The Aging of the American Law Professoriate

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To understand the implications for law schools of what is occurring we need to gain a sense of what universities are experiencing overall. What is occurring in law schools relative to faculty demographics is due to four main factors. One is declining resources caused by severe enrollment slumps. Related to this is the need for fewer teachers to instruct increasingly smaller student bodies. A third consideration is that the “corporatization” of universities has created a situation in which university boards and the increasingly business-oriented administrations of universities are seeking to recreate the institution in ways that provide university managers with greater flexibility and control over faculty and core elements of the budget. This involves eliminating tenure track positions when possible, replacing those positions with less protected teaching classifications than tenure track, cancelling the expenditure in part or in toto, or shifting the resources to administrative staffing needs. A fourth factor is that law schools and universities generally are populated by increasingly older tenure track faculties because fewer tenured professors have elected to retire since the 1994 removal of mandatory retirement rules.
This creates a more expensive faculty, one that tends to present an obstacle to change, and a barrier to the hiring of younger and usually more diverse “replacement” faculty.

A consequence of all this is that deans and law faculties are facing a situation where they can’t “reload”. For some law schools that fact will be irrelevant since there is an increasing probability a surprising number will be closed by their parent universities or be dissolved if they are not linked to a university. But for many other law schools the aging of their faculties produces both a benefit and a dilemma. The declining numbers of law students attending law school is generating a corresponding drop in demand by law schools for traditional tenure track faculty. Universities are grasping for solutions aimed at paring the ranks of expensive senior tenured professors but given the protections granted by tenure those solutions are expensive and uneven.

As indicated in a report in the *Wall Street Journal*: “Law schools across the country are shedding faculty members as enrollment plunges, sending a grim message to an elite group long sheltered from the ups and downs of the broader economy. Having trimmed staff, some schools are offering buyouts and early-retirement packages to senior, tenured professors and canceling contracts with lower-level instructors, who have less job protection. Most do so quietly. But the trend is growing, most noticeably among middle- and lower-tier schools, which have been hit hardest by the drop-off.”¹ Since senior tenured faculty members are not retiring, in many instances only a very small “space” is being opened up for new and [presumably] younger faculty. In other instances no slots are opened because the reduced costs are written off against reduced revenues or the funds diverted to other uses with the tenure track slot eliminated.

There is no question that tenure track faculty members not only in law schools but throughout academia are putting off retirement. The result is that faculties are aging dramatically and fewer entry-level positions are available. Some in the academic world consider this to be a situation that could produce intellectual stagnation, reduced scholarly productivity, a generational “disconnect” from younger students two generations removed from the faculty member, and a long-term barrier that prevents law schools (and universities generally) from bringing in “new blood” in the form of entry level faculty members.

I isolate the “tenure track” component of faculties because the university world has “flipped” over the past two decades to the point that tenure track faculty status is something enjoyed by only about one-third of overall university faculty. On the surface the situation has not changed quite as dramatically for law schools but changes are taking place in law schools that will have important consequences for quite a few of those institutions. In many law schools there has been a reduction in the number of tenure track slots along with a rapid increase in “quasi-tenured” slots for teachers engaged in clinical and legal writing activities. There are also far more law school courses taught by adjunct teachers than is generally understood.

¹ Paul Caron, “WSJ: Law Schools Slash Professor Jobs as Enrollments Drop”, Tuesday, July 16, 2013; Wall Street Journal, “Amid Falling Enrollment, Law Schools Are Cutting Faculty”.

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As I suggest in this brief analysis the claim made in a recent article that a main problem is the number of senior professors on university and law school faculties and that those older faculty members are somehow harming students is in many ways a disingenuous posturing aimed at masking other agendas. This does not mean there is no need to bring in younger personnel to ensure the dynamic continuity of the institution. But, ironically, one of the biggest obstacles to this supposed "rejuvenation" occurring is not the increased tendency of senior professors to stay on the job longer. The challenge is posed by the combination of declining applications to law schools producing shrinking financial resources, coupled with the tendency of the host university to freeze, eliminate and "cannibalize" the slots that are opened up by faculty retirements.

Are You Kidding Me?

To understand the implications for law schools of what is occurring we need to gain a sense of what universities are experiencing overall. A recent (rather tasteless) article argued: “Professors approaching 70 ... have an ethical obligation to step back and think seriously about quitting. If they do remain on the job, they should at least openly acknowledge they're doing it mostly for themselves.” ² In “The Forever Professors: Academics Who Don’t Retire Are Greedy, Selfish, and Bad For Students”, the insensitive author added: “The average age for all tenured professors nationwide is now approaching 55 and creeping upward; the number of professors 65 and older more than doubled between 2000 and 2011.” The author’s most intellectually savage comment [beyond “greedy” and “selfish”] was that: “faculty who delay retirement harm students, who in most cases would benefit from being taught by someone younger than 70, even younger than 65.”³ All I can say is “OMG!” how can these doddering demented cretins be so irresponsible as to do that to these innocent and needy young people?

There are numerous reasons not to retire at 65 or 70. Contrary to the implications of The Forever Professors prudence is not the same thing as selfishness. Nor is a continuing commitment to the enterprise of teaching something of which faculty in the upper levels of seniority ought be ashamed. Given the continuing uncertainty in our economy there should be a concern among many older faculty members about the sufficiency of post-retirement resources. Although I am not going to go back to uncover the precise details data I have previously reviewed indicate that Arts & Sciences faculty have salaries considerably lower than law school faculty, sometimes as much as fifty percent on average. This has significant implications for an individual’s quality of retirement. There are, however, institutional consequences to the choice not to retire at a point historically considered appropriate and one on which universities based many of their budgetary considerations and faculty hiring and retention policies. Reality is awkward.

