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Jeffrey L. Harrison
University of Florida Levin College of Law, harrisonj@law.ufl.edu

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Faculty Ethics in Law School: Shirking, Capture, and "The Matrix"

JEFFREY L. HARRISON*

INTRODUCTION

Recently, a colleague of mine said, fairly bluntly, that she thought another colleague's tenure file was weak but that she would not oppose him for fear of offending mutual friends. Only two things distinguish my friend from many other law professors. First, she was willing to express the fact that she was allowing her own social comfort to trump her obligation to make a decision based on the merits of the candidate's work.\(^1\) Second, she did not begin to "see" the work as actually "very good" as a way of avoiding the dissonance created by the conflict between her professional obligations and personal needs.

This behavior should force us to think about the hazards of faculty governance of law schools more generally. The primary focus of this essay is the ethical dimension of the decisions faculty governance requires law professors to make. These decisions are ethical ones because they often involve, as did my friend's tenure-decision vote, a personal/professional tension.\(^2\)

This essay is devoted to the proposition that conditions are ideal for most law schools to be governed for the benefit of the faculty at the expense of the welfare of students and others (stakeholders)\(^3\) who expect to be served by the law school. If this practice is sufficiently broad that it becomes a component of the institution's norms, two concepts from administrative law become relevant. One is "self-regulation" and the other is "capture." The analysis is presented in four steps. In the following section, the concepts of shirking and capture are explained more fully. Since no employees, including law professors, are expected to devote 100% of their energy to the institution, one issue that must be addressed is

* Stephen C. O'Connell Professor of Law, University of Florida College of Law. Thanks to Professor Amy Mashburn, Dean Patrick Shannon, and Sarah Harrison for comments.

1. This would be among the "Good Practices" suggested by the American Association of Law Schools. See infra text accompanying notes 5-8.

2. Maybe the most concise definition is that offered by Professor Dale Whitman: "ethical means we do the right thing even when it is contrary to our perceived self-interest." Dale Whitman, Doing the Right Thing, AALS NEWSLETTER (ASS'N AM. LAW SCH.), Apr. 2002, at 1-3, available at http://www.aals.org/pmapr02.html.

3. For further discussion of stakeholders see infra Section I.B.
what constitutes shirking. This section also suggests that faculty shirking, if it occurs, stems primarily from a lack of respect for those whom the law school serves.

Section II addresses the second step. Having described shirking and capture in the law school context, the issue is whether law schools are susceptible to this behavior. An argument is made that law schools are uniquely vulnerable to shirking and capture. In Section III, anecdotal4 as well as some empirical evidence is offered suggesting that shirking and capture are not merely possible, but do occur. In fact, law schools have entered into an era of expensive self-promotion which is itself shirking, encourages faculty shirking, and may conceal institution-wide shirking. In many respects, this behavior may be consistent with evolving social trends in which image is more valued than reality. Finally, a proposal is made to increase the accountability and transparency of law school decision-making by exposing it to what I identify as “stakeholders.”

Before beginning this discussion, it bears noting that the ethics of law professors has been addressed by others. In fact, in 1989, an American Association of Law Schools Committee issued an advisory document entitled “Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities.”5 The guidelines addressed issues ranging from dating students to methods of acknowledging the work of others in scholarship. Although the guidelines address a faculty member’s obligations to his or her law school, university, and to the general public, the wording is too general6 at times to be of much use. At other times, however, the guidelines can be useful if relied upon. For example, in an instance like the tenure vote described at the outset, the guidelines call for independent judgment in voting and caution against applying pressures on others to vote one way or another except by “persuasion on the merits.”7 In addition, evaluations of colleagues are to be “based exclusively upon appropriate academic and service criteria.”8 In general, however, the impression one has of the Statement is that it was indeed written by a committee and the result of compromise.

Issues of law professor ethics have also been addressed in the literature.9 In these instances, the emphasis seems to be on footnote use,10

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4. The anecdotes are all based on true incidents. I have not identified the schools or people involved because the objective is not to cause embarrassment but to develop a larger theory.
6. For example, “Individual professors have a responsibility to assume a fair share of... leadership.” Id.
7. Id.
8. Id.
plagiarism, faculty-student relationships, peer review, and disclosure of alliances that may affect views expressed in scholarship. The issues have not been framed in terms of faculty shirking or the more general matter of whether law schools are vulnerable to faculty capture.

