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ORGANIZING A BUSINESS LAW DEPARTMENT WITHIN A LAW SCHOOL

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This Article argues that legal education needs to get its act together by getting organized. Unlike the rest of the university, law schools are over a century behind in recognizing the need for the greater organization that departments can provide. Specialization, which did not exist many years ago, has become so universal that some members of any faculty either cannot understand or care about, much less govern wisely, what goes on around them. Ignorance is compounded by non-professional agendas driven by ideologies and interdisciplinary interests. One probable result of disorganization in legal education has been a decline in bar passage rates and enrollments. This Article provides a roadmap to a cure.

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INTRODUCTION

I must begin by explaining why a departmental organization within a law school is apparently a radical idea, when most other college units in a university contain multiple departments. My brief research into organization theory revealed very little about academic organization, or the justifications for what exists in universities today.[1] Present universities are nothing like the founding universities of Bologna, Paris, and other European cities. Those universities began in the eleventh century, with a few relatively autonomous tutors each teaching the Medieval classical curriculum (which was mostly the New Testament) in Latin.

This paper explores the development of academic departments, with their costs and benefits. It then considers the possibility of creating one or more departments within law schools.

1. *See* Walter C. Hobbs & Lester Anderson, *The Operation of Academic Departments*, 18 MGMT. SCI. B-134 (1971):

> There is an explanation, however, of the plethora of analytic description of academic departments which goes beyond the simple explanation of diversity: that explanation is the absence to date of a comprehensive theory of academic organization. Although general organization theory provides at a gross level bench-marks for inquiry into specific academic structures—for example, one might expect on the basis of organizational theory that the tension which obtains between hierarchy and professional autonomy in industrial research will be seen in university departmental life as well—there is a scarcity of data-based conceptual material with which to construct a theoretical framework for academic organization *per se*. Uninformed by such a framework, the analysis of specific elements of academic organization, such as departments, understandably proceeds willy-nilly.

These authors apparently missed the work of Robert K. Murray, *On Departmental Development: A Theory*, 16 J. GEN. ED. 227, 228 (1964). This article describes the evolution of faculty departments in five stages. In his account, the first stage, usually in small departments in low prestige institutions consisted of the absolute autonomy of the department head, with mostly non-scholarly faculty. The second stage exhibited the beginnings of resistance to this model, which may well have been unstable. The third involved departments that had overthrown the dictatorship and moved to rampant democracy, which often featured more faculty politics. The fourth stage, found at larger department at more prestigious universities, featured faculty selection of a head or chair and an elaborate committee structure. The fifth stage was where preeminent professors concentrated on graduate students and research, leaving undergraduate education to the lower status faculty. Some of these developments have little relevance to law schools at present.

I. THE HISTORY AND DEVELOPMENT OF THE ACADEMIC DEPARTMENT

A. History: From Bologna to Harvard

I begin by noting that the printing press with movable type was not invented until about 1450. Consequently, after the ravages of Germanic tribes over continental Europe to create the dark ages, there were few if any manuscripts available for either teachers or students. One account describes clergy as having memorized the Latin Version of the New Testament, which was somewhat distorted after generations of passing it on.[2] Ireland was so primitive and remote that it was not subject to the gothic ravages, and in its primitive monasteries Cistercian monks continued to copy manuscripts, of which the Book of Kells from around 800 A.D. is one of the most beautiful. As the Dark Ages ended, these monks took their learning to the continent to educate clergy throughout Europe.[3]

With these limits on learning, Europe's second university in Bologna—chiefly a school of canon law and, presumably Roman, civil law—began as a cathedral school. Many similar cathedral schools began with only one teacher.[4] To accommodate higher enrollment, larger faculties diversified into faculties of law, theology, medicine, and arts, corresponding to modern ideas of professional schools.[5] Latin remained the dominant language of instruction for quite some time. Even Harvard, patterned after Emanuel College at Cambridge, used Latin at its founding in 1636.[6]

2. *See* THOMAS CAHILL, HOW THE IRISH SAVED CIVILIZATION 193 (Anchor Books ed. 1995).

3. *See generally id.*

4. *See* Philip Daileader, *First Universities in the High Middle Ages*, GREAT COURSES DAILY (Oct. 1, 2020), https://www.thegreatcoursesdaily.com/first-universities-in-the-high-middle-ages/ [https://perma.cc/88XK-HCBN].

5. Paul L. Dressel & Donald J. Reichard, *The University Department: Retrospect and Prospect*, 41 J. HIGHER ED. 387, 388 (1970).

6. FRITZ MACHLUP, KNOWLEDGE: ITS CREATION, AND ECONOMIC SIGNIFICANCE, Vol. II: *The Branches of Learning* 130 (Princeton University Press ed. 1982).

