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### **COMMENTS ON THE LEGAL EDUCATION CARTEL**

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# **COMMENTS ON THE LEGAL EDUCATION CARTEL**

**Lloyd Cohen,  
George Mason University School of Law**

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## Comments on the Legal Education Cartel

LLOYD COHEN\*

In response to the question “How’s your wife?” Henny Youngman responds “Compared to what?” So too with the state of law school education. To what should the current structure and cost of legal education be compared?

I have in mind as a standard a perfectly competitive, fully informed, minimally regulated market of for-profit institutions from which people seek a legal education in order to acquire the knowledge, and learn sufficient craft that they may enter the legal profession and practice it with appropriate skill. While it might seem obvious that in an essay on legal education in America I should posit some reasonably well formed theory of its proper form and character, I decline to do so. While along the way I will share a few observations on that question that is not what this essay is fundamentally about. Instead I will suggest several ways in which the current market differs from the standard referred to above and discuss how those differences likely increase the cost and radically distort the character of legal education.

There are three related themes to this paper. First, I will restate in miniature the critical observation (well made by others) that law schools are one of the two great barriers to entry of the legal profession’s cartel. While this is the Gibraltar that shapes the major contours of legal education I will not discuss it in great detail for the simple reason that that project has been well performed by George B. and William G. Shepherd.<sup>1</sup> Second, I will explore the unique manner in which this cartel operates. While all cartels raise price and reduce quantity as compared to what would prevail in a competitive market, the legal education cartel

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\* J.D., Ph. D. (Economics), Professor of Law, George Mason University. I am grateful to Rabia El-Hage for her able research and to the Law & Economics Center at The George Mason University School of Law for its generous support.

1. George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091 (1998).

has some unusual features that channel and constrict those cartel generated rents into forms peculiar to the academic world. The shorthand version of the question we will explore is who “owns” the law school, and what do they seek to maximize. The argument I will offer is that law schools, much like their almost universal parents, universities, are hybrid enterprises. They partake in the characteristics of, and bear similarities to: (1) the worker owned firms in the former Yugoslavia; (2) traditional non-profit enterprises; and (3) large equalitarian partnerships. This results in a variety of peculiar and likely unforeseen financial and political incentives. Third, there is something quite unusual in the extreme sorting function of law schools. In legal education, more than in the rites of passage of any other profession, the most powerful impact of the law school at which one matriculates is on the sorting of the graduates based on their entering credentials, rather than on any putative superiority of the legal education they receive at higher ranked institutions. This has the result of sharply differentiating the markets in which law schools at the top and bottom of the food chain operate and the character of the legal education they provide. Ironically, it is widely held among the professoriate that at the upper reaches of the legal academy there is an inverse relationship between law school rank and the quality of the legal education offered.

#### I. THE ABA CARTEL

The big truth about the current structure of legal education in America is that it is the handiwork of a well functioning cartel, the product of ABA mandated rules that are enforced by state legislatures and supreme courts. As with all such state enforced, cartel creating and policing barriers to entry, the putative purpose of these requirements is to protect the public by ensuring a relatively high minimum standard of competence and training of those permitted to practice in the profession.<sup>2</sup> Whether, and to what extent, it does that, another salutary effect for those currently employed in the field is that it substantially increases the cost of entry to those who wish to become attorneys, thereby reducing the supply and increasing the income of those already members of the bar.

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2. “The ABA approval process is recognized by the highest courts of admitting jurisdictions as assuring that graduates possess the requisite qualifications to permit his or her entry into the practice of law. This result—instilling states and admitting jurisdictions with confidence in the requisite qualifications of law school graduates and providing them a standard upon which to rely—is the goal of the ABA accreditation process.” James P. White, *The American Bar Association Law School Approval Process: A Century Plus of Public Service*, 30 WAKE FOREST L. REV. 283, 288 (1995).

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Through the 19th century and well into the 20th many fine attorneys including Abraham Lincoln, Clarence Darrow, and United States Supreme Court Justice Robert Jackson entered the profession without completing law school, and only a miniscule number followed the current model of three years of full time post university academic study.<sup>3</sup> Now, with only the most minor of exceptions, that is not possible. Because of successful lobbying by the ABA during the 1930s, aspirants to the profession in the United States must attend three years of full-time post-university education at institutions that charge between \$15,000 and \$30,000 per year in tuition. As the recently departed Milton Friedman said “It is extraordinary how often we find that that which is in our personal interest is also in the collective interest.” While, the course of study during law school is more than minimally related to at least one possible path to acquiring the knowledge and skills to practice law, it is certainly not the only path—only by far the most expensive. It is no coincidence, that it serves the interest of those in the legal profession that passage through law school is an expensive, time-consuming proposition.

Beyond the first order cartel, there is a second order cartel. While it is in the interest of those in the legal profession that the path to becoming a lawyer be expensive, it is independently in the interest of law school “owners” that they extract as much as possible of the high price of attending law school in the form of economic rents rather than dissipating it in the form of costs. In the extreme, *ceteris paribus*, it would most serve their interests to simply receive the price from the applicant as an entry fee and perform no services in return.

One potential problem all cartels face, this one included, is competition by new entrants driving down prices and thereby eliminating economic rents. And, given that unlike OPEC the member schools of the AALS possess no unique un-duplicable resources, were entry unrestricted it would be rapid and complete. So, in addition to extracting rents a derivative but equally important goal of the residual claimants (i.e., owners) of law schools is to prevent competition. This has led to two separate but related policy strategies.

The first policy, acting through the ABA accreditation committee is to limit entry of competitors. This serves the interest of both the legal profession generally and the owners of law schools in particular. The ABA has successfully lobbied legislatures in all but 3 states to prohibit anyone who has not attended an ABA accredited law school from

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3. Shepherd & Shepherd, *supra* note 1, at 2121.

taking the state bar exam.<sup>4</sup> The ABA then refuses to accredit or even provisionally accredit a law school until it has faculty, administration, and all its physical facilities including a stocked library in place. Nor is the ABA shy about denying accreditation to aspiring law schools,<sup>5</sup> and prohibiting accredited law schools from accepting transfer credits from unaccredited law schools.<sup>6</sup> In this way they place both candidate law schools and their students at great risk.

