

# The Marketplace of Ideas

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## I. Law and Law and

Professor Posner's sketch has, I am sure, captured a widely shared view of the legal academy. In the foreground, behold a milling herd of well-groomed doctrinal analysts, curiously in decline. In the background, glimpse a gathering horde of slovenly social scientists and humanists practicing a bewildering variety of "law and . . ."s, surprisingly on the rise.

I think that this picture is misleading. Not that Professor Posner is wrong in thinking that something important is afoot. But it is a mistake to think of the change as a shift from doctrinal analysis to nondoctrinal musings. What is going on is a shift from one kind of doctrinal analysis to another kind of doctrinal analysis. Speaking very broadly, the newer sorts of analysis are characterized by a more self-conscious and elaborate conceptual apparatus than the kinds they are displacing. As a consequence, it is no surprise that the newer doctrinal analysts have been borrowing heavily from other parts of the university—where professors are paid to develop elaborate conceptual schemes for scientific empirical description and adequate normative evaluation. Yet the primary purpose of the modern law professor remains much as it was in the past: to provide disciplined methods for evaluating the flow of legal decisions and to train students in these methods so that they will intelligently practice them in their professional lives.<sup>1</sup> Guido Calabresi is different from William Prosser; Frank Michelman is different from Alexander Bickel. But nothing is gained, and much is lost, by saying that Prosser and Bickel

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1. It is true, of course, that a small number of law professors are also concerned with issues that are very distant from doctrinal analysis, however conceived. And it may well be that this group is larger in absolute numbers today than it was, say, during the heyday of the Legal Realists. Because the overall size of the professoriat has expanded greatly since then, it is less clear that the group of anti- (and supra-) doctrinal analysts constitutes a larger percentage of the total today than it did a generation ago.

were doctrinal analysts, while Calabresi and Michelman are not.<sup>2</sup> Indeed, it is only when this stark contrast is abandoned that the genuinely important question appears: what *precisely* are the differences in analytic approach that divide the new generation of legal scholars from their predecessors?

I will not attempt an elaborate answer to this question within the space of a short comment.<sup>3</sup> Rather than analyzing the new forms of analysis, I will try to exemplify them. Since I number myself amongst the interdisciplinary scavengers who are piecing together a distinctive form of doctrinal analysis, I shall do what comes naturally and analyze the problem posed for this symposium—legal scholarship—with the aid of some of the new tools honed in the academy over the past generation. By turning these tools upon their practitioners, we may learn something that might otherwise elude us.

## II. The Present State of Legal Scholarship (As Viewed by a Lawyer-Economist)

### A. *Incentives*

Begin with the forms of professional compensation. Law teachers receive much of their income in two currencies other than hard cash. Call the first *freedom*: professors are obliged to show up in the classroom only a few hours a week, thirty weeks a year, and to grade some final exams. After tenure is obtained, all other obligations can be easily evaded. Call the second currency *fame*: not only among the captive audience of law students, but in the larger professional community, as our students become practitioners and our articles become legal citations.

Note, moreover, that the mix of these currencies changes over the

2. Indeed, I am quite surprised to learn that Professor Posner does not consider himself primarily a doctrinal analyst. See Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1115 (1981) [hereinafter cited as Posner, *Present Situation*]. Although I have not attempted a precise page count, I would guess that the number of Posner-pages devoted to the analysis of legal doctrine far exceeds the number devoted to the scientific examination of the legal system. Indeed, even Professor Posner's most "scientific" papers investigating the efficiency of the common law are hardly devoid of doctrinal motivation, given his explicit endorsement of wealth-maximization as the ultimate test of good law. See Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

3. For preliminary efforts, see B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977), Ackerman, *Four Questions for Legal Theory*, in NOMOS XXII, PROPERTY 351 (J. Pennock & J. Chapman eds. 1980) (Yearbook of the American Society for Political and Legal Philosophy) [hereinafter cited as Ackerman, *Four Questions*], and Ackerman, *The Structure of Subchapter C: An Anthropological Comment*, 87 YALE L.J. 436 (1977).

course of the typical academic career. In the beginning, freedom and fame are at a minimum. It takes a lot of time for novices to do a credible job in class and to write the customary tenure article (or two). And an "unknown," by definition, isn't famous. Although entering academics certainly do dream of their future fame and freedom, they must compute the present value of these dreams by applying a heavy discount rate and risk premium. And that leads us to a first curiosity: since the present value of fame and freedom is at a minimum for the beginner, it is the "idealistic" assistant professor who receives a cash salary closest to the pay offered comparable lawyers by law firms.