B. Expansion of Departmentalization with the Expansion of Knowledge

Beginning at Harvard in 1825, there were a few groups of specialized teachers that might have been "departments."[7] The late eighteenth century saw a gradual expansion of subject matter, dramatically expanded by Thomas Jefferson's plans at the University of Virginia in 1824 to include separate degree-granting schools for medicine, ancient languages, modern languages, mathematics, natural philosophy, chemistry and *materia medica*, moral philosophy and law.[8] The passage of the Morrill Act in 1862, providing funding for "land grant" institutions, also provided impetus for the increase in more practical and scientific studies.[9] These movements also created gradual specialization at older universities, with Harvard moving dramatically toward departmentalization around 1891–1892, followed by Yale and Princeton.[10] In today's world, departmentalization is so commonplace I will not dwell on its expansion, except to quote the following observation:

> The first and most significant [force] was the increase in knowledge and its gradual organization into reasonably distinctive disciplines. Vocational specialties, sometimes drawing upon an array of disciplines but occasionally based largely on an accumulated body of practical experiences, gave further impetus to specialization of instruction.[11]

II. SHOULD LAW SCHOOLS CONSIDER DEPARTMENTALIZATION?

A. Growth of Necessary Knowledge in Law

While in other areas the expansion of knowledge has generated greater specialization, expertise, and departmentalization, in legal studies the need for knowledge has expanded, perhaps more than necessary for human well-being. For example, federal

7. Dressel & Reichard, *supra* note 5, at 390–91.
8. MACHLUP, *supra* note 6, at 134.
9. *Id.* at 143–44. One should also note the revolutionary nature of the creation of Johns Hopkins University in 1876, where the emphasis was on specialized graduate education and research, followed by the creation of the University of Chicago in 1890.
10. Dressel & Reichard, *supra* note 5, at 393.
11. *Id.* at 394–95.

regulation has expanded at an explosive rate for over the past half century. This has been quantified by measuring the total pages in the Code of Federal Regulations. From 1949 to 2005, The number of pages has grown (along with the number of regulatory agencies) by more than six times, from 19,335 pages to 134,261 pages.[12]

Another proxy for the growth of information needed to practice law is the expanding subject matter of courses in law schools. Between 1973 and 2018 the Association of American Law Schools (AALS) Faculty Directory shows the addition of thirty-two course subjects. The most course growth occurred in Financial Institutions and Computers and the Law (both up 500 percent between 1973 and 2018), Civil Rights (up 367 percent), Natural Resources (up 330 percent), Regulated Industrial and Other Activities (up 166 percent), and Intellectual Property (up 143 percent).[13]

Another measure of increasing complexity and course expansion is shown by the 70 percent growth in faculty over that era, while entering law students were about the same at the beginning and end of the era.[14] I have not measured the content of courses, but one suspicion is that many of them have more classroom hours and coverage than before. On the other hand, faculty teaching hours have steadily declined over this period, so the percentage increase in faculty did not necessarily lead to a comparable increase in classroom hours.[15]

Even more evidence supports this expansion and demand for specialized knowledge. A survey of a number of bar associations revealed thirty-eight separate sections of specialization in five sample states.[16] We can also examine departmentalization in law firms. Some firms, such as Latham & Watkins, represent the full range of current practice. Latham & Watkins displays forty-three different specialties on its website.[17] Probably no

12. John W. Dawson & John J. Seater, *Federal Regulation and Aggregate Economic Growth*, 18 J. ECON. GROWTH 137, 140 (2013).

13. William J. Carney, *Curricular Change in Higher Education*, 53 IND. L. REV. 245, 266–70 (2020).

14. *Id.* at 246.

15. BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 4 (2012). Berkeley had a teaching load of 5.2 hours per tenure track faculty. Carney, *supra* note 13, at 248 n.14.

16. Carney, *supra* note 13, at 258 n.51. The five states were Indiana, Massachusetts, Ohio, Oregon and Louisiana.

17. Practice areas include (without listing foreign practices): Activism, Antitrust & Competition, Banking, Benefits, Compensation & Employment, Capital Markets, CFIUS & US National Security, Climate Change, Communications Law,

law school can offer courses in all these areas with full-time faculty, but the number of firm specializations demonstrates the breadth and complexity of knowledge required by the profession. Some of this knowledge will be learned as an associate (the apprenticeship model).

Departmentalization could help close the gap between firm specialization and law-school learning by ensuring that students and faculty are the most qualified in their field. Dressel and Reichard summarize the benefits of departmentalization:

> The increasing size, organizational complexity, and multipurpose character of the new university ruled out the possibility of operation through a unitary faculty. Decisions about particular courses and curricula could only be made by those competent in the field. Decisions involved in employment, promotion, and salary adjustments also required delegation—at least in part—to individuals competent to pass judgment on the scholarly attainment of an increasing array of personnel teaching and researching in various subspecialties.[18]

B. Why Are There no Law School Departments?

This discussion will reflect personal knowledge and perhaps the bias of a retired corporate law teacher.[19] Imagine the

Complex Commercial Litigation, Corporate Governance, Creditors Rights & Bankruptcy Litigation, Data Privacy & Security, Derivatives, Emerging Companies, Entertainment, Sports & Media, Environment, Land & Resources, Environmental, Social & Governance, Export Controls, Economic Sanctions & Customs, Financial Regulatory, Government Contracts, Healthcare & Life Sciences, Insurance Counseling & Recovery, Intellectual, Property Litigation, International Arbitration, Investment Funds Islamic Finance, Litigation & Trial Practice, Mergers & Acquisitions, Outsourcing, Payments & Emerging Financial Services, Private Equity, Private Equity Finance, Product Liability, Mass Torts & Consumer Class Actions, Project Development & Finance, Public Company Representation, Real Estate, Restructuring & Special Situations, Securities Litigation & Professional Liability, Structured Finance, Supreme Court & Appellate, Tax, Tax-Free Spinoffs, Technology Transactions, and White Collar Defense & Investigations. *Practices*, LATHAM & WATKINS LLP, https://www.lw.com/practices_[https://perma.cc/X3YR-G3CL] (last visited Aug. 31, 2020).

