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THE DUALIST MODEL OF LEGAL TEACHING AND SCHOLARSHIP*

MARIN ROGER SCORDATO**

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INTRODUCTION: THE DUALIST MODEL

Legal academia has long presumed that the production of legal scholarship and law school classroom teaching are mutually supportive activities.¹ As a result, the ideal image of a law professor is that of a person who both excels in the classroom as a teacher and who contributes to the advancement of legal knowledge by regularly producing legal scholarship. Adherence to this assumption, and to its resulting ideal, has led to the development and maintenance of a uniform professional model for American law school professors—what is herein referred to as the “dualist” model.²

Under the dualist model, law school faculty are expected to engage actively in both the creation of legal scholarship and classroom instruction.³ At present, the dualist model for law school faculty so dominates the environment that it is formally codified, and its use

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¹. See, e.g., Abrams, Sing Muse: Legal Scholarship for New Law Teachers, 37 J. LEGAL EDUC. 1, 11 (1987) (stating writing induces clear thought thus improving teaching skills); Elson, The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Professor Perish?, 39 J. LEGAL EDUC. 343, 343 (1989) (asserting professional training is best performed in environment where scholarship is paramount); Kane, Some Thoughts on Scholarship for Beginning Teachers, 37 J. LEGAL EDUC. 14, 14 (1987) (noting any discussion of successful law teachers necessarily involves reference to scholarship). Legal scholarship generally refers to published legal works by acknowledged leaders in the legal profession. Gordon, Historicism in Legal Scholarship, 90 YALE L.J. 1017, 1018 (1981).

². There may be other reasons behind a law school’s decision to adopt and adhere to this model, such as the desire to achieve and maintain an affiliation with a research university and the ability to lure attractive faculty candidates from potentially lucrative careers in private practice with the promise of full-dress academic status and prestige. Acceptance of the teaching/research synergy assumption, however, is the dominant principled rationale supporting the dualist model.

³. Although law school faculty are normally expected to engage in activities other than teaching and scholarship, such as administrative committee work, alumni relations, and participation in ceremonial functions, teaching and scholarship dominate the equation.
mandated, in the standards used to accredit all American law schools. Of course, the notion that a full-time academic should function as both a classroom teacher and an active researcher is hardly unique to law schools; it is a model that has been borrowed from the traditional teacher/scholar model employed throughout academia.

Is the dualist approach appropriate or desirable for law school faculty, and is the model's fundamental assumption, that teaching and research are mutually supportive functions, valid? The majority of empirical studies investigating the question have found no significant relationship between teaching effectiveness and research productivity, and open challenges to the accuracy of the assumption

4. American Bar Association Standards for Approval of Law Schools and Interpretations (1988), Interpretation (5) of Standard 201 (asserting law schools must observe limits in number of weeks of teaching and course-hour load to give teacher time to think, write, and serve community); Standard 401 (mandating faculty members possess high degree of competence in scholarly research and writing); Interpretation (5) of Standard 405 (stating when there is no paid research assistant, support for faculty research requirements are not satisfied); Bylaws of The Association of American Law Schools, Inc. (adopted December 29, 1971; amended through January 6, 1990) reprinted in Association Handbook, 1990, at 16-27, § 6-5(c)(iii) (stating one criterion of emphasis in evaluation of faculty members is scholarly interests and performance), §§ 6-8(b) (requiring law schools to assign responsibilities to permit study of new developments and research), and 8(c) (requiring law schools to assist faculty to advance and transmit ordered knowledge).

5. See The Western Association of Schools and Colleges' Accrediting Commission for Senior Colleges and Universities Handbook of Accreditation, 94-35 (1982), stating:

Scholarship and instruction are mutually interdependent and mutually supportive activities which are integral to the purposes of any educational institution. Research, either pure or applied, can support instruction by adding to the fund of knowledge or by seeking new applications of knowledge. It provides stimulation and intellectual excitement to faculty and students and can contribute to excellent instruction.

This teacher/scholar model was first embraced in the United States in the 1850's, when American schools began to transform themselves into research universities, following the example of institutions of higher learning in Germany. See P. Seldin, Successful Faculty Evaluation Programs 128 (1980) (stating development of research in academic life has origins in nineteenth century Prussia); Barnhizer, The University Ideal and the American Law School, 42 Rutgers L. Rev. 109, 134-36 (1989) (discussing development of Germanic influence on American education); Blackburn, Careers for Academics and the Future Production of Knowledge, 448 Annals 25, 28 (1980) (stating scholarship and research were significant academic functions in Germany and describing development of such systems in America).


In those studies in which some positive relationship between research productivity and teaching effectiveness was found to exist, the relationship was uniformly small. See generally M. Finkelstein, The American Academic Profession: A Synthesis of Social Scientific Inquiry Since World War II 120-27 (1984) (providing review of studies concluding limited, if any, significant relationship between research and teaching); P. Seldin, supra note 5, at 132 (reviewing literature concluding research-teaching correlation is very low); Faia, Teaching, Research, and Role Theory, 448 Annals 36, 39-41 (1980) (concluding recent studies indicate no relationship or very slight positive relationship between teaching and research); Turner, Pub-
abound.\textsuperscript{7}

This lack of empirical support, however, has not dampened the enthusiasm with which the academic community embraces the dualist model. Under the prevailing view, the time and effort required to produce legal scholarship deepens and broadens the faculty member's understanding of a given substantive area, which in turn improves classroom performance.\textsuperscript{8} Continuing scholarship is also thought to keep a professor fresh and enthusiastic about a field of study,\textsuperscript{9} and subjects the faculty member's theses and perspectives on the material to a more critical, non-student audience.\textsuperscript{10}

It is not the purpose of this Article to evaluate the accuracy of the claim that teaching and research can be mutually supportive func-

\textsuperscript{7}ish or be Damned, 31 J. LEGAL EDUC. 550, 558 n.19 (1981) (citing further studies finding insignificant relationship between research and teaching).

This lack of empirical support has not dampened the enthusiasm with which the academic community continues to embrace the dualist model. \textit{See infra} notes 8-10 and accompanying text (discussing arguments of supporters of dualist model and citing support).

\textbf{7. \textit{See generally} P. Seldin, supra note 5, at 133 (listing reasons why research may be at odds with teaching); Samuelson, The Convergence of the Law School and the University, 44 AM. SCHOLAR 256, 269 (1975) (asserting conflict of interest exists between training professors for their career and creation of scholarly knowledge); Smith, To Communicate Truth: How Research Corrupts Teaching, 55 WHOLE EARTH REV. 52, 55 (Summer 1987) (stating "[It can never be stated too often or too emphatically: the great majority of modern academic research is not complementary to the teaching function; it is antithetical to it.") (emphasis in original).

\textbf{8. \textit{See M. Finkelstein, supra note 6, at 121 (stating that productive researchers are likely to display increased expertise in subject of research making them better teachers); C. Jencks & D. Riesman, The Academic Revolution 532 (1977) (finding no evidence that research and teaching are antagonistic and asserting that teachers cannot remain stimulating unless they continue to learn through research); R. Miller, supra note 6, at 65 (summarizing that scholarship is essential for all teachers); P. Seldin, supra note 5, at 130 (citing literature indicating positive relationship between research and improved teaching); Turner, supra note 6, at 552 (stating writing improves verbal communication and that without publishing requirement, dull teaching skills would result); Basis & Guskin, Building Quality: Research and the Regional Institutions, 18 CHANCE 57, 59 (July/August 1986) (recognizing belief that value of teacher-scholar runs deep in history of American higher education); Lewis, Writers of the Academy Unite!, 12 AM. SOCIOLOGIST 176, 176 (1977) (stating evidence that teaching profits from research); Paul & Rubin, Teaching and Research: The Human Capital Paradigm, 15 J. ECON. EDUC. 142, 146 (1984) (concluding weakening of publication requirement debases expertise in classroom). But see Webster, Does Research Productivity Enhance Teaching?, 66 EDUC. REC. 60, 60-68 (Fall 1985) (doubting truth of prevailing view and arguing that research and teaching are not mutually supportive).

\textbf{9. \textit{See R. Miller, supra note 6, at 50 (stating research brings challenges which force teachers to be more curious as new problems arise); P. Seldin, supra note 5, at 131 (citing study concluding that teachers became stale without research).}

\textbf{10. \textit{See Elson, supra note 1, at 359 n.47 (stating professor brings into classroom spirit of scholarly work by revealing research interest); Kane, supra note 1, at 14 (stating research and writing revives professors' ideas and enables enthusiastic return to classroom).}

Conversely, supporters of the dualist model argue that classroom teaching brings a faculty member into regular contact with the sometimes novel ideas and questions of students which in turn informs and enriches the faculty member's scholarship. \textit{But see} C. Jencks & D. Riesman, supra note 8, at 533 (writing that "[T]eaching is often adjusted to the exigencies of research, but research is almost never shaped by the experience of teaching. We have almost never encountered a professor, for example, who said he was working on a particular research problem because year after year his undergraduate students showed an interest in it.").
tions. Instead, the following analysis focuses on an aspect of the current situation which has been given much less attention, the costs to both legal scholarship and to law school teaching that result from the predominant dualist model. Identifying and examining some of these costs is important because even if it were established conclusively that legal research and teaching are mutually supportive pursuits, the desirability of the dualist model ultimately depends upon a balancing of the benefits with the corresponding costs of the model. In order to facilitate an understanding of these effects, Part I of this Article examines the costs that the dualist model imposes on law school professors' teaching function. Part II focuses on the costs imposed by the dualist model on legal scholarship. Part III notes the existence of signs of increasing stress in this system. The analysis then turns, in Part IV, to a consideration of some of the reasons why the dualist model has remained so resilient in the face of these recognized costs and increasing signs of dysfunction. The assessment set forth in Part IV suggests that the strength and longevity of the dualist model is due largely to the fact that the model satisfies important bureaucratic needs of law schools that are not satisfied easily in any other way. Part V proposes an alternative, the dedicated-track model, whereby law school faculty members may choose to teach full-time, research and write full-time, or teach and research, and examines the potential costs and benefits of such a model. This Article concludes that once problems involved in the qualitative evaluation of law school teaching are resolved, law schools can consider alternatives to the dualist model in order to remove the limitations currently imposed on teaching and legal scholarship.

I. COSTS OF THE DUALIST MODEL TO THE LAW SCHOOL TEACHING FUNCTION

Proponents of the dualist model argue that faculty time spent producing scholarship serves as a kind of investment in the human capital of the faculty member, an investment which pays dividends in the classroom through the development of a more substantively knowledgeable instructor.11 This argument is grounded on the assumption that a producer of legal scholarship inevitably develops, through the process of researching and writing, a deeper and more

11. See C. Jencks & D. Riesman, supra note 8, at 532 (asserting teachers who stop researching repeat themselves since they fail to learn anything new); Abrams, supra note 1, at 11 (stating writing makes better teachers by inducing clearer thought); Turner, supra note 6, at 552 (stating research stimulates intellectual growth by forcing professor to take closer look at subject taught).
rigorous knowledge of the law about which the author has written. That deeper and more rigorous knowledge is then communicated to students in the classroom.

One important problem associated with the preceding argument, at least from the perspective of the law school teaching function, is that it replaces a direct benefit to the students, faculty resources specifically focused on the improvement of classroom teaching, with what is at best a derivative, and contingent, benefit. For example, if a faculty member produces acceptable legal scholarship for administrative purposes and does not significantly deepen his knowledge of the substantive law as a result, or if the additional knowledge that the faculty member attains is overly-specialized, overly-practical, or overly-theoretical for classroom pedagogical purposes, or if the faculty member simply writes on a topic that he or she does not teach, then the asserted synergistic benefits of the dualist model either disappear, or become even more conditional and derivative in nature.

Moreover, the possibility that faculty research and writing produces some beneficial effects in the classroom does not, by itself, justify the widespread-adoption of a dualist model for all law school faculty. Any benefit to classroom teaching that results from faculty research and writing must be balanced against a significant number of corresponding costs imposed on the teaching function. As the ensuing analysis indicates, the costs imposed on the law school teaching function by the dualist model include: opportunity cost, influence on pedagogy, over-specialization, influence on course content and the law school curriculum, loss of natural leadership in teaching and curricular reforms, and a negative impact on junior faculty.

A. Opportunity Cost

The most obvious and most extensive cost exacted by the dualist model on the law school teaching function is the diversion of faculty resources away from the development, maintenance, and operation of law school courses. Simply put, law school faculty time and resources spent producing legal scholarship represent time and resources not devoted directly to the development or the improvement of law school courses. Moreover, the dualist model's formal requirement that all law school professors regularly research and publish creates an inevitable pressure to compromise preparation of classroom teaching and improvement of law school courses.
in an effort to free up additional time and personal resources for the production of legal scholarship.

The pressure on a law professor to forego personal investment in teaching in favor of the production of scholarship is made more acute by the fact that scholarship does not simply share a co-equal position with classroom teaching in the dualist model, but has come to dominate the equation.12 It is currently the common wisdom that tenure and promotion are attainable at most law schools by faculty who have compiled a record of solid published scholarship coupled with classroom teaching that does not provoke active complaints from students. Tenure and promotion are far riskier and less certain propositions, however, for faculty who excel in the classroom but have produced little published scholarship.13 In addition, faculty members generally understand that significant increases in

12. See, e.g., Elson, supra note 1, at 351 n.25 (contending law school professors are paid to study law and to teach students what they discover) (quoting letter from Owen M. Fiss to Paul D. Carrington, Martin, “Of Law and the River,” and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1, 26 (1985)); Kane, supra note 1, at 14 (asserting scholarly endeavors form core of law school teachers activity); Soifer, Musings, 37 J. LEGAL EDUC. 20, 20-21 (1987) (noting emphasis on production of scholarship); Turner, supra note 6, at 556 (stating that wise professor, when faced with choice of whether to expend energies in administrative tasks or writing for publication, will opt for the latter).

On occasion, the promotion of scholarship as the dominant value comes in the form of sharply negative characterizations of the teaching function. See McFarland, Self-Images of Law Professors: Rethinking the Schism in Legal Education, 35 J. LEGAL EDUC. 232 (1985):

Anyone with a good legal education, a glib tongue, and a fair mind can take what other men have worked out, learn it, and replay it to a class like a phonograph. No law school wants that alone. Parrots can be purchased at any pet store. What the school is looking for is a self-starting individual with considerable horsepower who will contribute something of his own.