Finally, it is easy to say that faculty should act "ethically," but difficult to say what that means. The problem can be understood by thinking about what economists call a "utility function." This is all the things and their trade-offs that result in a sense of well-being. Needless to say, it would be virtually impossible for a law professor's utility function to be completely consistent with the interests of his or her institution. After all, no one expects law professors to sacrifice all things, including family time, leisure, etc., simply to advance the interests of the school. Where is the line at which a law professor begins to put self-interest ahead of institutional interests to the point that the issue of ethics arises? This is one of the issues that must be addressed in an effort to assess faculty governance.

I. SHIRKING, CAPTURE, AND LAW SCHOOLS

A. Shirking Generally

Most readers are already familiar with the shirking or principal-agent problem even if they do not know it by any of its labels. A simple example is helpful. Suppose a homeowner lists a house for sale for $200,000 and agrees to pay an agent 6% of the final selling price. The homeowner's net will be the selling price minus 6%. Here, the homeowner's interest is in the highest selling price possible. To that end, the homeowner's preference is that the broker make all possible efforts, including expensive ones, to sell the house for the best possible price. The broker's concerns are different. The broker's net is 6% of the selling price minus the costs of making the sale. The broker's interest can be maximized by both increasing the selling

13. See The Ethics of Peer Review, supra note 9.
price and minimizing the costs of making the sale. Thus, while the homeowner will never be worse off and will likely be better off as a result of the broker’s efforts, the broker’s extra efforts can make the broker worse off. There is an obvious tension.

This conflict of interests between principals and agents is pervasive. For example, an employer who pays employees a salary or an hourly wage is benefited by maximum effort. The employee’s interest, on the other hand, is in attempting to maximize the difference between the effort and disutility of that effort (unpleasantness) and the pleasures the salary or wage can buy. There is no hard and fast line that describes when one’s activity edges over the line into shirking. In the case of the hourly employee, it is not shirking not to work as hard as possible. In fact, in most instances in which shirking is an issue, there will be activities that fit squarely into the shirking category and some that are clearly not shirking and others that fall in between. At bottom, however, all shirking issues can be seen as ethical questions in that they put the actor to the test of balancing self-regarding interests against the interests of others.

B. The Parties

When examining the issue in the context of law schools, it is important to define the relevant parties and their relationship. If one accepts the premise that law schools do not exist to serve the ends of faculty, then those who finance the operation of a law school are the most obvious principals. Here the term “stakeholders” is used to convey the idea that these are the people who are responsible for the continued existence of a law school and whose interests are served by a law school. In the case of private schools in which students pay the bulk of the expenses of the school, it seems pretty clear that the principal stakeholders are current and former students — especially, in the case of the later, those contributing to the endowment of the school. The general public could also be included by virtue of any favorable tax treatment. Hardly anyone would argue that the objective students seek in paying tuition is to advance the welfare of faculty as an end in itself.

On the other hand, publicly supported institutions typically exist to produce “public goods.” These are goods or services that would not be produced by the private sector because those producing the goods would not be able to internalize the gains from that production. Under this interpretation, faculty and students may both become means to the end of enhancing public welfare. Here the stakeholders are taxpayers, contributors and, depending on tuition levels, students. The first two groups may not have an expectation of direct gain. In fact, they may have more general goals like the “greater justice” or “equal justice.” One may
quibble about why public law schools exist, but it seems irrefutable that one of the reasons is not to "enhance the welfare of the faculty."

C. Shirking at School

Given the categories of faculty and stakeholders, it is possible to begin developing general rules of what constitutes shirking. There are two approaches one might adopt, both of which are related to defining what constitutes "good faith" in the context of contractual obligations and the process of gap-filling. Most on point are contracts that involve "best efforts" or some other flexible standard of performance. An important element of good faith or best efforts agreements or understandings is that they involve an element of trust. That is, since the precise actions of the parties cannot be defined, each party is required at least to operate as though it trusts the other not to take advantage. One good measure of good faith is what the parties' reasonable expectations are.

