HIERARCHY? WHAT HIERARCHY? WHY LEGAL EDUCATION IS THE MOST EGALITARIAN FORM OF HIGHER EDUCATION

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I. An Occupational Hazard

People become attorneys for a wide variety of reasons. But only a subset of attorneys become law professors. Most of those that do have a desire to not merely apply the law, but also to pursue justice. But the pursuit of justice usually means opposing oppression, and oppression usually involves a hierarchical relationship between the oppressor and the oppressed. Therefore, those who select into a career as a law professor are frequently predisposed to find hierarchies to smash. And this can cause them to see hierarchies wherever they look. If to a person with a hammer, everything looks like a nail, then to a person out to oppose injustice, everything may look hierarchical. Thus, the tendency to magnify the hierarchical aspect of common practices or to see hierarchies where they do not exist may be an occupational hazard for law professors.

Something like this may account for law professors' continual criticism of legal education as hierarchical in nature. Perhaps when looked at from the inside, the legal academy may appear to contain mountains of hierarchy. But from an external perspective, those mountains hardly register as molehills. As one who spent his career alternating between the legal academy and the traditional academy and who currently has one foot in each camp, I am able to understand the internal perspective while nevertheless taking the external one. And from the external perspective, it is clear that legal education is, by far, the most egalitarian form of higher education.

II. How Students Are Treated

My colleagues in the humanities and social sciences scoff when I assert that, from the students' perspective, law school is the best form of post-graduate education. They should not. For this is not just true; it is obviously true. To see this, simply compare the life of a typical graduate student with that of a typical law student.

Being a graduate student is probably as close as one can come to serfdom in the developed world. From your first class to the day of your dissertation defense, you are at the mercy of the professors in your department. After two or more years of course work, you are subjected to a battery of preliminary examinations that determine whether you will be permitted to pursue a PhD. If you pass, you then you get to research and write a dissertation. All the while, you are provided with a paltry stipend that is just sufficient to keep you living in poverty and

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guarantee that you will be willing work as a grader and/or researcher for the professors in your department and teach the introductory level service courses that your department must provide, but that no tenured or tenure track professor cares to teach. Your fate rests entirely in the hands of your dissertation committee, who not only determine whether you receive the PhD, but also provide the letters of reference that are absolutely necessary to obtain employment. In sum, you spend five to seven years in the role of impoverished sharecropper working for the departmental plantation that absorbs a significant percentage of your labor in return for an ephemeral promise of future employment that often never materializes.

Compared to graduate students, law students are incredibly empowered. Consider the classroom first. Unlike graduate students who typically must spend at least two years absorbing wisdom from their professors, law students are active participants in the learning process from the first day. Students read cases on their own before class. In class, they are asked for their analyses of the cases and their opinions on whether they are correctly decided. Law professors who do their jobs correctly invite the students to challenge not only other students' analyses but also their own and to argue against the professor's conclusions. Over the course of the three months of the semester, during which there are no quizzes or tests by which the professor evaluates the students' work from a position of superiority, the students engage in a multi-party dialogue in which they are active participants in the exploration of not only what the law is, but what it should be.

Such respectful treatment is not an accident, but is an essential feature of legal education. An attorney's job is to make persuasive and effective legal arguments for his or her clients. To train students to be attorneys, law professors must allow them to create the strongest arguments they can for the positions they support and criticize the strongest arguments for the positions they oppose, including those offered by the professor.

Furthermore, law students have complete freedom of speech in the classroom. They are graded anonymously on the basis of a single final exam. This means that nothing that they say in class during the semester and no disagreement with their professors, no matter how obstreperous, can affect their grade. And, again, if the professor is doing his or her job correctly, the exam is evaluated on the basis of the quality of its legal analysis rather than the students' ability to parrot the professor's position on any particular issue. Therefore, no one need suppress his or her philosophical, religious, ethical, or political beliefs out of fear that expressing them will be damaging to his or her grade.

Despite John Houseman's portrayal of Professor Kingsfield as an intimidating intellectual drill sergeant lording it over law students in a classroom analog of boot camp, the anonymous grading system ensures that law professors have no real power over students. And the number of real-life law professors who use the Socratic method to embarrass students rather than to coach them in the development of their analytical skills must be vanishingly small. I certainly don't know any.

In short, in the law school classroom, students are treated as equals in the intellectual exploration of the law in a way that graduate students can only dream of.