Id. at 240 (quoting Prosser, Advice to Lovelorn, 3 J. LEGAL EDUC. 505, 512 (1951)).

13. See, e.g., Abrams, supra note 1, at 13 (concluding tenure decisions are based almost exclusively on writing and publication); Bard, Scholarship, 31 J. LEGAL EDUC. 242, 243 (1981) (stating anyone who demonstrates scholarly capacity and is a competent teacher should be granted tenure and that competent scholars should be granted tenure even if they are only acceptable teachers); D'Amato, The Decline and Fall of Law Teaching in the Age of Student Consumerism, 37 J. LEGAL EDUC. 461, 491 (1987) (asserting best law schools base tenure decisions on scholarship, rather than on teaching); Kane, supra note 1, at 14 (noting that most common and crucial advice given to new law teachers is: “you must engage in legal scholarship in order to progress and earn tenure.”); see also J. CENTRA, DETERMINING FACULTY EFFECTIVENESS ix (1979) (relating stories of excellent teachers not receiving promotions because they had not published); K. DOYLE, STUDENT EVALUATION OF INSTRUCTION xv (1975) (proposing student ratings of instruction are controversial and their accuracy and reliability questionable); Bok, What's Wrong with Our Universities?, 92 HARVARD MAG., 44, 49 (May-June 1990) (stating extrinsic incentives and rewards are greater for research than teaching).

Professor Richard Abel of the UCLA Law School has recently completed an extensive study on the ways in which American law schools evaluate the teaching performance of their faculty and the uses which law schools make of these evaluations. Professor Abel found that most schools make no adverse personnel decisions on the basis of teaching and concludes that “[a]lthough schools claim that all forms of evaluating teaching have the greatest influence on the tenure decision, almost nobody is denied tenure because of teaching.” R. Abel, Evaluating Evaluations: How Should Law Schools Judge Teaching?, A-13-15 (1990) (available in The Washington College of Law, The American University Law Review) (to be published in the Journal of Legal Education).
salary and opportunities to visit and to teach at other institutions are more likely to result from the publication of a few more law review articles than from the reworking and improvement of the courses they teach.14 Moreover, from an institutional point of view, there is widespread acceptance of the fact that published scholarship advances the overall prestige of a law school more effectively than does quality classroom instruction.15

The incentives generated by this environment are such that the opportunity cost to law school professors of developing and improving their courses beyond the point necessary to prevent open complaints by their students exceeds the practical benefits to be derived from any incremental improvement in those courses. As a result, law professors operating within the dualist model face powerful practical incentives to develop their courses only to the point where students are not openly complaining, and to then devote the re-

14. See, e.g., Cramton, Demystifying Legal Scholarship, 75 GEO. L.J. 1, 14 (1986) (asserting that because academic prestige is considered most important, even professors who publish mediocre articles will earn more and be promoted faster); Elson, supra note 1, at 354 (stating factors such as hiring, promotion, pay, collegial recognition, societal prominence, and intellectual satisfaction are functions of the production of scholarship, not of teaching); Grantz & Whitehead, Monrad Paulsen and the Idea of a University Law School, 67 VA. L. REV. 445, 448 (1981) (contending teachers who want to train practicing lawyers will find market uncongenial); see also Bard, supra note 13, at 244 (stating writing provides means to ends of tenure, salary increases, and job offers at more prestigious institutions); Bok, supra note 13, at 49 n.4 (contending successful researchers are consistently supported); Turner, supra note 6, at 551 (stating publication provides professors with status boosting their careers).

As with the existence of the dualist model itself, the dominance of scholarship over instruction at American law schools mirrors a similar situation in the university at large. See generally M. FINKELSTEIN, supra note 6, at 91 (noting most faculty views research as supreme determinant of reward); R. MILLER, supra note 6, at 62-63 (discussing and evaluating faculty research studies); P. SELDIN, supra note 5, at 128, 163 (noting reward systems at prestigious institutions are more favorable towards research than teaching); Altbach, The Crisis of the Professoriate, 448 ANNALS 1, 5 (1980) (noting research function is most rewarded at universities); Becker, The University Professor As A Utility Maximizer and Producer of Learning, Research, and Income, 10 J. OF HUM. RESOURCES 107, 108 (1975) (demonstrating that improved teaching techniques will not improve teaching quality); Bok, supra note 13, at 44, 50 n.1 (stating rewards are heavily skewed toward successful research in competitive university system).

15. See, e.g., Abrams, supra note 1, at 11 (stating law schools are prestige conscious and that one important determinant of prestige is scholarly production of faculty members since publications are criticized by academics, who are primary critics of law schools' intellectual climate); Elson, supra note 1, at 378 (contending that prime determinant of law school prestige and its success in acquisition of best-credentialed students is quality and quantity of faculty's scholarship rather than quality of students' professional education); Turner, supra note 6, at 551 (noting law schools are competing to improve reputations and that prestige is enhanced when members of faculty are published, resulting in more qualified applicants, more funding resources, and many other indirect benefits); see also P. SELDIN, supra note 5, at 128 (describing relationships between research and prestige); Bok, supra note 13, at 47, 49 (asserting universities encourage professors to research to enhance reputations); Kane, supra note 1, at 15 (supporting contention that published research adds to institution's prestige); Klitgaard, Governmental Support and Young Academics, 12 CHANGE 9, 10 (Sept. 1980) (stating prestige is principle currency in allocation of academic services); Lewis, On Subjective and Objective Rankings of Sociology Departments, 3 AM. SOCIOLOGIST 129, 131 (1968) (discussing relationship between "celebrity researchers and institutions' prestige").
mainder of their personal resources to producing published scholarship.¹⁶

B. Influence on Pedagogy

In addition to creating an incentive for law school faculty to make only a minimal personal investment in classroom teaching, the current configuration of the dualist model also affects the pedagogical structure of law school courses.¹⁷ Law professors, operating in a professional environment that rewards the production of scholarship more highly than the improvement of classroom instruction, are indirectly encouraged to minimize personal investments in course preparation and to avoid the use of teaching techniques that do not yield long-term dividends. Thus, when faculty members do make investments in the improvement of classroom instruction, they are likely to invest in only those pedagogical techniques which can be used in the course repeatedly over a long period of time. A law professor following these incentives is likely to: first, stress the underlying theory and public policy aspects of the law covered in the course rather than focusing on current doctrinal development and the most recent court decisions in the area; second, rely more on straight lecture presentations rather than on interactive or discussion-based examinations of the material, especially new material; and third and most especially, avoid giving students practice hypotheticals, practice exam questions, small paper assignments, or any other exercise generating written work that would require individual grading and feedback.¹⁸ Because the dualist model creates incentives for law school teachers to minimize investment in class-

¹⁶. The creation of such incentives should be the object of serious concern and analysis even though not all law school professors respond in this way to such incentives. Professors certainly are as sensitive to the reinforcement and incentive systems present in their professional environment as are other workers in our society. See M. Finkelstein, supra note 6, at 91 (stating faculty expends effort in areas perceived as "pay off"); C. Jencks & D. Riesman, supra note 8, at 531 (noting that because teaching successes are not related to salary increase, move to more prestigious campus, or colleagues' admiration, professors are unlikely to strive as hard to create them as to do research).

¹⁷. See Elson, supra note 1, at 355 (arguing that because professors place primary attention on scholarship, they have little time to develop curriculum meeting students' professional needs).

¹⁸. Not all law professors respond in these ways to the incentives created by the dualist model. Moreover, substantial and pedagogically sound reasons exist for the adoption of some of these teaching techniques, especially the decision to direct the focus of a course on the theoretical and public policy aspects of legal doctrine, that have nothing to do with a desire on the part of the instructor to maximize time available for producing legal scholarship. See Grantz & Whitehead, supra note 14, at 446-49 (contending that school's fundamental commitment should be to promotion of social good and that classroom discussion should become testing ground for theoretical ideas and fundamental values); see also Carrington, The University Law School and Legal Services, 53 N.Y.U.L. Rev. 402, 407 (1978) (arguing that pursuit of law as intellectual endeavor is valuable to society).
room teaching, it has a powerfully negative impact on the pedagogical structure of law school courses.

C. Over-Specialization

In addition to influencing the way in which faculty prepare and design law school courses, the differential reward of scholarship over effective classroom teaching also encourages law professors to become expert in far more narrow and specialized areas of the law than is generally appropriate for law school pedagogical purposes. By most accounts, the great age of the treatise writers has passed, and much of the basic doctrinal scholarly groundwork in fundamental areas of the law has already been produced. As a result, most current law review articles focus on: (1) very recent, and relatively narrow, developments in statutory law or in court decisions; (2) relatively specialized areas of legal doctrine; (3) very theoretical and highly abstract approaches to legal doctrine; or (4) inter-disciplinary approaches to legal materials.

As a result of this emphasis on narrow, specialized, and theoretical articles, much of the basic legal doctrine that comprises the core law school curriculum is not, in the absence of a significant new statute or court opinion, likely to be the most fruitful ground for current legal scholarship. Law school professors, especially those facing an approaching tenure or promotion decision, often wish to produce a law review article within a reasonably short period of time and know that a large part of the perceived success of the piece depends upon the degree to which it adds something new and interesting to the existing literature. Given this circumstance, it is highly


20. Professor John Novak has written:

   One of my favorite persons in the profession... described to me how to become a successful professor with a national reputation when I was a fledgling professor. He said: "Take an obscure little problem that no one has thought much about, blow it out of all proportion, and solve it, preferably several times, in prestigious law reviews."


21. Although there is incomplete agreement on the question of what constitutes the core law school curriculum, it is safe to say it would include the law of contracts, torts, property, civil procedure, criminal law and procedure, federal constitutional law, business associations, commercial law, wills and trusts, evidence, and professional responsibility.

unlikely that the search for an article topic will begin with the doctrine of adverse possession, or the parameters of consideration, or the basic elements of false imprisonment, or many other time-honored legal doctrines. The point is not that there is nothing interesting or useful left to say about these subjects. A legal scholar working in the current age, however, is simply less likely to write on these topics than on recent, modern legal developments. Even when a classic legal doctrine is the primary focus of a scholarly piece, the writer is likely to examine the doctrine from a strikingly new theoretical or jurisprudential perspective and not from a traditional doctrinal perspective.

The most problematic aspect of this state of affairs in legal scholarship, at least from the perspective of the law school teaching function, is its incongruence with the majority of the law school curriculum, which is largely composed of legal doctrine analyzed from a traditional doctrinal perspective. What inevitably results from the interaction of the basic law school curriculum, the natural market for legal scholarship, and the dualist model, is law school faculty members who are, for the most part, teaching material in class that is unlikely to be the subject of their scholarly efforts, and who are at the same time working on scholarly subjects that do not easily fit within the basic law school curriculum. Over time, this disparity can create in an actively publishing faculty a deep expertise in specialized areas of legal doctrine or practice, or in very advanced theoretical or historical areas of study, that are simply beyond the basic pedagogic needs of the law school. For example, a legal scholar could productively spend a career studying the historical antecedents and philosophical foundations of modern gift and estate tax law, though it would be very hard to justify such material occupying more than a relatively small percentage of a well-educated law student's overall curriculum.

This tension between the increasing specialization of legal scholarship and the generalist focus of law school instruction compromises severely the asserted synergy between teaching and scholarship. To the extent that there does not exist an active market

23. See Turner, supra note 6, at 554 n.11 (asserting that lack of quality of law review articles is result of professors' "what's left" approach to topic selection).

24. Interestingly enough, the very same dynamic can develop when faculty members are practicing law actively during their non-classroom hours. For example, a professor of law engaged in a real estate practice might spend a great deal of time becoming familiar with the detailed provisions of different conveyancing instruments and commercial lease forms, the specific procedures required for the filing and inspection of deeds, and the local dynamics and procedures for obtaining zoning variances, all of which would be of marginal relevance to the students in that professor's first-year property course.
for legal scholarship which deals with the majority of the substantive legal doctrine that must be presented to law students, and deals with it in a way that is appropriate for students encountering this legal doctrine for the first time, then it is difficult to see how encouraging faculty members to devote their personal resources to the production of legal scholarship can have a significantly positive effect on their instructional effectiveness.

The incongruence between the demands of the market for legal scholarship and the generalist focus of the law school curriculum also has a dramatic personal effect on professors. To the extent that the substantive focus of legal scholarship is different from the appropriate focus of the core law school curriculum, law school faculty are asked to pursue simultaneously two independent and separate professional activities under the rubric of a single job title. It can be practically and personally difficult for law professors to maintain two different tracks in their professional lives and most law professors can be expected to attempt to minimize these difficulties.\(^\text{25}\)

The natural incentive produced by the disparity between the demands of legal scholarship and the demands of classroom instruction is for law school faculty to find and utilize techniques that reconcile those demands. Because the demands of legal scholarship are generated by a relatively open market that student editors rather than individual faculty members control,\(^\text{26}\) the most likely focus for the harmonization between scholarship and teaching is the law school classroom.

D. Influence on Course Content and the Law School Curriculum

In the current dualist environment, it is possible for faculty members to minimize the disparity between active legal scholarship and law school teaching by employing at least two simple techniques. First, law professors may design their basic law courses to include as much material compatible with their scholarly interests as is possible without generating explicit complaints from their students.\(^\text{27}\) The harm involved in the employment of this technique is the risk that introductory-level law school courses will, over time, contain a pedagogically inappropriate amount of abstract and theoretical mate-

\(^{25}\) See P. Seldin, supra note 5, at 157 (discussing frustration faculty members experience in attempting to juggle facets of their jobs including teaching, research and publication, administrative responsibilities, and community service).

\(^{26}\) See Jensen, The Law Review Manuscript Glut: The Need for Guidelines, 39 J. LEGAL EDUC. 383, 383-84 (1989) (stating there are many places to be published, but student editors evaluate submissions in publication decision).

