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# TEACHING AS PRODUCT DIFFERENTIATION: STUDYING UNDER PROFESSOR ARTHUR D. AUSTIN

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No one I know wanted to miss class when Professor Arthur Austin taught. Professor Austin taught my first-year Contracts class, which met four days a week, including Fridays. And the class began before 8:00 a.m. Thursday nights were an essential social event for the majority of our first-year class. It is thus significant that people still wanted to be in Professor Austin's class so early on Friday morning.

The emphasis on attendance held true, even when you knew that there was a substantial likelihood that you would be put on the spot that day. Professor Austin did not warn students that he would call on them ahead of time, nor did he move through the class list alphabetically, by row, or by seat. He did, however, use fairly identifiable and objective criteria; they were just different than the usual criteria for student selection.

If the case concerned a contract to which Allegheny College was a party,<sup>1</sup> for example, and a student in the class attended Allegheny College for his undergraduate studies, that student could be fairly confident that Professor Austin would call on him to discuss that case.<sup>2</sup> Or, if it was a Friday before a football Saturday on which the University of Notre Dame was scheduled to play, and a student

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<sup>1</sup> See, e.g., *Allegheny Coll. v. Nat'l. Chatauqua Cnty. Bank*, 159 N.E. 173 (N.Y. 1927) (holding that Allegheny College's agreement to name a memorial fund after a donor who agreed to give part of her estate to the college was sufficient consideration to make the agreement binding).

<sup>2</sup> See, e.g., Paul A. Marcela, Esq., B.S., Allegheny College (1978), J.D., Case Western Reserve University (1981). Paul was a student in Professor Austin's Contracts class for the fall semester of 1978.

attended the University of Notre Dame for her undergraduate studies, she could be fairly certain that she was going to be called on.<sup>3</sup> It was perhaps more difficult for my classmates who grew up in the Cleveland area and had attended either University School or Hawken School. For them, every day was a day that Professor Austin could put them on the spot.

On top of his somewhat unorthodox method of stimulating class participation, Arthur Austin was not a particularly easy grader. He did not let his students off easy in class.

Given all the courses that students could chose to take, and given Professor Austin's demanding grading style, participation expectations, and the early hour of the class, the question remains: why would students rarely miss his class?<sup>4</sup> In general, Professor Arthur Austin taught law in much the same manner as his faculty colleagues—the Socratic Method. He was as entertaining as anyone can be teaching first-year Contracts, but never abandoned his purpose for being there. Rather, the answer lies with two aspects of Professor Austin's approach that subtly shaped his students and drew their interest into the particular subject matter.

First, before his students walked into the classroom, Professor Austin seemed to know an alarmingly large amount of information about their pasts. This is even more incredible considering that these were the pre-Internet days of 1987. Professor Austin seemed to know far more than would be possible if he had each student's entire application file in front of him. Though never unnerving, exactly how Professor Austin had acquired such information is the academic equivalent of a proprietary trade secret. What his "research" really showed, however, was that before his students walked into the classroom, Professor Austin not only invested time in his course's subject matter (which he obviously knew cold), but also devoted hours to learning about his students.

Second, Professor Austin's teaching style never divided the class or encouraged competition among the students. Rather, he made class more like a friendly contest (relatively) between the class and himself. Professor Austin's message was far different from the overly dramatized 1L stereotype that 33 percent of the class would be

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<sup>3</sup> See, e.g., Mara E. Cushwa, Esq., B.A., University of Notre Dame (1987); J.D., Case Western Reserve University (1990); Gregg A. Rossi, B.A., University of Notre Dame (1987); J.D., Case Western Reserve University (1990). Mara and Gregg were students in Professor Austin's Contracts class for the fall semester of 1987.

<sup>4</sup> In my experience, the people who missed class on a Friday did not do so electively, but because of a lack of discipline the prior evening.

decimated through all-out competition.<sup>5</sup> Rather, he emphasized collaboration among classmates. In this way, Professor Austin's view was farsighted.