Next consider the respective roles graduate students and law students play in their institutions. After completing their course work and passing their preliminary exams, graduate students enter an extended period of peonage. While writing their dissertations, graduate students often have to act as research assistants on professors' scholarly projects and as graders for professors' large service courses. They also have to supplement professors' lectures to large

classes by meeting with small groups of students and teach introductory level service courses themselves. Any contribution to knowledge that they make—any professional publication—must be produced at their own time and expense in addition to these tasks and writing the dissertation.

Now consider what law students do after the first year. During the summers, some of the rising second years and most of the rising third years get paid summer positions with law firms at which they actually practice law. Some of them earn enough money to pay for much of their second or third year tuition. And even those who don't receive paid positions often find internships that provide useful real-world experience.

During their second and third years, many students staff the schools' main and secondary law journals. In this capacity, they evaluate articles submitted to their journals by law professors and practicing attorneys, select those they deem worthy of publication, edit the articles to ensure that they are of publishable quality, and publish their own research on the law in law journal notes. And in doing so, they exert considerable professional influence.

Because articles published in the top law reviews are frequently cited by the courts, students' selection decisions can directly influence the development of the law. And because law professors are evaluated on the basis of where they place their articles, students' selection decisions at the top journals can significantly advance a professor's career. While graduate students spend their lives having their work evaluated by professors, by the second year, law students are evaluating their professors' work.

Furthermore, as law review editors, law students are full partners with the authors in the production of legal scholarship. In addition to getting experience with the nuts and bolts of the academic publication process, student editors gain insight into what constitutes scholarship of publishable quality. And in working with the authors to produce the best version of their article, the students make a contribution to the advancement of legal scholarship. There are few of us who have not received useful suggestions from the student editors that made our articles better.[1]

Finally, students have the opportunity to influence the development of the law directly through the publication of their student notes. The students who staff the law journals get to select a recent legal decision or controversial area of law, do sufficient research to become an expert about it, and then write an article tracing its implications and commenting on its significance for publication in the journal. These notes can guide practitioners in preparing their cases and be cited by scholars in writing their articles. While graduate students are writing term papers for their professors' approval, law students are making direct contributions to the development of the law.[2]

Law students often complain about feeling oppressed. But feeling oppressed does not imply being oppressed. The feeling comes from the competitive situation in which they find themselves. Law students were typically at the top of their undergraduate classes. In law school, they are among a class of equally gifted individuals with whom they are competing for grades. Given the heavy intellectual work load and the importance of grades for career advancement, it is not surprising that law students feel oppressed. But that feeling does not derive from any actions of law professors or the method of classroom instruction. Looked at objectively, the relationship between law professor and student is much closer to that between partners than that between

[1] Along with the addition of dozens of footnotes.

[2] I recall a colleague rejoicing as he waved a Supreme Court decision that employed language from his student note.

master and servant.

III. How Knowledge Is Generated

My colleagues in the humanities and social sciences are appalled by the law review publication process. They heap derision on a system that not only is not peer-reviewed, but in which the publication decisions are made by students. Once again, they should not. For it takes only a bit of reflection to see that, at least with regard to the humanities and social sciences, the law review process is vastly superior to the traditional academic peer review process. It produces more scholarship. It produces more lucid, better written scholarship. It produces more timely scholarship. It produces more innovative and diverse scholarship. It is more meritocratic, more receptive to articles challenging mainstream thinking, and more egalitarian and anti-elitist.

Consider the peer review publication process. Authors may submit an article to only one journal at a time. They must then wait a matter of months to learn whether the article has been rejected, given a revise and resubmit (R&R), or accepted—something that almost never happens without an R&R. If the article is rejected, the author must then start the process over at another journal. Articles are usually rejected because they are of poor quality. But good quality articles can also be rejected because they challenge mainstream positions held by those typically selected to be reviewers or because they are so innovative that conventional-thinking reviewers fail to grasp their import.

If awarded an R&R, the author must alter the article's thesis or expression to conform to the recommendations—or the biases—of the reviewers,[3] then wait several more months to learn whether the article is accepted or rejected. If it is rejected, the author must start the entire process over at another journal. Unless the article is accepted at the first journal, the publication process can take more than a year, and in some cases, years.

