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# Self-Interest and Sinecure: Why Law School can't be "Fixed" from within

David Barnhizer



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## **Self-Interest and Sinecure: Why Law School can't be "Fixed" from within**

**David Barnhizer**

### *Abstract*

*The issue of how best to do a legal education is being approached as if it were an intellectual and pedagogical question. Of course in a conceptual sense it is. But from a political and human perspective (law faculty, deans and lawyers) it is a self-interested situation in terms of how does this affect me? The reality is that for law faculty and deans it is mainly a life style, status, economic benefit and political situation in which the various interests protected by the traditional faculty slot placeholders [as well as the non-traditional practice-oriented teachers) are being masked by self-serving language best described as "high rhetoric". My point is that as some lawyers have told me, "people would kill to have your job." That is disturbingly close to being accurate. And if that is true then it offers a useful insight that "people would probably do almost anything to keep that job" once they have become part of the incredibly comfortable academic system inhabited by the American law professor.*

*If we were critiquing any system other than the one in which we work, law professors (as lawyers) would immediately evaluate that other system based on the effects of the inevitable sense of entitlement, privilege, self-interest, bias and resistance to change that affects any system. A central dynamic operating against real change in legal education is the very high level of individualized self-interest that characterizes the amazing job of the American law professor. This individualized self-interest produces a set of inchoate "work rules" that is at least as powerful as the work rules under which many labor unions operate. The rules allow the law professor unaccountable "space" to do whatever he or she desires in teaching, research, and external activity. This allows too many members of law faculties to treat their lucrative and privileged positions as a part-time job. As I suggest in this brief essay, very few beneficiaries of such a system voluntarily seek to alter its highly favorable terms of operation or are able to fully withstand the seductions of its privileges and perquisites. Most engage in convenient rationalizations that prevent real change because that would require them to lose the privileges and impose greater accountability and responsibility.*

*A result of the intense self-interest in which the American law professor operates is that recommendations that law school be modified to be more "practical", implement clinical programs and incorporate courses such as Trial and Appellate Advocacy, Dispute Resolution, Negotiation, Interviewing and Counseling, Transactional work and so forth will not be accepted as significant across-the-board educational reforms. Arguments aimed at achieving substantial improvements in legal education have been around for four or five decades. It isn't as if the premises of those arguments were obscure and a "great cloud of unknowing" suddenly stripped away. It is amusing to see people "reinventing the wheel" and acting as if they have suddenly achieved an intellectual epiphany that allows them to understand that American law schools are in fact in the business of educating people to become effective practitioners and responsible and principled professionals. But even though there is a strong*

*likelihood that in many instances the new attitudes being trumpeted are little more than cynical or desperate public relations devices rather than actual shifts in pedagogical mission and educational strategies, they may offer hope for significant reform. If so this will be due to the sheer desperation being experienced in many law schools as enrollments plummet, lawyers and recent graduates protest, and parent universities become unwilling to subsidize their law schools.*

### **“High Rhetoric” and the Self-Interest of Law Faculty**

The issue of how best to do a legal education is being approached as if it were an intellectual and pedagogical question. Of course in a conceptual sense it is. But from a political and human perspective (law faculty, deans and lawyers) it is a self-interested situation in terms of how does this affect me? The reality is that for law faculty and deans it is mainly a life style, status, economic benefit and political situation in which the various interests protected by the traditional faculty slot placeholders [as well as the non-traditional practice-oriented] are being masked by self-serving language best described as “high rhetoric”. My point is that as some lawyers have told me, “people would kill to have your job.” That is disturbingly close to being accurate. And if that is true then it offers a useful insight that “people would probably do almost anything to *keep* that job” once they have become part of the incredibly comfortable academic system inhabited by the American law professor.

If all the fuss about law schools providing enhanced skills education for their students and producing “practice ready” graduates was something that represented a sincere educational commitment on the part of law professors and deans rather than panic at the precipitous plummeting of law school enrollments and finances then the brilliant minds of law professors would have pursued the changes decades ago. Just one example can be found in Bellow and Moulton’s classic text *The Lawyering Process* published in the mid-1970s. It offered a coherent and comprehensive look at much of the system involved in the practice of law as well as a substantive methodology related to how to teach the fundamental skills and professional insights.<sup>1</sup>

### **It Really Isn’t “Rocket Science”**

I and other clinical teaching fellows in the early years of the Harvard clinical program initiated by Gary Bellow used the *Lawyering Process* materials and teaching strategies as integral elements of our teaching as we moved to other law schools. Of course important work was also being done by such people as Joe Harbaugh at Temple, Bob Oliphant at Minnesota and Tony Amsterdam at Stanford along with a number of others in what can be referred to as the modern skills, professionalism and social justice movement. Since that point there have been a steady stream of insightful works relating to the practice of law and the fundamental skills required of the lawyer, including my own book *The Warrior*

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<sup>1</sup> The Lawyering Process: Materials for Clinical Instruction in Advocacy (Foundation 1978).

*Lawyer* that examines the strategic work of Sun Tzu's *Art of War* and Musashi's *A Book of Five Rings* in the context of law practice, diagnosis, goal setting and strategic behavior.<sup>2</sup>

Recommendations that law school be modified to be more "practical", implement clinical programs and incorporate courses such as Trial and Appellate Advocacy, Dispute Resolution, Negotiation, Interviewing and Counseling, Transactional work and so forth have been around for four or five decades.<sup>3</sup> One of the problems is that although experiential learning can be a profound and effective learning strategy, it requires sophisticated teaching skills and attention to detail.<sup>4</sup> All experience is not positive and experience by itself can teach as many bad lessons and habits as good.