\(^{27}\) See supra notes 12-16 and accompanying text (explaining incentive of law school professors to minimize classroom course development and maximize publishing efforts).
rial, material imported from a different academic discipline, or an unbalanced treatment of the topics traditionally included in the relevant doctrinal area.\textsuperscript{28}

The second basic technique available to law school faculty seeking to harmonize their teaching and scholarship responsibilities is to offer specialized upper-level elective courses that correspond closely to the faculty member's own scholarly interests and writing agenda. Unlike introductory-level courses, however, in which students are either assigned sections and instructors or as a practical matter have very few sections and instructors to choose from, students can freely decide whether or not to take an upper-level elective. This is important because a faculty member can effectively notify students of the influence of his or her research interests on the design and presentation of an upper-level elective, and students can respond accordingly. As a result, this second technique for harmonizing faculty research and teaching demands does not give rise to the same kind of harm to the law school teaching function as does the first technique.

The primary harm involved in the offering of specialized electives that are heavily influenced by faculty research interests is the likelihood, given the prevalence of faculty egalitarianism at most law schools, that almost all interested faculty members will be given the opportunity to offer at least one such elective, thereby causing the law school's overall curriculum to include many more of these electives than is pedagogically warranted.\textsuperscript{29} Moreover, once a law school builds a relatively large inventory of such electives, pressure inevitably builds for it to decrease the number of basic courses that a student is required to take, thereby increasing the potential market, the student enrollments, and the internal justification for continuing the specialized seminars preferred by the publishing faculty.\textsuperscript{30}

In addition to creating an incentive for law school professors to shape basic law school courses and to develop upper-level electives

\textsuperscript{28} See Elson, supra note 1, at 355-56 (asserting that where professors' research is devoted to complex theories and where they will teach in ways compatible with their research, classroom discussions will be devoted to abstract theory).

\textsuperscript{29} See R. Stevens, supra note 19, at 275 (noting offering of seminars such as linguistic philosophy, African law, theories of decision making, and empirical methodology); D'Amato, supra note 13, at 492 (arguing that law school curricula are lists resulting from political process having little to do with teaching and much to do with tradeoffs and satisfaction of political preferences of students and faculty members); see also Bergin, The Law Teacher: A Man Divided Against Himself, 54 Va. L. Rev. 637, 646-47 (1968) (decriing quality of law school elective courses).

\textsuperscript{30} See R. Stevens, supra note 19, at 238 (stating broadening of legal education may have gone too far as evidenced by fact that second and third year courses are mostly electives).
in a way that compromises either the faculty member’s research agenda or the educational needs of law students, the existence and dominance of the dualist model exerts a powerfully conservative influence on the law school curriculum. In the same manner that individual law school faculty who are actively engaged in research and writing face an inevitable pressure to minimize their personal investment in teaching activities, law school faculties collectively, and law schools as institutions, face the prospect of reaping few tangible rewards in exchange for expending the considerable resources necessary to effect significant curricular reform. This will continue to be the case so long as the general prestige of law schools as institutions is determined primarily by the quantity and quality of the faculty’s published scholarship. Given this environment, it is not surprising to find that the basic law school curriculum has hardly changed since the days of Langdell, and that what change has occurred has largely involved increased offerings of specialized upper-level electives.

E. Loss of Natural Leadership in Teaching and Curricular Reforms

A further aspect of the dualist model’s influence on the law school teaching function is the degree to which the current system of scholarship-driven prestige cripples the ability of the most prestigious law schools to serve their natural function as leaders in the area of pedagogical and curricular reform. No one generally benefits more from an existing hierarchy than those at the top. Correspondingly, few institutions have as much at stake in the current scholarship-driven hierarchy in legal education than those law schools perceived

31. See supra notes 12-16 and accompanying text (discussing law school professors' responses to incentives created by dualist model).
32. See Elson, supra note 1, at 355 (stating law school professors devote little time to development of appropriate curricula because of attention to scholarship).
33. A recent qualitative ranking of American law schools was published by U.S. News & World Report earlier this year. U.S. News & World Report, March 19, 1990 at 59. The six substantive categories used to develop the overall ranking were: academic reputation; lawyer/judge reputation; selectivity; placement success; graduation rate; and instructional resources. Id. I think that it is fair to say that none of the law schools identified as among the top ten—Yale, Chicago, Stanford, Columbia, Harvard, New York University, Michigan, Duke, University of Pennsylvania, and University of Virginia—have cultivated a reputation for emphasizing classroom instruction over published scholarship.
34. The curriculum at Harvard in 1879-80, after Dean Langdell’s innovations were adopted, consisted of property, equity, contracts, corporations and partnerships, agency and shipping, constitutional law, pleading, evidence, sales, conflicts, bills, criminal law, wills, torts, jurisprudence, and trusts and mortgages. E. Gee & D. Jackson, Following The Leader?: The Unexamined Consensus in Law School Curricula 18 (1975).
35. See generally D. Jackson & E. Gee, Bread And Butter?: Electives in American Legal Education 1-34 (1975) (describing nature of elective courses offered and taken in law school).
as being the most highly-prestigious. A loss of scholarly productivity would probably be more costly to such schools than a similar loss would be to a school which does not enjoy high-prestige status and that may not depend upon such a perception to maintain a competitive posture among its rival institutions. Thus, one can assume that the pressure to publish faced by faculty members at the most highly regarded schools is at least as great as that faced by faculty at less prestigious schools, if not significantly greater. As a result, these "top" law schools, which should naturally assume a leadership role in the profession, are likely to be even less willing to risk an over-allocation of institutional resources to pedagogical experimentation and development than would the average law school. This effect robs legal academia of its natural leadership class in the area of classroom teaching and curricular reform, and represents another cost of the dualist model to the law school teaching function.

F. Impact on Junior Faculty

Another cost of the dualist model to the law school teaching function is the fact that the practical conflicts generated by the need to engage simultaneously in both classroom teaching and legal scholarship are focused most sharply on the most junior members of law school faculties. While tenured members of law school faculties face pressures to produce legal scholarship in order to attain the rank of full professor, a chaired professorship, or a more substantial increase in annual salary, untenured members of law school faculties must produce legal scholarship in order to preserve the possibility of continuing to work in the profession, and they must produce it within a definite and limited period. This tremendous pressure to produce legal scholarship inevitably falls on new teachers who are in the first years of developing and preparing their assigned law school courses. This means that the pressures to prepare and to develop a course no more than is necessary to be perceived by students as competent and adequate, to make as few non-amortizable investments in teaching the course as possible, to limit exposure by

36. One indication of the importance of prestige-position among law schools, assuming that one is needed, is the consistency and stability of the list of schools occupying the top ten or fifteen spots in the hierarchy. See Lawrence & Green, A Question of Quality: The Higher Education Ratings Game, 5 HIGHER EDUC. RES. REP. 22 (1980) (finding although ranks of institutions vary between studies, traditional reputational assessments consistently identify same schools at top). It is fair to assume that such consistency is due in part to the strenuous efforts of the member schools to retain their preferred position.

37. See R. STEVENS, supra note 19, at xv (contending leading American law schools have entrenched power in legal profession, academic life, and country at large).

38. See Grantz & Whitehead, supra note 14, at 448 (contending those entering teaching profession must publish).
presenting the material in the form of straight lecture rather than in
a more interactive manner, and to offer specialized upper-level elec-
tives that mesh with a research and writing agenda, are visited most
strongly on the least experienced and least professionally mature
teachers. What makes this dynamic particularly pernicious from a
pedagogical perspective is that the pressure to compromise teaching
effectiveness in favor of research is focused on faculty members who
are in the formative stage of their teaching career, developing what
may be a lifelong approach to the law school teaching function.

Further, to the extent that the market for legal scholarship, which
untenured faculty members must be particularly sensitive and re-
sponsive to, favors a specialized or abstract approach to legal doc-
trine that is not pedagogically appropriate for introductory law
school courses, the aggressive pursuit of publication by junior
faculty members may actually hinder their attainment of extensive
expertise in the substantive areas they teach. Under the current
dualist system, beginning faculty members face overwhelming pres-
sures to set aside their efforts to develop a broad base of knowledge
in the substantive areas they teach in favor of a search for, and then
an in-depth examination of, a topic suitable for publication, a topic
that most likely covers only a very small percentage of the doctrinal
material that is presented to students. Such a model, operating over
time, takes a heavy toll on the overall effectiveness of the law school
teaching function. It may not drive law school teaching effective-
ness below the level of basic competency, but it certainly steals the
human resources and personal motivation necessary to improve sig-
nificantly the effectiveness of teaching over time and to move toward
general excellence.

It is of course true that not all law professors and not all law
schools respond fully to the incentives generated by the dualist
model. There have always been exceptional classroom teachers in
law schools, and important incentives other than promotion and sal-
ary exist for good teaching. Included among these less formal re-

39. See supra notes 19-23 and accompanying text (noting market for legal scholarship
results in narrow, theoretical, and abstract substantive areas of law).

40. As an illustration of a possible solution, imagine a law school environment which
places a preeminent value on classroom teaching effectiveness. In such an environment, be-
ginning faculty members might be encouraged to focus their primary efforts on the prepara-
tion and development of effective law school courses, and, in addition, to prepare their own
version of a mini-treatise in their teaching areas. Certainly the effort required to fulfill such a
research and writing requirement would be very beneficial to the development in young
faculty of a broad and personal knowledge of the substantive material they teach and could
therefore be expected to generate direct results in terms of increased classroom effectiveness.
The problem with such an approach from the perspective of the dualist model is that there is
very little need for, or value to, such efforts in the larger world of published legal scholarship.
wards are the expressed appreciation of students, the pleasure of a general reputation as a good classroom teacher, and the sense of pride that follows the teaching of an effective class or course.\textsuperscript{41} Moreover, principled reasons exist, wholly independent of the demands of legal scholarship, for many of the behaviors that are encouraged by the dualist model. Certainly one can defend and support the introduction of more sophisticated theoretical, public policy, and inter-disciplinary perspectives into introductory courses, the development and offering of very specialized and largely theoretical upper-level electives, and the maintenance of the traditional structure of the core law school curriculum without any reference whatsoever to the servicing of faculty research needs.

Nevertheless, it is important to recognize that the formal system of incentives generated by the current operation of the dualist model creates a fundamental conflict of interest between the pursuit of excellence in classroom instruction and greater faculty productivity in scholarship. So long as the advancement of individual law faculty careers and the perception of prestige of law schools as institutions depend more upon the production of published legal scholarship than on classroom teaching effectiveness, both individual faculty and law schools as a whole will be strongly encouraged to compromise classroom teaching efforts in favor of increased production of legal scholarship. Such a system of personal and institutional incentives inevitably places the law school teaching function at risk of serious harm.

\section*{II. Costs of the Dualist Model to Legal Scholarship}

Because scholarship enjoys a dominant position in the dualist model,\textsuperscript{42} the presumption naturally arises that the system tolerates the many costs that it imposes on the teaching function in exchange for corresponding benefits to faculty research and writing, and that legal scholarship therefore must thrive in a dualist environment. This, however, is not the case. In terms of production, evidence indicates that only a small percentage of law professors regularly produce law review articles after having earned tenure and full professorship.\textsuperscript{43} Moreover, widespread dissatisfaction exists with the

\begin{itemize}
  \item \textsuperscript{41} But see Elson, supra note 1, at 343 (noting that most law faculty would not sacrifice scholarship to emphasize teaching for professional competence).
  \item \textsuperscript{42} See supra note 12 and accompanying text (noting priority of legal scholarship over teaching).
  \item \textsuperscript{43} Swygert & Gozansky, Senior Law Faculty Publication Study: Comparisons of Law School Productivity, 35 J. LEGAL EDUC. 373, 373 (1985) (noting lack of scholarly literature by tenured professors).
\end{itemize}
quality of legal scholarship that is produced.\textsuperscript{44} A substantial part of both the quantitative and the qualitative problems currently associated with legal scholarship can be attributed to the significant burdens placed on the production of legal scholarship by the dualist model. The costs that the dualist model imposes on legal scholarship include: opportunity costs, the misallocation of scholarly talent, lack of full personal investment, influence on research agenda, a pressure to view legal doctrine as consistent, rational, and apolitical, excessive focus on "national" law, and faculty training as scholars.

A. Opportunity Cost

Just as it diverts resources away from the law school teaching function, the dualist model also imposes significant opportunity costs on the legal scholarship function. Faculty time and resources spent developing, preparing, and teaching law school courses represents scarce time and resources not devoted to the production of legal scholarship. In addition to a simple opportunity cost, there are two more subtle aspects to this problem. The first stems from the fact that legal scholarship, particularly sophisticated legal scholarship, requires long, uninterrupted stretches of time, especially at the stages of initial drafting and revision. Yet, for at least nine months of every year, the teaching responsibilities of law school faculty make such segments of time virtually unavailable.

The second aspect of this problem arises from the observation that a legal scholar, like any other academic scholar, is likely to improve with age and experience. As a scholar engages in additional, deeper research in an area of expertise, and expands his or her knowledge into other areas of the law, the work produced by that scholar should correspondingly increase in quality and sophistication. Given this model of a gradual accretion of knowledge and expertise over time, it is easy to see that the large percentage of a law professor's career that must be spent in teaching activities reduces dramatically the eventual amount of time, from a career-long perspective, that a law professor can devote to scholarship. This, in effect, places an artificial but quite definite ceiling on the cumulative expertise that a professor of law can develop over the course of a scholarly career.

B. Misallocation of Scholarly Talent

While the opportunity cost associated with the dualist model af-
flicts all law professors more or less equally, the costs to legal scholarship are especially high in the case of individuals who possess extraordinary scholarly talent. In these cases, overall scholarly understanding of the law can be seen as suffering a significant opportunity cost, in many cases up to 50% or more of the career-long effort expended by these especially talented scholars, in exchange for teaching services that could be performed by other law professors at far less marginal cost to the scholarly enterprise. The dualist model also causes costly misallocation of talent in the other direction. Not only are professors who possess exceptional scholarly talent forced to allocate very substantial amounts of their personal resources to instructional duties, but professors who possess exceptional teaching talent must similarly divert significant amounts of their personal resources away from the teaching of law students in an effort to produce scholarship.

