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# American Law Schools in a Time of Transition

## **Abstract**

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## **Keywords**

higher education, law school, tuition, technology, inflation

## **Comments**

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## **American Law Schools in a Time of Transition**

**by**

**Ronald G. Ehrenberg\***

(To be presented at a “Presidential Session” at the January 2012 Association of American Law Schools’ annual meeting in Washington DC)

\* Irving M. Ives Professor of Industrial and Labor Relations and Economics at Cornell University and Director of the Cornell Higher Education Research Institute (CHERI). CHERI receives financial support from the Andrew W. Mellon Foundation and I am grateful to the Foundation for its support. I am also grateful to Cornell PhD student Ross Milton and undergraduate students Andrew Key, Matthew Weiner and Jonathan Westman for their help in conducting some of the research that I discuss in this presentation.

## Introduction

Being a dean of an American law school these days is no easy task. To name but a few of the challenges:

1. The economic model upon which law schools is based is breaking down because of the collapse of the job market for new lawyers, which makes it difficult to justify ever increasing law school tuition levels.
2. The American Bar Association is contemplating changing standards for law school accreditation and concern has been expressed that the implicit requirement that most law school teaching be done by tenured and tenure track faculty will be eliminated, which may have profound implications for the academic freedom of law school faculty members and their ability to be engaged in important public policy debates.
3. Finally, law schools are under pressure to diversify their student bodies and faculties across racial/ethnic and socioeconomic dimensions.

American law schools are part of a much broader higher education system. So to set the stage, I will begin my remarks today by discussing the stresses that the American higher education system is under and the changes that we have seen in it over the last three decades. This discussion should convey to you that the challenges law schools are facing are not unique and that there are lessons from the broader academic experience that may prove useful to law schools.

I will then turn to a more targeted discussion of two issues: the role of tenured and tenure track faculty in law schools, and the pressures to diversify the faculty teaching at law schools. In discussing these issues, I will talk about relevant empirical research that

has been previously conducted and illustrate similar types of research that might be profitably undertaken for law schools. Finally, I will conclude with a discussion of some issues relating to the continued increase in law school tuitions at rates exceeding the rate of inflation and the role that the *USNWR* ranking of law schools plays in the tuition setting process.

I will argue that reports of law school unintentionally or intentionally misreporting a variety of types of data to *USNWR* should not be surprising; we have long seen similar problems occurring with respect to its rankings of undergraduate institutions.<sup>1</sup> The fact that rankings schemes can induce such behavior emphasizes the need for our law school deans and faculty members to always stay focused on the social purpose of higher education, rather being obsessed with perceptions of prestige and rankings.

### What's Been Happening in American Higher Education?

During the last three decades, undergraduate tuition levels increased each year, on average, by 3.5 percent more than the rate of inflation at private four-year academic institutions. The comparable increases for public four-year and public two-year institutions were 5.1 percent and 3.5 percent, respectively.<sup>2</sup> Tuition increases in private higher education have been associated over this period with increased real expenditures per student; in public higher education, as I detail below, at best tuition increases have helped to compensate for reductions in state support.<sup>3</sup>

I have extensively discussed elsewhere the forces that cause private and public undergraduate tuition levels to continually increase at rates that exceed the rate of

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<sup>1</sup> Lederman (2011)

<sup>2</sup> Baum and Ma (2011), figure 4

<sup>3</sup> Desrochers et. al. (2010)

inflation, as measured by the rate of increase in the Consumer Price Index (CPI).<sup>4</sup> For private institutions, they include:

1. The aspirations of academic institutions, similar to other nonprofit institutions, to be the very best that they can in every dimension of their activities, which calls for ever-increasing resources.
2. The perceptions by students and parents that where they go to college is almost as important as whether they go to college and the belief that higher priced selective private institutions confer unique educational and economic advantages on their students, which leads to long lines of applicants applying to these colleges and only limited market forces to limit their tuition increases and provides a cover for less selective institutions to raise their tuition levels.<sup>5</sup>
3. Published rankings, such as those of *U.S. News and World Report*, which are based partially on institutional expenditures per student, and thus lead to an arms race of spending; and
4. The growth of technology which often comes at a high cost and leads to improvements in quality in higher education, but these quality changes are not reflected in the rate of increase in tuition because, unlike with the CPI, adjustments are not made for product quality changes in computing the rate of tuition increase.