There is, in fact, a growing contradiction between professional excellence and the operating conditions and behaviors of much of the legal profession to the extent that experience in law practice by itself without mediation and guidance by a skilled professional instructor can lead to what most would consider unprofessional behavior and inadequate professionalism.<sup>5</sup> So while we are speaking of experiential learning we need to understand the potential negatives along with the significant positives that can be extracted from experience. Unfortunately, in my experience there is not that many law teachers capable of or trained in the array of skills required to instill the positive lessons in law students. Nor are there all that many people who have a realistic and substantive understanding of the conditions, culture and dynamics of law practice in its numerous forms.

It isn't as if the premises being trumpeted at this point were obscure and the "great cloud of unknowing" suddenly stripped away. From my point of view it is amusing to see people "reinventing the wheel" and acting as if they have suddenly achieved an intellectual epiphany that allows them to understand that American law schools are in fact in the business of educating people to become effective practitioners and responsible and principled professionals.<sup>6</sup> But, "better late than never" even though there is a strong

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<sup>2</sup> THE WARRIOR LAWYER (1997) [This book applies the strategic work of Sun Tzu's *Art of War* and Musashi's *Book of Five Rings* to the practice of law].

<sup>3</sup> The classic iteration is Bob MacCrate's report for the ABA on the importance of teaching the "skills and values" of the legal profession. See, MacCrate etc.

<sup>4</sup> See, "The Purposes and Methods of American Legal Education", 36 *Journal of the Legal Profession* 1 (2012); and "The Clinical Method of Legal Instruction: Its Theory and Implementation," 30 *J. of Legal Education* 67 (1979).

<sup>5</sup> See, "Abandoning an "Unethical" System of Legal Ethics", 2012 *Michigan State L. Rev.* 267", and "Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit," 17 *Georgetown J. of Legal Ethics* (2004).

<sup>6</sup> I offer references to my own works as a means of indicating just how long some of us have been attempting to bring such issues to the forefront of American legal education. "Redesigning the American Law School", 2010 *Michigan State L. Rev.* 251; "Of Rat Time and Terminators," 45 *J. Legal Ed.* 49 (1995); "Freedom to Do What? Institutional Neutrality, Academic Freedom and Academic Responsibility," 43 *J. Legal. Ed.* 346 (1993); "The Justice Mission of American Law Schools," 40 *Cleveland St. L. Rev.* 285 (1992); "The Purposes of the University in the First Quarter of the Twenty-first Century," 22 *Seton Hall L. Rev.* 1124 (1992); "The University Ideal and Clinical Legal Education," 35 *New York L.J.* 87 (1990); "The Revolution in American Law Schools," 37 *Cleveland St. L. Rev.* 227 (1989); "The University Ideal and the American Law School," 42 *Rutgers L. Rev.* 109 (1989); "Teaching and Testing Clinical Skills," LEGAL EDUCATION AND LAWYER COMPETENCY: CURRICULA FOR CHANGE (F. Dutille ed. 1981); "The Role of Practical Legal Education in the University Law School," in PERSPECTIVES ON LEGAL EDUCATION 278 (N. Redlich ed. 1979); "Clinical Education at the Crossroads: The Need for Direction," 1977 *B.Y.U. Law Rev.* 1025.

likelihood that in many instances the new attitudes being trumpeted are little more than cynical or desperate public relations devices rather than actual shifts in pedagogical mission and educational strategies.

Other than the significant expansion in the informational technologies that are being infused into the practice of law there is little new in the sudden burst of interest by deans, some law faculty, and the legal profession in advocating what is being termed “practice ready” legal education through a combination of strategies, including some form of what is loosely being called “experiential” learning. Frankly, it is easy to say “experiential learning” but hard to know just what it means, how to design effective experiential programs, and how to control the experiences for maximum learning. As suggested in this brief paper it is also difficult to understand how law schools can afford the new programs from a financial and staffing perspective.

At the same time I do not want to downplay the importance of the technological changes in relation to their impact on the legal profession and legal education. Two law teachers who are on the cutting edge of the transformations are Dan Katz and Renee Knake at the Michigan State University College of Law.<sup>7</sup> The “Special K’s” have been developing programs for MSU and elsewhere (including Westminster University in London with which I was affiliated) that seek to capture the nature of the shift and offer competitive solutions for law schools and the profession.

Such rethinking of the impact of information technologies on law practice, society in general in terms of privacy and governmental intrusiveness, and not coincidentally law school enrollments is vital for law schools and the profession. This is because the extraordinary capabilities of information management, mapping, extraction and research are altering the nature of a significant part of law practice. The tools provided by the ability to research, “mine” and manipulate data have eliminated a great deal of the time required on “lawyer” tasks. This has dramatically reduced the need for expensive labor in developing a considerable part of what lawyers have traditionally done in developing a case on behalf of clients.