The young professor benefits from law firm competition in a second way. In their effort to minimize salary costs, even elite law schools try to increase the present value the youngsters attach to their future fame and freedom by reducing their uncertainty. Hence the scandal of law school tenure practices. Rather than reserving tenured professorships for men and women who have already made substantial (if not, perhaps, significant) contributions to scholarship, law schools go out of their way to assure hot prospects that they will be promoted quickly if they perform acceptably in the classroom and produce a "promising" article or two.

This means that the beginning full professor of law will have a profile very different from that of his counterpart in the faculty of arts and sciences. A philosopher, say, is lucky if he has received tenure in a good university by the age of thirty-five. At that point, he has already written a number of pieces that have gained his peers' grudging respect; equally important, there is no better way for him to increase his fame, fortune, and freedom (by getting a job at a really elite place) than by publishing more and better. Not to say that every philosopher responds to these incentives by prosecuting an ambitious scholarly project to its successful conclusion. Sloth and academic politics are competing seductions. Nonetheless, the contrast with the full professor of law is stark.<sup>4</sup> Most obviously, our professor is often remarkably youthful. Sometimes he has not even developed the basic scholarly skills: the knack of defining fruitful topics, the ability to spend lonely hours seeing one's ideas fall apart, the sense of when

4. A fuller treatment would take into account academic fields that fall between the poles of philosophy and law in terms of consulting opportunities. For example, professors of economics have begun to exploit consulting options that rival those available to law professors. A comparative investigation of these two fields might afford us a clearer understanding of the importance of different institutional factors (for example, the requirement of a thesis in economics) in accounting for observable differences in scholarly output by the two professions.

to junk a project and when to trudge on in hope of inspiration. It is even more likely that he has never experienced the peculiar joy that follows publication—when others begin, ever so slowly, to take your work seriously enough to (ab)use it.

Indeed, premature promotion often generates a very different emotion: the young “scholar” is fearful that if he continues to publish beyond his tenure exercises, others will begin publicly to observe what he himself secretly suspects—that the emperor has no clothes. Even if he is not paralyzed by fear, the youthful law professor can only guess at his future promise as a serious scholar—by hypothesis, he has never developed a scholarly agenda more ambitious than a single article. Hence he must apply a heavy risk premium to his future investments in long-term scholarship to reflect his own uncertainty about his academic potential. Here too he differs from his counterpart in other university departments, whose past scholarly record provides better information by which to predict the future.

At the same time, the opportunity cost of long-term, high-risk scholarship is far higher for the law professor than for most other academics. Rather than making it difficult to gain immediate fame and fortune by extrascholarly pursuits, a university connection gives the lawyer-professor competitive advantages over his friends in private practice. Typically, they must contend with partners who, as a result of profit sharing arrangements, have a financial interest in forcing each partner to forego his self-interest when it conflicts with the firm’s interest in long-run profit-maximization.<sup>5</sup> In contrast, the lawyer-professor is the last of the solo practitioners: he can chart his own career to maximize his own fame and fortune, and nobody else’s. Even better, he obtains this precious freedom without sacrificing the economies of scale that force others into partnership. His library is far better than any law firm’s, and he gets it for free. His brightest students provide help comparable to that generated by superior law firm associates, at little or no cost.<sup>6</sup> His colleagues will provide valuable information on collateral legal issues, once again for free. And finally, the professor can often exploit an institutional reputation that even the most prestigious law firms may rightly envy. While a law partnership must work for years before its firm name becomes a valuable asset, the law professor basks in the glow of his law school’s reputation—a reputation created by the professional success of earlier generations of students, no less than teachers. What is more, law professors trade on a university name built up by historians, classicists, and theoretical physicists.

5. See W. KLEIN, *BUSINESS ORGANIZATION AND FINANCE* 61-69 (1980).

6. Sometimes a glowing letter of recommendation will suffice.

We put ourselves forward as professors of law at *Yale University* (to pick a name at random). Yet even knowledgeable outsiders do not always recognize that lawyers become professors on the basis of a publication standard that embarrasses their colleagues in the rest of the university.

Small wonder, then, that law professors find themselves in high demand in the marketplace for legal services. Although hourly rates are a closely guarded secret, my own experience suggests that professors from "name" law schools are often offered rates equal to those charged by senior partners at leading firms. And professors get to keep *all* their fees, while partners have to pay for an immense overhead!

