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## A Law School for the Consumer

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## **Abstract**

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Imagine, if you will, a law school truly devoted to the education of its students. By that, I mean a faculty which, both individually and collectively, would subject every decision it makes to this governing test: "Which choice will most enhance the educational experience of our consumers — the students?" Such a school would, I think, recognize that the great bulk of law students today intend, at least at the outset of their careers, to practice law; thus, the school would dedicate most of its time and energy to preparing its students for practice. To prepare them to enter practice, however, would not simply mean teaching them analysis, writing, and "skills" of the clinical/simulation variety; it would almost certainly include the provision, at least on an optional basis for the students, of the kinds of "perspective" courses that most of us would probably accept as worthy components of even a curriculum primarily designed to turn out effective practitioners. The faculty would make the maximum imaginable commitment to teaching, devoted to the goal of facilitating the intellectual growth and development of each student at the school. Professors would teach more hours in order to have smaller classes. Written assignments, with extensive written and oral feedback thereon, would be commonplace. Classes would be designed so as to encourage and require, in a variety of meaningful ways, maximum student participation. Professors would still make time, of course, to read extensively in their fields of specialization, taking special care to keep up with new developments. They would be busy, productive, effective, and fulfilled.

But would they necessarily "publish?"

When one thinks about legal education from the perspective of the consumer — and, in most private law schools, at any rate, that means the student — the deeply-rooted expectation that the professors must regularly produce scholarly writings becomes difficult to understand. If one were to pay \$5,000 annually to send one's child to a private elementary school, one would be a bit surprised and, I daresay, irritated to learn that the elementary school teachers — whose salaries were de-

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rived solely from tuition payments — regarded it as their responsibility to spend approximately half of their professional hours on tasks of research and writing having nothing directly to do with the education of the children in their charge. Yet in higher education, including the very expensive and largely unsubsidized study of law, we assume that precise state of affairs to be entirely proper.

Professor Byse is among the great many law professors who so assumes. Though he shows admirable sympathy for the dedicated “trainer of Hessians” who is not inclined to be an “academic,” he ultimately expresses his belief, in the last line of his paper, that most law professors “are morally bound to strive to contribute in both roles to the full extent of [their] abilities.”<sup>1</sup>

What Professor Byse does *not* tell us is *why* we are so bound.

Professor Byse does suggest a rationale for the notion of obligatory scholarship by law professors by asserting that “only the law teacher — the social science generalist and synthesizer, if you will — can perform [the] normative function” of “appraising and melding . . . uniquely legal factors along with . . . materials drawn from” other disciplines.<sup>2</sup> In other words, as Carly Simon might say, “nobody does it better.” But there are several problems with that assertion. First, it is probably a manifestation of a widespread form of intellectual arrogance on the part of law professors which, while understandable, cannot be successfully defended. In my own field of constitutional law, explorations of “legal” topics by historians<sup>3</sup> and political scientists<sup>4</sup> frequently reveal little need for the assistance of counsel. Second, even if it be assumed that a topic requires treatment by one trained in the law, why should we assume that it falls to a law *professor* to do the job? A moment’s reflection will bring to any of our minds some of the many fine books and treatises produced by practicing lawyers.<sup>5</sup> Most fundamentally, however, the argument that “we do it better” fails to respond to the basic question: why are law professors *obliged* to engage in legal

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1. Byse, *Legal Scholarship, Legal Realism, and the Law Teacher's Intellectual Schizophrenia*, 13 NOVA L. REV. 9 (1988). Why only “most” of us are so bound is not clear.

2. Byse, *supra* note 1, at 25.

3. *E.g.*, M. BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES* (1977).

4. *E.g.*, R. MORGAN, *DISABLING AMERICA* (1984).

5. *E.g.*, H. NEWBERG, *NEWBERG ON CLASS ACTIONS* (1977); C. REMBAR, *THE LAW OF THE LAND* (1980); J. GILSON, *TRADEMARK PROTECTION AND PRACTICE* (1988).

scholarship?

It is not an example of excessively legalistic thinking, I submit, to say that an "obligation" must have an identifiable source. Dean Abrams believes that law teachers have an obligation to educate the profession. My colleague Professor Brown speaks of an obligation to "share our knowledge and ideas." But whence cometh (if I may be permitted to lisp classically for a moment) these "obligations?" We have an obligation to educate our *students* that is based in contract. To speak of any other generalized "obligation" is simply to express an opinion about what the speaker thinks is appropriate behavior. (My colleague Professor Chase writes, in effect, of the historic bargain struck by the legal profession and the universities, strongly implying that this arrangement is the source of a professorial obligation to engage in legal scholarship; this argument, however, begs the question as to why the universities should insist on continued compliance with the alleged terms of this bargain.) Granted, our legally-enforceable obligations to our students are easily satisfied (as our presently low standards in legal education demonstrate so well), so that we professors have a great deal of "extra" professional time to spend, and a great deal of freedom in deciding how we are "obligated" to spend it. My judgment is that we could be doing much more for our students than we presently tend to do, and that our "obligation" is to do so, if for no other reason than that *they* pay our salaries.

