAL EDUC. 636, 637 (1983); Van Valkenburg, *Law Teachers, Law Students, and Litigation*, 34 J. LEGAL EDUC. 584, 600-05 (1984). I realize that my ambivalence about the actual impact of law schools on the values and methods of practicing lawyers may seem to undercut my claims that a more contextual approach to legal education would improve both law school training and legal practice. It does in part, but I shall argue that certain improvements need to be made and could be effective, if not as a widespread social function, then at least as a function of the training and practice of individual lawyers, individual law students, and individual professors. Certainly there are individuals who are substantially and directly influenced by their training in professional schools and who carry these methods and values into their subsequent practice or scholarship. The ideas of these individuals could eventually influence many others.

³¹ See, e.g., Llewellyn, *supra* note 16.

this narrowing effect may have unfortunate political implications because a formalistic, rule-oriented teaching technique appears to support conservative values both by rejecting arguments for change that are based on nonformalistic sources and by encouraging acceptance of the lawyer's role in conservative, bureaucratic organizations.³² For yet others, the primary values of law school professionalism may appear to be entirely appropriate from either a technical or political point of view.³³ Thus, the special perspective function is both poorly defined and often a subject of deep contention. It is, however, an important function because of the influence that law schools may have on the quality of American law and legal practice; it is this function, above all, that justifies a concern with law school methods.

The specific content of the values of law school professionalism has certainly shifted over time, and this content has at times been the subject of controversy among members of the legal academy.³⁴ Nonetheless, the general values of law school professionalism have, at least until recently, been deeply entrenched within the law school community. I shall argue in parts II and III, however, that some changes in the social structure of American law schools are causing our practices to deviate from the ideals of law school professionalism—to such an extent, perhaps, that the values underlying law school professionalism themselves may be said to be eroding or in decline.

II. THE TRANSFORMATION OF THE LAW SCHOOL COMMUNITY

In this part of the Article, I shall describe several structural changes that are altering the nature of American law schools. Since these changes are based on several fundamental aspects of American culture and political economy, they are probably deep enough and permanent enough to support some predictions about their effects on law schools. Individually, and in the aggregate, these changes—coming from within and without the law schools—promise to alter the nature of law school professionalism and even to break it down altogether. Within the legal academy, new breeds of professor and student are altering the way the law is taught. In response to the growing complexity of legal

³² See, e.g., Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW* 40, 41 (D. Kairys ed. 1982) (arguing that law schools “train students to accept and participate in the hierarchical structure of life in the law”).

³³ See, e.g., Rutter, *supra* note 22, at 9-14.

³⁴ See, e.g., Currie, *The Materials of Law Study* (pt. 3), 8 *J. LEGAL EDUC.* 1 (1955) (describing the conflict at Columbia Law School in the late 1920's and early 30's over a proposal by some faculty to integrate legal studies with the study of the social sciences); Kennedy, *supra* note 26.

practice, faculties are also becoming increasingly specialized, and this tendency toward specialization is affecting law school methods in a number of ways. In addition, the faculty population, after tremendous expansion in the late 1960's and early 70's, must now face and react to reaching the limits of its growth. Changes in the character of the student body over the last twenty years have also had a mixed impact. First, the radicalism of the sixties and the employment anxieties of the eighties have placed demands on faculty that have further weakened the traditions of law school professionalism. Second, the demographics of law school faculty and, to a greater degree, of the student body, have changed dramatically in recent decades, as women and minorities have joined the legal enclave and worked to challenge the assumptions and traditions of what has long been a white male stronghold. Finally, the university bureaucracy, which has gained substantial power in recent decades, has demanded quantitative evaluations of faculty work, reinforcing certain trends toward formalism in the law schools. External forces—including, on the one hand, a popular mistrust that questions the competence and ethics of lawyers and, on the other hand, the demands of the twentieth-century phenomenon of law firm capitalism—have further affected legal education.

A. *Changes in the Faculty*

1. Faculty Specialization

American law has become extensive and complex in the twentieth century, making it necessary for legal practitioners to specialize. While not all lawyers are considered "specialists," most in fact limit their practices to no more than a small number of practice areas.³⁵ This division of labor within the complex American economy is not surprising, nor is the similar division of labor and expertise among law professors. If the practice of law is complex and compartmentalized, it may seem natural that legal education and law faculties should be similarly divided. Legal education is a professional education, after all, and law professors as teaching lawyers can certainly be expected to share the professional ideas and attitudes of practicing lawyers. Furthermore, the perceived need to prepare students to deal with the basic rules and language of the type of law they may practice on graduation could justify faculty specialization along the lines of law practice specialization. In

³⁵ See F. ZEMANS & V. ROSENBLUM, *supra* note 30, at 70-81; Nelson, *The Changing Structure of Opportunity: Recruitment and Careers in Large Law Firms*, 1983 AM. B. FOUND. RESEARCH J. 109, 127-40.

any event, the fact of significant law faculty specialization during the past few decades is well recognized.³⁶

This specialization is understandable in view of the law faculty's need to demonstrate the highest level of expertise to students, practitioners, and themselves, and their related need to do consulting work or produce scholarly articles and books that are of immediate usefulness to the legal profession. The increasing specialization of law faculties is also encouraged by other changes reflecting the contemporary influence of university bureaucracies and the private law firm on American legal education. However, the degree of specialization in law faculties that has occurred is neither logically nor practically necessary. As noted above, the special function of law schools is to train beginners in the law, not to create specialized experts. Some specialization in law faculties is undoubtedly useful, but the extreme degree of specialization that reflects the contemporary division of labor in American law practice is not essential for teaching the new languages of legal analysis and legal argument to beginners. The professional training of fledgling lawyers should emphasize uncertainty, value conflict, and the practice of applying general legal standards to complex circumstances, not the "coverage" of rules in various legal specialties.³⁷

Like all changes in the character of the modern American law school, the rise in faculty specialization has had both positive and negative consequences. At a minimum, fragmentation along disciplinary lines diminishes the degree of substantive and methodological cohesion in the work of any legal faculty. Professors are more likely to share the professionalism values held by lawyers practicing in their substantive specialties than those held by their law school colleagues. This diminution of shared assumptions and common practices leads to a breakdown in law school professionalism. The response to this breakdown can be either the proliferation of new and unusual teaching methods or an increased emphasis on rule knowledge and a concomitant decline in law students' acquisition of analytical skills.

One consequence of faculty specialization has been the employment by specialist faculty of a wide variety of teaching techniques—techniques that are suitable to their own particular special-

³⁶ See, e.g., Sandalow, *The Moral Responsibility of Law Schools*, 34 J. LEGAL EDUC. 163, 165 (1984) ("In the decades following World War II, faculty members transferred their attention and allegiance from their schools to their scholarly disciplines.").

³⁷ See, e.g., D. SCHON, *supra* note 6, at 14-18; Amsterdam, *supra* note 30, at 613-15; Llewellyn, *supra* note 16, at 220; Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM. B. FOUND. RESEARCH J. 247, 250-52.

ties.³⁸ Consider, for example, the different methods that teachers in the areas of constitutional law, environmental law, and tax law could employ in teaching both their own courses and a common course such as property law. The constitutionalist might emphasize fundamental values and different levels of judicial scrutiny; the environmentalist may read just about everything in the form of statutes; and the tax teacher is likely to strive for a finely tuned consistency between specific rules. Similarly, consider the different approaches and attitudes toward, say, property law that might be taken by a former litigator, on the one hand, and a former office counselor on the other. The ex-litigator is likely to emphasize the uncertain, manipulable, litigable aspects of a subject, while the office counselor will probably emphasize what is certain in the law.³⁹ Each of these approaches may be appropriate to any legal subject, including property law, but, when compared, they will be perceived as dramatically different, even conflicting techniques and as employing radically different languages of the law.

Another consequence of increased specialization among law professors is an increased emphasis on the acquisition of a comprehensive knowledge of the current rules and court rulings in each particular field. Specialization may include much else besides, but the acquisition and dissemination of rule knowledge certainly forms the core of specialized law faculty expertise. This is made manifest by the high premiums that many schools and law teachers place on treatise writing, the compilation of casebooks, consulting work, and the production of influential doctrinal literature—particularly that which is cited in contemporary judicial decisions.⁴⁰ The acquisition and dissemination of rule knowl-

³⁸ See Sandalow, *supra* note 36, at 165-66; cf. Stevens, *supra* note 30, at 639 (Interviews with 50 students in the Class of 1972 at Yale Law School revealed that there was no uniform conception of the Socratic method among the students, a result that probably can be explained by "the wide variety of approaches toward teaching in any one faculty.").

³⁹ I owe this observation to my good friend Fred Six, an attorney who practices both as a litigator and office counselor in Lawrence, Kansas. Cf. Lehman, *The Influence of the Universities on Judicial Decision*, 10 CORNELL L.Q. 1 (1924). Lehman writes:

The lawyer in his practice deals with concrete cases, and his professional interest naturally lies in finding the general rule which the courts will apply to the case with which he is dealing. *He seeks primarily certainty in law*, so that he can advise his client what his legal rights and obligations are. . . .

My dismay . . . as a law student . . . was as nothing to the dismay I felt as a judge when I first realized that in many cases there were no premises from which any deductions could be drawn with logical certainty.

Id. at 2-3 (emphasis added).

⁴⁰ See, e.g., Posner, *supra* note 22, at 113-19; Schlegel, *supra* note 8, at 109.

edge by law faculty may be appropriate in several respects. But the increasing amount of time and effort law classes devote to the acquisition of rule knowledge is by no means a good thing for the training of beginners.⁴¹ Greater emphasis on learning the rules in each course surely means that something else has been deemphasized. This something else can only be a law school's traditional attention to analytical methods, especially the methods of analyzing difficult or complex opinions and constructing arguments or interpretations that are relevant to the lawyer's primary task of resolving problematic issues.

Specialization also affects faculty recruitment, feeding on itself and reinforcing its own development. If specialization is perceived as a good, it will affect the faculty recruitment process in two different ways. First, schools that want to hire new faculty for designated specialist positions will, in addition to the traditional requirements of a good law school record and attractive personality, pay close attention to the candidate's previous specialized experience. Second, since most law faculties today are small and already highly specialized, the incumbent faculty members will often be hiring persons whose special expertise is not represented, or at least not well represented, by the current faculty. The hiring committee may have to forego careful questioning of the candidate's methodological abilities or interests as they relate to teaching or scholarship because no one on the faculty knows enough about the candidate's substantive specialty to render a fair evaluation. Thus, full reliance may be placed on the candidate's objective credentials and personality.⁴²

Faculty specialization may also explain why so few law teachers today talk seriously with each other about their teaching or scholarship. Perhaps law faculties have never talked very much among themselves, or done much scholarship to talk about. Nonetheless, the lack of meaningful professional and intellectual exchange among members of many

⁴¹ On the new emphasis on rule knowledge in the classroom, see T. SHAFFER & R. REDMOUNT, *LAWYERS, LAW STUDENTS AND PEOPLE* 162-67 (1977) (At least at three Indiana law schools, legal education is returning to the textbook and lecture.); Cramton, *supra* note 8, at 328 (The Socratic method is becoming a thinly disguised lecture.); Gellhorn, *The Second and Third Years of Law Study*, 17 J. LEGAL EDUC. 1, 3 (1964) (Most law teachers continue to crowd more material into the hours allotted, with the Socratic method giving way to lecture while text and footnote comments overwhelm the opinions in casebooks.); cf. Austin, *Is the Casebook Method Obsolete?*, 6 WM. & MARY L. REV. 157, 164-65 (1965) (The case method is too theoretical and is impractical in large classes.); Brabson, *Twilight of the Casebook System*, 48 TAXES 501, 505-07 (1970) (The case method is too time consuming and does not allow enough material to be covered.).

⁴² Another consequence of law faculty specialization is the unwillingness of specialists to teach in more general areas of law, thus complicating the development of a rational law school curriculum. See, e.g., Sandalow, *supra* note 36, at 165-66.

law faculties is striking—especially in contrast to the professional conversations in large law firms, where both economic incentives and the necessary numbers of specialists support such conversation. Of course, a lack of meaningful and sustained talk in law faculties should not be that surprising in view of our extreme specialization and the ideal of high expertise. Advancing questions or statements about the law outside one's specialty may reveal one's ignorance or lack of expertise. Conversely, the need of a respondent to demonstrate her expertise—even if the need is only subconscious—may often produce conversation-stopping claims of a rather conclusory sort.⁴³ The likely result, then, is that we will talk outside our discipline altogether, the discourse revolving around sports, movies, or politics.⁴⁴

In summary, the phenomenon of law faculty specialization is diminishing the sense of a common professional community and the common attitudes, values, and methods of that community in the modern

⁴³ I have been guilty of this practice, and a victim of it as well. Cf. Riesman, *Law and Sociology: Recruitment, Training and Collegueship*, 9 STAN. L. REV. 643 (1957). Riesman writes:

[S]peaking for myself, I must say that the atmosphere of a law school is too abrasive, too cocky, to make for an easy collegueship on matters which are subject to scathing self-doubt at the frontiers of intellectual work. If one is working along an already laid-out track—as one can so readily do in many fields of psychology—it is one thing, but if one is exploring rather new areas, with all the misgivings to which pioneering intellectual work is prone, then to meet constantly the really quite amiable needling of the skeptical law-man may be tiresome. A certain amount of cultism, even occultism, I am suggesting, is an almost necessary part of new intellectual enterprise, and while of course, like any other morale-building effort this can go too far and become an end in itself, it is part of the protection which uncertain activity demands.

Id. at 652.

⁴⁴ I have been unable to document the general points of this paragraph in the literature, but then the lack of professional and intellectual exchange is not something that one would generally expect law teachers to write about. Cf. Kennedy, *supra* note 26, at 71 (“Yet even the committed empiricist must recognize that for the time being at least there are areas inaccessible to him, areas where what passes for knowledge must be no more than a network of intuitions and theories dimly grasped.”). Certainly it is my impression, from both personal experience and casual conversations with friends who have taught at other schools, that professional and intellectual conversation is commonly absent at many American law schools. Of course, there probably are significant exceptions at some schools and among certain faculty. See, e.g., Fiss, *Making Coffee and Other Duties of Citizenship*, 91 YALE L.J. 224 (1981) (describing, in a memorial to Arthur Leff, the feeling of community at the Yale Law School). Also, there may have never been much professional or intellectual exchange within law faculties, even in the good old days, although that would not be much of an excuse for its not occurring today. Compare Riesman, *Some Observations on Legal Education*, 1968 WIS. L. REV. 63, 69 (noting what he described as the “colleaguiality” of law faculties at elite law schools) with Riesman, *supra* note 43, at 647, 652 (noting that law professors are intelligent but rarely intellectual and that their arrogance creates an atmosphere that discourages intellectual exchange).

American law school. Different languages and different techniques are now employed throughout the curriculum. At the same time, the traditional emphasis on analytic methods and the acquisition of basic skills in all courses appears to be declining. Moreover, law faculty do not seem to talk to each other very much about the substance of their teaching or scholarship. All of these effects of law faculty specialization have contributed to the modern decline in law school professionalism. Law teachers are increasingly being forced to develop their own individualized ideas about teaching, legal analysis, and legal doctrine and are less and less able to ground their teaching and scholarship in the shared views of a unified professional community.

2. Faculty Expansion

Another structural change that has affected American legal education is the rapid expansion of many law faculties during the 1960's and 1970's. The increased supply of legal education during these years was a response to the dramatic rise in demand⁴⁵ attributable, in part, to the baby boom. Many new teachers—typically recruited from the national or elite law schools—were hired over a relatively short period of time.⁴⁶ A new wave of missionaries, presumably well schooled in the modern currents of "legal realism" said to pervade the national schools,⁴⁷ thus came forward to spread the gospel of realism to all schools.

This faculty expansion, I think, has had at least three consequences that may significantly affect the future of law school professionalism. First of all, the massive influx of new faculty members proportionally overwhelmed the older ones, thus depriving the young teachers of the socialization and training that new entrants to a profession traditionally receive from their more experienced colleagues. Second, this once young faculty has now reached middle age and, in searching for new outlets for its ambitions, has found that these outlets are few. Third, the liberal ideal of law as a vehicle for social change has been eviscerated since these professors entered the academy, necessitating a reevaluation of the relationships among law, society, and social reform.

The rapid expansion of law schools and their faculties suddenly

⁴⁵ See Auerbach, *Legal Education and Some of Its Discontents*, 34 J. LEGAL EDUC. 43, 44 (1984) (Since 1960, law school enrollment has increased about 200% in general and 215% at ABA-approved schools.).

⁴⁶ See Fossum, *supra* note 20, at 507-08 (In the 1975-1976 academic year, almost 60% of American law teachers were the graduates of 20 national law schools.).

⁴⁷ See, e.g., Goldstein, *supra* note 16, at 157-59; Woodard, *The Limits of Legal Realism*, *supra* note 10, at 704.

introduced into legal academia a large number of new teachers, who had to acquire the methods by which to develop reputations as accomplished classroom teachers and scholars. The socialization of new faculty members, which in earlier periods could take place more gradually and with a larger ratio of experienced to inexperienced teachers, was placed under a considerable strain. Because of rapid law school growth, the new recruits were surrounded largely by their peers, with little chance to be socialized in the traditions of the law school community by more experienced professors. Perhaps also we were too arrogant or too insecure to seek advice from our more practiced colleagues.

In the absence of this traditional source of values and methods, where did these new teachers turn for guidance? It is not surprising that many young professors applied the values, methods, and other technical apparatus that they had acquired in their previous law practices and other relevant experiences. These prior experiences could include, for example, political work and nonlegal studies as well as previous legal schooling. In recent decades, however, the immediate experience of most of us has been either in large, highly specialized law firms or in the highly politicized (and specialized) worlds of government bureaucracies and public interest or legal services law firms.⁴⁸ Thus, a basic demographic trend—rapid population growth—has hastened the replacement of a common style of law teaching and scholarship by the more diverse and specialized methods acquired in the private interest world of large law firms, in the public interest world of regulatory agencies or advocacy for the dispossessed, and in specialized academic training. In short, the demographics of legal education has reinforced specialization.

Today, the bright young law faculty of the 1960's and 70's is beginning to gray a bit at the temples and perhaps is getting a bit restless and frustrated as well. We have obtained tenure, and, unlike earlier generations of law professors, we have been expected to publish regularly. We are doing this, and many of us have even learned to enjoy the process. But once we have mastered the form of the basic law review article, what comes next? In what directions are the restlessness and varied ambitions of the new law teachers of the 1960's and 70's likely to move? Will it be more tennis and more consulting work or, instead, attempts at seminal scholarship?⁴⁹

⁴⁸ See Fossum, *supra* note 20, at 510-12; Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW* 281 (D. Kairys ed. 1982).