The second policy is to limit the services (or at least their cost) provided to law students, thereby allowing more of the revenues to be extracted as rents instead of dissipated as costs. The ability to limit services is subject to two constraints. First, there is the demand of the student/applicants who wish to receive training and education that will prepare them to pass the bar and practice law. Second, there are significant public constraints on law schools acting in an openly mercenary fashion. The political justification for legal enforcement of the cartel is the putative public purpose of ensuring a high quality of legal services. Should the barriers to entering the profession, or to establishing a law school, be too obviously removed from this purpose the legal enforcement of the cartel would come under attack and likely collapse. The requirements placed on aspiring law schools and law students must at least appear to serve the putative purpose of ensuring capable lawyers.

From the perspective of accredited law schools the most potent of the AALS policies for discouraging entry is the enforcement of requirements on all law schools that are a far heavier burden on aspiring law schools than on existing ones thereby “raising rivals’ cost.” In addition to putting new aspirants at risk of not receiving accreditation, it is in the interest of existing law schools to compel new aspiring law schools to scale barriers that represent largely unrecoverable sunk costs to current law schools. This discourages entry and increases economic rents at low cost to existing law schools. Library collections are probably the quintessential example of such a barrier. It is impossible at reasonable cost to evaluate the quality as contrasted to the quantity of a library collection. A set of irrelevant, antiquated books collected over a century may not add much—or anything—to a student’s legal education, nor may it have much market value, but, measured in volumes, it will serve as a very nice standard for new law schools to match before they are permitted to operate. So while such a library may be largely superfluous and obsolete it bears some

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4. *Id.* at 2122.

5. In 1997, the American Bar Association rejected for accreditation Nevada’s only law school. This resulted in the closing of the school in addition to the revocation of Nevada graduates’ licenses. *Id.* at 2129.

6. *Id.* at 2151.

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resemblance to a reasonable requirement and its duplication from scratch is inordinately expensive.

But, more than merely keeping out rivals and raising their costs, the owners of the law school wish to extract rents. It is in the peculiar nature of this extraction, shaped by the odd political and legal structure of law schools, that they differ most markedly from ordinary business firms. In the typical American business firm there is an owner, or set of owners, who are the residual claimants. They are entitled to a financial claim on the value of the firm proportional to their ownership stake. But that is not how it is in law schools.

## II. WHO OWNS THE LAW SCHOOL? AND WHAT DO THEY OWN?

I have referred several times to the “owners” of the law school. Even the only barely informed reader will do a double-take at the word owners. Law schools are non-profit institutions, so how could they possibly be owned? And, by whom?

In large part, I use the term “owners” of the law school to highlight that the core economic assumption of rationality applies to those who operate law schools as much as it applies to anyone else. Just as public choice economics was a useful antidote to the implicit or explicit assumption that those in government, whether elected or not, are beneficent automatons only serving some public interest, so too it is essential when thinking about law schools to remember that those who have the power to decide how a law school operates will act purposefully and often in their own narrow self-interest. So, to appreciate how a law school operates one must determine: (1) who gets to decide; (2) what are their interests; and (3) what constraints are they subject to.

Three salient characteristics of the law school world emerge from the analysis that follows and drives and informs our understanding of how they operate. First, law schools are (or were) required by ABA rules to be non-profit enterprises. Second, law schools are in effect owned principally, though not exclusively, by a faculty whose claim lasts only as long as their employment and can not be alienated. Third, law schools are governed as large equalitarian partnerships of the tenured and tenure track professors. This results in a variety of peculiar and unappreciated financial and political incentives.

The ABA accreditation standards originally required that all law schools be non-profit institutions. While that has since been amended it is still the de-facto rule. So in a formal sense there is no residual claimant,

because there is no residual to be claimed. Non-profit institutions, public and private law schools and universities included, are generally governed under the supervision of a board of trustees. Thus many of the issues of governance and management of law schools are variations on themes that apply to non-profits more generally.<sup>7</sup> But not all non-profits are in the same boat. Law schools and their parent universities are probably more badly suited for efficient governance than the typical non-profit.

In any non-profit when trustees are conscientious in carrying out their oversight they in effect become the legal owners acting as faithful agents of the beneficial owners. They are positioned to govern and monitor the institution much as a conscientious board of directors governs a corporation. But, even in the best of circumstances, given the lack of either powerful legal or market disciplining of feckless behavior (or worse) by trustees there is a constant pull in the direction of non-feasance by the trustees of non-profits.

But not all non-profits are the same. When might one expect less non-feasance by the trustees and when more? The greater the attachment of the trustees to the underlying putative purpose of the non-profit the more likely they will take their duties seriously. This should be a function both of the personal relationship of the trustee to the project and to its inherent moral appeal. Thus if the trustee is a loyal member of the Roman Catholic church and the non-profit he is overseeing is a charity established by the late Mother Theresa to minister to the poor one might expect more dedicated oversight than if the trustee is a prominent business figure appointed as a law school trustee of a law school he is not otherwise associated with. In the latter case there is little reason to think that he will work tirelessly to constrain costs and increase output. It is in the same spirit that though air-traffic controllers and postal workers are both civil servants and free from many standard market generated forms of discipline one expects more assiduous effort from the

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7. "For colleges, the mission is not to maximize profit, but rather, perhaps, to maximize the quality of their educational output over time. Colleges have no financial market that allows outsiders to evaluate performance or allows a takeover to be mounted to replace a poor-quality college board with one that demands better results from top management. There are no shareholders to sue board members who are negligent in performance of their duties . . . College trustees, although elected, are volunteers who must think it an honor to sit on the board, considering that it means a commitment of valuable time. Most trustees have no particular expertise in higher education and are passive, allowing administrators to run the show unless things seem to be getting grossly out of hand. Trustees rarely focus on the kind of objective measures available to guide corporate board members." RYAN C. AMACHER & ROGER E. MEINERS, *FAULTY TOWERS: TENURE AND THE STRUCTURE OF HIGHER EDUCATION* 29 (2004).