C. Lack of Full Personal Investment

Beyond the overall misallocation of faculty talent that occurs as a result of the dualist model, there is also a more personal cost involved. Because they are required to function simultaneously as classroom instructor and active legal scholar, law professors spend much of their careers juggling the disparate demands of these two professional roles, one foot planted in each of two different worlds. The need to perform both roles puts significant stress on law school professors and on academia. Moreover, law professors tend not to become fully-invested, from a psychological point of view, in either function. The temptation always exists for a law professor to

45. See Bergin, supra note 29, at 643-46 (stating that compelling true academics to teach is inefficient allocation of resources). Professor Bergin identified the burden placed on especially talented scholars by the dualist model more than twenty years ago:

[T]here is no fact more visible in our law schools than that teachers with extraordinary scholarly skills are being made to "pay for their keep" by rule preaching and case parsing. The time they must give over to preparation for their Hessian-trainer roles makes it literally impossible to produce serious works of scholarship. The result is that we have so little authentic scholarship in our law schools that we are lucky not to be driven out of the academic herd.

Id. at 645.

46. Substantial evidence supports the proposition that the need to function simultaneously in both worlds may put stress on academics, causing a significant degree of unrest among the American professoriate. H. Bowen & J. Schuster, AMERICAN PROFESSORS: A NATIONAL RESOURCE IMPERILED 14-24, 28 (1986); see also Jacobson, Nearly 40 Percent of Faculty Members Said to Consider Leaving Academe, CHRONICLE OF HIGHER EDUC., Oct. 23, 1985, at 1 (stating that because they are unhappy teaching, forty percent of professors are contemplating leaving jobs); Jacobson, New Carnegie Data Show Faculty Members Uneasy About the State of Academe and Their Own Careers, CHRONICLE OF HIGHER EDUC., Dec. 18, 1985, at 1 (citing study finding over forty-five percent of college professors dissatisfied with jobs). See generally Marks, Multiple Roles and Role Strain: Some Notes on Human Energy, Time, and Commitment, 42 Am. Soc. Rev. 921 (1977) (finding functioning in multiple roles leads to stress and strain).
rationalize the decision to expend less than maximum effort in one function by reference to the demands of the other. Similarly, the temptation exists for a law professor to evaluate overall performance in the job by compiling a personal “best of” list of accomplishments in each of the component functions, thereby reducing the incentive to devote personal resources to improve weaker areas of performance within either function. This problem of diminished personal investment in either of the basic faculty functions mandated by the dualist model is made much worse when faculty also devote significant amounts of their time to law school administrative activities,\textsuperscript{47} or to private consulting and practice.

D. Influence on Research Agenda

Another cost that the dualist model imposes on legal scholarship, analogous to certain costs to the law school teaching function, is the difficulty that faculty face when maintaining teaching responsibilities in one set of substantive areas and scholarly interests in another. On the teaching side, minimization of this difficulty encourages faculty to include in their introductory courses as much material that is compatible with their scholarly agendas as is tolerable, and to offer upper-level elective courses that reflect their current research interests.\textsuperscript{48} On the scholarship side, the desire to harmonize teaching and scholarly responsibilities encourages faculty to research and write primarily in those substantive areas in which they teach. By so doing, law faculty are able to have their course preparation serve double-duty as background research for their scholarship and to minimize the number of substantive areas of law in which they must stay current.

The problem with this incentive structure, from the perspective of legal scholarship, is that a law professor’s teaching portfolio is very rarely determined exclusively by that faculty member’s natural research interests, or, even more rarely, by the current demands of the market for legal scholarship. Institutional coverage of core course

\textsuperscript{47}. Law faculty involvement in the administration of a law school typically takes place through participation on faculty committees, such as faculty appointments committees, admissions committees, and curriculum committees. It is worth noting that the administrative operation of the law school as an institution, while perhaps compatible with classroom teaching and legal scholarship, has no necessary connection with these two functions; one need not be involved in the administrative operation of the law school to be an effective classroom teacher or a productive legal scholar. To the extent that law schools require their faculty members to engage in administrative activity through active committee participation, the dualist model becomes a tripartite model and aggravates almost all of the costs to both the law school teaching function and legal scholarship.

\textsuperscript{48}. See supra notes 28-35 and accompanying text (explaining that professors minimize conflict by changing course content to fit writing agenda).
offerings, class scheduling, seniority, personal pedagogic preferences (such as a desire to teach in the first-year), and the fact that a full teaching package for most law faculty consists of at least two or three separate courses often play, as a practical matter, a very significant role in the actual allocation of course assignments to faculty. Because these factors are unrelated to research considerations, this means that at any given time some substantial percentage of faculty are teaching courses in substantive areas in which they possess few, if any, natural research interests. In such cases, faculty must either count the resources allocated to teaching such courses as almost pure cost from a scholarship point of view or reduce the difficulty of discontinuity between teaching and writing responsibilities by abandoning their natural interests and instead searching for potential research topics in the substantive areas in which they teach. This latter course of action, however, is not one from which inspired legal scholarship is likely to arise.

An important aspect of this mismatching of teaching responsibilities and scholarly interests is that it occurs most frequently in the case of the most junior members of a law school faculty. This is the case because it is the most junior members of a law school faculty who generally possess the smallest chance of being assigned a package of courses to teach that is compatible with their natural research interests. The problem posed by this dynamic is that these beginning legal scholars, at the most formative stage of their academic careers, are strongly encouraged to direct their research efforts toward substantive areas that are determined primarily by the practical staffing requirements of the law school curriculum. This kind of program runs the risk not only of directing young scholars away from the substantive areas in which they are likely to be most active and productive over the long-run of a career, but also of generating

49. See Rowles, Toward Balancing the Goals of Legal Education, 31 J. LEGAL EDUC. 375, 387-88 (1981) (arguing courses law professors teach have strong influence on research interests they choose and develop).

50. In addition to influencing law school professors' choices of substantive topics to study, the dualist model also influences the research techniques that are likely to be employed. Professors involved in full-time teaching are unlikely to select research techniques, such as empirical studies, that are not easily transferable to the class setting. Similarly, they cannot easily pursue research which takes them outside the university campus for any extended time. See Allen, The New Anti-Intellectualism in American Legal Education, 28 MERCER L. REV. 447, 452 n.18 (1977) (arguing legal research is dominated by professional concerns); Elson, supra note 1, at 376 (noting nature of empirical research makes it unattractive to scholars); Schuck, Why Don't Professors Do More Empirical Research?, 39 J. LEGAL EDUC. 323, 325-30 (1989) (commenting on lack of empirical research by legal scholars).

51. This is likely due to a number of factors, including lack of seniority, the fact that a junior professor has not been on the faculty long enough to shape a teaching portfolio over time, and that most beginning faculty members have not yet developed more than very tentative and frequently shifting research interests.
disenchantment and alienation toward the scholarly function in general.

Further, given the fact that the core of the law school curriculum carries far higher student enrollments than the more peripheral courses, and given the much greater staffing needs that higher enrollments entail, the dualist model, combined with faculty desires to avoid discontinuity between teaching responsibilities and research interests, results in an almost constant funneling of faculty research efforts into the same dozen or so substantive areas of law. While this kind of allocation of faculty research efforts may ultimately prove to be beneficial, it is important to note that the allocation pattern is not being dictated in any real way by the needs of legal scholarship, or by the needs of the audience for legal scholarship, but is instead dictated by the staffing requirements of the core law school curriculum. Moreover, as more and more law professors are encouraged by their teaching responsibilities to engage in research and writing in the same basic substantive areas of law, the opportunities for novelty and originality in scholarship in those areas are likely to be found primarily in increasingly narrow, increasingly technical, or increasingly esoteric approaches to the material.\(^5\)

While such approaches may well produce interesting and useful scholarship, they frequently fall outside of the pedagogical needs of introductory law school courses. This means that over time, even professors who are teaching introductory courses in substantive areas in which they are also producing legal scholarship are experiencing a discontinuity between their teaching responsibilities and their research interests.

\textbf{E. Cognitive Dissonance and the Pressure to View Legal Doctrine as Consistent, Rational, and Largely Apolitical}

Another possible cost to legal scholarship that results from the dualist model is the pressure placed on law school professors to approach legal rules and doctrine from a harmonizing, rationalizing, and largely apolitical perspective. This pressure is generated initially by the responsibilities of classroom instruction but inevitably spills over into the faculty member's work as a legal scholar. The

\[^5\] See Farber, \textit{The Case Against Brilliance}, 70 MINN. L. REV. 917, 917 (1986) (commenting on current scholarly standards placing too much emphasis on brilliance defined in terms of traits of novelty, surprise, and unconventionality, and arguing that thoughtfulness and common sense should be more important virtues); \textit{see also} Farber, \textit{Brilliance Revisited}, 72 MINN. L. REV. 367, 375-82 (1987) (defending position and stating that truth is key to good scholarship as opposed to one of equally valid goals); \textit{Note, Gresham's Law of Legal Scholarship}, 3 CONST. COMMENTARY 307, 310 (1986) (arguing legal scholars are expected to produce controversial articles).
general phenomenon referred to here is known in the field of psychology as "cognitive dissonance" and it generally occurs when an individual simultaneously holds two or more contradictory attitudes or thoughts. Because cognitive dissonance produces psychological stress, individuals in whom it is aroused seek to reduce the dissonance and thereby relieve the stress. One common technique used to reduce cognitive dissonance is to alter one or both of the contradictory attitudes, thereby harmonizing them.

In the classroom, law professors face powerful incentives to present legal doctrine and legal processes as being fundamentally rational, coherent, and consistent with current notions of sound public policy. This pressure arises from both structural and aesthetic sources. Structurally, the very existence of law schools and the requirement that people graduate from an accredited law school before being allowed to practice law rest fundamentally on an assumption that there exists a coherent, understandable, and more or less rational body of legal doctrine and process of legal analysis which can be effectively conveyed to law students through the law school experience. As full-time members of the legal education community who depend upon the continued viability of law schools for their professional livelihood, law professors naturally feel substantial pressure to view the law and the legal process as being fundamentally coherent, rational, and well-intentioned, or at least to publicly profess such a view.

The aesthetic source of this pressure derives from the fact that law students frequently carry with them into class powerful assumptions about the coherence, rationality, and substantiveness of legal rules and legal doctrine. Classroom approaches to legal materials that significantly challenge, that fail to validate, or that do not adopt such assumptions as routine pillars of analysis invariably meet with a strong and often visceral negative reaction. By contrast, a classroom session in which seemingly disparate and irreconcilable legal rules are shown to in fact fit within a subtle and conceptually cohesive doctrinal scheme that is designed to optimally promote impor-

53. See L. Festinger, A Theory Of Cognitve Dissonance 2 (1957) (discussing and explaining theory of cognitive dissonance); H. Gleitman, Basic Psychology 296 (1987) (stating that cognitive dissonance refers to process of reinterpreting events so as to minimize whatever inconsistency may be present); C. Morris, Psychology 376-77 (1979) (referring to desire for consistency and cognitive dissonance as result of disparities).


55. See R. Abel, supra note 13, at C-20 (stating that "[m]ost students appear to enter law school already imbued with the view of the nineteenth-century German pandectists that law is a comprehensive system of rules, which mechanically produce outcomes when applied to unambiguous facts.")
tant public policy values, invariably generates enthusiastic praise and awed respect. This reinforcement system, present in one form or another in most law school classes of any significant size, places potent pressures on law professors to present the law as a generally cohesive and rationalizable whole.

These constant pressures, and the dynamics of cognitive dissonance, combine to create a law school environment in which faculty members face strong incentives to carry the view of law that they espouse daily in the classroom into their professional scholarship. This of course limits the range of possible approaches a legal scholar is likely to bring to his or her studies, and to limit similarly the range of likely conclusions that he or she will draw from the research. These limiting effects are not necessarily the result of prior research, or direct personal experience, but are simply due to the fact that under a dualist model, the professional scholar is also a full-time instructor.

Thus, the dualist model, by requiring all law school professors to regularly teach law school courses, forces the vast majority of active legal scholars to regularly face an emotionally powerful reinforcement regime that strongly encourages the public adoption of certain assumptions about the nature of law. While there may exist legitimate controversy over whether those teaching law school courses should be expected to adopt publicly the view that the law is coherent and rational, there should be no question that such an influence is not beneficial to legal scholars, compromising as it inevitably does both their actual and their perceived objectivity.

F. Excessive Focus on “National” Law

Another negative effect of the dualist model on legal scholarship arises from the desire of many law schools, especially the most prestigious, to posture themselves as “national” law schools. These schools generally do not teach students the law of any particular state (especially the state in which the law school is located), but instead teach students principles of law that are generally applicable throughout the United States. This correlation between “na-

56. An ongoing debate exists as to whether professors ought to present law as cohesive and rational or to present views of the law which they personally espouse. See generally Carrington, Of Law and the River, 34 J. LEGAL EDUC. 222 (1984); Martin, supra note 12, at 1.

57. At least one important purpose of such a posture is to permit the school to recruit students from all regions of the country, thereby allowing the school to maintain a maximally high incoming and enrolled student profile in terms of undergraduate grade point averages and LSAT scores, these being the critical quantifiable measures of quality most frequently reproduced in prospective student guides to law schools. See E. EPSTEIN, J. SHOSTAK & L. TROY, BARRON'S GUIDE TO LAW SCHOOLS (8th ed. 1988) (listing average grade point averages
tional" orientation and high prestige spills over to legal scholarly journals, causing prestigious, and prestige-seeking, law reviews to adopt a similarly "national" posture in their article selection and editorial policies. An article focusing primarily on the law of a single state stands only a small chance of being accepted and published by any of the most prestigious law reviews in this country, and this circumstance inevitably influences the research and writing agendas of aspiring authors.