⁴⁹ A former university colleague, Charlie Levine, in a lecture entitled "The Gray-ing of Academe," recently claimed, with all due mock scientific seriousness, that the "average American university professor" has published "1.5 books and 11.5 articles"

For those who would turn their restlessness toward scholarship and similar ambitious pursuits, there are some significant constraints. While the supply of law teachers and law review articles has greatly increased in both quantity and quality in the last twenty years, there remains the same small number of prestigious national schools at which to teach, and the same small number of prestigious law reviews in which to publish. In a small way, then, the new generation of American law teachers is experiencing what economist Fred Hirsch calls the "social limits" to growth.⁵⁰ These are the new limits on an individual's advancement that result from increased material wealth, expansion of the middle class and professional ambitions, the physical and social crowding that reduces the quality of life in so many ways, and society's natural tendency to allocate status, prestige, and fame narrowly and hierarchically. The opportunities to teach at national law schools and to publish in prestigious law reviews are what Hirsch calls "positional goods"—goods that become increasingly scarce (and increasingly expensive) as a result of social attitudes or social constructs rather than physical shortages.⁵¹ Positional goods cannot be expanded by the mere application of technology or additional resources, and their shortage creates a "joyless economy" in the midst of increasing material wealth.⁵²

This generation of law faculty may also be said to have run into some "political limits" to growth, which may account for the current

and has discovered "that the probable marginal return to the next article is zero." Thus restlessness. Charlie advised us to undertake the risks of seminal scholarship. Statistical evidence documents this kind of frustration in the current generation of law teachers:

In 1969 both law students and faculties felt good about their schools, but not so in 1975. . . . [L]ess than half the faculties (47 percent) in 1975 regarded their schools as a 'very good place' for them. . . . [M]ost law professors describe themselves as "intellectuals" but [o]nly 30 percent of the law professors in 1969, and 20 percent in 1975, described the intellectual environment of their schools as excellent, [with almost half of the faculty satisfied at "the top twenty schools" and only 14 percent of the faculty satisfied at other schools in 1975.]

Auerbach, *supra* note 45, at 53-54. As Roger Cramton sees it,

the older model of a Mr. Chips teacher in the local or regional law school [is] being replaced by new recruits who may be more talented intellectually but who have been seduced by the bitch goddess Success. This latter group seeks national recognition. They can get it only by bringing themselves to the attention of schools higher up in the pecking order. One generally does that by publishing doctrinal articles and not by developing innovative materials for teaching lawyer skills or inspiring students at a local law school.

Cramton, *supra* note 8, at 326.

⁵⁰ See F. HIRSCH, *SOCIAL LIMITS TO GROWTH* (1976).

⁵¹ See *id.* at 27-54.

⁵² See T. SCITOVSKY, *THE JOYLESS ECONOMY* (1976).

restlessness and frustration of many law teachers of middle age. In the late 1960's and early 70's, many of us entered law teaching with liberal or even radical views and the faith that legal scholarship and law teaching would enable us to translate our values into social reform. These values, tendencies, and faith were supported, of course, by our experience as observers or participants in such significant events as the civil rights movement, the protest against the Vietnam War, and the Warren Court's progressive approach toward both constitutional and statutory law.⁵³ In 1985, however, we have discovered that doctrinal law may not be a very effective tool for reforming society.⁵⁴ In fact, we are now discovering (or rediscovering) that the dominant conservative forces in society can use the law at least as effectively as could the progressives in their halcyon days.⁵⁵ These political limits to the ambitions of the current generation of law teachers are yet another factor that could support some interesting, if unpredictable, changes in law school teaching and scholarship.

The law faculty expansion of the 1960's and 70's promises to be a potentially destabilizing force in legal education for several reasons. Many of the new faculty members were never fully socialized into the traditional ways of teaching law as represented by the values of law school professionalism. Further, many of us are now experiencing the "social limits" and "political limits" to our desires for prestige and political influence. In this atmosphere of frustrated ambition, political cynicism, and professional overcrowding, there is a potential for significant and diverse change in the ways that this generation of law professors pursues its teaching and scholarship. On the one hand, the professoriate could retreat from realism toward more traditional doctrinal analysis in the face of student pressures and economic incentives to produce useful professional scholarship. On the other hand, law professors could advance beyond realism, toward newer forms of legal scholarship and law teaching.

3. Meeting the Demands of the University Bureaucracy

American universities, like the law schools within them, have expanded dramatically since World War II. At the university level, this expansion has been accompanied by the "professionalization" or "bureaucratization" of university procedures and values and the crea-

⁵³ See Gordon, *supra* note 48, at 282-84.

⁵⁴ See, e.g., Mashaw, "Rights" in the Federal Administrative State, 92 YALE L.J. 1129, 1171-73 (1983).

⁵⁵ See, e.g., Dworkin, *Reagan's Justice*, N.Y. REV. BOOKS, Nov. 8, 1984, at 27.

tion of a class of university bureaucrats.⁵⁶ For law schools, this has often meant the use of new "objective" criteria to evaluate the teaching effectiveness and scholarship of the faculty—especially untenured faculty—in preference to the more traditional "subjective" criterion of law faculty opinion about individual performance. The new requirements for objective evidence about the productivity and quality of law teachers come in several forms—quantitative student evaluations, formal peer review, and law review publication history—that contribute significantly to the erosion of the values of law school professionalism.

Consider student evaluations. The practice of using formal student evaluations to assess teaching quality was apparently initiated in some law schools in response to the student activism of the late 1960's. Today, however, the widespread use of these evaluations in law schools and their common emphasis on numerical comparisons of professors is generally a bureaucratic requirement, imposed either by university rule or by decanal persuasion.⁵⁷ The urge to make university faculty accountable by some quantifiable measure is certainly understandable, but this particular process appears to have had some significant and deleterious effects on law school methods.

The typical law school evaluation form invites students to evaluate teachers on some unidimensional scale.⁵⁸ On first impression, such evaluations might seem to supply an effective reinforcement or substitute for the traditional socialization of law teachers, because the evaluation form may appear to measure a young faculty member's success in

⁵⁶ See, e.g., Angel, *Professionals and Unionization*, 66 MINN. L. REV. 383, 393-94, 406-10 (1982).

⁵⁷ See generally J. CENTRA, DETERMINING FACULTY EFFECTIVENESS 1-46 (1979) (describing the substantial increase in the use of student evaluations by American universities during the 1970's and attributing this increased use to the need of universities in this period to make more discriminating choices on tenure, salary increases, and other employment matters); Roth, *Student Evaluations of Law Teaching*, 17 AKRON L. REV. 609, 614, 619 (1984) (summarizing the current widespread use of formal student evaluations by American law schools, which apparently includes a very common emphasis on numerical ratings of all faculty on such "global" questions as "overall teaching ability").

⁵⁸ See Renner, *Comparing Professors: How Student Ratings Contribute to the Decline in Quality of Higher Education*, PHI DELTA KAPPAN, Oct. 1981, at 128-30. It should be noted that this unidimensional or consensus scale may be quite general in nature and thus allow students to make relatively useful or accurate evaluations of teachers who may have different styles but who emphasize the same values and methods in their teaching. What this scale will not take account of, however, is the full range of possible teaching goals and methods, especially those that may be considered "controversial" or "unpleasant" by a significant number of persons in the evaluating community. See *id.*; see also K. DOYLE, STUDENT EVALUATION OF INSTRUCTION 65-66 (1975) (Summary evaluations by students on such global questions as "over-all teaching ability" are more helpful to administrative personnel decisions than more specific evaluations.).

teaching analytical skills. But student evaluations were generally introduced into law schools in the 1970's, and by then the leading teachers at many schools—the creators of the unidimensional scale of excellence—were presumably emphasizing the acquisition of rule knowledge in their particular specialties. The evaluations they created reflect and privilege their own conceptions of teaching excellence. Thus, by rewarding those who teach legal rules clearly with high marks and discouraging those who strive for different objectives in the classroom, student evaluations are likely to reinforce both law faculty specialization and an emphasis on the transmission of rule knowledge.⁵⁹ Furthermore, in evaluating teachers, law students are as likely to emphasize entertainment, practical advice, or clarity of presentation as they are to emphasize acquisition of useful rule knowledge or mastery of complex analysis.⁶⁰ Any teacher who needs to acquire favorable student evaluations, for tenure purposes or otherwise, may be afraid to adhere to the older methods of law teaching, methods that challenge students to solve problems on their own.⁶¹

Perhaps I am overly pessimistic about the effect of student evaluations. These evaluations could be designed to provide useful information without discouraging teachers from adopting different or unusual approaches, including those that challenge students to become active learners on their own. Moreover, it is conventional wisdom that law school deans can “read” student evaluations in a way that measures the true quality of the faculty in an even-handed way.⁶² These considerations, however, may not provide adequate safeguards against the formalizing and homogenizing effects of student evaluations in law

⁵⁹ See J. CENTRA, *supra* note 57, at 18-19; Renner, *supra* note 58, at 128. In my view, the tendency of student evaluations to emphasize the clear presentation of “substance” may result from the practice in university courses of teaching mainly by lecture, where the clear expression of difficult subject matter by a professor quite naturally is appreciated. But the use of this standard to evaluate both undergraduate lectures and other types of teaching, including those employed in law school classes, seems wildly inappropriate. See *id.* at 128-29.

⁶⁰ See J. CENTRA, *supra* note 57, at 35; Renner, *supra* note 58, at 128-29.

⁶¹ As Roger Cramton notes:

Perhaps the elective curriculum and the misuse of student evaluations of teacher performance have led to an analog of Gresham's law in which cheap teaching drives out good teaching. The pressure for high student enrollments and the desire to be popular may sometimes lead to easy or relaxed standards of performance and make it more difficult for tough, demanding teachers to make their way.

Cramton, *supra* note 8, at 35; see also Vernon, *Ethics in Academe—Aston Dekanal*, 34 J. LEGAL EDUC. 205, 212 (1984) (“In part, the conscious attempt to ‘please’ the consumer by currying favor is encouraged by administrators who use student evaluations as an accurate reflection of the quality of teaching . . .”).

⁶² See Roth, *supra* note 57, at 609.

schools. It is common practice to ask law students to rate law professors on their "overall ability," "command of subject matter," and other general qualities by using a numerical scale.⁶³ These numbers, which then constitute the "hard" or "objective" data of teaching effectiveness, are very easy to use, and they must be equally difficult for law deans to ignore. Deans are, after all, bureaucrats by reason of their position in the new university bureaucracy, and bureaucrats need easily usable data such as the numerical responses on student evaluation forms. Further, the use of a common numerical scale to record answers to some rather vague and general questions surely encourages law students to respond to evaluation questionnaires on the basis of some unidimensional scale, whatever that scale may be. Thus, the leading teachers who have helped to establish the scale at their schools will be inherently advantaged in the student evaluation process, because the dean and others won't need to "read" their evaluations against low numbers. (Indeed, there may be little to read in addition to high numbers on the evaluations of some teachers.) The general notion that law school deans and other faculty members can adequately understand and evaluate teaching effectiveness on the basis of "reading" student evaluations is therefore a misleading one.⁶⁴

If law professors sense this, they will probably do whatever is necessary to earn high numbers on their school's unidimensional scale. It is rational (or at least natural) to try to avoid the special burden of justifying low numbers on student evaluations, even if these numbers are in fact caused merely by the use of different or especially challenging classroom techniques. It is also natural to care what students think of your teaching, even if the dean and other professors are able to "read" student evaluations evenhandedly despite damaging low numbers. Accordingly, student evaluations, as they are currently employed in American law schools, probably have a significant impact on the teaching methods of American law professors. At many schools, evaluations may encourage the teaching of rule knowledge in a clear and nonthreatening way and, conversely, discourage the effective teaching of analytical skills as well as other nonformalistic teaching methods. Furthermore, the rating of faculty members on a common numerical scale means that half of the faculty is inevitably rated as only "average" or "below aver-

⁶³ See *id.* at 613-14.

⁶⁴ Cf. J. CENTRA, *supra* note 57, at 3-4 ("Fair personnel decisions can best be made by combining information from several sources so that the shortcomings of one approach can be balanced by the strengths of another."); *id.* at 44 ("Because most student rating instruments elicit numerical responses that can be compared and quantified, it is easy to assign them a precision they do not possess.").

age" quality. This feature of numerical ratings, especially among competitive professors, may cause bitterness or cynicism among many teachers in or below the "fiftieth percentile," and these feelings can severely diminish faculty enthusiasm for teaching, sever intrafaculty relations even further, and otherwise distort the teaching process.⁶⁵

The bureaucratization of the university has also required formal peer reviews of teaching, especially for tenure purposes. If there is little communication between law faculty about teaching methods in general, this process is likely to support the trend toward specialization and use of different analytical methods in the classroom. When an untenured faculty member must perform in a high quality manner for the purposes of a formal, written peer review by a more experienced teacher, what could be more natural than to emphasize the rule knowledge and unique methods of a specialty that she has brought from practice into teaching? This may be the only way (or the best way) for a relatively inexperienced teacher to prove herself as a high quality expert; besides, most of her peer reviewers—specialists themselves—may have no effective way to assess this sort of work.

Another type of "objective" evidence about a law professor's ability consists of the frequency and "quality" of her publications, with quality assessed purely or primarily on the basis of the reputation of the law reviews in which the work is published.⁶⁶ Consider the dilemma presented to the new teacher who must try to meet these two standards of scholarship relatively early in her career, while simultaneously demonstrating that she has considerable teaching skill as well. The young professor will need to write quickly, frequently, and with splash in order to meet the standards of scholarship required first to obtain tenure and then to obtain recognition, advancement, and even salary increases. Moreover, the pressure to meet these formal standards, especially that of publication in prestigious journals, is compounded by the social overcrowding and social limits to faculty expansion previously described. In all likelihood, the new scholar will be forced to rely on the values and technical skills acquired in practice and

⁶⁵ See Renner, *supra* note 58, at 129-30.

⁶⁶ The bureaucratic impetus for these quantitative and qualitative norms of legal scholarship can develop from several formal influences, such as university review of law school tenure decisions, periodic competitions for research funds that require evidence of past productivity, and a university requirement of annual formal evaluations of all faculty, which would seem to encourage reports by law faculty to their deans of a faculty member's "annual production." See generally J. CENTRA, *supra* note 57, at 11-16, 119-24 (discussing how scholarship and research are currently evaluated while noting that there exists no one criterion adequate to measure the performance of researchers and scholars).

previous schooling in order to forward her scholarly career. At least initially, if not in the long run, this bureaucratic pressure to satisfy formal standards of acceptable legal scholarship is likely to reinforce the narrowing, fragmenting influence of faculty specialization and student demands for classroom formalism.⁶⁷

B. *The Student Perspective*

The law student's changing views of what legal education should provide and achieve have also contributed to the decline of law school professionalism. In this section I will examine a number of changes in the character and practices of the American law student that seem to be encouraging the tendency toward a new formalism and the emphasis on rule acquisition. The student activists of the 1960's and early 70's questioned the legitimacy of seemingly "hostile" law school methods; as a result, the rigor of the traditional case method began to dissipate. More recently, when fears about the "lawyer surplus" focused student anxiety on grades, students began to demand certainty in grading; law professors have responded by writing more objective examinations and emphasizing rule knowledge in the classroom. Finally, the growing phenomenon of student employment by law firms has diverted student attention away from their studies and increased the demand for a quick and easy injection of rule knowledge without benefit of analytical training.

Although the "war radicalism" that hit many university campuses in the late 1960's and early 70's has clearly subsided, a few traces remain.⁶⁸ One consequence is the widespread use of formal student evaluations to measure teaching quality.⁶⁹ Although the current vitality of this practice is attributable more to bureaucratic needs than to student empowerment, this practice seems to have increased students' confidence in exercising their "voice" to sanction disagreeable or uncomfortable educational practices.⁷⁰ Specifically, this exercise of student voice

⁶⁷ Cf. Ackerman, *supra* note 1, at 1135-36 (describing how the "economic" incentive of consulting possibilities for law professors tends to encourage narrow doctrinal scholarship that is useful to practitioners); Crutchfield, *Hazards Faced by Young Pianists in Competitions*, N.Y. Times, May 18, 1985, at Y13 (The growth of juried competitions as a gateway to concert careers for pianists "is widely thought to have had a profound effect on the kind of music they make" by reducing the "emotional sensitivity" and "charisma" of modern young pianists.).

⁶⁸ See, e.g., Richburg, *Campus Rebels are Conservatives Now*, Wash. Post, Dec. 2, 1984, at D1, col. 3.

⁶⁹ See Roth, *supra* note 57, at 609-12 (Almost all law schools use some form of student evaluation of professors, although specific techniques vary widely.).

⁷⁰ See generally A. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* (1970) (Individuals may express

has supported a powerful attack on the traditional "hostile" oral examination of students by teachers in the classroom. This style has been viewed by many as both inhumane and counterproductive to effective learning.⁷¹ Thus, both the use of student evaluations and a new skepticism about the traditional manner of case analysis have contributed to a "softening" of the case method and perhaps to the deemphasis of analytical skills in many American law schools.⁷² In effect, then, the increasing voice or power of students as consumers of legal education has reinforced the tendency of law faculty specialization to emphasize the acquisition of rule knowledge in the classroom.

Several national demographic trends that began after World War II and gained momentum in the 1960's and 70's—notably a rapidly expanding college-aged population, the greater material wealth of the American population in general, and the increased propensity of high school and college graduates to seek professional careers—have supported a significant expansion in both the demand for and supply of legal education.⁷³ This expansion finally led to today's "lawyer surplus," which has, predictably, increased student anxiety about grades.⁷⁴ Law students have always been competitive, but their new focus on grades as the route to a successful career, along with their new sense that students should participate in law school governance, has helped produce a student body that inquires about and demands to know the reasons for their law school grades.⁷⁵ The consequent pressure on law faculty to set "objective" examinations with easily demonstrable "right answers" is considerable, and I believe that this pressure is at least a partial explanation for the increased use of short-answer examinations, model answers, or check-list answers as common methods of grading student performance.⁷⁶ This move toward "objectivity" in examinations

their discontent with organizations either by leaving them or by arguing for change).

⁷¹ See, e.g., Kennedy, *supra* note 26, at 72-73; Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 457-62 (1970). See generally Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91 (1968) (discussing the psychological damage caused by legal education and recommendations for reducing it).