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former than the latter. Shepherding airplanes to safe landings is inherently more meaningful, inspiring and rewarding than delivering bulk mail.

In addition, the more esoteric the productive activity of the non-profit and the larger and more entrenched its senior professional staff the more difficult it becomes for the trustees to effectively monitor and govern the institution. Once more universities and law schools with large tenured faculties would seem to be a quintessential example of almost unmonitable non-profits. So while law schools, both the few free-standing ones and the vast majority that are divisions of universities, are nominally run by or under the supervision of a board of trustees, the emphasis should be put on the word “nominally.”

This governance structure of law schools and universities bears a surface similarity to corporate governance of publicly held business firms. Neither corporate nor university boards are structured to actually manage the organization they nominally control. That surface similarity might incline one to be overly optimistic about the monitoring role that boards of law schools and universities play. While corporate boards do not actually manage the corporations in their care, they can and do play an important role in the structural decisions of the business and the choice of chief executive. They recognize that the financial well being and solvency of the institution they govern are their core concern. University and law school boards are different. They not only play no role in the day to day operation, but even with respect to long term planning, the board of trustees of a typical university or law school is largely a nominal figurehead. This is also reflected in the remuneration of the board members. While corporate directors are usually handsomely compensated, university trustees are more frequently large contributors.

It was not always thus. A large majority of the private universities in America had their origin as appendages to religious denominations. It was elders of the particular church who served as trustees. They not only had a substantial influence for good or ill on the ethos, and curricular and faculty choices of the institution, but they were concerned with getting value for the dollar. Because they had educational goals for the institution they were anxious to restrain costs.

Now, with a trivial few exceptions that model is but a distant memory. University and law school trustees are no longer chosen because they have a substantial stake in the product of the institution and so boards of trustees are mere husks of what they once were. They do little more than rubber stamp the choices of the administration—certainly on most financial matters.

In the corporate world, when the board of directors is captured by management, the ultimate owners of the corporation—the shareholders—can bring about a fundamental change through a hostile takeover of the corporation and a replacement of management. No equivalent mechanism is available in the world of self-perpetuating university boards of trustees. The closest we have to anything approaching a hostile takeover in the university world occurs when certain boards reserve some of the seats on the boards to elected alumni. My colleague, Todd Zywicki, and two other insurgents recently succeeded in winning seats on the Dartmouth College Board of Trustees. Their principal reason for standing for election was a concern with the political and philosophical soul of the institution rather than its financial practices. In part as a result of what they discovered after assuming their seats they now have a heightened concern over the financial management of the institution. It remains to be seen whether they will have any success in constraining costs or in anything else of significance.

So, if the board of trustees does not run the institution then who does? Applying the analogy of the commercial corporation one might suppose that it is the current management—the administration. And that is how things work at some of the lower rungs of the academic world, where powerful and long-serving college presidents simply run roughshod over all corners of the institution.<sup>8</sup> These are the places where, in economic terms, the faculty have very low opportunity costs. Individually and collectively they are grateful to have any university job at all and so do not make waves. But at the higher level academic institutions that most readers will be familiar with—and at virtually all law schools—the faculty and senior administrators are in a symbiotic relationship. While individually each faculty member is politically inferior to the administration, collectively they are superior. The administrators serve for the benefit of the faculty, and at the same time use their position to extract rents for themselves.

At first blush one might think that this changes nothing fundamental in the actual operation of the institution, that it is merely that the faculty (and administrators) have become owners of the law school and will act like any other profit-maximizing set of partners. But, the matter is more

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8. Virginia State University, a historically black institution, has been successfully sued three times within the past 15 years. The most recent legal troubles surrounding the university involved Professor Jean R. Cobbs, who sued for over \$20 million claiming that she was being discriminated against for her conservative political views. Specifically, the President of Virginia State has been accused of punishing African-American professors who did not support the Democratic party. Eddie N. Moore, Jr., *The Destructive Faculty Feud at Virginia State University*, J. BLACKS HIGHER EDUC., Oct. 31, 2001, at 79.

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subtle and convoluted than that. The faculty do not own the law school in the sense that they have a partnership holding in the equity of the institution. Each individual professor's claim on its resources lasts only as long as he remains on the faculty, and he may not transfer his claim to another aspirant.

In this respect universities—and law schools even moreso—have taken on many of the attributes of worker owned firms in the former Yugoslavia.<sup>9</sup> Because the workers (faculty) can not take their share of the capital value of the firm with them when they leave, and their retirement wealth is usually held by third parties such as TIAA-CREF, they have little or no interest in constraining costs and accumulating a surplus. The greater their mobility, and the nearer they are to retirement, the less their concern. Their interest is—subject to not killing the golden goose—to take out as much of the capital as possible for themselves over the course of their career. As far as the faculty is concerned the two most important attributes of senior administration is their ability to raise money, euphemistically referred to as “development”—and their willingness to dole it out to them. The joke is told that the job description of the president of Harvard is that he lives in a mansion and begs for a living.

What makes law schools even more like worker owned firms than the rest of the university is that they are discrete, not overly large, usually autonomous units. So, while in a university as a whole the president may play off constituencies, defined by subject matter, division, department, and school against one another and so maintain power by inertia and deal-making, this is less true in law schools. Especially at more prestigious institutions the dean serves at the sufferance of the faculty, and if the dean does not serve faculty interests he will usually be removed.

*A. Explaining Endowments*

One of the more peculiar and puzzling aspects of universities is the notion of an endowment. Virtually all gifts to universities are either

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9. “In Yugoslavia, workers possessed ownership rights in their firms, but these rights were nontransferable. This created perverse incentives, such as short time horizons leading to under-investment. Given that the condition of their firm after their own retirement was of no interest to them, workers heavily discounted the future benefit of most investments.” Robert Wisner, *A Socialist Shortcut to Capitalism? The Role of Worker Ownership in Eastern Europe's Mass Privatizations*, 19 N.C.J. INT'L L. & COM. REG. 123, 128 (1993).

placed in an endowment or designated for a capital building project. An endowment is a fund whose capital can not be spent except under the most extraordinary circumstances. The administration may only withdraw a relatively small interest-rate based share of the endowment each year. Why?

