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Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom

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A COMMERCIALIST MANIFESTO: ENTREPRENEURS, ACADEMICS, AND PURITY OF THE HEART AND SOUL

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I. INTRODUCTION 781

II. FEAR, LOATHING, AND THE MARKETPLACE 783
A. *The Good Old Days* 785
B. *Reality Bites* 787

III. GO TO THE MARKETPLACE AND CREATE GREATNESS .. 792
A. *We're There Already* 792
B. *They Are Our Customers; Let's Treat Them Right* 794
C. *Strangers "Get It Wrong"; Worse Yet, They Keep Our Money* 797
D. *Commercialism for Fun and Profit* 799
1. Marketing 799
2. Educational Products 802
3. Continuing Legal Education 804
4. Consulting 805

IV. CONCLUSION 810

I. INTRODUCTION.

Fear drives us to do many bizarre things. We create strange rituals to ward off evil spirits that always seem to surround us. We pray for desirable outcomes, even if the last time we engaged in religious behavior was in childhood. We avoid dark, scary places. And, when we are overcome with fear, we run away, hide, or even act irrationally.

Some of our worst fears concern the unknown or the different. We stay away from strangers. We will not taste new foods—at least until someone braver than we are (and who we trust) takes a taste, does not make a face, and gives us the sign that it is safe to munch. We certainly avoid new places that speak "funny" languages. Risk-averseness is our credo, our survivors' guide.

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But if it is true that we are fearful, we also live in a country that has adventure built into its very fabric. Americans revel in boldness, in a spirit of risk-taking, in innovation—a kind of "what-the-heck, why not, never up, never in" attitude that is the essence of trying new things. Even stranger, these two seemingly inconsistent character traits often reside together in the same people or institutions. We cling to the familiar, while simultaneously leaping into the unknown—sometimes just for the fun of it.

I am interested in one such schizoid institution—higher education. We in academia cheer often wildly theoretical and cutting edge scholarship. We applaud interesting and novel teaching approaches. We dance with glee as we impose novel pedagogy on our students, introduce material from other disciplines, or attend conferences with people who hold strange views, come from out-of-the-way places, and represent deviant strains of thought. But tell a faculty member that he or she must use a new book, or add or take away credit from his or her favorite course, and life as we know it may come to a halt. Add to that such crises as the introduction of new stationary, the development of a new university logo, or even the creation of a different football ticket priority system, and the unyielding, worrisome, conservative, and fearful parts of our personalities ooze out.

In this essay I focus on one prospective change in the business of universities (and their law schools) that will create remarkable fear and loathing—the move by higher education to become more "commercial." One cannot underestimate the antipathy directed toward "creeping commercialism." The pariahs targeted for criticism are plain: administrators who call for market responses, legislators and boards that demand consumer sensitivity, and students who think they are involved solely in product purchasing.

Talk about palpable fears:

— Fear of what we will become—junior colleges, adjuncts to law firms or companies, shills for new products, schools with so little soul that they surely would sell themselves to the highest bidder.

— Fear that a financial focus will prevent programs from being educationally sound.

— Fear that commercialism will crawl into our courses, taint our teaching, distort our research, and tarnish our missions.

— Fear that salaries will depend on illegitimate consumption preferences unrelated to quality.

— Fear that "bean-counting," "form filling," "I-dotting," and "T-crossing" will take the place of evaluation of actual work, and that

quantity and profits, rather that fame and reputation, will become the currency of the academy.

— Fear that student consumerism will run rampant, ruin education, and force us to pander to the market, rather than offer quality education.

— Fear that administrators will mold their mission to confirm to the expectations of outsiders—donors, legislators, U.S. News & World Report voters, the media, etc.

— Fear that as popular culture invades the "business" of education, so too will that culture absorb the academy as any other product that can be bought, sold, marketed, and packaged.

— Fear that academic freedom will give way to godless searches for filthy lucre.

— Fear that the security of the academy will give way to the vagaries of the market—just like every other segment of the economy.

YIKES!

This essay confronts our fear. It urges us to accept reality—commercialism is here, now, and it is not going away. The battle is over. Let's stop fighting. Embrace commercialism; WORKERS OF THE ACADEMY UNITE (at least in search of some dollars)! This essay argues that financial focus and accountability must undergird the world of higher education. It says honestly: we are a business, deal with it. It also says: wake up and *show me the money*; it is simply too late to expect that the university is exempt from reality. It ends with a Commercialist Manifesto: Go to the Market and Create Greatness.

II. FEAR, LOATHING, AND THE MARKETPLACE

I've never thought of myself as the boogie-man, a representative of the Evil Empire, a capitalist pig, or even a scary guy. If self-image counts for anything, chalk me up as someone struggling to improve an institution in the face of decreasing resources and increasing expectations.

But to Professor Martin Guggenheim[1] of New York University School of Law, and Professor Lisa Lerman,[2] of Catholic University School of Law, my views on the need for commercial reality in the academy are at the cutting edge of the decline of legal education (maybe

1. Martin Guggenheim, *Fee-Generating Clinics: Can We Bear the Costs?*, 1 CLINICAL L. REV. 677 (1995).

2. Lisa G. Lerman, *Fee-for-Service Clinical Teaching: Slipping Toward Commercialism*, 1 CLINICAL L. REV. 685 (1995).

even Western Civilization) as we know it.[3] Professor Guggenheim argues that the "superficial appeal"[4] of one of the commercial experiments undertaken by my former school was so significant a threat to the status quo within academia that it was "dangerous."[5] He argues that the experiment—the novel idea that clinical faculty lawyers would charge for their legal services—"will prove so seductive that it will be uncritically adopted by other schools."[6] In essence, the "plan threatens to destroy . . . the very heart of the clinical approach."[7]

Professor Guggenheim finds it quite upsetting that adoption of the experiment "undoubtedly will make clinics' representation of clients more economically efficient."[8] Worse yet, he believes that the experiment "will probably make clinics a more valued part of the law school community."[9]

Perhaps I'm naive, but neither producing greater efficiency nor cultivating greater esteem for law school clinics strikes me as particularly offensive. The actual offense, however, is much more subtle—that a fee-generating clinic "convert[s] the clinical enterprise to pure enterprise."[10] Or, as Professor Lerman puts it: "The question is whether and in what respects we might constrain the development of commercialism within our schools."[11]

Professors Guggenheim and Lerman raise specific questions about the pedagogy, ethics, and fairness of a fee-generating clinic, all of which are interesting and in need of a separate response.[12] In this essay, however, I focus on the essence of their complaints, the "problem is one of competing missions: education and income generation, and the potential of the latter to undermine the former."[13]

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3. Guggenheim, *supra* note 1, at 678; Lerman, *supra* note 2, at 706-07.
4. Guggenheim, *supra* note 1, at 677-78.
5. *Id.* at 678.
6. *Id.* at 681.
7. *Id.* at 683.
8. *Id.*
9. *Id.*
10. *Id.*
11. Lerman, *supra* note 2, at 706.
12. Without oversimplifying the argument, the fear is that clinicians who teach students how to practice law cannot simultaneously teach students *and* bill clients. The notion is that there is something of a conflict between the two functions. In essence, charging for services is incompatible with the first-rate, ethical practice of law. My response is curt. Lawyers charge for their services. Students need to know how law is practiced in settings that approximate real conditions. Thus, students must learn to deal with money and client expectations of service for the dollars spent.
13. Lerman, *supra* note 2, at 706.

In keeping with the "in-your-face" tradition of deans at the University of Florida College of Law, let me be blunt: the problem is not commercialism. The problem is that change, difference, and experimentation are uncomfortable. Simply put, most law schools are destined for failure if they ignore commercial reality. Our students will live in a world of high pressure, economic struggle, demanding work environments, and limited resources. We do them no favor by ignoring these societal forces.