⁷² See R. STEVENS, *supra* note 2, at 276-77.

⁷³ See *id.* at 205-06, 235-36; Auerbach, *supra* note 45, at 43-44.

⁷⁴ See Cramton, *Change and Continuity in Legal Education*, 79 MICH. L. REV. 460, 462 (1981) (The "overcrowding" of the legal profession in recent years and the resulting "scramble for employment" has significantly affected student attitudes and behavior in law schools.).

⁷⁵ I base this point on my own observations and experience, which will have to do in the absence of published studies. See *supra* note 44 (on the absence of published studies on law faculty interchange); see also Nickles, *Examining and Grading in American Law Schools*, 30 ARK. L. REV. 411, 474-79 (1979) (asserting that many law students view high grades as the route to external success).

⁷⁶ Alternative or additional explanations for the apparent increase in objective ex-

(and away from open-ended essay questions) is likely to reinforce tendencies toward formalism in the law school classroom. That is, if students expect that law school examinations will demand a bunch of "right answers," and their energies are directed solely toward the examination grade, a faculty member who hopes to achieve favorable student evaluations will necessarily focus her teaching efforts on establishing with clarity (and in abundance) the many right answers on which the student will be examined. In this somewhat circular process, both the faculty member and her students may lose sight of the less tractable and less testable aspects of the law.⁷⁷

In the past two decades or so, the law student's perspective on the nature of education in general may also have changed in ways that encourage both formalism and the acquisition of rule knowledge. Duncan Kennedy has suggested that the pervasive tendency in American public schools and universities toward "convergent reasoning" (thinking that focuses on the acquisition of right answers) may be substantially influencing education at even the most prestigious American law schools.⁷⁸ In this view, most law students see law school simply as the last phase of a fierce competition—which begins in junior high school, if not earlier—for the highest possible grades.⁷⁹ This is a rather sad view of American education, but it is not, I am afraid, an unrealistic one.⁸⁰

Finally, the recent expansion of urban law firms and the consequent high salaries for law firm associates have increased the demand for part-time student employees in law offices, especially at urban-

aminations might be (1) a decrease in available faculty time for, or faculty interest in, the responsibilities of teaching, which could result from the increase in law faculty specialization, and (2) a belief that objective examinations constitute a better way to measure student achievement in law school courses. See generally Bell, *Law School Exams and Minority-Group Students*, 7 BLACK L.J. 304 (1981) (minority law students are disadvantaged by the "subjective" nature of the law school examination process); Coutts, *Examinations for Law Degrees*, 9 J. SOC'Y PUB. TEACHERS L. 399 (1967) (arguing that law school examinations place too much emphasis on memory and speed).

⁷⁷ Cf. Schlegel, *supra* note 8, at 107-08 (contrasting the realist view of legal practice with "what gets learned because it is tested, in classrooms throughout the land").

⁷⁸ See Kennedy, *supra* note 26, at 79-80 (citing E. FRIEDENBERG, *COMING OF AGE IN AMERICA* (1963) (discussing convergent thinking)); see also Watson, *supra* note 71, at 94-106 (The background, age, and personality of many law students may reinforce law school tendencies to emphasize the acquisition of "right" answers.).

⁷⁹ For an explanation of the new emphasis on grades, see Bromley, Crow & Gibson, *Grade Inflation: Trends, Causes, and Implications*, 59 PHI DELTA KAPPAN 694 (1978).

⁸⁰ Cf. Cahn, *Some Reflections on the Aims of Legal Education*, 11 J. LEGAL EDUC. 1, 1-2 (1958) (arguing that law school examinations, grades, objectivity, and the demand for precision all represent "academic distortions" of the search for truth).

based regional and local law schools.⁸¹ While many students at these schools have always worked or wanted to work while in school, the new opportunities are legal opportunities. These opportunities are influencing legal education in two important, if contradictory, respects. On the one hand, this work allows law students to obtain extensive "clinical" training at no monetary cost to law schools. In the same way that clinical training in law schools can be an extremely valuable aspect of legal education, this increased work experience—albeit under supervision that is quite variable—may be both an underrated aspect of modern legal education and an efficient way to remedy much upper class boredom and waste.⁸² On the other hand, these work opportunities demand a lot of the student's time and divert her attention and energies away from classroom activities.⁸³ Moreover, if these opportunities are constructed rationally from the profit-making perspective of a private firm, they may involve much routine and repetitive work and thus be less educationally challenging than are advanced studies in law school or the responsibilities of a new associate. These work opportunities, then, by their routine nature and heavy demands on student time, may reinforce the student demand for formalism and the acquisition of rule knowledge in the classroom. Study that features other approaches to the law will be more time consuming and will appear less immediately practical.

In summary, several changes in law students' perspectives are encouraging, if not requiring, a new emphasis in law classes and law examinations on the acquisition and display of rule knowledge. To be sure, there still may be a fair amount of "analysis" and "application" of the rules as well, but this analysis will tend to be less frequent and less rigorous than is contemplated by the traditional notions of law school professionalism. Such analysis will generally be of a very limited sort, and, more often than not, will be performed by the teacher rather than her students. In general, a security blanket of rule knowledge will

⁸¹ See Cramton, *supra* note 74, at 464-66. See generally Pipkin, *Moonlighting in Law School: A Multischool Study of Part-Time Employment of Full-Time Students*, 1982 AM. B. FOUND. RESEARCH J. 1109 (summarizing the results of a study that attempted to differentiate employed from nonemployed law students based on financial status, attitudes, and type of law school).

⁸² See Cramton, *supra* note 74, at 465-66 (asserting that work provides more legal training than can be acquired in the classroom); Pipkin, *supra* note 81, at 1156-58 (Law students consider outside employment a beneficial addition to their legal education.). On the values of clinical legal education, see Amsterdam, *supra* note 30 (arguing that clinical experience shapes more effective lawyers); Barnhizer, *Clinical Education at the Crossroads: The Need for Direction*, 1977 B.Y.U. L. REV. 1025, 1032-48 (same).

⁸³ See Cramton, *supra* note 74, at 464-65; Pipkin, *supra* note 81, at 1135-50.

be provided and traditional emphasis on the development of independent critical thinking in law students will be deemphasized or abandoned.⁸⁴ In this regard, the basic effect of these changes in the student perspective will be to reinforce a major consequence of law faculty specialization: the concentration on rule knowledge and formalism.

C. *Woman's Voice*

Another notable change in American law schools during the past ten to fifteen years is the substantial presence of women in the law school's professional community. Women have quickly become a large part of the student population, and the numbers of women law professors, including those with tenure, are beginning to increase, albeit at a more gradual pace.⁸⁵ This new dimension in legal education has helped to produce significant changes in the classroom and in law schools generally—at least on the surface. More importantly, this change offers the potential for developing new ways of thinking about and implementing legal theory and law school methods.

First, the substantial presence of women on law faculties and in the student body has promoted a more civilized discourse in classrooms, faculty meetings, and presumably student-run activities occurring outside the classroom. The presence of women, along with formal student evaluations, seems to have reduced if not eliminated the instances of open arrogance and hostility that law professors, in the Kingsfield manner and by other means, have traditionally displayed toward their students. This is not to say that law professors, including women professors, are no longer arrogant or inwardly hostile toward their students; however, such public behavior toward women generally is not tolerated in our society (except perhaps when women run for political office), and it thus follows that women have had a civilizing effect on what was previously a male enclave.⁸⁶

⁸⁴ Cf. Watson, *supra* note 71, at 122 (on the psychological need of law students for "a tidy set of notes from which they can readily imbibe wisdom"). Frank Strong, Professor Emeritus at the University of North Carolina School of Law, was of the opinion a few years ago that contemporary law teachers continue to teach "analysis" but not "synthesis." As a judgment about relative emphasis in the classroom, this observation seems accurate, but in my view there has also been a serious decline in student-initiated case analysis.

⁸⁵ See Auerbach, *supra* note 45, at 49 (In 1982, women constituted 37% of the student enrollment of ABA-approved law schools.); LaFranchi, *Women in the Law: Do They Change the Legal Perspectives?*, Christian Sci. Monitor, Oct. 26, 1984, at B6, col. 1 (In 1983, women constituted 13% of all tenured and nontenured law teachers, which was up from 7.6% in 1976.).

⁸⁶ See C. EPSTEIN, *WOMEN IN LAW* 67-69 (1983). For a good discussion of the traditional arrogance and hostility of male law professors, circa 1968 to 1970, see Ken-

Second, the increasing numbers of women law students and women faculty may, and I emphasize the term "may," ultimately bring a substantially different perspective to bear on the way in which the professional law school community thinks about and attempts to resolve difficult legal issues. In a recent book, Carol Gilligan advances the thesis that women's moral thinking may be inherently different from the type of moral thinking prevalent among men.⁸⁷ Her theory is that men in Western societies typically attempt to resolve difficult moral issues through a morality of hierarchically ordered rights that emphasizes personal identity, an active self, and the resolution of issues on the basis of accepted rules and procedures used by individuals to define boundaries around areas of autonomous activity. Women, on the other hand, typically attempt to resolve difficult moral issues through a morality of caring and responsibility to others in a web-like interdependent community. Moral thinking among women emphasizes the connection between human beings and a contextual rather than rule-oriented approach to resolving difficult and complex questions.⁸⁸

In a recent lecture, Kenneth Karst relied on Professor Gilligan's theory to argue that the increasing presence of women in the legal profession might provide forms of constitutional interpretation that are more contextual and more socially responsive than those that currently exist in the rule-oriented jurisprudence of the male-dominated Supreme Court and legal academy.⁸⁹ If Gilligan and Karst are right, the substantial presence of women in law could exert a similar influence on basic law school methods and the prevailing values in our legal system that have traditionally supported a jurisprudence of rules and procedures and the associated concepts of "legal formalism" and "legal autonomy." A more contextual approach to legal problem solving, and a focus on the values of community and the public good that transcend the aggregation of individual interests, could do much to help vanquish the law's long-standing and deeply entrenched traditions of a formalis-

nedy, *supra* note 26, at 72-75.

⁸⁷ See C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

⁸⁸ See *id.* at 43-44; see also Elshstain, *Antigone's Daughters*, in *FREEDOM, FEMINISM, AND THE STATE* 61 (W. McElroy ed. 1982) (an essay on feminist politics that calls for a "social feminism" that would emphasize the special values that women can bring to the resolution of public issues). It should be noted that Professor Gilligan has not attempted to resolve the underlying question whether different types of moral thinking between men and women result from nature or nurture. See C. GILLIGAN, *supra* note 87, at 2. Of course, if these different types of moral thinking are primarily the result of environmental conditions, one or both types could disappear as women become full participants in the professions.

⁸⁹ See Karst, *Woman's Constitution*, 1984 *DUKE L.J.* 447, 480-508.

tic, rule-oriented, and socially autonomous legal system.⁹⁰

Of course, even if Professor Gilligan is correct about the prevalent style of moral thinking among women, the presence of women in law schools may have little impact on legal methods and legal theory. Women who choose to practice law may think in the prevalent, male pattern before they enter law school, or they may come to think this way as a result of their socialization in law school.⁹¹ But it is too early to predict the ultimate result, since there are still very few women judges, senior partners in law firms, or tenured professors, that is, women in legal positions most likely to influence the ways in which we think and talk about the law.⁹²

D. *External Pressures*

The decline of law school professionalism is attributable to a number of external as well as internal developments. The pressures from the "outside world" have come from the wider legal community as well as the lay population. In this section, I shall address three extramural developments that are contributing to (and reflect) the erosion or decline in law school professionalism: public and professional concerns with lawyers' ethics, perceptions that lawyers lack practical competence, and the pressures exerted on the legal academy by the phenomenon that I call "law firm capitalism." Like most of the forces contributing to the decline of law school professionalism, these extramural developments may either add new formalistic layers to legal training or support a much richer, more contextual legal education.

It is my belief, in general, that the ethical behavior and practical competence of lawyers have remained relatively constant over a long

⁹⁰ See generally P. NONET & P. SELZNICK, *supra* note 7 (asserting that law should be examined in the context of and should serve contemporary society); W. SULLIVAN, *RECONSTRUCTING PUBLIC PHILOSOPHY* (1982) (arguing for the abandonment of currently dominant liberal individualism, and its replacement with the public philosophy of civic republicanism, which would "provide a reasoned basis for a new ethic of equity and cooperation").

⁹¹ See Farrell, *The Man Who Put Neo in Neoliberal*, N.Y. Times, Nov. 1, 1984, at B12, col. 1 (quoting Charles A. Peters, editor of *The Washington Monthly*) ("The moral content of most of the practice of law is either neutral or negative I thought the women were going to come along and save us with new humane values. And what do they do? They adopt the worst values of the young male and go off to law school."). For a succinct description of the socialization process in law schools, see Rowles, *Toward Balancing the Goals of Legal Education*, 31 J. LEGAL EDUC. 375, 379 (1981). For an extensive description of the socialization of women, especially women managers, in a male-dominated private corporation, see R. KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977).

⁹² See Karst, *supra* note 89, at 506-07, 507 n.229; LaFranchi, *supra* note 85, at B6.

period of time.⁹³ The recent public and professional outcry about ethics and competence reflects, in my view, simply a new awareness of old and continuing problems. But whether the standards of professional ethics and competence have remained constant or declined only recently, the new emphasis on and new treatment of these problems provides more evidence of a decline in law school professionalism. Further, in the law school response to these concerns, one can detect at least a glimmer of an important reformation in law school ways.

The recent public and professional concern with the ethical behavior of lawyers arose initially in response to the Watergate scandal. The special problem with the lawyers in and out of the Nixon Administration who participated in Watergate was their apparent inability to distinguish between private interests and the public interest, that is, to perceive the public morality or legality that lawyers are thought to serve as interpreters (and enforcers) of the law. Since Watergate, public and professional concern with lawyers' ethics has broadened; attention is now given to the apparently more pervasive problem of lawyers' failure to distinguish between their own personal interests and the private interests of clients and to exercise adequate professional responsibility in general.⁹⁴

The legal profession has reacted to these concerns by revising its code of professional ethics and by establishing an "ethics" examination for licensing—an attempt to clarify and improve the rules and to educate both the profession and the public about a lawyer's duties to recognize and resolve situations of conflicting interests.⁹⁵ Also, since 1974,

⁹³ Cf. J. BERLANT, *PROFESSION AND MONOPOLY: A STUDY OF MEDICINE IN THE UNITED STATES AND GREAT BRITAIN* 29-31 (1975) (Internalized moral norms are typically distributed in a normal, or bell-shaped, pattern throughout a population.). See also F. ALLEN, *LAW, INTELLECT, AND EDUCATION* 54-56, 62 (1979), in which the author argues that the legal profession's discontent in the 1970's with the quality of legal education may be attributed to three factors that have relatively little to do with the ethics or practical competence of new lawyers: the new attitudes and objectives of contemporary law students, the attitudes of contemporary law professors, who often dismiss concerns of the practitioner, and the failure of law schools to provide adequate training in the "practical" skills and information about local practice that can enhance the profit-making capacity of private firms in hiring new graduates.

⁹⁴ See, e.g., Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377, 379-83 (1980); Conklin, *Clinical Education in the Seventies: An Appraisal of the Decade*, 33 J. LEGAL EDUC. 604, 604-05 (1983); Pipkin, *supra* note 37; Wasserstrom, *Legal Education and the Good Lawyer*, 34 J. LEGAL EDUC. 155, 160-62 (1984).

⁹⁵ See Burger, *supra* note 94, at 383-86; Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OR. L. REV. 455, 456-58 (1984). See generally *Review Symposium: The Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RESEARCH J. 921, 921-1023 (discussion of the Kutak Commission's proposed model rules of professional conduct). The proposed model rules were adopted in modified form by the ABA's House

the American Bar Association has required law schools to offer training in "professional responsibility" as a condition of ABA accreditation.⁹⁶ Law schools have reacted to all this by offering special courses on professional ethics.⁹⁷ Ironically, because of the contractual relationship that exists between lawyers and their clients, any code of professional ethics is as likely to emphasize the ways in which lawyers should zealously serve their clients' interests as it is to specify the ways in which lawyers should limit their own or their clients' self-interested behavior.⁹⁸ Arguably, the modern rules of professional ethics also suffer from a reliance on our common-law tradition of ambiguous, general, and often contradictory "situation oriented" rules, which in essence allow an ad hoc weighing of competing factors and the treatment of each case as unique.⁹⁹ Thus law schools, by teaching an ethical code more thoroughly, may be emphasizing the acquisition of a very peculiar sort of rule knowledge. This knowledge presumably helps to teach the ideology of zealous client service, which arguably led to Watergate in the first place. In addition, any code's general ideology of weighing conflicting interests on an ad hoc basis may be an ineffectual way to constrain unethical decisions.¹⁰⁰ In sum, the law school response to a perceived "crisis" in professional responsibility has been the limited, formalistic one of creating a new, specialized course in professional ethics that is of doubtful efficacy.¹⁰¹

of Delegates in August 1983. Rotunda, *supra*, at 457-58. The newly adopted rules, known collectively as the Model Rules of Professional Conduct, are designed to replace the ABA's 1969 Model Code of Professional Responsibility, which by the early 1970's had been adopted with some modifications by state and federal courts as the ethical code for virtually all jurisdictions in the United States. *See id.* at 456.

⁹⁶ *See* Pipkin, *supra* note 37, at 248.

⁹⁷ *See id.* at 249.

⁹⁸ *See, e.g.,* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 4, 7 (1979) (Lawyers generally should protect client confidences and secrets, and they should strive to represent clients' interests zealously within the bounds of the law.); *see also* Redlich, *Disclosure Provisions of the Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RESEARCH J. 981, 982 (The central difference between the Code of Professional Responsibility and the Model Rules is the Code's attempt to enlarge the protection of confidentiality between attorney and client, and the Model Rules' attempt to limit the privilege.); Rotunda, *supra* note 95, at 467-84.

⁹⁹ *See* Aronson, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273, 286-93 (1976).

¹⁰⁰ *See id.* at 289 (The system may provide little guidance to lawyers who must define and weigh conflicting interests in difficult situations.); *cf.* Kissam, *Antitrust Boycott Doctrine*, *supra* note 8, at 1171-72 (Ad hoc balancing by antitrust courts is a poor way to constrain subjective decisions by judges and to generate consistent judicial results.).