One approach to determining reasonable expectations is to think about what the parties would have agreed to had they considered the specific behavior at hand. There are two perspectives to take. The first is primarily economic and "sees" the parties as negotiating over specific contract terms. This imaginary process in the context of a law professor could be quite bizarre. As an example, suppose at the time of bargaining with a new faculty member about the terms of her hiring, she asks: "May I take personal friendship into account in making tenure decisions?" The answer from the stakeholder might be "no, unless you accept a lower salary since that type of activity lowers your value to the institution." Now the question becomes who places a higher value on the "right" to allow personal friendships to enter into the equation. In effect, the faculty member could be seen as compensating the stakeholders, by virtue of a lower salary, for the right to not be as single-mindedly focused on the stakeholders' interests as possible. If the value to the faculty member of allowing friendships to

16. The rationale of public support of legal education is not always clear. Public support is generally necessary when the market does not produce something in sufficient qualities. This occurs when producers are unable to internalize the benefits of their efforts. Lawyers for the most part attempt to internalize the benefits of their efforts. On the other hand, the appropriate level of legal services may be different from the amount reflected in market demand. If so, the subsidization of legal education is one way — along with subsidizing the payment for legal services — to address this need.


18. Contracts professors are familiar with the issue from cases like Empire Gas Co. v. Am. Bakeries Co., 840 F.2d 1333 (7th Cir. 1988), and Bloor v. Falstaff Brewing Corp., 454 F. Supp. 259 (S.D.N.Y. 1978).

count is higher than the obligation to stick to professional merit is to the stakeholder, the imaginary contract will permit faculty to have that discretion.

The economic approach to gap-filling can be very useful, but there is something discomforting about applying standards to parties about which they did not agree. In addition, the approach becomes unwieldy when applied to conduct that is not defined in distinct increments. For example, consider again the negotiation between the law professor and principal in the context of favoring friends. How would one measure the level of “personal prerogative” rights the professor purchased by virtue of a lower salary, and how would one assess whether the professor has already “spent” the amount purchased?

A second and better perspective in light of the trust element that exists between faculty and stakeholders, is to invoke a modified version of Rawls’ “veil of ignorance.” The question would be what types of behavior would be viewed as acceptable by the parties if, at the time of contracting, they did not know whether they would be a stakeholders or faculty members. The obvious critical element of the veil of ignorance is that it literally forces one to treat others the way they would like to be treated. Another attractive element of the veil is that neither party can take advantage of imbalances in information or in bargaining power. This may actually reflect the relationship of most law professors to stakeholders. For while it is clear that some law professors have significant bargaining power in relation to deans and faculty, it is not clear that stakeholders would ever view one law professor as significantly more valuable than many others.

Invoking the veil puts the question more in the realm of what people regard as “fair” in terms of expectations. Having determined what is fair behind the veil, deviations from that behavior once the veil is lifted are forms of shirking. More importantly, those deviations reveal a lack of respect for stakeholders because they indicate that stakeholders were only worthy of greater consideration when it was possible that professors could have been stakeholders. This lack of respect means that institutional resources are used to further interests other than those that would be furthered if professors actually did place the interests of stakeholders first.

The principal/agent problem in the context of law schools and law faculties may take a variety of forms, but it all comes back to slippage between the goals of those who provide support for the school and those who are paid to achieve those ends. Shirking is not always and, with law professors, may rarely take the form of simply loafing. The example at the outset of this essay is one manifestation. Other standard examples are:


21. This duty to stakeholders can be seen as arising from a social contract that permits self-regulation in exchange for observation of professional standards. See The Ethics of Peer Review, supra note 9, at 229.
1. Mailing letters and parcels by express mail at school expense when there is no rush;
2. requesting school money for travel to a conference that is mainly a vacation;
3. teaching with less rigor and less effectively in order to avoid low teaching evaluations;
4. voting on appointments and tenure matters in order to increase one's social or political comfort;
5. using one's position as a law professor to promote personal political views or to discourage students from voicing disagreement;
6. offering courses that are interesting to the professors but of limited use to students; and
7. allowing the shirking of others to go on without challenge as a way to avoid personal discomfort.