³ “The Forever Professors”, id.
Although the diatribe against professors at the upper ends of the faculty age range in *The Forever Professors* who opt to stay on the job is biased and unprofessional, the undeniable fact is that tenured law school and university faculties are getting older. As I indicate below, so are university presidents who on average are nearly ten years older today than only two decades ago. There are consequences, good and bad, associated with the chronological aging of the tenured professoriate. But a number of the core assumptions behind laments such as are presented in *The Forever Professors* are banal, bigoted and biased. Since the author is female we might even condemn the observations as “matronizing” and they are particularly so since the greedy, selfish, senile, incompetent, unproductive class of people of whom she speaks is comprised predominantly of older white men—lamentably the only segment of American culture of which it is acceptable to project stereotypical criticisms. I freely admit that some of my best friends fall into this category.

**What Is the “New Normal” in Continuing Productivity?**

In a society that increasingly prides itself on celebrating the “new normal” it is an obvious and apparently uncomfortable fact for some that the “new normal” in academia includes a faculty demographic where the “middle” of “middle age” is now around 65. This means that people who would have previously retired at that age or even earlier are going to stay around considerably longer than previously. Improvements in health care and physical activity regimens that inhibit the most deleterious effects of early aging have altered the equation for physical, intellectual and emotional health.

Many people in relatively non-stressful occupations such as university teaching and research are consequently able to remain productive and vital considerably beyond what we long-considered to be the traditional norm. On the one hand this is a wonderful development that allows universities and law schools to harvest the wisdom of lengthy experience and continue to receive proven teaching ability from people who are still able to communicate effectively in classrooms, scholarship and public service activities. On the other hand, in a shrinking system that has come to count on the older “rhythms” of retirement holding true, the recent failure to retire by productive older faculty members creates a different system where new tenure track appointments are blocked and efforts aimed at hiring new and younger faculty run up against an unanticipated “dam”.

The “Forever Professors” critique stated forcefully that it might be actually harmful to have senior professors teach young students from whom they were decades removed in experience and interest. The harm, I suppose, is that the critics fear the existence of an “inter-generational disconnect”. This suggests the degree to which superficiality and banality dominate a culture in which we are continually permeated with media and advertising messages that elevate the desires of a “young demographic” to attract audiences and consumers for commercial purposes. What could elders in a society have to say to the youth of the culture that would be of any depth or significance?
Applied to law teaching I think that such attitudes are abysmally stupid variations on things like target groups on television, movies and advertising that shape all their messages to “reach the demographic” of a particular age range. Nor, in any event, even if senior faculty decided to retire and in theory open up resources for hiring less inexpensive “kids” to teach other “kids”, in many instances the parent universities would suck up the freed resources and freeze or eliminate the faculty position. A result of such behavior is that a law school doesn’t receive the resource benefits of the retirement and the budget is reduced, along with the teaching capacity.

This suggests the underlying issue behind the complaints about senior faculty remaining longer than anticipated in the traditional pattern has little or nothing to do with declining productivity by senior faculty. It is part of an agenda aimed at matters such as faculty “reloading”, the desire to implement affirmative action and diversity strategies given that the professoriate in the over sixty-three and up range is dominated by white males, cost reduction aimed at eliminating those with higher salaries, and the movement in universities to reduce the power of tenure track faculty who are sometimes seen as obstacles to rapid change, adaptation and innovation.

How Far Along Is the Forever Professors “Atrophy”?

While the observations offered in The Forever Professors were written in the context of Arts & Sciences disciplines they are also applicable to law school faculties. It is useful, however, to have an understanding about the overall conditions involving aging of university faculties. The shift in faculty demographics has not occurred overnight but can be specifically linked to the 1994 elimination of a mandatory statutory retirement age. That change has had predictable consequences since faculty could no longer be compelled to retire at 65.

A 2004 analysis in the Harvard Crimson observed: “The country’s oldest University is getting older. Today, seven percent of Harvard’s tenured professors are over age 70. With more professors staying on to teach well into their 70s, the average age of faculty members is rising, and the age gap between faculty and students is widening. … Today [2004], 36 percent of full time faculty across the nation are 55 years old or older, compared with 24 percent in 1989…. At Harvard, these numbers are even more pronounced: 36 percent of the faculty… [are] now 60 or older. … 7 percent of the faculty are older than 70.”

The reporter added: “In his annual letter to the Faculty of Arts and Sciences (FAS), Dean of the Faculty William C. Kirby calls for a “rejuvenation” of the faculty, a push to recruit younger and more diverse junior and senior professors. But in the meantime, many professors fear the change in demographics might have adverse effects on pedagogy, faculty diversity and hiring.”

4 “Older Faculty Stay On at Harvard: Ten years after the end of mandatory retirement, the Faculty has aged”, Rebecca D. O’Brien, CRIMSON STAFF WRITER February 12, 2004.
5 “Older Faculty Stay On at Harvard”: id.
My conclusion is that there have been no negative effects on pedagogy, at least in law schools, but there have been significant ones related to hiring as university budgets come under increased pressure and tenure track faculty slots are filled with longer-term professors. As to diversity, I speak of it and the concept of “role modeling” at some length below. But I want to add at this point that what is going on has less to do with age than with the push to “de-tenure” university and law school faculties.