At first blush one would think that donors who were sympathetic to the mission of a law school or university would prefer that their gift not be so constrained. After all, if at present one is sympathetic with the administration and faculty of the institution, but in fifty years the entire ethos may be turned upside down, one would not want one's financial legacy to fall into those unsympathetic hands. It is in that spirit that John M. Olin in establishing his foundation designed it to self-destruct by dispensing all its wealth relatively shortly after his death.<sup>10</sup>

The existence of, and rules with regard to, endowments go hand in hand with universities and law schools being in effect owned by the current faculty. Because faculties have no interest in accumulating capital in the institution, law schools and universities annually expend their entire budgets. They will do this whether they have good things to spend money on or not. In soliciting funds, donors need to be persuaded that their donation will not simply be dissipated in economic rents to current claimants. Because potential donors implicitly understand that the true residual claimants of the institution, the faculty, have no reason to save anything from year to year, the university (or law school) binds its hands through the establishment of an endowment and then unless a gift is requested to fund a particular current building project or program it will be solicited as an addition to the endowment.

### *B. Law School Politics*

Politics refers to both the jockeying for power, privilege and money within the law school and for the grander "political" views of the faculty. While the first use of the term is our principle focus, the two phenomena are related and their relationship grows out of the ownership structure of the law school.

The ABA-mandated structure of the law school as a non-profit institution, and the historical association of virtually all current law schools with parent universities has resulted in a "democratic" internal governance structure in which each tenure-track faculty member has one vote on

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10. John M. Olin specified that resources at the Olin Foundation were to be spent within one generation of his death in order to prevent its co-option. Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 346 (2003).

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certain matters, and each tenured faculty member has one vote on others. So, the governance structure is something like an equal share partnership. But, as discussed earlier, because the faculty have no claim on any accumulated residual, the normal partnership incentives to manage the firm to increase its net worth is distorted and attenuated.

The governance structure of law schools separates decisions into two categories: those which fall under the purview of the administration and those which fall under the purview of the faculty as a whole. Because of the shared political—as distinct from legal—power between faculty and administration there is wider variation and more contentiousness in the law school world than in typical businesses, government agencies, or even other non-profits over where authority and responsibility for particular issues lie. That said, there seems to be one general distinction that holds with some regularity. Each individual faculty member's relationship to the institution is determined by his personal negotiations with the administration, rather than with his colleagues as a body. Thus salary, office assignment, research budget, teaching load, assignments and scheduling all derive from the administration. This is not just a matter of administrative convenience; it is also a result of the obvious and powerful conflicts of interest of the alternative regime. The faculty as a body decides on general policies that at least directly affect the size and ingredients of the pie, while the administration doles out the slices. And, of course, the policy decisions of the faculty acting as a body will affect each member in different ways. For example, offering a six hour sequence in torts rather than four hours increases the demand for the tort professors' services.

As a political actor each faculty member can be expected to further his own interest under a regime in which decisions are made collectively and democratically. Some of their interests are in concert with one another and others are in conflict. But it is more nuanced than that, for even within each category of faculty demand there is both a non-rivalrous and a rivalrous dimension. Consider the physical plant. It is in every faculty member's interest that the physical plant be as pleasant and spacious as possible. But, it is also in each faculty member's interest that he be assigned the nicest office. So too it is in their general interest that the collective teaching load be as light as possible, and that the administrative support be as generous as possible, but at the same time it is in each individual's interest that their workload be as light as possible. And of course the same is true with respect to the most important benefit of employment, salary. The faculty is of one mind in wanting as much

budgeted for salary as possible, while in obvious conflict with one another in each wanting as large a slice of the pie as he can claim.

It is particularly in those areas where the interests of the faculty are congruent, and given the accreditation process, where their interests are congruent with those of faculty at other law schools, and with the legal profession as a whole, that the faculty interests will most fully be realized. Maximum teaching load is a prime example of such a category. Rules and policies limiting teaching load serve the interest of each of these constituencies. For the faculty at the particular institution it means less work, for faculty at sister institutions it means a standard that they may employ to bring pressure on their own institution, and for the legal profession it raises the cost and therefore the price of legal education to applicants and so reduces the quantity supplied.

The politics and economics of dividing up the spoils make for an intricate dance. Consider salary, important in itself and representative of all the other conflicts. Because, of the democratic governance structure a dean who wishes to retain his job must balance the political claims on the salary pie of the various members. Aside from particular individual claims there are fundamentally two categories of claims on the salary pie. For a given exogenously determined salary budget, some faculty will prefer across the board salary increases, while others will favor "merit" raises.

A powerful driving force in this ballet is opportunity cost. Both aspiring and current faculty members have alternative opportunities to employment at this particular law school, and those opportunities differ markedly. Some lawyers specialize in highly remunerative areas of practice, others do not. Thus a skilled tax, patent, or corporate lawyer needs to be adequately compensated to enter the legal academy and stay there. On the other hand, those who claim an expertise in jurisprudence, critical legal studies, legal history, law & literature, etc., do not have the same set of financially attractive private sector career choices. Once in the academy, employment opportunities at other law schools are the major determinant of one's opportunity cost. Distinguished scholars deemed to have published many high quality books and articles have more opportunities and so can bargain for higher salaries. At the same time, those who specialize in areas of law with relative shortages of skilled scholars and teachers will also find that they can generate competing offers.

Hiring law professors with high opportunity costs, and matching offers received by current members of the faculty can be a positive sum game for the entire faculty. The salary pie is in part endogenously determined. The law school is in competition for resources with other

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divisions of the university. To the extent that the dean can make the case that his faculty are not earning rents he can squeeze resources from those units of the university where the faculty have very low opportunity costs. Still, *ceteris paribus*, it is in the interest of those faculty members within the law school whose opportunity cost is low to favor across the board raises to merit raises.