These two aspects of Professor Austin's teaching style—getting to know the students and encouraging cooperation among them—were part of his way of differentiating his instructional product from that of the other highly regarded professors in the law school. For law students focused on maximizing career opportunities in competition with classmates, Professor Austin's style was hard to appreciate. In my experience now, as a legal practitioner with about two decades of experience, it is easy to appreciate how often one's former law school colleagues can help with a seemingly intractable legal problem or render a professional courtesy in a relatively far-flung jurisdiction when an emergency arises.

In the same year that Professor Austin taught Contracts to my class, he published what turned out to be one of his more popular law review articles. In *Footnotes as Product Differentiation*,<sup>6</sup> published in the *Vanderbilt Law Review*, Professor Austin examined one of his favorite topics—legal scholarship—through the lens of another of his favorite topics: antitrust. In particular, Professor Austin drew upon the well-known antitrust concept of product differentiation, which describes a perfectly acceptable, pro-competitive method of increasing market share.<sup>7</sup> Law professors used footnotes, Professor Austin wrote, to do the same thing. “Experience, discussions with numerous authors, and a survey of law review literature indicate that authors rely on ‘footnote differentiation’ as the primary vehicle to distinguish their articles from those of their rivals.”<sup>8</sup>

Before highlighting the proper use of footnotes as product differentiation, Professor Austin's article exposes those types of differentiation techniques that did not reflect positively on the profession. Comparing his criticisms in *Footnotes* to the way that he taught in the classroom, Professor Austin appears consistent in theory and practice. Tactics that he criticized (albeit with good humor) as differentiation techniques that were not additive in a qualitative sense

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<sup>5</sup> See, e.g., JOHN JAY OSBORN JR., *THE PAPER CHASE* (1971) (telling the fictional story of a first-year student at Harvard Law School and his relationship with his demanding and intimidating contracts professor); SCOTT TUROW, *ONE L* (1977) (painting the first year of law school as a cutthroat, competitive experience).

<sup>6</sup> Arthur D. Austin, *Footnotes as Product Differentiation*, 40 *VAND. L. REV.* 1131 (1987).

<sup>7</sup> See EDWARD CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1933) (In what appears to be the first use of the term “product differentiation,” Chamberlin explains the theory of imperfect competition through the concept of product differentiation, in which many competing producers sell products that are similar, but not exactly alike).

<sup>8</sup> Austin, *supra* note 6, at 1136.

in law review articles, were the kinds of methods that he avoided in the classroom.

For example, the first differentiation technique that Professor Austin studied he calls the numbers game. As he notes in *Footnotes*, for those that pursue the “[n]umbers game,” “[e]xceeding 500 [footnotes] is a dramatic expression of footnote machismo. Implicit is the message that the higher the number count, ‘the more authoritative will be the article.’”<sup>9</sup>

By contrast, Professor Austin’s class was by no means a numbers game. He discouraged excessive spouting of information designed to present a “large” answer as opposed to a concise, thoughtful answer. Similarly, his teaching style was not about increasing “his numbers.” His class was not about listening to Professor Austin talk for long periods of time. In any given Contracts class, the students likely spoke far more than Professor Austin did, though his words carried more value.

Professor Austin’s *Footnotes* article points out that the “most pretentious form of first page differentiation is the ‘lead-in’ quotation whereby the author prefaces the main body of the text with a quote from an esteemed scholar, a famous decision, or some other prestigious source.”<sup>10</sup> For those playing this game, “[i]deally, the lead-in quote should be obscure—oriental sources are recommended—and should not have a substantive link to the subject matter of the article. Lack of linkage provokes mystery and forces the reader to ponder the author’s hidden (albeit nonexistent) reason for using the irrelevant quote.”<sup>11</sup>

Contrary to this facile tool used by some legal scholars, Professor Austin’s classes did not start or draw students in with a teaser or “lead-in.” There was no advertising or hawking to make students attend rather than sleep in. It was Professor Austin himself and his

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<sup>9</sup> Austin, *supra* note 6, at 1141. (quoting Frederick C. Thorne, *The Citation Index: Another Case of Spurious Validity*, 33 J. CLINICAL PSYCHOL. 1157, 1159 (1977)).