¹⁰¹ On the general failure of American law schools to do a good job of teaching professional ethics, *see* Aronson, *supra* note 99, at 278-80; Burger, *supra* note 94, at 388-90; Pipkin, *supra* note 37, at 273-75. *See also* Samad, *The Pervasive Approach to Teaching Professional Responsibility*, 26 OHIO ST. L.J. 100, 106 (1965) (arguing that

This response provides some additional evidence of the decline in law school professionalism. A professional community typically defines itself by a confident sense of "professional solidarity" and "professional expertise," which recognizes the professional community as the only appropriate arbiter of acceptable professional conduct.¹⁰² Furthermore, a confident professional community will hold to the belief that the majority of its members are committed to the values of "ethical practice" and "public service," and therefore that any wrongdoing is aberrational and not indicative of system-wide failure.¹⁰³ A professional community, then, will probably resist admitting to any systemic failure and, when tactically in need of some system-wide correction, will probably incorporate any change into its common methods.¹⁰⁴ The response of the law school community to charges of unethical behavior has instead been to admit to a crisis in professional ethics but to treat the problem as one fit for a new kind of specialization: a new rule-knowledge course in professional ethics. This development could be merely a low-cost way of placating outsiders rather than the admission of a crisis in professional responsibility. But this would not be the behavior of a confident

ethical issues should be addressed in all substantive courses rather than being relegated exclusively to the course in professional responsibility). To be sure, the parallel development of clinical legal education during the 1960's and 70's holds out some promise of providing a more effective kind of training in professional responsibility. *See, e.g.,* Barnhizer, *supra* note 82, at 1034-40 (suggesting that clinical programs can provide students with professional values that are less elitist and more socially responsible than the values a student absorbs in the traditional law school experience); Condlin, *supra* note 94, at 605 (arguing that despite the ineffectiveness of many existing clinical programs, clinical education is potentially a very effective way to teach ethics). But this promise may be a limited one, especially in view of the substantial costs that are involved in developing ideal clinical programs and in view of the more general adversarial, rule-oriented jurisprudence of our law and law teaching. *See id.*; Luban, *supra* note 30. The formalistic response of law schools to this "crisis" in professional ethics also should not be very surprising, since the legal profession now tests the "ethical knowledge" of prospective lawyers by means of a special short-answer examination—the Multi-State Professional Responsibility Examination.

¹⁰² *See, e.g.,* E. FREIDSON, *supra* note 9, at 152-53.

¹⁰³ *See, e.g.,* T. PARSONS, *A Sociologist Looks at the Legal Profession*, in *ESSAYS IN SOCIOLOGICAL THEORY* 370 (rev. ed. 1954).

¹⁰⁴ A number of commentators have supported a "pervasive approach" to teaching professional responsibility. *See, e.g.,* Samad, *supra* note 101, at 106; Wasserstrom, *supra* note 94, at 158-59; Watson, *The Watergate Lawyer Syndrome: An Educational Deficiency Disease*, 26 J. LEGAL EDUC. 441, 445 (1974). *But see* Aronson, *supra* note 99, at 174-75 (advocating the use of "system oriented models" for teaching professional responsibility); Barnhizer, *supra* note 82, at 1034-35 (advocating a clinical approach to teaching professional responsibility). *See generally* SPECIAL COMMITTEE FOR A STUDY OF LEGAL EDUCATION, AMERICAN BAR ASS'N, LAW SCHOOLS AND PROFESSIONAL EDUCATION 55-62 (1980) (discussing the effectiveness of attempts by legal educators to teach professional responsibility and alternatives to the specialized course approach); Luban, *supra* note 30, at 637-45 (discussing the limitations of any approach to professional responsibility within our adversarial, rule-oriented jurisprudence).

professional community either, which, if it believed that the problem did not exist, should have had the cultural authority and expertise to convince outsiders that no problem existed. In either event, the response of law schools to concerns about professional responsibility demonstrates a fragmented and specialized community rather than a unified one.

The recent concerns among members of the legal profession and the rest of the population regarding the practical competence of lawyers and the law school response to these concerns also indicate a decline in law school professionalism.¹⁰⁵ If we assume, initially, that there has been no real change in the quality of legal services, a decline in law school professionalism is indicated in several ways. First of all, it is significant that most challenges to the practical competence of modern lawyers seem to come from the rather subjective and general observations of judges and other lawyers.¹⁰⁶ These observations could be based on the simple fact that lawyers today are employing varied methods, not necessarily of a lower quality, in the performance of their daily tasks.¹⁰⁷ In the ineffable world of professional quality, the appropriateness or commonality of methods rather than the objective results or outcomes of professional services is frequently the measure of quality.¹⁰⁸ Mere variations in lawyers' methods could thus constitute a basis for current perceptions of a decline in professional competence, and this

¹⁰⁵ See generally SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, *LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS* (1979) [hereinafter cited as *LAWYER COMPETENCY*] (advocating changes in legal education to improve lawyer performance in the wake of public and professional criticism); Gee & Jackson, *supra* note 1, at 841-975 (analyzing various reform measures in legal education).

¹⁰⁶ See, e.g., Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227, 230-38 (1974); Cramton & Jensen, *The State of Trial Advocacy and Legal Education: Three New Studies*, 30 *J. LEGAL EDUC.* 253, 253-55 (1979); Kaufman, *The Court Needs a Friend in Court*, 60 *A.B.A. J.* 175, 175-77 (1974). Most of the expressed concern and virtually all of the present opinion surveys about lawyer competence have concerned trial advocacy, where the lawyer's performance is more visible to her peers. *LAWYER COMPETENCY*, *supra* note 105, at 8. For a discussion of the bar's more general concerns about the practical competence of new lawyers, see F. ALLEN, *supra* note 93, at 54-56.

¹⁰⁷ In particular, the variation in method between "mega-lawyers," who represent large organizations and other wealthy clients capable of paying for comprehensive research, analysis, and case development, and "ordinary lawyers," who must continually engage in quality/cost trade-offs because of the limited resources of their clients, is probably growing at a dramatic pace in our increasingly bureaucratic and commercialized legal profession. See Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United States*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* 152 (R. Dingwall & P. Lewis eds. 1983).

¹⁰⁸ See Williams & Brook, *Quality Measurement and Assurance*, *HEALTH & MED. CARE SERV. REV.*, May-June 1978, at 1.

variation in methods could be explicable, at least in part, by specialization in the law school classroom.¹⁰⁹ In addition, law schools have typically responded to concerns about competence not by introducing system-wide changes, as a confident professional community would, but rather by introducing new and separate specializations: the legal clinic; simulated clinical programs, such as trial advocacy, negotiation, and estate planning; and new or expanded "research and writing" courses.¹¹⁰

If in fact there has been a decline in the practical competence of new lawyers, this could be an even stronger indication of a decline in law school professionalism. What might explain a declining competence among recent law graduates? Since practical training in clinics was not provided in the past, a decline in the practical competence of new lawyers might be explained by a breakdown in the traditional emphasis on the methods of legal analysis, synthesis, and argumentation. As I have argued throughout this Article, this breakdown is attributable to the increased emphasis on the acquisition of rule knowledge in classrooms, an emphasis that stems most directly from law faculty specialization, new bureaucratic requirements, and contemporary law student demands and expectations.¹¹¹

Contemporary concerns about the ethical and practical training of lawyers could have significant and beneficial effects on legal education in the long run. Clinical education has developed in the past two decades as the major response by law schools to these concerns.¹¹² This

¹⁰⁹ The other major cause of variable methods among lawyers, of course, is specialization in practice. The current perceptions of a decline in professional competence might also be explained in part by the recent increase in the ratio of inexperienced lawyers to lawyers generally, which resulted from the substantial expansion of law schools in the 1960's and 70's.

¹¹⁰ A possible exception to this pattern of specialized response is the integrated instructional program that is being developed at the University of Montana School of Law. See Academic Planning Project, University of Montana School of Law, Interim Report (1984); see also Amsterdam, *supra* note 30 (by the 21st century, all law schools may or should have become clinical instruction programs).

¹¹¹ An alternative or additional explanation of a real declining competence among new law graduates might be a declining average quality, due to law school expansion, of persons attending law school during the past two decades. While this idea could be as difficult to measure empirically as the notion of a breakdown in law school methods, it would seem to be refuted by the demographic factors that explain the recent law school expansion (an increase in the population of college-aged persons, increasing material wealth, and new groups of law students, such as women and minorities), as well as by the general sense that the "quality" of law students has, at many schools, improved during this period. See, e.g., Zimmer, *Survival after the Boom: Managing Legal Education for Solvency and Productivity*, 34 J. LEGAL EDUC. 437, 437-38 (1984); cf. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 573 (1983) (noting that "law . . . attracts an unusually large proportion of the exceptionally gifted").

¹¹² See R. STEVENS, *supra* note 2, at 214-16 (Clinical programs serve the need for

movement promises substantial reforms in American legal education by expanding legal training to include supervised experience and practice in such important matters as conducting factual investigation, making choices between alternative legal strategies, applying legal standards to complex and uncertain situations, and assuming responsibility for an actual client's interests.¹¹³ The clinical movement could also trigger a reform of the entire curriculum by supporting simulated clinical courses, by creating more demand for writing throughout the curriculum, and perhaps by placing a renewed emphasis in the traditional classroom on problem-solving rather than rule coverage.¹¹⁴ If so, the clinical movement may be the most effective means of ultimately bringing about new forms of legal teaching and scholarship, forms that are oriented toward a more contextual analysis, socially responsive law, and professionally responsible lawyers.

A third external factor that is affecting law schools is the modern development of "law firm capitalism." The integration of the modern corporate law firm into the complex political economy of America, the basic structure of this firm (with partners as profit-making employers and associates, consultants, and part-time students as wage-earning employees), and the general rationalization of the modern law enterprise in order to maximize profits for partners have transformed legal partnerships into capitalistic enterprises.¹¹⁵ This structure has influenced the decline of law school professionalism in at least two basic ways. First, the specialization of lawyers in these firms has provided the basic graduate training for members of the legal professoriate, a training that

a more practical legal education.); Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67, 71-72 (1979) (Clinical education is currently the most reliable method for teaching professional responsibility effectively.).

¹¹³ See Amsterdam, *supra* note 30, at 616-17; Barnhizer, *supra* note 82, at 1034-38; Doyel, *The Clinical Lawyer School: Has Jerome Frank Prevailed?*, 18 NEW ENG. L. REV. 577, 589-90 (1983); Luban, *supra* note 30, at 644.

¹¹⁴ The influence of the clinical movement may occur in several ways, including the establishment of simulated clinical courses to support clinical programs and the moving of clinical teachers into the classroom, as well as more subtle forms of imitation. I owe this point about the cross-curricular influences of clinical programs to Marina Angel of Temple Law School. For a discussion of how the merits of clinical education could lead eventually to a widespread redeployment of law school resources into clinical types of teaching, see Amsterdam, *supra* note 30, at 616-17.

¹¹⁵ See, e.g., Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms*, 1981 AM. B. FOUND. RESEARCH J. 97, 126 (Because law firms, as partners admit, "buy associates' time at 'wholesale and sell it at retail,' the work of associates is an important source of surplus for the partnership and, given expanding demand for services of the firm, a factor that will encourage the firm to expand."); see also Nelson, *supra* note 35 (Associates entering large law firms today face an increasingly bureaucratic system.).

has become, at many schools, almost a necessary condition for obtaining a law faculty position.¹¹⁶ Second, the specialization of these firms has created an increasing demand for consulting services by law faculty who themselves are specialists, and this consulting business, if significant, can certainly determine the nature of a law teacher's classroom and scholarly methods. These methods may be designed (either consciously or subconsciously) to serve the specialty practice rather than any common set of professional methods and values within the law school.¹¹⁷ In addition, law firm capitalism may be supporting the erosion of law school professionalism by insisting on (or by encouraging students to insist on) the teaching of legal specialties and acquisition of rule knowledge throughout the law school curriculum. To be sure, many firms still prefer to hire generalists with good skills rather than graduates with the most extensive rule knowledge of various corporate specialties. To the extent that some firms do ask for specialized knowledge, however, a rational law school may very well try to satisfy all law firms by specializing its courses while claiming that generalists with good skills are still being produced within the newly specialized system. I think that this is unlikely to work, but it would be a rational move by law schools, especially in light of all of the other incentives to specialize.

The emergence of law firm capitalism could potentially influence the development of legal education in more fruitful ways. It has been traditionally understood, especially at national schools, that many of the basic skills of practicing lawyers would be provided by "graduate training" in large urban law firms. Today, however, when the salaries of new associates at these firms have increased dramatically, this graduate training has become quite expensive. It is only rational for private firms to seek to transfer these costs elsewhere,¹¹⁸ and their demands may eventually force modern law schools to offer a richer mix of research, writing, and clinical opportunities to substitute for private-firm graduate training.¹¹⁹ This move would be consistent with (and could support) the development of more critical inquiry in legal education.

¹¹⁶ See Fossum, *supra* note 20, at 510-13 (reporting a survey finding that as of the 1975-1976 academic year 67.2% of law school "tenure track" teachers had prior experience practicing law).

¹¹⁷ See Ackerman, *supra* note 1, at 1135-36.

¹¹⁸ See Cramton, *supra* note 74, at 466.

¹¹⁹ See *id.* (arguing that the contemporary expansion of law school graduate programs may have developed in part to substitute for private firm graduate training).

III. FORMALISM OR PLURALISM?

In parts I and II, I described law school professionalism and several changes in American law schools that are undermining the traditional values and methods that constitute this professionalism. These changes point in two directions. Some support a new formalism in legal education, while others support a variety of moves away from formalism toward a more contextual, more critical, and more pluralistic study of law. In this part of the Article, I shall examine these trends more systematically. In section A, I consider the traditional concepts of "legal formalism" and the emergence of a "new formalism" that is resulting from the confluence of the older concepts, certain professionalism values, and contemporary structural changes. Sections B through D discuss the contradictory development of a "new pluralism" in these schools and the ways in which this pluralism might help produce significant changes in law school methods and legal theory.

A. *The New Formalism*

Legal theorists have traditionally used the term "formalism" to describe two distinct approaches to legal problem solving. In a strict or narrow sense, formalism refers to legal reasoning that is "correct" in a formally demonstrable way. In this sense, legal reasoning is formalistic when it proceeds by deduction from agreed-upon premises that (somehow) can be found embodied in statutes, legislative histories, and judicial opinions.¹²⁰ In a broader sense, formalism refers to the lawyerly penchant for sticking precisely to the forms of things—whether they be statutes, judicial opinions, legislative histories, or even well-recognized customary practices—without regard to the underlying purposes, values, or general context within which and for which these forms have been created.¹²¹ In this part of the Article, I shall argue that both of these formalisms continue to pervade American legal education, that both are being reinforced in important ways by current structural changes, and that the "new" or "transformed" law school formalism may limit the richness and effectiveness of much legal analysis.

Formalism in its narrow sense has been under a heavy intellectual attack since the time of Holmes and Pound. The American legal realist movement dealt the strict sense of formalism critical blows within the walls of American law schools in the 1920's and 30's.¹²² As a matter of

¹²⁰ See, e.g., Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-88 (1976).

¹²¹ See, e.g., P. NONET & P. SELZNICK, *supra* note 7, at 53-72.

¹²² See Woodard, *The Limits of Legal Realism*, *supra* note 10, at 723; Note,

conventional wisdom and the best legal scholarship, we no longer believe, at least with regard to hard cases, that lawyers can reason in certain or noncontroversial ways from agreed-upon premises to required conclusions.¹²³ Yet, perhaps because so many cases lend themselves easily to the style of formal reasoning, many lawyers and many courts continue to prefer and employ this kind of formalism in hard as well as easy cases. Perhaps these lawyers have been captured by a "paradigm" of formalist reasoning,¹²⁴ or perhaps there are important professional and private interests that are served by the maintenance of a formalistic style in legal argument.¹²⁵ It is even possible that a certain kind of sophisticated formalism is valid as the appropriate process of legal reasoning.¹²⁶

In any event, in law schools, where the realist onslaught has been most influential, strict-sense formalism has resisted the onslaught and persists as a method for describing and doing legal reasoning in day-to-day classroom practice.¹²⁷ This may be simply because the realist attack on logical formalism has not extended far enough, but I believe there are better reasons than this. In my view, the retention of strict-sense formalism in many classrooms can be attributed to law faculty specialization, new student perspectives, the new emphasis on rule knowledge, and the older ideals of the law professor as high-quality expert and omniscient judge. These several values or functions are all served by the retention of strict formalism because it is a mechanism that helps to describe the multitude of "correct" rules and "correct" results in any legal specialty. Furthermore, without this formalism, how can there be "objective" or "fair" law school examinations? In these days of lawyer surplus and strenuous competition for high grades, law teachers are much better off writing examinations that have demonstrably correct

supra note 8, at 1157-72. See generally M. WHITE, *SOCIAL THOUGHT IN AMERICA* (1947) (a history and critique of liberal social philosophy in early twentieth-century America).

¹²³ See, e.g., E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 1-3 (1949); A. PEKELIS, *LAW AND SOCIAL ACTION* 1-41 (1950).

¹²⁴ On the notion of paradigmatic resistance to new ideas in scientific research, see T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). Kuhn argues that normal scientific research is conducted within the constraints of "scientific paradigms," which are major scientific achievements that are accepted, often implicitly, by specific research communities as constituting the basis for future scientific research. These paradigms, while efficient, can obscure or create much irrational resistance to new ideas among scientific researchers. See *id.* at 5-7, 59-65, 77-82.

¹²⁵ See Schlegel, *supra* note 8, at 104-09.

¹²⁶ See generally R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-45, 81-130 (1977) (arguing that judicial decisions characteristically are, and should be, generated by principles that are embedded in our legal institutional practices rather than by free-wheeling legislative policy choices).

¹²⁷ See Schlegel, *supra* note 8, at 107-09.

answers. Formalism is a way to do this; the realists' focus on policy is not.

