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Self-Congratulation and Scholarship

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ABSTRACT

Professor Jay Silver's criticism of the reform proposals put forward in Brian Tamanaha's book *Failing Law Schools* displays some characteristic weaknesses of American legal academic culture. These weaknesses include a tendency to make bold assertions about the value of legal scholarship and the effectiveness of law school pedagogy, while at the same time providing no support for these assertions beyond a willingness to repeat self-congratulatory platitudes about who professors are and what we do.

The high costs for our students of the current scholarly expectations at American law schools are clear. What is not clear is whether those costs are worth incurring. Simply asserting that they are because the typical publications of American law faculty supposedly provide valuable critiques of the legal system that have a beneficial effect on the system's operation does not constitute an argument. Likewise, neither do similarly ungrounded assertions that traditional law school pedagogy teaches law students how to think.

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INTRODUCTION

Brian Tamanaha's *Failing Law Schools* argues that American law schools now cost far too much to attend, given long-term trends in the employment market for people with law degrees.[1] For example, according to statistics compiled regarding the national graduating class of 2011, only 55 percent of graduates had found long-term, full-time jobs requiring bar admission nine months after graduation. He proposes several different methods of reform, some of which involve loosening regulatory restrictions that inhibit the creation of alternatives to the largely homogenous model of legal education prevalent in the United States today.[2]

Professor Jay Sterling Silver criticizes Tamanaha's proposals.[3] Silver believes the proposals will lead to a stratified hierarchy of law schools, with only a few elite institutions continuing to provide the high-quality pedagogical experience that Silver assumes everyone now enjoys by attending law schools accredited by the American Bar Association (ABA). Silver argues that Tamanaha's reforms would force the vast majority of law schools to provide their students a "cut-rate education,"[4] much to the detriment of the students' future clients.

It would be harsh, but fair, to point out that Silver's criticism of Tamanaha works as a kind of performative refutation of Silver's central claim, which is that the traditional model of legal education teaches people how to think. If how to think means how to think in a way that allows one to argue in a coherent and convincing manner, then Silver's piece does no credit to that model. On the other hand, if how to think means believing that making a string of unsubstantiated and often facially incredible assertions will sway readers to one's point of view, then legal education has, at least in Professor Silver's particular case, succeeded all too well.

Professor Silver's response contains a number of unsubstantiated assertions. This Essay addresses three of them: the current cost of legal education is an accurate reflection of the real cost of producing adequately trained lawyers, the scholarship produced by tenured law faculty has enormously beneficial effects on the operation of the legal system, and Tamanaha's reform proposals would stratify legal education. These claims illustrate how, in my view, the crisis of the Ameri-

1. BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS, at xi (2012).
2. *Id.* at 172–81.
3. Jay Sterling Silver, *The Case Against Tamanaha's Motel 6 Model of Legal Education*, 60 UCLA L. REV. DISC. 50 (2012).
4. *Id.* at 59.

can law school is in large part a product of the tendency of law school faculty to indulge in platitudinous self-congratulation.

I. MARKET FAILURES

Before turning to those assertions, we should note that Silver's reply to the thesis of *Failing Law Schools* is oddly nonresponsive. Assume for the purposes of argument that Silver is correct that the high cost of contemporary American legal education is unavoidable[5] if we are to produce minimally competent lawyers. It would seem to follow that, given Tamanaha's analysis, minimally competent lawyers can be produced only at a cost that leaves very large numbers—indeed arguably a solid majority—of law graduates unable to secure a positive long-term economic return on their educational investment.[6]

Silver gives no hint that he disagrees with Tamanaha's conclusions regarding the consequences of making law degrees costly to obtain. This seemingly commits Silver to arguing for heavily subsidizing legal education. Silver, however, ignores this and other practical consequences of his implicit concession of the main point of Tamanaha's book, which is that the economic structure of legal education now results in many, if not most, new law degrees having negative net present value for their holders.[7] This concession allows Silver to confine himself to the more congenial task of arguing that the current high salaries and low teaching loads of law faculty have enormous benefits for society as a whole[8]—