### B. *The Production of Legal Scholarship*

Given this incentive structure, positive economic analysis permits a set of striking predictions. Not only can we say something about the overall level of scholarly output, but we can predict both the kinds of "scholarship" a professor will produce over the course of his career and the kinds of law school that will be congenial to different varieties of scholarship.

#### 1. *Quantity*

Legal academia will be full of full professors who fail to fulfill the promise of one or two "promising" articles published at an early age. The publication curve of the modal law professor will resemble that of the professor of mathematics, who also burns out early. For the mathematician, the explanation lies in the remorseless decay of the higher analytic capacities of the human mind;<sup>7</sup> the law professor's apology, however, cannot be of the same kind. As long ago as Aristotle,<sup>8</sup> it was clear that legal analysis was an art that should grow in depth and breadth with the years. The young professor's academic decline and fall is a tribute to the power of the marketplace to triumph over the natural progress of the human mind.

#### 2. *Quality*

Even those law professors who continue to produce scholarship after tenure will not stray far from "the logic of the opinion or the series of opinions that they are examining."<sup>9</sup> This is so for three reasons. First, such articles will be promptly cited by lawyers and judges try-

7. See G. H. HARDY, *A MATHEMATICIAN'S APOLOGY* (rev. ed. 1969).

8. ARISTOTLE, *NICHOMACHEAN ETHICS*, lines 1094b-1095a.

9. See Posner, *Present Situation*, *supra* note 2, at 1114.

ing to minimize their own transaction costs. Citation, in turn, will advertise the scholar's wares and increase his market value as a consultant in the next round of legal activity. In contrast, an article using unfamiliar categories will be used as decisional authority only after a long delay, if at all. Hence, the fame and fortune gained by its publication will be subjected to a heavy discount. Second, insofar as professors practice law, it will be cheaper for them to reflect on the categories they encounter in their consulting work than to spend time thinking up more enlightening ways to formulate legal questions and solutions. Third, the practitioner role may become so dominant that clients may pay lawyer-professors to publish articles in law journals in the hope that a "scholarly" article will seem more persuasive to courts than the same material submitted in a brief.

This blurring of the line between scholarship and brief-writing is predictable regardless of the kind of doctrinal analysis in vogue. If concepts drawn from economics become important in one or another doctrinal area, scholarship in law and economics should be expected to resemble advocate's briefs no less than did more traditional forms of doctrinal analysis in their heyday. Indeed, there is reason to fear that economics-oriented discussions will suffer from narrow partisanship even more markedly than the legal scholarship they displace. Traditionally, the great check on narrow partisanship has been the conscientiousness of student law review editors, whose professional incentives lead them to orgies of source checking. Unfortunately, however, this check will be less effective in weeding out the most egregious forms of special pleading when they dress themselves up in language borrowed from the economist. The abuses of this form of doctrinal analysis will not typically lie in selective or dishonest citation of sources, but in the partisan manipulation of economic jargon to reach a predetermined result. Yet, precisely because economic argument is technical, it is less likely that a randomly selected student editor will be able to detect outrageous *non sequiturs*, let alone subtler analytic failures that might seem obvious to *cognoscenti*. This makes it even more tempting to hire a "scholar" to write an article on behalf of a client in a pending law suit: if the scholarly brief gets by a student editor, it will bask in the glow of the reputation for technical competence that the law review has earned through generations of source checking.

### 3. *Law Schools as Scholarly Workplaces*

Not all law schools with equal financial resources will foster the same sort of scholarship. Some will be dominated by lawyer-professors

who sometimes find the time to churn out a brief-article; others will encourage writing that seeks to illuminate and criticize the premises underlying received legal categories.

The extent to which a law school will encourage this more fundamental kind of work will be a function of its size and geographic location. A professor located in a great legal center like New York, Washington, or Chicago, can go into lucrative practice at a much lower transaction cost than an academic located in a legal desert blessed with poor airline connections. Scholarship is also aided by a location in an economically declining region, where living costs, especially real estate prices, are low but university endowments remain substantial. Even minor geographic differences may prove significant over time as lawyer-professors gravitate toward metropolitan law schools and legal scholars move to university towns in economically declining regions.

The significance of law school size is usefully approached through Mancur Olson's now-familiar logic of collective action.<sup>10</sup> To simplify, assume that each professor is faced with a polar choice. On the one hand, he may use his free time consulting, not even trying to make his law school into a genuine scholarly community. On the other hand, he may spend his free time reading his colleagues' papers, talking about their ideas, encouraging their ambitious intellectual projects, and so forth. If he takes the first course and others take the second, then he will live in the best of both worlds—he can gain fame and fortune by consulting and intellectual titillation by gabbing with colleagues whenever he is in the mood. If, however, too many professors take this free ride, there won't be enough of them around enough of the time to constitute a vital scholarly community.