I assume most would agree that all of the above involve an abuse of the trust relationship between professors and stakeholders. Just to be sure, however, I conducted an unscientific survey in which I asked stakeholders their views on each of the matters listed above. The results, as set out in

22. Teaching in an especially heavy-handed way that is also ineffective because it "feels good" is also a possibility. For a discussion of "weak teaching," see Ronald H. Silverman, Weak Law Teaching, Adam Smith and a New Model of Merit Pay, 9 CORNELL J.L. & PUB. POL'Y 267 (2000).
23. The AALS "Good Practices" Statement does not directly address the responsibility of a professor who observes the unethical conduct of another law professor acting in that capacity. It does, however, indicate that law professors "should . . . adhere to the Code or Rules of Professional Conduct of the state bars to which the law professor may belong." See supra note 5. The Model Code of Professional Responsibility is very clear on the issue of reporting the misconduct of others:
(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

MODEL RULES OF PROF'L CONDUCT R. 8.3 (2003). In addition, the "Good Practices" Statement seems to incorporate by reference the Statement of Professional Ethics of the American Association of University Professors ("AAUP"). Under general AAUP guidelines, there appears to be a duty to "take the initiative to inquire about or to protest against apparently unethical conduct" when a professor reasonably believes another faculty member has violated professional standards. See The Ethics of Peer Review, supra note 9, at 245-46 (citing Am. Ass'n of Univ. Professors, On the Duty of Faculty Members to Speak Out on Misconduct, 84 ACADEME 58 (1998)).
24. This list could be expanded to include too much consulting, misuse of secretaries, and a number of other practices.
25. Using a "strongly agree" to "strongly disagree" with a numerical range of one to five, the questionnaire was as follows. The average scores are in parentheses after each
the footnote strongly suggest that my initial impression is correct and that most stakeholders would regard these as more or less bedrock violations of the trust relationship that necessarily exists between professors and stakeholders. Granted, the subjects of the questionnaire were not behind the veil of ignorance and, thus, knew that they were not law professors, but the results do confirm what, I think, most readers including law professors would expect.

To be sure, some of the items here seem fairly petty. On the other hand, voting to hire personal or political friends or to grant them life-time employment has enormous implications as do pushing a particular political philosophy or avoiding teaching courses that are most useful to students. Although I have noted that these are not the same as typical loafing, there is in fact, a close similarity. The loafer does not give the stakeholder his or her full effort. The shirker gives the stakeholder less than expected also by substituting personal interests.

In general, one can see these shirking possibilities as being of various types. First, some of it is highly individualized and generally unconnected to the institution. These might include missing class without rescheduling or using secretaries for personal matters. In another context, this might be comparable to stealing towels from a hotel. These might be called “petty crimes” and, although inappropriate, at low levels they are probably not of great concern. Others have greater institutional implications because they directly affect the functioning of the school. These would include individualized instances of voting for friends, insisting on teaching courses that are primarily of interest to the professor, and using one’s position to stifle debate.

The sample size was sixty individuals, nearly all of whom seemed incredulous that these questions needed to be asked.

I am interested in your opinion about the activities of law professors at a state-supported law school. Below are ten statements. Please check the box that best indicates your view of the appropriateness of the activity. The boxes range from “1” for strongly disagree to “5” for strongly agree:

1. It is acceptable for a law professor to use more expensive express mail for letters as opposed to regular mail even if there is no need to rush delivery. (1.0)
2. A law professor should be permitted to use state funding to attend a meeting or conference even if the purpose of the travel is primarily social. (1.2)
3. It is acceptable for a law professor to teach with less rigor in order to avoid poor evaluations by students even it means the teaching is less effective. (1.0)
4. When deciding on whom to hire or to retain, a law professor should be able to consider the impact of that decision on his or her personal friendship with the person under consideration. (1.3)
5. It is acceptable for law professors to teach in a manner that promotes his or her own political views and makes students reluctant to disagree. (1.0)
6. Law professors should be permitted to teach courses they find interesting even if other courses are more useful to the students. (1.2)
7. It is acceptable for law professors not to attempt to discourage colleagues from the above activities. (1.5)
Both "petty crimes" and "institution-affecting" shirking can be so widespread that they are best viewed as institutional norms. In other words, the practices occur more than occasionally and are not questioned when they do occur. At this point, it may be more accurate to call it institutional shirking because the practices are elevated to the status of acceptable behavior. An institutional norm of "petty crimes" is a problem much like widespread shop-lifting or skimming would be. The impact is to make the institution less effective for the funds invested. Far more serious are the institution-affecting norms. In these instances, not only is the stakeholder’s investment taken, but it is then used against stakeholder-preferred outcomes.