18. Dressel & Reichard, *supra* note 5, at 395.

19. When I informed Professor Ronald Gilson that I was writing a mergers and acquisitions casebook that would compete with his, he remarked, "welcome to a very small market." When my book appeared, I learned that most of the adoptions were by adjunct professors. I explain this by noting that very few law professors had more than a few years' experience in practice and were apparently unwilling

difficulty that many faculty members would have in judging both the curricular needs of students and the qualifications of faculty candidates in the corporate law area. Teachers of international law, family law, criminal law, intellectual property, critical race theory, and feminist legal theory, to name a few, have little-to-no knowledge of the literature or practice needs in corporate law or other areas of transactional and commercial law. The reverse is also true: corporate law professors have little idea of the needs of those professors. The different professors may each have their own agendas for appointments outside their own areas, but we must ask how much value this contributes to the quality of education within the school. Other than the competence of colleagues to address quality issues outside their area of specialization, one must ask whether increased faculty size (up 70 percent overall since 1973, which includes additional law schools) has attenuated the benefits of a smaller faculty and the need to focus on basic courses needed to prepare students for practice. I began my career, for instance, as one of thirteen faculty members all officed in close proximity. Now, the number is twenty-four with the same student enrollment.[20]

Because some growth in faculty occurred because of many additional schools, I wanted to look at the impact on individual existing schools. I sampled the faculty size of a limited number of schools—those with names beginning with the letters A and B. The 1973 sample included 14 schools, while the 2018 sample included 15.[21] The average size of the faculty grew from 35 to 53 over that period while enrollments remained roughly the same.[22] In 1973, the largest faculty in the sample was 67; in 2017–2018 it was 89. Some schools not counted in the sample were larger; the University of California, Berkeley, had 103 faculty members in 2017–2018.

I have been unable to locate any law faculties that operate on a departmental basis. One large faculty, that of the

to learn new material. I addressed the latter problem with a lengthy teacher's manual that would spoon-feed the instructor, but that was not enough to change the pattern.

20. *Directory of Law Teachers*, ASS'N OF AM. LAW SCHOOLS 203–04 (2017–2018).

21. Antioch Law School was on the 1973 list, but not the later list. The University of Arkansas at Little Rock and the University of Buffalo were added to the later list. The lists both include some emeritus faculty, and those librarians with apparent faculty status.

22. Carney, *supra* note 13, at 247–48. Student enrollments reached a peak increase of 42 percent by 2010, only to decline to the 1973 level by 2018.

University of Virginia (113 members in 2017–2018), appears from a personal visit to operate more extensively through committees rather than the faculty at large than smaller faculties. A more common pattern seems to be the creation of institutes and centers within a school.[23] There is little evidence of the amount of autonomy in governance these organizations possess. New York University Law School is reported to be shifting toward specialization for students, without changing the faculty organization.[24] This is not a radical change—I experienced a similar concentration model at Yale in the early 1960s that culminated with a writing-seminar requirement.

National law firms with multiple complex practices have generally departmentalized and delegated certain responsibilities to each department. In one national law firm, department heads in areas like corporate, litigation, real estate, tax, and employment had tremendous influence on partnership decisions and partner compensation. They did not get involved in associate hiring or review; that was done at the office level.[25] In a similar firm, hiring requests were initiated by department heads. Associate reviews began in the department although there was an associate review group which consisted of the department chairs for the most part.[26]

Size does not fully explain the lack of law school departments. Even small colleges often have small departments, as they feel a need to offer a broad range of courses. Many school websites do not disclose this information, but a few do. Agnes Scott college has 86 faculty, offering 39 majors (most likely with somewhat fewer departments than majors).[27] Reinhardt

23. Hofstra University Law School offers eight areas of concentration. *Concentrations*, HOFSTRA UNIV., https://law.hofstra.edu/jdprogram/academics/concentrations/index.html [https://perma.cc/B4E9-XHJW] (last visited Sept. 5, 2020). Another example is the Getches-Wilkinson Center for Natural Resources, Energy and the Environment at the University of Colorado. Such institutes usually sponsor research and host events in their field of study. George Washington University Law School has numerous centers. *Research Centers & Initiatives*, GEORGE WASHINGTON L. SCH. https://www.law.gwu.edu/research-centers-and-initiatives [https://perma.cc/WA8U-J3V7] (last visited Apr. 17, 2021).

24. Victor Fleischer, *The Shift Toward Law School Specialization*, N.Y. TIMES (Oct. 25, 2012), https://dealbook.nytimes.com/2012/10/25/the-shift-toward-law-school-specialization/ [https://perma.cc/2KFD-VP5K].

25. From a former partner in a national law firm.

26. *Id.*

27. *Meet the Faculty*, AGNES SCOTT COLL., https://www.agnesscott.edu /academics/faculty/index.html [https://perma.cc/V93W-HWR8] (last visited Sept. 3, 2020).