All of these factors hold for public higher education institutions as well, plus the pressure that cutbacks in state support put on tuition.

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<sup>4</sup> See, for example, Ehrenberg (2002, 2006, 2007, 2010) and Archibald and Feldman (2011)

<sup>5</sup> Most studies, including Brewer, Eide and Ehrenberg (1999) and Eider, Brewer and Ehrenberg (1998) find that high priced selective private institutions confer educational and economic advantages on their students; the only studies that find contrary evidence are Dale and Krueger (2002) (2011)

The nature of faculty positions has also changed dramatically during the last 30 to 40 years. The percentage of faculty nationwide that is full-time has declined from almost 80 percent in 1970 to 51.3 percent in 2007 and the vast majority of part-time faculty members do not have Ph.D.s.<sup>6</sup> The percentage of full-time faculty not on tenure tracks has more than doubled between 1975 and 2007, increasing from 18.6 percent to 37.2 percent.<sup>7</sup> As a result, today only about one-third of the faculty teaching at American colleges and universities are full-time and tenured or on tenure-track appointments.

Why did this change in faculty composition happen during a period when undergraduate tuition levels increased in real terms, on average, at the rates indicated above? Part of the reason is that the *tuition discount rate*—the share of each tuition dollar that institutions returned to their undergraduate students in the form of need-based or merit grant aid—increased substantially at private 4-year institutions. For example, the average tuition discount rate for first-time full-time first year students at private four-year institutions reached 42 percent in the fall of 2008; the comparable figure in the fall of 1990 was 26.7 percent.<sup>8</sup> Much of the increase in tuition revenues at private colleges and universities has been plowed back into undergraduate aid; at all but a handful of the very wealthiest privates, the vast majority of undergraduate financial aid dollars come largely from tuition revenue.

The wealthiest and most selective privates, which have no problems achieving their desired enrollment levels, dramatically increased the generosity of their financial aid policies during the period in response to evidence that relatively small fractions of their

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<sup>6</sup> U.S. Department of Education (2010), tables 249 and 253

<sup>7</sup> *Trends in Faculty Status, 1975-2007* available at ([www.aaup.org/pubresearch/](http://www.aaup.org/pubresearch/))

<sup>8</sup> National Association of College and University Business Officers (2009) (2010)

students were coming from lower- and lower middle-income families<sup>9</sup> ; to the rapid growth rates in their endowments during much of the period and their relatively low endowment spending rates which led to pressure from the U.S Senate Finance Committee for them to increase endowment spending on financial aid; and to dramatic increases in the financial need of their applicants because of the decline in family incomes and asset levels after the financial collapse in 2008. Other private institutions, which use need based and merit aid to craft their classes and to achieve desired enrollment levels, found that market forces do matter; competition from lower priced public institutions along with stagnating real family income levels during much of the period, and then the decline in family incomes and assets after the financial collapse, dramatically increased their need to increase grant aid and offer tuition discounts both to fill all their seats and to achieve the desired composition of their class in terms of student selectivity and other factors..<sup>10</sup>

In public higher education, tuition increases have barely offset a long-run decline in per full-time equivalent student state appropriations. State appropriations per full-time equivalent student at public higher educational institutions averaged \$6,454 in fiscal year 2010; at its peak in fiscal year 1987 the comparable number (in constant dollars) was \$7,993; a decline of 19 percent.<sup>11</sup> Even if one leaves out the “Great Recession,” real state appropriations per full-time equivalent student were still lower in fiscal year 2008 than they were 20 years earlier. Overall, the sum of net tuition revenue and state

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<sup>9</sup> Supiano and Fuller (2011)

<sup>10</sup> While tuition levels rose in percentage terms by more at the 4-year publics than they did at the 4-year privates during the period, because tuition levels were so much lower at the publics at the start of the period, dollar increases in tuition were much larger at the privates and the difference between public and private tuition levels (in real terms) increased during the period

<sup>11</sup> State Higher Education Executive Officers (2011), figure 3

appropriations per full-time equivalent student at the publics was roughly the same in real terms in fiscal year 2010 as it was in fiscal year 1987.<sup>12</sup>