The System Has “Flipped” and the Tenure Track Shrinks

The post-2004 situation upward age shift noted above on the Harvard faculty did not improve and hiring has suffered in the overall university world since the economic downturn of 2008. Numerous universities are treading water in terms of faculty and others are cutting back. A 2011 survey estimated that 73% of professors with tenure were between the ages of 60 and 66 with a significant number over 66. The lead researcher in that study estimated 75% of the professors at those ages admitted they had not begun to make preparations for retirement due to the ongoing financial crisis and/or the desire to stay on the job. A 2013 survey reached similar results about retirement by senior tenured faculty.  

Kazar and Maxey describe the radical extent of the shift, noting that the balance has “flipped” over the past several decades. They indicate: “In 1969, tenured and tenure-track positions made up approximately 78.3 percent of the faculty, and non-tenure-track positions accounted for about 21.7 percent.... By 2009, data from the National Center for Education Statistics’s [sic] Integrated Postsecondary Education Data System show these proportions had nearly flipped; tenured and tenure-track faculty had declined to 33.5 percent of the professoriate, and 66.5 percent of faculty were ineligible for tenure. Of the 66.5 percent, 18.8 percent were full-time, non-tenure-track, and 47.7 percent were part-time. While the numbers of non-tenure-track faculty have grown the most at community colleges, they make up a large portion of the faculty at all institutional types.”

These data provide insight into the reality of the “aging professoriate crisis”. They reflect a dramatic move by universities away from the tenure track model. Not only do a majority of university faculty not occupy tenure track positions but a very large number of teachers are part-time teachers and adjuncts with little or no job security. Even if all the negative comments about senior faculty in an advanced state of productivity decline were accurate (and I do not believe that) the senior faculty makes up such an increasingly small proportion of the total of university teachers that it is difficult to envision much of a problem not to mention a “crisis”. They almost surely do, however, represent a comparatively large budget line for universities and a roadblock to the hiring of younger faculty with privileged “diversity” characteristics.

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Tenure Track Professors are an “Inconvenience” for University Administrators

Tenure track faculty groups represent a countervailing power bloc that is often incompatible with the managerial needs and desires of university administrations. Pursuant to the rules governing such faculty and their traditionally recognized governance rights, tenure track faculty members also represent a political bloc that inhibits certain kinds of change within university departments. Tenure track faculty members *en masse* are a source of friction and inhibition that delays or blocks the actions of university administrations.

From their point of view they are protecting and preserving the traditions and intellectual quality of the university. From the perspective of university CEO’s who have taken on the trappings of a professional executive corps they are expensive obstacles to managerial efficiency, innovation and cost control. From the perspective of diversity activists who desire to repopulate university faculties with different kinds of teachers and scholars, older and largely white male faculty members represent something akin to social “legacy costs” who simply do not have the integrity or good sense to “get out of the way of history” and allow others their opportunities at the wonderful position of tenured university professor.

The university perspective provides a road map of sorts for where university administrators want to take law school faculties. It is no accident that the American Bar Association has come under increasing pressure to remove tenure as an accreditation requirement for law schools. This push will almost certainly continue. From a managerial and budgetary standpoint universities have far greater latitude in managing, budgeting, hiring and terminating non-tenure track faculty. If we look at universities in a business sense it is absolutely appropriate for the “corporate university” to be able to want to adjust to a rapidly changing climate in which demands on their resources are fluid and budgets are under significant pressure. This is wise business management even if it is inconsistent with the traditional ideals and mission of the university. Tenure track and tenured faculty are expensive fixed costs for a university. Not only are the costs of such a system unavoidable, the structure and “work rules” of a tenure system inhibit the institution’s ability to adapt, redirect resources, innovate and conserve.

Businesses that lack these qualities ultimately fall prey to more aggressive competitors. Although conditions have to this point allowed universities and law schools to operate in a different way than private businesses, for better or worse the operational modes have changed to the point that the university world has moved closer to the model of the private sector. This is reflected in the soaring pay of university presidents and administrators as well as law deans as they have evolved into a professional class distinct from the academic and scholarly traditions of the university. It is not surprising therefore that many universities over the past several decades have reversed the ratio between tenure track and other “lesser” faculty statuses offering few or no employment guarantees or protections.
Although the use of non-tenure track, part-time and adjunct faculty is usually associated with the general university non-tenure track teachers and adjuncts have certainly made their presence felt at law schools. I did an analysis a year or two ago that indicated something on the order of fifty percent of my former law school’s courses were taught by adjunct faculty. This is not necessarily bad from an educational point of view but it does alter the nature of the institution and undermines overall scholarly productivity. When the courses taught by Legal Writing faculty who are not on the traditional tenure track are included the proportion of non-traditional faculty with a different set of interests than has been assumed represent the full core of the professoriate’s responsibility goes significantly higher.

So What Really Is Going On?

These factors suggest that the claim that older tenured professors are harmful to students and the scholarly quality of the university and law schools is not something that is closely connected to educational quality and overall faculty productivity. I note this because it seems obvious that tenured and tenure track faculty make up a considerably smaller proportion of university and law school faculties than we tend to be aware. Two thirds of university faculty are already off the tenure track and could be easily disposed of by universities. Of course they are also typically paid at levels significantly lower than tenure track faculty members, with senior faculty comprising the most expensive group other than university administrators. A large proportion of law school classes are being taught by adjuncts and “quasi-tenured” faculty who have far fewer job protections that those with tenure. While some might be concerned with senior faculty who remain through their sixties and early seventies they represent a small percentage of faculty. So what really is going on?