With deference to Professors Guggenheim and Lerman, the purity of the clinical or any other educational model is the least of my worries. I am much more concerned about unnecessarily raising costs, risking the core capacity of my law school to educate a new generation of trained practitioners, graduating students who do not understand the economics of legal practice, and conquering the scarcity of resources in order to improve students' education.

This response is quite short. I will not burden the reader with a point by point refutation of each criticism offered by Professors Guggenheim and Lerman. My focus is two-fold. First, to set forth my understanding of the economic realities facing higher education. Second, to suggest how market-based solutions to the problems of scarcity are consistent with the goals of higher education.

The world of higher education is changing. In order to understand the ways in which these changes are occurring, however, one probably needs a more nostalgic picture of the way the world has looked to this point. Let me provide one (drawn from Professors Guggenheim and Lerman).

A. *The Good Old Days*

Income Is Abundant—There is a never-ending supply of income to law schools—provided by state subsidy, student tuition revenue, or some other source that is not of concern to the faculty—that will continue to allow schools to fund their programs, salaries, and enhancements in perpetuity.[14] As Professor Guggenheim explains it:

> [I]t is *understood* that tuition and other law school income are supposed to pay the salary of a school's teachers. Teachers, in short, come to a law school to teach (and to write and to do other things). They *expect* to be paid for their work and they *expect* the law school to figure out a way to allow them to do their jobs. End of the matter.[15]

14. Guggenheim, *supra* note 1, at 681-82; Lerman, *supra* note 2, at 709.
15. Guggenheim, *supra* note 1, at 682 (emphasis added).

Finances and Job Security Are Unrelated—The law school's financial condition is irrelevant to the job-security of its faculty.[16]

Faculty Have No Responsibility for Finances— Someone, anyone other than the faculty, is responsible for the economic stability of the law school.[17] Or, as Professor Lerman puts it:

> Faculty at most law schools have the freedom to select academic interests regardless of income potential. Likewise, law faculty generally are free to work without institutional pressure to generate income for the law school and without fear of personal financial consequences if they fail to generate income.[18]

Just Showing Up Is Enough—Once tenured, a faculty member's position is secure merely if he or she makes a good-faith effort at doing his or her job.[19] "[T]he tenured academic faculty's job requirements are fully met simply by showing up for their classes and teaching students to the best of their ability."[20]

A faculty member can reasonably expect the university to fund them for working only during normal business hours, with substantial release time from teaching and scholarship. According to Professor Lerman, the funded activities of a clinical faculty member might "conservatively estimated" to include the following:

- at least two weeks per year at conferences;
- at least four weeks of vacation time, including summer, Christmas break, and spring break;
- at least one week devoted to pro bono work;
- at least two weeks a year for participation in law school governance activities—faculty meetings, committee meetings, committee work;
- at least one week per year for bar association or other professional activities;
- at least one week per year for illness or other unscheduled absence from work.[21]

16. *Id.* at 682-83. Professor Guggenheim notes that "I am still looking for the academic faculty member who lost his or her job because the school had to pay his or her salary." *Id.* at 683.

17. Lerman, *supra* note 2, at 702.

18. *Id.*

19. Guggenheim, *supra* note 1, at 682-83.

20. *Id.*

21. Lerman, *supra* note 2, at 689 (footnotes omitted).

B. *Reality Bites*

Resources Are Limited—I understand fully that "tuition and other law school income" are supposed to pay the salary of a school's teachers.[22] I also understand, however, that such income must pay the salaries of all other employees, the heating and cooling bills, the maintenance of a crumbling physical plant, the purchase of new equipment, the hiring of new faculty members, the lost teaching resources caused by sabbatical leaves, medical and other benefits, discounted tuition for "high end" and "low income" students, faculty trips, photocopying, telephones, overnight mail, faxes, library acquisitions, new computers, and everything else. In short, unless income is adequate, something does not get paid, purchased, or maintained.

Traditionally, income shortfall has not been a problem. State universities for many years merely asked for greater support from friendly state legislators. Private universities could rely on the tried and true: tuition increases, larger enrollments, or greater philanthropy. And, if worse were to come to worst, the school could always defer maintenance, stop buying books, or lay off anyone other than faculty.

Those days are over. First, state legislators no longer seem to believe that universities—let alone law schools—are in dire need of larger budgets, especially when primary education, roads, health care, and other competing demands remain under funded.

Second, large tuition increases are unlikely in the foreseeable future.[23] Students in law school rarely pay with their own money; they borrow. And, they are borrowing more and more money at greater and greater cost. Unfortunately, students' projected incomes have not kept pace with their borrowing. The consequence is simple: significantly greater numbers of defaults, mounting and excessive debt for students, and a more austere future for those of us that set the price of a law school education.

Third, increasing the size of the student body continues to be a viable short-term solution—read mistake—that is available. For

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22. *See* Guggenheim, *supra* note 1, at 681-82.

23. Public schools still may have some flexibility to raise prices. While private university law schools are reaching the upper-end of price, many state university law schools continue to have modest tuition levels. Therefore, public schools may be able to raise their prices over the next few years. However, even the public schools will reach their price limits. If their quality is insufficiently high, the loss of a price advantage may cut into their student demand. Raising their price may bring a public school into competition with higher priced, but perhaps marginally stronger programs at private universities. Students' may soon sense that the marginal cost savings of the public school can be outweighed by the stronger reputation of the private school or even an out-of-state public school. Ultimately, it is a matter of time—sooner or later, the price simply cannot go any higher.

whatever reason, most law schools have many more applicants than the number that can be enrolled. However, as a friend of mine says: "just because you can do something doesn't mean you should do something."

Can class size be increased without damaging quality? Can class size be increased without assurances that jobs will be available for the increased number of graduates? Can class size be increased without also providing more staff, faculty, books, and service? Increase class size?—No!

Fourth, increased philanthropy is unlikely. Donors give to success, not need. Donors do not support operating expense; they support new initiatives. These days, many donors would prefer to support efforts to graduate fewer lawyers, not to provide support that may allow the law school to maintain its size.

Fifth, reducing all expenses other than faculty salaries can be a short-term solution. Over the long-run, it is a strategy that certainly will fail. Students who pay nearly $20,000 for their education will not be satisfied with ill-maintained facilities. They will choke on answers that the library will "borrow" the very book that the law school down the street owns. They will rebel at long lines at the bookstore, registrar's office, financial aid office, career service office, or business office, which are all understaffed, underpaid, and unable to meet student expectations. Can cutting expenses work?—No!

In face of these substantial concerns about financing the law school, we are told that faculty members "expect the law school to figure out a way to allow them to do their jobs. End of the matter."[24] No, it is not the end of the matter. Faculty members who have tenure, relatively high salaries, and excellent work conditions, can no longer assume that "the law school" is responsible to insulate them from economic reality. Where is it written that the optimum resource allocation decision preserves faculty positions and salary at the expense of all other institutional interests? In times of economic need, all may be called upon to serve in the best ways that they can, including bearing some of the responsibility for the economic future of the organization.[25]

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24. Guggenheim, *supra* note 1, at 682.