In addition, academic institutions have changed how they allocate their resources. The share of institutional expenditures going to faculty salaries and benefits in both public and private institutions has fallen relative to the share going to nonfaculty uses such as student services, academic support, and institutional support.<sup>13</sup> Some observers have attributed this to administrative bloat and the declining influence of the faculty on decision making at universities.<sup>14</sup> However, after experiencing the collapse of financial markets in 2008 and the great recession, many universities have hired external consultants to advise them on how to reduce their administrative costs and are taking serious steps to do so. My own university, for example, is well on the way to reducing the administrative costs on its Ithaca campus by \$75 to \$85 million a year; this represents 5 to 6 percent of its base annual operating budget (excluding external research funding). (<http://dpb.cornell.edu>). I must caution, however, that one time reductions in administrative costs will not slow the rate of tuition increases; continuous reductions in costs will be required to do that.

All of these things are occurring at a time when American higher education is facing enormous pressures. Our nation's economic growth and prosperity during the 20<sup>th</sup> century was driven by our leading the world in terms of the share of our population that had college degrees.<sup>15</sup> But other nations have overtaken us and today we rank no higher than 12 among 36 developed nations in terms of the share of our young adult population

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<sup>12</sup> State Higher Education Executive Officers (2011), figure 3

<sup>13</sup> Desrochers, Lenihan and Wellman (2010)

<sup>14</sup> Ginsberg (2011)

<sup>15</sup> Goldin and Katz (2008)

with college degrees.<sup>16</sup> The groups in our population that are growing most rapidly, people of color, immigrants, and people from relatively low income families, are the groups that historically have been underrepresented in higher education and improving access to higher education and persistence to college graduation is essential for our nation's prosperity in an increasingly international competitive world where economic growth is based on a knowledge-economy. Concerns that high rates of tuition growth will prevent us from achieving our goals, coupled with the decline in income and assets caused by the great recession and the collapse of housing markets are putting pressures on private and public higher education institutions to limit their rates of tuition increases.

Public higher education institution, in which the vast majority of American undergraduate students are educated, face pressures to increase enrollments and increase persistence and graduation rates at the same time that state support is being cut back. A growing private for-profit higher education sector which now enrolls almost 10 percent of all students has attracted primarily adult learners interested in education leading to careers; the largest "players" in this sector, including the University of Phoenix, have been among the leaders in restructuring methods of delivering education through the use of technology to improve learning and reduce costs; notable efforts from the nonprofit sector to similarly do so include the work of the National Center for Academic Transformation (<http://www.thenatcat.org>) and the Open Learning Initiative at Carnegie Mellon University (<http://oli.web.cmu.edu/openlearning/initiative>).

The for-profits have also been among the leaders in reducing reliance on tenure and tenure-track faculty, seeking to measure learning outcomes, and evaluating instructors based on what their student learn. Recent research concluded that very little

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<sup>16</sup> Lewin (2010)

learning actually occurs for many American students in higher education and this has added to the pressures for accountability that academic institutions now face.<sup>17</sup> Academic institutions are increasingly being asked to provide information on how they assess learning outcomes as part of the accreditation process.

#### Possible Reduced Reliance on Tenure and Tenure Track Faculty

The Standards Revision Committee of the American Bar Association's proposed guideline for accreditation remove language from the ABA standards that many faculty members (but not the ABA committee) have interpreted as requiring law schools to have a tenure system and to have most law school teaching conducted by full-time law school faculty.<sup>18</sup>

A traditional argument for the importance of a tenure system for faculty is based upon academic freedom. Absent tenure, and the job security it provides, faculty members may be reluctant to pursue research on, or to engage in public debate, over controversial issues. Michael Olivas very eloquently expressed this view in his presidential address to the AALS last year and if one wanted to single out a single academic discipline in which such academic freedom is absolutely essential, it certainly would be law, where many of you debate and write about controversial public policy issues on a frequent basis.<sup>19</sup>

The importance of this rationale for tenure was brought home to me personally in the late 1970s when several trustees at my own institution challenged my promotion to professor because they disagreed with testimony I had given in a regulatory proceeding in

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<sup>17</sup> Arum and Roska (2011)

<sup>18</sup> Jaschik (2010)

<sup>19</sup> Olivas (2011)

New York State.<sup>20</sup> President Frank Rhodes, who had arrived at Cornell only a few months earlier and who had never met me, suggested to trustees that academic decisions were best left to academics and my promotion went through. The Cornell Trustees as a body shortly thereafter formally took the position, which it has repeatedly reaffirmed over the years, that academic decisions are best left to academics and that the final decisions on individual tenure and promotion cases are to be made by the Provost and the President of Cornell, with the Trustees only pro forma approving the decisions.

