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Washington University Journal of Law & Policy

Markets and Mindwork

Derek C. Bok*

Americans have always been attracted to competition. For decades, while European policymakers lauded the stabilizing, orderly virtues of private cartels, American judges and lawmakers doggedly upheld the antitrust laws and condemned monopolies, price-fixing, and other private schemes to escape the rigors of the marketplace. Not only did competition rule the private economy in the United States, it underlay a wide variety of other important activities. For example, competition among political parties, individual lawmakers, and branches of government became a familiar part of how American democracy worked. The prevailing method of settling legal disputes was built upon the adversary system, which requires lawyers to argue competitively in order to reach a just decision. Justice Holmes justified even the First Amendment right of free speech as a way of achieving truth by creating a marketplace of competing ideas.¹

In the last twenty-five years, markets have strengthened their hold on the American imagination. The demise of Soviet Communism removed the chief competing theory for ordering the economy. The travails of big government and the swing to the right in American politics since the 1960s gave further impetus to free market policies. In economics departments, business schools, public policy faculties, and even law schools, free market doctrines have become more

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1. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

visible and more ingenious in their claims for extending the principles of competition to other areas of American life.

Buoyed by the ideas of free market intellectuals and swept along by the current *zeitgeist*, competition has increasingly entered professional life. In medicine, Health Maintenance Organizations compete for members, occupying a greater and greater share of the market for medical services. In the legal profession, law firms compete for the brightest students, while personal injury lawyers advertise loudly to capture business from competitors. In higher education, universities publicize their attractions more widely than ever before and resort to all manner of tricks—tuition discounts, merit scholarships, luxurious living quarters, and other amenities to enroll the students they want. Even public education has begun to feel pressure from reformers anxious to inject some competition through the use of charter schools and voucher plans.

Government officials have actively encouraged these developments. Judges have struck down rules preventing lawyers from advertising for clients. The U.S. Department of Justice brought an antitrust suit against the Ivy League to prohibit its member schools from agreeing to award scholarships solely on the basis of financial need. Though the role of competition remains more contentious in the field of public education, lawmakers have authorized charter schools in many states. A few local governments have even agreed to install limited voucher programs or to contract out entire school systems to competing private companies.

In short, competition is pervasive in America. It is almost blasphemous to question its efficacy in ordering human affairs. Despite this wave of popularity, I question how beneficial competition is for institutions that traffic in the work of the mind. Cervantes asks, “Can we ever have too much of a good thing?”² I would suggest that there *can* be too much competition in intellectual pursuits. At least, in these fields of endeavor—including law and education—there is no invisible hand that automatically guides human activity to optimum results. On the contrary, intellectual services share certain characteristics that make competition highly

2. JOHN BARTLETT, FAMILIAR QUOTATIONS 149 (Justin Kaplan ed., 1992).

problematic unless great care is applied. In fact, competition is already doing some damage to America's three most prominent intellectual institutions: public schools, universities, and law firms.

I. THE PROBLEMS WITH COMPETITION IN INTELLECTUAL SERVICES

Competition in intellectual pursuits is problematic in that it is often hard to measure the quality of the product. How is one to tell whether one law firm is better than another? In law, as Justice Holmes once remarked, judgment is what the world pays for.³ However, judgment is very hard to measure even in retrospect—and harder still before the fact when someone is trying to choose which law firm to employ. If anything, the problem is even greater in choosing among schools and universities. Who among us really knows how much we learned in three years of legal training, and whether we might have learned more or less at a different school?

Lacking good indices of quality, we tend to fall back on crude measures. We must make judgments about what law firm to engage or what university to attend. In choosing a law firm, we look at earnings per partner, or perhaps at the law schools members of the firm attended, or at the stature of the clients that hire the firm. For universities, there are the *U.S. News & World Report* rankings. While evaluating public schools is even harder, individuals can look at information on how well students at different public schools perform on standardized tests. Indeed, officials and newspapers often brandish such data as indicia of how well individual schools are performing.