25. If I were more mean-spirited I would address the behavior of various faculty members whose behavior costs the law school money. I could criticize those faculty who insist on treating students as the enemy, those who bad-mouth the law school in public fora or to the alumni, those who insist that all correspondence be sent Federal Express, or those who entertain speakers, faculty candidates, and each other without regard to who is paying and how much things cost. Perhaps I could address the impropriety of faculty members who complain about the low quality of support services provided by overworked and underpaid staff members whose salaries have been frozen to preserve the faculty members' ability "to teach (and to write and to do other things)." *Id.* But, politeness prevents me from doing more than saying every

Perhaps we ought to reconceptualize our understanding of the academic world:

> [I]t [should be] understood that tuition and other law school income are supposed to pay the [expenses of the law school, but when they do not, everyone working at the school must contribute as best they can to make ends meet]. Teachers, in short, come to a law school to teach (and to write and to do other things [that contribute to the health of the school]). They expect to be paid for their work and they [should] expect the law school to [make every effort] to allow them to do their jobs. [In return the law school should expect that every faculty member engage in activities that will help the school to meet its financial obligations.][26]

Job Security Is in Jeopardy—Professor Guggenheim is still looking for the "academic faculty member who lost his or her job because the school had to pay his or her salary."[27] I guess that New York academics have not talked about whole departments being closed at universities that no longer can afford to run in the red, or of faculty members being bought out of tenure because it is cheaper to give a lump sum than pay a salary over a lifetime. Perhaps news of untenured (or even tenured) faculty members losing their labs, students, or jobs because they have failed to generate grant income is unheard of on the east coast. In Florida—and at almost every other University—we know of such situations.

Salary is an expense. Expenses must be paid by revenue. If revenue does not equal expenses, expenses must be cut. That is the economic reality of any business, including a university. That we in legal education have been spared the specter of widespread lay-offs, salary cuts, and outright loss of jobs has nothing to do with whether one is an "academic" faculty member or a clinician. It has to do with finding resources. When resources cannot be found, no job is secure. Thus, I would much rather imagine an academic world in which we find new ways of generating resources than one in which we cut the most vulnerable first and then everyone else later.

Faculty Responsibility Is Broad—What is the definition of a faculty member? As I understand Professor Lerman, a faculty member is

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institution must change to become more effective, even if it means placing greater responsibility on the faculty and staff to create a more solid bottom line.

26. *Cf. id.* For the unmodified text, see *supra* text accompanying note 15.

27. Guggenheim, *supra* note 1, at 683.

someone who has the freedom to do whatever he or she wishes—as long as it can be listed in the course catalog—"regardless of income potential," without any "institutional pressure to generate income for the law school and without fear of personal financial consequences if they fail to generate income."[28] Really? How come?

In the business world success is measured by profits—the financial bottom line. If the organization is successful—makes profit—all share in the profit. If it loses money, all employees take responsibility to improve the bottom line. If they do not, or if their actions contribute to the loss, they may be in jeopardy of losing their jobs. The employee, therefore, takes an interest in the financial success of the company.

We in higher education do not have the same measurement of success. The financial strength of the university may be unrelated to our measures of success. Instead, more esoteric measures may be used such as the academic reputation of our school, the success of our students, the production of new knowledge, and the fostering of "good" values within our community. The freedom to act in ways that produce success by these measurements is to be treasured by us all.

However, such freedom can never be unlimited. Must a school hire a scholar whose needs in library support are exceedingly high in comparison to other faculty members? Must a school support every low enrollment course that a faculty member desires to teach without regard to other curricular needs? Is a school required to put in laboratories, computers, and costly machines to permit faculty members to pursue whatever goals they have? Of course not. No one would have the temerity to suggest that schools must support every activity regardless of cost.

Yet, to concede this point is to underscore the reasons why faculty members *ought* to be responsible for thinking about the income potential of their jobs. Salary is also a cost. The day is coming where schools will have a hard time justifying the high salaries of faculty who offer only boutique courses, taught only at times convenient for the faculty member. A faculty member who is capable of generating a substantial income from consulting activities—which are created through the faculty member's reputation, which in turn was enhanced by the law school's generous leave policy, summer research support, and public relations office—should share the income with his or her school.

If a school has financial worries, or if additional income would improve the quality of the school's educational program, then all employees bear responsibility for finding more income.[29] Someone,

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28. Lerman, *supra* note 2, at 702.

29. I assume Professors Guggenheim and Lerman would say that if *all* employees were

other than students, their parents, and their lenders, should bear at least some of that responsibility.

Life Is More than Just Showing Up—Is it really true that a "faculty member's job requirements are met simply by showing up for their classes and teaching students to the best of their ability?"[30] Even if it is true, should it be true?

At most good law schools, every faculty member is expected to reach a high level of performance in virtually every aspect of his or her job. Thus, if teaching students to the best of a faculty member's ability resulted in sub-par teaching, the faculty member would not be meeting his or her job requirements. Moreover, every faculty member bears greater institutional responsibility than merely showing up. Faculty members must participate in the governance and administration of the school through its committees. They must counsel students. They must be available for members of the media. They meet with alumni and other friends of the school. They help with university affairs. In short, their jobs require an investment in the entire operation of the school.

Of course no faculty member is excellent at every feature of the job. In fact, many faculty members do not even participate in some of these activities. However, no faculty member merely shows up and teaches. Every faculty member participates in at least some additional law school activities.

There is an even more disturbing omission from the easily met job requirement of showing up. Faculty members are responsible to produce scholarship and new knowledge. An untenured faculty member certainly never will be granted tenure if she or he fails to become a productive

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required to contribute, it would be acceptable. They argue that it is the differential treatment of clinical and tenure-track faculty that makes Chicago-Kent's fee generating clinic so repulsive.

My response is simple. First, clinical faculty are often in a better position to generate income. Yet, we also encourage other faculty to generate income through grants and other support. And, although these faculty are not *required* to generate income, their own financial well-being is enhanced by the effective fundraising. Second, clinicians are not singled out as the only faculty members who bear income-generating responsibility. Graduate program directors are responsible to bring in students. CLE speakers are required to attract business. Faculty members who do not write will not receive salary increases unless their participation in other activities—larger teaching loads, greater student supervisory responsibility, and other activities that lessen the burdens of other faculty members *and* provide service directly related to student welfare (read customer satisfaction)—is superb. Third, the law school provides economic incentives to every faculty member who contributes to the school's economic well-being through salary increases to those whose work enhances the school's reputation.

While this response cannot demonstrate parity between academic and clinical faculty, it does suggest that those lines will begin to blur as new income-generating possibilities are found. As I discuss below, commercial activity is neither evil nor inconsistent with educational goals.

30. Guggenheim, *supra* note 1, at 683.

legal scholar. We are not law *teachers* alone. We are responsible to help the law develop and grow. Our goal is to help in the understanding of the legal system. If we were not engaged in scholarship, then there would be little justification for a university affiliation or a full-time faculty.

III. GO TO THE MARKETPLACE AND CREATE GREATNESS

Arguments to maintain commercial purity in educational institutions are flawed. They lead to giving unwarranted privileges to the most powerful. They license irresponsible behavior. And, they ignore very real life threatening financial crises faced by schools. Restricting a school to an abstract world untainted by commercial reality fails to account for the fiscal needs of universities and law schools. Moreover, such a failure does the students no great service because those students soon will enter a commercial world in which they will need to learn how to balance practice, ethics, and business realities. Furthermore, the arguments against commercial activity in the law school ignore the deeply embedded academic bias that protects the faculty from fiscal problems and imperils everything else. Thus, I have no hard time concluding that some commercial activity is a necessary part of higher education.

But, merely suggesting the need for some commercial activity will do no more than provide a moderate defense of some nontraditional marketplace activities in academic institutions. This mere defense makes out no commercial imperative. The argument supporting a more aggressive commercial agenda is straightforward: (1) even the purest academic institution is already deeply enmeshed in commercial activity; (2) such activity, at a minimum, requires treating the students and other stakeholders in the school more like "customers"; (3) pure models place commercial activity in the wrong hands, those of outsiders like university administrators, donors, and auxiliary enterprises; (4) organized entrepreneurial activity by a school produces value, both monetary and programmatic; and (5) becoming more accountable in the market will allow schools to control their own destinies. I address each of these points below.