Economists have developed a number of other arguments that can be used to support the importance of tenure systems. One is that because a tenure system provides senior faculty with some job security, they have an incentive to fully share their expertise with junior colleagues and students without fear of creating competitors who will challenge their position; in this way tenure facilitates the intergenerational transmission and expansion of knowledge.<sup>21</sup> .

Another is that a tenure system can be thought of as an implicit long-term contract model, or a winner-take-all tournament model, and that both of these models provide incentives for all faculty members to work harder than would otherwise be the case.<sup>22</sup> Still a third is the traditional labor economics argument that tenure is a desirable job characteristic and, in the absence of a tenure system academic institutions would have to pay higher salaries to attract faculty of a given quality. Indeed, research that I undertook with two collaborators suggests that, after controlling for other factors that influence

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<sup>20</sup> The incident is described in Ehrenberg (2002), p.127.

<sup>21</sup> Stigler (1984)

<sup>22</sup> Lazear (1979) and Rosen and Lazear (1981)

salaries, economics departments that offer lower probabilities of tenure have to pay higher starting salaries to attract new faculty.<sup>23</sup>

While all of these arguments supporting a tenure system are important, one may reasonably ask, why should the typical college student be taught by a researcher on the frontier of his field when the material the student is being taught is miles inside the frontier? Doesn't heavy reliance on tenured and tenure track faculty needlessly raise the cost of undergraduate education? Put simply, what is lost if undergraduate students are taught by adjuncts or full-time non tenure track faculty and a smaller number of tenure track faculty focus on research and graduate education?

Only recently have economists and other social scientists begun to address this issue and their findings suggest that there is no such thing as a "free lunch" in higher education. For example, Liang Zhang and I used institutional level data for a number of years and found, after controlling for other factors, that when a four-year academic institution increases its use of either full-time non tenure track or part-time faculty, its undergraduate students' first-year persistence rates and graduation rates decrease.<sup>24</sup> Several other studies have found that greater reliance on part-time faculty reduces two-year college students' graduation rates and probabilities of transferring to four-year colleges.<sup>25</sup> Still other studies have found that both public two- and four-year college students that take "adjunct heavy" first year class schedules are less likely to persist in college after the first year.<sup>26</sup>

Not all studies suggest that adjuncts always adversely influence academic outcomes. For example, Bettinger and Long (2010), in a study that may be particularly relevant to

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<sup>23</sup> Ehrenberg, Pieper, and Willis (1999)

<sup>24</sup> Ehrenberg and Zhang (2005)

<sup>25</sup> Jacoby (2006), Eagan and Jaeger (2009), and Jaeger and Eagan (2009)

<sup>26</sup> Bettinger and Long (2007) and Jaeger and Eagan (2011)

legal education, showed that having an adjunct as an instructor in an introductory class in some professional fields increases the likelihood that a student will take additional classes in the field.

Given that many full-time non tenure track faculty members are dedicated teachers and can devote themselves fully to undergraduate education because they do not have any research expectations placed on them, why might they adversely affect student outcomes as many of these studies suggest? Typically their teaching loads are higher than tenure-track faculty members, which may leave them with less time to work with individual students outside of the class or to keep up with new developments in their fields. Adjunct faculty appointments are often ad hoc in nature and instructors trying to eke out a living from this type of work often must take on much higher teaching loads, spread in urban areas across multiple institutions; this leaves them little time and often no place to meet students outside of class.<sup>27</sup> They also are less likely to be up to date on their department's curriculum and therefore may be less prepared to advise students.

However, what appears to be true for undergraduate education is not necessarily true for legal education. Adjuncts in law schools are typically practicing lawyers who bring professional knowledge to the classroom. Nontenure track full-time faculty in law schools are often found in clinical areas. Would an adoption of an accreditation standard that deemphasized the importance of tenured and tenure track faculty actually have any adverse effect on law students' education?