Although the dilemma is being described as one centered on age and the presumption of declining productivity it is really a struggle over who controls the university and the desire by university administrators and trustees to reduce operational costs. Tenure track university faculty, including those teaching in law schools, are losing out in this ongoing struggle. To have a sense of the ways in which the choices are often presented consider the description of one university’s dean of faculty, for example, who “encouraged the college’s governing board swiftly to adopt a retirement incentive program with this rationale: It is no secret that faculty effectiveness decreases with age, and turnover would be healthy. Older faculty members become distanced from the modern roots of their fields. There are the yellowed lecture notes, the less-traveled path to conferences and seminars, the less than enthusiastic welcome for students.”

Kezar and Maxey go on to explain: “Such remarks devalue older professors and cast a pall over the culminating stages of faculty careers. Stray remarks may be offered as evidence in lawsuits over age discrimination. A department may seek, for example, “encouraged the college’s governing board swiftly to adopt a retirement incentive program with this rationale: It is no secret that faculty effectiveness decreases with age, and turnover would be healthy. Older faculty members become distanced from the modern roots of their fields. There are the yellowed lecture notes, the less-traveled path to conferences and seminars, the less than enthusiastic welcome for students.”

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little trees underneath can grow.” He admitted that “little trees” referred to younger university staff. AARP has offered guidance on language that may demean older people. AARP suggests avoiding terms such as: behind the times, dear, doddering, feeble, foolish, fragile, fuddy duddy, gray, little, old fool, old maid, out dated, over the hill, senile, sweet, withered, wrinkled.”

In working through the claims that older tenured professors have “lost their zip” and are harming students while being generally less productive, I found it fascinating that data from a 2012 report by the American Council on Education determined a sharp rise in the average age of university presidents. Bryan Cook reports: “Two decades ago, the average age of college and university presidents was 52. Today, it is 61. In fact, in 1986 just 13 percent of presidents were over the age of 60. In 2011, 58 percent of presidents are over 60. One possible reason for this aging of the presidency is the increasing complexity of leading a postsecondary institution. As colleges and universities face a growing number of internal and external challenges, governing boards and search committees are likely looking for more experienced leaders.”

Given the nature of averages this suggests that a substantial number of university presidents are well up into their sixties. As the ACE study notes, however, these individuals are hired for their abilities to handle complex challenges effectively. This suggests that arguments about automatic age-related declines among faculty represent a fundamental bias or are being offered for other purposes. While those purposes may in some aspects be intended to advance noble ends, the fact that they are being pursued through the casual condemnation of senior university faculty through use of generalized accusations of selfishness, inadequacy, intellectual decline, loss of interest and greed are reprehensible. Such assertions would be rightly condemned if made in any other context and against any other group.

Post-Tenure Law Professors

My assessment and experience is that faculty productivity and quality of performance is a case-by-case issue and that much of it has nothing to do with age. I know a fair number of highly productive older law faculty members as well as a significant number of only marginally productive junior faculty. Even if the allegations were generally valid descriptions of a fair number of senior faculty members [and I do not agree they are] do they apply to law professors teaching in American law schools? I ask this because there is an upward age skewing in tenured law faculties that is becoming more prominent due to several considerations. Many law schools are facing a “double whammy”. Applications

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by prospective students are plummeting with a consequent loss of revenue. Long-term tenured professors are in many instances and for various reasons holding onto their jobs.

Twenty-five years ago the tenure track law faculty at my law school had over 40 members. The tenure track faculty now numbers approximately 24, including three administrators. The law faculty also includes a total of 13 clinical and legal writing teachers with longer-term contracts that provide a kind of “quasi-tenure” and 70 adjunct faculty members. Last year in a triumph of diversity 11 tenure track faculty members were women and six were of African-American ethnicity. Another interesting fact is that even the supposedly “young” faculty members on the tenure track are not really youthful. Most are in their forties and fifties.

At least four of the tenure track faculty members are over 70, with three in their late sixties. These numbers are “guesstimates” because like many other law schools whose websites I examined, precise information that would help pinpoint a faculty member’s age seems to have vanished. This is actually a quite recent phenomenon. Formerly, the data sometimes even offered year of birth, college and law school graduation years, years in law practice or other employment, etc. I must assume law schools are trying to blur the ages of their faculties lest applicants might look at the sites and think, “I don’t want to be surrounded by a bunch of “old dudes”. I want to be with teachers I can relate to and who can understand me, not with my grandma and grandpa!”

The proportion of senior law faculty members in the overall group at my law school today would be considerably higher except that nine senior faculty members, including eight senior white men [including me] and one woman, have opted to retire in the past several years. It is common for retired faculty to continue teaching reduced course loads with 25%-33% pay for up to three years past the point of retirement. The law school has a reasonably substantial number of “old geezers” in their mid-seventies who have taken advantage of this reduced load post-retirement option who are still teaching core courses to much younger law students and doing it well. Unlike the lament about “forever professors” a substantial number of senior tenured faculty have opted to terminate our tenured appointments and teach during a transitional period prior to wandering off into the sunset.