These measures are extraordinarily crude. No lawyer would confidently assert that firms averaging \$500,000 per partner are necessarily better than firms averaging \$400,000 per partner. In fact, no one really knows how much a firm's profits depend on the partners' legal abilities, their skill in generating business, their fields of specialization, or, simply their luck in winning a huge verdict in one or two cases.

3. OLIVER WENDELL HOLMES, *John Marshall*, in *SPEECHES BY OLIVER WENDELL HOLMES* 90 (1934).

University rankings are at least as unreliable as law firm rankings. The results are primarily based on evaluations from educators at other institutions. Having filled out many of these ratings while administering a university, I can testify that college presidents know next to nothing about the quality of education students receive at colleges other than their own. Other indicators enter into the rankings—SATs of the entering class, alumni contributions, dropout rates, and the like—but all of them bear little connection with how much students are actually learning and developing at the institutions being measured.

Standardized test results are an equally crude indicator of the true quality of a school. Contrary to popular belief, the most careful empirical studies suggest that the quality of teachers is considerably less important than other factors in influencing student achievement.⁴ The family circumstances of the students and the kind of upbringing they have received do more to influence test scores than the school itself. Even the most dedicated teachers cannot raise the test scores of inner city students above those of students from a mediocre school in a neighboring suburb.

The fact that standards of performance for intellectual services are seriously flawed does not necessarily prevent them from being used. After all, some unit of measure must exist to help clients or prospective college students choose among competing providers and—in the case of schools and universities—to give the government some means of assessment. Flawed standards, however, are not without consequences. In practice, they lead to all types of unfortunate results.

In law, for example, earnings per partner have taken on added importance now that they are public knowledge and have become a major way of assessing performance. Law firms today do things to increase their rankings that they did not do when firms only discussed per partner earnings at private meetings inside the firm. Billable hours are now recorded with greater precision and firms give them greater weight when promoting associates. Firms calculate how to get maximum leverage from associates, figuring out how many

4. See generally CHARLES TEDDLIE & SAM STRINGFIELD, *SCHOOLS MAKE A DIFFERENCE: LESSONS LEARNED FROM A TEN-YEAR STUDY OF SCHOOL EFFECTS* (1993).

associates they can hire without making the chances of making partner so slim that the firm can no longer compete for the brightest young graduates. Rather than suffer a decline in profit ratings, firms respond to declines in business by discharging associates, or even partners—a practice unheard of several decades ago. Above all, firms increase workloads to awesome proportions, as they encourage competition among associates to rack up impressive numbers of billable hours. The only type of work that does not increase, of course, is pro bono work.

Universities too, engage in questionable conduct through the force of competition based on imperfect criteria of success. Universities elevate research over teaching, not because teaching is unimportant but because its quality is hard to measure and is generally unknown outside a professor's own campus. Research is what establishes the university's reputation in computing the annual ratings in *U.S. News and World Report*, and research is what determines a professor's success, job offers, awards, and public recognition.

Universities can neglect teaching with impunity, because it does not play a role in students' enrollment decisions, in the published rankings of academic institutions, or in individual professors' standing in the profession. Consequently teaching does not receive the effort and attention it deserves on most university campuses.

Public schools represent the saddest case of flawed performance standards. Standardized tests represent an impossibly crude measure of the quality of a school and its teachers. Nevertheless, some measures must be used, for otherwise it is impossible for the government to judge effectiveness. Therefore, against all reason, school authorities publish the results on standardized tests, claiming credit when scores improve, and even giving bonuses and salary increases to teachers in schools with higher average scores.

This is grossly unfair. Poor test scores can occur for many reasons, apart from a school's effectiveness. Basing recognition and financial rewards on test scores threatens to reward or punish for reasons having little or nothing to do with the quality of teaching. It causes teachers to spend more time coaching students on how to perform well on the tests at the expense of work that might be more valuable. It would be hard to think of a more efficient way to ruin morale.

