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How the structure of universities determined the fate of American legal education – A tribute to Larry Ribstein

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ABSTRACT

Prior to 1862, with insignificant exceptions, American colleges and universities were either strongly tied to a particular religious denomination or they reflected an elitist social consciousness that, like religion, helped define the "mission" of the schools. The non-profit status (usually a charitable trust) was perfectly consistent with this mission, as the last thing wanted by the founders was consumer sovereignty or a competitive market for higher education. There were no "departments" as we know them today and little intellectual specialization; philosophy, the classics and theology constituted the standard curricular fare. These schools were "vocational" only in the ancient sense of preparing students for the ministry or possibly elementary-level teaching. Other kinds of vocational training, such as for engineers, chemists, architects, lawyers, or doctors, was done overwhelmingly through either apprentice-type training (actually a form of proprietary education) or in proprietary institutions. There had to have been – very little is known about this – an enormous and thriving for-profit educational sector. All this changed with the establishment of the land-grant schools under the first Morrill Act in 1862 which eventually caused massive failures of both the private religious schools and the proprietary ones. The land-grant schools were highly vocational in their mission, but they retained the governing structure of their private not-for-profit predecessors, a structure consistent with the fact that no one in charge really wanted consumer sovereignty or a competitive market for students. Vocationalism, of course, mandated specialization, and the departmental system was born. Each department (or "school", as in the cases of medicine and law) became a semi-autonomous "firm" competing outside their hallowed halls only for the most appropriate new colleagues, i.e. those who would fit most tranquilly – and ideologically – with the existing faculty. Since there were no proprietary interests and success could not be judged by profitability, a status hierarchy evolved among departments or schools. Attitudes and approaches adopted by the school at the top of the hierarchy would be filtered down the hierarchy because professors, aspiring to gain the next higher level in status (and, it so happens, money), would tend to reflect the positions prevailing in that next higher rung. Thus, at any given moment, a single ideology or methodology would tend to dominate throughout a particular field. In law, as in other fields with no constraining market to answer to, schools tend to reflect the intellectual and ideological preferences of the faculties at the standard-setting schools, and their quasi-governmental powers are rarely noted.

1. Background and statement of the problem

It is almost trite today to catalog the problems of modern legal education. The popular press and the internet have done a pretty good job of making the professional concerns of legal educators almost popular fare for casual readers and especially for prospective law students. But, just to hit the highlights, here is a list of the better-known grievances: high tuition, too many law schools, broken accreditation system, inappropriate training for modern practice of law, unneeded and esoteric courses, ideological bias in teaching, arbitrary admissions policies, undue reliance on standardized tests, underworked, overpaid and inaccessible faculty, "publish or perish" mentality instead of focus on quality of teaching, ideological hiring practices, lack of specialization and innovation, bloated administrative staffs, exorbitant administrative salaries, promotional materials misleading about prospective employment, inadequate preparation for the bar exam or conversely too much attention to the bar exam. The list could undoubtedly be elaborated

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or extended,[1] but, repetitive or contradictory as it may appear, the list is long enough to suggest an institution in crisis.

The ideas that have generally been advanced to correct these various problems have been largely ad hoc in nature (e.g. abolish tenure, dispense with ratings, jiggle the curriculum or redesign the LSAT), the very sort of correction one might anticipate from a failure of the reformers adequately to understand why the problems developed in the first place. A large dose of history and of economics is required to make the real problems of modern law schools in any way tractable, though neither subject is a strong point of modern education reformers. And, a *caveat* to the wise, though an understanding how we got here is a necessary factor in improvement, it is not a sufficient one.

We start the task by noting that American law schools are today overwhelmingly administrative divisions of larger universities, both the private not-for-profit and the public institutions. But that was not always the case, and in the main this has only been true since the late-19th or early-20th Century. Prior to that time, formal law schools[2] were overwhelmingly free-standing, for-profit institutions. As a result, these schools were run as any ordinary profit-seeking enterprise and were generally outgrowths of law offices.[3] Probably any student who could pay the tuition was admitted; the faculty would have been entirely part time; the curriculum would have closely tracked the practice of most lawyers of the period (who certainly were not generally highly specialized). Local law would have been emphasized, and little if any time would have been spent on esoteric or extra-legal topics. There would have been almost no tuition scholarships and very little credit available for this expenditure. In the nascent national law schools in major universities, like Harvard and Yale, the student body would have been comprised largely of students from families who could afford the tuition, expenses and opportunity costs of that education. But for most 19th-century law students the schooling was either part time or entirely in night classes so the students could work while they went to school. Prospective employers knew what they were getting, since the curriculum was tailored to their practice and generally established lawyers and judges were also the teachers in the schools.[4]

But the story of how we got from that picture to one where nearly all legal education – now quite different in character – is offered as part of the broader offerings of relatively large universities does not proceed in a straight line. There was no simple takeover of the for-profit law schools by aggressive, empire-building universities. For that matter the very development of the modern large universities occurs as part of the same process that includes the "academization" of law schools. Consequently we must know something about the early history of this larger and different part of the higher education industry in order to understand the position of the law schools.