A. *We're There Already*

I find it hard to believe that anyone can argue that the University should be free of commercial activity. In essence, that argument ignores a critical fact: education is marketed, sold, and serviced every day. No school can survive without a sophisticated sales, advertising, and collections department. Any parent whose child attends a university or professional school will testify that they are dealing with a business. The

parents also will tell you that those businesses should be held accountable for their "product." Does the school provide good service to its customers on the phone, by mail, or by e-mail? Does the school meet the students' financial and emotional needs? Does the school provide an education that has value in the marketplace? Does the school produce consumer welfare? Schools that do well on these measures will continue to attract students; those that do not, will be in jeopardy.

Every school participates in multiple commercial settings involving varied customers. Schools must recruit students, who will pay for the education and whose payments (or per head subsidy from the state) cover the school's operating expenses. Schools must produce graduates who are sufficiently talented or knowledgeable that employers will buy their services as new employees. Schools must also successfully market the concept that they are doing so well and producing such high quality products that its graduates will feel compelled to make sufficiently large donations to allow the school to grow and improve (or even just pay its bills).

These are all sales activities. Without these activities there is no university. Yet we sometimes pretend that there is no consumption decision made by customers of the university. For example, some seem to argue that the only thing that attracts the student to a school is its academic quality. These individuals are wrong. Students are attracted by "quality," but they also are attracted by facilities, services, amenities, reputation, and even football rankings. All of those things cost real dollars; some cost a great deal. All of those costs must be borne by the school. Frequently they are paid for by the student, or the employer using the facilities of the school, or by the graduate whose gift supports the activity. Thus, it should come as no shock that those schools that best fill the needs of these customers are likely to be most successful.

Like it or not, the educational enterprise involves consumption decisions. When schools effectively meet customer expectations (or drive them through their marketing) and when they produce good products (graduates), they will receive payments sufficiently large to keep them going. The converse is too awful to contemplate! With this understanding, it becomes clear that the educational mission of the school is deeply tied to commercial behavior. Bad teaching will ultimately erode student demand. Bad scholarship will harm reputation. Ineffective graduates—perhaps those that cannot pass the bar exam—will cut into donations, and translate into lower student demand. No jobs for graduates eventually means no applicants. As we say at the University of Florida: "It's Performance that Counts."

B. *They Are Our Customers; Let's Treat Them Right*

Students spend significant amounts of money on their education. Law firms and other employers send us fees to fund our career services offices. Alumni give us gifts. In each of these instances, these people are making a consumption choice. Nonetheless, these important customers of the law school are frequently treated as unwanted interlopers.

Students wait in long lines for registration. They cannot reach their deans and faculty members on the phone. They expect to be able to take classes that they "need" for their career choices, but which the law school no longer offers because no one will teach those courses. They wait to receive grades until other projects are finished, sometimes long after the "official" grading deadline has passed. They go to classes where they are expected to be on time, even if their faculty member is late or holds the class after the time for class has ended. They must attend class regularly even when the teacher may reschedule the class on a whim for personal reasons. They are asked to come to events where other members of the community may be absent. They have no parking. They can't get transcripts from the registrar. They can't find books in the library that have been moved to someone's office. In short, they sometimes feel as if they pay the rent, but get no lodgings.

Many of these complaints are the product of students' misperceptions about their role. They are customers, but they also are going to be graduates. As such, they must learn to be professional—i.e., on time and prepared—even if others are not. However, many of their complaints are quite legitimate. When students make an expenditure the size of that made for education, they have the right to expect that their calls will be returned, that faculty members and administrators will be available, and that their needs will be treated as important. Students are not a means to an end—they pay so that we can do "important" work like scholarship or travel to conferences. They are the end—we must provide them with quality education and services.

The realization that our students are "customers" in this sense forces us to become engaged commercialists. It requires that the law school organize its services so that they are courteous and efficient. It requires us to be attentive to legitimate student requests for expenditures. It helps us to prioritize our expenditures. Finally, it delegitimates excuses by us that academic integrity permits unreasonable conduct. It simply cannot be the case that rudeness to students is permissible for an educational reason, especially if that conduct places the school's long-term finances in jeopardy. Minimally, we must be responsive to the student's needs.

Similar tales are told by other law school constituencies. The treatment of our graduates and friends presents an especially compelling

case. The law school's graduates and friends hear frequently from the school—especially as the time draws near to make year-end donations. In return, alumni ask very little, often only that their phone calls be returned, that the faculty and staff turn out for events that they have funded, and that the law school itself not engage in behavior that is harmful to its graduates—like producing badly educated graduates or unethical practitioners.

Despite a law school's need to extract resources from its graduates and friends, and despite the relatively low cost of servicing those graduates and friends, many programs often act without regard to their needs. Even if a school does not give preference in admissions to the children of its graduates and donors, it does owe them the courtesy of returning their calls, sympathizing with their situation, and giving them advice to help their offspring find another suitable placement. If a school thinks enough of a donor to take his or her gift, it ought to treat them as a valued customer. All things being equal, they should not be *dis*advantaged because they support the school.

Other situations, involve a similar analysis. Where we have choices among possible curricula, public programs, or pro bono work, we sometimes seem to choose the one that is certain to upset our graduates. We have the academic freedom to make these choices, but it seems that we frequently make such choices without envisioning the consequences to the school. I always have appreciated the clinical faculty member who torments over the decision to bring a certain claim, or the career service officer who worries before closing the office to a graduate. In both instances, the law school's decision, even if it harms the financial interests of the school, is thoughtful AND defensible by the dean. It is only the decision that is taken without regard to the impact on the school that is hard to defend.

Sometime we can be our own worst enemies. It always saddens me to address the concerns of alumni and others that the law school's new initiatives are "destroying the school," especially when I find out later that the concerns were planted by "concerned" faculty and staff who just "thought they should know." Internal fighting is difficult enough without fanning discontent by calling alumni and friends and involving them in internal matters. Worse yet, creating discontent among that group can have an enormous negative financial impact.

Simple illustrations of some of our behavior underscore the point. There is the story of the dean, faculty member, and the graduate who went to dinner at a very expensive restaurant. While consuming a glorious meal, wonderful wine, and an after dinner treat, the faculty member spent the better part of the evening talking about how horrible it was that the law faculty's curricular preferences could be shaped by

a donor whose restricted gift of a chair would force hiring someone in an area that the faculty did not consider important. As the meal came to a close the graduate could contain himself no longer. "Who the ____ do you think is paying for this meal? Should I have no say in where we go to eat? You can also be sure that I will invest my gift someplace else, where it might be more appreciated."

Obviously, the faculty member has made an important point. Probably a point that needed to be directed against the dean who failed to take account of the law school's true curricular needs. A school should not utilize resources provided by others if they undermine the integrity of its program. But it is hardly sensible to lay blame on graduates of the law school who seek to influence a school's direction through their gifts and participation. Such donors must, at the very least, be respected for their decision to support the college. It also is hardly sensible that the school should be inattentive to the needs of the donor. Gifts rarely come without some donor intent. The key is to help the donor mold that intent to match the school's needs. Because the resources a donor gives to the school would not otherwise have been obtained, donors legitimately should expect some say in the use of their gift. Does this involvement destroy academic integrity, especially if the donor's preference will add resources to the law school and not detract from its mission? No. In that situation, the law school is improved through the gift, not harmed at its core, and is helped to create a positive environment for future giving among its graduates. The question is one of a stake: should the law school have complete control of its agenda? Do others have a role to play? The answer seems plain to me. Cooperation between the law school and the donor is good for the law school, even when the donor's gift is not optimal, so long as it does not undermine fundamental academic integrity. Moreover, our donors often get it right. They fund the chair in some obscure area that the faculty thinks is unimportant. Then, only a few years down the road, the field is hot and important to students and scholars alike. Dialogue of this type can only be helpful.