University has eighty faculty, 1,261 students, and seven programs in the liberal arts.[28] Small colleges often have small departments—sometimes a single person.[29]

The question then becomes why law schools are outliers in academic organization. I am unaware of any published discussions of this issue, so all one can offer is speculation. Path dependence is one plausible explanation.[30] Roberta Romano has suggested that one difference between law and business schools is that business schools started teaching distinct sets of methodological specialties, while law schools operated out of a generalist framework. A federal study in 1970 showed business schools operating with seventeen named specialties, while law schools operated with a single named specialty.[31]

Ronald Gilson's seminal article noted that business lawyers could only justify their existence if they added value to transactions.[32] He did not offer suggestions about what law schools should do to prepare their students for this practice. Thomas Morgan suggested that this was not the role of law schools and that law firms were better able to provide apprenticeship training for these skills.[33] In a world where sophisticated corporate clients are less willing to pay for the schooling of new associates in business law, what should law schools be doing to prepare their graduates to become productive young lawyers?[34] Where Gilson wanted to teach more business theory, others have argued for more practical business and transactional skills.[35]

28. *School of Arts & Humanities*, REINHARDT UNIV., https://www.reinhardt.edu/schools-programs/school-of-arts-humanities/ (last visited Sept. 3, 2020).

29. Lawrence Biemiller, *At Small Colleges, Smaller Departments*, CHRON. HIGHER ED. (July 15, 2018), https://www.chronicle.com/article/at-small-colleges-smaller-departments/ [https://perma.cc/3YDE-LF84].

30. Path dependence is when the decisions presented to people are dependent on previous decisions or experiences made in the past.

31. MACHLUP, *supra* note 6 at 163–64 (citing Robert A. Huff & Marjorie O. Chandler, *A Taxonomy of Instructional Programs in Higher Education,* U.S. DEP'T OF HEALTH, ED., & WELFARE (1970)).

32. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 253 (1984).

33. THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 202–03 (2010).

34. Eric C. Chaffee, *Answering the Call to Reinvent Legal Education: The Need to Incorporate Practical Business and Transactional Skills Training into the Curricula of America's Law Schools*, 21 STAN. J. L., BUS., & FIN. 121, 124 (2014).

35. *Id.* at 128. Emory has partially achieved this with the William and Jane Carney Center for Transactional Law Training and Practice, which works with adjunct professors to teach material that tenure-track faculty are either too proud or too incompetent to teach.

The first study that seemed to have a significant impact on the move away from the old single-pedagogy model of legal education was the MacCrate Report in 1992.[36] "The report recommended that law schools develop greater emphasis on instruction in skills, as well as the formation of values. These require, according to the report, opportunities for the performance of lawyering tasks with feedback, including ongoing reflective evaluations of student performance."[37] The study notes that the MacCrate report did not consider the cost of such education, which is necessarily more faculty intensive, because students must receive more one-on-one guidance and evaluation. This report was followed by the greater adoption of the clinical model, which often focused on dispute resolution, with little focus on areas like transactional law.

The most important change in legal education has been in litigation training and transactional law, and both have been treated more or less as outsiders in the academy, as centers or institutes often led by non-tenured contract faculty. Litigation training began outside the academy, in an organization that dealt with the absence of such training in law schools, the National Institute for Trial Advocacy.[38] When first introduced to law schools by those experienced in this simulation program, it relied, and still does, on teaching by experienced trial lawyers. Emory's widely recognized Trial Practice Program began in 1981, with the movement of Professor Abraham P. Ordover from Hofstra University, where he initiated the program. For a long time, there was no analog to this in the business law area. Tina Stark has explained that the analytic skills used by deal lawyers are different from those used by litigators (thus suggesting methodological differences similar to those of a business school):

> Specifically, litigators use the analytic skill that we teach in our first-year courses. There we teach students to take the law and apply it to the facts to create a persuasive argument. . . . The paradigm is one in which the litigators seek a certain legal result by working backwards from the law to a static set

36. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 93 (citing *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development,* AM. BAR ASS'N (1992) [hereinafter MacCrate Report]).

37. *Id.*

38. NITA began in 1971. *See About NITA*, NITA, https://www.nita.org/about-us [https://perma.cc/6CMT-X7CT] (last visited Sept. 4, 2020).

> of facts. The analytic skill of deal lawyers stands this paradigm on its head.
>
> Deal lawyers start from the business deal. The terms of the business deal are the deal lawyer's facts. The lawyer must then find the contract concepts that best reflect the business deal and use those concepts as the basis of drafting the contract provisions.39

Professor Stark had taught a commercial contract drafting course at Fordham before she came to Emory in 2007, to begin a more ambitious program for a newly created Transactional Law Center. Her genius was to conceive an entire series of courses, from a basic commercial contract drafting course,[40] to follow-up courses in Deal Skills and capstone courses in a variety of complex corporate and commercial areas. These courses involve learning negotiation and drafting skills, as well as specialized knowledge in a variety of fields. Other literature emphasizes engagement in "complex practice skills," such as those mentioned by Professor Stark.[41]

In summary, a wide variety of courses involving simulations and drafting can prepare law students to work in business transactions.

C. Departmentalization in Other Professional Schools

Business schools, as one might expect, are more organized and "business-like" than law schools. The Harvard Business School has ten departments, with a total of about 300 faculty members.[42] A smaller school, such as Emory, has five

39. Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL ED. 223–24 (2004).

40. *See* Tina L. Stark, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2007).