2. Pre-1862 higher education in America

Colonial America had nine colleges, and there were scatterings of various non-degree granting[5] schools in all the colonies and early states. All of these colleges, with only minor exception, were mainly what we would today term "liberal arts" schools, since large-scale vocational training (other than for the ministry) was still many years in the future. And though one or two of these early colonial colleges termed themselves "non-sectarian," the more descriptive term, even for those schools, would have been "non-sectarian Christian," for there was some religious affiliation in every single one of these schools. This general religious affiliation of schools was, of course, a continuation or copying of the English situation tailored to the special needs of a more diverse religious population in America. But, as we shall see, the non-profit model, basically inherited from England as part of the Common Law, was peculiarly appropriate for their purposes. Though the apprenticeship form of training for a profession or skill was quite common, there is little record of for-profit firms offering higher education in a market setting in the colonial or just-past colonial periods, though they did exist.

The next phase of American higher education history, 1800–1860, makes the religious aspects of higher education in America even more clear and oddly helps explain a lot about the governance of colleges of the period. From Independence until the Civil War literally many hundreds of small denominational colleges were founded west of the Alleghenies (and some still in the East). Less than a handful of these were secular. For the most part these schools were founded by the ordained and lay leaders of small, local, religiously homogenous communities that needed schools to prepare ministers and often lower-grade teachers,[6] to guarantee that their future community leaders would be thoroughly indoctrinated religiously and, in some few cases of co-education (more likely juxtaposition), to provide a marriage market to assure that the children of the community married within the faith.

2.1. Some economics of not-for-profit institutions

The fact that colleges in the United States before about 1890 were overwhelmingly both denominational and non-profit is neither accidental nor surprising. Religiosity characterized American society until well into the 19th Century to a degree almost unfathomable today. The only institutions of higher education the colonials were familiar with were Oxford and Cambridge, then appendages of the Church of England. The "classical" higher education they offered was not thought of as vocational preparation (except perhaps for the ministry) or as an investment for future wealth. And to the extent that some early American colleges, especially those nine colonial schools, were a bit more secular than their forebears, they were to a large extent merely substituting social distinction ("class status" in modern parlance) for religious training to determine the "mission" of their schools. One did not go to one of these colleges in order to establish social status; one went to college because one's family's social status demanded that. It was

[1] A rather comprehensive set of complaints can be found in the recent book by Tamanaha (2012).

[2] We are limiting this discussion to "formal" law schools and not, for the moment addressing the more common manner of training of 19th-Century lawyers, apprenticeships. A strong case can be made for the inclusion of apprenticeships within the category of "for-profit" education, though the convention has been to see them as separate educational forms. The first law school in the country, the famous Litchfield School, was simply an outgrowth of a practitioner's popularity as a mentor. *See* Stevens (1983) at 3. It has been estimated that there were over 100 law schools in the United States in 1890, most of which were for-profit. *See id.* at 74–76.

[3] Stevens (1983) at 3–4.

[4] The rapid growth of law firms starting in the first half of the 20th Century – and the business model these firms adopted – will not detain us here, though some of Larry Ribstein's most telling commentary on the profession involved criticism of this model and also the extent to which the law schools blithely ignored what the market seemed to be telling them. *See* Ribstein (2010).

[5] Academic degrees, following the English precedent, could only be granted by institutions empowered by the appropriate legislature to do so. *See* Rudolph (1990) at 3–5.

[6] It should be noted here that the same period saw an expansion of so-called "normal" schools, i.e. those designed to train lower-grade schoolteachers. These were generally not religious schools but rather simply vocational training operations. These were frequently formed by local governments, but all forms of organizations were utilized. Overwhelmingly these schools were adopted into the rising universities later in the 19th Century, where they became departments or colleges of education. However, a few evolved into four-year colleges or universities. Apart from demonstrating the rapacious appetite of the newer universities for absorbing any and all academic programs, they have little to do with the thesis developed in this paper.