Another interesting "customer" connection is the career services operation of the law school. To faculty, the employability of the school's graduates is tangential. While they believe that it is good to have high employment because that makes happy graduates who will give back to the school, they also think that it is the job of others in the school to help students obtain jobs. The faculty should teach and write and let students and others take the responsibility for the employment process.

In my view, this attitude is troublesome. First, students see the school as a means to an employment end. We can try to convince

students otherwise, but even the person most deeply committed to the intellectual enterprise of legal education understands that it is beneficial for both students and the law school to have a successful career services operation. Second, legal education cannot be insulated from the instrumental purposes of law. The needs of clients and employers are not irrelevant to educators. The law faculty member who teaches contract law solely as a course in common law, due to its intellectually fascinating underpinnings, and who as a result never mentions the UCC, has failed educationally. If we learn from employers that our students are unprepared as writers or advocates or that their knowledge of a particular area is out-of-step with current practice, we commit educational malpractice. In this context, paying attention to commercial trends improves our educational product.

C. *Strangers "Get It Wrong"; Worse Yet, They Keep Our Money*

The arguments above form a kind of "necessary evil" justification for schools to participate in commercial activity. Let me add another similar argument. Regardless of the views of faculty members, deans, or others who may protest the "subversion" of our academic mission by business activities, commercialism in the university is a permanent condition; it will not go away.[31] Moreover, most of these activities are already controlled by non-faculty.[32] Furthermore, these individuals frequently "get it wrong" from the perspective of the academic unit. Hence, we have the worst of all worlds: commercial activity and outsider control. A few illustrations will suffice.

Universities hire outside vendors to run their auxiliary operations such as cafeterias, bookstores, athletic departments, and photocopy services. In return for providing these services, the vendors share the profits with the university. While these activities are relatively tangential to the central academic missions of most schools, they are nonetheless

31. There are even more aggressive university commercial ventures. Universities own patents on products invented by faculty. They sign agreements for University logo licensing with banks, credit card companies, clothing manufacturers, wrist watch companies, and others. Universities sell advertising in the alumni magazine, create exclusive product contracts for use in the stadium and auditoria. Universities even make sure that the athletic teams proudly display vendor labels at sporting events. Needless to say, these programs do not always benefit academic units.

32. This is even true of such traditional activities as fundraising. In many universities, funds are solicited by development officers who work for a central foundation. Unrestricted gifts are often diverted by administrators. The central foundation "charges," at rates well-beyond commercial norms, for its management of funds created by other units. They may arrange loans between one fund and another, all with accompanying interest payments. Thus, even inside the university there is a separate commercial money market.

critical to the operation of the university. Students need food, books, photocopies, and even intercollegiate athletics. These activities permit schools to become full-service communities that attract students. Without such services, schools simply would not flourish. Students and others would go to competitors that provide for all of their college, professional, and personal needs. Accordingly, these commercial activities are pervasive and quite important to successful universities.

When these services are provided by outsiders, those who fear commercial activity are generally mollified because the university is not directly involved in commercial activity. The school, however, is not totally free of commercial taint. It implicitly "endorses" the outsiders that provide the services to avoid putting itself in the position of directly engaging in purely commercial behavior. But, as always, there is a rub. Regardless of what entity actually provides the service, members of the academic community—whether students, faculty, or visitors—inevitably will blame the university for every misdeed, incompetence, and pricing decision made by the outside vendor. Customers merely see services being provided *by* their school; they do not recognize the niceties of control. The university offers it, endorses it, profits from it, and therefore is responsible for it.

Here is the way that it works. When the bookstore does not order enough books, the faculty member is blamed. When the food at the cafeteria is overpriced and of poor quality, the students complain to the school, not the vendor. When the photocopy machines break down, the students loudly proclaim: "I pay my [insert outrageously high tuition figure here] and these [insert appropriate four letter word] machines don't work. You people are incompetent." Whether we like it or not, universities must become involved in the management of these commercial activities or suffer from their mismanagement.

Consequently, it is no surprise that universities get involved in commercial activity, often to the disadvantage of individual colleges. When the university hires (and supervises) the cafeteria vendor, it gives that vendor a monopoly on food services for the campus. Thus, when students at a college want to do a pot luck meal, they are told that they cannot bring in their own food or use the facility occupied by the cafeteria, even when the cafeteria is closed. Or, the faculty are told that they cannot bring in food from the local grocery for a luncheon round table discussion and that they must use the services of the vendor, even though those services will cost the college more money and the quality may not be as good. Why? Because the funds received by these commercial vendors must be preserved and the revenue they generate is needed to support other parts of the university. They own it and manage it; therefore, they control its rules and profits.

This arrangement leads those of us in the colleges to some inevitable conclusions. There will be commercial activity. It will be controlled by others who care nothing about us or our colleagues and who take the revenues that are generated and use them to support programs about which we care not. The solution seems plain: either give us a share of the profits or let us to do it on our own.

D. *Commercialism for Fun and Profit*

Each of the arguments made above relates to fairly standard commercial issues confronting higher education. It is becoming less and less controversial to recognize that our students, faculty, alumni, and employers are customers who are entitled to good treatment. It is fairly commonplace to believe that schools operate in a market, that they compete, and that better commercial performance will improve the bottom line for the school. Even taking the more controversial step of providing direct commercial services is becoming a norm. Thus, it is inevitable that institutional purity about commercial matters will be compromised and commercialism will be more accepted by members of the academy.

Despite the growth of commercial activity in higher education, schools still hesitate to aggressively seek commercial support. There appears to be a tawdriness to the whole profit motive that leads some to argue against a more business-like approach to education. Such hesitancy makes it less likely that a school will embrace commercial activity. Despite these fears, however, there are strong reasons for schools to embrace the market. I outline some of the steps that schools can take to become more comfortable with commercial activity and why these steps should be taken.

1. Marketing

The most painless commercial activity in which a law school can participate is marketing. Yet even this relatively elementary business necessity can be quite controversial. For example, the emphasis of law school publications might differ substantially depending on whether one focuses on "academics" or on "selling" the program. Faculty members frequently disagree with administrator's priorities—the marketers want pictures, the faculty want text; administrators emphasize specialty programs, academics underscore the underlying curricular theory; and p.r. flaks focus on career opportunities, curriculum chairs highlight academic rigor. The first meeting of the law school's technology committee devoted to the content of its homepage captures the conflict perfectly. The designers and the dean want pictures, cool graphics, sound, and sizzle. On the other hand, the faculty want accuracy, text and

explanation, and copies of all of their articles. Conflict between the sales and production employees are common in business. They are upsetting in the academy.

The problem of emphasis is often solved simply by the allocation of authority. Those most interested in the academic program of the law school simply are not assigned the task of writing publications or designing web sites. Thus, they may complain about the "sale" of the law school, but leave it to deans and others less concerned with "quality" to produce the materials. Other marketing activities, however, cannot be shaken off so easily.

Is it the duty of the faculty to help the law school with alumni relations? Is it the responsibility of the faculty to talk to the press? Come to events? Work with the advocacy programs and student journals, even when no academic credit is involved? Work on university committees or in community service? None of these activities directly is involved with the law school's core academic program. Nonetheless, each of them is integral to the law school's marketing program.