To answer such a question requires one to specify what the outcomes of legal education are and then to estimate whether the composition of faculty at a law school

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<sup>27</sup> Zhang and Liu (2010) show that four-year academic institutions in urban areas make more use of part-time faculty than other four-year institutions

influence these outcomes. During the past year a group of undergraduate and graduate students and I took a first stab at doing this. We obtained the data to conduct our research from the *Official Guide to ABA Approved Law School*; the most recent year's data was available on the LSAC Web site, five previous year's data electronically were obtained from the ABA, and data for an additional 8 years came from published volumes of the *Guide*.<sup>28</sup>

The law school performance measures available in *Guide* were the attrition rate of first year students for academic reasons and the bar passage rate for first-time test takers from the law school for the jurisdiction in which the largest numbers of its students took the bar exam; we standardized the latter by comparing it to that state's average bar pass rate for first-time test takers<sup>29</sup>

The faculty measures available in the *Guide* for our study were not ideal.<sup>30</sup> Available to us were the shares of faculty that are “full-time”, “other full-time”, “deans and librarians and others who teach”, and “part-time”. The full-time faculty measure includes not only tenure and tenure track faculty, but also clinical and other faculty on multiyear term appointments, as well as visitors who are temporarily filling “full-time” slots. The “other full-time” faculty measure includes other people teaching full-time to whom no multi-year commitment has been made.

Nonetheless, we estimated whether either the academic attrition rate measure or our “adjusted” bar passage rate measures was associated with the shares of faculty at an

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<sup>28</sup> I am grateful to Kenneth Williams at the ABA for providing us with the electronic data

<sup>29</sup> In computing this variable we first recalculated the state average pass rate removing the school's test takers and test passers from the data.

<sup>30</sup> I am grateful to Richard Robinson, Associate Dean for Administration and Finance at the Cornell Law School for helping me to understand the classifications of faculty in the *Guide* and the years to which various data elements in an issue of the *Guide* refer.

institution from the different groups.<sup>31</sup> Our equations attempted to control for other factors that might be related to the outcomes, including the GPA and LSAT scores of the students and, in some specifications, the gender/racial/ethnic distribution of students .We found no evidence from our analyses that the distribution of faculty across the types that were available to us had any effect on the first-year academic attrition rate or the adjusted bar passage rate of graduates of the institution.

I must emphasize that the data we were using were inadequate to address the question of whether full-time tenure and tenure track faculty matter? We did not have information on the share of faculty that were tenured or on tenure-tracks. Equally problematic, we had no information on the characteristics of faculty who were teaching the first-year classes; the classes that would be most relevant in determining attrition after the first-year. We also had no information on the characteristics of faculty teaching basic second year survey classes, which along with the first-year classes, cover the majority of the material that appear on the bar exams. In theory, one could obtain information on the characteristics of the relevant faculty from copies of the annual *AALS Directory of Law Teachers*, but to do so in a cost efficient way would require the AALS to allow researchers access to electronic versions of the *Directory*.

I also make no claim that the student performance measures that we used are the best ones that might be used; the AALS might profitably address what better measures might be. One might consider, for example, job market outcomes; studies using job market outcomes would be akin to large numbers of studies by economists that seek to ascertain if the labor market earnings of college graduates are related to the characteristics of the

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<sup>31</sup> We used the faculty shares for the year the students were first year students in the attrition equation and experimented with these shares and the average shares over the three years they were enrolled in law school in the bar passage equations

undergraduate institutions that they attend.<sup>32</sup> However, as you are all aware, published data on the share of a law school's graduates that are employed after graduation and the graduates' salary levels have come under attack and better earnings data will need to be collected before one can focus on this outcome. What seems clear, however, is that the ABA should want to know the answer to the question "Do tenured and tenure-track faculty matter in law schools?" before seriously proposing accreditation standards that decrease reliance on tenure and tenure track faculty.