A number of qualifications are in order here. First, I do not mean to suggest that the lines between petty crimes and institution-affecting shirking are clearly drawn. No doubt there is significant overlap. Second, a good law school has representatives from a diversity of personalities and views. Clearly, it is not shirking to express one’s views when it adds to a mix that is ultimately beneficial to the students. On the other hand, decisions driven by personal greed or comfort are easily off-limits. Similarly, promoting one’s political views while opposing a more diverse set of views also seems out of bounds. Third, there is no evidence — nor do I intend to suggest — that law professors are any more personally flawed than anyone else, at least until they enter the profession. Nor do I mean to suggest that shirking is uniform across law professors. Balancing personal preferences and institutional obligations is a struggle affecting most law professors. When this struggle is successful, institutional norms may evolve that are roughly consistent with those of stakeholders. The struggle is lost and the balance upset, however, when professors begin to think and act as though there is no separation between themselves and stakeholders. Before ending this discussion of shirking and examining capture, there are two final issues that may need clarification. The first is one of the conundrums the process of defining ethical standards and identifying shirking gives rise to. Consider two professors. Professor A goes home at 6:00PM every night in order to eat dinner with her family and does no work at home because she enjoys watching sports on TV. These things are in her utility function. If she stayed at work until 9:00PM, she could easily write one more article per year and her law school would benefit both by her increase in knowledge, the service provided to the legal community, and recognition of the school generally.

Professor B is not much different than Professor A except in one important respect. She regularly socializes with faculty colleagues and their friendship is important to her. Over the years, some of those

26. Perhaps a good test is the response one would get if he or she raised mention to a member of the relevant faculty. A shrug or a statement like “that’s just normal for us” is an indication that the practice has reached norm level.
colleagues have been considered for tenure. Professor B readily admits that a few of them have not been very good scholars and has refused to review their work, but remains silent because she values their friendship and the friendship of those who support those candidates. Those friendships are in her utility function.

Both professors have within their utility functions preferences that conflict with advancing the interests of the law school. My impression is that most readers will regard Professor A as acting reasonably and Professor B as acting selfishly or even unprofessionally. If the hypothetical is changed so that Professor B works until 9:00 every night in order to offset the negative impact of her social preferences with increased scholarly productivity, the question is whether there is a principled distinction between Professors A and B. In effect, both have made the same net contribution to the institution.

At least in the context of this essay, the issue of shirking is not a matter of net contribution. Highly productive people can be monumental shirkers while those less productive may be deeply loyal to stakeholders. To allow net productivity to be the shirking standard would be to introduce an element of utilitarianism into what is, at least for the purposes here, a question of personal ethics and how one defines his or her rights. Professor B has engaged in what is very similar to an attorney who makes use of a client's funds and then reimburses the client, perhaps even with interest. This is an ethical violation because the attorney uses his or her power to create a forced loan without consent and puts the assets of the client at risk. It is this notion of using or exploiting others to further one's own ends that is the essence of the ethical question in this essay.

The second clarification concerns the issue of whether less shirking or a greater sense of duty to stakeholders can be equated with being a less selfish and, presumably, more moral person. Some economists as well as others either believe or assume that any seemingly selfless acts are simply the result of personal preferences. In the context of law professors or judges, for example, actions that seem not to be self-interested actually are no less self-interested than any others. It just happens that the professor or judge actually experiences greater utility by taking that action. Judge Richard Posner has referred to these people as "ordinary human beings." Others believe that people are capable of what Amartya Sen calls "counter-preferential choice." These individuals are actually able to act outside the constraints of their utility functions and act "selflessly." At least for the purposes of this essay, I do not believe this distinction is an

important one. For example, the non-shirking professor may be acting in accord with a utility function that includes a preference for acting in a way that will benefit others or may be a person who chooses to act counter-preferentially out of a sense of duty.