One obstacle to the ability of law schools to “reload” their tenure track faculties is the needs and agendas of parent universities. The problem is that many law schools are shrinking dramatically and universities are also under significant financial pressure. A dilemma for those who seek to have the law faculty or other university professorial tenure track slots refilled with “new blood” is that the university institution is operating according to a different agenda. In my own law school’s situation in various instances the university has “cannibalized” the vacated positions and the law school has ended up with a net loss. After checking various law school websites this is not atypical and indicates that not only are law school faculties shrinking they are not “reloading”. The problem is that you cannot fairly conclude that the university’s action is irrational or malicious. In many instances they represent the inevitable effects of a declining resource base, the costs of senior faculty, an expansion of administrative demands and a shift to a “business model” of university
management that seeks an enhanced ability to allocate resources and programs without what they consider self-interested interference by tenured faculty groups.

In terms of shrinkage of tenure track positions the outcome is not entirely irrational. Since there are fewer students generating lower revenue a reduced number of faculty is needed to cover instructional responsibilities. If a position is opened through attrition due to retirement or movement of a faculty member to another institution or job it is far simpler for the university to freeze or eliminate the position than it is to try to discharge a sitting faculty member. As law school revenues plummet and they no longer can be relied on by parent universities for the provision of regular transfers of surplus dollars as opposed to a need for university subsidies it makes absolute sense from the perspective of the university to wage a “war of attrition” that takes advantage of budget reduction opportunities to achieve significant cost reductions.

Law Faculty as Role Models

The degree of congruence between law faculties and student bodies offers an intriguing issue. Is it desirable, possible or necessary to somehow “match” the mix of faculty backgrounds, ethnicities, gender, religion, political orientation, sexuality, etc. with those represented by students at the particular institution? Except in very limited situations I suggest that it is neither possible nor necessary. A contrary view was taken in a recent analysis that suggested law schools should be rated by *US News & World Report* on the basis of faculty diversity. The reason, the authors proclaimed, is that providing students with appropriate role models is directly related to educational quality.\(^\text{12}\)

Such loose proclamations tend to represent a combination of strong political rhetoric and inadequate logic and data. The authors of the analysis assert: “law students need role models while they are in law school. This is especially the case for women students and students who are members of racial minorities, as these groups historically were excluded from the legal profession. A full representation of women in law school faculties, for example, would confirm in the eyes of women law students that they can be effective lawyers and indeed can in fact succeed in the legal profession.”\(^\text{13}\)

To me, this argument patronizes women and minorities, treating them as if they are fragile, emotionally weak and inadequate creatures in dire need of the raw and simplistic visual symbolism of another person of their gender or ethnic group performing well in an immediate context in order to grow into professional maturation. This conflates the qualities required for intellectual and professional success with simplistic assumptions that say in essence that “certain” people need direct and continuing contact with other “certain” people of the same gender or ethnic group if they are to be able to fully comprehend their own innate abilities in the academic process.

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\(^\text{13}\) “Why *U.S. News and World Report* Should Include a Faculty Diversity Index in its Ranking of Law Schools”, id.
This idea sounds good in the abstract because we do learn something from “role models”, although we can learn bad habits as well as good. This idea of a teacher as role model was something that Gary Bellow emphasized as part of our responsibility when I was a Clinical Teaching Fellow at Harvard as we launched the school’s clinical program. The concept meant we were responsible for serving as role models of professionalism in performance, commitment to clients, principles and values. The role modeling was based on our professional personas not on our ethnic or gender backgrounds or on our sexuality. Even in what was clearly a clinical program based on a strong commitment to social justice it was accepted that our responsibility was to educate students to become effective lawyers and that we did that through how we performed and the standards we sought to inculcate in our students. Those standards were ones we saw as defining the lawyer as a professional in service to clients, society and the institutions of justice.

As I attempt to set out below, the idea of role modeling has for some become little more than a sloppy political slogan aimed at university and law school hiring policies with the intent of seizing the hiring agenda by claiming some kind of automatic privilege in faculty recruitment. Although voiced in principles of educational quality I see it by now as much more an attempt to control hiring based on factors having little or nothing to do with pedagogic effectiveness.

**What Is Being Role Modeled?**

When someone writes that older university faculty members who refuse to expire (sorry “retire”) are “harming” students it is fair to ask in what ways? Law school is about increasing the ability to think and solve problems. That is what lawyers do. Legal thought is a complex intellectual, social, political, metaphysical and applied activity. These capabilities can emerge from anyone, and are perhaps even more likely to be offered by people with experience and wisdom. It was not an accident that Plato’s Philosopher King could be elevated to that status only after a quite lengthy period of worldly experience that, coupled with earlier philosophical study produced wisdom. Whatever might be said of youth, a rich font of experience and wisdom are not characteristics that immediately come to mind.

There hasn’t been much attention to what it is that is supposedly being “role modeled”. The “role modeling “shtick” is tiresomely overdone and dismaying over-generalized. It is the mission of law schools to teach students the principles, meaning, vital role and techniques of law. It is not the role of law schools to hire faculty to match every ethnic, gender, sexual identity, socio-economic grouping, educational class and status criteria that are found in American society. Is there a need or responsibility to perfectly match percentages of student enrollment to faculty characteristics according to specific identity characteristics? Similarly, how do we count faculty members (or students) who represent multiple characteristics?