The simple fact is that we have moved rapidly into a “doing more with less” era for lawyers and this requires not only adaptation by the law schools but means that fewer lawyers are needed to do the same (or an even greater) volume of work. I am told by a lawyer who has done a great deal of work in intellectual property that the patent bar is under enormous downward pressure because very large amounts of developmental legal work relating to patents is being outsourced to India where large numbers of very bright people are providing services at prices far below anything found in the US. This is the proverbial “tip of the iceberg” as to external competition for services in a transnational legal market. Many law firms are downsizing their partnership-track lawyers, reduced hiring of new associates, and replaced them with contract lawyers and non-lawyers who can do much of the work previously performed by associates. Not surprisingly, law schools and the legal

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<sup>7</sup>See, [http://www.abajournal.com/legalrebels/article/how\\_this\\_duo\\_is\\_trying\\_to\\_reinvent\\_law\\_school/](http://www.abajournal.com/legalrebels/article/how_this_duo_is_trying_to_reinvent_law_school/). “How this duo is trying to reinvent law school”.

profession are floundering under the pressure and uncertainty of profound and permanent shifts in the nature of law practice, what comprises law practice, and the rise of competitive forms of delivering legal services that did not exist even a decade ago.<sup>8</sup>

### **Public Relations “Packaging” or Real Change?**

There have been some gains in educating law students for entry into their lives as lawyers, although it has often been like extracting teeth. But numerous law schools have installed such “practical” courses albeit in a generally limited and patchwork way. A seeming irony is that just as financial crisis has hit American law schools due to declining enrollments, many law schools are claiming that they are implementing more clinical, skills and experiential courses. A reality in many instances is that they are simply “repackaging” existing courses for competitive reasons aimed at attracting applicants in a rapidly slumping market in which no one is able to predict the outcome with accuracy.

I could, for example, take the various courses I have taught over the years and pull them together for to describe an approach to preparing something close to “practice ready” law graduates as long as we are using an honest definition of what that can realistically be. From the perspective of courses that are typically thought of as skills and professionalism this includes in depth clinical work in in-house criminal and civil settings, “out-sourced” clinical experiences with a Legal Aid office, an environmental law clinical program in the law school, an externship program with lawyers and judges, and a “Semester in Washington, DC” externship with placements with NRDC, the Environmental Division of the Department of Justice and a House of Representatives Subcommittee dealing with environmental issues, including Superfund reform. In addition to these “real” experiential courses I have also taught courses in Interviewing, Counseling and Negotiation, Alternative Dispute Resolution, Legal Strategy, Pre-Trial Advocacy, Trial Advocacy, Advanced Litigation, Appellate Advocacy, Evidence from a Trial Perspective, and Legal Profession along with a wide range of other subjects (Jurisprudence, Criminal Law, Toxic Torts, and various Environmental Law courses).

In a seemingly odd way, I have always felt that the Jurisprudence course I taught was one of the most practical courses. This is because it helped students understand the structure of rules and principles underlying the Rule of Law and that make up judicial decisions and interpretations. *Jurisprudence* was taught as a 3 credit, first year course to law students in their second semester. The basic approach was to use Christie’s *Jurisprudence* text for the first half of the semester to familiarize the first year students with philosophical vocabulary and concepts. This involved a great deal of in-depth discussion and was also related in

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<sup>8</sup> “Abandoning an “Unethical” System of Legal Ethics”, 2012 *Michigan State L. Rev.* 267; “Lawyer regulation strategies—A personal view from the USA”, 17 *International Journal of the Legal Profession* 181 (November 2010); “Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit,” 17 *Georgetown J. of Legal Ethics* (2004); “ ‘On The Make’: Campaign Funding and the Corrupting of the American Judiciary,” 50 *Catholic Law Review* 361 (2001); “Princes of Darkness and Angels of Light: The Soul of the American Lawyer,” 14 *Notre Dame Journal of Law, Ethics & Public Policy* 371 (2000)

several instances to cases they were studying in other first year courses. Problems such as *The Case of the Speluncean Explorers* were also used as well as movies that included *Judgment at Nuremberg*. Primary coverage included Aristotle's *Politics* and *Nicomachean Ethics*, as well as Aquinas, Grotius, Pufendorf, Rousseau, Locke, Hume and Hobbes along with several American theorists such as John Rawls and Ronald Dworkin.

Developing the base in jurisprudential concepts on which the Rule of Law is founded allowed us to spend the second half of the semester analyzing the complete decisions in *Furman v. Georgia* (capital punishment) and *Roe v. Wade* (abortion). This was followed by extensive discussion, arguments, and role-playing exercises that included students serving as Supreme Court justices and lawyers who argued the cases to the Court. The goals included not only an introduction to jurisprudential concepts but demonstration of the roles of deep value systems and inchoate assumptions operating both in lawyers' argumentation and in judicial decision-making. Because it was an elective offered to first-year students it also had the goal of helping them integrate the analysis in other courses through helping them appreciate the conditions of judicial analysis and the imprecision of judicial doctrine. By the end of the course the students uniformly shared with me their opinion that they understood the legal system in important ways not generally reflected in discussions with other First Year students.

### **Staffing, Quality Control, Financing and Threats to Traditional Law Teachers**

As I hope is clear, the courses listed above can be described as a package that would seem to prepare law students to enter the legal profession pretty much able to "hit the ground running" and in fact I feel confident that this was achieved for many of the students who participated in a significant number of these courses. From regular feedback from students after graduating and entering the practice of law I think this feeling was shared. The problem is that depending on the specific course and the degree of monitoring and educational critique and feedback required, the permitted enrollment ranged from eight to twenty-four students at any time.

A challenging reality is that to construct an integrated system in which all students enrolled in a package of perhaps five of similar course offerings would require a significant expansion in staffing if the learning is to occur at a significant level. I participated several years ago in a clinical conference sponsored by UCLA at which a professor from a Chinese law school described her clinical program. Initially it was exciting to hear of the ideas and the fact that such learning had made it into China. Unfortunately, she went on to explain that she was individually responsible for supervising 300 law students. It simply doesn't work that way.

