LEGAL ACADEMIA AND THE BLINDNESS OF THE ELITES

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The Harvard Federalist Society hosted a conference on diversity in the legal academy in the spring of 2013. The premise of this conference was that there ought to be more intellectual diversity on the faculties of America's law schools. While there are numerous ways of defining "intellectual diversity," one form of intellectual diversity tends to be overlooked: diversity of academic and professional backgrounds on a school's faculty.

In one particular respect, the faculty hiring practices of America's most elite law schools are highly unusual. Much of American academia observes a strong informal norm that programs ought to avoid "hiring their own"—that is, someone who has received an advanced degree from a graduate program will usually not be considered for a position on that faculty, or at least not until the graduate has established an academic career at another institution.[1]

This norm is a product of the assumption that, at least in regard to intellectual diversity, institutions should fight against the tendency to replicate themselves. It would be an understatement to say this norm has had little influence on the hiring practices of the Harvard and Yale Law Schools in regard to their own faculties. And Harvard's and Yale's hiring practices appear to have had a ripple effect on hiring practices through

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1. Because such norms are almost always informal, they are difficult to document. *See Hiring "their own" practices . . . (nepotism, academic endogamy)*, CHRON. HIGHER EDUC., https://chronicle.com/forums/index.php?topic=78080.0 (last visited Dec. 2, 2013) (forum discussing university faculty hiring practices).

legal academia as a whole.[2] These trends are, especially under present conditions, significant.

The American legal academy is strikingly monolithic with respect to diversity of academic and professional backgrounds. Consider the following statistics:

- Of the forty-seven current non-clinical tenure-track members of the Yale Law School faculty who have their initial law degree from an American law school, thirty-nine received that degree from either Yale or Harvard.[3]
- Of the eighty-one current non-clinical tenure-track members of the Harvard Law School faculty who have their initial law degree from an American law school, seventy-one received that degree from either Harvard or Yale.[4]
- A recent survey found that, among the 486 entry-level, tenure-track hires made by ABA-accredited law schools between 2003 and 2007, 38.5% of those hires had a J.D. degree from either Harvard or Yale. The survey also found that 85.6% of new hires received their J.D. degrees from one of a total of twelve elite law schools.[5]
- A 2003 study found that the average amount of experience in the practice of law among new hires at top twenty-five law schools, among those hires who had any such experience, was 1.4 years.[6]

2. The intense concern with the institutional pedigree of faculty candidates that marks the contemporary hiring practices of law schools in general can be interpreted as a reflection of, or reaction to, the policies of the highest-ranked schools in the field.

3. Data taken from the Yale Law School faculty profile website. *See Faculty*, YALE LAW SCHOOL, http://www.law.yale.edu/faculty/faculty.htm (last visited Dec. 2, 2013).

4. Data taken from the Harvard Law School faculty profile website. *See Faculty*, HARVARD LAW SCHOOL, http://www.law.harvard.edu/faculty/index.html?l=l (last visited Dec. 2, 2013).

5. Brian Leiter, *Top Producers of New Law Teachers, 2003-2007*, BRIAN LEITER'S LAW SCHOOL RANKINGS (Mar. 19, 2008), http://www.leiterrankings.com/jobs/2008job_teaching.shtml.

6. Richard E. Redding, *"Where Did You Go to Law School?" Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 601 (2003).

- A new study of the top twenty-six law school faculties reveals that those faculties include sixty-six tenure-track faculty members who do not have law degrees.[7]
- Even a cursory examination of the resumes of the tenure-track faculty at American law schools, and especially at highly-ranked schools, reveals that what little practice experience faculty have tends to be limited to a very narrow sector of the profession—either associate work at a large law firm, or work for a government agency, usually for the federal government.
- The large majority of tenured faculty at American law schools are over fifty years old, and graduated from law school prior to 1990.[8]

Should we even care about this type of intellectual diversity?