Alumni Relations—Law faculty are the beneficiaries of much of the law school's alumni relations program. Yet, it is sometimes difficult to find faculty members to go the extra mile. Often, no faculty members are willing to teach classes on "Back to School" programs, or to judge advocacy competitions set up by graduates, or to attend lectures funded by outsiders. It is even more difficult to have the faculty actively involved with visiting committees or working as colleagues with alumni on their pet projects to improve the law school. Even when they become involved in such ventures, the faculty ask for additional compensation or they want to be recognized for their "service."[33]

By placing alumni relations in the hands of the administration, the faculty downgrade fundraising as a dirty commercial business, but are happy to receive whatever bounty is produced.[34] In delegating this function to the dean and others, the faculty retain the right to criticize

33. I don't mean to suggest that all faculty members or even a majority do not willingly participate the law school's alumni programs. I argue only that many consider it an imposition and a favor, rather than a part of the job. If law schools took more seriously the notion that every employee has a responsibility for improving each school's bottom line, a faculty member no longer could legitimately deny her or his role in alumni relations. Moreover, rather than seeing these activities as burdens, the law school might actually build healthier relations between its faculty and its graduates.

34. This is especially a problem at schools in which the faculty see no personal responsibility in supporting their own institution. The stories of deans trying to raise funds from graduates who will not make a gift because few faculty members have contributed to the school are legion. Thankfully, I am the dean at the University of Florida College of Law where 100% of our faculty have made financial commitments to the law school. Our graduates understand that their faculty believe in the program and respond accordingly.

the purposes of gifts and the lack of involvement of the alumni in the law school, but bear no responsibility for the choices made or the low participation. This is not right. Most alumni love and respect the faculty. When the faculty become involved, participation improves and the purposes of the gifts can be molded to important projects of the faculty. This type of marketing should be at the center, not the periphery, of the academy.[35]

Press Relations—Speaking to the press or writing the occasional op-ed piece rarely contributes to the advancement of scholarly knowledge. It does, however, raise the law school's visibility, which in turn may help with applications and donations. Despite the prospect of better students and financial resources, many academics believe that helping the popular press is beneath them. Some even view it as a sullied activity that looks to personal aggrandizement, not knowledge production. They believe that news folks rarely seek the truth or the complicated full story. The press, they argue, looks only for the sound bite. Therefore, many faculty reject the need to participate in such activities. Why? Doing interviews often costs little in time or effort and the cumulation of media hits can move the school forward. We should applaud, rather than decry, such outcomes.[36]

Law School Events—Participating in law school events—such as graduation, speakers' presentations, moot court competitions, homecoming parades, and reading papers not written for credit—is not at the core of teaching or scholarly duties. Yet, such participation generates the type of good will among students and graduates that often translates into financial support. Nonetheless, many in the law school treat participation in these events as a favor to the community. They come only under duress and they resent their forced participation. This is undesirable. I do not think that it is a illegitimate to expect the entire community to participate in the extra-curricular life of the institution. Yet, some

35. Of course good alumni relations begin with good student relations. Many schools have a difficult time raising money because of the disenchantment of students resulting from unfriendly administrators and faculty. For this reason, any school interested in effective marketing to alumni must begin when the alumni are still in the pre-alumni stage—sometimes referred to as students. Thus, if the faculty and staff take seriously their role in helping the law school raise funds, they also should take seriously the need to treat future graduates well while they attend law school.

36. It also may be beneficial to the faculty member to pursue the popular press. While we often toil in the journals for the benefit of the few experts who take the time to read our profound words, one mention in the New York Times or the Wall Street Journal seems to be the only method for our work to be read by policymakers. Such articles get us invitations to testify to Congress or join task forces or even to speak at other schools. Once one sees publicity in this light, it is much easier to imagine why such commercial activity helps not only the law school, but its faculty as well.

colleagues fail to participate, justifying their lack of involvement as appropriate, since such law school events are "extra" duties, primarily of a fundraising or friend-making type.

These self-righteous excuses ring somewhat hollow, as many of the events directly benefit the education of students or faculty development. But even if the events solely are for improving the law school's finances, failure to participate in events is wrongheaded. When the whole community participates in events, even those that involve neither teaching nor scholarship, we produce maximum monetary gain for the community. Moreover, we avoid some members of the community free riding off the participation of others.

Neither university nor volunteer community service is central to the law faculty's job. Yet, as law firms and businesses have noticed, such involvement is the best marketing tool available to the organization. We should "get with the program" as well. First, law faculty, staff, and administrators are good at such activities. We are organized, committed, and skillful in dealing with conflict resolution. Second, we need to be role models. At the very time that law schools have begun to require mandatory or voluntary pro bono service of students, have instituted professionalism programs, and have asked students to get "involved" in their communities, we seem hypocritical to demand less of ourselves. Without giving students personal examples of professionalism, we can never expect them to move beyond "irreducible minimum" performance at their jobs.

Volunteerism has such great intrinsic value that it is attractive to many members of the law school professional staff.[37] The real issue to a committed commercialist, however, is whether the law school should *promote* such activity, or whether the law school should provide incentives to faculty to spread the good word through its good deeds. My answer is clear: of course we should.

2. Educational Products

Faculty members write casebooks, treatises, and study aids. Traditionally, the royalties generated by the sale of these products belong to the faculty member and to commercial publishers. Academic purists have no fundamental problem with this distribution because the financial rewards received by the faculty member are so low that the commercial nature of the writing cannot be its primary purpose. The writing remains academic in scope. The fact that a commercial publisher profits from the

37. The faculty of the University of Florida College of Law, unlike those at many other schools, take service very seriously. They are leaders in University committees, as well as Bar Association study groups, pro bono legal representation, and community philanthropies.

sale of the materials is a mere by-product of the educational mission of the faculty member and the school.

One might imagine a slightly different version of the traditional publishing business, especially as students and other readers transition from text to on-line or CD materials. The law school might enter the business of producing materials. It can contract with its faculty members and graduates—or even strangers—to author materials. Those authors could receive their traditional royalties; but, rather than giving the profits away to strangers, the school could retain the revenues received from the sale of the products.[38]

Law faculties have expertise in a wide variety of fields. They also have a comparative advantage over other lawyers in their ability to conduct significant and wide-ranging research in obscure areas. These advantages would allow the law school to create made-to-order teaching or training materials for students at other law schools or other disciplines as well as for the public. In the web-based environment of the future, every professor's materials could be made available world-wide. Fees could be collected by credit card or advanced licensing arrangements. The law school and the faculty member could prosper, together. Whole classes might be taped, digitized, and sold to the public as off-the-rack education. It could even be marketed as entertainment.[39] We are limited only by imagination.

Schools also have an untapped ability to charge for services that they traditionally have given away. Libraries are extraordinarily expensive to maintain. Yet, we give law firms free access to the collection, often let them borrow books without charge, permit them to make photocopies at our subsidized rates, and watch them pass on their time and expenses to their clients. We have the ability to charge for many of these services. Law schools could set up lawyer research services, in which we research projects, copy or download materials, and then deliver the

38. Of course, the publishing business is treacherous and difficult. It is probably beyond the expertise of most educators. Rather than becoming publishers, therefore, the law school might create an educational partnership with private entities in which the law school would receive a fee to facilitate private transactions between publishers and authors. In a more sophisticated version of this plan, the law school itself might enter into joint ventures with publishers, in which publishers would contract for materials to be produced by the school, depend upon the school to make writing assignments internally, pay the school a fee, and expect the school to divide the proceeds as it sees fit. The author of such materials might be the law school itself, with individual faculty members receiving pay incentives to produce the materials. This idea has some potential power for brand name schools. A full run of Harvard study aids might be a strong second-place in the market to Gator-aids.