Nor is it legitimate to say that since 20% of law students are minorities of various sorts (Black, Hispanic, Asian, Lesbian, Gay, Bisexual or Transgender, women, Christian, Muslim,
Protestant, Catholic, German, French, Israeli, Chinese, Korean, Thai, Indian etc., etc.) hiring visible “role models” as law faculty that are presumed to offer special insights to this incredible range of diverse interests should, must or ought be a core part of law schools’ focus in creating a diverse faculty. Even suggesting this as a strategy is ignorant. It is also an impossible challenge in actual practice.

If I, for example, suggested that “a” person of African-American ancestry was representative of all people of that descent I would be labeled stupid at best. The people, cultures, experiences, socio-economic situations, and educational backgrounds of any so-called grouping cover a wide range. There is “diversity within diversity” and some one who “models” part of an element of a “group” may be quite unrepresentative of many distinct members of the general population of that same set of people, or even antagonistic to some. The same problem exists for any supposed social “grouping”. LGBT is a set of political classification for leverage, not a situation in which all gays, lesbians, bisexuals and transgender people have a general identity as opposed to a shared political interest on a specific set of issues.

There are close to 10,000 Protestant sects and nearly 160 Islamic ones. Is hiring a Sunni Muslim law professor a sufficient model for all Muslim students or do we need to hire a Shia faculty member to maintain some kind of balance. What about Sufis? If a Baptist is hired do we need a Roman Catholic or a Unitarian? For that matter are we speaking of strict Southern Baptists or more liberal segments? If a religious criterion is applied don’t we need someone to represent the increasingly expansive and self-identified sects of atheism, agnosticism, humanism or secularism? What about a Deist? Thomas Jefferson and other Founding Fathers were Deists and they were smart people so perhaps we should make certain that the creators of our Constitution are properly represented.

Another “inconvenient truth” of American law schools other than avowedly religious ones, is that intellectually conservative faculty members are few and far between. We might even say it is harder for a faculty candidate to enter the “heaven” of a tenure track position than for “a camel to fit through the eye of a needle”. But since a substantial proportion of law students are middle-of-the road or conservative in their politics where are the faculty role models consistent with their beliefs and values? Personally I am neither liberal nor conservative but I do believe in a fair balance and I would truly be disingenuous if I claimed there was anything even close to a political and intellectual balance on law school faculties.

My belief is that it is insulting to assert that “minorities” of any kind can be represented by one or two people who have the characteristics of a particular piece of a minority group or that someone with some of those characteristics represents the full diversity of the people comprising that bundle of interests. This is a particular danger in situations characteristic of most American law schools. Law schools often have a small number of faculty members and it would be impossible to achieve a comprehensive staffing that reflected the great diversity of the student body.

If we are talking about role modeling for Hispanics, are we talking about Cubans, Puerto Ricans, Guatemalans, Mexicans, Brazilians, etc.? Nor are all Brazilians, Mexicans and so
forth “cultural clones” of each other. The assumption that anyone who has a Hispanic surname somehow represents very distinct and diverse cultural and socio-economic groups across the board is facile at best and biased, manipulative and opportunistic at worst. I was once involved in a project that met in Honduras with representatives from nearly all Latin American countries. The participants fully understood the enormous range of linguistic, economic and cultural realities, including biases, racial and ethnic prejudices and pecking orders between and within nations in the region. They would have been amused and offended at the thought that any one of them was capable of representing the complex admixture of values, beliefs, experiences and agendas this very diverse group possessed.

Similarly, I served as the facilitator for a group of activists from a wide variety of Asian countries in a meeting in Malaysia. The same reality applied with the diverse cultures, languages, agendas, and belief systems of the participants who were tied momentarily together by the fact that they were “Asian”. Of course they shared this “non-identical” identity with two billion other people representing extremely diverse cultures and ethnicities. But for purposes of hiring and “role modeling” on American university and law faculties it would almost certainly be sufficient that they were “Asian”. I was in fact able to facilitate the interactions because the participants trusted me based on prior dealings and the discussions were productive. The thing being “role modeled” in this Oxfam/Novib meeting in Malaysia was a professional skill based on a varied range of experience with disputes and negotiations. In fact the reason I was asked to be the facilitator was that if any of the Asian participants had been selected there could have been suspicion and jealousy about the motives. The point is that diversity and difference can sometimes separate rather than bring together. Simplistic conceptions of role modeling can do the same.

We get into trouble for ascribing a fixed or stereotypical set of characteristics to a general grouping and are accused of bias, racism, ignorance, prejudice and so forth when we do. Is, for example, President Barack Obama sufficiently “black” as some Black leaders have observed? Whatever intended by those who have make this allegation, a person of African-American descent does not represent all blacks. A person of a specific African nationality does not represent African-Americans nor is the individual capable of representing other Africans from different nations or tribes, just as a single Venezuelan individual does not represent all Venezuelans or Mexicans, or Cubans or Cuban-Americans or Argentinians and so forth because they are “Hispanic”. For that matter there are numerous distinct ethnicities, geographic distinctions and socio-economic levels within Mexico. A “Mexican” does not represent all these people and categories. Does a woman who is a lesbian represent all women or just women who are lesbians and even then does she represent all women who are lesbians, or bisexuals or transgendered persons?

The assumption that the “role model” operates as a symbol that transmits a message to students that “this person” automatically shares some supposedly universal characteristics and qualities with them because the teacher is “black”, “female”, “male”, “gay”, “transgender”, relatively close in age, short, tall, severely overweight, or any other of our societal “code” statuses is not only offensive and inaccurate but little more than a transparent tactic to expand the ranks of certain preferred categories on faculties. The way
in which the “role modeling” and “diversity” mantras have evolved has little to do with the quality of teaching and learning. They are elements of a political power gambit used by politically driven interests seeking to achieve specific goals.