Several scholars at the aforementioned conference emphasized both the theoretical and practical value to students of being taught by faculty who represent a wide range of backgrounds and views.[9] In addition to diversity of opinion, an appropriately diverse faculty should include a sufficient number of tenured faculty who have a real connection to, and experience with, those areas of the legal profession in which typical graduates of the school are likely to find themselves practicing, or trying to practice, law.

The statistics quoted above indicate that, at most American law schools, a strong plurality of the faculty are graduates of the law schools at the nation's two most elite universities, while the law faculties at those two universities are themselves overwhelmingly dominated by graduates of those two schools. And

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7. Joni Hersch & W. Kip Viscusi, *Law and Economics as a Pillar of Legal Education* 21 (Vanderbilt University Law School, Working Paper No. 11-35, 2011), *available at* http://ssrn.com/abstract_id=1907760.

8. ELIZABETH MERTZ ET. AL., AFTER TENURE: POST-TENURE LAW PROFESSORS IN THE UNITED STATES, AMERICAN BAR FOUNDATION (2011), http://www.americanbarfoundation.org/uploads/cms/documents/after_tenure_report-_final-_abf_4.1.pdf.

9. This argument was emphasized by speakers on the second panel, which included Professors Richard Fallon, Victoria Nourse, Michael S. Paulsen, and Nicholas Quinn Rosenkranz. *See* Fallon et al., Panel II: Effects: should law schools care about intellectual diversity? At the Harvard Federalist Society Intellectural Diversity and the Legal Academy Conference (Apr. 5, 2013) *available at* http://www3.law.harvard.edu/orgs/fedsoc/intellectual-diversity-conference/ (last visited Dec. 2, 2013).

most of these faculty members graduated from law school at least twenty years ago.

In addition, at most law schools very few tenure-track law professors have significant experience as practicing attorneys, and what practice experience they do have tends to be limited to a very narrow range of jobs.[10]

This lack of diversity in both educational and professional backgrounds has produced what can be called a blindness of the elites. In the context of contemporary American legal academia this blindness has manifested itself as a failure to recognize the gradual but inexorable development of a deeply dysfunctional relationship between the cost of legal education and the long-term investment value of a law degree. In other words, the people who control, through hiring and tenure practices, the core identity of American law schools, replicate the very homogeneity that makes it difficult for law schools as institutions to genuinely understand the plight of many of their graduates.

Consider, for example, the changing relationship between the cost of one year of tuition at Harvard Law School and the salary of a first-year associate at the nation's highest-paying law firms.

Over the past sixty years, tuition at Harvard Law School has increased ten-fold in constant, inflation-adjusted dollars. In the early 1950s, a year's tuition at the school cost approximately $5,100 in 2011 dollars. Over the next two decades this figure more than doubled, so that by 1971 tuition was $11,664 in 2011 dollars. Tuition grew at a (relatively) modest pace over the course of the 1970s, so that by 1981 it was $14,476 in 2011 dollars. Then it climbed rapidly again, rising to $25,698 in 1991, $34,484 in 2001, and nearly $50,000 in 2011, again all in constant dollars.[11]

Now for much of this period, a superficially plausible justification for this astonishing increase in the real cost of a Harvard law degree could be put forward. Defenders of the legal aca-

10. That most tenure-track law professors possess little, or in some cases no, practice experience is to some extent ameliorated by the presence on law faculties of clinical and adjunct teachers, who usually have much more actual experience as lawyers. Yet the majority of law graduates never take a clinical class, while adjunct professors tend to play a very marginal institutional role within law schools.