It is here where law school size enters. If the law school is large, each professor knows that his contribution to the scholarly give-and-take won't make much of a difference to the overall quality of the academic community; hence, he might as well maximize his individual fame and fortune by consulting. As faculty size decreases, however, it becomes increasingly plain to each professor that his own decision to abandon the life of scholarship *will* have a perceptible impact upon the law school's academic atmosphere. Not only does this give each teacher a greater incentive to allocate more time to supportive scholarly interchange, but it also gives him an incentive to monitor the decisions of his colleagues more closely. Whenever somebody begins regularly to leave the law school for parts unknown, this will

10. M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 53-66 (1965).

have an immediate impact upon those left behind: they will tend to view the defection to the world of consulting as a personal betrayal, no less than an abstract breach of academic ideals. The prospect of confronting deeply aggrieved colleagues does more, I am sure, to preserve the integrity of a small scholarly community than any sophisticated sanctioning scheme yet devised by the most ingenious legal mind.

### III. The Future of Legal Scholarship (or Beyond Wealth Maximization)

#### A. *Legal Economics as a Form of Doctrinal Analysis*

Like all reductionist accounts, positive economic analysis hardly tells the whole story about legal scholarship. And doubtless, it is one of the tasks of legal scholarship to explore the complex ways in which the lawyer-economist's reductionist model inevitably distorts the "reality" he hopes to describe. When inspecting the economist's descriptive model for systemic blindspots, however, it is especially important for the analyst to avoid the very sins of reductionism that he is so quick to find in the lawyer-economist.<sup>11</sup> In particular, it is far too simple to assert that the lawyer-economist's adoption of a distinctive vocabularily inevitably leads him to an uncritical embrace of the status quo. To the contrary, economic language is one of the most powerful tools of criticism available to American lawyers. By describing the way self-seeking individuals respond to the existing legal regime, positive economic analysis can shock us into action—forcing us to confront the kind of people we may become if we allow ourselves to drift along with the invisible hand. By emphasizing the way in which the pursuit of self-interest can erode "reformed" legal regimes, positive economic analysis permits a hardheaded view of the extent to which we may sensibly look to legal change to ameliorate our numberless

11. Although this has been a main aim of my own work, see Ackerman, *Four Questions*, *supra* note 3, at 351 (asking four questions, rather than one), I do not imagine myself to be alone in resisting the lures of reductionism. A variety of writers—very different in other respects—have contributed to a growing hermeneutic literature that seeks to clarify the interpretive presuppositions of the lawyer-economist's description of "reality." See, e.g., Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Heller, *Is the Charitable Exemption from Property Taxation an Easy Case? General Concerns about Legal Economics and Jurisprudence*, in *ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENT* 183, 183-207 (D. Rubinfeld ed. 1979); Kelman, *Spitzer and Hoffman on Coase: A Brief Rejoinder*, 53 S. CAL. L. REV. 1215 (1980); Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977-1978).



afflictions—a talent that would, I suspect, be no less useful in a socialist democracy than it is in a capitalist republic.

The story I have told, for example, describes the systematic impact that a series of rules and practices—relating to promotion, consulting, and publication—can have on the amount and kind of legal scholarship produced by the professoriat. Rather than serving as an elaborate apologia for the status quo, this story has permitted us to isolate a set of thoroughly undesirable incentive structures. Analytically speaking, we are in the delightful presence of an “easy case”—one in which the prevailing rules and practices seem bad on any plausible view of the public good. What, then, is to be done?

### B. *Beyond Wealth Maximization*

Even for those like Professor Posner who aim for wealth maximization, the failure of the existing marketplace of legal ideas should be obvious. Simply put, neither the bench nor the bar has much of an incentive to do the hard thinking required to place an individual case in a broad perspective—whether the perspective be doctrinal, philosophical, historical, or economic in character. Although judges may read a few articles that try to do this job for them, they hardly have the time for independent exercises in wide-ranging reconceptualization. And so long as lawyers are paid by clients, and pressed by deadlines, they will have neither the time nor the inclination to explore “tangential” legal issues—especially when a broader perspective may well reveal unsuspected weaknesses in their case as easily as unsuspected strengths. If, despite these dangers, an odd lawyer perseveres in high-risk reconceptualization, it is most unlikely that a court will accept a novel legal argument on its initial presentation. Most probably, such an enterprise will only serve to win somebody else’s case ten or twenty years from now; but typically, the innovative lawyer will have no way to induce these remote beneficiaries to pay the cost of his early legal activities on their behalf.<sup>12</sup>