Even if formalism in the strict sense is not as important as I have suggested, formalism in the broader sense of limiting analysis to the "legal" forms of judicial opinions, statutes, and legislative histories continues to be a very significant if not controlling influence in law school analysis. It is a commonplace that law professors and their students are trapped in a limited social and legal analysis by their emphasis on cases, statutes, and judicial opinions, by their rather exclusive use of casebooks, and by their concurrent failure to explore "nonlegal" data and ideas in any systematic fashion.¹²⁸ Formalism in this broad sense unduly directs the attention of lawyers away from social and human values, the use of related disciplines, such as economics or philosophy, and the social and moral contexts of the legal process itself.¹²⁹ Significantly, the realist attack on formalism in the strict sense never included a comparably successful attack on formalism in the broad sense, even though many realist professors have been interested in research and scholarship that goes far beyond the boundaries of legal forms. At least in the classroom, realist methods have concentrated on demolishing the formalist "myth" of judicial decisionmaking (strict-sense formalism) and have merely added some ad hoc, seat-of-the-pants policy discussions about what the (formal) rules or rulings should be.¹³⁰ This intuitionistic sort of policy discussion, which relies heavily on a few common "policies" that typically can be found in the legal forms, has never required a frontal attack on, much less the displacement of, formalism in its broader sense.¹³¹

These two kinds of formalism are, in fact, additional aspects or

¹²⁸ See, e.g., Austin, *supra* note 41, at 164; Brabson, *supra* note 41, at 507-08; Holmes, *Education for Competent Lawyering—Case Method in a Functional Context*, 76 COLUM. L. REV. 535, 539 (1976). *But cf.* Fried, *The Artificial Reasoning of the Law or What Lawyers Know*, 60 TEX. L. REV. 35, 57 (1981) (Lawyers depend on analogy and precedent to guide their reasoning, because philosophical structures, while valuable, are always incomplete.); White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669, 1672 (1984) (justifying the emphasis on judicial opinions in legal education).

¹²⁹ See, e.g., P. NONET & P. SELZNICK, *supra* note 7, at 53-72.

¹³⁰ See Gordon, *supra* note 48, at 282-83; *cf.* B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 6-22 (1984) (arguing that realism provided the legal profession with an essentially conservative intellectual structure that allowed lawyers to use common-law rules without accepting the common law's laissez-faire foundations); Note, *supra* note 8 (arguing that the realist emphasis on the "facts" of cases and the "professional craft" of lawyering severely limited realist analysis of underlying social conditions and values).

¹³¹ See Posner, *supra* note 22, at 1114-15 (arguing that policy analysis in traditional doctrinal scholarship does not go very far beyond the formalism of judicial opinions).

consequences of traditional law school professionalism. Significantly, the survival of these formalisms, despite a century of "modern thought" about the law that should have been sufficient to vanquish them—or at least limit them—attests to both the continuing strength of certain professionalism values and the force of the new structural changes in law schools. Today's law school formalism is based on the traditional values that grew out of the notion of law as science, and on recent structural changes, such as law faculty specialization, the new demand by students for rule acquisition and demonstrable right answers, and the new bureaucratic requirements of "objective" evidence of teaching ability and scholarly accomplishments. This formalism is a product of social structure rather than legal theory, and it therefore seems appropriate to call it a "new formalism."¹³²

B. *The New Pluralism*

The breakdown of common analytical methods in law school teaching and scholarship has led to the recent development of several new ways of studying, interpreting, and criticizing the law. This pluralism is more evident in legal scholarship than in the classroom, but this may be simply because the changes in scholarship are more visible or because it takes a longer time for change to reach the classroom. In this section, I shall outline the general nature of this pluralism and note some of its immediate consequences. In subsequent sections, I shall discuss the longer-run implications of the new pluralism for law school methods and legal theory.

1. The New Pluralism in Classroom Methods

As I have indicated, the new emphasis on rule coverage and objective examinations in traditional classes is eroding the traditional emphasis on skills training—the use of legal methods by students—in the classroom. This diminished emphasis on skills training is promoting, or at least encouraging, what might be described as a "breakdown" in law school method, or as an erosion of common methods in law school teaching and analysis. To be sure, there is a common emphasis on helping students acquire rule knowledge for use in their law school exams and subsequent practices; this emphasis is not, however, a

¹³² *But cf.* Schlegel, *Langdell's Legacy Or, The Case of the Empty Envelope* (Book Review), 36 STAN. L. REV. 1517, 1532-33 (1984) (suggesting that contemporary law school formalism is an historical product of the search by law professors for a professional identity and, more fundamentally, of a deep cultural attachment of Americans to the rule-oriented notion of law).

method of teaching, but rather a goal or function. The methods by which the dissemination of rule knowledge is carried out are no longer uniform or even well designed to perform this task, let alone to achieve other goals.

Concerns about a breakdown in methodology and the deemphasis on skills acquisition have been expressed before. As early as 1944, Karl Llewellyn was criticizing methods training.¹³³ In 1952, Edmund Morgan could describe three prevalent styles of the "case method" in law school teaching: the disfavored (by Morgan) use of the case method merely to discover or announce the rules of cases without attention to their underlying purposes, rationales, or use in future problem solving; the class discussion of case rules and their rationales, but no more; and the broader examination of cases as instances of, and instruments for, legal problem solving.¹³⁴ Today our classroom methods have certainly multiplied. There is much talk in both the literature and among law professors of a need to resort to lectures—particularly in upper class courses—in order to "cover" the constantly expanding doctrines of modern law. Consider also the well-known but less frequently recognized "Socratic monologue," in which teachers, in essence, answer their own questions, and the use of assigned "class experts" who "lecture" (together with their teachers) while others listen. There is also the well-recognized trend toward "casebook formalism," which provides contemporary students with materials containing only brief excerpts from judicial opinions—one case per issue—and extensive notes that help outline the substantive law. This trend, of course, encourages the coverage of rules and discourages, if not eliminates, the possibility of emphasizing the traditional skills of case analysis and synthesis.¹³⁵

In a parallel development, many teachers are beginning to employ a variety of methods for interpreting both legal texts and nonlegal data. To start with a simple proposition, there is the basic but considerable difference between law teachers who emphasize "holdings" or the resolution of specific factual disputes, and those who emphasize the "rules" of cases or more general standards that serve to summarize or justify

¹³³ See Llewellyn, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345 (1945); see also Fuller, *Legal Education and Admissions to the Bar in Pennsylvania*, 25 TEMP. L.Q. 249, 263-68 (1952) (Most professors in Pennsylvania law schools lecture, rather than using the case method exclusively.).

¹³⁴ See Morgan, *supra* note 13, at 383-85.

¹³⁵ See R. STEVENS, *supra* note 2, at 270 n.48; Gellhorn, *supra* note 41, at 3-4; cf. Speziale, *supra* note 14, at 11-20 (discussing use of the case method by Dean Langdell at Harvard, who slowly probed for an understanding of the principles embedded in a line of unedited cases).

judicial decisions.¹³⁶ There is the further distinction between the Langdellians, who continue to emphasize the conceptual order of legal systems and the doctrinal rightness or wrongness of particular decisions, and those many straightforward realists who essentially appear (to students at least) to believe that law is nothing but policy or what the judges say it is.¹³⁷ There is another distinction, which can overlap the previous ones, between the methods employed by "private law" and "public law" teachers.¹³⁸ Different specialists will also emphasize different approaches to the interpretation of the same body of law.¹³⁹ Finally, to make things even more complex, there are those faculty scattered throughout American law schools who are applying various types of social science analysis to the law, from either a positive or normative perspective,¹⁴⁰ and others who wish to emphasize a more direct moral analysis of the law, be it neo-conservative, liberal democratic, or radical-left critical theory.¹⁴¹ All in all, contemporary American law professors appear to be offering a very complex, potentially confusing, and possibly confused menu of analytical methods to their students. There is little sense of a common professional community apparent in all this.¹⁴²

¹³⁶ I owe this observation to Malcolm Davy, who suggested this distinction after studying Karl Llewellyn's *THE BRAMBLE BUSH*, *supra* note 11, in a legal methods course, and on being asked to describe a model of his daily classroom work in substantive first-year courses.

¹³⁷ This is the way my jurisprudence class typically divides the law faculty at the University of Kansas after reading Woodard, *The Limits of Legal Realism*, *supra* note 10.

¹³⁸ See Clune, *A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers*, 69 IOWA L. REV. 47, 114-22 (1983); see also B. ACKERMAN, *supra* note 130, at 23-45 (discussing the different methods of "reactive" and "active" lawyering).

¹³⁹ See *supra* text accompanying notes 38-39.

¹⁴⁰ See generally L. FRIEDMAN & S. MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* (2d ed. 1977) (examining the ways in which the legal system and society affect each other); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977) (applying economic principles to the rules and institutions of the legal system).

¹⁴¹ Compare R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978) (law-and-economics antitrust analysis) with B. ACKERMAN, *supra* note 130 (manifesto for a contemporary liberal law) and Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277 (1984) (critical theory analysis of administrative and corporate law) [hereinafter cited as Frug, *Ideology*]; Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983) (manifesto for the study of law from a viewpoint of critical theory); Frug, Book Review, 84 COLUM. L. REV. 1881 (1984) (reviewing B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW*). The cited authorities concern scholarship rather than teaching methods, but presumably law school teaching practices reflect the different attitudes and kinds of analysis on display in these different forms of scholarship.

¹⁴² Cf. J. HIGHAM, *HISTORY: PROFESSIONAL SCHOLARSHIP IN AMERICA* 233-62 (1983) (discussing pluralism in contemporary historical scholarship); Donoghue, *Anger and Dismay*, LONDON REV. BOOKS, July 19-Aug. 1, 1984, at 16 (discussing pluralism

The predictable law school response to this "methodological crisis" in the community has been the innovation and proliferation of law school courses on "the legal process" or "legal methods."¹⁴³ The dour reception that so many students seem to give to required first-year courses in legal methods or legal process is further evidence of a breakdown in method.¹⁴⁴ Although these courses were developed to substitute for a diminishing emphasis on analytical methods in "substantive" courses, many students appear to treat them as either disguised courses in legal philosophy or extensions of undergraduate training in political science. These courses are treated in this way because the students are unable to make sufficient connections—or any connections at all—between the traditional legal methods that are examined in such courses and their daily work in other subjects.¹⁴⁵ The failure of so many students to make this connection suggests that the traditional emphasis in law classes on legal synthesis and the construction of legal arguments is no longer sufficiently present or is presented in such conflicting ways that generalizations about legal methods appear useless, unpopular, and thus inappropriate as the subject of a required course.

2. The New Pluralism in Scholarship

The breakdown in traditional law school methods is also evident in the manifold types of contemporary legal scholarship now being published. In 1936, Fred Rodell could describe the great bulk of law review writing as a kind of uniform doctrinal "spinach,"¹⁴⁶ and by 1962 the situation had not changed enough to cause Rodell to retract this evaluation.¹⁴⁷ Yet in the past twenty years much has changed, and

in contemporary literary criticism).

¹⁴³ Although legal methods courses were initially established in some law schools immediately after World War II, see R. STEVENS, *supra* note 2, at 212, it is my impression that contemporary concerns during the past decade with Watergate, professional ethics, and professional competence have motivated many law schools to institute or reinstitute such courses. Certainly there has been a plethora of new and revised "casebooks" on legal methods published in recent years. See, e.g., J. DAVIES & R. LAWRY, *INSTITUTIONS AND METHODS OF THE LAW* (1982); H. JONES, J. KERNCHAN & A. MURPHY, *LEGAL METHOD* (1980); R. KELSO & C. KELSO, *STUDYING LAW: AN INTRODUCTION* (1984); S. MENTSCHIKOFF & I. STOTZKY, *THE THEORY AND CRAFT OF AMERICAN LAW* (1981).

¹⁴⁴ This observation is based on a considerable amount of personal experience in trying to teach such a course.

¹⁴⁵ This failure to make sufficient connections has been made evident to me by the frequency with which good students, who have performed well in my legal methods course, inform me several semesters later that "now I appreciate the course."

¹⁴⁶ See Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 45 (1936); see also Cavers, *New Fields for the Legal Periodical*, 23 VA. L. REV. 1, 1-2 (1936) (noting the sameness of contemporary law reviews and law schools).

¹⁴⁷ See Rodell, *Goodbye to Law Reviews Revisited*, 48 VA. L. REV. 279, 286

I doubt if Rodell would or could make the same claim today. Legal scholarship still may be spinach, of course, but it certainly is no longer all doctrinal spinach.¹⁴⁸ There are, for example, many legislative policy studies,¹⁴⁹ much economic analysis of law,¹⁵⁰ a significant literature on the sociology of law,¹⁵¹ and many philosophical excursions by law professors¹⁵²—all from various points of view. There are also hybrid sorts of literature that can fairly be described as “meta-doctrinal”; these articles examine legal doctrine from a nontraditional perspective by exploring the implicit rather than explicit premises, values, and analytical methods that may lurk in the contingent masses of legislative and judicial materials.¹⁵³

Legal treatises, at least in the fields I am familiar with, are beginning to demonstrate a similar variety in the analytical methods they employ to interpret and explain judicial decisions. Compare, for example, Lawrence Tribe’s “seven models” of constitutional analysis¹⁵⁴ with the more traditional presentation of constitutional cases by Professors Nowak, Rotunda, and Young.¹⁵⁵ Or compare the economic model of antitrust law that is used by Phillip Areeda and Donald Turner in their multi-volume treatise¹⁵⁶ with the more eclectic view of antitrust law and values that Lawrence Sullivan offers in his hornbook.¹⁵⁷

The virtual explosion in new types of legal scholarship that has occurred during the past two decades may be attributed in part to the decline in law school professionalism. Faculty specialization, the break-

(1962).

¹⁴⁸ For a good discussion of legal scholarship, see *Papers from the Yale Law Journal Symposium on Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981) [hereinafter cited as *Symposium on Legal Scholarship*].

¹⁴⁹ See, e.g., Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975 (1978).

¹⁵⁰ See, e.g., R. POSNER, *supra* note 140; Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975). See generally *The Place of Economics in Legal Education*, 33 J. LEGAL EDUC. 183 (1983) (conference proceedings on the “law and economics” movement in legal education).

¹⁵¹ See generally Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 LAW & POL’Y Q. 149 (1984) (reviewing the impact of the law-and-society movement on legal education and scholarship).

¹⁵² See, e.g., Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985).

¹⁵³ See, e.g., Mashaw, *supra* note 54; Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982). See generally Ackerman, *supra* note 1, at 1131-32, 1139-41 (discussing different analytic approaches to legal scholarship).

¹⁵⁴ See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* chs. 2, 8-11, 16-17 (1978).

¹⁵⁵ See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* (2d ed. 1983).

¹⁵⁶ See P. AREEDA & D. TURNER, *ANTITRUST LAW* (1978, 1980, 1982).

¹⁵⁷ See L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* (1977).

down in traditional law school methods, the weakened socialization of new faculty, and the new bureaucratic structures in universities all have played at least contributing roles in the hiring of new faculty members who are doing this scholarship. These factors have also contributed to the creation of an environment that encourages and supports this research. The ambitions and restlessness of new faculty in an overcrowded market are undoubtedly also contributing factors.¹⁵⁸ The contemporary proliferation of new types of legal scholarship has been the subject of several recent symposiums;¹⁵⁹ only a few of the more significant developments need to be mentioned here.

The law-and-economics movement, because it has probably had the greatest influence in the classroom, is undoubtedly one of the most significant new types of legal scholarship.¹⁶⁰ Its relative success can be explained by several factors that have little to do with whether economic analysis is the best way to study law. Economics has long been accepted as part of antitrust and regulated-industries law, and its expansion throughout the curriculum may not seem to be as innovative or radical as the introduction of other disciplines, such as history, sociology, and moral philosophy. Moreover, economics analyzes markets, and law schools concentrate on teaching market-regulating law, that is, on commercial and corporate-law subjects. Economics therefore may appear to be simply a more useful interdisciplinary tool for many law school subjects than other kinds of inquiry. In addition, positive economic analysis is grounded fundamentally on what consumers do with their money, and this analysis generates relatively conservative answers that are likely to be more consistent with the results of traditional legal analysis than are the answers offered by other lines of inquiry.¹⁶¹ Finally, much economic analysis of law employs some rather elegant de-

¹⁵⁸ In a recent lecture at the University of Kansas, Frederick Crews, Professor of English at the University of California, Berkeley, similarly attributed the contemporary proliferation of theories of literary criticism to the ambitions and restlessness of many English professors, who were initially hired during the expansion era of the 1960's and now want to move on and ahead in their careers by distinguishing their scholarship from the existing mainstream tradition. Cf. J. HIGHAM, *supra* note 142, at 233-67 (on the contemporary explosion in new types of historical scholarship).

¹⁵⁹ See *Critical Legal Studies*, 36 STAN. L. REV. 1 (1984); *Symposium on Legal Scholarship*, *supra* note 148; *The Place of Economics in Legal Education*, *supra* note 150; see also *Law and Literature*, 60 TEX. L. REV. 373-586 (1982) (discussing various theories of the meaning and interpretation of texts in both legal scholarship and judicial decisionmaking).

¹⁶⁰ See *The Place of Economics in Legal Education*, *supra* note 150, at 183.

¹⁶¹ See Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975) (arguing that current applications of economic principles to law result in generally conservative judicial policy); Schlegel, *supra* note 8, at 109 (discussing some common roots of the studies of law and economics).

ductive reasoning from first principles, and this type of reasoning is closely akin to the legal tradition of formalistic reasoning in the strict sense. Economics is thus likely to have a better "fit" with the traditional legal mentality than are other academic disciplines.¹⁶²

The law-and-society movement is another significant branch of the new scholarship.¹⁶³ This movement, with its emphasis on empirical research into the social effects of alternative rules and processes, has also influenced law teaching, although it appears to have done this less directly than has law and economics. This scholarship focuses on specifying the gaps between the promises of legal rules and the realities of legal practice, and such findings arguably are (or should be) a significant influence on law teachers, particularly in such subjects as criminal law, contracts, and general litigation subjects.¹⁶⁴

While these movements are perhaps the best-developed "schools" of new legal scholarship, other movements include the use of techniques of literary criticism in legal interpretation,¹⁶⁵ the application of modern and post-modern philosophy in developing the "Critical Legal Studies" movement,¹⁶⁶ and the attempt to apply the learning of contemporary Anglo-American political philosophy to the analysis of specific legal issues.¹⁶⁷ This diversity of voices may be appreciated aesthetically,¹⁶⁸ and it has already made some important contributions toward the development of a socially responsive law. However, the individual contributions from each perspective should be regarded as but partial understandings (at best) of the relationship between law and social values.¹⁶⁹ Only through some grander, if less determinate, conception of law in

¹⁶² See R. BORK, *supra* note 141, at 72-89. In particular, it should be noted that much microeconomic analysis employs a binary type of thinking (some event or rule is either "efficient" or "inefficient"), which would seem to accord well or "fit" with the traditional binary type of legal analysis that determines guilt or innocence, breach or nonbreach, liability or nonliability.

¹⁶³ See Macaulay, *supra* note 151 (reviewing the impact of the law-and-society movement on American law schools).

¹⁶⁴ See *id.* at 150-56.

¹⁶⁵ See, e.g., *Law and Literature*, *supra* note 159; White, *supra* note 128.

¹⁶⁶ See, e.g., *Critical Legal Studies*, *supra* note 159; Frug, *Ideology*, *supra* note 141; Unger, *supra* note 141.