A second major problem with competition is the opposite of one of its greatest strengths. Competition is a powerful force capable of unleashing great energy in pursuit of an established goal. Yet competition is single-minded. It focuses effort on a designated end without regard for other ends. The most ambitious, determined, successful competitors set the amount of effort required to reach a specific goal. Other rivals must try to keep up with these hard driving characters or resign themselves to losing the race.

This is a particular problem for law firms as well as investment banks, consulting firms, and research universities. Existing within these organizations is a deliberately constructed contest for success—for law firms, making partner—where the most ambitious, single-minded competitors set the standard of effort for the rest. The results may serve the economic purposes of the firm very well, but they exact a price. The brightest young people in America working in law firms, investment banks, and other institutions find themselves having to make a Faustian bargain. In exchange for a high salary and a chance at permanent status in a highly regarded organization, they must apply themselves with such energy and devote such long hours that they have time for little else. Unfortunately, there is no counterbalancing competition to strive for the happiest marriage, the most fulfilling life, or the most well raised children. As a result, at a stage in their lives when they should be raising a family, building an enduring relationship with a spouse or a partner, and cultivating interests important to a balanced life, the best and brightest must instead immerse themselves in a contest that demands their full attention sixty to seventy hours per week.

The powerful motivations unleashed by competition have other unfortunate byproducts as well. The desire to win the contest, and the fear of failing, create strong pressures to resort to unsavory methods to improve one's chances of success. Competition causes these dubious tactics to spread, because competitors feel obliged to follow suit in order to keep up. We use legal rules, of course, to keep such tendencies in check. However, the law can only protect against certain conduct such as force, fraud, breaking promises, and violating trusts. It does not address many other, subtler failings. In particular, it does not compel those higher standards of conduct to which true professionals should adhere.

For example, in the legal profession, formal rules cannot bring about genuine civility in the way lawyers interact with one another. It is therefore hardly surprising that as law firm competition has increased, most lawyers of my generation would regretfully agree that standards of civility have declined. For similar reasons, rules cannot effectively guarantee that lawyers will devote a sufficient amount of their time to pro bono activities or that older attorneys will devote enough effort to mentoring their younger colleagues. Obviously, such activity is unlikely to flourish in an environment driven by the desire to maximize billable hours in order to push profits per partner to a high level.

Among universities, competition has had other consequences that are equally regrettable. Raising the ranking of a university, or merely avoiding a loss of status, requires a lot of money to attract outstanding faculty, build new facilities, stock the library, and provide all the amenities and extracurricular opportunities that students today demand. Consequently, there is a pressure to look aggressively for new sources of revenue to pay for these needs. For example, universities patent discoveries in their labs and license them for royalties, offer high priced executive courses to business people, and earn television revenues and ticket receipts for their football and basketball teams.

The pressure to obtain the resources to improve status, however, can easily tempt university officials into questionable policies that threaten basic academic values. Many colleges have compromised their admissions standards and created watered down courses to attract and retain the athletes they need to field successful teams. Some scientists have agreed to observe excessive secrecy requirements in order to obtain corporate funding for their research. In operating their extension schools or continuing education divisions, academic leaders have hired cheaper instructors and refused to allow any financial aid in order to make a profit for use in other parts of the university. Even the struggle for higher ratings in *U.S. News & World Report* has led a number of colleges into dubious practices. For example, some institutions actually deny admission to applicants with outstanding credentials who seem likely to choose another college and thus lower the percentage of admitted applicants who accept—a key indicator in the magazine's rankings.

Public schools, too, have resorted to unsavory methods in their effort to have their students make a good showing on the annual standardized tests. The most conscientious teachers feel they must devote class time to teaching the tactics of doing well on multiple choice exams, class time better spent for other purposes. A minority of schools have even resorted to more nefarious means. Some encourage their slowest students to call in sick on the days when the exam is given. Some reclassify their dullest students to special education status where their scores will not count. A few have actually cheated outright by distributing the tests to students in advance or having teachers help the students by giving them the correct answers.