11. All tuition figures are taken from *Harvard Law School Catalogs*, HARV. L. SCH. LIBR., http://www.law.harvard.edu/library/digital/harvard-law-school-catalogs.html (last visited Dec. 2, 2013). I have adjusted for inflation using the federal government's official Consumer Price Index. *See CPI Inflation Calculator*, BUREAU LAB. & STATS., http://www.bls.gov/data/inflation_calculator.htm (last visited Dec. 2, 2013).

demic status quo could point to the rapidly rising starting salaries for associates at large law firms, and, more tenuously, could assert that average compensation for attorneys, or at least attorneys who had attended elite law schools, was also increasing markedly. Here is, again in 2011 dollars, the change over time in "the starting associate salary at the highest-paying New York law firms":

1957: $42,300
1967: $67,050
1977: $103,357
1987: $138,607
1997: $119,200
2007: $173,579[12]

On a more general level, while median household income in the United States has stagnated since the mid-1960s, the real income of what are euphemistically referred to as "upper middle class professionals" has increased substantially over this time frame: For example, between 1966 and 2006, the 95th percentile of household income rose from $114,230 to $198,166 in constant dollars.[13] And while these gains are modest in comparison to the explosion of wealth among the richest Americans, legal academics have seen them reflected in their own economic situation: In real terms, compensation for law professors has nearly doubled over the past thirty years.[14]

Unfortunately for law graduates, the belief apparently held by many law professors—that rising tuition costs are to a significant extent reflected in the increasing value of a law degree—turns out to be false. Indeed, the last quarter century has been marked by a sharp contraction of the legal services sector, in relation to the rest of the American economy. Data from the

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12. For salary shifts between 1991 and 2007, see Judith N. Collins, *Salaries for New Lawyers: An Update on Where We Are and How We Got Here*, NATIONAL ASSOC. L. PLACEMENT, http://www.nalp.org/uploads/0812Research.pdf. For 1987 figures, see Tamar Lewin, *Law Firms Add Second Tier*, N.Y. TIMES, Mar. 11, 1987, http://www.nytimes.com/1987/03/11/business/law-firms-add-second-tier.html. For earlier figures, see RICHARD ABEL, AMERICAN LAWYERS, 194–98 (1989).

13. Historical income levels for households are collected by the U.S. Census Bureau. *See Historical Income Tables: Households*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/income/data/historical/household/ (last visited Dec. 2, 2013).

14. *See* Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177, 188 (2012).

federal government's Bureau of Economic Analysis reveal that in 1989, the legal sector's share of the nation's total gross domestic product (GDP) totaled $181.38 billion (in 2011 dollars). In 2011, the legal sector accounted for $179.84 billion of the nation's GDP. Over this same time period, United States GDP increased by 68.8% in real dollars. In other words, as a relative percentage of the economy as a whole, the legal sector shrank by 41% during this time.[15]

Over this same period, ABA-accredited law schools increased their annual output of law graduates by nearly 25%.[16] This combination of increasing supply and stagnant or contracting demand has had a predictably dire effect on people licensed to provide legal services, especially in recent years. Indeed, at a national level, only slightly more than half of law school graduates are managing to secure legal jobs within nine months of graduation, and it seems probable that the median income of recent law graduates is under $60,000.[17] Meanwhile, because of the extraordinary increase in the cost of attending law school, average educational debt among new law graduates with such debt is now around $150,000, and far higher amounts are commonplace.[18] The juxtaposition of the latter two figures spells economic catastrophe for a large percentage of recent law graduates, especially as the percentage of entry level jobs that pay enough to service such debt levels remains relatively minuscule.[19]

A lack of a certain form of diversity has played a key role in bringing about the current radical mismatch between the cost of legal education and the prospective long-term return on law degrees—a mismatch that leads to the conclusion that a majori-

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15. *See A Profession in Decline: BEA Legal Sector Data (1977-)*, LAW SCH. TUITION BUBBLE, http://lawschooltuitionbubble.wordpress.com/original-research-updated/a-profession-in-decline/ (last visited Dec. 2, 2013).

16. *See Legal Education and Admission to the Bar*, AM. B. ASS'N, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf (last visited Dec. 2, 2013).

17. *See* Campos, *supra* note 14, at 206.