In other areas, the patent system provides innovators with the in-

12. See generally Landes & Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979). To the extent that institutional litigants, like large corporations and public interest law firms, self-consciously plan litigation strategies extending over a decade or more, the market failure described in the text is somewhat ameliorated. Although such long-range planning is hardly unknown, see Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 100-03 (1974) (parties who are repeatedly involved in litigation have interest in establishment of favorable laws over time), it nonetheless remains the exception, rather than the rule, in most areas of law.

centives they need to sustain the research enterprise.<sup>13</sup> Yet there are obvious problems in extending this solution to the market failures afflicting innovative legal research. Rather than giving a legal innovator a patent on his ideas, the wealth-maximizer should call upon the legal academy to provide a plausible institutional response to the market failure we have described. By encouraging professors to embark on broad-gauged, high-risk scholarship, a university law school maximizes overall wealth as it fulfills its own highest academic ideals. Moreover, every day the academy fails to reform its own rules regulating tenure, consulting, and publication, it runs the risk of a far greater danger. Perhaps the time will come when the courts will heed Professor Posner's call for efficiency and force a sweeping reform on academics who are maximizing their own wealth at the expense of society's. Yet close judicial supervision of professorial activity transparently endangers fundamental principles of academic freedom—principles that doubtless have their wealth-maximizing aspect as well. For efficiency-buffs, then, the optimal solution is clear: the law schools should act on their own to encourage innovative legal research and thereby avoid the heavy costs generated by the intrusion of efficiency-minded common-law judges.

The need for serious reform is even clearer to those of us, happily in the great majority, who believe that American law is committed to a set of moral principles far more complex and demanding than pure wealth maximization. Although resistance to the Posnerian ethic remains strong,<sup>14</sup> surely Professor Posner is right in observing that, at present, there is no single normative framework that guides legal thought in the same way that pragmatic utilitarianism did a generation ago.<sup>15</sup> A critical academic task, then, is to clarify the competing ideals currently struggling for ascendancy: by exploring their competing policy implications, by appraising their philosophical foundations, by placing them in historical and cross-cultural context. Legal scholarship of these kinds will make a unique contribution to the larger body of citizens who will never step into a law library or glance at a law review. For they, no less than we, think that the country

13. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY* 609 (Universities-National Bureau for Economic Research 1962).

14. Although I hardly wish to deny that a concern with wealth-maximization ought to play a significant role in a larger theory of social justice, see B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 190-95, 200 n.16, 257-61 (1980), I think that Professor Posner has greatly overextended himself in suggesting that wealth-maximization might serve as the sole touchstone for legal evaluation. For an outstanding critique, see Dworkin, *Is Wealth A Value?* 9 J. LEGAL STUD. 191 (1980).

15. See Posner, *Present Situation*, *supra* note 2, at 1126.

stands for more than wealth maximization and look to the law to express the nature of these larger commitments. If law professors are too busy with their law practices to help clarify the legal implications of the basic value choices before us, who *will* be doing this critical work?

Doubtless, the ultimate direction of American law will not be determined by such acts of scholarship alone. It is easy to be cynical, however, about the scholar's long-term impact. Precisely because the rest of his brethren in the profession are so busy, they will accept *almost* any scholarly guide whose perspective clarifies the flux of everyday practice—provided, of course, that the scholar's flickering lamp happens to illuminate the justice of their particular client's cause. If only a few scholars resist financial temptation, even their half-baked ideas may have great influence in the long run. The only remedy for oligopoly in the production of new ideas is more scholarly competition—full of participants who find engaged dialogue its own reward.

### C. *Reform*

Although institutional reforms cannot guarantee academic vitality, a number of steps can help.

#### 1. *Tenure*

The standards for tenure must be raised. I do not think that this will dry up the supply of high quality talent. Thanks to the job crunch in other parts of the university, law schools are attracting people who would have gone to the graduate school of arts and sciences in balmier days. Even though a more substantial tenure requirement may reduce the percentage of academically inclined law students who initially choose teaching as a career, a *smaller* percentage of a *larger* pool will yield an entering stream of assistant professors that is as large as we need.<sup>16</sup> Although it is hard to get a firm grasp on the elasticity of supply, the time seems ripe to test the issue by gradually raising the publication standard required for a tenured professorship.