The pedagogical, staffing and financial dilemma is that at least in some forms such programs are generally much more labor-intensive in terms of faculty/student ratios than larger doctrinal courses and therefore more costly. They are competitive with smaller special interest seminars beloved by law faculty and these seminars are likely to become the victim of the "practice ready" movement as financial reality hits even harder than now. There are continuing issues of quality control with what are labeled "skills" courses (just as

with traditional doctrinal courses) and the availability of the programs has tended to be limited to a relatively small portion of a law school's students. Expanding such courses and programs in an effort to ensure all law graduates are as "practice ready" as can reasonably be accomplished during three or four years of formal legal education is a daunting challenge from the perspective of both cost and staffing. This is because, done well, such educational strategies require close observation, monitoring of performance, frequent feedback between teacher and student, and in many instances an added administrative component to ensure coordination, client record keeping (if a clinical course).

This does not mean that such "skills" courses must be taught by full-time law teachers with the highly credentialed backgrounds characteristic of most legal academics in doctrinal core courses. In fact in many instances doctrinal law faculty lack the experience, skills and commitment of the kind required to nurture the kinds of learning sought in the offerings. Christopher Langdell was dedicated to the idea of the law professor as "legal scientist" and for him this meant that Charles Ames represented the paradigm of the new law teacher—one not tainted by the "dirt" of law practice.<sup>9</sup>

One of Langdell's first acts was to remove Jurisprudence as part of the required course of study at Harvard. A major statement was needed that demonstrated the institution's commitment to the only seemingly acceptable intellectual methodology for a university during that period--science. Langdell provided this justification in his statement that: "If law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices."<sup>10</sup> Prior to Langdell's arrival, Harvard Law School had come to be regarded as in decline. It was said that: "No one took Harvard seriously" in those decades. It had become an essentially unscholarly place. Science . . . was no longer regarded as the object of study in a law school. The purpose of students of this time in the School, as well as in the later career of their generation at the bar, usually was practical and self-centered in the highest degree."<sup>11</sup>

Langdell's approach spelled the doom of the role of the experienced practitioner in law schools. He concluded that the actual practice of law was *unscientific* and therefore suspect. Langdell argued: "[A] man of mature age, who has for many years been in practice at the bar changes his habits with some difficulty. He has become used . . . to making himself a temporary specialist in a narrow field, and finds it hard to adapt his mind to the quite distinct profession of the teacher, whose field must be the whole law."<sup>12</sup> What was needed in Langdell's new world of scientific law was not law faculty experienced in practice but a new type of academic "scientist" who was not yet tainted by exposure to the confusing and distorting world of law practice. Enter the youthful recent law graduate

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<sup>9</sup> On this issue of actual law practice being seen as undesirable, see "The University Ideal and the American Law School", *supra* n. .

<sup>10</sup> Christopher Langdell, Address delivered Nov. 5, 1866, reprinted in 3 Law Q. Rev. 123, 124 (1887).

<sup>11</sup> *The Centennial History of the Harvard Law School: 1817-1917*, at 21 (1918).

<sup>12</sup> *Centennial History*, *id.*, at 26. (quoting Christopher Langdell).



James Barr Ames, Langdell's *new legal scientist* who, lacking experience, offered “purity of thought”.

### **The “Friction” of Faculty Self-Interest, Academic Privilege and Sense of Entitlement**

There are various approaches that can be used to coordinate and implement the “practical” curriculum on the basis that all law students should receive this form of education. To do this well, however, requires coordination, training, monitoring, administrative support and much more. It would also require the reallocation of financial resources and staffing changes. A central dynamic, and the generator of the “friction” generated by law school faculties and administrations relative to resistance to significant across-the-board reforms in legal education, is the very high level of individualized self-interest that characterizes the amazing job of the American law professor. This individualized self-interest produces a set of inchoate “work rules” that has been at least as powerful as the written work rules under which many labor unions operate. The cultural work rules allow the law professor a substantial degree of unaccountable “space” to do whatever he or she desires in teaching, research, and external activity. It even allows the faculty member to treat the lucrative and privileged position as a part-time job.

It seems entirely obvious that if we were critiquing any system other than the one in which *we* work, law professors (as lawyers) would immediately evaluate that other system based on the effects of the almost inevitable sense of entitlement, privilege, self-interest, bias and resistance to change that affects any system. Privilege, entitlement and the related factors listed above really stand for the ideas that humans strive to protect their “turf” and political fiefdoms from which they derive benefits and status. In such systems the controlling orthodoxy of any institutional structure defends its way of doing things through rationalization, rhetoric, and the distribution of rewards for supporting the system and more or less subtle sanctions for deviation. This has been the case in legal education for several generations.

For traditionalists particularly, the use of “high rhetoric” to describe the apparent wonders of legal education is intended to make it seem as if there are serious and deep intellectual matters involved in teaching law students as they are compelled to pass through the mandated process that is essentially the sole vehicle for entry into the legal profession. The countering reality is that law school has always been what Chroust labeled an “academic-professional” undertaking. The “dirty truth” is that American law school has always focused on skills and technical knowledge made up of the “pockets” of law practice (torts, contracts, procedure, criminal law, legal research, property, tax, corporations, commercial and securities law, and so forth). My point is that to the extent what is taught in American law schools is a theoretical and intellectual discipline it is one comprised of the compartmentalized and technical “theory” of property, contracts, tax, corporations, procedure and the like.

French Civil Law jurist Rene David has described the American approach to legal education in a Common Law system as a “meaningless mass of technicalities”.<sup>13</sup> This is wrong in the sense that the “mass” does have meaning, but it is meaning assigned by the dictates of a particular segment of law practice and by the inevitable fact that law teachers across generations have continued to operate according to a curricular and structural model and pedagogical technique in which they excelled as students.

This “endless repetition of the same” has been made easy by the power of the educational orthodoxy and accreditation rules that locked law schools into a particular form and content. But it has all been tied together with the bindings of self-interest on the part of the professoriate, administrators, the American Bar Association and the legal profession in individual states intent on protecting their markets.