That does not make the effort entirely illegitimate at some level but it is useful to be honest about what is going on. I certainly do not represent all white males, or all heterosexual white males or all older white males or all tall white males. If I have served as a role model it is due to my teaching, research, social activism, or legal skills and not due to my race or gender. I also feel quite strongly that I have been able to serve as a professional role model in those categories to males and females with all kinds of racial and other personal characteristics and that what I have “modeled” are the professional values, skills, and principles of being a lawyer in society including the need to improve the quality of social justice in American society. For a law professor that has always struck me as a core part of my responsibility.

**Age Is Not the Problem: A “Watered Down” Tenure Award System Is at Fault**

There are numerous superb scholars, teachers and social contributors who deserve and benefit from tenure but there are also far too many “free riders” who receive the “gift” of tenure and then rarely if ever do anything to justify the grant. My point is that the situation of declining productivity is not one of age. Given the criteria associated with obtaining an appointment as a law professor it is not even generally an issue of talent. The problem is a lack of continuing drive and commitment to the full responsibilities of the law professor—and these failures afflict many professors of all ages at numerous law schools and universities.

It is an “uncomfortable truth” that in many US law schools the tenure decision has been made at the point of hiring. It seems to me that law faculties have lost the courage (or some might say cruelty) to terminate anyone. This may be because no one on a faculty is willing to cut loose a friend due to carefully cultivated relationships that are developed over the three or four year pre-tenure period. Or it may be because we all operate within our own scholarly “zone” and other members of our school’s faculty necessarily rely on outsiders for evaluations with the “right” of the candidate to heavily influence the choice of their own reviewers.

The problem is not mainly one of age and declining productivity. There are two issues and age is not ranked among them. The first failure is that of not establishing strong rules requiring continuing productivity after the grant of tenure. The second is relaxation of the actual standards applied to the grant of tenure in the first place. The fact is that we can pretty much tell if someone is going to be an energetic, productive, driven, innovative and open-minded faculty member in the latter stages of a career based on the extent to which they have been productive after receiving the original grant of tenure and “the pressure is off”.

For me being a tenured law professor was an incredible privilege that generated a profound sense of responsibility. The problem I have seen is that many people simply
cannot handle the freedom of being the recipient of a well paid fully guaranteed employment position with numerous perks. But given the amazing human ability to rationalize anything, they still manage to subjectively define their own professional performance as meeting high standards. This state-of-mind is surprisingly easy to achieve. Since in law schools there is very limited post-tenure review or continuing pressure to produce, and since law faculties have become highly resistant to internal criticism (other than aimed at the dean or university) it is basically a “do your own thing” situation. The only real pressure to produce at the highest levels of quality and continuity is created by an individual’s own internal set of productivity norms. When this does not occur to the extent that might be expected the problem isn’t that the faculty member has gotten older but that the person shouldn’t have been allowed to function in an unproductive manner long before reaching senior status.

There is, of course, an inevitable negative bias built into the assertion that older faculty are unproductive, are poor teachers or have lost interest in teaching. Similarly, there is a positive and discriminatory bias related to the claim law schools and universities need to hire younger faculty. Being “young” does not mean an individual offers an answer to anything. Law professors are hired because they did well in law school on the testing and writing mechanisms used to evaluate law students. To the extent that law faculties are dominated by “old people” as teachers then those schools hired almost of necessity candidates who excelled by engaging in an analytical methodology created by, evaluated by, and rewarded by “old guys”.

Presumably this must create the risk that the most successful law students are ones who best mirror the thought processes considered most important by “aging”, “white haired”, even “septuagenarian” law faculty who may not even have been properly “diverse” as that term is now intended. There are reasons we speak of the impetuousness of youth and reasons we coin phrases such as “there is no fool like an old fool”. At the heart of the matter is the need to consider the actual merits and productivity of an individual, not the stereotype qualities (or lack thereof) supposedly associated with particular group characteristics.

The softening of the tenure and promotion standards is a de facto process rather than a de jure dynamic. While on paper the technical criteria defining promotion and tenure impose the same standards as previously, the process itself has become in many instances not one focused on whether a person should be awarded the incredible privilege of lifetime employment security but one aimed at building a brief for a fellow faculty member with whom one has worked and associated for a period of three to five years. The goal is to generate a package sufficient to justify not only the award of tenure at the law school level but to paint the individual in such glowing terms that the university committees who approve the recommendation agree with the law faculty's action. This process has “softened” and diluted the tenure approval to such a degree that a lifetime employment privilege is granted based on a watered down process that imposes no real post-tenure demands for continuing productivity.
On my own former faculty I see professors who are senior and have never produced any scholarship of merit. I see senior faculty who have always been and remain effective teachers and ones who are productive scholars and contributors to important societal debates. I see younger faculty members who are doing some great analytical and social justice work and are fine teachers. I see others, including mid-career law teachers, who don’t really do much but were granted tenure by colleagues afraid or unwilling to “ding” anyone. Nonetheless, the reports we send over to the university for final approval of tenure recommendations are uniformly glowing.

I also see a movement toward dumping the teaching of analytic and professional writing on a relatively new class of “quasi-tenure track” legal writing teachers who have become organized nationally into a sort of union and represent a significant bloc of votes on a number of faculties. This grant of power to a specific and organized interest group is probably not the wisest thing tenure track law faculties have done. Given the diversity of their activities and areas of engagement, tenure track faculty have functioned in a loosely atomistic way, connected mainly by their presence on a specific law school’s faculty. Legal Writing faculty, and to a lesser extent clinical faculty, represent organized and coherent political forces with substantial weight.