A dean interested in retaining his position and also in improving the “quality” of the law school faculty is in a bind. Seeking and rewarding faculty with high opportunity cost will “improve” the law school. But, this is not a recipe for securing his own tenure. The faculty with high opportunity cost will not be particularly loyal, and many will gradually depart. At the same time, those earning rents will stay till retirement, nursing their wounds.

So, we have the uneasy balance of an equalitarian democratic power structure at war with the market forces of supply and demand, all taking place in a social and political culture of skilled and less skilled faculty politicians jockeying for advantage. There is more that can be said of an empirical nature examining how these battles are typically resolved at various law schools. Such a study might consist of either in-depth case studies of several schools, or aggregate econometric analysis. I leave that project for others.

*C. Politics, Faculty Governance, and Constraints on  
Financial Rent Extraction*

Given the constraints on profit maximization in law school operations and that the rents generated by the law school can not easily and reliably be taken in cash by the faculty, the ownership claims of the faculty make themselves felt on other margins. Gary Becker noted that managers in oligopoly and monopoly industries can engage in invidious discrimination based on personal animus to a much greater extent than firms in competitive industries.<sup>11</sup> It is in that same spirit, only more so, that law school faculties can indulge personal tastes in hiring, tenuring, and promoting their colleagues rather than focusing on the crass concerns of effectiveness and productivity.

Those tastes answer to two goals that will enter a faculty member’s utility function. The first is the direct consumption value of one potential colleague versus another, and the second is the political/economic

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11. GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 49-50 (2d ed. 1971).

advantage that a particular colleague might offer. These two arguments will generally coincide; colleagues who are friends are likely to become political allies. The consumption value of a potential colleague loosely translates as the oft-repeated term, collegiality. This means quite simply that one wants a colleague whose company one enjoys. The political/economic argument centers on the governance structure of the law school. In a democratic equalitarian polity such as a law school faculty there is much to be gained by having allies and supporters.

But before further investigating the role of personal tastes and political advantage it is important to reemphasize the central feature that drives to prominence these clearly second order concerns. In a world where one's own job is secure, future salary is constricted within a rather narrow range unless one creates non-firm-specific human capital such as well received publications, and little turns on the overall "productivity" of one's institution, one can and will indulge objectives other than the efficiency and "productivity" of one's future colleagues in hiring and other personnel decisions.

Given that tastes differ it might appear that there is little more that one can say about the outcome of the faculty political process. That is, perhaps one should expect each faculty member to cultivate his own garden and indulge his own idiosyncratic tastes in choosing colleagues. But, that neglects the dynamic forces at play in the process. A state in which all professors give light weight to political concerns and in which their tastes are personal and parochial is evolutionarily unstable. Those faculty members who put more weight on questions of adding political allies and supporters to the faculty and seek to form coalitions with like minded colleagues will have more success in the faculty hiring game. And with each success they will be able to form still stronger coalitions for the next round of hiring, and other curricular and governance matters. When the losers in this process recognize what has happened they will find it progressively more in their interest to form a countervailing coalition. Over time faculties often reach an internal political equilibrium with two or more coalitions able to exercise some attenuated control or at least veto over policy and hiring.<sup>12</sup>

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12. Perhaps the most widely publicized case is that of Harvard Law School at which there have been a series of battles over faculty composition. One well reported incident began in 1990 when Harvard Law Professor Derrick Bell refused to teach again at Harvard Law School until a woman of color was hired as a member of the faculty. Students also concerned with diversifying the school organized boycotts and staged sit-ins. In the spring of 1995, five years after Bell's initial protest, the law school offered a visiting professorship to Professor Lani Guinier, an African-American woman who had been nominated by President Clinton as Assistant Attorney General for Civil Rights.



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In seeking acolytes and allies the dimensions on which to choose are myriad. The cleavages of possible identification are as potentially varied as the human imagination. But, some cleavages are more salient and historically established than others. So, race, religion, ethnicity, sex, sexual orientation are all candidates, and each has played some role at law schools somewhere. But, in the usual sense of an animus against those of a minority status these cleavages are both déclassé and ineffective as coalition forming devices. The larger the majority group at the institution the less individually and collectively those in the in-group have to gain by forming a coalition. Where is the payoff for any member of the undifferentiated religious majority to form a coalition of his majority group?

Who is most eager to play this political game? Once more opportunity cost provides a window into this world. A faculty member's eagerness to play the game and the attractiveness of a particular potential colleague is inversely related to the opportunity costs of each. The lower one's own opportunity costs, the more locked in one is to one's current institution, and the greater the need to protect one's rents. Similarly, the lower the opportunity cost of potential hires the more likely they can be enlisted into the political game as an ally or supporter. Thus one should expect that a specialist in jurisprudence with a skimpy publication record will be more interested in employing faculty politics in general, and hiring in particular, to cement alliances than will the experienced and skilled tax lawyer or the corporate lawyer with a distinguished publication record.

But beyond having an interest in forming coalitions and acquiring allies one must be able to choose people who will have shared political interests or be beholden. It is here that the chemistry of politics in the sense of ideology can prove powerful especially when combined with issues of race and sex. In an era of racial and sexual preferences in particular many people are hired with inferior credentials and the prospect of generating less than distinguished publication records. These are perfect candidates for those who believe they can enlist them in voting coalitions.

But, the political process is more general in its application than merely reflecting ideological or ethnic loyalties. It goes to the very heart of what some would treat as the legitimate core measure of faculty value to the institution.

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*News and Views; Harvard Law School Makes an Offer to Lani Guinier*, J. BLACKS HIGHER EDUC., June 30, 1995, at 43.

#### *D. Productivity?*

The ceaseless, senseless demand for original scholarship in a number of fields, where only erudition is now possible, has led either to sheer irrelevancy, the famous knowing of more and more about less and less, or to the development of a pseudo-scholarship which actually destroys its object.<sup>13</sup>

Then there is the question of “productivity.” In the normal profit maximizing firm there is a reasonably clear understanding of the meaning of the term. The value of the marginal product of an input is the marginal product of the input times the price at which the output is sold: number of additional widgets times price per widget. But in the academic world in general, though the word productivity is much used, its referent is something else entirely. It certainly does not mean number of students taught or quality of teaching. Indeed, in the corrupt language of law school it is those faculty members who are deemed least “productive” who are condemned to do the most teaching.