### **The Best Job in the World (Until Now)**

Consider the typical terms within which law teachers and administrators function. The salary data are just for “ballpark” purposes. For the most highly rated law schools full professor salaries easily range between \$250,000-\$450,000 with significant health and pension benefits, additional stipends, released time from teaching, and lucrative consulting opportunities. The University of Texas received considerable attention when it turned out that some faculty in the law school received “loans” as high as \$500,000 that were forgiven and never repaid.

*Doctrinal or “traditional” law teachers:* Average \$150,000 salary plus subsidized health benefits, substantial retirement program, paid trips to interesting places, lack of oversight or accountability, several months per year on break, relatively minimal teaching responsibilities, consultancies.

*Legal Writing teachers:* Average \$75,000 salary plus fringes, retirement program contributed to by employer, one to two months break time per year, often long-term renewable contracts with expectation of continuation, control of schedule, and generally no scholarly production requirements.

*Clinical teachers:* Average \$75,000-\$80,000 salary plus substantial fringe benefits including health and retirement, one to two months break time per year, clinical tenure or long term contracts with expectation of renewal, generally no scholarly requirements, control of schedule if not a litigation-based clinic.

*Skills teachers:* Pretty much the same as doctrinal teachers depending on the law school, often tenure track, salary in \$120,000-\$150,000 on average, two to three months break time per year, travel, conferences, some scholarship but mostly technical issues related to particular skills and tactics, control of schedule,

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<sup>13</sup> “University Ideal”, id.

*“Scholars”*: \$150,000-\$175,000 average salary range with fringes, reduced teaching schedules, regular scholarly production, travel and speaking, significant schedule control, three months or more break time, access to significant research grants, salary supplements for appointed professorships.

*Deans*: tenure, salary averaging in \$250,000 range plus expansive benefits, travel, conferences, one month break time per year, limited to no scholarly production expectation, limited to no teaching required, but after a few years as a dean it becomes difficult to return to the traditional faculty culture and activity.

*Associate Deans*: \$150,000-\$200,000 salary range for longer contract in the year with administrative stipend, substantial fringe benefits, reduced teaching requirement to typical 50% course load, limited scholarly expectation, one to two month break time, travel and conferences, pathway to becoming a full-dean but academic/scholarly career can be sidetracked after two or three years of administration.

*Politically-Oriented teachers*: Tenure track as with other traditional doctrinal law faculty, teaching courses that they would not be able to teach in many other contexts, substantial element of teaching schedule spent on “political” seminars, travel and conferences, \$125,000-\$150,000 + salary with fringes, often women or minority faculty members, scholarship often “political”.

### **The “Seductive Sinecure” of the American Law Professor**

Think about the implications of the wonderful working conditions of “the best job in the world” and then consider how unlikely it has been for people holding those positions to vote for changes that alter that employment culture. The fact is that the job of the law professor is an incredibly sublime enterprise in which egos are stroked, significance is bestowed by the role, pay is substantial, collateral benefits are diverse and significant, and one can do whatever you want including basically “blowing off” the job once life tenure has been granted. What most people don’t understand is that being a law professor in America is pretty close to being able to live the lifestyle normally associated with being rich. The workload is not heavy compared even to other academic disciplines. The pay scale for a law professor is considerably above that available for most other non-administrative university positions.

The typical law professor in a doctrinal course teaches between three and four individual hour-long *classes* per week. My sister-in-law teaches philosophy in a university as an adjunct professor and she is responsible for five separate complete *courses* in a semester and is paid roughly 25% of a law professor’s salary for carrying a teaching load that is two to three times heavier. Interestingly, the adjunct model that has now come to make up more than fifty percent of the course offerings in the general university outside law schools may soon intensify its inroads into legal education. Given the economic straits in which many law schools find themselves as their admissions plummet there may be few other choices beyond closing for a not inconsiderable number of law schools.

Although tenure-track law professors are expected in theory to produce significant scholarship with the large amount of time remaining when they are not teaching, many do whatever they want for whatever reasons they desire. There are virtually no controls on how law professors spend their time. This includes putting in twenty or twenty-five hour workweeks (including teaching) while feeling entitled to use the rest of the time as some kind of personal “flex time”. While many cannot handle the absence of external accountability and pressure, in fairness, many law faculty do use the non-teaching time to produce occasional scholarship or to engage in public interest projects usually related to law. Some relatively few law faculty members provide exceptional work through scholarship and service. I could probably list between five and seven members of my former law faculty (out of 35-40 faculty members) who deserve such recognition along with another five who should receive “honorable mention”. And as to the work of legal scholars, it is certainly not their fault if after putting in a year’s work researching and writing an article for a law journal data unfortunately indicate that a law review article is read by only an average of three people.<sup>14</sup>

There are also significant status and ego advantages to being a law professor although these vary depending on where one teaches. It opens doors for the individual that would otherwise not be available. Some of these involve expense paid travel to some fascinating places as well as appointments to boards and commissions seeking the advice or cachet associated with a law professor. Plus, people actually tend to listen to you when you speak and think you must be “pretty smart”. Some students even look up to you for your perceived wisdom and intellect although given the breakdown in cultural behaviors and rise of cynicism in our society this admiration seems to be on the wane in a culture without heroes.

At the core of the problem is not only that the position of law professor has so many “perks” but that it makes a person unable to tolerate an authoritarian structure of governance. You quickly reach a point where no one can “tell you what to do!” and feel entitled to operate in that context as you somehow have actually earned the privilege of lifetime employment at a substantial salary. Historically law deans do have some power in terms of salary and scheduling but ultimately the task of being a dean involves a combination of having been part of the academic culture and forming relationships you don’t want to damage, not wanting to create an intensely negative work environment by fighting against a combination of apathy and resistance to change, and operating in a context that I have heard described as “trying to herd cats through a cemetery at midnight without a lantern”.