The argument will quickly be put forward, as it has been by Professor Byse and by my colleague Professor Michael Richmond, that "teaching and scholarship need not be conflicting but can be mutually reinforcing."<sup>6</sup> Certainly that is true. So are the following observations: (1) Much scholarship engaged in by law professors hovers loftily above the basic doctrinal building blocks whose understanding we struggle mightily to facilitate in our classrooms; in such instances, authorship of an article is an enormously inefficient mechanism for improving one's teaching. (2) Engaging in the practice of law can also "reinforce" one's teaching, yet is rarely found praiseworthy by deans or colleagues on this or any other ground. (3) There are many other ways to improve one's teaching, most of which are far more likely to be cost-effective than writing an article for publication. If effective teaching is to be our paramount goal, as I think it should be, then scholarship ought to be regarded simply as one approach among many to the successful

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6. Byse, *supra* note 1, at 29.

achievement of that goal.

I have long suspected that scholarship remains a condition to the proper care and feeding of law professors for the simple reason (along with its intrinsic virtues) that — unlike teaching — it is quantifiably measurable. That a factor is procedurally convenient, however, is not necessarily a reason for affording it substantive preeminence. Indeed, the very quantity of articles pouring out of American law schools today points *against* any universal “obligation” to keep producing more. How *useful*, after all, is the average law review article? (Let someone research *that*.) How likely is it to even be read, and by how many people? “Yes, yes,” one may respond. “The overabundance of chaff is undeniable, but high productivity is necessary if *any* wheat is to be produced!” Consider, however, all the energy that could be re-channeled to the direct benefit of students if the “Hessian-trainers” were truly liberated from the task of compelled article production. (Most of the “wheat,” I’d wager, would still be produced.) Are we presently striking the proper balance?

Undoubtedly, there are many law teachers who will read this essay and respond, “The alleged conflict between teaching and writing does not exist; we can do both.” My response to that position is: You *can't* devote half your professional time to writing and still give your consumers what they are paying you for — unless, of course, (a) you are willing to reduce your prices, or (b) your students believe that they derive a benefit, in terms of the enhanced prestige of their law school, from the publications of their teachers. The latter suggestion may be a credible one at the most prestigious law schools, but is questionable even there.

In setting forth this bold argument for a consumer-oriented approach to legal education, I should make it clear that I am *not* advocating adoption of the rigid (and largely forgotten) maxim that “the customer is always right.” Students surely do not always know what is best for them, and, while their views are important, they should not be allowed to dictate curricular choices or teaching methodologies. To hinge salary increases or professional advancement largely upon popularity with students is also a mistake.<sup>7</sup> Equally questionable, however, and arguably perverse, is a system which reserves its greatest rewards for those who most dependably turn out a certain kind of product — but a product directed to a “market” *other* than one's paying

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7. See D'Amato, *The Decline and Fall of Law Teaching in the Age of Student Consumerism*, 37 J. LEGAL EDUC. 461 (1987).

customers.

As Professor Byse recognizes,<sup>8</sup> and as Professor Wellington has written,<sup>9</sup> there are indeed "two cultures" (at least) in legal education today. In a law school which is heavily endowed, or state-subsidized, that dichotomy is surely acceptable, and probably desirable. In a tuition-based law school, however, it is otherwise; there, from a consumerist perspective, I would place the burden on those who are a part of the "academic culture" to justify their expenditure of professional time and energy on pursuits that, presumptively, are far removed from the primary educational mission of the school. Not the prolific writer, but the "trainer of Hessians" — in the broadest understanding of that term — ought to be the "model" law teacher.

It was former Judge Robert Bork, I think, testifying before a Senate Committee for some forgotten reason, who suggested that a law professor's writings may properly serve the purpose of provoking thought and discussion, without necessarily reflecting the professor's deeply-rooted beliefs; of course, hardly anyone believed him.

But enough talk! I grow weary, and the Hessians await.

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8. Byse, *supra* note 1, at 26.

9. Wellington, *Challenges to Legal Education: The "Two Cultures" Phenomenon*, 37 J. LEGAL EDUC. 327 (1987).