While public adoption of a national posture may be a very effective strategy for creating and maintaining a highly-credentialed student body in law schools seeking national visibility and prestige, and while this strategy may be indispensable in the case of law schools associated with already prestigious universities which are located in states with relatively small populations, it is not at all clear that a national perspective is preferable to a state-based, or local, perspective when it comes to legal scholarship. Many critically important areas of legal doctrine, including the vast majority of what now comprises the basic first-year law school curriculum, are fundamentally state-based systems of legal regulation. It may well be that a significant reduction in clarity, depth, incisiveness, and ultimate usefulness is an unavoidable aspect of legal scholarship which treats essentially state-based areas of law in a generalized, national manner. To the extent that this preference for a national orientation in legal scholarship is not warranted, the above described dynamic represents a potentially considerable cost to the overall interests of legal scholarship. Perhaps even more disturbing is that this dynamic illustrates the way in which the dualist model provides a conduit through which the marketing needs and interests of a law school’s teaching program can be translated into a significant influence on the way in which legal scholarship is both perceived and practiced.

G. Faculty Training as Scholars

Another way in which the needs of the law school’s teaching program compromises the interests of legal scholarship is the fact that a large percentage of law school faculty members have not earned a
doctorate degree.\footnote{60} A traditional doctorate degree is considered to be the fundamental academic credential and a basic prerequisite to appointment as a full-time faculty member in all but the professional schools of American universities.\footnote{61} Because law schools must attract competent classroom teachers in order to be competitive and because the lucrative market for practicing attorneys makes the pursuit of a doctorate degree financially unattractive to most law school graduates, law schools have historically not demanded a doctorate degree of candidates for faculty positions.\footnote{62}

As a result, most law professors have not had the formal training in scholarly research and writing that is provided by the successful completion of a dissertation.\footnote{63} Because law schools recruit and select faculty who have not written dissertations, they are unable to ascertain candidates' genuine interest in scholarly research and writing and to evaluate directly the candidates' natural aptitude for scholarship. Thus, although the dualist model requires law school professors to contribute to legal scholarship as well as to teach, most law school professors have not received the kind of formal scholarly training generally obtained by professional scholars through successful completion of a doctoral program.

III. SYMPTOMS OF STRESS IN THE DUALIST MODEL

A. Law School Teaching

Generally, one would expect that the law school teaching function could fall far below its highest level of possible effectiveness before any overt symptoms of dysfunction appear. One reason for this is that the primary audience for law school classroom teaching, law students, are in the first three or four years of their exposure to the law and legal practice and thus are not in a position to determine easily the degree to which the instruction that they are receiving is effectively preparing them for a life in the law. Even assuming that

\footnote{60. \textit{See generally} Fossum, \textit{Law Professors: A Profile of the Teaching Branch of the Legal Professions}, 1980 AM. B. FOUND. RES. J. 501 (conducting empirical study of qualifications of law professors in America).}

\footnote{61. \textit{See generally} D. BORNHEIMER, \textit{The Faculty in Higher Education} 121 (1973) (noting importance of doctorate degree).}


\footnote{63. \textit{See} Bard, \textit{supra} note 13, at 242-43 (examining training of law school professors); \textit{see also} Bard, \textit{Legal Scholarship and the Professional Responsibility of Law Professors}, 16 CONN. L. REV. 731, 732 (1984) (examining law school professor qualifications). Some commentators have argued that the lack of doctoral training also negatively affects a law professor's ability to teach upper-level interdisciplinary law school seminars successfully; \textit{e.g.}, Bergin, \textit{supra} note 29, at 647 (noting most law school professors do not have doctorate degrees and thus have not written dissertations).}
law students are capable of effectively evaluating the overall quality of their law school instruction, their inexperience in the study of law is not likely to give them much personal confidence in their evaluations.

Moreover, even assuming sufficient competence and confidence on the part of students to evaluate accurately the quality of law school instruction, there is little practical incentive for law students to complain openly about their exposure to classroom instruction that is no better than merely adequate. The object of such critical comment is, unavoidably, the law school faculty itself. Law students, while still in the educational program and yet to receive the degree that is critical to further advancement in the profession or the formal recommendation of the school for admission to the bar, might understandably feel reluctant to openly and explicitly voice complaints regarding the quality of classroom instruction. Moreover, after having graduated from law school and having been admitted to the bar, most law school students are savvy enough to understand that explicit and public criticism of the instruction that they received in law school is against their self-interest to the extent that it serves to lower the favorable impression that significant others have of the law school from which the student graduated, thereby reducing the practical value of the student’s degree.

Few groups other than law school students are sufficiently exposed to law school instruction to evaluate effectively its general quality. Moreover, because it is difficult for prospective law school students to gather feedback from current students on the quality of classroom instruction, especially at the so-called “national” law schools, one would not expect the quality of classroom instruction at a law school to impact negatively on the school’s success when recruiting new students, until the quality of instruction falls significantly below that offered by other law schools in roughly the same level of the law school prestige hierarchy. In addition, apart from bar examination passage rates, there is a dearth of quantitative techniques available to measure the effectiveness of law school instruc-

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64. As discussed subsequently in this Article, law school faculty generally do not spend much time monitoring the classroom performance of other faculty members. See infra notes 90-92 and accompanying text. Although law school faculty are exposed regularly to their own classroom teaching, they cannot be expected to voice openly significant criticism regarding it. In fact, research has shown that professors consistently tend to overrate their own teaching effectiveness. J. CENTRA, TWO STUDIES ON THE UTILITY OF STUDENT RATINGS FOR INSTRUCTIONAL IMPROVEMENT 34 (1972); Blackburn & Clark, An Assessment of Faculty Performance: Some Correlates Between Administrator, Colleague, Student and Self-Ratings, 48 SOC. EDUC. 242, 249 (1975); Clark & Blackburn, Faculty Performance Under Stress in PROCEEDINGS: FACULTY EFFECTIVENESS AS EVALUATED BY STUDENTS 233 (1973).
tion. Further, the current lack of consensus regarding the practical skills that newly graduated students should possess means that even the employers of law school graduates are not in a good position to evaluate the quality of a given law school's classroom instruction.

Nevertheless, even in an environment in which one would not expect it to arise, there exists substantial and sustained criticism of law school instruction. Writing in the *Journal of Legal Education* in 1987, Andrew Pirie noted that "although criticism of legal education has not spanned centuries, it has been as harsh and exhaustive as that endured by the profession. The critics' voices, described as 'widespread,' 'a swelling chorus,' 'never as . . . unanimous as they are today,' have resulted in 'a serious indictment of university legal education.'" Criticism of law school teaching has focused on its failure to prepare students adequately for the practice of law, its lack of pedagogical innovation and over-reliance on a narrow variation of the socratic method, its failure to maintain the interest of law students beyond the first year, its failure to train law faculty adequately to fulfill their instructional function, and, perhaps most disturbingly, its propensity to inflict psychological harm on law students. A survey of law school graduates conducted in the late

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65. See infra note 101 and accompanying text (discussing difficulty in defining or evaluating effective teaching).


67. See Elson, supra note 1, at 343 n.1 (noting existence of articles and surveys criticizing law schools for failure to educate students adequately); id. at 547 n.13 (discussing fact that lawyers believe law schools did not teach most important skills in law practice).

68. See D'Amato, supra note 13, at 491 (arguing that law school teaching is characterized by bad socratic method or lecture); Stuesser, The Need for Change in Teaching the Law, 38 U. New Brunswick L.J. 55, 55 (1989) (calling for more imaginative and innovative teaching in classroom); see also Fasan, If Wishes Were Horses: Reflections Without Footnotes on Legal Education, 9 N. Ill. U.L. REV. 125, 123 (1988) (discussing flaws in legal education).


70. See K. Doyle, supra, note 13, at xv (stating although teaching faculty have not had training as teachers, they are asked to teach as their teachers taught).

71. See Benjamin, Kasznik, Sales & Shanfield, The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers, 1986 AM. B. FOUND. RES. J. 225, 247 (citing studies showing depression in law school students). A study showed that besides depression, law students demonstrated higher than normal symptoms of obsessive-compulsive behavior, interpersonal sensitivity, anxiety, hostility, phobic anxiety, paranoid ideation, social alienation, and isolation. Id. at 246. See also Shanfield & Benjamin, Psychiatric Distress in Law Students, 35 J. LEGAL EDUC. 65, 69 (1985) (citing study showing law students having higher rates of psychiatric distress than contrasting normative population or medical student population).
1970's found that a significant number of alumni believe their law school failed to provide them with many legal skills that they perceive as critical to their practice.\textsuperscript{72}

A more recent development is the possible translation of some of these long-standing criticisms into concrete action. In 1989, John Elson, a Professor of Law at Northwestern University School of Law, warned that unless law teachers reconsidered the primacy of legal scholarship, then forces outside of academia would direct the reforms needed to improve professional education.\textsuperscript{73} Later that same year, the American Bar Association Section of Legal Education and Admissions to the Bar established a Task Force on Law Schools and the Profession which was "[c]harged with narrowing the gap between the teaching of law and how it is used in society, and with identifying ways by which what is taught can have enhanced relevance for today's legal profession."\textsuperscript{74}

B. Legal Scholarship

In turning from teaching to research, one encounters little difficulty finding explicit and often scathing expressions of dissatisfaction with modern legal scholarship.\textsuperscript{75} Fred Rodell, former professor of law at Yale University, wrote in 1962, "[t]here are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground."\textsuperscript{76} While some commentators argue that the basic substance of much legal scholarship is badly lacking,\textsuperscript{77} and that the style of presentation is

Some commentators, however, have argued that psychological pain may be a necessary and unavoidable part of a powerful learning experience. See Allen, The New Anti-Intellectualism in American Legal Education, 28 Mercer L. Rev. 447, 460 (1977) (arguing that academic pressure is necessary component of learning).

\textsuperscript{72} Zemans \& Rosenblum, Preparation for the Practice of Law - The Views of the Practicing Bar, 1980 Am. B. Found. Res. J. 1, 5-7.

\textsuperscript{73} Elson, supra note 1, at 381.

\textsuperscript{74} MacCrate, Task Force on Law Schools and the Profession Formed, XXI Syllabus 1, 7 (Summer 1990).

\textsuperscript{75} For example, Edward Rubin has recently written:

These are not cheerful times for standard legal scholarship. In fact, the field is widely perceived as being in a state of disarray. It seems to lack a unified purpose, a coherent methodology, a sense of forward motion, and a secure link to its past traditions. It is bedeviled by a gnawing sense that it should adopt the methods of other disciplines but it is uncertain how the process is to be accomplished. The field even lacks a conceptual framework within which to criticize itself.


\textsuperscript{76} Rodell, Goodbye to Law Reviews — Revisited, 48 Va. L. Rev. 279, 279 (1962); see also Rodell, Goodbye to Law Reviews, 23 Va. L. Rev. 38, 38 (1936) (criticizing style and content of legal scholarship).

\textsuperscript{77} See, e.g., Bard, Scholarship, supra note 13, at 244 (commenting that most legal scholarship lacks idea content); Cramton, supra note 14, at 7-8 (criticizing lack of objectivity in legal scholarship); Kelman, The Past and Future of Legal Scholarship, 33 J. Legal Educ. 432, 436
deplorable,78 others criticize mainstream legal scholarship for its lack of practical relevance to either the bench or the practicing bar79 and for its unusual tradition of having law school students manage and edit virtually all of the professional scholarly journals in the field.80
In addition to the existence of a plethora of public criticism regarding the nature and quality of current legal scholarship, another serious symptom of stress in the dualist model is that a large percentage of law professors rarely publish once they have tenure and full professor status. A 1985 study conducted by Michael Swygert and Nathaniel Gozansky examined the publication activity between 1980 and 1985 of all senior faculty members at accredited law schools. This research revealed that almost half of all senior law faculty failed to publish any scholarship at all during the three year study period, and that “nearly two-thirds of the population, 64.93 percent to be exact, ended up with no more than one publication.” After analyzing the results of their work, the authors concluded that “it seems reasonable to infer that nearly half of the senior faculty in America’s 169 approved law schools publish minimally if at all.” Swygert and Gozansky were neither the first to note the relative lack of scholarly productivity by law school faculty, nor were they alone in discovering that a very small percentage of law professors account for a disproportionately large percentage of legal scholarship. What emerges from this data is

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the picture of a law school community in which only a small percentage of professors choose to engage actively and regularly in legal scholarship after the point at which such activity is required to achieve promotion and tenure.

It is not necessary to identify in detail all of the potential causes of the current malaise in legal scholarship in order to recognize it as a serious symptom of stress in the present dualist system. The combination of low productivity by senior faculty and the continued existence of strong criticism regarding the quality of published work suggests strongly that the dualist model, under which the great majority of active legal scholars operate, is taking its toll on both the process and the product of legal scholarship.

IV. UNDERSTANDING THE BUREAUCRATIC UTILITY OF THE DUALIST MODEL AND THE DIFFICULTIES INVOLVED IN EVALUATING TEACHING EFFECTIVENESS OF LAW SCHOOL FACULTY

Despite identifiable costs to the law school teaching function and to legal scholarship, and despite the existence of outward symptoms of stress in the dualist model, there are few indications that anyone in the legal education community is seriously questioning the efficacy of the dualist model.88 One critical reason for this complacency is the fact that published legal scholarship currently serves as a convenient and relatively inexpensive device for evaluating the general effectiveness of law professors. When attempting to understand the preeminence and the endurance of the dualist model, it is important to appreciate the tremendous difficulty involved in evaluating the classroom teaching effectiveness of law school faculty.

The dualist model requires law professors to be active both in the basic teaching program of the law school as well as in the produc-
tion of legal scholarship. Generally, an individual faculty member's performance in both spheres of endeavor are critical factors for promotion through the formal ranks of assistant, associate, and full professor, and for the purposes of attaining tenure. At many institutions, however, the production of scholarship has become the preeminent faculty value, far outweighing any other consideration factored formally into the promotion and tenure calculus. It is currently the accepted common wisdom that although movement by a faculty member from untenured to tenured status, from assistant to associate to full professor, and, most especially, to a highly prestigious law school is possible without much more than minimally competent classroom performance, it is almost impossible without a solid record of published scholarship.

On the surface, this pattern of relative preference between teaching effectiveness and scholarly productivity in law schools is puzzling. While the valuing of research and scholarship over teaching is very common in academic departments in the sciences, engineering, and medicine, these departments are fundamentally different from law schools in that they depend almost exclusively upon the attainment of outside grant money to finance a large percentage of their physical assets and research activity. In such an environment, it appears rational for these departments to value more highly those skills that attract additional resources to the institution.