Furthermore, because the reviewers who determine whether the articles get published are professors with expertise in the relevant field of study, authors write in a manner designed to impress such scholars. Thus, their articles tend to contain complex and convoluted arguments laden with technical jargon and obscure references, and, in an effort to demonstrate erudition, have excessive bibliographies that cite virtually every well-known source even marginally related to the topic. As a result, the articles are often inaccessible to the lay reader.

Finally, under the peer review process, authors are subject to what public choice scholars call "agenda control" by the journal's editor. The editors of prestigious peer review journals are usually established senior professors who represent the mainstream of academic thought in their field. They have the power to desk reject articles without sending them out for review. This can mean innovative, but heterodox articles, or those that challenge what the editor believes to be a settled question, may never see the light of day. They also select the reviewers for the articles that they do send out for review. They have the power to send articles that they disagree with or that challenge the positions they are identified with to reviewers likely to be hostile to it. They also have the power to send articles that they agree with or that support their position to reviewers likely to be favorably disposed to its thesis.

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[3] I myself have published an article that includes a page and half discussion of an unrelated point that a reviewer insisted be included that ends with a statement that the discussion is not relevant to the thesis of the article.

This is the apotheoses of a hierarchical system. The most established and powerful person in the field, the editor, aided by a set of established and powerful lieutenants, the associate editors, control the publication destiny and hence the career prospects of the holy-poly junior professors and tenured professors from less prestigious institutions.

Now consider the law review publication process. Authors may submit their articles to as many journals as they wish simultaneously. This creates a market for articles where the authors are sellers and journals are buyers. Both parties are shopping for the best price—the journals for the highest quality articles they can obtain and the authors for the most prestigious placement they can obtain. This requires negotiations in which both parties' interests must be respected and which tend to produce win-win results.

Shorn of the monopoly power wielded by peer review journals, a law review that identifies an article it wants to publish must persuade the author to accept its offer. Because of the competition from other law reviews, it has no power to issue conditional acceptances or demand that authors revise their article and resubmit it. It must either reject or accept the article as is. If a law review's editors think an article needs revision, they must *persuade* the author to make desired changes by offering editing as a service supplied by its staff. In addition, unless a law review is one of the very top-ranked journals, it must negotiate a time period during which the author can shop his or her article to other journals—the period during which authors may request expedited review—to entice the author into accepting its publication offer.

The market forces at work produce quick publication decisions and timely publication. Because the authors retain ultimate control over editing decisions, they get to express their ideas without the distortion introduced by the need to accommodate reviewers. Furthermore, articles advocating heterodox or unpopular positions can be published if they are well-written and well-reasoned. Because of the competition for articles, there will almost always be some journal whose editors are willing to put their ideological biases aside to get a good article.[4]

Legal scholars often express dismay at having to write for journals in which students select the articles for publication and have a hand in the editing process. This is, at least in part, because they resent the discipline it imposes on them. Having law students, who are intelligent non-experts, make the publication decisions requires authors to write in a way that is intelligible to a general audience. They cannot write jargon-laden tomes that assume a high degree of specialized knowledge possessed only by other experts. They must write simply enough to educate the student editors, and hence, the journal's ultimate readers, on the relevant academic debate before launching into their particular contribution to it, which also must be expressed in terms that the non-expert can understand. In short, having students as editors requires legal scholars to write clearly.

It also requires them to be careful in their research and reduces academic fraud. Student law review editors check every citation in the articles their journals publish, something peer reviewers almost never do.[5] All of us have felt the temptation to cut corners on our research, but

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[4] Indeed, early in my career, I had an article make it to final review at the Stanford Law Review before being rejected. Upon inquiring about the reason for the rejection, the Editor-in-Chief forthrightly told me that his board did not want to publish an article advocating my point of view. Nevertheless, the editors of the Duke Law Journal were willing to overlook its unorthodox thesis and publish it.

[5] Like almost all of my colleagues, I plead guilty to this.

the knowledge that our citations will be checked causes us to use care and expend the energy necessary to make sure that our sources actually say what we claim that they say. This knowledge also inhibits those whose ideological commitments might override their commitment to truth from engaging in the intentional misrepresentation of their sources.

My colleagues in the traditional academy argue that without peer review, law reviews lack quality control. This is an extremely myopic viewpoint. Peer review is *a* method of quality control, but it is not the *only* method of quality control. Peer review is a top-down, command and control method of quality control. It invests experts with control of the publication process and empowers them to make judgments that determine whether an article get published. Peer review is quality control through central planning.