In the law school world, as in most of academia, productivity is measured almost exclusively by a proclivity to write and publish. While, many—perhaps most—law professors will gleefully and honestly assert that much of the “scholarship” of their fellows is rubbish for which innocent trees are slaughtered, nevertheless, it is the quantity of those publications that will be a crucial measure of the “productivity,” value, and marketability of law professors. “Quality” counts as well, but that measure is usually operationalized in a manner that belies its name. For all but those at the very pinnacle of the discipline, the quality of one’s publications is generally determined by the prestige of the journal in which one publishes. A reasonable—though not clearly correct—standard in many disciplines, but in the law, where the vast majority of law professor writings are published in un-refereed student edited journals, it seems at best arbitrary and capricious that the whims and wisdom of third year law students are the dominant measure of the perceived quality of faculty scholarship.

Even if the publications were benign valuable contributions to knowledge—I believe they generally are not—both the theoretical and operational standard of productivity remains a puzzle. What drives this generous gratuitous positive externality? How does it serve the interest of law schools and their owners to provide this knowledge to the world at large without compensation? It does not! So why does “scholarship” play such a prominent role in the careers and payoffs to law professors? I will not supply a full blown theoretical model but only a few

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13. Hannah Arendt, <http://www.quotationsbook.com/quotes/35062/view> (last visited Aug. 12, 2007).

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fragmentary thoughts on how this grows out of the peculiar governance and “ownership” structure of law schools.

First, we must note that this phenomenon applies not merely to law schools but to universities more generally. The measurement of faculty productivity and value by weight of scholarship is essentially universal across the disciplines. Whether it is physics, chemistry, economics, law, political science, modern literature, nursing, or recreational science faculty are tenured, promoted and recruited based on their scholarly output. This strongly suggests that the incentives at work span the disciplines and have more to do with the nature of the academy than with any putative value of the scholarship to the world at large. In some of these disciplines the value of the scholarship is doubtful at best. What drives this process?

Our task is much like puzzling over how a particular herbivore has emerged as the most powerful animal on some isolated island. The most important force at work is what is absent—a large carnivore. So too in the law school world. It is the lack of a traditional residual claimant able to cash in on the capital value of the law school that permits the emergence of scholarship as such a prominent feature of faculty evaluation and compensation. Were there a traditional residual claimant, he would suffer a large opportunity cost in permitting, let alone encouraging, faculty scholarship. He would want them to spend their time teaching paying students. But, that only means that contributing to profitability is not the central measure of faculty output. It does not tell us why there is a premium placed on publishing.

I will suggest two different sorts of explanations: epistemic and economic. As the quote with which I begin this section illustrates, a bizarre and often pernicious singular focus on “research” and publishing has infected the entire world of university scholarship. What drives it? While a full answer goes well beyond the economic analysis employed in this paper, one potent cause may be described as ‘mimicking one’s betters.’ The enormous success of the natural sciences over the last two centuries has made them an often inapt model for all the scholarly and not so scholarly disciplines. Because chemists successfully do “research” and publish it, a facsimile of that process has become the *de facto* gold standard of scholarly productivity. Every university discipline from philosophy to nursing to recreational science employs the same often bizarre and wasteful criterion of achievement, published research.

But rather than—or in addition to—such an epistemological error perhaps there is a more direct economic explanation at play. As I

suggested earlier, if law schools and universities were owned by entrepreneurs concerned with profit maximization there would be little or no market for legal scholarship. Precisely because universities and law schools are non-profit organizations and faculty members have no direct claim on the revenues generated by the institution, the faculty decision-makers have only a severely attenuated concern with productivity in the usual sense. The primary way in which they extract rents is by pursuing their interests and living relatively unconstrained and what to a layman would seem undemanding professional lives. Professors, especially law professors, are generally very bright accomplished people. While for those with superior legal intelligence and sufficiently assiduous in its study, teaching law is an ego gratifying pleasure, a dream job, that appeal quickly fades for the less than competent. To face a class of eager, demanding, intelligent students with nothing to say and no answer to their questions is a nightmare, not a dream. And so, it is those most gifted at and inclined to intellectual speculation about the law that are drawn to the academy. Nor is it only teaching that is attractive, for many so inclined and gifted studying and producing legal scholarship is at least an equally attractive way to spend one's day.

The next part of the dynamic in explaining publication is that law schools need to regularly make both entry-level and lateral appointments. In part because there is no measure of profitability and no interest in the same, the hiring committees will have difficulty identifying a likely addition to their faculty employed at another law school by any means other than their publication record. And, as I mentioned earlier, for the individual faculty members doing the hiring, to the extent that they want their future colleagues to value their own frolics in the land of legal scholarship, there is an implicit incentive to hire those who get similar gratification from publishing.

From the prospective candidate's point of view in addition to whatever gratification comes from producing legitimate scholarship, there is often a substantial financial return to publishing sufficiently to generate offers from other law schools. This is similar to, but distinct from, the usual role of competing offers in the private for-profit sector. In both cases one's opportunity cost is expressed by what one can receive elsewhere. The difference is that because of the peculiar non-profit nature of law schools the generation of competing offers is for political reasons an almost exclusive means to substantially raise one's remuneration.

Neither the dean nor the faculty at one's current institution have any theoretical or operational measure of the value of a professor's marginal product, and precious little incentive to care. So, the politics of faculty governance generates institutional stickiness in faculty salaries. In the

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absence of an exogenous shock a law professor's salary will only move slowly up in a band formed by colleagues at approximately the same level of seniority and rank at the particular institution. When someone joins a faculty and begins to invest time in their career both in the profession at-large and most importantly at the particular institution, they typically earn ever increasing quasi-rents with each passing year. This is less true in law schools than in other university departments, but true nonetheless. That is, professors are paid more than is necessary to keep them indefinitely employed at that particular institution. So, if administrators had the political power to lower the real salaries of faculty it would put all faculty at risk with respect to the principle financial benefit of university employment, a steady, predictable, and secure income. So, remembering that administrators are largely servants of the faculty, if the entire salary structure were up for grabs each year it would make the politics of law school governance much rougher and high stakes. The fight over the salary pie would become the central issue in faculty governance and dean selection. In order to prevent that, a *de facto* rule has evolved leaving little play in faculty salaries barring an exogenous shock. Those shocks come in two main forms. The first is changing one's status from faculty to administration. If one moves out of the faculty status into administration one gets a bump in salary that can frequently be retained when one moves back to the faculty.