In stark contrast to this pattern, law schools depend almost exclusively upon tuition and alumni donations to fund basic activities, including the acquisition of books for the library and the financing of faculty research activity through sabbaticals, lighter teaching loads, and travel. Little grant money or foundation support is available to law school faculty for pursuance of research projects, and what little money there is rarely involves the acquisition of hard assets that inure directly to the benefit of the host law school. Given this resultant financial dependence upon tuition and alumni contributions, one might predict that law schools would most highly value those skills in their faculty that are perceived by students and potential students as most directly serving their interests. Under such an approach, effectiveness in classroom teaching would supplant scholarly production as the preeminent and dominant law faculty value. This, however, is clearly not the case. One critically important reason why classroom teaching is not valued as highly as legal scholarship is the enormous difficulty involved in evaluating the teaching

89. See supra notes 13-14 and accompanying text (explaining importance of publication in attaining tenure).
effectiveness of law school faculty. Several reasons why it is so difficult to evaluate the effectiveness of a professor's teaching include: the excessive consumption of institutional resources, the qualitative difficulty of evaluation, the inherently personal nature of evaluation, and the difficulties associated with student evaluation.

A. Excessive Consumption of Institutional Resources

The first difficulty involved in evaluating the classroom teaching effectiveness of law school faculty is that a proper peer evaluation requires an exceptionally large time commitment on the part of the evaluating faculty members. This large time commitment is required because it is not possible for an evaluating faculty member to be exposed sufficiently to another faculty member's course to develop a substantive evaluation without being present for the majority of the class sessions and without reading, or already being very familiar with, the assigned written materials. Because a law school course will often expose students to a variety of legal materials and intellectual approaches to legal problems, and because a law school instructor will vary frequently the manner of analysis and the mode of classroom discourse, a peer faculty evaluation of teaching effectiveness based on exposure to small "samples" of individual class sessions will be fundamentally unreliable.90 Although such an evaluation may be capable of capturing the external style of the instructor, it cannot intelligently examine the genuine effectiveness of the instructor: whether the instructor varies his or her approaches to the material and trains students to recognize and use different intellectual perspectives on legal problems; whether the reading assignments are reasonable and are integrated well with the classroom instruction; or whether the course adequately exposes students to the standard legal doctrine in the area.91 Thus, while evaluations of classroom teaching effectiveness based on a "sampling" of classes...

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90. See K. Doyle, supra note 13, at 16 (discussing problem of evaluating faculty by conducting evaluations at isolated points of time); P. Seldin, supra note 5, at 70 (noting that solitary observation of classroom performance may not represent teacher's customary performance); Centra, The How and Why of Evaluating Teaching, 17 New Directions for Higher Educ. 93, 99 (1977) (noting that ratings based on classroom observations alone would not be reliable without major investments of time). According to one survey, however, more than half of all faculty members, observing another's classroom instruction, attend on average, only one class. Among those faculty who observe more than one class, sixty-nine percent see two, twenty-five percent see three, and only six percent observe more than three classes. R. Abel, supra note 13, at A-11, B-23. Professor Abel also found that thirty-three percent of schools reported that more than eighty percent of observers saw only one class; forty-five percent reported that more than sixty percent did so; and sixty-four percent reported that more than forty percent did so. Id. at A-11 n. 23.

91. See, e.g., R. Abel, supra note 13, at D-5 (noting that meaningful evaluation is impossible without extensive faculty observation, and that observers must be knowledgeable about
can provide peer reaction to an instructor's outward style of presentation, it cannot address the much more critical question of overall teaching effectiveness. This means that a proper system of peer review of law faculty classroom teaching effectiveness requires the institutional commitment of an enormous number of law faculty work hours.

Moreover, if the basis for the evaluation of classroom teaching effectiveness increases beyond the mere sampling of one or two class sessions, it is likely that the results of these evaluations will be taken much more seriously by the institution and will therefore have an increasingly direct effect on the evaluated faculty member's career. In response to this increase in the practical stakes involved, evaluated faculty members can be expected to become more aggressive in challenging the accuracy and the fairness of unfavorable evaluations. As a result, the extra faculty time devoted to the resolution and management of such disputes, and the inevitable strain that this process is likely to place on the collegiality of the faculty, is a significant additional cost of any program involving an in-depth evaluation of classroom teaching effectiveness.

subject matter; they must attend reasonable sample of classes throughout semester, read assigned materials, examine syllabus, and review written and oral assignments).

Nonetheless, this kind of evaluation can still be extremely useful because problems in this area, such as not speaking loudly enough, speaking to the board, failing to make eye contact with the class, or missing student questions, are often difficult for the instructor to become aware of without some feedback and are often relatively easy to correct once recognized.

In fairness to this approach of evaluating classroom teaching effectiveness, not all of the time spent by evaluating faculty members attending another instructor's law school course represents a pure cost of evaluation. It might, after all, prove to be very beneficial for a faculty member, from both a teaching and a scholarship perspective, occasionally to audit an entire law school course. In fact, such a program may be justifiable wholly apart from any evaluative function that it serves.

Assume, for the purposes of illustration, that the average core curriculum course consists of four credit hours and that two faculty evaluators are assigned to assess the teaching effectiveness of an instructor in a given course. It would then require, at a minimum, 120 faculty work hours to evaluate a single instructor in a single course, not including the time required for the evaluator to absorb the required reading in the course and to prepare and present the results of the evaluation. This estimate is based on the assumption that the course runs for fifteen weeks with one hour class sessions, and thus presents to the students sixty total hours of classroom instruction. Assuming a total faculty of thirty-five members who teach on average two core curriculum courses of four credit hours each, and a desire by the law school to evaluate the effectiveness of each core course at least once every five years, the minimum amount of faculty time needed to engage in such a program of classroom teaching evaluation would easily exceed 1500 hours per year. This estimate is based on the assumption that the number of hours of classroom instruction that must be reviewed come to 1680 hours per year (thirty-five faculty each teaching two courses evaluated once every five years results in fourteen courses that must be evaluated each year—fourteen courses each receiving 120 classroom hours of observation requires 1680 total classroom hours of evaluation time).

See J. Centra, supra note 13, at 1 (observing that faculty members question fairness and objectivity of evaluations); K. Doyle, supra note 13, at 15 (noting that fear, politics, favoritism, competitive resentment, and retaliation enter into evaluations).
In contrast, the institutional resources required to evaluate published legal scholarship are quite small. Moreover, because law schools frequently ask outside scholars to read and formally evaluate the published scholarship of a faculty member, especially in the case of tenure candidates, the amount of faculty time invested in the process of evaluating its own faculty's legal scholarship is further reduced.

On balance, then, it seems clear that the overall time commitment required to effectively evaluate law faculty scholarship is very significantly less than the time commitment required to evaluate law faculty effectiveness in classroom teaching. Moreover, not only is the time required for evaluating teaching effectiveness much greater than that required for the evaluation of scholarship, it is also quite large in an absolute sense, demanding the equivalent of at least one full-time faculty position each and every year. Consequently, law schools face a powerful practical incentive to use evaluations of published legal scholarship as a surrogate means of evaluating the overall effectiveness and productivity of its faculty.

B. Qualitative Difficulty of Evaluation

Although there is no consensus on what constitutes good, better, and the best kind of legal scholarship, there is a relatively well-accepted and time-honored form, an appropriate "look and feel" for quality legal scholarship. This generally accepted and largely unvarying style can be found by looking at almost any of the lead articles in the most prestigious law reviews. Because an accepted form does exist, a cursory evaluation of any given piece of legal scholarship can be performed easily by comparing the outward form of the piece against the established standard. This kind of superficial evaluation is made even easier by the availability of quasi-quantitative measures such as the length of the piece and the number and

96. Assume again, as in the teaching evaluation illustration in supra note 94 that two faculty members are asked to evaluate the legal scholarship produced by a third in a given year. Assuming that it requires on average ten hours of work for each faculty member to evaluate the published scholarship, then the total investment of faculty time in the evaluation process would be twenty hours. This compares quite favorably with the bare minimum of 120 hours of faculty time required to evaluate that same professor's classroom teaching performance in just one law school course.

97. This statement is based on the estimate of a minimum expenditure of 1680 faculty hours developed in supra note 94, which represents a commitment of forty-two full forty hour work weeks (1680 divided by forty). Assuming, as is standard, at least ten weeks of unstructured faculty time during the summer, then 1680 hours a year represents the permanent commitment of the equivalent of one full-time faculty position to the task of classroom teaching evaluation.

length of the footnotes employed. In addition, qualitative aspects such as the clarity of writing style, the tightness of organization, and the logical progression of ideas and arguments can be fairly easily determined from a single, more or less casual reading of the piece, and would probably occasion little disagreement among multiple evaluators.

Moreover, evaluators of legal scholarship generally have available to them an incredibly low-cost evaluative tool: the relative prestige of the academic journal in which the evaluated piece of scholarship has been published. While the quality of legal scholarship does not reliably correspond to the relative prestige of the journal in which it is published, it would be naive to think that many, if not most, of the persons who draw conclusions about the quality of a given piece of scholarship do not do so in part based upon the relative prestige of the journal in which the piece appears. At the very least, one can comfortably assume that articles appearing in the most prestigious journals enjoy a presumption of quality not enjoyed by articles appearing in the relatively less prestigious journals. In either case, knowing that a piece of legal scholarship has already undergone a thorough evaluation process by law review editorial boards and has subsequently been published by a review that is located at some identifiable point on the relative prestige hierarchy gives an evaluator a significant amount of information about the relative quality of the piece at almost no cost to the evaluator.

In contrast, both the form and the substance of law school classroom teaching varies widely and is not currently subject to an accepted form or standard. Moreover, no qualitative pre-screening devices exist in the area of classroom teaching that operate the way that the fact of publication and the relative prestige of the publishing journal do in the area of legal scholarship. As a result, the qualitative evaluation of law school classroom teaching effectiveness is an exceptionally difficult task to perform, and a difficult one to defend.

99. Some academics believe that the task of evaluating scholarship is in practice sometimes simplified even further by reducing it to a simple count of publication credits. See, e.g., P. SELDIN, supra note 5, at 13 (observing that at many colleges and universities, research and publication is merely counted); Abrams, supra note 1, at 12 (submitting that quantity rather than quality of writing carries significantly more weight in tenure decisions); Bok, supra note 13, at 50 (noting more than forty percent of faculty in research universities believe that reviewing authorities consider only quantity of publications, rather than quality, in judging faculty promotions).

100. See Abrams, supra note 1, at 12 n.14 (commenting placement of article in one journal often becomes “proxy” for quality of writing); Soifer, supra note 12, at 20, 23 (1987) (noting articles are often evaluated according to where they appear).

101. See P. SELDIN, supra note 5, at 8, 10 (contending some faculty members oppose ratings by students and peers because effective teaching characteristics are too elusive to measure, but noting that general characteristics of effective teaching are emerging).
if challenged,\textsuperscript{102} especially when compared to the qualitative evaluation of published legal scholarship.\textsuperscript{103}

\textbf{C. Inherently Personal Nature of the Evaluation}

A published piece of legal scholarship is, by its very nature, a formal and somewhat stylized public performance on the part of the author. Typically, a work of legal scholarship has been carefully designed and structured over time, drafted and redrafted repeatedly, checked for factual accuracy, and independently edited prior to publication. In contrast, a law school class is far more casual and spontaneous in nature. No matter how well prepared the instructor is, a live law school class, unless it is an uninterrupted monologue without questions, involves a great deal more spontaneous risk and a projection of the faculty member’s personality than does a piece of written scholarship. As a result, faculty members might be reluctant to evaluate candidly and vigorously a colleague’s classroom teaching performance.\textsuperscript{104} Similarly, evaluated faculty members may find it hard to hear and accept such criticisms. Because of the more intimately personal nature of the task, hurt feelings and long-standing animosities are more likely to develop among faculty members who evaluate one another’s classroom teaching performance than among faculty members involved in what can appear to be the more formal and cerebral endeavor of evaluating one another’s published legal scholarship.

\textbf{D. Other Problematic Aspects of Peer Evaluation}

In addition to the excessive time commitment, the difficulty of qualitative assessment, and the personal nature of the activity involved, there exist a number of other possible problems associated with a serious program of peer evaluation of law school faculty effec-

\textsuperscript{102} As noted earlier, attempts to evaluate seriously and thoroughly the quality of law school classroom teaching are likely to generate significant practical consequences for the evaluated faculty. As the importance of the practical consequences increase, so too will the likelihood that evaluated faculty members will aggressively challenge unfavorable evaluations. As a result, the question of the relative dependability of evaluative results becomes an important one.

\textsuperscript{103} See, e.g., Bard, \textit{supra} note 13, at 242 (noting it is attractive for institutions to base tenure decisions on scholarship because decisions are easy to reach and defend); see also J. Centra, \textit{supra} note 13, at 2 (noting professors question efficacy of teaching evaluations); C. Jencks & D. Riesman, \textit{supra} note 8, at 531 (commenting it is easier to evaluate professor on basis of papers they write than on basis of interaction with others).