In sum, competition has harmed intellectual service organizations in at least three ways. First, because it is so hard to create adequate standards of quality, competition has caused intellectual service providers to misdirect their energies. Consequently, they devote too little effort to important ends that are impossible to measure or to capture adequately in performance standards. Second, competition focuses the energies of professionals too heavily on achieving vocational success. As a result, it subjects all participants to the standards set by their most single mindedly ambitious rivals. This pressure forces everyone to neglect other aspects of life to a degree that most sensible people would consider unfortunate. Finally, the emphasis our competitive system places on success, and the correlative fear of failing, causes organizations to cut corners and ignore optimal standards of conduct in ways that cannot be fully contained by enacting laws and rules.

II. IMPROVING THE MARKETPLACE

Despite the foregoing, my message is not to eliminate competition altogether in hopes of returning to some imaginary golden age when all law firms were filled with wise, high minded counselors, all universities were monkish communities staffed by dedicated scholars, and all public school classrooms were presided over by devoted, grandmotherly teachers. Competition may not be the noblest motive, but it is often the most effective. Without it, law firms, universities, and schools may become complacent places where professionals live

placid lives at the expense of their clients and students. Oxford and Cambridge have been accused of exhibiting such tendencies at various points in the past. Many people believe that public schools currently match this description, leading many critics to call for competition in the form of charter schools or, better yet, voucher systems.⁵

Admittedly, competition has an important role to play even in the lives of intellectual services organizations. The challenge is to direct competition toward the right goals and keep it from violating sensible limits while still retaining its capacity to summon the creative energies of the participants.

A familiar way to address this challenge is to adopt stricter rules to keep competition within tighter bounds. For example, the National College Athletics Association (NCAA) tried this for decades and now has devised several hundred pages of intricate rules to regulate competition in intercollegiate athletes. The National Institutes of Health has worked for years to draft conflict of interest rules to protect patients from participating unwittingly in clinical experiments for companies in which the scientists conducting the tests have financial interests. Much of the American Bar Association's Code of Professional Responsibility ostensibly aims at avoiding the harmful effects of competition among lawyers and law firms.

Such rules have their place, just as the antitrust laws have a necessary role in keeping commercial competition within reasonable bounds. However, rules have limited value. They can avoid the worst transgressions, but they cannot make professionals exert their best efforts or observe the kinds of positive behavior and values that mark the true professional. Schools can place limits on the time professors can spend on outside activities but they cannot draft rules that will make them prepare conscientiously for each class, or devote real thought to advising their students. Moreover, it is difficult to persuade professions to regulate themselves effectively. As the saying goes, "No priesthood ever reformed itself." The reluctance to impose serious limits on one's own behavior is evident when athletic directors vote on rules for athletes, or when medical professors

5. See generally JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990).

debate restrictions on conflict of interest, or when teachers' unions try to define the meaning of professional misconduct. Too often, the product of years spent tinkering with rules is a cumbersome bureaucracy administering inadequate regulations with a great deal of paperwork, while behavioral deficiencies continue in more sophisticated forms. Fortunately, though rules will not cure the problems I have described, universities and their professional schools are in an especially good position to improve the quality of competition in intellectual services by other means.

The first step would be to devise better standards of quality by which to evaluate schools, universities, and law firms in order to help citizens make more enlightened choices among competing organizations. For example, rather than complain about the ratings of colleges and professional schools in *U.S. News & World Report*, which educators do incessantly, universities could devise better measures. Carefully constructed surveys of recent graduates might provide better guidance than the uninformed opinions of university presidents and deans about institutions other than their own. Better yet are efforts, such as those the Pew Foundation has undertaken, which evaluate colleges on the basis of how extensively they use effective teaching methods. These methods include smaller, more participatory classes, frequent interchange between students and faculty members, and substantial, supervised projects and papers.⁶ Rankings based on factors such as these would at least use competitive pressures to bring about improvements in the quality of education.