This shift to more demanding standards will generate transition costs. There will be painful hypocrisy when senior professors impose standards on juniors that the seniors themselves cannot pass. There will be arbitrariness when, during the extended period of transition, some unlucky juniors fail of promotion while others sneak through

16. Especially since the days of dramatic expansion in law school enrollments are past.

on work that is roughly comparable in quality and quantity. These costs, however, are part of the price we must pay for a vigorous academic life.

It is a price worth paying. A more demanding tenure standard will not only screen out obvious nonstarters. It will have even more significant systemic effects in the longer run. Most important, the imposition of stricter tests for tenured professorships will make it easier for the law schools to select an academically promising crop of untenured professors. All of us recognize, I think, that we rely too heavily on law school grades in choosing among prospective law teachers. Although a string of bad law school grades is a negative indicator of scholarly success, I do not think that the person who finishes, say, tenth in his class at the Harvard Law School will consistently turn out to be a better scholar than the person who "only" finishes in sixtieth place. It is not merely that the classic three hour examination in issue-spotting and on-the-other-handing fails to test powers of synthetic imagination that are absolutely essential in the scholarly enterprise. The awful fact is that raw intelligence is not enough to assure a distinguished scholarly career. A certain kind of character is no less important—one that permits a person to resist the countless diversions of everyday life and carry through a scholarly project that, *precisely* because it asks new questions, will sometimes seem of doubtful value during the long years required for its completion. To master the inevitable periods of doubt and depression, the successful legal scholar must have an ability to defer gratification, to impose his own deadlines, and to define his own objectives. There is a great need, if you will, for creative pigheadedness. Yet even the most distinguished grades do not ensure the existence of this essential characteristic.

The other data that are typically available also have a tea-leaf quality.<sup>17</sup> Although it is encouraging when an applicant has been highly successful as a law clerk or legal practitioner, this fact cannot bear the weight sometimes given it. At best, it shows that the applicant has done an excellent job in shaping and fulfilling the desires and deadlines expressed by others; it does not show that he will master the different challenge awaiting him in the clientless world of legal academia—namely, to impose *his own* order on the world in a way that will induce others to reflect anew on the legal categories that

17. Of course, the best evidence of scholarly aptitude is an existing piece of serious scholarship. Rather than producing such work, however, our best students spend much of their time on law review dealing with printers, checking each others' sources, and selecting the next year's editors. As a consequence, it seems unfair to expect them to produce anything more than a "good student note."

currently order their perceptions. Who can tell whether one or another plausible sounding young lawyer has the pigheadedness required for *this* task?

Surely the person who can guess best is the applicant himself, and not the senior faculty who are anxiously engaging him in Socratic questioning during his day of intensive interviewing. And it is here where a serious tenure standard comes to the rescue. Quite simply, the prospect of a serious tenure test encourages the applicant himself to think hard about his own character and whether it will bloom in an academic environment that is (or ought to be) different from the client-oriented world of legal practice. To put the point paradoxically: a young lawyer who pigheadedly accepts an entering position at a law school that applies a demanding tenure test provides, *by his very acceptance*, the best evidence that he is sufficiently pigheaded to thrive in academic life. In contrast, the present lax standard imposes the burden of guesswork on the party more likely to make a mistake—the senior faculty.<sup>18</sup> By permitting the applicant to externalize much of the cost of error, the existing tenure system fails to discourage future lawyer-professors from applying for university jobs.<sup>19</sup> As a consequence, a greater proportion of lawyer-professor types occupy entry level jobs than would be the case under a more stringent tenure system.

A lax tenure system not only yields a less scholarly mix of assistant professors at each school, but has an especially harmful impact upon would-be scholars who were unlucky enough to be rejected by the elite schools at the time of their initial entry into academia. At a later stage in their career, some of these people are in a position to correct initial mistakes—by producing scholarship of a quality and quantity that puts their luckier competitors to shame. Yet, under the present system, the top schools persist in promoting their own lawyer-professors without attempting a serious nationwide search for more serious scholarly contenders. It would be bad enough if this simply meant that many fine scholars are forever deprived of the students, research leaves, and libraries that go with an appointment to a leading university. The present practice is downright pernicious, however, in weakening the morale of would-be scholars who find themselves

18. Lawyer-economists will recognize that I am applying a standard Calabresian move to the problem at hand. See Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1070-74 (1972).