<sup>10</sup> Austin, *supra* note 6, at 1144. In the interest of full disclosure, the *Footnotes* article itself does include a lead-in quotation. Specifically: “Product differentiation is propagated by differences in the design or physical quality of competing products, by efforts of sellers to distinguish their products through packaging, branding . . . and sales-promotional efforts designed to win the allegiance . . . of the potential buyer.” *Id.* at 1131. (quoting JOE S. BAIN, BARRIERS TO NEW COMPETITION 114 (1956)). At first, this reference might appear to be contrary to the point in the text. However, reference to Bain’s definition is not necessarily a reference to a prestigious source. Rather, it’s an unpretentious citation to a basic point to allow the reader glancing at the title to understand the import of what Professor Austin is saying without having to read deeply into the article. Thus, in this case, the lead-in quote is not used as an improper method of product differentiation, but rather as an aid for the reader.

<sup>11</sup> Austin, *supra* note 6, at 1144.

teaching style that attracted students, even if the subject matter (first-year contracts, five hours per week) did not.<sup>12</sup>

The *Footnotes* article also highlights the “density factor” prevalent in the academic works that Professor Austin criticizes. The density factor refers to the characteristic of law review articles “with notes occupying one-quarter to one-third of the bottom of each page.”<sup>13</sup> Professor Austin notes that those who pay attention to such things strive for that benchmark.<sup>14</sup>

Again, in contrast to the density factor others might employ, Professor Austin’s teaching style reflected his preference in the *Footnotes* article for clarity and conciseness. The students, not Professor Austin, carried the flow of discussion in his classes. His points were clear and suitable for first-year law students: one or two, perhaps three, distinct concepts at a time. There were classes where I walked out not understanding everything that was discussed (after all, it was the first semester of my first year), but I still knew what Professor Austin said.

Professor Austin’s *Footnotes* article also describes the author’s note as a way for the author to make friends and network. “Ostensibly, the motivation [of an author’s note] is academic courtesy; in reality, this note provides the opportunity to consummate a cluster of self-serving goals. . . . Publishing a stream of names in an author’s note can sustain a movement to higher status and

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<sup>12</sup> Again, in the interest of full disclosure, despite the early hour of our class, there was, at some point, a beer-tasting experiment that apparently had some tangential relationship to the case at hand or a wager or something else. One could argue that this might obviously have increased a desire to attend his class for some of the class members; however, the event occurred very late in the term. The pattern of enthusiastic attendance *sans* alcohol had been firmly established by that point.

<sup>13</sup> Austin, *supra* note 6, at 1145. Professor Austin highlights a footnote that spans five pages. *See id.* n.61 (citing the example of Alfred J. Sciarrino, “*Free Exercise*” *Footsteps in the Defamation Forest: Are “New Religions” Lost?*, 7 AM. J. TRIAL ADVOC. 57, 117 n.317 (1983)).

<sup>14</sup> In writing this tribute, I began to get nervous about my own (very limited) publication history in law reviews. In reading back over those two articles, there appear to be only about half of my pages that actually have footnotes that extend to one-third of the page and few of those, if any, have text beyond the actual citation. Essentially, this clears me of the density criticism, but to some extent puts me into the camp of those who exasperate readers who have to “lower [their] eyes from [the] text only to discover meaningless signals like *id.* or *supra.*” Austin, *supra* note 6, at 1134. Thus, my own writing may have partially measured up to Professor Austin’s expectations for this limited purpose. While I am happy to reveal the identity of those two articles to anyone who wishes to contact me at Tim.McDonald@ThompsonHine.com for verification, I am loathe to actually put them into this tribute to avoid “the ego sustaining self-citations.” *Id.* at 1136. Of course, Professor Austin would likely find that, by disclosing here my own footnoting record against the standards set forth in the *Footnotes* article, the resulting footnote is improperly dense. *See id.* at 1144–45 (explaining that dense footnotes provide visual contrast, allowing authors to differentiate their article from those of other scholars).

reputation.”<sup>15</sup> For some, the author’s note had become the equivalent of name dropping in legal academia.