41. Judith Wegner, *Reframing Legal Education's "Wicked Problems*,*"* 61 RUTGERS L. REV. 867, 884 (2009).

42. The departments are: Accounting and Management, Business, Government and the International Economy, Entrepreneurial Management, Finance, General Management, Marketing, Negotiation, Organizations and Markets, Organizational Behavior, Strategy, and Technology and Operations Management. *See MBA Required Curriculum*, HARV. BUS. SCH. https://www.hbs.edu/faculty/units/am/Pages/curriculum.aspx [https://perma.cc/M3CR-BZPT] (last visited Sept. 2, 2020) (Listed under "Academic Units").

departments, with a faculty of slightly over 100.[43] Business schools are ranked in seven substantive areas; accounting, business analytics, finance, international business, management, marketing, and production/operations.[44] Because most business schools serve both undergraduate and graduate students, their faculties are generally larger than those of law schools.

Medical schools, in contrast, are graduate programs. Most medical schools have faculties many times larger than law faculties, engaged not only in teaching but in research and patient care.[45] Yale's medical school has twenty-eight departments, reflecting the complexity and advances of knowledge in the area.[46]

Theology schools are generally exclusively graduate schools at universities. Emory's Candler School offers degrees in four separate areas.[47] The 67-member faculty is roughly comparable to the law school's 63 members. This suggests that even relatively small faculties within a university can organize into smaller groups, and often do so—except in law schools.

D. The Benefits to a Law School

Leaders in the legal academy should take departmentalization seriously, especially when it is nearly universal in all other areas of higher education. In "leaders" I include deans with authority, but also intellectual leaders among faculties who also understand the problem of setting priorities and standards within a discipline.

43. *Faculty Profiles*, GOIZUETA BUS. SCH., https://goizueta.emory.edu/faculty/profiles [https://perma.cc/QWS8-NY6C] (last visited Sept. 2, 2020).

44. *See, e.g.*, *Duke University's Graduate School Rankings*, U.S. NEWS, https://www.usnews.com/best-graduate-schools/duke-university-198419/overall-rankings [https://perma.cc/8U38-PX87] (last visited Sept. 2, 2020).

45. DEREK BOK, HIGHER EDUCATION IN AMERICA 271 (2013).

46. Anesthesiology, Cell Biology, Cellular & Molecular Physiology, Child Study Center, Comparative Medicine, Dermatology, Emergency Medicine, Genetics, History of Medicine, Immunobiology, Internal Medicine, Laboratory Medicine, Microbial Pathogenesis, Molecular Biophysics and Biochemistry, Neurology, Neuroscience, Neurosurgery, Obstetrics, Gynecology & Reproductive Sciences, Ophthalmology and Visual Science, Orthopaedics and Rehabilitation, Pathology, Pediatrics, Pharmacology, Psychiatry, Radiology & Biomedical Imaging, School of Public Health, Surgery, Therapeutic Radiology and Urology. *Faculty by Department*, YALE SCH. OF MED., https://medicine.yale.edu/intranet/facultybydept/ [https://perma.cc/2R7X-A4UH] (last visited Sept. 2, 2020).

47. *Candler Facutly Directory by Area*, CANDLER SCH. OF THEOLOGY https://candler.emory.edu/faculty/faculty-area-directory.html [https://perma.cc/27V6-CDXR] (last visited Sept. 2, 2020).

1. Development of Coherent Curricula

Few law schools have a permanent curriculum. When Professor Ellen Ash Peters left the Yale Law School faculty in 1978 to accept an appointment to the Connecticut Supreme Court, Yale was left without a commercial law teacher until the appointment of Alan Schwartz in 1987.[48] Yale now appears to have more organization, at least in some areas, with a Center for the Study of Corporate Law and a Center for Private Law.[49] Yale's Center for the Study of Corporate Law has no teaching responsibilities, however, being responsible for organizing student programs, suggesting adjunct professors and initiating and supporting clinics.[50] Curricula too often follow the Yale Model, of hiring the best, brightest, and most prolific scholars regardless of subject area and course coverage.[51] One of my Emory colleagues asked an associate dean (a Yale graduate with no private practice experience) why the school was not offering a course in secured transactions. His response: "Who would want to take that?" When an adjunct professor was hired, fifty students enrolled in the course. Students who are concerned with their future apparently have a more informed view of what their practices will require than many academics with little or no practice experience. Experienced faculty with expertise in these areas should not suffer this disability.

Emory lacks a permanent curriculum that would allow students to plan course choices without having to worry about new conflicts the following year. Each of the capstone courses in Emory's Transactional Law program had a number of prerequisites. The difficulty was in assuring that all of these courses were offered regularly, and not in conflict with other required courses in the same area. Too often students were unable to complete the certificate program because of their inability to take a prerequisite. One capstone, in mergers and Acquisitions, which was developed at a major law firm for its associates, was dropped

48. Email from Professor Alan Schwartz, Sept. 5, 2020 (on file with author).

49. *Corporate & Commercial Law*, YALE L. SCH., https://law.yale.edu/studying-law-yale/areas-interest/corporate-commercial-law [https://perma.cc/JKA6-JUBH] (last visited Sept. 5, 2020).