Law reviews employ an alternative method of quality control that allows distinctions in quality to evolve out of the competition for articles. Because law reviews allow simultaneous submission, the less prestigious, lower ranked journals tend to make reasonably quick offers in an effort to get high quality articles. The authors of these articles may then ask higher ranked journals for expedited reviews. If a higher ranked journal makes an offer on such an article, the author receives another time period to request expedited review by even higher ranked journals. This process may be repeated several times. Poor quality or non-innovative articles quickly hit their ceiling, while higher quality articles rise through the ranks to the more prestigious journals. In the end, the better articles tend to end up in the higher ranked journals, which serve as reasonable proxies for quality. Law review quality control is quality control through market forces.

Both peer review and the law review competitive method of quality control have imperfections and will at times produce perverse results. But in my opinion, the law review process does better at the margin because it has built in correctives that limit the damage of the bad publication decisions that inevitably occur. In the first place, without the imprimatur of peer review, law reviews provide a relatively unbiased forum for the battle of ideas. Because the articles are chosen by students, none can claim the blessing of the entrenched academic establishment—that is, none benefits from the academic hierarchy. All are equally open to challenge and must stand or fall on the quality of their arguments.

But more importantly, although articles that challenge mainstream thought may not always be published in as highly ranked journals as they deserve, if they are well-written, they will be published somewhere. And if they are truly innovative, they will be noticed and cited, and thus, will still be able to significantly influence the academic debate. In contrast, under peer review, such articles may never be published at all or, if they are, may have their publication delayed for years while they work their way through a series of hostile reviewers. Simply put, law reviews do a better job of realizing a true marketplace of ideas.

In sum, in the law review model of publishing, students and professors work together to produce *clearly written and accurately sourced* high quality scholarship, there is little to no censorship of heterodox ideological positions by the entrenched academic power structure, and the theses of all articles are subject to robust criticism and evaluation by any and all interested parties. This is pretty much the antithesis of a hierarchical publication process.

IV. Conclusion

Be assured that I do not take a Panglossian view of legal education. There is much to

criticize in the current structure of the legal academy. And it is not difficult to identify many inequities in the way law schools are organized and function. But I think it is worth pointing out that such inequities are not unique to the legal academy, and are usually even more prevalent in the humanities and social sciences. In comparison to the other forms of graduate and professional education, law schools look pretty good.

In my judgment, the most serious hierarchical inequity besetting legal education has nothing to do with the way students are treated or scholarship is generated. Rather, it concerns the way law professors are hired. Many professors occupy more prestigious positions than they deserve because they went to the right law school or know the right people or have the right skin color or hold the right ideological positions. Many who deserve better are in low prestige positions or have been excluded from the legal academy entirely.

This may be due to the fact that one needs only a JD to be eligible for appointment as a law professor. In the traditional academy, which requires a PhD for appointment to a tenure line position, a case can be made that the training one gets in pursuing the degree prepares one to be a professor—one must teach classes while a graduate student and demonstrate scholarly potential by completing a dissertation.[6] But the skills required to get a JD and to practice law are not necessarily those that one needs to be an effective teacher and productive scholar. Therefore, law schools need some basis for distinguishing among the JDs seeking employment as law professors.

Not unreasonably, law schools traditionally seek graduates of the top law schools who have clerked with Federal Court of Appeals judges or Justices of the Supreme Court. This is reasonable not because either of these qualifications indicate that one will be an effective teacher or productive scholar, but because of the selection effect. Because the top law schools admit only the brightest and most promising students and the judges and Justices select only the brightest and most promising of these for their clerks, these characteristics can serve as good proxies for intellectual acumen. And in the absence of any direct evidence of teaching ability and scholarly potential, that is a reasonable ground for hiring preference.

The only way to counteract this hierarchical bias is to provide the necessary direct evidence of teaching ability and scholarly potential. Providing such evidence is the raison d'etre of the Freedman Fellowship. After all, the best evidence that one is qualified to do a job is that he or she has already done it and done it well. For this reason, it is entirely appropriate to hold a symposium on *Disrupting Hierarchies in Legal Education* designed to explore the impact of the Freedman Fellows program.

[6] The case can be made, but all of us with PhDs know how large the gap is between theory and practice in this respect.