### Diversifying Law School Faculty

American higher education institutions are trying to diversify their faculty across race, gender, and ethnic lines. If talent is equally distributed across all groups, to do otherwise would be to not maximize the quality of our faculty. While role models for students do not have to be of the same race, gender and ethnicity, some (but not all) research relating to undergraduate students suggests that female students are more likely to persist in science and engineering fields if the instructor in their introductory class is female; analogous results were found in one study for African American students and African American professors.<sup>33</sup> With respect to law schools, a recent *New York Law Review* survey suggests that law schools with a high percentage of full-time female faculty members had a larger percentage of female students on their flagship law reviews.<sup>34</sup>

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<sup>32</sup> Brewer, Eide, and Ehrenberg (1999) and Dale and Krueger (2002)

<sup>33</sup> Examples include Rask and Bailey (2002) and Carrell, Page and West (2010) for gender and Price (2010) for race. Studies that conclude that the gender match of faculty and students does not enhance female students persistence include Canes and Rosen (1995), Bettinger and Long (2005), Griffith (2010) and Price (2010).

<sup>34</sup> Sloan 2011

In a recent study, colleagues and I also addressed the role that the leaders of American college and universities- trustees, presidents, and provosts – play in influencing the rate at which academic institutions diversify their faculty across gender lines.<sup>35</sup> While a much more direct role in faculty hiring is played by faculty search committees, department chairs and deans, presidents and provosts establish the “rules of the game” for faculty searches and make clear what their expectations are in terms of efforts to diversify the faculty. Trustees in turn make clear what their goals are for the institution during the process of hiring a president and monitor the progress of the institution and the president in meeting these goals. It is now quite common for trustees to require that each year the administration report on its progress in diversifying the faculty.

Using institutional level data spanning the 1984-2007 period for a set of 4-year colleges and universities, we estimated whether the gender of the president and the provost, as well the share of trustees that were female influenced the rate at which the institution diversified its faculty across gender lines, after controlling for other variables that might be expected to influence this rate (for example, a measure of the expected share of new hires that should be female based upon the “female PhD intensity” of the fields in which the institution employed faculty). We found that institutions with either female presidents or provosts, as well as those with a greater share of female trustees increased their female share of faculty at a more rapid rate over the period. We also found that the magnitude of the effects of these leaders are larger at smaller institutions, where central administrators typically play a larger role in faculty hiring decisions and that a critical mass of female trustees, at least 25 percent, had to be reached, before the gender composition of the board mattered.

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<sup>35</sup> Ehrenberg, et. al. (forthcoming)

Earlier studies by social scientists had also found evidence that the gender composition of deans and department chairs appeared to influence the rate at which new female faculty were hired.<sup>36</sup> My students and I knew from the *AALS Statistical Reports on Law Faculty* that in 1990-91 only 8.5% of law school deans were female and only 6.8% were people of color. By 2007-08 these percentages had risen respectively to 19.8 and 12.7 (with another 6.8% of dean's race not being reported in 2007-08). These changes led us to naturally to wonder if we could adapt the methodology used in our paper to estimate whether the gender of the dean at a law school influences the rate at which the school diversifies its faculty across gender lines and similarly if the race/ethnicity of the dean influences the rate at which the school diversifies its faculty across racial/ethnic lines.

Through online searches of *Directory of Law Teachers*, my students identified the gender and minority status of the dean of each ABA accredited law school each year from 1997 -98 to 2010-2011. They then estimated equations using institutional level data in which the change in the share of the full-time faculty (obtained from issues of the *Official Guide*) that was female between two years was specified to be a function of the gender of the dean and of the initial year's share of female faculty. They conducted similar analyses for changes in the share of faculty that were minority using the minority status of the dean as the key explanatory variable. In none of the specifications that they estimated did they find any evidence that the gender of the dean significantly influenced the rate at which the gender distribution of the full-time faculty changed nor did they find

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<sup>36</sup> See, for example, Bach and Perrucci (1984), Kulis (1997), Konrad and Pfeffer (1991) and May, Moorhouse and Bossard (2010)

any evidence that having a minority dean influenced the rate at which the share of the full-time faculty that was minority changed.

There are compelling reasons to try to diversify the leadership of law schools that go beyond changing the rate at which law schools diversify their faculty so our evidence should not be interpreted as suggesting that efforts to diversify law school leadership should be reduced. Moreover, once again our research is not the definitive work on the topic. Changes in faculty shares results from hiring decisions, from decisions by faculty to move to other law schools, to nonacademic employment and to retire, and from decisions by law schools not to grant tenure to tenure-track faculty.