50. Email from Professor Roberta Romano, Sept. 5, 2020 (on file with author).

51. Dean Eugene Rostow of Yale remarked at least once that hiring excellent scholars would naturally lead to their becoming excellent teachers during my student years of 1959–1962. Unfortunately, I am not sure that it will lead to a willingness to teach outside their specific area of scholarly interest.

when prerequisites were no longer offered.[52] Several years ago Emory's registrar sent an email to the faculty announcing that a new semester was coming, and what did they want to teach and when did they want to teach it? Thus departs coherent planning of a curriculum. The law school becomes a sandbox in which faculty are free to do what pleases them, rather than a serious effort to prepare students for the profession. Other schools have followed this incoherent sandbox-model. Yale, for instance, allows faculty to set their courses. And at Berkeley many tenured professors teach no core courses at all; the school hires adjunct professors to teach them instead.

Development of a departmental structure would not only lead to a coherent and consistent course-scheduling process; it would provide a structure for justifying those courses and the need for faculty qualified to teach them. Between 1973 and 2018 the proportion of faculty devoted to business law declined nationally from 27.2 percent to 22 percent. Emory Law School's loss was particularly egregious: from 35 percent to 22 percent, a decline of about 37 percent overall.[53]

A department's focus on its mission and the progression of learning both knowledge and skills would allow its faculty to share a common goal with a minimum of misunderstanding, and a commitment to fill instructional needs. It would also facilitate a common understanding of problems facing the department. Professors identifying with a single department would also minimize divided loyalties to the goals of other departments.

2. Expertise in Appointments and Promotion

If scholarship is valued in the modern legal academy, it must be at least in part because authors are making some useful contribution to the advancement of knowledge. Colleagues in the same area are best qualified to make those judgments. One sign of this is the frequent requirement in tenure cases that the candidate's work be reviewed by outside reviewers with a widely recognized reputation. At the appointments stage there is no such filter, but the issues are basically the same, the potential

52. Both the doctrinal course and the capstone workshop have been restored. *Course Descriptions*, EMORY UNIV. SCH. OF LAW https://law.emory.edu/_includes/documents/sections/registrar/spring-2020-course-descriptions.pdf [https://perma.cc/N95M-DRPQ] (last visited Oct. 3, 2020).

53. Carney, *supra* note 13, at Table A.

for valuable scholarship and competent teaching.[54] The task is more difficult, and the outcome more uncertain at this stage, making the expertise of department members more critical in making these judgments.

Too often appointments are made for reasons other than (departmental) curricular needs, on bases such as ideology, gender preference, gender, and race.[55] This is often the result of preferences of those outside the particular area of specialization. The presence of advanced degrees in other fields irrelevant to professional education are also involved.[56] This author has found that several faculty members will no longer speak to him (at least in private) because of factual disagreements grounded in ideology. Having these faculty—who are so ideologically partisan that they will cordon themselves off from any diversity of thought—exercise control over appointments, promotion, and tenure decisions is inconsistent with excellence in any teaching area.

3. Enhanced Collegiality and Cooperation

Too often today's faculty relations, including faculty appointments, promotion and tenure, are troubled by ideological differences unrelated to scholarship or facts.[57] Progressive politics play a role. They polarize academic discourse in much the same way now occurring in the political world.[58] Courses taught at several universities reflect this preference.[59] None of this has

54. I once knew a physics department chair charged with strengthening the scholarly reputation of the department who remarked that, if the scholarship qualified, the only question about teaching was whether the students were "in open rebellion."

55. *See, e.g.*, William J. Carney & Martha Fineman, *On Feminism, Politics and Rhetoric***,** 54 EMORY L. J 261 (2005).

56. Carney, *supra* note 13, at 263–65.

57. *See, e.g.*, Carney & Fineman, *supra* note 55 (challenging claims on the basis of the Statistical Abstract of the United States).

58. James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013,* 39 HARVARD JOURNAL OF LAW & PUBLIC POLICY 89 (2016) (80 percent of faculty were democrats).

59. Carney, *supra* note 13 at Table H. *See also Race, Racism, & Business Law Courses*, PrawfsBlawg (Aug. 31, 2020), https://prawfsblawg.blogs.com/prawfsblawg/2020/08/race-racism-business-law-courses.html [https://perma.cc/B75K-H4P5]. "Carliss Chatman, Cathy Hwang, and Ben Edwards put together a statement on race/racism in business law that they are inviting all law professors to sign. The statement states in full:

> We are law professors, and many of us write and teach about business law. We think race and racism are important to the study of business law, just as they are important to the study of any area of law. From slavery and

much to do with teaching the law and economics of business, where the dominant assumption is that directors' duty is to maximize shareholder profits, which occurs when a company sells products or service consumers want at prices they are willing to pay.[60] All of this involves a nexus of contractual relationships.[61] These include agency costs, ownership structure, regulations, employee relations, and supplier and customer relations. All of these are voluntary and complex. No one course can begin to cover all this. Yet the shift in emphasis in law teaching, to courses I have described as law and social change, shows a distinct disinterest in private ordering, preferring public ordering.[62]

E. Potential Costs

Kay J. Andersen has cataloged the possible disadvantages of departmentalization within the university.[63] While many are inapplicable to professional schools, several are worth considering:

- Expanding decentralization resulting from demands for departmental autonomy has eroded central authority.

redlining to lack of opportunity in the workplace and limited access to capital, race and racism have always been part of business and business law. To our colleagues and our students: we welcome the opportunity to engage in these discussions and commit to thinking hard about how to incorporate them into our research and our teaching.

60. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase its Profits*, N.Y. Times Mag. (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/6HL7-RV5H] ("In a free enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.").

61. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976).