A result is an anti-change and anti-authority mindset on the part of law faculty and unwillingness by deans to fight through the resistance. This is because change would

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<sup>14</sup> “Prophets, Priests and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America,” 50 *Pitts. L. Rev.* 127 (1988); “Natural Law as Practical Methodology: A Finnisian Analysis of *City of Richmond v. Croson*,” 38 *Cleveland St. L. Rev.* 15 (1990); “The Virtue of Ordered Conflict: A Defense of the Adversary System,” 79 *Nebraska Law Review* 657 (2000).

nearly always impose added (or simply different) responsibilities on the law teacher or a change in desired behaviors. This highly conservative traditionalist mindset works within the academic system from the perspective of the individual beneficiaries who are empowered to do whatever they want. But it also renders the law professor virtually unemployable in contexts outside legal academia because you have a very hard time “taking orders”.

One thing I noted during my years of law teaching is that US law professors tend to have an extremely limited concept of working as part of a team and learning how to subordinate one’s own individual interests to “the greater good” of a larger collaborative effort. This is cleverly masked by intellectual rhetoric but as a general rule traditional law professors are not team players. This is likely a combination of the personality traits of law faculty and the effects of the seductive environment of legal education. A consequence, however, is that members of a law school faculty are pretty much useless as employees of bureaucratic organizations after as little as five or six years of academic life, perks and privilege.

This fact is likely to create enormous tension and hostility on the part of law faculty who face the prospect of significant change in what they do or even the specter of downsizing. This includes clinical and legal writing teachers as well as the traditional doctrinal faculty, because the simple truth is that as the law schools draw down financial resources and seek new ways to deliver a legal education, one of the only ways to do this is to eliminate faculty positions as they are currently defined. A result is that there will be increasing tension on the part of traditional faculty who see their world shrinking and changing. This works at least as much on the part of legal writing and clinical faculty who have very good employment situations with benefits (even if paid less than traditional tenure track law faculty) and are unlikely to be able to replicate that situation if thrown out onto the open market of a contracting and aggressively competitive legal profession that is itself in trouble.

The non-accountability, “space” to do whatever one desires, self-interest and resistance to even moderate change was workable as long as the world of law practice employment was continually expanding. But as it has contracted, the theoretical marketability of law faculty who always assumed they could return to well-paid jobs in private practice has disappeared. Now faculty are caught in a situation in which they are not welcome back into practice by high paying employers, are not oriented to or have the skills for smaller practice contexts, and are certainly not possessed of the kinds of entrepreneurial skills and competitive drive and savvy that would allow them to create a successful life in a new law practice environment where clients and jobs are scarce. The diminished employability for law teachers who might be in danger of losing their jobs as law schools adapt to the rapidly changing circumstances of a shrinking resource base and demands that they alter how they educate, applies at least as much to Legal Writing and Clinical teachers. In many law schools needed changes will be resisted not only by traditional doctrinal teachers but by long-term writing and clinical faculty who are convinced that their forms of pedagogical experimentation are the “best” ways of educating law students.

### **Other Sources Resisting Change**

It isn't only the law schools that have created a bureaucratic system filled with internal "friction" creating resistance to significant change and innovation. Over the decades numerous "players" have established fiefdoms that are resistant to change, some simply from tradition and others for economic reasons or because they have been co-opted by the traditional institution of law school. This includes the ABA's Section on Legal Education and Admission to the Bar through its accreditation role and responsibilities. Along with this are the State Supreme Courts that in a system that accepts the idea that lawyers must be admitted on a state-by-state basis to gain the right to practice in a specific jurisdiction operates as a highly effective monopoly system. The state-by-state admission requirement erects significant market barriers that protect the law practices of lawyers in those jurisdictions.

Along with these barriers are those of the LSAC (Law Schools Admissions Council), the Bar Review and Examination industries, the more recent but highly profitable CLE (Continuing Legal Education) industry, and the Legal Publishing "Industry" that with approximately 125,000 law student "customers" each year in a largely captive market represents something close to \$100 million in annual sales assuming students average \$800 in book expenditures. In a world where hard copy book publishing is on the wane having a largely captive market serviced by publications by law faculty committed to traditional formulations of curriculum offers an important source of guaranteed sales.

### **"What If ....?"**

The reason I have sketched out these "facts" is that it might make the situation clearer if we put aside "what is" and approach the analysis from a fresh perspective. One question that could be asked is what are the best ways to educate lawyers in the US? A second is whether the same methods are best suited to all individuals who are seeking to become practicing lawyers and whether it makes sense to force all prospective lawyers in all contexts to undergo the exact same preparation or whether there are basic differences in what lawyers do that suggest different educational methods and/or content? Finally (for the moment) even if there are differences, is there a common set of educational strategies and content that we think all individuals who intend to become lawyers should be exposed to? This presumably would apply differentially to graduates who earned a degree of the kind that allowed the possibility of representing clients. A different set of rules would be applicable to graduates whose degree did not automatically allow them the opportunity to take a bar exam and provide general representation in the way that is now accorded by the completion of the graduate law degree.

Rather than being monolithic the legal profession, including the many careers law graduates pursue that are not definable as law practice, is very diverse. Yet even with these radical differences law schools in America operate essentially in lockstep. Curricula are nearly identical across the nation. Faculty backgrounds are very similar with a very high percentage of law teachers coming from a very small number of law schools generally thought of as elite. Texts and other materials are from the same limited group of publishing companies and dominated by the easily recognizable names of a limited number

of authors from a limited number of highly-ranked law schools. Even though admission to practice is state-by-state the bar exams taken in those states are pretty close to identical given the subject matter and the development of the Multi-State Bar Examination along with a pretty much ridiculous national examination on legal ethics.