5. *Id.* at 54–59.
6. *See* Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177, 201 (2012).
7. In fact, legal education in America is heavily subsidized by the federal government at both the front and the back end. At the front end, federal student loans allow students admitted to law schools to borrow the full cost of attendance as determined by those schools. These loans are subject to no actuarial controls and in effect require taxpayers to loan sums to law students that in many cases would be unavailable from private credit markets. At the back end, federal loans are eligible for income-based repayment, a federal government program that allows debtors subject to a partial financial hardship to pay less than what they would otherwise owe on their debt. Both forms of subsidy are crucial to the economic structure of contemporary legal education. For information on income-based repayment, see FED. STUDENT AID, http://studentaid.ed.gov/repay-loans/understand/plans/income-based (last visited Apr. 16, 2013).
8. Silver, *supra* note 3, at 55 ("Stripping law faculties of the time to contemplate the weaknesses of the law and the injustices of the legal system, and discarding the tenure necessary to instill meaning in the words 'academic freedom,' reduces a vital social resource to a cog in the current structures of power. Under the guise of fiscal management, law professors willing to take on the wielders of power in the public and private sectors would be silenced.").

although apparently not the sort of benefits that can be captured adequately by market transactions.[9]

Speaking of markets, Silver's argument begins with a discussion of the changing market for law school admissions. Conceding Tamanaha's main point once again, Silver acknowledges that legal education now resembles the housing and mortgage derivatives markets, which inflated into speculative financial bubbles before bursting so spectacularly five years ago. According to Silver, "the law school bubble is about to burst in a perfect storm of market correction."[10] Silver points out that applications to law school are down sharply over the past two years; he argues that this will lead to law schools relaxing their admissions standards, which will lead to lower bar passage rates, which in turn will depress law school applications even further.[11]

What is missing from this analysis is any acknowledgment that the housing crisis and the law school bubble are each textbook examples of *market failure*. In each case, a purportedly rational and efficient market was severely distorted by, among other things, poor information, which in turn was largely a product of self-dealing. Indeed, the analogy between the housing and law school bubbles is in many respects almost eerie, with the *U.S. News & World Report* "employment percentages" playing the role of Standard & Poor's and Moody's bond ratings, which gave sterling investment grades to mortgage derivatives that were in fact certain to default sooner rather than later.[12]

Nor does Silver acknowledge that market failures of this sort are not self-correcting. In the case of the law school bubble, applications are collapsing in no small part because of a concerted campaign to force law schools to start providing something resembling transparent information regarding initial employment and

9. Law school faculty salaries have roughly doubled in real terms over the past thirty years, while teaching loads have declined by 50 percent or more at many schools. *See* Campos, *supra* note 6, at 186, 191.

10. Silver, *supra* note 3, at 53.

11. As of January 25, 2013, the total number of applicants to ABA-accredited law schools had declined 20.4 percent compared to the same time last year. If this trend holds, approximately 54,000 people will apply for admission to the 2013 class, compared to 87,900 applicants in the 2010 class—a three-year decline of 38.6 percent. *See Three-Year ABA Volume Comparison*, LAW SCH. ADMISSION COUNCIL, http://www.lsac.org/lsacresources/data/three-year-volume.asp (last visited Jan. 25, 2013).

12. On the housing bubble and the mortgage derivatives market, see generally MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2010). Law schools inflated employment percentages by counting all forms of employment—legal, nonlegal, nonprofessional, part-time, and temporary—equally. Thus, an associate at a big law firm and a barista working ten hours per week were both counted as employed for the purposes of a school's advertised graduate employment rate. In addition, salary data were often reported without any caveats regarding the (often very low) percentage of graduates whose salaries were represented by that data.

salary outcomes for graduates.[13] The publication of *Failing Law Schools* was an important moment in this campaign. The book emphasizes that one particularly crucial way in which law schools have failed is that, for many years, potential law students have relied on misleading employment and salary data provided by the schools when deciding whether to enroll.[14]

Over the past two years, the law school transparency movement has largely succeeded in making the following information much more accessible to potential law students: (1) At present, ABA-accredited law schools graduate approximately two people for every available legal job; (2) The large majority of such jobs pay $60,000 per year or less—often far less; and (3) Law students are graduating with an average of more than $150,000 in educational debt.[15] These facts, which are central to Tamanaha's argument that the economics of American legal education are broken, did not become generally known through a perfect storm of market correction but rather via the efforts of a committed cadre of reformers, among whom Tamanaha has been acknowledged as the most important and influential.[16]

In short, Silver does not dispute Tamanaha's diagnosis. Instead he recommends the budgetary equivalent of a couple of aspirin and some bed rest: Law schools must "tighten their belts, reduc[e] the size of incoming classes, cut[] administrative costs, and forgo[] hiring for a while,"[17] rather than the more aggressive treatments *Failing Law Schools* advocates.