Many of the beneficiaries of “quasi-tenure” are understandably concerned with preserving and protecting their jobs. This is because the reality of the situation facing law teachers of nearly all kinds at this low point of the legal profession is that well-paying jobs are not “out there” waiting for them if they had to leave their law school positions. This holds true for most tenure-track faculty as well since the legal profession is also “downsizing”, including the large law firms from which many tenure track faculty came. This is a frightening time for most law teachers as law schools shrink and compress. We can speak eloquently about the need for change but change is costly, arduous and scary. Change is capable of crushing us as jobs are eliminated and alternative opportunities fading. There are always winners and losers as change unfolds and the process is never pleasant and often unfair. To expect dramatic or intelligent change is not realistic. It is a “hunkering down” time for most.

How Can Law Schools “Have Their Cake” with Senior Faculty?

There are reasons why senior members of law faculties are not retiring. Some love teaching and that is admirable. Some of those who love teaching are actually quite good at it and consider it a calling rather than an obligation. Others remain productive as scholars although that is an area where there can sometimes be a substantial decline in output, in part because the person is expanding contributions in important social or legal service settings. Some have relationships throughout academia that they don’t want to give up. Some cannot conceive of what life would be like without the focus provided by their professorial positions. One problem that I have discussed with other faculty is that some have no sense of identity outside their existence as a respected law professor. Apprehension by many older law professors based on reports on post-retirement that indicate death commonly occurs within a relatively brief period after retiring ought to be taken into account.
Feeling useless is not a healthy emotional state and that is what I think inhibits retirement for many. When I made the decision to retire I was 63. Friends on the faculty warned me that it would involve a dramatic shift in perspectives, including how people looked at me. I was asked, “but what will you do?” I was also asked how I would feel when people realized I was not longer a regular faculty member and began looking at me differently. I responded that I wasn’t retiring in the way that most people thought of it but simply refocusing my priorities and projects while being able to collect a rather substantial pension. In fact I still don’t quite know how to answer when people ask me whether I am retired. I generally respond that I am retired from my full-time faculty position at CSU but manage to find other things to occupy my time.

I may not represent the majority of older law professors but there are quite a few senior tenured faculty members who continue to do very good work. I was simply shifting focus when I “retired” and freeing up time to spend on other things about which I cared. Since “retiring” I have served as a Visiting Professor at Westminster University in London, as a Senior Associate Research Fellow with the Institute of Advanced Legal Studies of the University of London, co-authored a book on the Rule of Law with my son Daniel who teaches law at Michigan State, published four substantial law review articles, coordinated conferences on professionalism in London and at Michigan State, taught several semesters at Cleveland State, served as a preliminary consultant on clinical education for a law school in Cairo, was a member of a corporate board of directors, agreed to write a weekly blog for the law school, served for three years as General Counsel for an emerging high-tech company, and wrote something like another eight electronically published articles on subjects related to immigration, cultural assimilation, loss of privacy, legal education and the legal profession, the connection between political correctness and linguistic “cleansing”, and the impact of the climate of terrorism on democratic rights.

I am not saying this to boast but to indicate that so-called “retirement” need not be thought of as an exercise in flipping the “off” switch and that “old” guys should not automatically be thought of as brain dead or “over the hill”. Productivity and the ability to innovate or be open to others’ creative work are functions of mindset and commitment, not age. It is not something that comes and goes but is innate. As indicated above in discussing the “softening” of tenure and promotion standards, one problem is that the “system” is frequently “finessed” by people who understand the importance of “gaming” it until they achieve the “brass ring” of tenure but who then basically operate as if they have achieved the final goal even though that was the step that in theory was intended to allow the individual to fully “blossom” in the glory of his or her powers and productivity. Sound familiar?

In many ways I think this situation is becoming worse rather than better. This is because law faculties often seem to no longer have the political will and intellectual fortitude to honestly evaluate their friends and associates based on the actual quality and significance of what they have produced as scholars or the quality of teaching, or to impose post-tenure standards that ensure continuing productivity at the highest levels. This problem is compounded because many law schools are now operating on the margins of teaching and financial resources. When the university and law school systems were “flush” with
expanding resources “free riders” could be carried because there was surplus faculty capacity and—if the truth be told—virtually no real accountability for a lack of productivity. This margin for error has largely disappeared and accountability is rearing its ugly head. Smaller tenure track faculties and heavier teaching loads are likely to be the outcome at many law schools.

I am only touching on one approach. The point is that there are numerous ways in which law schools can continue to “harvest” the wisdom, expertise, energy and teaching skills of the best senior faculty. Misdiagnosing the problem is not a good way to begin creating effective strategies and placing the main weight on the age of faculty is clearly wrong. There are ways that schools can “have their cake and eat it too” if they would only undertake some moderately simple steps to figure out how to re-open the system to ensure the best new minds are drawn into the system as well as retained. One approach is to create a system of senior faculty appointments with some guarantees of continuation. The obligation to do scholarship would be removed and the teaching load lessened while the person would be paid 25-50 percent of prior salary depending on obligations or a flat fee for teaching two or three courses per year. For the law school the faculty member would retire, receive a pension but still provide experienced teaching services at greatly reduced rates.