Universities compete not only for students but for younger faculty as well. Younger faculty, in turn, compete with one another for desirable positions. These competitions could also be improved if faculty members could make more informed choices with better information. To this end, universities should gather much better evidence of the teaching ability of their graduate students and junior faculty. For example, each of these young instructors could receive a portfolio complete with student evaluations for courses they have taught and videotapes of them actually teaching a class. Most

6. See BOWLING GREEN STATE UNIVERSITY, REPORT OF THE RESULTS OF THE NATIONAL SURVEY OF STUDENT ENGAGEMENT (2001).

colleges and universities would like information of this kind to aid them in hiring. Universities supplying such material would assist other institutions in making more enlightened hiring decisions and help prospective faculty members find good positions. They would also motivate graduate students and junior faculty to develop stronger instructional skills in order to improve their employment prospects. In this simple way, universities could help to reduce the excessive emphasis on research and allow the job market to function more effectively.

In much the same way, universities could do more to create reliable measures for judging the quality of schools. Rather than merely looking at average test scores, schools could measure test scores relative to the social and economic backgrounds of their students, class sizes, and teachers' educational attainments. Moreover, researchers should increase their efforts to make the tests themselves reflect more fully and accurately the knowledge, skills, attitudes, and accomplishments that the schools are seeking to develop.

Law firms present a greater challenge. How can one provide an adequate overall measure of a law firm's quality, when quality presumably varies depending on what kind of legal problem is involved and which partners and associates work on it? These are genuine difficulties but perhaps not insuperable ones. Restaurants offer many different dishes, but still receive useful overall ratings from trained evaluators. Colleges, too, vary in quality depending on what majors students plan to pursue and what their specific needs and aspirations happen to be. For colleges and law firms, however, the relevant question is not whether it is possible to devise a perfect or even a reasonably good measure but rather whether one can construct a better basis for making decisions than those currently in use.

Admittedly, it is difficult to help clients evaluate law firms; yet it seems possible to aid law students in deciding which firms to seek out for interviews and where to accept employment. At present, the published information on firms is highly imperfect. As a result, although students learn much about the firms they work for during the summer, they have limited information about the full range of firms they might ideally wish to consider. It should be relatively easy to develop richer data about firms that would include, for example,

the average number of hours billed per partner and associate, the average vacation time actually taken by partners and associates, the amount of pro bono work done by the firm, the firm's policies toward pro bono work, and the availability of child care and parental leave.

Information of this kind would allow law students to make enlightened interviewing and employment decisions. But it would do much more than that. Publishing this comparative information could influence organizational policy. Reporting the profits per partner at various firms has induced firms to pay greater attention to their profits and how to increase them relative to the competition. Similarly, making information public about parental leave, child care, vacation time taken, and pro bono work performed may persuade law firms to place more emphasis on these policies as well.

Improving the definition of goals and amplifying the information about the performance of competing organizations are useful steps, but they can accomplish only so much. University faculty and staff should do what they can to prepare students to make competition work better. Perfect competition assumes perfectly informed consumers. In real life, however, consumers are far from perfectly informed. Therefore, universities should prepare students to make more enlightened and ethically proper choices in hopes of making the market work in more humane and satisfying ways. The exact method needed to accomplish this result is a complicated subject, too much so for a single essay. I restrict myself, therefore, to the challenge law schools face in preparing students for the increasingly competitive, profit driven world of contemporary private practice.