\textsuperscript{104} See P. Seldin, \textit{supra} note 5, at 71 (commenting it is natural for colleague to be discomfited by need to be critical of fellow teacher who is also friend); see also J. Centra, \textit{supra} note 13, at 73 (observing that when used for tenure or promotion decisions, colleague assessments may be distorted by mutual backscratching or by professional jealousy).
tiveness in classroom teaching. Included among these additional problems are:

(1) the risk that law school professors will have less academic freedom in their classroom instruction as they receive negative evaluations for having presented the course material from an intellectual perspective that is disliked or disapproved of by the faculty evaluators;\(^{105}\)

(2) the risk that evaluated faculty, not always knowing the pedagogical preferences of the evaluators, and not willing to chance a negative evaluation, will be significantly less inventive and spontaneous in their classroom presentations;\(^{106}\)

(3) the risk that evaluated faculty will design and present their courses primarily for the benefit of the peer evaluators, thus presenting the material at an inappropriately sophisticated level for an introductory course, or devoting classroom time to pedagogically unproductive trappings of scholarship, such as supporting statements made in the classroom with multiple citations to cases and other authorities in the area;\(^{107}\)

(4) the risk that evaluated faculty will become more self-conscious, and thus less effective, while teaching in front of evaluators;\(^{108}\)

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105. See P. SELDIN, *supra* note 5, at 67 (noting that colleges do not review instructional material because of faculty complaints about academic freedom and violations of classroom privacy); Faia, *supra* note 6, at 45 n.15 (stating faculty members do not become involved in others' teaching because of fear of threats to academic freedom); Winthrop, *Worth of a Colleague, 14 IMPROVING C. & UNIV. TEACHING* 262, 262 (1966) (discussing how department's majority can be unfair to minority members). But see Dressel, *The Current Status of Research in College and University Teaching, APPRAISAL OF TEACHING IN LARGE UNIVERSITIES* (1959) (accusing opponents of teaching evaluation of granting professors privilege to teach as badly as they wish). An almost identical dynamic exists in the case of peer review of published scholarship. See Faia, *supra* note 6, at 45 n.15 (observing threats to academic freedom are as severe in research realm as in teaching, but that research scholars rarely accuse critics of assaulting academic freedom). The pressure toward conformity within the mainstream is more onerous in the case of classroom teaching than in the case of published scholarship, because of the inherently personal nature of law school classroom teaching.

106. See P. SELDIN, *supra* note 5, at 71 (suggesting instructors performance may be weakened by unusual amount of preparation).

107. I would suggest that anyone who suspects that this potential problem is overly speculative, and thus unlikely to ever occur, examine any one of a number of current casebooks that sacrifice pedagogical effectiveness in an attempt to serve as authoritative and exhaustive secondary sources in the area of law covered.

Because certain indicia of quality scholarship exist within the community of legal scholars, it is a natural impulse for legal scholars to include as many of these indicia as possible in work which other legal scholars are expected to see. The problem in this dynamic comes, of course, when the work in question is primarily pedagogical in nature but the author also expects that it will be seen by other legal scholars. This problem is inescapable in the case of published casebooks. A formalized system of faculty review of teaching effectiveness, however, brings this dynamic right into the law school classroom and thus poses a significant risk of affecting the pedagogical effectiveness of law school classroom teaching.

108. An instructor's anxiety at being formally observed and evaluated by his or her peers
(5) the risk that the presence of a faculty evaluator will destroy the natural intimacy between the instructor and the students in the course; and
(6) the risk that the presence of a faculty evaluator will erode some of the implicit authority of the instructor, causing students to question the efficacy of the professor's teaching.

E. Difficulties Associated with Student Evaluation

Because of the problems and the risks associated with a serious system of peer review, one is tempted to suggest that the evaluation of classroom teaching effectiveness be based on the response of law students. After all, students are obliged to attend the class sessions in the course, they experience the full range of intellectual approaches and techniques employed by the instructor, and they do so, inevitably, from the most appropriate evaluative perspective — that of a novice in the subject matter being taught. Despite the advantages that a student-based system of faculty evaluation possesses over a faculty-based system, law schools generally do not cede to law students more than a small amount of formal authority to evaluate the classroom teaching effectiveness of their faculty. There are some good reasons for this:

First, law students, especially first-year students, have neither experienced much law school instruction nor typically given much thought to the different possibilities of law school pedagogy. As a result, law students generally lack a sufficient context within which to evaluate the effectiveness of their instructors. They have little strength to transform the experience from a test of pedagogical effectiveness into a simple test of grace under pressure. See, P. SELDIN, supra note 5, at 71 (suggesting instructors' performance under pressure may be weakened by anxiety); Gage, The Appraisal of College Teaching, 32 J. HIGHER EDUC. 17, 19 (1961) (noting when teacher knows that he or she is being watched by someone whose opinion determines promotion or salary, performance may depend more on nerve than teaching skills).

109. See R. MILLER, supra note 6, at 45 (noting that if asked relevant questions that are within their experiential background, students can make fair and sound judgments about teaching); Seldin, Rating the Teachers, 8 CENTER MAG. 75, 76 (1975) (suggesting that opinions of students who are being taught should be considered). Formal student evaluations of law faculty teaching are administered in almost all law schools. See R. Able, supra note 13, at A-9 (finding that ninety-eight percent of law schools responding reported that they regularly ask students to evaluate formally the quality of classroom instruction). Roth, Student Evaluation of Law Teaching, 17 Akron L. REV. 609, 610, 626 (1984) (finding that 95.7% of schools responding to survey administered student evaluations).

110. See R. Abel, supra note 13, at A-12 (noting although faculty elicits student opinion through both questionnaires and interviews, most schools give those views less weight than its own observations); Roth, supra note 109, at 609 (observing that for administrative purposes, law school teacher evaluations are not taken very seriously). But see D'Amato, supra note 15, at 461 (arguing many deans take student evaluations seriously). Some law schools, including Yale Law School, have never used student questionnaires to evaluate the teaching effectiveness of their faculty. R. Abel, supra note 13, at D-2.
idea of what is possible in terms of law school classroom instruction and thus cannot be expected to meaningfully evaluate, in any absolute sense, the effectiveness of the instruction they receive. Consequently, student evaluation becomes a largely intramural exercise in which students essentially evaluate the effectiveness of their instructors relative to the other instructors that they have experienced at the law school.

Second, law school students lack sufficient experience with the actual practice of law to evaluate meaningfully the degree to which any particular instructor, or the law school program in general, effectively prepares them for the practice of law. As a result, law students may evaluate their instructors more on personality and presentation than on the basis of effectiveness of preparation for law practice. Although law students eventually reach a position from

111. Of course all law school students have experienced years of classroom instruction in high school and in their undergraduate degree programs, and are fully capable of comparing that experience with the instruction they receive in law school. The problem with such an evaluation, especially for the purposes of measuring the teaching effectiveness of individual law school faculty, is that such a comparison inevitably includes all of the differences between the law school setting and the college and high school settings, such as the size of classes, the quality and competitiveness of fellow students, the casebook as primary textbook, and socratic instruction in general.

112. See D’Amato, supra note 13, at 475-76 (arguing because students learn through certain teaching style, teachers with different style are judged as ineffective).

This dynamic poses at least three kinds of problems. First, the essentially intramural nature of student evaluations makes it difficult to gauge the overall teaching effectiveness of an entire faculty by means of student evaluations. Moderately effective instructors are likely to be evaluated as being very effective in law schools in which the overall teaching effectiveness of the faculty is low. Conversely, effective instructors are likely not to be evaluated as well in a law school where the overall teaching effectiveness of the faculty is high.

Secondly, the essentially relative nature of student evaluations creates a risk that a climate will develop among the faculty which subtly discourages the active pursuit of excellent classroom teaching by its members. A faculty member who aggressively seeks to improve his or her classroom teaching by preparing additional supplemental materials for students, administering additional tests and graded assignments, conducting review sessions outside of the scheduled class periods, or being readily available to answer student questions outside of class, could be perceived by colleagues as being responsible for raising overall student expectations for faculty performance in these areas, and might experience informal pressure from peers to move individual teaching behavior closer to the institutional norm.

Thirdly, because students take different combinations of courses and instructors during their law school careers, they will bring different experiential contexts into a given law school course. As a result, students who have experienced effective classroom teaching in previous courses are less likely to produce positive evaluations of the current instructor than are students who have experienced less effective classroom teaching in their previous courses. This effect will result in systematically different evaluations of the instructor’s effectiveness despite the fact that all of the students are experiencing the same instruction at the same time in the same course.

113. Hazard, Competing Aims of Legal Education, 59 N.D.L. Rev. 533, 546 (1983) (noting that students know little about practice of law and about proper education for practice to evaluate faculty teaching effectiveness); Roth, supra note 109, at 609 (noting professors feel that students will not appreciate their teaching until they have been out in practice for a period of time).

which to evaluate the effectiveness of their law school experience in preparing them for professional practice, law schools do not regularly survey alumni on this point, especially with respect to the effectiveness of individual members of the faculty.\textsuperscript{115}

Third, law students are not sufficiently aware of the full breadth of legal doctrine customarily contained in a given subject area to evaluate how fully, or how thoroughly, the instructor covered the material in the course.

Fourth, law students are also insufficiently aware of the relative importance of the different topics contained in a given subject area, either from a practice or an academic perspective, to evaluate how well the instructor allocated the time available in the course to various topics within the general subject area.\textsuperscript{116}

personality traits of professors important to students); Ellis, Ratings of Teachers by Their Students Should Be Used Wisely — Or Not at All, 41 CHRONICLE HIGHER EDUC., Nov. 20, 1985, 88 (stating that student evaluations are biased because students rate professors high if liked in class and low if disliked in class); Friedrich & Michalak, Why Doesn’t Research Improve Teaching? Some Answers From a Small Liberal Arts College, 54 J. HIGHER EDUC. 145, 159 (1983) (concluding from study of small liberal arts college that no positive correlation exists between faculty research productivity and positive student evaluations); Marques, Lane & Dorfman, Toward the Development of a System for Instructional Evaluation: Is There Consensus Regarding What Constitutes Effective Teaching?, 71 J. EDUC. PSYCHOLOGY 840, 840 (1979) (noting instructional style is important factor in student evaluations); Murray, Low-Inference Classroom Teaching Behaviors and Student Ratings of College Teaching Effectiveness, 75 J. EDUC. PSYCHOLOGY 138, 146 (1983) (concluding from study student ratings are determined primarily by classroom behavior of professor). \textit{But see} J. CENTRA, supra note 13, at 35 (concluding highly rated teachers tend to be “substance teachers”); Feldman, The Superior College Teacher From the Student’s View, 5 RES. IN HIGHER EDUC. 243, 243 (1976) (determining that students rank characteristics such as knowledge of subject matter, organization of course, and enthusiasm as important for superior instructors); Gleason, Getting a Perspective on Student Evaluation, 38 AAHE BULL., Feb. 1986, 10 (noting current studies conclude popularity and personality are not key to high student evaluations); Mannan & Traicoff, Evaluation of an Ideal University Teacher, 24 IMPROVING C. & UNIV. TEACHING 98, 100 (1976) (finding students rank effective organization and clarity of expression as top qualities of “ideal professor”); Tennyson, Boutwell & Frey, Student Preferences for Faculty Teaching Styles, 26 IMPROVING C. & UNIV. TEACHING 195, 196 (1978) (stating students prefer professors who are seen as teachers rather than socialites).

115. Numerous studies have been conducted demonstrating that student ratings of teacher effectiveness correlate highly with alumni ratings of those same teachers. \textit{See} J. CENTRA, supra note 13, at 41 (noting students rate professors same as alumni rate them); Braunstein & Benston, Student and Department Chairman Views of the Performance of University Professors, 58 J. APPLIED PSYCHOLOGY 244, 247-48 (1973) (finding that alumni ratings are similar to current student ratings); Druckers & Remmers, Do Alumni and Students Differ in their Attitudes Toward Instructors?, 42 J. EDUC. PSYCHOLOGY 129, 142 (1951) (concluding that students and alumni rate instructors similarly).

116. \textit{See} R. Abel, supra note 13, at B-7 (noting faculty should not credit student judgments about instructor knowledge because students lack background necessary to make absolute or relative assessments and that faculty do not rely on student judgments about substantive value of scholarship).

It is worth noting that law school faculty do rely on student judgments about the substantive value of faculty-produced scholarship because students determine what will and what will not appear in the student-run law reviews. In fact, given the rigid hierarchy of relative prestige that attaches to student-run law reviews, it can be said that law professors permit law students to “grade” the product of their scholarly efforts as rigorously, and much more publicly, than professors grade the examination efforts of law students.
Fifth, with the exception of first-year classes, where students are pre-assigned, students voluntarily enroll in law school courses. This means that the students sitting in elective law school courses are in essence a pre-selected group, all of whom presumably either possess a preference for the instructor's approach to legal materials or are not so bothered by the instructor's approach that they have chosen to enroll in another course.\textsuperscript{117} Therefore, one would expect a given instructor to receive systematically more favorable student evaluations in elective courses than the instructor would receive from a randomly selected subset of the students in the school. Moreover, the self-selection process involved in elective law school courses, combined with the relative nature of student evaluations, could be expected to generate largely favorable evaluations of law school classroom instruction from upper-level students even in those cases in which the overall teaching effectiveness of the faculty is low.\textsuperscript{118}

Sixth, and perhaps most importantly, if significant responsibility for evaluating the teaching effectiveness of a faculty is allocated to students, professors might be encouraged to employ classroom techniques that are designed to generate positive response and favorable evaluations from students but that do not contribute to the educational experience of the students.\textsuperscript{119} A faculty member who knows that the evaluations of students will constitute a major part of the institution's perception of his or her teaching effectiveness, and will thus generate significant career consequences for the teacher, might be tempted to curry the favor of the students at the expense of pedagogical objectives.\textsuperscript{120} Conversely, a system in which law student evaluations of faculty teaching effectiveness are taken seriously by law schools might also discourage the faculty from employing effective but generally unpopular teaching techniques in the

\textsuperscript{117} Students can acquire knowledge of a given instructor's approach to classroom teaching by having taken the instructor in a previous course, inquiring of students who have already taken the course from the instructor, or attending the class sessions of the course prior to the deadline for final registration.

\textsuperscript{118} See D'Amato, supra note 13, at 461 (noting studies show required courses receive lower professor ratings than electives).

\textsuperscript{119} See id. (commenting that because pay and promotion decisions are influenced by student evaluations, unpopular professors are pressured to learn how to become popular, and criticizing fact that standards of good teaching are defined by those being taught).

\textsuperscript{120} The faculty member in question might be tempted to require relatively light reading loads of students, require relatively little or relatively easy in-class participation by students, rarely impose sanctions on students for not performing adequately in class or for not being adequately prepared, or cultivate a reputation for giving high grades relative to other faculty members.
classroom for fear of low evaluations by students.\textsuperscript{121}

The five factors described above: the excessive consumption of institutional resources; the qualitative difficulty of evaluation; the inherently personal nature of the evaluation; the other problematic aspects of peer evaluation; and the difficulties associated with student evaluation; combine to forcefully demonstrate the enormous difficulty involved when attempting to evaluate the teaching effectiveness of law school faculty. Law schools, facing these difficulties, are strongly encouraged to seek an easier and less costly means of faculty evaluation. The production of published legal scholarship by law school faculty serves this important function. There are, however, as detailed in Parts I and II of this Article, significant costs attached to the employment of legal scholarship as the primary device for evaluating the overall effectiveness of law faculty. These costs are exacted both on the classroom teaching function and on the pursuit of quality legal scholarship. In the long run, the costs imposed on teaching and scholarship may well eclipse the bureaucratic benefits afforded by the dualist model.