¹⁶⁷ See, e.g., B. ACKERMAN, *supra* note 130, at 72-104 (calling for an application of theories of justice to legal analysis); R. DWORKIN, *supra* note 126; Coffee, *supra* note 149; Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32 (1973).

¹⁶⁸ See Leff, *Law and*, 87 YALE L.J. 989, 1008-11 (1978) (The multiple perspectives that legal scholarship can cast on the law may ultimately be futile, but "at least there is this on the way to the final defeat: there are, at least for some, some beautiful innings.").

¹⁶⁹ See *id.*

society can we hope to achieve a unified theory of responsive law.

The new pluralism in legal scholarship and legal thought has also had some general effects on how we think about the law, and these ideas are likely to hold whether or not the long-term benefits of a decline in law school professionalism are ever attained. In brief, the scholarly developments noted above are helping to "demystify" the law. That is, whether or not we continue to behave in a formalistic and autonomous fashion as lawyers, the current generation of law teachers (and presumably their students as well) will at least know that formalism is a façade that disguises deeper relationships and values. This, of course, was the teaching of the realists in the 1920's and 30's, but that movement did not extend far enough. Moreover, the realist scholarship could be dismissed by others as typical oppositionist scholarship that is present in every intellectual era. Today, however, with several different types of oppositionist scholarship being produced, in much greater diversity and much greater quantity, by more and more faculty at our leading schools, the lesson that law is inseparable from society may finally sink in. This at least would make us better moral agents, even if we are unable collectively to bring about a socially responsive law by defeating the reigning concepts of legal formalism and legal autonomy.

In summary, we have arrived at a point where any "reasonable" method of analyzing cases, teaching law, and writing about the law is acceptable in the law school world. Surely this is important evidence of a decline or radical shift in law school professionalism during the past few decades. More importantly, this breakdown in method, which appears to allow the use of a variety of methods in both the classroom and in scholarship, is inviting ground on which to construct fundamental changes in legal theory and legal methods. It is to the possibility of these changes that I turn in the next sections.

C. *The Waning of Legal Formalism?*

The new pluralism in American law schools, together with the structural changes that support a more contextual approach toward legal studies, may finally achieve what the realist movement started but could not finish. That is, there are today new opportunities for legal teaching and scholarship that could reduce both the strict and broad senses of legal formalism to an appropriately limited place within the universe of legal methods. To be sure, these new opportunities have been only hazily and spottily realized to date. This should not be surprising, however, in view of the fact that it may take much longer than two or three decades for all of the consequences of a decline in law school professionalism to be realized. In any event, the new opportuni-

ties to vanquish formalism rest on several aspects of the decline in law school professionalism.

The breakdown in a common method of analysis in law schools now grants to the individual teacher the basic intellectual freedom to teach in a nonformalistic manner and to engage in nonformalistic scholarship. Of course, the side-constraints of obtaining necessary credentials for tenure and providing fair examinations must be met, and formalism is an easy way to satisfy these demands. Furthermore, colleagues and students may disapprove of or be unable to comprehend nonformalistic analysis. Nonetheless, these constraints may not be that substantial in the long run; individual faculty at almost any school may be able to overcome them in an acceptable fashion and yet teach and do scholarship in new and different ways.

Although I have identified the increase in faculty specialization as an important contributing factor to the new overemphasis on rule knowledge, this specialization, paradoxically, has also increased the possibility that nonformalistic types of lawyers may be recruited to faculty positions. Specialization tends to reduce faculty interest and capability in assessing the values and methods of candidates for specialist positions; as a result, a higher percentage of nonformalistic lawyers may have joined law faculties recently or may be able to join them in the future. Faculty specialization has also encouraged the recruitment of new professors to teach courses in the burgeoning areas of "public law." This too should encourage the recruitment of nonformalistic lawyers because public law subjects typically invite an analysis much broader than that provided by formalism.¹⁷⁰ In addition, faculty specialization presumably weakens the constraints of professional socialization on faculty members who are interested in nonformalistic inquiry.

The influence of women and faculty restlessness resulting from the expansion of law schools in the 1960's and 70's are also important, if indeterminate, factors that could support a final break with legal formalism. Reading Gilligan and Karst strengthened and explained my long-felt impression that women students tend toward and are adept at contextual analysis of judicial decisions and the legal process. I am hopeful that the growing number of women in law schools will enable the moral voice described by Gilligan to be heard, listened to, and incorporated into legal reasoning.¹⁷¹ Similarly, the faculty restlessness factor, though not yet fully played out, is already an important explan-

¹⁷⁰ See B. ACKERMAN, *supra* note 130, at 11-72; Clune, *supra* note 138, at 49-50.

¹⁷¹ See *supra* text accompanying notes 85-92; Karst, *supra* note 89; Savoy, *supra* note 71, at 488. For a fine example of contextual legal analysis, see Sylvia Law's *Re-thinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

atory variable in the proliferation of new types of legal scholarship that attempt to break down formalist notions of law in one way or another.

Furthermore, new teachers and scholars are likely to find some support for their different approaches to the law among an increasing number of students. To be sure, this number may always be in a minority at most schools. Yet the expansion of law schools in the past two decades has been accompanied by increased diversity in the faculty and student populations. The increasing numbers of women, members of minority groups, older persons, and members of other "nontraditional" groups among both law faculties and law students may provide an environment in which the nonformalistic analysis of law can flourish. These persons may provide constituencies at many schools that are sufficient in strength to allow minority views of the law and law teaching to attain more than token representation.

D. *The Waning of Legal Autonomy?*

Critical to the struggles for and against formalism in law school education is the notion that law is essentially autonomous from moral and social values or relationships.¹⁷² As I demonstrated in part I of this Article, the law-as-science notion is the cornerstone of the classical conception of law school professionalism, and that notion presupposes that law is relatively independent from social influences. Of course, lawyers have always realized that moral, political, and other social considerations figure into the work of legislatures and administrative agencies, and the realist movement established pretty clearly that such considerations often play an important, if subconscious, role in how judges decide difficult or contested issues of law.¹⁷³ But generally, and fundamentally, it seems that most lawyers, law professors, and law students continue to adhere to the ideal that the real legal process is autonomous and divorced from political and social values other than those conventionally identified as "legal values."¹⁷⁴

The new opportunities for reducing formalism are simultaneously opportunities for replacing this restrictive notion of legal autonomy

¹⁷² See P. NONET & P. SELZNICK, *supra* note 7, at 53-72.

¹⁷³ See, e.g., B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); A. PEKELIS, *supra* note 123, at 1-41. See generally Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 51-55 (1985) (discussing the Holmesian view that legal doctrines "evolve in response to changes in the social environment," and that judges, in deciding doubtful cases, "have social 'ends articulately in their minds'") (quoting Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899)).

¹⁷⁴ See, e.g., Posner, *supra* note 22, at 1113-14 (noting that doctrinal legal scholarship has been largely autonomous from other branches of learning).

with a more expansive concept of "responsive law"; that is, a law that is made purposefully responsive to social needs and conditions.¹⁷⁵ The decline of law school professionalism has created a fair chance for an increasing number of law teachers and their students to engage in a critical analysis of law limited by neither procedural nor substantive restrictions.

The effective displacement of the autonomy concept, however, involves more than is needed to displace formalism. A successful attack on formalism alone could be maintained simply by a diversity of non-formalistic approaches, which would demonstrate to lawyers that they do not and should not limit themselves to legal forms. However, no attack on the autonomy notion will succeed unless some general conception of the relationships between the legal process and underlying social conditions can be developed in a way that is satisfying to a large number of legal analysts and practicing lawyers. If such a conception is not developed, the autonomy principle could be preserved by simply granting a priority to "rules of law" over the pluralistic babble of nonformalistic arguments. Without an acceptable model of law-society relationships, the substantive values that are introduced by nonformalistic arguments will remain a disorganized and peripheral influence on both the practice of legal education and the practice of law.¹⁷⁶

To consider what a controlling conception for a contextual approach to the law might look like, let us start with the realist notion that law is politics, or policy. This concept was designed to replace the older Langdellian notion of law as science, that is, as a series of routine methods involving the induction of a legal subject's underlying principles and then the deduction of concrete results from these principles.¹⁷⁷ But the concept of law as politics needs refinement because law is a special kind of politics. Law is an ideological politics in the sense that ideas—standards, principles, policies, and rules—play an important role in determining or at least in justifying judicial decisions. Even if judges do politics, they do it in a significantly different style than legislators or administrators, and this style may determine or constrain a

¹⁷⁵ See P. NONET & P. SELZNICK, *supra* note 7, at 73-113. Responsive law, it should be noted, need not be identical to contemporary moral analysis nor fully determined by social conditions and values. See, e.g., R. DWORKIN, *supra* note 126, at 81-130 (arguing that law that is infused with moral principle will nonetheless be substantially influenced by institutional factors such as the doctrines of stare decisis and legislative supremacy).

¹⁷⁶ This new model would be epistemological rather than normative. In effect, it would constitute a new "paradigm" of legal inquiry. Cf. T. KUHN, *supra* note 124, at 43-51 (discussing the priority of paradigms in the normative model). See generally Note, *supra* note 8, at 1153-57 (on law-society relationships and legal paradigms).

¹⁷⁷ See, e.g., Grey, *supra* note 14, at 5-6.

judge's "political" decisions.¹⁷⁸ Accordingly, modern scholars have attempted to define the nature of law as politics more precisely, and they have developed three essentially different conceptions of how law might be related to social values.

One approach has been to view law as a positive social science.¹⁷⁹ In this view, the complex relationships between law and other social variables, for example, efficiency, poverty, clean air, and class structure, must be analyzed by one or more social science disciplines in order to determine the precise nature of these relationships. Once understood, these relationships can be of use to both policymakers (including judges) and advocates who desire to change the law to serve private interests by arguing the public interest. These relationships might also be of use to lawyers who wish simply to obtain a more reliable system for predicting future decisions. Of course, those who view law as a positive social science often end up advocating the values analyzed by that science as the normative values that the law should pursue. We might call this phenomenon a "technological" conflict of interests.¹⁸⁰

A second approach has been to view law as a form of practical moral philosophy.¹⁸¹ This approach recognizes that the special nature of legal institutions and conventions can play a significant role in the practice of moral philosophy by courts and lawyers, but it declines to acknowledge any sharp distinction between legal and moral values.¹⁸² In this view, a positive social science analysis of law may be relevant, but it will be subordinate to the analysis and choice of overriding moral or normative values that are embedded in our legal institutions and other parts of our culture.¹⁸³

A third approach is the treatment of law as history or, more precisely, as the interpretation and construction of many discrete histories. This approach is less sharply defined in the literature than the other two, perhaps because it has several loosely related components. First, the conception of law as history recognizes that in the roles of investigator, trial attorney presenting evidence, and negotiator of deals, contracts, and settlements, the lawyer is involved in the determination and

¹⁷⁸ See R. DWORKIN, *supra* note 126, at 81-130.

¹⁷⁹ See, e.g., R. POSNER, *supra* note 140; R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976).

¹⁸⁰ See B. ACKERMAN, *supra* note 130, at 89-90; cf. Kissam, *Government Policy Toward Medical Accreditation and Certification: The Antitrust Laws and Other Procompetitive Strategies*, 1983 WIS. L. REV. 1, 12-23 (discussion of a similar conflict between technological and normative interests in physician self-regulation).

¹⁸¹ See, e.g., R. DWORKIN, *supra* note 126; J. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984); Unger, *supra* note 141.

¹⁸² See, e.g., R. DWORKIN, *supra* note 126, at 14-45, 81-130.

¹⁸³ See *id.* at 96-100.

telling of stories, and thus in the construction of some very concrete and specific histories. Then, as lawyers and judges turn to apply legal standards to these stories, they become involved in the construction and interpretation of a second kind of history, the doctrinal history of statutes, legislative histories, judicial practices, and other authorities that form the bulk of precedents and governing rules in a legal system. Finally, an appreciation of the broader historical context and contingencies within which the bulk of precedents and other governing rules have been established is also necessary for a sound moral understanding and rational application of legal rules in light of their purposes.¹⁸⁴ This third kind of history—the historian's history—is necessary for the complete understanding of the social and moral contexts in which legal rules were originally established, have been applied over time, and might be applied in current or future cases.¹⁸⁵

These three approaches to relating law to social values are not inconsistent with each other, although they may suggest different answers to specific questions from time to time. Ultimately, I suspect that the idea of law as history will prevail as the guiding conception of how American law relates to social values. Quite simply, the conception of law as history is the broadest and most capacious conception; it has the capacity to include both social science and moral philosophy within its analysis, while the other conceptions appear to be more limited in their essential focus and methods.¹⁸⁶ In addition, the conception of law as history has the ideological advantage of reflecting, at least in a rudimentary way, the fundamental legal doctrines (and democratic values) of legislative supremacy and *stare decisis*. In a word, the law is “conservative” and history is its game, although this does not mean either a return to formalism or a clear victory for legal and political conservatives. Historical analysis can be radical as well as conservative. It can, for example, disclose more radical intentions among the framers of past rules than our contemporaries have dreamed of,¹⁸⁷ and it may also broaden our current vision by indicating radical options foregone in the past.¹⁸⁸ More generally, the concept of law as history does not foreclose

¹⁸⁴ See Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981) (discussing the historical contingency of law).

¹⁸⁵ Cf. B. CARDOZO, *supra* note 173, at 51-58 (discussion of a “method of history” in common-law decisionmaking).

¹⁸⁶ Cf. J. HIGHAM, *supra* note 142, at ix (“Historical thinking proceeds with a minimum of rules, lending itself to all the cross-purposes of life.”).

¹⁸⁷ See, e.g., Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1013-17 (1984).

¹⁸⁸ See, e.g., Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution* (Book Review), 96 HARV. L. REV. 340, 340-42 (1982) (reviewing THE COMPLETE ANTI-FEDERALISTS (H. Storing ed. 1981)); G. HASKINS &

changes or innovations in the law; because historical analysis of the context of prior rules may often reveal that the conditions supporting these rules have disappeared, it will frequently be seen that the rules should disappear as well.¹⁸⁹

I should qualify this concept of law as history in one important and perhaps obvious respect. This conception does not mandate that legal or law school methods be identical to historical methods. In the third component of law as history, which attempts to understand the development of law as an historical phenomenon, the methods may be the same, but the daily work of lawyers and the doctrinal histories that figure into legal argument will frequently introduce special features into the treatment of law as history. There are special conventions among lawyers and other public officials that make these components very special kinds of histories, which professional historians might not recognize at all. Telling stories at trial is governed by the rules of evidence and procedure that perhaps make "the trial" a metaphoric game as much as an economic activity designed to produce accurate histories.¹⁹⁰ Similarly, the construction of doctrinal histories and the legal use of broader historical analysis is governed by a "doctrine of political responsibility" that asks courts to justify their decisions by standards that are reasonably consistent with the vast bulk of precedents and other governing rules.¹⁹¹ These conventions will produce concrete histories in the law that vary greatly from the stories that a professional historian would tell.

What might law school curricula and teaching methods look like under this conception of law as history? A new emphasis on clinical or practical education, particularly to the extent that it includes closely supervised practice in appellate and trial advocacy, negotiating, counseling, and writing, would be ideally designed to encourage the training of law students as critical investigators, interpreters, and tellers of discrete, concrete histories.¹⁹² Further, the law-as-history conception would place a new emphasis on legal history courses and new legal history components in standard doctrinal subjects. This would help to train students more carefully as investigators, interpreters, and tellers of

H. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15 (2 HISTORY OF THE SUPREME COURT OF THE UNITED STATES) (1981).

¹⁸⁹ See B. CARDOZO, *supra* note 173, at 51-58; Gordon, *supra* note 184, at 1037-45.

¹⁹⁰ See Leff, *supra* note 168, at 994-1005 (likening the trial to a game by using the language of competition).

¹⁹¹ See R. DWORKIN, *supra* note 126, at 87-88.

¹⁹² See generally Amsterdam, *supra* note 30, at 612-16 (arguing that clinical education provides students with the broadest possible range of analytical and legal skills).

concrete and effective doctrinal histories, by providing them with both the extensive doctrinal history and the related social history necessary for the critical study and application of doctrinal rules.

It is more difficult to predict what the concept of law as history might do to the teaching of discrete subjects in which individual faculty members wish to go beyond legal formalism and autonomy. There are already a few casebooks that pay considerable attention to the historical development of legal doctrine, although most of these books retain a traditional doctrinal organization, and their history is more attentive to doctrinal shifts than to underlying historical or social contexts.¹⁹³ The concept of law as history, however, could enhance the production of casebooks with a more comprehensive historical focus. We might also expect to see more casebooks that emphasize a social science analysis of law, or moral philosophy and the law, since these disciplines are relevant to law as history.¹⁹⁴ In addition, individual teachers might begin to make more use of complementary texts in conjunction with casebooks in order to develop their social science, moral, or historical perspectives in a systematic fashion. These teachers might also begin to lecture more frequently, in order to combine these broader perspectives with legal doctrine in a manageable way, a feat which is not often possible in traditional faculty-student discussions. Finally, individual teachers could begin to attend more to "case studies," or extended versions of the "problem method," in order to develop an integration between traditional legal analysis and the broader conception of law as history.¹⁹⁵

In summary, the structural changes in American law schools and consequent breakdown in traditional law school methods offer important opportunities for the ultimate defeat of formalism and legal autonomy as reigning concepts in the study and practice of law. This is not to say that legal formalism will not be present or sufficient to perform many legal tasks, but it is to say that the decline in law school professionalism promises considerable opportunities for improving the quality

¹⁹³ See P. BREST & S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISION-MAKING* (2d ed. 1983); G. GUNTHER, *CONSTITUTIONAL LAW* (10th ed. 1980); M. HANDLER, H. BLAKE, R. PITOFSKY & H. GOLDSCHMID, *TRADE REGULATION* (2d ed. 1983). The book by Professors Brest and Levinson is less restricted by traditional doctrinal organization than the other two. See generally Stone, *Towards a Theory of Constitutional Law Casebooks*, 41 S. CAL. L. REV. 1 (1968) (discussing how constitutional law casebooks could and should be more creatively organized).

¹⁹⁴ See, e.g., P. BREST & S. LEVINSON, *supra* note 193; C. GOETZ, *CASES AND MATERIALS ON LAW AND ECONOMICS* (1984); R. POSNER & F. EASTERBROOK, *ANTITRUST* (2d ed. 1980).