18. *Id.*

19. Of the 44,495 total graduates in the national law school class of 2011, only 4757 were reported to acquire positions with law firms of more than one-hundred attorneys. *See* NATIONAL ASSOCIATION OF LAW PLACEMENT, CLASS OF 2011 NATIONAL SUMMARY REPORT, http://www.nalp.org/uploads/NatlSummChart_Class-of2011.pdf.

ty, and indeed quite possibly a large majority, of law degrees have negative net present value for new law graduates.[20]

Put in the simplest terms, law schools across the country are dominated by graduates of elite law schools in general, and by graduates of Harvard's and Yale's law schools in particular. As the statistics above show, these graduates almost always practiced law for a very short time, if at all, in hyper-elite settings, largely before the sharp relative decline in the demand for legal services that has characterized the last quarter century. In other words, legal academics today are usually people who have, at best, a wholly abstract relationship to the actual economic conditions law graduates are facing, especially the vast majority of law graduates who graduate from far less elite law schools than those their professors attended. This helps explain, I believe, the otherwise inexplicable fact that the very large numbers of law schools that place tiny percentages of graduates in high-paying entry level jobs often charge almost as much in tuition as the shrinking handful of schools that place enough graduates in such jobs so as to not render their tuition absurd on its face.[21] This blindness of the elites has produced an economic model of legal education that is propped up by, on the one hand, extremely inefficient and unjust price subsidies,[22] and, on the other, the willingness of law schools to exploit the cognitive errors to which prospective law students are prone, while charging them prices which bear no rational relation to the value of the degrees the schools are conferring.[23]

Putting legal education back on something resembling sound economic footing is not going to be easy. Too many very smart people in positions of influence have talked themselves into minimizing or dismissing criticisms of what is, in the long run,

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20. *See* Campos, *supra* note 14, at 211.

21. Average private law school tuition at ABA-accredited law schools now averages more than $40,000 per year. *See* Karen Sloan, *Tuition is Still Growing*, NAT'L L. J., Aug. 20, 2012.

22. Legal education in America is subsidized by the federal government's policy of allowing almost all students who matriculate at ABA-accredited law schools to borrow whatever those law schools choose to charge in tuition and estimated cost of living, without any actuarial standards for issuing these loans. *See* Paul Campos, *Self-Congratulation and Scholarship*, 60 U.C.L.A. L. REV. DISC. 214, 217 (2013).

23. *See generally* BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012).

an unsustainable system.[24] One of many steps that can be taken toward fixing that system is to promote diversity of experience among law school faculties. The pursuit of this form of diversity would be based on the assumption that a significant portion of a law school's faculty should have had some sort of real experience with those sectors of the legal profession that the school's graduates are most likely to enter, or to try to enter.

Nothing here should be taken as a criticism of elite law schools per se. These are great institutions, which have made countless valuable contributions to the American legal system. But that system has no need for two-hundred law schools that try to resemble Harvard and Yale, just as it has no need for two-hundred law schools that try to place their 45,000 annual graduates in the 5,000 or so legal jobs that arguably pay enough to justify the average law school's tuition structure.

The current faculty hiring practices of American law schools ensure that law school faculties lack what is, under present circumstances, an especially critical form of diversity. American legal academia is suffering from a blindness of the elites—a blindness that has led us to lose contact with the increasingly grim economic and social realities many of our graduates face.

Law schools, and especially that vast majority of law schools which will never send more than a tiny percentage of their graduates into the elite portions of the profession,[25] need to maintain (or more realistically, re-establish) contact with the profession as a whole. Faculty hiring practices that try to turn every school into a pale imitation of Harvard and Yale have not served our students and graduates well.

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24. *See, e.g.*, Erwin Chemerinsky, *You get what you pay for in legal education*, NAT'L L. J., July 23, 2012; Lawrence Mitchell, *Law School Is Worth the Money*, N.Y. TIMES, Nov. 28, 2012, http://www.nytimes.com/2012/11/29/opinion/law-school-is-worth-the-money.html?_r=0.

25. Elite positions in the profession are by definition occupied by a small minority of the members of the profession. But beyond this, such positions are, relatively speaking, dominated by graduates of elite law schools, as any examination of the resumes of federal judges or partners at national law firms will confirm.