First, law schools should offer courses concerning the recurring moral dilemmas lawyers face in order to help students resist the pressures competition can bring to erode ethical standards. Such courses, however, should not merely focus on the Code of Professional Responsibility, which includes a confusing mixture of ethical principles and self serving rules. Rather, the courses should focus on genuine ethical dilemmas that crop up repeatedly in practice involving the challenge of reconciling a lawyer's duty to her client with her obligation to the court, not to mention her own integrity.

It is fashionable in some law schools to deprecate such courses, but the reasons for doing so are not convincing. Critics characterize these classes as boring, but this need not be so. The ethical dilemmas

of practice are just as intellectually challenging as the problems discussed in standard law courses. Other skeptics claim that ethics are a matter of proper upbringing and that law school courses cannot add much, but this too is a delusion. Properly taught, courses in legal ethics can add a lot to a legal education. They can teach lawyers to spot moral issues at an early stage and thus avoid the fate that has befallen many attorneys who have recognized ethical problems only after committing themselves to an extent that has made it more costly and embarrassing to put matters right. Well taught courses can also help students think through moral problems in the safety of the classroom so they can be much better prepared than they would be if they encountered such issues for the first time amid the pressures of practice where expedience and self interest can easily cloud one's moral judgment. Finally, competent courses can help students understand more deeply why certain moral precepts are important to the profession, to parties affected by the outcome, and to students' own integrity and self worth. Such understanding may in turn help young lawyers to muster the will power needed to make proper decisions when the time comes to resolve a difficult moral dilemma in the heat of practice.

Beyond arming students to avoid unethical behavior, law schools need to consider ways of helping their students think about how they can live a fulfilling life in the profession. This is a more difficult challenge than devising quality courses in legal ethics, so much so that faculty members are reluctant even to acknowledge a responsibility to address the subject. After all, they say, "we ourselves do not necessarily know how to live fulfilling lives as lawyers. How can we be expected to teach such a subject to students?"

The only appropriate answer is that the challenge is simply too important to be ignored. Law students are uniquely in need of help in thinking about their careers. Of all professional school students, they are by far the most uncertain about what sort of law they will practice or whether they will practice at all. When I was dean of Harvard Law School, we conducted a poll of entering students. A substantial fraction, perhaps twenty percent, replied that they were sure they would never work as lawyers. (Presumably, they had concealed this fact from their parents who, at that time, still paid the bills.). An even

larger fraction, perhaps thirty percent, reported being wholly undecided whether they would practice or not. Another substantial fraction felt that they would practice in a public interest firm specializing in poverty law, environmental law, civil rights law, or some similar field. Only a small minority responded that they expected to seek a career in a conventional law firm.

As it happened, over ninety percent of the class ended up in conventional firms. This implies that law school for most of these students was not a simple process of preparing for a long awaited career, as would be the case, for example, of the typical medical student. For most of these law students, their three years led to fundamental shifts in their ambitions and aspirations about how they would lead their lives.

Law schools would not need to address these career choices if students were making their transition to practice in a smooth and ultimately satisfying way. There is substantial evidence, however, that this is not the case. On the contrary, evidence suggests considerable dissatisfaction among lawyers with the choices they have made and the level of dissatisfaction may be rising.⁷ More ominous still, existing figures indicate that levels of divorce, depression, severe stress, suicide, alcohol abuse, and drug addiction are higher among lawyers than among the population as a whole.⁸

Law firms seem quite one-dimensional in their thinking about what young people want in a legal career. The conventional wisdom appears to be that law students only care about making money. As a result, the competition to attract talented students is predominantly waged in financial terms. Every two or three years, a few firms increase entry level salaries by an additional several thousand dollars. Firms across the country feel compelled to follow suit, while stepping up efforts to work associates even harder to pay for the increases.

It seems highly doubtful that money is actually so important to graduating students. Surveys suggest that the most satisfied lawyers

7. See DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE* 25 (2000); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 891 (1999). *But see* Kathleen E. Hull, *Cross-Examining the Myth of Lawyers' Misery*, 52 VAND. L. REV. 971 (1999).