39. Don't laugh. People pay for Court T.V. and watch hours of trials. A snappy classroom discussion of Pennoyer v. Neff, 95 U.S. 714 (1878), is just the ticket for a late night treat. Warm the popcorn, I can't wait!

product to customers for far less than it would cost them to send their own employees to do the work at the law school. We can scan non-copyright materials, produce digital records of those materials, and then sell them or make them available on-line. We can and we should sell these services.[40]

3. Continuing Legal Education

Law schools have long been in the continuing legal education business, one in which many have lost far more income than they have made. But, with proper management and aggressive marketing, there is simply no reason not to exploit our natural competitive advantage as educators and become involved as CLE providers.

The market for CLE is significant: judges, lawyers, paralegals, professionals from allied disciplines, students from other disciplines (or undergraduates), high school students, and members of the public are fascinated by law. We know law. Can we make a deal? Obviously, the range of CLE activities that might be conducted by the law school is quite large—from traditional lectures and symposia to on-line chat rooms to setting up law camps for adults who have always dreamed of being Perry Mason. The activities not only generate income, they also create good will.[41]

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40. For years, Chicago-Kent's Legal Information Center has sold memberships to law firms, run a photocopy service in which firms may order materials that the law school will copy and deliver to the firm, and run a sophisticated scanning operation where documents are made searchable for a fee. Some of these programs already are profitable; others will become profitable over the years. Nonetheless to the law school's customers, the programs are a great bargain. A few illustrations make this plain.

For a small law firm, the cost of building a library is quite high. That same firm might "join" the law school's library for $1000 per year. Although they could use the library as a member of the public, since most law libraries are government depositories that must be open to the public, they would not ordinarily have borrowing privileges. Hence, by joining the library they could avoid making purchases of materials and yet could gain access to materials for a relatively low investment. To protect students and faculty, the law school's primary users, the law school could maintain a recall procedure.

Similarly, if a firm needs a relatively obscure document not found in its collection, it could send a paralegal or a messenger to a library, where the messenger would copy the materials, and then return to the office. The cost to the firm of such time is quite high—$30-100 per hour. Libraries can hire students or others for far less to do the same work, and thereby save the firms by performing this work for them. The charges still may be passed on the client, although they are lower, and the law school can recoup its cost and even add a respectable profit margin for less than the cost the firm would otherwise incur. I call that a win-win transaction.

41. The law school's own graduates can be especially grateful for high quality CLE. For years, the University of Florida College of Law has had alumni receptions, lunches, or dinners at various locations around the state. Its graduates, feeling some loyalty and obligation, have dutifully attended—even when they have given up billable time. Recently, the law school has

4. Consulting

The most controversial commercial activity that schools might engage in is the pure sale of its faculty members' services. As Professors Guggenheim and Lerman argue, this activity poses a potential conflict between the law school's educational mission and its commercial goals.[42] I argue that this fear is overdrawn and that the benefits of aggressive commercial projects at the law school far outweigh any risks to the integrity of its program.

I have great familiarity with three consulting projects that have the potential to raise revenue and educational value for law schools: fee generating clinics, technology consulting firms, and law firm/law school partnerships. I discuss these in turn.

Fee Generating Clinics—The law clinic at Chicago-Kent College of Law has long been operating on a fee-generating basis. The clinical faculty members' salaries there are paid from fees received from clients whose cases are the basis of the clinic's teaching. The faculty members in the clinic negotiate contracts with the law school that provide them with office space, library support, secretarial services, and salary and benefits. In return, the clinical faculty member undertakes clinical and classroom teaching and earns fees to reimburse the law school for overhead and salaries. The faculty members' salaries are dependent on the fees they earn from the practice of law and are keyed to each faculty member's financial projection of business.

This plan is unique among law schools and is controversial among clinical faculty members. From the perspective of the law school, however, the fee-generating model is an ideal response to scarcity of resources. Better yet, such a clinic serves the law school's educational mission.

The financial implications of the fee-generating model are complicated.[43] Although clinical teaching is much in demand, and lawyers and

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started to do CLE at its events. And, even though its graduates are charged for what was once free, they have felt a much stronger tie to the school. The events now provide value, as well as heartburn and another solicitation by the dean.

42. *See supra* text accompanying notes 1-13.

43. Not only must a school have sufficiently sophisticated internal accounting procedures to allow it to deal with receivables and payables, it must also be a part of a university system that is flexible enough to allow for funding positions through collection of receivable accounts. Moreover, not every school can operate a fee-for-service clinic. Most public universities make operation of such a clinic problematic, whether for political reasons, such as fears that the clinic will sue the state, represent criminals in prosecutions conducted by the state, or lobby for regulations of the state's largest industries, or to protect private lawyers from subsidized competition. Even private schools face similar issues, especially in smaller cities that have small client bases that would pit the law school against local lawyers—or even its own graduates.

students rightly believe that live-client work while in law school can improve the quality of graduates, the cost of such education is so high as to make it unavailable for substantial numbers of students. A clinical faculty member can teach only 8-10 students a semester in clinic. If that faculty member teaches one other course, she or he might reach a total of 100 students a year. In contrast, the classroom stand-up teacher often teaches as many as 100 students per class, or several hundred a year. Consequently, most law school clinics are quite small; it is simply too expensive to run a large clinic.

If a law school chooses to create a fee-generating clinic, however, the cost of maintaining faculty members is reduced substantially. When a faculty member generates nearly his or her whole salary and overhead expenses, the law school can afford to expand the clinic (and thereby reach more students).

Given this financial incentive, one might expect that many schools would experiment with fee-generating clinics. It has not happened, in part because of criticisms such as those offered by Professors Lerman and Guggenheim that clinical faculty, fearing for their financial security, will sacrifice good teaching to commercial interests. My observations of the clinical faculty at Chicago-Kent lead me to believe that this criticism is unfair. First, this criticism is unfair to clinical faculty members, who willingly take on the professional responsibility to act competently and completely as teachers first (and fee-generators next), and who therefore do not sacrifice their academic integrity to the almighty dollar. Second, this criticism is also unfair to lawyers in general, who always mediate between the need to generate their income and their higher responsibility to clients. This criticism totally misperceives the way all faculty operate. Stand up faculty members also must navigate between their professional responsibility to the school and students and any financial incentives they have to give education short shrift. Publish or perish has teeth. Those that write prosper financially, including grants, merit increases, and travel and research assistant funds. Nonetheless, we never doubt that these incentives take second-place behind fulfilling the student's educational needs.[44] The fee-generating clinician's conflict is different in degree, not in kind.

44. As in any system, some faculty members succumb to temptation; they give in to the dark side of the force. That some may abuse the system, however, does not mean that law schools should abandon incentive-based systems that encourage great research productivity. Rather, it means that the law school must enforce performance standards on every faculty member, even those who produce well on some measures. Similarly, that some clinician may sacrifice student needs to financial concerns does not undermine a system in which others act with proper balance.

There is an even more important problem with criticizing fee-generating clinics. The clinician who deals with the financial realities of fee-for-service client representation approximates more closely the type of lawyer that most students will become than does the clinician who is paid a salary to work on a fixed class of client or case. Fee-generating clinicians are wonderful role models for students. Where the faculty members in traditional law school clinics operate like legal aid lawyers—they are paid salaries and face docket pressures, but do not have to worry about the cost justifications of their service on behalf of a client and rarely deal with the thorny ethical issues concerning legal fees—the fee generating clinician, like most private attorneys, must be able to balance financial reality and legal representation. Having a fee-for-service clinic, therefore, gives students a picture of the real-world of lawyering that they will eventually enter. Thus, such programs not only help the law school finance large-scale clinics, they also improve their students' real-world education.