¹⁹⁵ See *infra* text accompanying notes 228-34. The uses of "legal history" or "history" in teaching specific doctrinal subjects will be a major concern of an Association of American Law Schools mini-workshop on legal history to be held in January 1986. See AALS Memorandum No. 85-75 (Oct. 29, 1985).

of legal education and practice, if only these opportunities can be seized in a sustained way.

IV. PROBLEMS AND CORRECTIONS

The structural changes in American law schools have created new conditions that may result in either a more contextual and socially responsive legal education or a more restrictive, tedious, and formalistic legal education. While either tendency may ultimately prevail, the demands of the new formalism may unfairly and unwisely restrict the efforts of teachers and students who are inclined toward nonformalistic teaching, studying, and writing. In this part, I shall discuss several potential reforms within the control and discretion of law school faculties and administrations that could improve the modern law school as an environment for effective legal training and scholarship. Although my fundamental concern in this part will be with nontraditional forms of analysis, the steps proposed could benefit both the formalistic and nonformalistic approaches. Perhaps these reforms could be implemented as a matter of rational persuasion and rational choice despite several apparent roadblocks. The new formalism might thus be mitigated.

These proposals for reform are designed to be consistent with the "deep" social structure and functions of the American law school. Further, they are designed to recognize the interests of tradition-minded faculty, differences among law schools, and the underfunding of all law schools, which has consistently left them with high student/faculty ratios compared to graduate and other professional programs. Quite simply, I would like to avoid the fate of those proposals for more radical change in American legal education that failed in part because they ignored these conditions.¹⁹⁸ The following recommendations are therefore deliberately modest in nature. In essence, they call merely for the recognition and extension of some current trends in American legal education that could easily be promoted by both individual and organizational choices.

A. *The Acquisition of Methods*

If the analysis in parts II and III of this Article is correct, many contemporary law teachers and students will face considerable obstacles to obtaining adequate training in the analytical skills and methods necessary to successful legal practice, legal teaching, and legal scholarship.

¹⁹⁸ See R. STEVENS, *supra* note 2, at 264-70; Currie, *supra* note 34, at 64-78.

For contemporary teachers who choose to teach and write within the paradigms and methods of a practice specialty, these problems may be less severe or nonexistent. But for many others, including students, the breakdown in traditional law school methods and institution of the new formalism will create serious gaps in their professional training. The institutions of the new formalism will also frustrate the goals of those teachers and students who care about doing nonformalistic analysis. Since the breakdown of law school methods is grounded on some deeply entrenched structural changes, it is bootless to try to restore the older ways of doing things. New paths must be followed.

The specific aspects of the new formalism that are subject to the discretion of law school faculties and administrations include many of the formal controls established in American law schools during the past fifteen or twenty years. These are the current form of student evaluations, the limited and exclusive use of formal peer reviews of untenured faculty members, and the emphasis on the quantity of faculty scholarship and prestige of the law reviews in which that scholarship is published to the disregard of the scholarship's intrinsic quality. Each of these developments, in subtle or not so subtle ways, encourages formalism and discourages critical inquiry. Of course, I may be overstating the extent or adverse effects of the new formal controls. Law professors do, after all, continue to have substantial individual discretion in the performance of their daily work. At any rate, these formal controls could be eliminated or redirected by individual schools in ways that would encourage intellectual pluralism and a more effective implementation of critical legal inquiry. There is no justification for the continuation of controls that obstruct different and challenging approaches to teaching and scholarship.

Changing these formal controls may not be easy. Like any form of regulation, the new controls have helped to create a new set of vested interests that will probably oppose change in the current regulatory scheme. Specifically, the quantitative data that is generated by student evaluations and a similar quantitative emphasis on faculty scholarship appear to have reallocated power within many law faculties. Those who have gained power include law school deans and those faculty members who emphasize the clear (and entertaining) presentation of legal doctrine in the classroom or who generate large quantities of doctrinal scholarship, especially scholarship that obtains prestigious publication. Those who have lost power include faculty members who are interested in challenging students to perform their own critical in-

quiry¹⁹⁷ or who need significant amounts of time to develop scholarship that analyzes the more fundamental premises, consequences, and values of contemporary American law in an insightful and useful way.¹⁹⁸ Although the prospect of turf battles between these groups is not very appetizing, we can seek consolation in the knowledge that similar battles have occurred in the past and in the awareness that these political battles may be some of the very few worth fighting by middle-aged law professors in the 1980's.¹⁹⁹

Student evaluation forms, the practice of limiting peer evaluation to formal reviews of untenured faculty, and any quantitative norms concerning faculty scholarship should be expressly modified to take account of the pluralistic practices of modern analysis and critical legal inquiry. These controls on law faculty performance, in their current form, are not essential to the operation of the modern law school; they are instead unthinking responses by law faculties and their deans to several broad changes in the social structure of American law schools. Modification of these practices is within the control of law faculties, who should effect changes that recognize and support pluralism while preserving the notion of accountability and any other values of formal controls. Appropriate modifications would eliminate or reduce the formal elements in these practices and instead stress individuated evaluations of teaching quality and scholarly productivity.

For example, informal and unrecorded peer reviews of all untenured faculty (or all faculty) should be required in addition to any formal reviews that are necessary. Similarly, common numerical scales should be removed from student evaluation forms, and these questionnaires should be individuated, at least in part, to take account of different subject matters, different teaching goals, and different classroom techniques. Further, as an antidote to any implicit (or express) quantitative norms concerning faculty scholarship, law deans and their faculty should construct individual scholarship plans that provide accountability with regard to faculty productivity while freeing individual scholars

¹⁹⁷ See *supra* text accompanying notes 56-65.

¹⁹⁸ Cf. Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1221-22 (1981) (asserting that legal scholars who accomplish the difficult task of mastering social theory are unlikely to shift their specialty when intellectual trends shift and are thus unattractive candidates for tenure).

¹⁹⁹ For discussions of some contemporary law faculty struggles, see Clune, *A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers*, 69 IOWA L. REV. 47, 114-22 (1983); Feinman & Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 925-30 (1985); cf. Currie, *supra* note 34, at 1-11 (describing the conflict at Columbia Law School in the 1920's and early 30's over the prospective installation of a "functional" law school curriculum).

from piece-work incentive systems. These changes would not eliminate all the incentives for formalism, to be sure, but they would constitute an important (and official) recognition of the importance, or at least equal worth, of pluralism in American legal education.

Faculty members of any law school should be able to improve their communications with each other by engaging voluntarily in informal peer reviews and, perhaps more satisfactorily, by teaching individual classes, parts of courses, or even entire courses jointly. There are, of course, the potentially substantial problems of incentives and professional timidity that could make the implementation of these suggestions difficult. Yet sympathetic deans and faculties ought to be able to attack the incentive problem by, for example, offering explicit opportunities to teach courses (especially seminars) jointly. This and other incentives for more informal kinds of communication and peer review could accomplish wonders with regard to the somewhat inherent and (I believe) widespread timidity that discourages the professional from expressing substantive ideas to her peers.²⁰⁰

With regard to the acquisition of teaching and scholarship methods other than traditional ones, interested faculty and sympathetic deans should consider establishing a voluntary two- or three-year post-tenure "scholarship moratorium" plan that would allow law professors to engage in extended studies of law-related subjects. Professors who chose to work under this plan would not be expected to "produce" any scholarship or teach new courses for two or three years immediately after obtaining tenure. The acquisition of information and skills to do nonformalistic scholarship and teaching, such as the application of economic analysis or moral philosophy to doctrinal subjects, requires a very substantial investment of time and effort.²⁰¹ A moratorium of a few years would allow the relatively new professor to engage in a plan of fundamental reading and study that could significantly enhance and enrich her teaching and scholarship in future years.²⁰² It would probably be impractical, and perhaps ineffective, to attempt such a program in a law teacher's first years of teaching and scholarship. However, implementation of such a program immediately after the tenure decision could be an effective way to arrest the channeling of an individual

²⁰⁰ This professional timidity results in significant part, I think, from both the "highest expertise" and "ideal judge" values that are part of law school professionalism.

²⁰¹ See Tushnet, *supra* note 198, at 1221-22.

²⁰² Cf. Summers, *Fuller on Legal Education*, 34 J. LEGAL EDUC. 8, 20 (1984) ("As for scholarly publication, [Lon] Fuller held that this required a certain maturity of thought, and he frequently advised new appointees to the Harvard faculty not to publish anything for at least five years or so.").

faculty member's habits and methods into the specialty apparatus and techniques that were probably employed to earn tenure. There are other ways to encourage creative scholarship, to be sure, but a formal moratorium on scholarship requirements is an inexpensive and effective method of encouraging richer and more critical legal analysis.

Many of these proposals will appear unattractive to tradition-minded law school professors and deans who have benefited from the new formalism. Because of the powerful hold that law's formalist paradigms can have on one's view of what constitutes a "proper" legal education, these professors are likely to justify current law school practices with total sincerity and without apparent regard to self-interest.²⁰³ They may also be reluctant to upset the established way of doing things because of the tacit importance of legal formalism to the professional identity of the law professor as a recognized expert.²⁰⁴ Yet the struggle for change need not be a bloody one, as long as the tradition-minded majority can appreciate the value of a healthy pluralism and the need to respect minority views, tastes, and approaches that may exist among both faculty and students.²⁰⁵

The problem that contemporary students face in acquiring a satisfactory set of legal skills and methods is more complex and puzzling, and my recommendations in this area are correspondingly less confident and rather sparse. For the individual student, one can at least advise—if not require—that she elect clinical and simulated clinical courses, especially where the educational component is significant and well done. Although clinical education is undoubtedly an effective way to teach students the "practical skills" of how to file papers in a particular court, its real value is as an introduction to contextual inquiry and the exercise of professional judgment.²⁰⁶ Viewed in this light, clinical education may begin to seem more valuable to the general mass of law students, and the demand for it may thus increase. Students should also be advised to elect, or required to take, "theory courses" such as juris-

²⁰³ Cf. T. KUHN, *supra* note 124, at 5-7, 59-65, 77-82 (suggesting that scientific paradigms constrain the behavior of researchers and often generate substantial—if irrational—resistance to new ideas and achievements that fall outside the prevailing paradigms).

²⁰⁴ See Schlegel, *supra* note 8, at 103-04; Schlegel, *supra* note 132, at 1533. See generally M. LARSON, *supra* note 1, at 2-63 (on dealing with the "professional phenomenon").

²⁰⁵ Perhaps I am too optimistic in this view. Perhaps most American law schools cannot afford or tolerate diversity, but, like television networks, must compete for majority attention and audience by offering a diet of teaching and scholarship that appeals to the lowest common denominator.

²⁰⁶ See, e.g., Amsterdam, *supra* note 30, at 616-17; Condlin, *supra* note 94, at 604-05; Luban, *supra* note 30, at 636-37.

prudence or legal history. At least some aspects of jurisprudence and legal history are essential to understanding and doing critical legal inquiry. These courses, then, in addition to providing the student with illuminating "perspectives" on the law, will orient her in the fundamental issues underlying the law.

The clinical movement's ability to effect reform will be diminished if the new formalism becomes further entrenched in law school practices. One obvious impediment is the substantial cost to any organization or faculty member engaging in the development of effective clinical programs.²⁰⁷ Another obstacle is the significant, often subtle, resistance of traditional classroom faculty to the incorporation of clinical training into the "mainstream" of American legal education. The more open manifestations of this resistance include a refusal to entertain budgetary reallocations, formalist requirements of scholarship for clinic teachers, and often a second-class citizenship for the clinical faculty. The more subtle forms of resistance may include a failure to award adequate time and educational credits to students for clinical work, an absence of general faculty advice that students should do clinical work, and an amiable faculty skepticism toward the development of innovative clinics or simulated clinical programs ("There won't be any blue books that can be graded A-B-C; how will we know whether the student has done any work, or learned anything?"). There is also—most perniciously—the formalist tendency to characterize clinical education as merely a new kind of specialization, one of the many in the contemporary American law school. This characterization serves to justify indifference toward and ignorance of the clinical movement among traditional classroom teachers, for how can we be expected to learn much or do much about somebody else's specialty? In sum, there are theoretical or ideal visions of clinical education that promise very beneficial reforms, but there are also the significant realities of limited resources, institutional inertia, and the paradigmatic resistance of formalist law professors that certainly will limit and ultimately may defeat this promise.²⁰⁸

Another possible approach is to train law students in a broader gamut of legal methods by advising them or requiring them to elect a major. By taking all of the courses offered by the law school in one or more legal specialties, law students can at least maximize their exposure to the legal methods employed by theorists and practitioners in one specialized discipline.

Students should also elect as many research and writing opportu-

²⁰⁷ See, e.g., Barnhizer, *supra* note 112.

²⁰⁸ Cf. *supra* note 124 (discussing Thomas Kuhn's views on the effect of accepted paradigms on the development of scientific theory).

nities as possible, especially in their chosen specialties. Thinking at length and writing about difficult or complex issues is certainly the most active, most intensive, and most effective way to acquire experience and skills in the critical methods of case analysis, legal synthesis, and legal argumentation.²⁰⁹ Law schools in general may not offer sufficient writing opportunities for all students, especially in light of the specialized interests of faculty and the prevailing student/faculty ratios. Since World War II, however, the so-called "seminar" offerings of American law schools have flourished, and these courses usually provide some opportunity for writing.²¹⁰ In any event, the individual student should be able to ferret out adequate writing opportunities at almost any modern school.²¹¹

Finally, law faculties and curriculum committees could consider easing the student's problem of skills acquisition in the following ways—none of which should be either costly or threatening to the interests of individual teachers. Law schools could abandon the traditional Langdellian or private law curriculum of the first year and replace it with a multi-stream curriculum that emphasizes (or introduces) different types of analysis in each of several first-year courses. Adoption of such an approach need not represent a radical change in the curriculum, for it could simply involve switching some required or de facto required courses from upper class years into the first-year schedule. Such a first-year curriculum might include a public law course in constitutional or administrative law, a statutory course in business associations or tax law, a social policy course such as labor law or family law, and perhaps a clinic or simulated clinical class such as trial practice or a course in interviewing, counseling, and negotiation. The displaced

²⁰⁹ See, e.g., Hines, *Should Permanent Faculty Teach First-Year Legal Writing?*—Yes, 32 J. LEGAL EDUC. 415, 416 (1982). See generally P. ELBOW, *WRITING WITH POWER* (1981) (providing instruction on how to use a creative/critical writing process to communicate with clarity and power); *THE WEB OF MEANING: ESSAYS ON WRITING, TEACHING, LEARNING AND THINKING* (D. Goswami & M. Butler eds. 1983); Elbow, *Teaching Thinking by Teaching Writing*, CHANGE, Sept. 1983, at 37 (on using different drafts or stages of the writing process to encourage and eventually integrate creative and critical thinking).

²¹⁰ See R. STEVENS, *supra* note 2, at 211-13.

²¹¹ A major problem with law courses requiring student research and writing projects, in my experience, is that these projects, especially if they involve much critical analysis as opposed to reporting, are very open-ended and therefore significantly more frustrating and time-consuming for students than time-limited blue book exams. I do not have, nor have I seen, any structural solution to this difficulty. Perhaps the use of shorter, more frequent writing assignments, including the use of take-home examinations, could ameliorate the problem. In any event, individual students might comfort themselves with the fact that grades in small seminars tend to be higher despite the fact that a scribbled blue book is apparently thought to be a better indicator of a student's abilities than a typed manuscript.

first-year subjects could still be required in the second or third year.²¹²

A less expensive alternative is to establish additional requirements in the second and third years that would ensure that all students obtain some exposure to a variety of contemporary legal methods. This official sanctioning of a need to acquire a diverse set of methods in different courses might also encourage students to take up the problem of methods acquisition on their own, in the various ways that I have outlined. On the one hand, the installment of a multi-stream curriculum in the first year is preferable because it will help to defeat the presumption that the traditional rule-knowledge approach is the superior approach to legal education; this curriculum will reach law students while they are still a "captive audience" and have not yet turned their attention to the job search, law review work, and other extracurricular concerns.²¹³ On the other hand, as Kevin Clermont has suggested, the addition of new course requirements in upper class years might help to restore a sense of common enterprise to these years and thus reduce the well-recognized malaise that affects so many upper class students.²¹⁴

An even less expensive alternative would be to make distributional recommendations to students, which would at least encourage them to seek out an introduction to a diverse set of legal methods on their own. Again, this might provide the considerable advantage of indicating official approval of academic diversity, an approval that could be significant in a profession that attends to authority. However, the elective approach is less satisfactory than the requirement approach, because students who have mastered the Langdellian methods of case discussion and issue-spotting examinations will be loathe to sacrifice the certainty of high grades for the sake of a novel educational experience. Furthermore, electives and encouragement lack the normative force and faculty commitment that specific requirements possess. As long as traditional course work continues to be required, and nontraditional, nonformalistic educational approaches are merely optional, the message will continue to be clear: the traditional approach is essential to an effective education, and the newer methods, while perhaps beneficial, are ultimately of limited importance.

²¹² Cf. 1984-86 BULLETIN OF THE LAW SCHOOL OF THE UNIVERSITY OF PENNSYLVANIA (The University of Pennsylvania Law School first-year program currently includes Constitutional Law, Labor Law, and an elective course. First-year electives include Economics of Law, Income Security, American Legal History, and Legal Philosophy.).

²¹³ On the channeling effect of the first year in law school, see Cramton, *supra* note 8, at 328-30.

²¹⁴ Clermont, *Resolving the Law School's Biggest Problem*, 5 CORNELL L.F. 16, 18-19 (1978).

B. *The Reconstruction of Community*

The decline of law school professionalism has meant, among other things, the loss of any sense of common community or common professional purpose among law professors. Although this development may have some positive results, it has brought with it the atomization of law faculties into highly compartmentalized producers of specialized rule knowledge, doctrinal articles, and traditional legal treatises. This loss of community has important spiritual as well as methodological effects that may diminish the enthusiasm of many law professors for their daily work. It may also diminish the opportunities for effective intellectual exchange that are so important to the quality of one's scholarship and teaching. A "reconstruction of community" to replace this lost sense of common purpose may help teachers and students acquire adequate methods for critical inquiry. There are several steps that law teachers and law students can take, and in some measure are already taking, to rebuild and strengthen a professional community from which they may obtain needed intellectual and spiritual sustenance.