In addition, the gender and race/ethnic mixes of potential faculty that are available to fill a law school faculty vacancy will depend upon the subject matter area in which a law school is seeking to recruit. For example, in 2007-08, 87.9% of antitrust law professors were male, but only 38.4% of family law professor were male. If the gender distributions of lawyers seeking faculty positions in antitrust and family law are similar to the current faculty distributions, the likelihood that a vacant position will be filled by a female is much higher if the position is in family law than if it is in antitrust law.

These considerations suggest that if the AALS is interested in conducting a better designed study of the role of the gender and minority status of law school deans in diversifying the faculty, it will need to provide researchers with access to individual level data on new hires from the *Directory of Law Teachers*, along with data on the “availability” of job applicants by gender and minority status that might be obtained from both the *Directory* and the *Faculty Registry*. Future studies might also profitably take into account that the responsibilities of law school deans are very varied and it is possible that

the key individuals whose gender and race/ethnicity might matter are the associate or assistant deans in charge of academic affairs and faculty hiring, along with the faculty search committee chairs.

### Ever Increasing Law School Tuition

The ABA Commission on the Impact of the Economic Crisis on The Profession and Legal Needs is well aware that law school tuitions, like undergraduate tuitions, have risen substantially relative to the rate of inflation.<sup>37</sup> What is not as well publicized is that law school tuitions have also increased substantially relative to undergraduate tuitions over the last two decades.

During the 1990-91 to 2009-10 period, average private law school tuition rose by 5.9 percent a year, while average private undergraduate tuition rose by a half a percentage point less a year less. Similarly while a weighted average of resident and nonresident public undergraduate tuition levels rose by about 6.8 percent a year during the period, average public resident and nonresident law school tuition levels rose by 9.1 and 7.5 percent a year, respectively.<sup>38</sup>

Why has this occurred? One possibility is that law school faculty salaries have increased relative to faculty salaries in other academic disciplines and that higher tuition levels were necessary to attract and retain top law school faculty. I am not privy to data on salaries of faculty at private law schools, but average salaries of faculty by discipline, including law, from a set of public universities and land grant colleges that are collected annually by the Office of Institutional Research and Management at Oklahoma State University are published periodically in *Academe*. I take the average salaries of English

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<sup>37</sup> American Bar Association (2009)

<sup>38</sup> The law school tuition data are from the ABA and the undergraduate tuition figures from the College Board.

professors as a comparison group because the Oklahoma State data indicate that salaries in many other fields have risen relative to those in English over time.

In 1991-92, the average salary of professors of law and legal studies was about 154 percent that of the average salary of professors in English; by 2009-2010, the advantage of law professors had increased only slightly to 159.5 percent. The comparable salary ratios advantages at the assistant professor level were 179.2 percent in 1991-92 and 171.6% in 2009-2010, so during the period salaries of assistant professor of law and legal studies actually fell a bit relative to those of assistant professors of English.<sup>39</sup> While these data are only for public institutions, they do not provide strong support for the proposition that more rapid increases in law school tuitions were due to the need to raise revenue for law school faculty salaries.

I told you at the start of my talk that a large fraction of undergraduate tuition at private colleges and universities goes back to undergraduate students in the form of need based or merit based financial aid. Indeed the wealthiest privates have eliminated all loans from the financial aid packages of undergraduate students. In contrast, the debt loads that law school graduates have been assuming are extraordinary. A cursory look at the data included in the most recent *U.S News & World Reports* top law rankings of law schools shows that almost half of ABA Accredited law school reported that their 2010 graduates who incurred law school debt averaged over \$100,000 in debt and the percentages of graduates with law school debt at these schools ranged from 61 to 99.

These numbers suggest that the typical private law school is probably not giving back as great a share of its tuition dollars in the form of grant aid as the typical private institution is at the undergraduate level. But I may be wrong; the *Official Guide* does

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<sup>39</sup> American Association of University Professors (2011)

provide information on the share of recent students receiving grant or aid and the median amount of this aid for each law school. I checked the numbers for the private law schools in New York State and across these law schools between 36 percent and 75 percent of students received grant aid, with the median grant aid level for full-time students varying between \$7,500 and \$20,000. If private law schools have used their higher tuition increases to provide increased grant aid to students, it would be prudent for them to publicize this information to potential applicants.