19. It is true, of course, that some potentially great scholars may be deterred by the prospect of a higher tenure standard and refuse to apply for an assistant professorship under the new riskier regime. Although one must regret the loss of these timid scholars, their absence seems a necessary part of the price that must be paid to free academia from a surplus of lawyer-professors.

trapped in uncongenial surroundings. Because they know that even a striking scholarly success is unlikely to gain them a professorship at a leading place, it is all too easy for them to give up serious work with the bitter recognition that nobody is watching anyway. The lax tenure system, then, generates a double distortion: it encourages young lawyer-professors to flood the elite schools, and it demoralizes serious scholars in the rest of legal academia.

## 2. *Consulting*

A gradual tightening of tenure standards is only a first step toward academic reform. It is no less important to control tenured professors who engage in the private practice of law or other forms of outside consulting. For starters, law schools should actively enforce their universities' rules restricting consulting. Each professor should be required to submit a confidential report to his dean, on a regular basis, explicitly reporting the number of hours he has spent on outside work. Persistent violations of university-wide limits should be treated as a most serious breach of academic discipline.

But, of course, the rules themselves should be reappraised. I have no doubt that *some* practice and consulting may well enrich *some* academics' scholarship and teaching. It does not follow, however, that the amount of time professors spend on such activities should be left entirely to the academic conscience of the individuals involved. The task is to design an incentive scheme that induces each professor to take into account the external costs imposed on the scholarly community generated by excessive consulting. Happily, the problem in institutional design does not require a conceptual breakthrough on the order of the invention of the wheel. Whatever its limitations in other contexts, some well-worked lore of the lawyer-economist seems made-to-order for the problem at hand.

To see the point, begin by viewing consulting as if it raised just another garden variety issue in externality control—analyze it, say, to the problem posed by dirty smokestacks. Just as the industrial polluter generates external costs while engaging in profitable activity, so too does the academic lawyer when he consults to excess. Just as it would be counterproductive to prohibit all pollution, so too would it be counterproductive to prohibit all consulting. What is required is a more discriminating regulatory regime—one that permits some, but not too much, of the cost-externalizing activity.

In controlling consulting, moreover, it is important to avoid building an oppressive and inefficient administrative apparatus worse than

the initial dis-ease itself. We should not create yet another assistant deanship to police consulting arrangements; we should not force professors to convince the new petty bureaucrat of the redeeming social or academic value of each particular outside relationship. Rather than permit the further erosion of fragile academic values, we should take seriously the lawyer-economist's critique of traditional forms of bureaucratic command and control. On this now-familiar line, the best cure for market failure is the sensitive reshaping of market signals to reflect an activity's external costs. In the case of the industrial polluter, this involves redefining property rights so that firms must purchase rights to pollute at prices that reflect the external costs they impose on their neighbors.<sup>20</sup> An analogous redefinition of property rights is required in the case at hand: professorial consultants should make a special payment reflecting the external costs they impose on the academic community. Of course, the university cannot redefine property rights by passing a law in the manner of the state; but it can achieve the same result through the institution of private contract. All that need be done is to establish a standard profit-sharing agreement as part of the professorial contract. Under the terms of the agreement, no professor need ever be obliged to convince some academic bureaucrat of the redeeming social value of one or another consulting effort. All he need do is share his profits with the university on the basis of a general schedule that reflects his law school's assessment of the external costs generated by excessive consulting. By modifying prevailing market signals, profit-sharing protects the integrity of the academic community without infringing on the freedom of each professor to determine the value of outside work for his own scholarly development.

Although one may quibble endlessly over the details of the profit-sharing schedule,<sup>21</sup> I do not think any professor can plausibly assert

20. A polluter may also be induced to take external costs into account by subjecting him to a special "effluent tax" based on the marginal costs of his discharge. See C. SCHULTZE, *PUBLIC USE OF PRIVATE INTEREST* (1977). For reasons presented in Rose-Ackerman, *Market Models for Pollution Control: Their Strengths and Weaknesses*, 25 *PUB. POL'Y* 383 (1977), I think the effluent charge system is often inferior to one in which a fixed number of pollution rights are sold to the highest bidders.

21. Disagreement on details, however, should not prevent a broad consensus emerging on the most appropriate shape of the profit-sharing schedule. It seems clear that the schedule should resemble a "progressive" income tax in allowing professors to keep a larger share of their first five-thousand dollars of consulting income than their second five-thousand, and so on.

The case for a "progressive" schedule rests on two judgments. First, the marginal damage to the academic community—measured in loss of collegiality and decrease in the quality of scholarly output—increases markedly with the intensity of a professor's outside engagements. Second, a professor is more likely to ignore his academic con-

that he has a legitimate expectation to *all* the consulting income he chooses to produce. Because a substantial portion of each consulting fee is attributable to the professor's university connection, it is only fair that the university recapture some of the gains made by trading on its name and resources. And as we have seen, not even the wealth-maximizer can deny that excessive consulting impoverishes legal scholarship.