The organization of law faculty reading groups on works of general interest to legal scholars and teachers may be a good way to begin the development of less formal exchanges that would enrich both teaching and scholarship.²¹⁵ Reading groups and other less formal contacts between law faculty and interested nonlaw faculty in the surrounding university could similarly help the development of ideas about law teaching and scholarship, at least in the many legal fields that lend themselves to interdisciplinary inquiry.²¹⁶ In addition, the recent expansion and development of the academic sections of the Association of American Law Schools, together with the concurrent organization of several regional and specialty conferences by law professors, could ultimately result in a very substantial exchange of working papers and oral presentations, at least within given specialties.²¹⁷

The problem of providing the transient student with a renewed sense of community is perhaps less tractable. A number of effective

²¹⁵ This is already happening at some schools. See, e.g., Clune, *supra* note 138, at 47 n.* (reading group on Max Weber at Wisconsin Law School).

²¹⁶ In the past decade, I have benefited from three interdisciplinary reading groups at the University of Kansas; the subjects covered were the philosophy of criminal punishment, Robert Nozick's *Anarchy, State and Utopia* (1974), and John Rawls' *A Theory of Justice* (1971).

²¹⁷ In the mid-1970's, the AALS established a separate recruitment convention in order to improve the academic quality of its annual conference. My sense that such improvement has occurred is impressionistic but I believe that my view is widely shared. See Cramton, *Scholarship and the AALS*, AALS NEWSLETTER, May 1985, at 1.

measures are easily identifiable, however. For example, it has been my observation that students in clinical programs and certain seminars—especially those that are student-run—often develop an infectious esprit de corps about both their work and their workmates.²¹⁸ These feelings of community can help relieve the upper class malaise and indifference to method that currently pervade our law schools. Students should be encouraged to seek out these collective opportunities. Perhaps hard-pressed law school administrations would be well advised for this reason alone to support and promote the development of clinical and seminar programs.

Students on the school's law review, especially those who achieve positions on the executive or managing editorial board, enjoy a communal work experience with their law review colleagues, and often with members of the faculty as well, that is denied to other students. It is unlikely, however, that many of these journals will ever be large enough to include every capable member of the student body who would like to join. Either because of limited resources or the fear that the resume value of law review experience will be reduced by universal membership, it is probable that the law review ranks will always be confined to a select few. However, most of the important elements of the law review experience can be extended to a greater percentage of the student body without straining limited resources or threatening vested interests. Many schools now have alternative reviews, initiated by members of the student body or the faculty, that cover such specialty subjects as civil rights and liberties,²¹⁹ women's issues,²²⁰ criminal law and procedure,²²¹ and international business law.²²² If law review experience is as important to the development of a high-quality legal practitioner as many large law firms claim it is, a wider range of journal opportunities should be made available by the law schools.

²¹⁸ My colleague David Gottlieb has pointed out that the esprit de corps in clinical programs often may be explained by the cooperative ethic that prevails in such programs, as opposed to an individualistic, competitive ethic that dominates the traditional law school class. This point might also help to explain the similar esprit de corps that occasionally surfaces in seminars and more individualized faculty-student research efforts.

²¹⁹ E.g., *Columbia Human Rights Law Review*, *Harvard Civil Rights-Civil Liberties Law Review*.

²²⁰ E.g., *Harvard Women's Law Journal*.

²²¹ E.g., *Kansas Criminal Procedure Review*.

²²² E.g., *Journal of Comparative Business and Capital Market Law* (University of Pennsylvania Law School); *Law and Policy in International Business* (Georgetown Law Center).

C. *On Blurred Genres, Case Studies, and Unifying Theory*

The individual teacher or student who wishes to engage in nonformalistic teaching, study, or scholarship, even given adequate opportunities for the acquisition of methods and professional exchange, may still face some considerable conceptual or intellectual problems in choosing research topics and developing a contextual and critical approach to teaching and studying the law. How can one integrate the various demands of daily law school work, the very substantial influence of our formalistic training and experience, and our contemporary desires as teachers or students to work beyond these limits?²²³

Some faculty and students have previous training or special aptitudes that support, both in the classroom and in scholarship, effective approaches that integrate social science, moral philosophy, and history with traditional legal doctrine. But there are others who lack special background or training and yet want to integrate law and social conditions in their teaching and scholarship. These individuals may feel insecure about engaging in nonformalistic legal education and scholarship without "appropriate" training. I can at least encourage these teachers to develop their own nonformalistic approaches to the law by relying on, alone or in combination, the notions of "blurred genres," "case studies," and "unifying theory."

A useful point of departure concerns the presence of "blurred genres" in contemporary intellectual work. In a recent essay, Clifford Geertz described the growing practice among social scientists of borrowing concepts from other disciplines, including the humanities, on an as-needed basis to strengthen their understanding and interpretation of particular social behaviors.²²⁴ In effect, Geertz argues that social behavior can often be understood only by reference to multiple perspectives. Social scientists should not avoid borrowing from another discipline just because they lack formal training in it. If social scientists fail to borrow

²²³ See Strauss, *Teaching Administrative Law: The Wonder of the Unknown*, 33 J. LEGAL EDUC. 1, 10-11 (1983). Professor Strauss writes:

No doubt it is my own failing, yet a strong sense of vertigo attacks me whenever I see that to understand well what is being argued to me I shall have to master two or three disciplines other than my own. One has here a basis for profound empathy with our students: how can I ever bring even a small fraction of this within my grasp?

Id. at 10. Professor Strauss shortly recovers, however, and suggests, more hopefully, that one can strive to build coherent models of law and society that will aid our individual understandings of the law "without having to believe that [they] will provide the measure by which the real world's results can or will be organized or judged." *Id.* at 11.

²²⁴ See Geertz, *Blurred Genres: The Refiguration of Social Thought*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 19 (1983).

aggressively from other disciplines, important interdisciplinary connections might never be made, and significant intellectual discoveries might be forever lost. To guard against an uninformed use of borrowed concepts, the social scientist will still have the more general intellectual constraints of rational skepticism, respect for logical argument, and the empirical grounding of concepts to assure discriminating use of the borrowed analysis.

If law in fact is "the Queen of the Social Sciences,"²²⁵ then law professors should also borrow from the substance and style of other intellectual disciplines. To be sure, we could perhaps do a better job if we were formally trained in the Ph.D. program of another discipline.²²⁶ But the job needs to be done, and lawyers should be able to bring their general skills in intellectual inquiry to bear on the discriminating use of borrowed concepts. Geertz's assertion about the prevalence of blurred genres in modern social thought should provide a measure of consolation and encouragement for the faint-hearted. The breaking down of intellectual barriers in legal inquiry, even without interdisciplinary credentials, is appropriate intellectual work, and it will involve legal scholars in an important intellectual movement in contemporary Western thought.²²⁷

Secondly, I believe that the use of "case studies" is a potentially useful method of inquiry in both the classroom and legal scholarship. By case studies, I mean the detailed and extensive examination of individual cases, or specific problems, as an effective way of establishing connections between legal rules and underlying social conditions. These case studies could replace the typical focus of classroom teachers and legal scholars on sets or lines of cases that display legal doctrine in an apparently coherent but formalistic manner.²²⁸ In many ways, this is a traditional sort of observation. For example, both Karl Llewellyn and Edmund Morgan encouraged classroom analysis of appellate cases as "problems to be solved" in order to promote training in the skills of advocacy and client counseling. In this approach, cases should be analyzed not so much for their ultimate holdings or rules but rather for the doctrinal and policy arguments that advocates would (or could) have

²²⁵ Woodard, *The Limits of Legal Realism*, *supra* note 10, at 738.

²²⁶ See Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 649-56 (1968); Dworkin, *Legal Research*, 102 DAEDALUS 53, 59-62 (1973).

²²⁷ The new pluralism in legal scholarship, of course, is evidence that this process is already well under way at national law schools.

²²⁸ See generally Gordon, *supra* note 184, at 1045-56; Lindgren, *Beyond Cases: Reconsidering Judicial Review*, 1983 WIS. L. REV. 583, 635-38 (advocating the examination of judicial decisions through a study of the interaction between the judiciary and the legislature and/or society in resolving legal conflicts).

constructed in the case and for the advice that office counselors might (or should) have given to their clients in order to avoid litigation.²²⁹ Similarly, Abraham Goldstein has described the use of appellate cases as instances for discussion of broader social policy analysis by realist law teachers and students.²³⁰ The concept of case studies as a teaching device to integrate legal doctrine and social conditions could also draw, I suppose, from the somewhat more recent tradition of teaching by "the problem method."²³¹

A renewed emphasis on Llewellyn's technique of using cases as "problems to be solved" might be a practical way to combine the teaching of doctrine with more critical forms of inquiry. In my experience, antitrust law, administrative law, and constitutional law have all proved to be subjects that are amenable to this approach, and I see no reason why other doctrinal subjects could not be turned in this direction.²³² By attempting to construct the best possible arguments on behalf of particular parties, my students and I are often forced to deal in some detail with the doctrinal history of precedents, the social contexts of precedents and the instant case, and the construction of persuasive arguments. I have also found that after this exercise my students are usually more comfortable analyzing and evaluating the doctrinal and social soundness of leading decisions and in predicting their consequences. Of course, these are the virtues that Llewellyn claimed for this method, and the experience of dealing with complex problems in this way should be transferable to other kinds of complex problems that lawyers must face in practice.²³³

²²⁹ See Llewellyn, *supra* note 16, at 213; Morgan, *supra* note 13, at 384-87; see also Gerwin & Shupack, *Karl Llewellyn's Legal Method Course: Elements of Law and Its Teaching Materials*, 33 J. LEGAL EDUC. 64, 67-74 (1983) (a description of Professor Llewellyn's use of cases in the classroom as "problems to be solved").

²³⁰ Goldstein, *supra* note 16, at 159-61.

²³¹ See generally Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654 (1984) (describing how the problem method develops the student's skill in synthesizing material from a variety of subjects); Zarr, *Learning Criminal Law Through the Whole Case Method*, 34 J. LEGAL EDUC. 697 (1984) (arguing that a problem-method approach imparts a broader perspective on the legal process and its role in society).

²³² See generally Gerwin & Shupack, *supra* note 229, at 64-74 (describing the mechanics of the problem-method approach). A practical obstacle to this development is the extreme formalism of many casebooks, but there are exceptions, and these exceptions may increase. See *supra* notes 193-94 and accompanying text. The major obstacle to this approach, of course, is likely to be formalism among law students, especially in required subjects.

²³³ See Goldstein, *supra* note 16, at 159-61; K. LLEWELLYN, *supra* note 11, at 25-40; see also J. WHITE, *supra* note 181, at 9-14 (The "imaginary participation" of law students in understanding the arguments raised by parties to a case will serve as a basis for interpretation and evaluation of judicial decisions.). A significant obstacle to implementing "case studies" in the classroom is that complex analysis can be performed

The use of case studies in scholarship as a device to help integrate the understanding of legal doctrine with knowledge of social conditions is perhaps a more radical notion, especially in view of scholarship's traditional emphasis on analyzing abstract legal doctrine. There is, of course, the writing of "case notes" by student editors of law reviews, but this practice, with some exceptions, has pretty much focused on explaining a specific case in terms of more general doctrine. What I have in mind, quite simply, is that an emphasis on comprehensive studies of individual cases, with doctrine as only one aspect of the problem, might be a useful corrective to our formalistic tendencies to take on wide-ranging doctrinal studies.²³⁴

Of course, there may be disincentives for individuals who choose to emphasize case studies in the classroom or in scholarship. The widespread student acceptance of and participation in the practice of "doctrinal abstraction," the need to construct "objective" examinations, the desire to obtain favorable student evaluation numbers, and the prestige of the law reviews in which we are able to publish may all be jeopardized or threatened to some extent. This is why a movement toward enhancing the acquisition of methods and reconstructing communities may be so important for critical legal inquiry. But even in the absence of these changes, a new emphasis on case studies is possible and would enhance critical inquiry in both teaching and scholarship.

Finally, I would encourage the further development of the current trend in contemporary scholarship and legal education toward the construction of "unifying theories" in various legal disciplines and sub-disciplines. This trend is clearly apparent in antitrust law²³⁵ and constitutional law,²³⁶ and seems to be gaining force in a variety of other

most effectively by writing exercises rather than in oral discussions, and the general limitation of law school resources may make additional writing assignments impractical in many situations. Some professors have incorporated writing assignments into their courses. See Feinman & Feldman, *supra* note 199, at 918-25 (In the authors' "Contorts" course, students were graded on the basis of examinations and a number of brief written exercises.) Perhaps, however, the teachers of large law school classes can accommodate this problem by developing short writing exercises that could be reviewed on a satisfactory/unsatisfactory basis by teaching assistants or even by other students in the class.

²³⁴ See Lindgren, *supra* note 228, at 583-99. For a recent example of an extended case study, see Simson, *The Role of History in Constitutional Interpretation: A Case Study*, 70 CORNELL L. REV. 253 (1985) (examination of *Nevada v. Hall*, 440 U.S. 410 (1979)).

²³⁵ See, e.g., P. AREEDA & D. TURNER, *supra* note 156; R. BORK, *supra* note 141; R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); R. POSNER & F. EASTERBROOK, *supra* note 194; Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Kissam, *Antitrust Boycott Doctrine*, *supra* note 8, at 1168-90.

²³⁶ See, e.g., P. BOBBITT, *CONSTITUTIONAL FATE* (1982); P. BREST & S. LEVIN-

fields, such as contracts,²³⁷ torts,²³⁸ and administrative law.²³⁹ The development of such unified theories, though potentially dangerous, may be an effective way for professors to integrate traditional doctrinal subjects and underlying social conditions. Importantly, the attempt to construct or employ any unifying theory forces one to consider the first principles and fundamental methods of a subject in order to provide a coherent explanation or justification of that subject. While this attempt can be essayed in a formalistic manner, with heavy or exclusive reliance on the express doctrinal statements of legislatures and courts, one is more likely to succeed at producing a coherent theory of a legal subject if the underlying principles and methods of the subject are derived from an analysis of its moral and social contexts. This is so for two basic reasons. The inclusion of social context will make it easier to discover principles that give a subject consistency or coherence, and the discovery of unifying principles in a broader context should also increase the "acceptability" of any legal theory among interested legal and nonlegal observers alike.²⁴⁰

The particular dangers of a search for nonformalistic unifying theories are twofold. First, especially in scholarship, the desire to construct unique, attention-getting theories—that is, theories that will appeal to article editors at prestigious journals—may inspire work that in fact is merely trendy or frivolous. Second, the development of unifying theories, in both scholarship and the classroom, will draw particular attention to the nonformalistic attack on the formalist's paradigms. Scholars who adhere to traditional paradigms may respond with anguished or angry howls of dissent.²⁴¹ In the classroom such howls may come from students who expect, or have learned to rely on, instruction that follows the formalist paradigm. But these dangers can perhaps be discounted as

SON, *supra* note 193; J. ELY, *DEMOCRACY AND DISTRUST* (1980); M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982); L. TRIBE, *supra* note 154; Brest, *The Misperceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

²³⁷ See, e.g., Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982).

²³⁸ See, e.g., G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

²³⁹ See, e.g., Mashaw, *supra* note 54; Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175 (1981).

²⁴⁰ On the notion of "acceptability" as a criterion for coherent legal theories, see Grey, *supra* note 14, at 10-11.

²⁴¹ For example, compare Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983), with Saphire, *Constitutional Theory in Perspective: A Response to Professor Van Alstyne*, 78 NW. U.L. REV. 1435 (1984).

the expected, ordinary costs of any professional or scientific work that falls outside the prevailing paradigms of a professional or scientific community. We can hope that these costs will not be a significant deterrent to the expansion of nonformalistic methods and theories, for, to the extent that we adhere to formalism, we impede the development of socially responsive law.

CONCLUSION

In this Article, I have argued that a concentrated set of social changes in American legal education is gradually eroding the traditional sense of a unified professional community in law schools. This erosion offers an opportunity to make changes that could benefit legal education, legal scholarship, and legal practice in general. Most importantly, the decline in law school professionalism is providing opportunities to reduce the concepts of legal formalism and legal autonomy to their appropriate, limited places in legal education, and to replace these concepts with a more contextual and more critical study of the legal process. It is quite possible, however, that these changes may not be achieved on a widespread basis in most American law schools. For one thing, some of the structural changes in legal education support a new kind of rule-oriented formalism that may be difficult to dislodge. For another, the values and attitudes of law school professionalism may be much deeper than a mere ideology of law professors—an ideology that seemingly could be altered by individual and organizational choice. The values of law school professionalism may be so deeply entrenched in our subconscious attitudes that they will continue to support the formalist, autonomous paradigm of law notwithstanding persuasive arguments to the contrary.²⁴²

There is a third possibility. The contending forces of the new formalism and new pluralism in American legal education could remain in a continuing muddle for a long time to come. In fact, this may be the most likely result unless the American legal system is subjected to some new external shock, such as another Great Depression or Vietnam. In the science of evolution, the theory of "punctuated equilibria"²⁴³ holds that new species do not evolve gradually over time but instead arise suddenly in response to periodic catastrophes or other episodic occur-

²⁴² See *supra* note 124; Schlegel, *supra* note 132, at 1528-33; cf. Kissam, *supra* note 180, at 22-33 (suggesting that "technological" conflicts of interest in medical self-regulation are stronger than "ideological" conflicts of interest).

²⁴³ See Eldredge & Gould, *Punctuated Equilibria: An Alternative to Phyletic Gradualism*, in *MODELS IN PALEOBIOLOGY* 84 (T. Schopf ed. 1972).

rences such as the asteroidal bombardment of earth that many believe extinguished the dinosaur. A similar evolutionary theory might hold for significant changes in American legal education: the Langdellian system achieved prominence in the midst of the Industrial Revolution of the late nineteenth century,²⁴⁴ and the realist reformation of this system succeeded as a means of preserving the professional power of lawyers in the face of the New Deal and its revolution in statutory law.²⁴⁵ Ah well, if continuing muddle is our future, we can at least hope that it will be a creative muddle for some individuals and some aspects of our legal system.

²⁴⁴ See Gordon, *supra* note 10, at 88-100; Schlegel, *supra* note 8, at 105-07; see also M. LARSON, *supra* note 1, at 166-76 (describing the efforts of the legal profession to insert itself into the new class system created by the industrial revolution, and the way in which national law schools, particularly Langdell's Harvard, were instrumental in this process).

²⁴⁵ See B. ACKERMAN, *supra* note 130, at 6-22. For an example of how such an evolutionary theory can be used to explain changes in legal education, see Bankowski & Mungham, *A Political Economy of Legal Education*, 32 *NEW UNIV. Q.* 448, 448 (1978) ("[R]eforms in professional education are only seriously entertained at those moments when the profession concerned is being forced to come to terms with some sharp internal crises or contradictions."). The authors argue that pressures on the traditional markets for solicitors were in part responsible for post-war reforms in British education. See *id.*