D. Capture

As noted already, there may be a point at which "petty crimes" or "institution-affecting" shirking is widespread enough that they become institutional norms. The second general concept that is relevant here is the notion of capture. Here I use the term "capture" to describe something that falls between self-regulation and regulatory capture. In the more typical case of regulatory capture, one thinks in terms of an administrative agency that enacts rules that generally promote the interests of those in the agency and those regulated over those the agency is expected to protect. Regulating bodies can be captured when those regulated have power to affect the welfare of those doing the regulating. This power can take a variety of forms. For example, in some instances the regulators are dependent on those regulated for information or financial support. Sometimes those regulated have input about who the regulators will be. Influences may be more informal. Regulators and those regulated may live in the same communities, go to the same churches, or share other interests. The crucial point is that pleasing those who are regulated worms its way into the utility function of those who are asked to regulate.

The pattern of law faculty may seem to fit the idea of self-regulation. After all, law professors create the rules that govern their own behavior. In fact, one may view self-regulation as the ultimate form of capture. Still, I think the better analogy is to the notion of capture because the law schools do exist apart from the faculty and, as institutions in an ideal setting, have objectives that are not fully consistent with those of the faculty. The question is whether the institution itself is captured for the benefit of the faculty. In fact, the idea of capture in this sense is turned around. It is not capture where those regulated capture the regulatory officials. Instead, it is capture whereby employees capture the institution for their independent ends.

The relationship of shirking to capture may be obvious from the discussion above. Shirking can take place on an individualized or "micro" level. When it becomes a community norm and the members of that community are consistently and effectively placing personal interests ahead of the stakeholders that fund the institution, they have, in effect, captured it. The critical question is whether members of a community will turn a blind eye to the shirking of others and whether this log-rolling 31 is sufficiently

31. "Log-rolling" is the practice of trading favors. For example, I may be indifferent to whether a certain person is hired but vote for that person because it will please a colleague. In turn, my colleague may be indifferent to whether a course I would like to
pervasive to make it too costly or impossible for others to correct. Clearly, once established, the prospects for “freeing” the institution are slim. In fact, for capture to be fully effective there must be means for resisting reform efforts that may come from within or outside. Resistance to outside efforts may take the form of self-promotion and claims that reform efforts are inconsistent with academic freedom. Insider efforts would come from new or veteran faculty. New faculty who have non-shirking ideals are likely to be untenured and wary of appearing to be reformers. Reform efforts of more veteran faculty can be dealt with in more subtle ways including invoking various collegiality norms that have the impact of curbing debate or delegitimizing efforts to reach outside the institution for help.

In sum, there are a number ways in which law faculty may capture an institution and engage in behavior that is inconsistent with stakeholder interests. This is not to say it goes on. For example, law faculty may simply commit themselves to the priority of stakeholders. In addition, it may be that self-correcting mechanisms are in play that prevent capture. This raises the issue of whether the institutional characteristics of law schools actually invite and facilitate capture.

II. LAW SCHOOL VULNERABILITY

The baseline requirement for shirking to take place is, like many things, that it results in higher benefits than costs. This is not to say that individuals engage in a careful cost-benefit analysis of their actions but, for the most part, people shirk because it is better for them than the alternative. Drawing from the criminal law analogy, shirking is most likely to be beneficial when the expected negative consequences are low or negative. Expected negative consequences are low when the shirking behavior is unlikely to be “detected” and the punishment is low. Conversely, shirking is low when accountability is high. As an example, consider a cashier at a fast food restaurant who must account for all food sold and money in the cash register at the end of the day or lose his or her job. Here the probability of detection is high and the sanction is severe. Consequently, the incidence of shirking is low. In fact, employers often use sophisticated

32. The analogy here is to punitive damages and criminal sanctions.
33. See The Ethics of Peer Review, supra note 9, at 229. (“In order to maintain the social compact and its autonomy, a profession must both develop clear principles of professional conduct and hold members of the profession accountable for meeting the principles.”).
techniques to discover and discourage shirking. On the other hand, when shirking is hard to detect or even part of normal behavior and there is no punishment for the shirker, the incidence is likely to be high. Law schools fit this latter description.