62. As of 2018, the proportion of faculty resources engaged in such teaching was 7 percent nationally, while at Emory it was 12.3 percent. Carney, *supra* note 13, at Table A. The Emory calculations came from the same source.

63. Kay J. Andersen, *The Ambivalent Department*, 49 ED. REC. 210–11 (1968).

- Departments become political and social blocs which crush developments that would threaten their control over students and funds.

- The department may become rigid, isolated, and self-contained.

- The extreme specialization of knowledge involved in the departmental organization is unnecessary, except perhaps in the experimental sciences.

Andersen rejects most of these objections, as summarized by Dressel and Reichard:

- The department possesses the advantages of familiarity, formal simplicity, and a clearly defined hierarchy of authority.

- It provides a basis on which faculty members can interact with a minimum of misunderstanding and superfluous effort, and supplies the new faculty member with a transfer point from which to acquire the professional understanding necessary to adjust to his institution.

- The department provides the locus of power to which an instructor can most easily relate himself.

- The department as a unified group can operate more effectively in the university organization than can individual faculty members. In this sense, the college or university constitutes a bureaucracy as well as a community of teachers and scholars.

- The academician tends traditionally to think of himself as being somewhat eccentric in his professional behavior as compared with the population generally, yet members of the department have learned to accept wide personality differences.

- The department provides an understandable and workable status system within which the faculty member may orient himself, and it affords the scholar protection from

> those persons both within and outside the academic community who demand more, intellectually, from the academician than he is prepared to deliver.
>
> - A scholar's achievement and promise cannot be appraised wisely except by his professional colleagues within the department.
>
> - Academic departments form the basic units of the administrative structure with power to initiate most actions that affect the institution. They have the opportunity, and sometimes the exclusive authority, to propose the selection or promotion of faculty members, and to suggest changes in conditions affecting the student in the classroom. At the same time, they carry out, properly or inadequately, the policies of the institution.[64]

One might add the power of the purse; the dean—presumably but not always—in collaboration with the faculty as whole, has control over the funding of departments.

Dressel and Reichard mention several other problems where research is valued, a low standard teaching load is established, and there is a tendency to ignore any other functions performed (such as public service). Departments are also criticized for low standards of monitoring—but so are central administrations. "University pretensions, departmental prestige, and scholarly aspirations obscure the real needs of students and society and the problem of resource allocation in relation to those needs."[65]

III. IMPLEMENTING A DEPARTMENTAL STRUCTURE

Radical change is not the normal mode for law-faculty behavior, evidenced by its lag in adopting a departmental model. Those on faculties will recognize this ignores the many subgoals of individual faculty members, or groups of faculty, that influence decisions—minimizing the changes in teaching responsibility, promoting ideological views, etc.

64. Dressel & Reichard, *supra* note 5 at 397–98.
65. *Id.* at 401.

My searches for discussions of departmentalization produced little in the way of formal analysis of costs and benefits. Hobbs and Anderson, however, provide an important contribution to organizational theory.Two departmental processes are of fundamental significance and together they constitute the basis upon which the model is built: (1) governance, the process by which decisions are made; and (2) administration, the process by which tasks necessary to the implementation of programs and policies are accomplished.[66] These authors describe two models for faculty governance, collegium in matters of curricular concerns, and oligarchy in professional matters:

> In curricular matters, e.g., the proposed addition of new courses or the nature of the requirements to be met by students majoring in the discipline, faculty democracy is the rule. Members, regardless of rank or administrative title, share equal voice in the decisions which are made. Such organizations are collegiums in the meaning most commonly assigned the word: all actions are 'subject to the rule that a plurality of individuals must cooperate for their act to be valid.'[67]

> In the area of professional affairs, the faculty addresses itself to issues of scholarly and occupational significance, the most weighty of which are promotion and appointment to tenure. Here faculty rank has its greatest relevance and power. For purposes of such decision-making, departments commonly organize as formal oligarchies: respondents consistently reported that 'rank votes on rank, and tenure on tenure.'[68]

Hobbs and Anderson report that various faculty members accept responsibility for certain tasks. Where a faculty member resists, he or she negotiates with the department head. "No one who was interviewed stated, or even implied, that faculty members serving in administrative capacities either gave orders to other faculty members or received orders from 'superiors.'"[69] One important administrative power of department heads is

66. Hobbs & Anderson, *supra* note 1, at B-135.
67. *Id.* at B-138.
68. *Id.* at B-137.
69. *Id.* at B-136.

control over compensation. One chairman said, "It's the only real power that I have."[70]

Geoffrey Hazard has described the lack of law-faculty change as a function of the dominance of faculties in the choices involved.[71] He claims that the lack of curricular innovation is a function of the structure of law school faculties, which has not changed.[72] He mentions two schools that have attempted to depart from the conventional faculty model, one of which, Antioch, has subsequently closed.[73] In the case of "the practice arts" he notes that it is called "clinical education," and the teacher "enjoys similar subordinate position in the status of its faculty."[74] A few schools have appointed lawyers with broad practice experience, without an expectation of publication, often as contract "professors in the practice," with some limitations on their governance participation.