8. Schiltz, *supra* note 7, at 874.

are doing the kinds of legal work that pay the least, such as public service, legal education, and government work.⁹ Other surveys find that large majorities of young associates would prefer to work fewer hours for less pay. However, that is *not* what private practice offers them nor is it ever likely to offer them this possibility unless and until graduating students look for different values when they choose a firm and communicate the reasons for their choices clearly enough to force firms to respond.

Helping students think through these questions is difficult, but no more so than other educational challenges law schools have faced in the past. Surely, law faculties could acquaint students with what is known about the advantages and disadvantages of different forms of practice, the organization and economics of modern law firms, and the factors that help or hurt professionals in finding fulfillment in their careers. There is substantial literature on the nature of legal practice, the operation of law firms, and the satisfactions and discontents of lawyers and other professionals in various settings. However, those seeking more imaginative approaches could follow the example of Robert Coles, who uses short stories and novels about legal practice to encourage students to talk together about the problems and dilemmas of professional life without the embarrassment or the inhibitions involved in speaking directly about their own worries and doubts. Law schools could also generate fresh interest in the quality of legal work by providing a forum in their publications for discussing new initiatives by individual law firms to make practice more humane or more rewarding to their members.

There is much room for debate about exactly how to teach students to think about their legal careers, when to teach them, and whether the instruction should be required, elective or extracurricular. No matter how these questions are resolved, the point remains that many law students have fundamental doubts about how best to live their professional lives, while many lawyers have difficulty

9. Kenneth G. Dau-Schmidt & Kaushik Mukhapadhaya, *The Fruits of Our Labors: An Empirical Study of the Distribution of Income and Job Satisfaction Across the Legal Profession*, 49 J. LEGAL EDUC. 342, 346, 365 (1999). See John P. Heinz, Kathleen E. Hull & Ava A. Harter, *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735, 744 (1999).

answering these questions satisfactorily in their own careers. Therefore, if law schools are serious about adequately preparing their students, they need to think more deeply about how best to help their students think creatively about the challenge put forth by Justice Holmes: how “to live greatly in the law.”¹⁰

In conclusion, I hope I have raised, at the very least, some doubt about whether markets are always a force for good in the case of intellectual service organizations. Although competition in some form is desirable, even imperative, substantial effort is needed to make competition work well for universities, schools, and law firms. This point is often overlooked by those who worship the market, regardless of their ideological persuasion. Economists as diverse in their social philosophies as Milton Friedman and Charles Schultze contend that the great virtue of competition is that it takes imperfect human beings and channels their greed and self-serving behavior into socially desirable results.¹¹ As Schultze once observed, “Market-like arrangements . . . reduce the need for compassion, patriotism, brotherly love, and cultural solidarity as motivating forces behind social improvement Harnessing the ‘base’ motive of material self-interest to promote the common good is perhaps *the* most important social invention mankind has yet achieved.”¹²

Such statements make everything sound wonderfully automatic. As if by magic, the alchemy of the marketplace transforms human clay into gold. In fact, alas, the truth of the matter is very different. For competition to work well, especially in the fields discussed herein, much must be done to prepare competitors for the contest. They must be informed enough to make good choices. They must understand themselves enough to know which opportunities will give them lasting satisfaction. They must be virtuous enough to withstand the pressures that competition often creates to act unethically in the struggle to succeed. Only when we appreciate these requirements, can we understand how much universities need to do to prepare

10. OLIVER WENDELL HOLMES, *The Profession and the Law*, in COLLECTED LEGAL PAPERS 29-30 (1920).

11. MILTON & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 13-14 (1979).

12. CHARLES L. SCHULZE, THE PUBLIC USE OF THE PRIVATE INTEREST 18 (1977).

students for the competition and to help the market function humanely and well. Since there is no real alternative to competition, at least in the United States, those of us who teach in universities should acknowledge this agenda and go to work on it as soon as possible.