One can understand the vulnerability of law schools to shirking by first thinking in terms of higher education generally. Without clear standards for performance, the expected consequences are low because it is exceedingly difficult to determine with precision whether shirking has occurred. In higher education generally, it is difficult to assess the quantity or quality of output. There are many imperfect measures like the number of graduates or expenditures per graduate or percentage placement. Ultimately, a faculty member’s contribution to the function of the institution is assessed in terms of teaching, research, and service. Of course, none of these is subject to an objective standard. The subjectivity involved in evaluation leaves huge gaps for interpretation by faculty committees and self-promotion by individual faculty.

Law schools, of course, are subject to this higher-education subjectivity and the lack of accountability that follows, but it goes further. Even at the level of the most fundamental activities — teaching and research — the detection of shirking is extremely difficult and the expected costs low. In the case of scholarship, most law faculty have professional degrees and have spent little time around professors engaged in scholarship. The socialization that takes place in virtually every other academic context is simply absent in law schools. In effect, scholarship is part of on-the-job training for law professors, and the process does not result in what most disciplines would regard as scholarship. Rather than adhere to the Scientific Method as a means of searching for “truths” and which would allow peer review of methodology, law professors are more likely to identify an ill in society and expose it or write to promote a particular political point of view. In effect, it is difficult to assess the methodologies that law professors employ or the accuracy of their “findings.”

As a substitute for objective standards, to a significant degree the perceived contribution of a faculty member is dependent upon the ranking of the law review in which the scholarship is published. These placement decisions are based, however, on the judgments of second and third year students. In addition, the huge number of reviews virtually assures that every article is published somewhere. This is in stark contrast to most other areas in which the demand for articles is considerably lower and the review process is conducted by experts.

One argument is that the review process of law professors comes at the “back end” in the sense that peer review does take place at the time of the tenure and promotion decision. This is accurate in a sense but, at most, peer review of scholarship takes place once or twice in a law professor’s career — not with each article or book published. In addition, the peer
review process of law professors is subject to bias and manipulation. As already noted, law professors often write what amount to expanded briefs in support of one position or another. When these articles are reviewed by those sharing the views expressed by the author, it is very unusual to receive a negative review. When candidates or their friends on a faculty have a role in selecting reviewers, the probability of a disinterested review declines further. Finally, the law teaching community is a relatively small one; when considered by specialty, the communities are even smaller and often focus on social and political positions as opposed to traditional fields of research. This makes negative reviews even more difficult to write for a reviewer who is likely to cross paths with the person reviewed for years to come at conferences and meetings. In effect, there are few measures of scholarly productivity and little incentive (and actual disincentive) for peers to write painstaking reviews.

This all can lead to an intensely incestuous process of which the following can occur. Professor A decides to contact several professors and ask them to write articles on a topic and they all do. There is no peer or even student review of the articles at any time before publication. One of the professors asked is a colleague of the professor forming up the project. The project is then executed and eventually the collection is printed as a symposium by a middle or lower ranked law review or university press. The organizer then congratulates the writer of the essay for having had the article published and, as likely as not, sits on a committee that determines whether the writer will be promoted.

The futility of establishing objective standards is exacerbated by the variety of ways law professors express themselves. Accepted forms of scholarship include articles, books, casebooks, treatises, edited books of essays by others and, sometimes, teaching materials. It is difficult enough to make qualitative assessments within each group and impossible to make reliable cross-category assessments.

In the area of teaching, objectivity is also difficult. The most basic quantitative measure — number of students times credit hours — rewards those with large classes. But the ironic danger here is that a large class can be a sign of a lack of rigor and possible shirking. Plus, small classes dealing with difficult material may take more preparation by the professor than large ones. Qualitative measures are also problematic. Class visitations by peers mean that the professor is seen infrequently and only on his or her best days. Student evaluations may measure effectiveness or popularity. With the possible exception of actually holding class as scheduled and posting regular office hours, there appear to be few ways to establish accountability in teaching.