Although the notion of a fundamental right to all consulting income seems hollow, there is a more insidious threat that should give the reformer pause. Once profit-sharing is instituted, the university's central administration may become addicted to the funds accumulated annually by lawyer-professors. Rather than viewing a large fund as an alarming sign of the loss of scholarly commitment, the central administration may view the fund as a convenient excuse for draining yet more money out of the law school's coffers for general university purposes. Indeed, it is even possible to imagine a university administration actively encouraging a law school to increase its profit-sharing fund by recruiting market-tested academic entrepreneurs. Thus, the profit-sharing proposal might lead in the end to the further entrenchment of abusive consulting and the final downfall of the academic ideal.

I do not wish to deny the possibility of this dismal scenario: economics is not called the dismal science for nothing. Yet I do not wish to draw a despairing conclusion from this intimation of decline and fall. The story, after all, is only one of many that can be told. Its telling merely emphasizes the obvious: that, without a commitment to academic ideals, no clever technique offered by the lawyer-economist can halt a law school's degradation. Yet, although cleverness is no substitute for commitment, the reverse is also true. Profit-sharing will help a committed academic community maintain its integrity; it will help an ambiguously academic community define its principles more clearly. And that should be enough of a recommendation.

science when offered a large amount of money than when offered a small one.

To avoid misconception, I should emphasize that the case for progressivity in profit-sharing has absolutely nothing to do with the case for progressive income taxation. First, progressive profit-sharing may *not* have a progressive overall impact. Thus, a nonconsulting professor with inherited wealth may earn a million dollars a year and pay nothing into the profit-sharing fund while another professor, with no independent means, may be obliged to pay \$25,000 of the \$40,000 he earns from consulting work. Such outcomes only emphasize that the rationale for profit-sharing is not income redistribution but externality control.



It remains to confront a final excuse for inaction. Temporizers will suggest the need to obtain the agreement of all law schools—or at least most “leading” law schools—before a serious effort can begin to control consulting abuses. I am convinced, however, that this is the wrong way to begin realistic reform. As we have seen, economic analysis suggests that abusive consulting will not be equally prevalent at all law schools. Instead, it will be a function of each law school’s geographic location, its faculty size, its academic traditions, and the happenstance of its professorial personalities. Moreover, the law schools with the worst consulting problem will, predictably, be the most reluctant to do anything serious about it. They will use the negotiations required for a joint policy both to delay agreement and to dilute the principles ultimately enunciated. Further, the effectiveness of any paper agreement among law schools may be readily overestimated. The joint policy will inevitably be administered by each law dean, who will have plenty of room to make low visibility deals if his faculty wishes to evade the agreement. Academic cartels are no less difficult to manage than more profitable kinds.

Realistic reform must begin at each individual law school. The fact that other professors are cashing out their academic freedom at other law schools is hardly a reason to tolerate the same abuses at *our* school. If it is fair for the university to recapture “outside” income generated by the professor as a result of his university affiliation, it remains fair to require profit-sharing even though other schools let the traffic in *their* names continue unchecked. As things now stand, each law school must take responsibility for its own future as a scholarly community: how much will we cherish genuine academic interchange, how much will we serve as a particularly prestigious law office address?

### 3. *Publication*

And while we ask this question, perhaps our students will help us out—by refusing to publish articles in their law reviews that have been written to order by scholars in the pay of one of the parties to a lawsuit. Although an ideal editorial process might filter out all the distortions and special pleading, I entirely agree with Professor Posner’s bleak assessment of present editorial practices.<sup>22</sup> Especially in legal fields permeated with social science jargon, student-run reviews

22. See Posner, *Present Situation*, *supra* note 2, at 1123-24.

regularly publish a great deal of incompetent work. While random publication of bad work is unfortunate, it is intolerable when litigants exploit a weak editorial process to flood the journals with self-serving propaganda. Although a strict rule against party-commissioned scholarship will sometimes exclude novel and/or worthwhile insights, these nuggets can still be transmitted to the courts in the form of a brief—where they may be mined by judge and law clerk after the other side is given a fair chance to say what they are worth.

Law reviews are for other things. They are places where we try to convince one another that there is something to the law beyond mere self-assertion, and that lawyers must try to describe that something if their work is to be worthy of their fellow citizens.