The second exogenous shock is the one we are more concerned with, an offer from another institution. Foreign institutions can place a lateral candidate anywhere in its structure it wishes without upending the status/income relationships of the prior faculty within the institution. For obvious reasons faculty members do not entertain offers for less money and perquisites than they are currently receiving. But often a faculty member would prefer to remain at his current institution. Particularly, in the world of non-profit institutions of higher education where there is no measure of the value of the marginal product of the faculty member it is only the presence of a competing offer that provides any sense of the market value of a faculty member. Such an offer seems to allow the administration to sidestep the faculty politics of a fight over slicing up the salary pie.

So the story of faculty scholarship seems to run something like the following. Many professors like to write articles and books. They may also enjoy teaching, but it is only scholarship that provides a visible representation of their marginal product. Professors want their scholarship to be treated as valuable by their institution—though there is nothing

obviously of value to the institution in such scholarship. So, professors—in their role as a hiring committee for the law school—are inclined to hire faculty and deans similarly enamored with scholarship. That reinforces the ethic of publication as the central measure of a professor's value to his institution, and ensures that his own scholarship will be valued. Those law schools with larger budgets will be able to hire away superior scholars from lower tiered institutions and in that way the same criterion is reinforced down the food chain. A *de facto* hierarchy will then develop as an artifact of this hiring process, regardless of any merit to the underlying criterion.

To reiterate, given that those who advance will have a stake in the maintenance of the standard of advancement they will seek to hire and promote those who share a stake in the established criteria. So, whatever virtues or vices there may be in legal scholarship it constitutes a kind of self-reinforcing criteria for advancement in the profession. In those disciplines where scholarship represents a positive externality to the world at large the generation of this externality is a fortuity of the self-interested behavior of the participants. But in those disciplines—perhaps law—in which it is at best of marginal value it is similarly the unintended byproduct of the need to have a criteria for advancement in the profession. Note that the tendency of those who publish to hire others who publish or aspire to publish is not fundamentally different than faculty hiring those of the same race, sex, religion, or political bent as oneself in order to garner allies and supporters. Though one will hear much huffing and puffing about productivity, scholarship like each of these other criteria, is not obviously in the institution's interest.

#### *E. Tenure*

Much is made of the institution of tenure. Many decry it as a source of inefficiency in university and law school administration.<sup>14</sup> And so it would seem. The notion that one cannot be fired except for gross incompetence, misfeasance, or malfeasance would seem to be a great incentive to shirking. Tenure is most often defended on the grounds of ensuring academic freedom.<sup>15</sup> There is less to either side of the argument

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14. AMACHER & MEINERS, *supra* note 7, at 27.

15. "Dismissing the worst—that is, most unproductive—tenured faculty members, which is a small percentage of the total, sends chills through the ranks of everyone who worries that they also are seen as, or might become, deadwood. If faculty want the assurance that tenure in practice means a life sinecure, which is not what tenure grants legally, they have strong incentives, often under the guise of academic freedom and within faculty committees that wield too much power, to protest any move against incompetent faculty." *Id.* at 42.

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than first appears. As for academic freedom, the payoff seems awfully small and the costs large. First, tenure seems neither necessary nor terribly effective as a device to protect academic freedom. The vast majority of university professors do not engage in anything remotely offensive to any political powers and those who do are subject to pressures other than dismissal that can quiet the timid.

But, it is on the other side of the equation that things are more interesting. Tenure, rather than being a net and avoidable cost to the university is the natural outcome of the political process of university governance and an institution that solves agency cost problems and encourages the faculty to make decisions in the university's interest. The model of the management of a private for-profit firm is not the proper analog for the administration of a university. In the for-profit sector the management operates the firm in the interest of the owners. In the non-profit university because there are no owners and the constituency that comes closest to assuming that role is the faculty as a body it is their interests that are promoted by management. So, the job security of tenure has become the most cherished perquisite that the faculty/owners allocate to themselves—gussied up in the language of academic freedom.

But it is not all rent extraction. There is an important benefit to the operation of the university from the grant of tenure to relatively senior faculty. It is the faculty that hires new professors. If the future employment of those who did the hiring were highly contingent and in the hands of administrators current faculty would not be inclined to hire those capable of surpassing them on whatever criterion of productivity is employed. For to do so would make it all the more likely that management would replace you with the very people you hired. It is only the security of one's own position that permits an indulgence of fostering the apparent interest of the institution.

### III. THE SORTING FUNCTION OF LAW SCHOOL

One of the most striking features of the law school market is how much one's future career prospects turns on the law school one has attended. Graduates of Stanford Law School and Western States School of Law are both permitted to sit for the California Bar exam, but if both pass that hurdle were they to meet for coffee to talk about their careers, they would quickly reveal—not discover—that they are in only the most remotely related employment markets.

While some attorneys are executing simple wills and real estate closing and representing defendants in DUI cases, others are structuring leveraged buyouts of public corporations, or arguing complicated patent cases before the United States Court of Appeals for the Federal Circuit. As a general matter the two never meet professionally because they never crossed paths in law school. They attended institutions in very different portions of the food chain.

Students who graduate from one of the top ten American law schools can—with the rarest of exceptions—rest assured that they will obtain a highly demanding professional position that will offer them the opportunity to rise in the profession. This will almost entirely be a result of the school they have attended rather than courses that they take, connections that they make, or their achievements in law school. At the other end of the spectrum graduates of low ranking law schools will at best be able to land a position as a journeyman attorney in a small firm, and more likely will simply have to hustle up a practice on their own. Why?