II. TENURED FACULTY AND LEGAL SCHOLARSHIP

Silver's objection to Tamanaha's recommendation that there ought to be more variety among law schools, with some deemphasizing tenured faculty and faculty scholarship and/or offering two-year J.D. programs, is that such changes would harm both legal scholarship and law school pedagogy.[18] According to Silver, these changes would produce inferior lawyers, who in turn would inadvertently harm the interests of those clients who could not afford to purchase legal services from the graduates of traditional law schools.[19]

13. *See* Rachel M. Zahorsky, *Kyle McEntee Challenges Law Schools to Come Clean*, ABA J. (Sept. 19, 2012, 9:00 AM), http://www.abajournal.com/legalrebels/article/kyle_mcentee_scourge_of_the_status_quo.
14. TAMANAHA, *supra* note 1, at 71–74.
15. *See* Campos, *supra* note 6, at 199–206.
16. The January 2013 issue of *National Jurist Magazine* chose Tamanaha as the most influential person in American legal education. Jack Crittenden & Christina Thomas, *2012 The Most Influential People in Legal Education*, NAT'L JURIST, Jan. 2013, at 22, 23.
17. Silver, *supra* note 3, at 54.
18. *Id.* at 56–59.
19. *Id.* at 58.

Silver argues that tenure and low teaching loads are necessary for the production of valuable legal scholarship:

> As a wise colleague pointed out to me not long ago, "The legal professoriate develops suggestions for law in the common interest that are not produced by the powerful lobbies generating laws today. If we are reduced to teaching automatons, we would leave the field to those who buy their spokespersons." Stripping law faculties of the time to contemplate the weaknesses of the law and the injustices of the legal system, and discarding the tenure necessary to instill meaning in the words "academic freedom," reduces a vital social resource to a cog in the current structures of power. Under the guise of fiscal management, law professors willing to take on the wielders of power in the public and private sectors would be silenced.[20]

This argument makes several assumptions: (1) That the production of valuable critiques of the legal system is a common outcome of the current publication requirements for tenure-track faculty at American law schools; (2) That seriously suboptimal amounts of these valuable critiques of the legal system would be generated by law schools if Tamanaha's reforms were adopted; and (3) That these valuable critiques of the legal system constitute an important practical counterweight to the invidious effect self-interested actors have on the legal system.

These three assumptions strike me as, respectively, implausible, incredible, and utterly fantastic. Professor Silver might well reply that they don't strike him that way and that in his view the scholarship being emitted by American law faculties at an ever-accelerating rate[21] is in fact "a vital social resource"[22]—presumably because such scholarship provides, via some unspecified mechanism, socially efficacious critiques of the nation's power structure.

Still, under current circumstances the burden of persuasion in such a debate falls on Silver. After all, Silver does not dispute that legal scholarship has become very expensive to produce and that this expense is having various bad consequences for law graduates. In other words, legal scholarship produced by tenured faculty at American law schools plays a significant role in driving up the cost of law degrees. What is not clear is whether those costs are worth incurring. Simply asserting that the costs are worth incurring because the typical publications of American law faculty provide valuable critiques of the legal system and that these

20. *Id.* at 55 (footnote omitted).
21. I estimate that tenure-track faculty published approximately 1650 law review articles in 1970 and nearly 10,000 in 2010. *See* Campos, *supra* note 6, at 187.
22. Silver, *supra* note 3, at 55.

critiques have a beneficial effect on the system's operation, does not constitute a compelling argument.[23] Further, Silver fails to provide any evidence for the beneficial effect that these critiques have.