Cut backs in state support for higher education at public universities have often been larger at professional schools, such as law, than they have for undergraduate education. From the perspective of state policy makers, greater state cuts for professional schools, such as law, make sense because more highly educated individuals are more mobile across state lines and thus graduates of professional schools are less likely to remain in the state and pay taxes after graduation than are college graduates.<sup>40</sup> Disproportionate cuts in state support for public law schools may partially explain their higher rates of tuition increases relative to the tuition increases for undergraduate students at public institutions.

More likely, tuition increases at both public and private law schools have been driven by the same two forces that drive tuition increases in undergraduate education – the quest that all nonprofits face to accumulate resources to they can be the very best they can in every dimension of their activities and the quest for prestige that is driven largely by published rankings of law schools, such as the U.S News & World Reports rankings. A ranking scheme that is partially based on the resources devoted to educating students puts pressure on law schools to spend more. A ranking scheme that is partially based on

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<sup>40</sup> However, state specific bar exam may dampen interstate mobility of lawyers.

student selectivity puts pressure on lower ranked law schools to try to “buy” top student with merit aid.<sup>41</sup> And a ranking system that is based partially on peer assessments and assessment scores by lawyers and judges puts pressure on law schools to be perceived as continually improving what they are doing and to spend money to continually convey such information to external constituents.

Put simply, national law schools find themselves in a competitive arms race of spending – any institution that unilaterally cuts its spending, or increases its spending at a slower rate than its competitors, will fall behind in the rankings. The promise in the past of large earnings for law school graduates, much higher earnings than the earnings of typical college graduates, made potential law students willing to bite the bullet and pay the tuition levels at law schools that were increasing at more rapid rates than those in undergraduate education. However, the collapse, at least temporarily, of the labor market for new lawyers, has greatly dampened the likelihood that future potential law students will be willing to take on such large loan burdens. It is quite reasonable to project that in the years ahead law schools will have to moderate their rates of increase in tuition, or dramatically increase the share of their tuition revenues that they give back in the form of grant aid.

Any time a rankings scheme is based upon a variety of self-reported variables institutions have incentive to take actions that will influence those variables in a way that will improve the rankings. I have written extensively about the things that undergraduate institutions have done to improve their USNWR rankings; things that may require the use of resources and increased spending, but that have no real positive effect on

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<sup>41</sup> An important issue recently addressed by Organ (2011) is the extent to which some law schools award merit scholarships to entering first year students that are much more difficult to renew in subsequent years than the students believe and this impacts on the students and student culture

undergraduate students' experiences. Institutions also carefully look at all the data they are going to submit to USNWR to see if there are legitimate things they can do that will make their data "look better"<sup>42</sup> However, when institutions begin to take actions to improve rankings that will mislead future applicants, such as allegations that some law schools hire their own graduates into temporary jobs to inflate the reported employment probabilities of their graduates, these institutions are coming close to violating ethical norms. And when they intentionally provide inaccurate data, as a number of law schools have been alleged to have done, they have definitely crossed the line.<sup>43</sup> Law schools should be synonymous with ethical behavior.

Obsessions with rankings and maximizing institutional prestige have taken the eyes of many American higher education leaders away from thinking about the important social role of higher education. However, some leaders have kept their focus. To take but one example, Cornell's President David Skorton barely blinked when I showed him data that suggested that while Cornell's undergraduate student body was getting better each year, it was getting better at a slower rate than our competitors' student bodies and thus we were falling behind in student selectivity rankings and probably needed to figure out how to alter our financial aid policies to attract more top students. But when David saw data in 2008 that showed that the share of our students that receiving Pell Grants, the federal undergraduate grant aid program for students from lower- and lower middle-income families, was falling, he immediately dramatically increased the generosity of our grant aid programs for lower income students, even though Cornell was already suffering serious structural budget deficit problems at the time.

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<sup>42</sup> Ehrenberg (2002), (2003), (2005)

<sup>43</sup> Lederman (2011)

Hopefully the controversies relating to the misreporting of law school data to USNWR will help to remind members of the AALS that obsession with the USNWR law school rankings is not in the social interest.

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