There is not enough time in five lifetimes to acquire enough knowledge—even if one could retain it all—to be an expert in even a small portion of the vast array of subjects covered by American law. On the other hand the number of truly unique skills and amount of knowledge necessary to allow one to learn the rest on the job as needed are probably contained in a typical two to four semester “legal research, writing, and advocacy” class. As for the notion of learning to “think like a lawyer,” I will admit that I have no idea what it means. Aside from the ability to think, write, and speak clearly, intelligently, carefully, and honestly there is nothing unique about the thinking skills required of lawyers. Those skills may be acquired and developed prior to law school, during law school, after law school, or never.

So what does one spend one’s time on during law school? All law students are required to attend three years of full time study, so the option of acquiring what one deems necessary and then getting on with one’s career is absent. The optimal course of study for the student turns on the market in which he is likely sell his services. At the bottom of the food chain, where passage of the bar exam is a significant hurdle, the student expects: (1) to be exposed to the core concepts in a wide variety of legal subjects; (2) to experience the repetition of classical forms of legal argument in a variety of subject areas; and (3) to be provided a course of study that will function as an extended bar preparation. These students cannot generally enter law school with confidence that upon graduation they will find a position that will permit them to specialize in a single pre-determined area of law. Instead they will have to be prepared to practice in a vast array of subject areas. Further, if they



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manage to be employed by a firm rather than being reduced to striking out on their own they cannot expect their place of employment to offer a formal or extensive training program. They will need to bring as full a toolbox of skills to their job as possible. Further, given that the need to obtain a job is uppermost in their minds, they especially value the opportunity to do internships while in law school in the hope that one will blossom into an associate position upon graduation. Here the interests of the regular faculty are served by having a large number of adjunct faculty teaching as many of the specialized courses as possible. Law schools—especially those in large urban areas—generally can hire adjuncts for a pittance in comparison to the salary of a tenure track professor.

This is in sharp contrast to what goes on at the other end of the food chain. The students at Yale understand, implicitly or explicitly, that the Yale law degree is the entry ticket into the upper echelons of the legal profession. If they fail to prosper after that it won't be because they took a course in law and literature rather than one on the UCC. They expect that when hired they will learn much of what they need to know on the job. It would defy economic logic if these beliefs, though mistaken or not shared by their prospective employers, persisted over time. But neither appears to be the case. The system seems to work.

Though top-tier law firms might prefer that students specialized exclusively in rigorous legal education, they will not substantially downgrade applicants who do not. Their attitude appears to be that the students who attend Yale Law School are the most intelligent in the nation, and usually among the most driven. Whatever misgivings they have about the course of study at Yale, they believe that the students did not get much stupider after three years of law school classes. Given that the practice of law is a mixture of a trade or craft where skills are honed by practice, and an art and science where creative, disciplined intelligence is the essential input, the employers will hands down prefer a Yale Law School graduate who took courses in law & literature, Icelandic blood feuds, critical race theory, and feminist jurisprudence to a University of Connecticut graduate who did not indulge in such non-traditional courses.

At some elite schools the indulgence of faculty offering and students taking non-traditional law classes is so pronounced that some students do not even take enough core classes to be properly steeped in the legal culture. A renowned Federal Court of Appeals judge once confided to me that when he was first appointed to the bench he hired his clerks from all the elite law schools, but after the first two years he dropped

Yale from his list having discovered that some of their graduates were simply not up to it. It was not their lack of specific legal knowledge that concerned him, but rather that they had not been acculturated into the law.

And then there is the wife of a colleague of mine, a Yale Law School graduate, who reports that when being interviewed for a clerkship the interviewer was surprised—though not displeased—to see that she had taken a course in the UCC. Such serious (boring) courses were apparently odd choices for Yale law students—especially those seeking appellate clerkships.

This odd divergence between the top law schools and the rest is unique among professional schools. What drives it?

The ABA requirement that all law students attend three years of law school is excessive. Those applicants to law school at the far right end of the distribution know that not only do they not need that much time in law school in order to practice, but they do not need it to acquire the kind of job they would like. So, they are not overly demanding as to the course offerings or their content. Indeed, given that the law is a profession—rather an art or a science—in which one must serve one's clients, many of the subject areas are not inherently fascinating. So, after an initial taste of traditional common law courses many students are all too willing to consume rather than invest in their law school education so long as further extensive investment is unnecessary to get one's foot in the desired door. At the top law schools, therefore, the demands of law students as to the curriculum are not the constraint that they are further down the foodchain. As for the faculty, their tastes are much like those of the students. The ins and outs of the UCC, the 34 Act, the rules of federal jurisdiction, and the IRC, are often not their cup of tea. Many would prefer to study and teach philosophy, literature, history or economics. So, if those subjects can be tangentially related to law that is what the faculty will offer.

#### IV. SUMMARY AND CONCLUSION

We return to where we started. The American legal academy is a strange beast.

While the welfare implications of Adam Smith's "invisible hand" may be hard for some to understand and embrace, not so the more pedestrian implications of his thesis. In the simple world of consumer sovereignty the consumer rules and all else flows from that. Every aspect of the firm can be traced back to how it serves the consumer's interest. But once we move away from that world to one in which private parties use the state to enforce cartels all becomes convoluted and confusing.

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So it is with legal education. The lawyers' cartel, the ABA, mandates three years of post-university law school education. The law professors' cartel prevents new firms from entering the industry. The ABA also requires (or required) that all law schools be non-profit institutions. And finally, given the lack of committed and interested trustees serving as more than a figurehead, the faculty emerge as the de facto owners of the law school.

So out of this strange mélange we get: (1) a faculty that seeks to dissipate the capital of the enterprise in current income; (2) a democratic faculty governance structure that encourages hiring based on all manner of invidious criterion for reasons of personal pique and politics; (3) measures of productivity that speak to the tastes, interests, and self-interest of faculty rather than to any necessary consumer driven market; and (4) a course of study in which some of the brightest young men and women spend their final year of law school "studying" feminist jurisprudence, critical race theory, and law and literature.