Beyond this, Silver sets up and knocks down a rhetorical straw man in the form of the assumption that we need, as of this writing, no less than 201 ABA-accredited law school faculties enjoying both the protections of tenure and the protection of light teaching loads in order to produce the important social benefits generated by the publication requirements at contemporary American law schools. Tamanaha argues that while some law schools ought to continue in something like their present form, some others should not, given the gains that could be realized from producing somewhat less legal scholarship in exchange for somewhat lower attendance costs.[24] Instead of engaging with this modest proposal, Silver conjures up a world in which all law faculty are untenured and have the high teaching loads that were standard among law faculty a generation ago.[25]

III. TWO TIERS OF LEGAL EDUCATION AND THE SOCRATIC METHOD

Silver then turns from the more general, societal benefits of law review article publication to what he calls "the needs of students and clients."[26] Tamanaha's suggested reforms would result, Silver says, in a stratified system of legal education with Ritz-Carlton law schools for a favored few and a Motel 6 education for their less privileged peers:

> Tamanaha touts his "differentiated" legal education, where a handful of elite law schools remain three-year research institutions and the rest morph into cut-rate, two-year trade schools, as a means by which "[p]rospective students will be able to pick the legal education program they want at a price they can afford." He adds, tellingly, that "[a] law graduate who wishes to engage in a local practice need not acquire, or pay for, the same education as a graduate aiming for corporate legal practice." Law students, in other words, would no longer be able to

23. The claim that legal decisionmakers (let alone other powerful social actors) are influenced significantly by legal scholarship seems so implausible on its face that it is all the more remarkable that legal academics feel free to make it without any supporting evidence.

24. At no point in *Failing Law Schools* does Tamanaha specify how many schools he believes ought to move to a significantly lower-cost model. *See* TAMANAHA, *supra* note 1.

25. In the 1970s, teaching loads of five or six classes per year were standard at nonelite schools, while teaching four classes per year was considered a privilege of faculty at elite institutions. Today, three classes per year is standard at dozens of nonelite schools, while functional two-class per year teaching schedules have become commonplace. *See* Campos, *supra* note 6, at 186.

26. Silver, *supra* note 3, at 56.

> select freely among the various career paths within the profession after exposure to the different areas of law in law school. Instead, based on their ability to pay, they'd either attend a school from which they might emerge onto Wall Street or one where they'd have no choice but to hang up a shingle on Main Street.[27]

I can only imagine the exasperation that reading something like this would elicit among students at the very large number of law schools where less than one in ten graduates acquire what would be called "Wall Street" jobs, even in the loosest metaphorical sense of that term.[28]

Few areas of American life are as hierarchically stratified as the legal profession in general and the law school component of it in particular. We already have, in the legal academic world, Ritz-Carltons and Motel 6s and many exquisitely calibrated gradations in between. But there is an important difference between hotel and law school pricing: If a room at the real Ritz-Carlton costs $300 per night, a room at the Motel 6 does not cost $270. That, however, is the pricing structure of law schools. An unranked law school with terrible employment outcomes often costs nearly as much to attend as its elite neighbor that sends twenty-five times as many graduates to Wall Street law firms.[29]

Tamanaha's suggested reforms are based on the unexceptionable idea that something is wrong with a system that allows institutions to get away with charging luxury prices for what could, only with extreme charity, be described as cut-rate outcomes. After all, someone who buys a night at a Motel 6 actually gets a motel room. By contrast, at very large numbers of law schools, an actual majority of graduates fail to acquire legal jobs, even liberally defined, within nine months of graduation. What happens to them beyond that period remains largely unknown. Silver's response, like that of some other defenders of the status quo, is that a high-quality legal education is inherently expensive since it cannot be entrusted to nuts-and-bolts-oriented adjuncts or other insufficiently academic faculty.[30] "The law professor's principal task," Silver writes, "is not to teach would-be attorneys how to fill out forms, or whether to turn left or right in

27. *Id.* (alterations in original) (footnotes omitted) (quoting TAMANAHA, *supra* note 1, at 174).

28. *See generally* Employment Summary Report for 2011, ABA, http://employmentsummary.abaquestionnaire.org (last visited Mar. 21, 2013).

29. For example, compare employment results and relative costs for the classes of 2011 at Columbia and New York Law School. Columbia sent 267 of 456 graduates to firms of more than 250 attorneys, while New York Law School sent ten of 515 graduates to such firms. This year tuition and fees at the two schools are $55,597 and $49,225 respectively. *Id.*

30. *See* Erwin Chemerinksy, *You Get What You Pay for in Legal Education*, NAT'L L.J. (July 23, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202564055135&You_get_what_you_pay_for_in_legal_education.

the courthouse to find the Registry of Deeds."[31] Rather than limiting ourselves to transmitting mundane practical knowledge, the legal professoriate should be dedicated to a higher calling:

> More than teaching students *what* to think, the law professor must—like the old adage about teaching a man to fish so he can feed himself for a lifetime—teach students *how* to think. Whether the client is a corporation whose counsel would've emerged from one of Tamanaha's elite, three-year programs or an average Joe whose lawyer was herded through a cut-rate, two-year school, *all* clients need and deserve a lawyer who thinks as well as she can.[32]

And the best way to teach law students how to think is "the time-honored Socratic and casebook method of legal instruction, administered by professional educators," which according to Silver "is a snug fit with the pedagogical needs of future attorneys."[33]

As was the case with his unsupported claims regarding the value of legal scholarship, Silver provides no evidence for these assertions. I have been a law professor twenty-three years, and I confess that I have no idea what those in the academy mean when they claim law professors teach students *how* to think. Indeed, while Silver's claims regarding the practical value of legal scholarship and the pedagogical efficacy of the "time-honored Socratic and casebook method of legal instruction"[34] may be wholly unsupported, they are also familiar to the point of banality within the self-contained world of the American law school.

Time and again we hear that law school teaches people—and not just any people but adults who enter law school with at least seventeen years of formal education—how to think. The words of the fictional Professor Kingsfield are merely a reflection of what was and remains the conventional wisdom about the educational value of law school: "You teach yourselves the law, but I train your minds. You come in here with a skull full of mush; you leave thinking like a lawyer."[35] This is the sort of thing that would not, in the words of Duncan Kennedy, "stand up for a minute in a discussion between equals."[36] Yet, as Silver's essay illustrates, legal academics are especially prone to having the kinds of one-way discussions in which the bald assertion of implausible claims masquerades as reasoned argument.

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31. Silver, *supra* note 3, at 57.
32. *Id.*
33. *Id.* at 58.
34. *Id.*
35. THE PAPER CHASE (20th Century Fox Film Corp. 1973).
36. Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 40, 46 (David Kairys ed., 1982).

Note too that Silver is so carried away with what he imagines to be the virtues of traditional legal pedagogy that he doesn't notice the contradiction between his praise of a method focused on supposedly teaching people how to think—as opposed to teaching them to do the things practicing lawyers do—and his criticism of Tamanaha's (in my view self-evidently correct) claim that "the best way to learn how to practice law is to actually do it."[37] Silver describes this as "no less a prescription for failure with fledgling lawyers than it would be with heart surgeons,"[38] even though two paragraphs earlier he derided the idea that a law professor's job might be to teach lawyers how to do things lawyers do ("fill out forms," etc.).[39] Given his condemnation of learn-by-doing lawyering, it is difficult to understand how Silver can also believe that the Socratic casebook method—which countless critics have pointed out teaches law students nothing about the actual practice of law—is nevertheless "a snug fit with the pedagogical needs of future attorneys."[40]

I have not touched on the ahistorical character of Silver's argument. For example, in the 1970s teaching loads for law faculty were much higher, salaries were much lower, law reviews were publishing approximately one-sixth as many articles as they do now, and not coincidentally tuition at private law schools was a quarter of what it is today in constant dollars, while resident tuition at almost all public law schools was essentially nominal.[41] If Silver is to be believed, this state of affairs should have produced a generation of Motel 6–quality attorneys, while allowing the wielders of power to operate without facing the various trenchant critiques that otherwise would have been appearing in the nation's law reviews. Again, does Silver or anyone else have any evidence that either the quality of legal education or the social value of legal scholarship are substantially higher than they were a generation ago?

CONCLUSION

I have gone to the trouble of critiquing Silver's attempt to reply to Tamanaha's criticisms of contemporary legal education because Silver's essay displays the same characteristic weakness as American legal academic culture: a tendency to make bold assertions about the value of legal scholarship and the effectiveness

37. Silver, *supra* note 3, at 58 (quoting TAMANAHA, *supra* note 1, at 172).
38. *Id.*
39. *Id.* at 57.
40. *Id.* at 58. The Socratic method has been heavily criticized on pedagogical, practical, and political grounds. For a good overview, see Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113 (1999).
41. *See* Campos, *supra* note 6, at 178, 183–84, 187, 190.

of law school pedagogy, while at the same time providing no support for these assertions beyond a willingness to repeat self-congratulatory platitudes about who we are and what we do. Self-congratulatory platitudes, however, do not become true merely through constant repetition.