It would be absurd to think of Professor Austin as a name-dropper. In fact, he tended to the opposite extreme. Around the time that I began work as the Editor-in-Chief of Volume 40 of this Law Review, Professor Austin told me bluntly that we would have as an author Associate Justice Antonin Scalia.<sup>16</sup> There was no conversation, much less explanation; just the statement, and then Professor Austin walked away. Having known Professor Austin at that point for the better part of two years, he had never mentioned any connection or ability to land such a plum author. In his role as a faculty member working to secure speakers for the Sumner Canary Lecture Series, he was true to his word.<sup>17</sup> And he repeated the same process shortly thereafter with United States Circuit Judge Frank H. Easterbrook.<sup>18</sup> Those are two pretty big freebies to fall into any law review’s lap.

Finally, the *Footnotes* article takes on the problem of fugitive sources. Professor Austin defines “fugitive” as meaning “that the source is newly discovered, unusual, or exotic.”<sup>19</sup> For example, quoting both President Richard M. Nixon and Associate Justice Oliver Wendell Holmes to show that they thought that enforcement of the Sherman Act was a bad idea, would clearly be “fugitive” material according to Professor Austin.<sup>20</sup> “[U]se of ‘fugitive’ material in footnotes elevates the differentiation campaign to the ultimate level of polish and style and separates the artist from the poseur.”<sup>21</sup>

By contrast, there were no fugitive sources in Professor Austin’s class. He was not seeking to get style points. Rather, underneath the humor and levity that he injected into class, Professor Austin recognized that his purpose was to lay the necessary foundation for the courses that we would take in our remaining semesters of law school.

Of course, it would be typical of Professor Austin to disclaim all of this and accuse me of just making it up. Other than justly taking credit for the legendary Phlegm Snopes Basketball Tournament,<sup>22</sup> the

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<sup>15</sup> *Id.* at 1145–46 (footnotes omitted).

<sup>16</sup> Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581 (1990).

<sup>17</sup> *Id.* at 581 n.\*.

<sup>18</sup> Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990).

<sup>19</sup> Austin, *supra* note 6, at 1147.

<sup>20</sup> *Id.* at 1147–48.

<sup>21</sup> *Id.*

<sup>22</sup> AURTHUR D. AUSTIN, CURRICULUM VITAE 2, available at <http://law.case.edu/faculty/cv/austin.pdf>.

largest law-school related basketball tournament of its kind, Professor Austin never took credit for much.

His *Footnotes* article, though, does address the benefits that flow from product differentiation via footnotes. As a paragraph near the end of his article notes, there is a place for appropriate footnote differentiation in academia:

Footnote differentiation, as a manifestation of creativity, contributes significantly to legal scholarship. The quality of the footnotes reveals the author's range and comprehension of the topic. In a notoriously risk averse discipline, footnotes are the accepted forum for risk-taking. Footnotes leave permanent passages and landmarks to obscure information. As literary submarines, footnotes can torpedo established doctrine with frontier perspectives. They serve as embryos for new ideas and an underground source for humor, fugitive nuggets, and candor.<sup>23</sup>

Though Professor Austin may balk at the idea that he is the expert in footnote differentiation, he would likely also approve of effective product-differentiation techniques in the classroom.

Professor Austin was simply a fantastic teacher, and it was a privilege to study under him. For those who could probably still use a few more lessons (or in my case, he would probably say a lot more, and he would be right), I expect he will simply decamp to his legendary writing base, The Buzzard's Roost in Hinckley, Ohio,<sup>24</sup> and continue there.

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<sup>23</sup> Austin, *supra* note 6, at 1153 (footnotes omitted).

<sup>24</sup> See *Professor Mixes Humor With Jurisprudence*, THE HINCKLEY RECORD, April 1996, at 48 (noting that one of Professor Austin's favorite locales for his hypotheticals, "The Buzzard's Roost," is actually a real-life bar and restaurant in Hinckley, Ohio, where Professor Austin enjoys writing). The reader should note that footnotes in this article conclude on an even number, which the Pythagoreans considered feminine. See Austin, *supra* note 6, at 1143 (citing GRAHAM FLEGG, NUMBERS: THEIR HISTORY AND MEANING 273 (1983)); see also *id.* at 1155 n.107 (noting that the *Footnotes* article ends on an odd and thus masculine number).