V. PROLEGOMENON TO ANY FUTURE VARIATIONS IN THE DUALIST MODEL

Given the problematic aspects of a law school model in which all faculty are expected to conform to the simultaneous "teacher/scholar" ideal, one should ask what advantages and disadvantages are likely to attend a significant modification of this model. This inquiry will consider an alternative system, a "dedicated-track" model, in which members of a law school's faculty may pursue one of three basic paths: full-time classroom teacher, full-time legal scholar, or the current dualist model of simultaneous classroom teacher and legal scholar. The inquiry assumes that individual faculty members may be recruited by law schools for any one of these three basic paths and that they are generally free, through negotiation with their particular institution, to move from one path to another throughout the course of a career in legal education.

A. Possible Advantages of a Dedicated-Track Model

From the perspective of the law school teaching function, there are a number of advantages that may flow from the adoption of a dedicated-track model. One of the primary advantages is that it

\textsuperscript{121} See Allen, supra note 71, at 460 (noting learning occurs under intense conditions, although students feel that pressure is inefficient and impossible).
would permit law school teachers to devote their full attention and
time to law school classroom instruction because they will not be
required to produce simultaneously legal scholarship. This advan-
tage would be especially beneficial to law school teachers in the first
years of their careers when the difficulties and demands of prepar-
ing their courses and developing a strong classroom presentation
are most acute.

Because the performance of full-time teachers would be evaluated
primarily on the basis of their effectiveness in classroom instruction,
a second advantage of a dedicated-track model is that it provides a
powerful incentive for law school teachers to improve continually
the quality of their courses. This continuing incentive for improving
the effectiveness of the instruction provided to law students con-
trasts sharply with the incentive currently offered to faculty in the
dualist model and is one of the most potent advantages offered by a
dedicated-track model. Moreover, the extra time made available by
a dedicated-track model would permit law school teachers to im-
prove courses in ways that are not practicable under the dual-tract
model. For example, full-time teachers would be in a position to
provide more personalized instruction to law students by requiring
more written work, giving more individual feedback, and adminis-
tering more examinations.

The dedicated-track model would also free teachers of the pres-
sure to specialize that is now generated by the need to produce pub-
lishable legal scholarship. As a result, law school teaching faculty
could more easily develop and retain a generalist's perspective in
the subject areas in which they teach. They will be able to read
more broadly, keep abreast of current developments throughout
their subject areas, and develop and maintain an appropriate level
of expertise in more than one subject area. In addition, incentives
to structure introductory courses and to develop upper-level elec-
tives in ways that serve scholarly rather than pedagogical interests
will largely disappear.

A further advantage of a dedicated-track model is that law schools
will be able to recruit candidates for full-time teaching positions
without regard to the candidates' potential for producing publisha-
ble legal scholarship. Conversely, law schools will no longer be in
the position of hiring and placing into basic introductory courses
faculty candidates who possess the clear potential for producing
quality legal scholarship, but who are not expected to be particularly
effective classroom teachers.

Another significant advantage of a dedicated-track model is that it
frees law schools to organize and to structure their curricula around pedagogical concerns only, largely eliminating the pressure on teaching faculty to compromise between the demands of scholarship and the needs of their students. Further, the removal of faculty scholarship interests from the area of course offerings and course staffing would allow changes to the curriculum at a much lower cost, thereby encouraging law schools to explore the possibility of productive curriculum reform.

Further, a dedicated-track model, if widely adopted by law schools, may encourage the improvement of current pedagogical materials and aid in the development of new pedagogic materials. In a world in which the dedicated-track model is in place at most law schools, full-time teachers will dominate the market for required law school texts. This may result in the abatement of some of the current pressure on authors to design and to write casebooks in such a way as to have them perceived as appropriately "scholarly" efforts. The release of this pressure to posture published teaching materials as scholarship could permit casebook authors additional flexibility and creativity, encouraging them to be guided in their thinking primarily by pedagogic concerns. Moreover, the existence of a large pool of full-time law teachers might lead to the greater development of an explicitly pedagogical literature in the law, the existence of which could enrich the law school teaching function and improve the effectiveness of classroom instruction nationwide.

From the perspective of legal scholarship, the primary advantage of a dedicated-track model is that it would permit those most interested in, and most capable of, producing legal scholarship to pursue

122. While law school students are the actual purchasers of casebooks, it is the instructor who chooses the required texts and, thus, it is the instructor to whom the casebooks are marketed.

123. Some casebooks contain: copious footnotes, often including extensive citations to books, law review articles, and cases without serious pedagogical effect; exhaustive treatments of almost every conceivable aspect of the subject matter covered without regard for the usual length of the course or the relative importance of different topics covered; and little or no reference to connections between the subject matter covered and other law school courses that the students are likely to have taken. One cannot help but notice the marked difference between the form and content of most law school casebooks, which are selected by the faculty, and the form and content of law school pedagogic materials that are voluntarily purchased by the students themselves.

124. Law professors who are one hundred percent involved and invested in teaching might begin to publish and distribute more distinctively pedagogical literature than currently exists. Such literature could include analysis and discussion of the overall law school curriculum, the structure and flow of specific courses, the relative merits of specific casebooks and other pedagogic materials, the relative merits of lecture, socratic, and problem approaches to teaching specific material, and the publication of specific classroom treatments of landmark cases and standard doctrine in various substantive courses.
the activity on a full-time basis. This could in turn be expected to:
(1) provide active legal scholars with long, uninterrupted stretches
of time in which to engage in research and writing; (2) allow legal
scholars the opportunity to develop a depth of expertise in a partic-
ular field over the course of an entire career rather than on a "part-
time" basis; (3) encourage those who produce legal scholarship to
be fully personally invested in the activity; (4) sever the current con-
nection between the research agenda of a law school's legal scholars
and the staffing requirements of the law school's core curriculum;
and (5) insulate legal scholars from the harmonizing and rational-
izing perspective of the law encouraged by the dynamics of law
school classroom teaching.

Furthermore, the adoption of a dedicated-track model will make it
possible for law schools to recruit those expected to engage in active
legal scholarship exclusively on the basis of candidates' demon-
strated potential for producing quality legal scholarship. Law
school faculty candidates who possess an exceptional aptitude for
legal scholarship would no longer be disadvantaged because they
may not be perceived as being sufficiently extroverted, or suffi-
ciently verbal, to excel in the law school teaching function. Corre-
spondingly, law schools will no longer forego the opportunity to
add extraordinary research and writing talent to their faculties due
to such considerations.

In addition to these specific advantages to both the law school
teaching function and to legal scholarship, the adoption of a dedi-
cated-track model could provide law professors with a significant
personal benefit: the ability to manage their careers in accordance
with their natural abilities and interests. Under the dualist model,
al law professors are assumed implicitly to be equally enthusiastic
about, and equally capable of excelling in, both classroom teaching
and legal scholarship. To the extent that this assumption does not
mirror reality, the dualist model directs law professors to engage in
an activity in which they possess less interest and aptitude to the
detriment of an activity in which they possess more interest and ap-
titude. Therefore, in addition to causing a misallocation of law pro-
fessor resources from an institutional perspective, the dualist model
also causes personal frustration and diminished productivity in indi-
vidual law school faculty.

In contrast to the effects of the dualist model, a dedicated-track
model would allow law school faculty to create formally a mix of
professional responsibilities that most closely match their personal
interests and aptitudes. This opportunity would be especially im-

portant to the extent that faculty members' relative interest in teaching and scholarship change over time. By being able to seek either a full-time teaching position or a full-time scholarship position at the outset, and to alter the formal mix of teaching and scholarship responsibilities over time as their interests change, one could expect law professors to be significantly more productive and satisfied over the course of a career than when laboring under the strict dualist model.

B. Possible Costs of a Dedicated-Track Model

Though a dedicated-track model would provide a variety of important benefits, the prospective picture is not entirely free of costs. Along with the benefits, the adoption of a dedicated-track model could be expected to generate a number of significant problems as well.

The most important of these problems is, in a sense, not so much a problem as the absence of a solution. The adoption of a dedicated-track model does not resolve in any significant way the many problematic aspects of evaluating the effectiveness of law school teaching. It would be just as difficult and expensive to determine the actual teaching effectiveness of individual law faculty under a dedicated-track model as it is under a dualist model. In fact, the existence of a dedicated-track model may aggravate the teaching evaluation difficulties by eliminating in the case of full-time teachers the opportunity for a law school to use scholarship productivity and quality as a surrogate measure of teaching effectiveness.

Another important problem that could accompany the adoption of a dedicated-track model revolves around the issue of faculty teaching loads. Under the dualist model, law school faculty members teach between ten and twelve credit hours of courses each ac-

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125. See supra notes 90-121 and accompanying text (discussing difficulties involved in evaluating teaching effectiveness); see also Blackburn & Clark, supra note 64, at 247-49 (indicating that professors over-rate their own teaching effectiveness). Because this research clearly indicates that faculty consistently overestimate the quality of their own teaching, it appears that some form of third party evaluation of instructional effectiveness remains necessary, despite the inherent difficulties.

126. It should be noted here, however, that a number of researchers and commentators are quite optimistic about the prospect of fair and effective teaching evaluation, including student evaluation of teaching. See K. Doyle, supra note 15, at 81 (arguing student ratings of faculty, when based on professional standards, appear sufficiently reliable for making personnel decisions); P. Seldin, supra note 5, at 163 (concluding that teaching can be assessed from student ratings, classroom visits, colleague reviews of teaching materials, alumni opinions, self-assessments, and special incidents); see also J. Centra, supra note 13, at 3 (contending that faculty evaluations can best be made by combining information from several sources so that shortcomings of one approach can be balanced by strengths of another); R. Miller, supra note 6, at 31-55 (discussing role of student ratings in teacher evaluations).
In order to fill the gaps in the staffing of law school courses that would inevitably occur as a result of the creation of full-time scholarship tracks, law schools will be forced to either hire a large number of additional faculty, which would involve a substantial commitment of additional resources, or to require the full-time teaching faculty to assume significantly higher teaching loads. To the extent that the latter course is the one more widely adopted, some of the expected benefits of the dedicated-track model for the law school teaching function will be substantially diminished, especially the expectation that full-time teaching faculty might provide more personalized instruction to law students.

A further problem that could arise with the adoption of a dedicated-track model involves the issues of factionalism and perceived prestige. Though one wishes it were not so, it seems inevitable that the creation of different tracks for law school faculty will lead in time to the perception of different levels of prestige associated with the various tracks. This phenomenon will create, among what is now generally perceived to be a relatively homogeneous and democratic faculty group, formalized factions with differential levels of perceived prestige. In addition to disturbing overall collegiality and reducing the ease of faculty governance, this phenomenon is likely to raise a large number of awkward and divisive issues, most centering around the relative allocation of resources among the full-time teachers, the full-time scholars, and the dualist teacher/scholars.

To the extent that serious factionalism does arise, it may not be practically feasible for a faculty member to choose the combined teacher/scholar track. Thus, only two faculty tracks might be available in practice, the full-time teaching track and the full-time scholarship track. Moreover, if one track were perceived to be more prestigious than the other, then faculty members may, in an effort to achieve high stature in the legal community, feel compelled to follow the more prestigious track. This need for professional recognition may conflict with a faculty member’s innate skills and intellectual ambitions. In either case, the expected ability of law school faculty operating under a dedicated-track model to shape

127. See American Bar Association Standards For Approval Of Law Schools Standard 405 (1987) (requiring law schools to afford faculty members reasonable opportunity to conduct scholarly research); By-Laws of the Association of American Law Schools, Inc. (adopted Dec. 29, 1971; amended through Jan. 6, 1990), reprinted in Association Handbook 1990, at 16-27, § 6-8(b) (prohibiting law schools from requesting faculty to teach an average of more than ten hours per week during academic year).
their formal responsibilities in accordance with their natural interests and aptitudes would be severely compromised.

Conclusion

Viewed from a vantage point outside of the traditional confines of academe, the dualist model seems strange and idiosyncratic. The enormous power and potency of specialization by function has been recognized and embraced in our society for a long period of time. Even the rudimentary organization of simple games manifest an intuitive understanding that a team functions more effectively and efficiently when different kinds of players, each possessing different combinations of natural talent and acquired skills, are blended together to create a forceful, unified whole. In stark contrast to this general societal trend, however, law schools continue to organize their faculties so that each faculty member performs two major functions simultaneously: that of a classroom instructor and that of a legal scholar.

Lying at the heart of the decision to impose upon law faculty this rigid, uniform role of simultaneous instructor/scholar is an institutional acceptance of the assumption that the functions of professional scholar and classroom instructor are fundamentally compatible and mutually supportive. While this belief in teaching/scholarship synergy possesses an intuitive appeal, especially to law faculty members who are implicitly characterized by the model as being intellectually omni-competent, a closer analysis strongly challenges this assumption. When examined from an operational perspective, the dualist model, and the synergy assumption upon which it is based, can be understood as imposing a large number of substantial burdens on both the law school teaching function and the production of quality legal scholarship.

Why is it that the dualist model survives, largely unchallenged, in the face of the many costs that it inflicts on law school teaching and legal scholarship, especially when serious symptoms of stress exist in both of these areas? One important answer to this question lies in the enormous difficulties involved in any serious, formal system of evaluating the quality of law school instruction, and in the critically important role that published legal scholarship plays as a surrogate measure of overall law faculty performance. Once the problems involved in the qualitative evaluation of law school teaching are resolved, however, serious alternatives to the dualist model, such as the dedicated-track model, can be productively considered. These alternatives could release law school teaching and legal schol-
arship from the limitations currently imposed by the dualist model and free them to develop and pursue their own unique versions of excellence.