Technology Consulting—In recent years, the use of technology in the legal profession has expanded tremendously. Despite the fact that many lawyers are compu/science/math/tech phobic, law firms have become high-end consumers of information technology. Many law students, and a new generation of law school teachers and administrators, have grown up in cyberspace. While their skills often do not surpass those of lawyers, their fearlessness and ability to experiment, give them real advantages over practicing lawyers in organizing their technology knowledge into a comprehensive system for conducting legal work. Given that most lawyers and law firms lack the time to systematize their technology, there is a superb opportunity for a law school that could market its technology expertise to firms, charge them consulting fees, and thereby enhance both the school and the firm.

The University of Florida College of Law has recently established the Legal Technology Institute, a for-profit auxiliary of the law school, whose mission is "[t]o provide an innovative forum for making a positive impact and improving technology in the legal profession." To accomplish this mission, the Institute is selling the following services to law firms, government agencies, courts, and corporate legal departments: legal technology consulting, legal technology training and resources, web design, and legal technology research and design testing. The fees range from daily consulting fees to long-term, fixed price contracts. The Director of the Institute is responsible for generating income sufficient to cover the full cost of the Institute. Additionally, the Director has a profit-sharing incentive to generate profits beyond cost-recovery. These profits will be divided between the Institute, its staff, and the general law school budget. The law school intends to use whatever profit is

generated to hire staff to train faculty and students in technology use, create a training facility for the law school, and fund technology equipment purchases.

There are multiple benefits, external and internal, to this avowedly commercial venture by the law school, any one of which outweighs any taint to the College caused by its foray into the market. The external benefits are clear. First, through consulting services the law school can develop closer ties to firms and other legal entities that can lead to more effective fundraising and placement of students. Second, establishing closer relationships to firms underscores the law school's desire to be a part of the profession. Third, building closer ties to the bar reinforces perceptions that the law school is an innovator in providing training for the modern legal professional, which in turn enhances the stature of the school. Internally, the benefits are straightforward as well. The Institute provides a method for funding technology training that does not lay additional burdens on either the state or students. The Institute provides a platform for spreading the word about the law school's quality to those that will employ its students and provide it with private support. Finally, it gives faculty who are interested in using technology a new laboratory in which to experiment.[45]

The Institute also has a scholarly mission: to conduct research into the best new technological products and services and provide a neutral forum for testing vendor's products. In the world of high pressure sales of technology, a safe haven for testing serves a critical role for the private market. Thus, although the Institute is surely commercial in nature, it will benefit, not harm, the law school's core educational objectives.

Law Firm Partnerships—Even if many critics of academic commercialism might be satisfied that clinics or technology consulting services are tangential and unlikely to harm the law school, they are sure to criticize more direct commercial ventures with private practitioners. The University of Florida College of Law's most ambitious new market activity—active joint venturing with private law firms—may become the poster child for unbridled commercial enthusiasm. Yet, in many ways the project also has the greatest potential for educational and economic benefit.

The model used by the law school is simple, best exemplified by its agreement with the law firm of Holland & Knight to create the Holland

45. The Institute may also facilitate publications by the faculty or the law school as an entity. Thus, the Institute may create training guides, books, software, articles, monographs, or on-line materials that can be sold to others. In this way, it provides both an enhancement of faculty publishing options as well as another way for the law school to generate needed revenue.

& Knight Institute. The Institute contemplates that the law school and the law firm will cooperate by sharing knowledge and personnel: the law firm will use law school faculty to consult on firm projects and the law school will use firm personnel to teach. The following types of transactions are contemplated.

Firm Initiated Projects—The law firm can send the law school an RFP (request for proposals) on various projects of its choosing. Law faculty members interested in the projects may contact the firm to discover if their interests mesh. The law firm can then arrange with the law school to "purchase" the faculty members' time, from several hours to full-time. The firm will then arrange to pay the law school for those services. First, it will reimburse the law school for the salary and benefits of the faculty member, based on the percentage of time being bought. Second, it will pay an overhead charge to compensate the University and the College of Law for indirect costs associated with the faculty member. Third, as an inducement to the faculty, it may provide a "bonus" to the faculty member in an amount agreed to by the law school. Fourth and finally, it will pay an additional amount into an endowment fund as gift in honor of the faculty member.

Projects in this category might include: conducting internal research on novel issues of law; helping the firm to develop artificial intelligence systems to process transactions or litigation projects; assisting on actual client matters as expert consultants; co-authoring a book or article with a member of the firm; or creating new products to be sold in the market.

Law School Initiated Projects—Payment will be as outlined above. However, projects here will be initiated by faculty members contacting the firm with proposed projects for the firm to consider. Such projects could include: writing jointly authored books, articles, or other publications, training firm members in novel areas of emerging law, providing members of the firm with training in skills, helping associates learn to write and advocate more effectively, or setting up internal continuing education programs for the firm.

The law school might also ask the firm to provide help in teaching courses in specialized areas in which the law school lacks expertise. The agreement contemplates that the firm members who teach in this plan will be compensated by the firm—thereby costing the law school nothing. The benefit to the law school of having new experts added to the faculty cannot be overstated. No law school has a faculty large enough or expert enough to teach every course desired by the students. By a creative partnership with an excellent law firm, the law school can greatly expand its educational capacity.

Partnerships, such as the Holland & Knight Institute, might be criticized by traditional educators for blending private commercial

interests with the academy. Some private practitioners might complain that the plan "monopolizes" faculty consulting services. Both of the criticisms miss the mark.

First, the blending of commercial interests and the academy already takes place in private consulting arrangements. The Institute plan merely makes more efficient what already takes place. More importantly, it captures some percentage of the profits that would otherwise go to the faculty member. This is eminently fair, as the faculty member's capacity to provide consulting services to the private market is enhanced greatly by the law school that provides a safe and steady income stream, by the former students and law school graduates, who are attracted to the faculty member because of his affiliation to the alma mater, and by the reputations that the faculty members have made conducting research funded by the law school and the university.

Second, the arrangement with any firm is not exclusive. Both Holland & Knight and the University of Florida College of Law are delighted to have contracts similar to the Institute with other firms, schools, and agencies. The simple bottom line is that the firm and the law school want to have a win-win situation, where the business of the firm is improved and the finances of both the law school and its faculty members are enhanced.

IV. CONCLUSION

I believe that the market experiments listed above will provide extraordinary benefits to the law school. They will enhance the law school's financial base, make it less dependent on the dollars of students, give the school closer ties to the legal industry and thereby increase its likelihood of success in the philanthropic market, and promote the employment of the school's students. If the plans go well, the result of aggressive commercial activity by the law school will be to have a higher paid faculty, to have a better educated group of students and faculty, to have greater understanding of the real-world of legal practice, and to be better understood by lawyers, judges, and others who regulate the law school.

Becoming commercially active may also become imperative over the next few years if law schools and universities are to escape the wrath of legislators or private boards that believe schools are wholly unproductive places. Many schools have already faced productivity assessments, hourly time sheets, cries for abolition of tenure, imposition of post-tenure review, and demands for accountability. Unless the academy is willing to face up to commercial reality, its fate may rest in the hands of others.

I don't wish to be understood as advocating a way to escape from accountability. I fully concur in any attempt to make us more productive and sensible in our educational priorities. Rather, I think that by embracing a commercial role for our schools, we create a position in which we can establish the criteria for measuring our success. The less financially dependent we are on the "kindness of strangers," the greater the possibility is that we can carve out our own mission. Trust in our management ability, will buy us autonomy and academic freedom. Thus, the seeming inconsistency of commercialism and education is reduced substantially only when we are in control of our own destiny, rather than subjected to review and scrutiny by others whose educational values may be alien to our own.

I began this essay worrying that the academy will be fearful of change and threatened by entrepreneurial activity. I hope I have made the case for checking our fears and easing the perception of threat: commercial activity is good. It generates resources. It allows the academy and the private world to learn from each other. It allows us to experiment. With judgment and good taste, every school can become a commercial and educational giant.