Hazard posits a hypothetical dean who would hire faculty in discrete areas, to carry on teaching, research and, to some extent practice, although he doubts such a model is either achievable or sustainable, largely because of the composition and attitudes of incumbent faculty.[75] Reorganization could be mandated by the university administration, but it has little specific knowledge about what departments are appropriate, and little incentive to incur the faculty enmity that would ensue.[76]

The most obvious and least disruptive model would be to employ course clusters advertised by some schools to their students. In a previous article the author employed subjects from concentrations shown on the web pages of the University of Minnesota (a state school) and Boston University (a private school).[77] The last subject, Law and Social Change, was drawn

70. *Id.* at B-139.

71. Geoffrey C. Hazard, *Curriculum Structure and Faculty Structure*, 35 J. LEGAL ED. 326, (1985) ("[I]n curriculum reform the faculty of the law schools were not so much the solution as the problem."); *see also* Henry G. Manne, *The Political Economy of Modern Universities*, *in* THE ECONOMICS OF LEGAL RELATIONSHIPS : READINGS IN THE THEORY OF PROPERTY RIGHTS (Manne ed. 1975)

72. Its curriculum and activities were subsequently taken over by the newly created District of Columbia School of Law. *Id.*

73. Hazard, *supra* note 71, at 332.

74. *Id.* at 331.

75. *Id.*

76. Judith Wegner describes legal educational reforms as "wicked problems." Wegner, *supra* note 41.

77. Carney, *supra* note 13, at n.11–12 (citing *Concentrations*, Univ. of Minn. https://www.law.umn.edu/academics/concentrations [https://perma.cc/5FAY-JGLA] (last visited June 21, 2020); and *Areas of Study at BU*, Boston Univ. https://

from Harvard Law School.[78] The subject groupings are found in Table A of that article.[79] The "unclassified" group of courses that might be divided in several ways, depending on the preferences of individual faculties. The question of faculty buy-in to the entire prospect of change is open and challenging.

Another open question is how law school departments would be divided. The groupings described in the previous paragraph might be an obvious starting point for most schools. What courses students will take, after the obvious basic first-year courses, may depend upon the school. The University of Wyoming's faculty, in a natural resource based economy, might already be reflected in its course offerings in water law, oil and gas law and mineral law, while New York University's offerings would offer more corporate and financially-oriented courses. There are many more possibilities.

My own personal preference would be to create one department (Business Law) as an experiment. And if it succeeded, it would create incentives for the remaining faculty to lobby to create others. "Success" might be defined as financial support because a department head or chair would be in a position to make coherent arguments about curricular and faculty needs. Although I might be biased, the facts show that business law suffered a 19 percent loss as a proportion of faculty resources over the period 1973–2017, second only to criminal law.[80] But business law has not contracted as a source of employment for attorneys: One study of lateral placements placed corporate law second only to litigation—and much litigation involves business law issues.[81] If one adds other subject areas included in business law—real estate, finance, insurance coverage, tax and antitrust and competition—the total is 28.12 percent of total lateral job placements—nearly equal to litigation placements.[82]

www.bu.edu/law/academics/areas-of-study/ [https://perma.cc/4S5X-Q99Z] (last visited June 21, 2020)). The categories were drawn from the 2018 webpages and may have changed by 2020.

78. *Programs of Study*, HARV. L. SCH. https://hls.harvard.edu/dept/academics/programs-of-study/ [https://perma.cc/WKA6-SGE8] (last visited June 21, 2020). The description of this area may have changed since 2018.

79. Carney, *supra* note 13, at Table A.

80. *Id.* at Table E.

81. Harrison Barnes, *The BCG Attorney Search 2019 State of the American Lateral Law Firm Legal Market Report*, BCG ATTORNEY SEARCH, https://www.bcgsearch.com/article/900050106/The-BCG-Attorney-Search-2019-State-of-the-American-Lateral-Law-Firm-Legal-Market-Report/ (last visited Aug. 12, 2019).

82. Carney, *supra* note 13, at Table F.

CONCLUSION

The organization of higher education has changed, except at law schools. Bar associations and others have expressed concern through the MacCrate and Carnegie Foundation Reports, for instance.[83] Bar Examiners may have similar concerns. The bar exam passage rate for first time takers has declined from 82 percent to 72 percent for first-time takers between 1973 and 2017.[84] As tuition has risen, this makes legal education, with its distraction from the basics of professional education, a riskier investment for students. The coronavirus and the accompanying increase in remote learning may lead students to reconsider law school.[85] Any further decline in student revenues will increase law-school budget-pressures, which could motivate schools to consider serious changes. The choice may be to get organized or close the school.

83. MacCrate Report, *supra* note 36; SULLIVAN ET AL., *supra* note 36, at 93. The study does a commendable job of examining the first year of legal education, which remains largely a Socratic approach to training students in abstract analysis—"thinking like a lawyer." In this area it articulates the educational principles that are inherent in the first-year curriculum. It then appropriately criticizes legal education for replicating this methodology in the last two years of law school, before exploring efforts to move beyond this methodology to "lawyering." To a modest extent, it attempts to articulate the educational principles involved in this effort. Here the study falters, identifying only methods designed to train lawyers in dispute resolution, either through litigation training, mediation training, or clinical experiences. In this respect it represents an admirable portrait of legal education of several decades ago. What it fails to capture is the development of efforts to train lawyers in what amounts to half of what lawyers do, which involves counseling and representing clients in transactions.

84. Carney, *supra* note 13, at n.6.

85. Many schools have already closed for reasons other than the pandemic, probably chiefly because of reductions in the number of qualified applicants. *See id.* at 257.