A result of the identical law school curricula and the defined subject matter on all the bar examinations around the US is that it provides a justification for law schools to offer an education that allows students to pass the examinations that represent a rite of passage after spending more than \$100,000 obtaining their law degrees. This in no way justifies the rigidity of most law schools in curricula and teaching methods. The reality is that there is a depressing “sameness” to American law schools in which an outside observer might conclude they were clones fashioned from a single template.

The different contexts of law practice represent distinct approaches depending on what the individual desires as part of their course of study or intends to do on graduation. This is considerably less foreign than a current devotee of the traditional law school might conclude. It could be as simple as the creation of different “majors” in law school in which a student focuses on a particular area of law practice along with a basic set of introductory experiences.

Assume we are in a situation where there were no law schools and someone comes up and says “I will provide whatever you need to create the best approach to educating people to become lawyers and to serve as effective representatives of their clients and contributors to a society founded on the ideals of the Rule of Law”. This person who could be Bill Gates or Warren Buffett, offers: “all I care about is how you design the system and designing what is the best way to prepare people to practice law”. What would law school look like at the end of that planning process?

### **Possible Competitive Solutions Depending on the Nature of the Specific Law School**

At this point I simply want to set out some of the strategic variables that can buffer or overcome some of the most serious effects of the changes law schools are experiencing. There is no single choice that could be most effective because the specific conditions vary depending on the particular law school, applicant and employment markets to which the school has access, reputational and programmatic realities and opportunities, sources of funding and degree of competition with other law schools in the specific markets served by the law school. Large-scale or macro-systemic factors have different impacts on most law schools. There are also context specific micro-system dynamics that depend on factors such as a particular school’s national status or lack thereof, geographic location, applicant and employment markets served, public or private funding stresses, and number of competing institutions in the specific territorial or employment niche markets.<sup>15</sup>

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<sup>15</sup> See, Karen Sloan, “Public universities begin furloughing employees — and law schools are not exempt” February 12, 2009, National Law Journal [online only],

One does not have to go further than the *US News & World Report's* annual ranking of American law schools to understand that the world of legal education is comprised of "haves" and "have-nots". These are comprised of internationally and nationally prominent institutions, regional and state-dominant law schools, and a host of largely localized "wannabes" whose faculties espouse Harvard and Yale principles as justification for their mostly unread scholarship and for use of the teaching methods to which they were subjected when they were law students.

The economic forces forcing changes in legal education are coming from every direction and will prove irresistible. The writing is "on the wall" for law schools if they only bother to read the message. Law schools are finding they share the need with other industries for a combination of actions that include downsizing of staff due to reduced student enrollment and development of alternative educational offerings other than those offered as part of the traditional law degree. Among the greatest sources of pressure will be budget cutting necessitated by mandated reduction demands from parent universities and state governments, along with lower revenues from fewer students.<sup>16</sup>

Schools such as Harvard and Yale will continue to exist without any real difficulty but will be affected by issues of demand, the incredible costs of attending such institutions, and applicant quality. The competitive future of the "elite" law schools cannot be disconnected from the fact that the highest paying jobs in "Big Law" are drying up for new graduates. This fact is known, and there are few other options for earnings at the level required to pay off a \$100,000 to \$150,000 educational debt of the kind required to attend those institutions. This ensures that a large law school such as Harvard will need to reduce enrollment. Smaller and more specialized institutions such as Yale in which all accepted applicants strive to change the world, or become US Senators or President will dip lower in the credentials of its applicant pool.

Even this will have competitive implications. The traditional elites representing perhaps six law schools considered truly national (Harvard, Yale, Stanford, Chicago, Columbia, Michigan) along with others that are quasi-national or regionally dominant (Georgetown, NYU, Texas, Northwestern, Emory, USC, Pennsylvania, Cornell) will siphon off applicants that had attended other well-regarded but lower ranked law schools. This will force those institutions to reduce their size or adjust the quality of admitted students downward. In that regard, the "rich don't get richer" but the "poor definitely get poorer".

Outside the schools traditionally classed as the elite institutions, many law schools are entering an era in which their student bodies and faculties must shrink, where job security is reduced, life-tenure is questioned, and the level of acceptable productivity takes on a different meaning than showing up twice a week for classes and producing an occasional article every two or three years that is read only by a handful of academics who already agree with the author. There are, however, competitive options for many law schools to

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<sup>16</sup> December 3, 2009, "The Proliferation of Public Sector Employee Furloughs and Layoffs", Daniel Mitchell (UCLA Management) has posted on the LERA Listserv a link to an article that highlights the proliferation of public sector employee furloughs. [http://lawprofessors.typepad.com/laborprof\\_blog/2009/12/the-proliferation-of-public-sector-employee-furloughs-and-layoffs.html](http://lawprofessors.typepad.com/laborprof_blog/2009/12/the-proliferation-of-public-sector-employee-furloughs-and-layoffs.html).



pursue. They include:

- Withdrawing the American Bar Association's accreditation role and creating a new mechanism.
- Recognizing that state-by-state admission to law practice is little more than a market protection system designed (or with the predictable consequence) of protecting individual state's lawyers from competition and impeding the free movement of legal services in a national market.
- Designing local and regional consortia among law schools aimed at reducing costs, combining resources and focusing on specific needs in that area.
- Implementing Distance Learning Options aimed at cutting faculty costs and creating alternative learning methods, particularly in courses that are aimed primarily or entirely at "information transfer".
- Creating an Attractive Market Niche (dispute resolution, trial, transactions, health, medicine, insurance, small-scale practice concentrations, etc.) aimed at attracting applicants and serving the needs of the school's primary employers of law graduates.
- Altering Institutional Scale by downsizing student enrollment to reflect the ability to maintain a student enrollment base of substantial quality while recognizing the reality of the saturated lawyer market in the regions most relevant to employment of a specific law school's graduates.
- Downsizing Faculty as a cost-cutting move aimed at the reality of smaller law schools with limited financial resources and more restricted enrollments.
- Using Shorter Term Contractual Faculty as means to cut costs and attract a cadre of lawyers and judges who have a more focused and substantive understanding of law practice and critical social issues as played out in the system of law. This contrasts with the limited professional experience base of many "traditional" law faculty members who not only enter law teaching with minimal experience but become increasingly attenuated in their connection with the world of law practice in the culture of legal academia. There is a "double whammy" for many law teachers who had very little experience prior to teaching and soon find their knowledge and experience increasingly obsolete and disconnected from the professional world for which they are preparing law students.
- Using More Adjunct Faculty not only as a cost cutting move but a means of increased programmatic flexibility and adaptation. If a law school created team-teaching courses in which a traditional faculty member and an adjunct taught a course

together for perhaps two years that experience would go far to help the traditional teacher update and improvement on “practice ready” knowledge.

- Eliminating Esoteric Courses as means of focusing educational attention more on what lawyers actually do as opposed to what current law faculty members want to teach. Students under the current system are being asked to carry the burden of funding faculty research or subject matter *esoterica* that in many instances make no contribution to their educational experience. Many seminars in such areas of faculty interest attract very small numbers of students to the point that they are contrary to a law school's primary mission.
- Increasing Faculty Workload as means of concentrating on the mission of teaching and reduction of law faculty scholarship.
- Eliminating Tenure for all or all but a central core of faculty as means of creating a lower cost and more flexible model that can be adjusted more easily to financial realities of declining enrollments and budgets.
- Eliminating Publication Requirements for some faculty based on the premise that from an educational perspective even though the law schools are accredited to educate aspirants to law practice a significant proportion of academic legal research consists of a small group of faculty committed to a particular perspective speaking only to “the choir” of others who already share their views. There are some “real scholars” in American law schools but the numbers are not great relative to the population of law teachers.
- Radically altering what is considered essential to a law school library including a significant shift to electronic information systems and away from expensive hard copies of law reports and other texts.
- Creating Collaborative Consortia among law schools to reduce costs and offer not only economies of scale but increase the ability to offer innovative programs.
- Improving Job Marketing in Target Areas: But there is limited ability to alter the traditional markets, particularly in a time where the employment world has changed dramatically (and perhaps permanently) and the competition for jobs is far more intense.
- Reducing Tuition: This can be done due to cuts in faculty and staff, as well as library budgets. But if applications drop and law schools reduce student bodies at the same time that states are deciding they cannot afford to subsidize law students due to lack of need and demand then reducing tuition can end up as a “death spiral”. There are public schools (Michigan, Virginia and Michigan State) that charge private tuition and do not depend on state subsidies. This may be one strategy for a number of publicly funded law schools.

- Creating Tuition Forgiveness Programs for Graduates' Public Service. This is a nod toward a whole additional subject, the way to use technology and the new market pressures to establish legal services for the middle class in a way that make a decent living possible for young lawyers and provides better access to the legal system for people who need help but can't afford it. This may expand the concept of who is included in the idea of "public service" in a Rule of Law system where access to lawyers and competent service is beyond most peoples' financial capacity.
- Accessing New Applicant Markets by such things as creating 3/3 programs with early law school enrollment for university students prior to graduation.
- Creating New Types of Degree Programs: This offers more hope than some other options because many people want to possess legal knowledge even if they don't want to practice law in the traditional sense. This could mean Corporate Law degrees, Health, Real Estate, Insurance or even Transactional or Alternative Dispute Resolution degrees. Many of these could be accomplished in a year to 18 months at significantly lower expense and could open up entirely new markets for law schools.
- Possibly reducing the formal period spent in law school to two years while allowing the right to engage in some forms of law practice after receiving that abbreviated degree. Along with this could go various kinds of study and/or certification programs for which the successful completion could expand the types of law practice allowed the lawyer. Part of this could be a qualitative upgrade of the CLE offerings to make them more extensive and sophisticated study than currently found in the "CLE mills" that have arisen.
- Designing skills-oriented interactive computer simulations in which the law students perform professional tasks including analysis, fact development, case and dispute diagnosis, interviewing, negotiation, trial and administrative presentations and so forth. Of course, a sophisticated set of such computer-based simulations could also supplant a portion of traditional informational face-to-face teaching by flesh-and-blood law professors. The reality is that law faculty members can either learn how to utilize such technologies or wither away with some rapidity in many law schools. I love tradition, but "business-as-usual" simply does not work in a world filled with less expensive and often more effective options and with students whose perspectives and learning modes are of a quite different nature than traditional law teachers.
- As several law schools are now doing, including Cleveland State, one innovative approach is to create an "incubator" in the law school in which new graduates engage in law practice in ways that enhance their professional skill development. Given the concerns in the legal profession about a lack of adequate training and jobs for lawyers, and the fact that many new graduates are setting up solo practices because they lack alternatives, the "incubator" can be a device to enrich the lives of

new graduates while expanding the availability of legal services. It is possible that such programs can also increase law students access to the complex dynamics of the practice of law at important points in their educational experience.