Beyond the bedrock functions of teaching and research are activities that in many respects may be more important. Voting on hiring, retention, and curricular matters have greater potential for shirking than individual diligence with respect to teaching and research. A faculty that allows
personal friendships to influence tenure votes is essentially doing the same thing as an attorney using the client’s funds or a company director feathering his or her nest at the expense of shareholders. Yet, the law professor version of this type of shirking is immune to outside assessment. Similarly, faculty decisions to offer certain courses and not others, to promote a particular point of view, to discourage dissent, or to operate specific programs or centers that interest them but do not accrue to the benefit of tax or tuition payers are even less detectable than poor teaching and scholarship.

Having standards of performance and an ability to detect deviation is but one element of the consequence analysis. The other is the sanction itself. As a general matter, there are few meaningful sanctions for tenured faculty. Denying tenure is not realistic except for the most egregious conduct. Withholding pay raises could be an effective sanction if there were standards and sufficient salary increase potential to make a significant difference but, in fact, salary increase possibilities at most law schools are relatively modest.

The expected consequences of shirking at law schools are low, but that may be only half the story. If shirking is the norm, then there actually may be sanctions for not shirking. Not shirking can take two forms. One is simply to attempt to make judgments about the use of law school resources that are consistent with the interests of stakeholders, whether tax or tuition payers. In a zero-sum context, however, not engaging in advantage-taking behavior can render one worse off than he or she would be if surrounded by like-minded people.

Of greater concern is the plight of the non-shirker who believes there is a moral and professional obligation to alter the direction of the community.34 For example, this person might speak up at a committee meeting on tenure and promotion in which favorable review letters have been purposely solicited. Similarly, he or she might challenge the legitimacy of programs that are not in the interest of stakeholders. No less than the whistle-blower in any other context, the law professor can expect his or her behavior to be sanctioned. This sanction can take a variety of forms. Social exclusion is one. Another is exclusion from law school programs like symposia and foreign teaching opportunities where there is a single person or a small group controlling the activity. In addition, the non-shirker in a context in which shirking is the norm may be the subject of negative reference letters that may hamper opportunities at other institutions.

34. This has been termed “ethical activism.” Jonathan Knight & Carol J. Auster, Faculty Conduct: A Study of Ethical Activism, 70 J. HIGHER EDUC. 188 (1999).
The most pervasive of the sanctions is labeling the non-shirker "uncollegial."35 Civility standards in the sense of requiring "polite" — as opposed to honest or ethical — behavior are rarely applied to people with whom someone else agrees. They do tend to be applied to faculty who do not place the institutional interests above those of a majority of the faculty or who rebel against administrators who facilitate capture.37 In effect, collegiality issues are often about the substance of speech as opposed to its manner. By claiming that the non-shirking person is uncollegial or a hot-head, the majority is able to rationalize ignoring the substance of the claims. Going outside the captive law school is regarded as particularly unacceptable38 even though it may be the only way to achieve the type of scrutiny that can lead to protecting stakeholder interests. In effect, civility, collegiality, and etiquette standards can be a way to silence dissenters and seal the institution against outside scrutiny.39 Even well-meaning people who apply these standards tend to view the faculty as the institution and ignore those for whom the institution exists. These dangers are recognized by the American Association of Law Professor's Committee on Academic Freedom and Tenure when it observes, "[h]istorically, 'collegiality' has not infrequently been associated with ensuring homogeneity, and hence with practices that exclude persons on the basis of their difference from a perceived norm."40

A lack of standards and the means of silencing those who disagree make law schools vulnerable to shirking and eventually capture. A further factor is the training of law professors. Most are trained in one form or another of advocacy. All are capable of interpreting rules and events in a wide variety of ways. In effect, just as they have used those skills to advocate the interests of clients before entering law teaching, they can begin to represent themselves in the context of the law school.

The lack of objective measures of success and the susceptibility of evaluative systems to manipulation might not lead to capture if there were some overriding authority that were willing and able to intervene. To the outside world, the idea of a law school dean suggests that this power exists in that office. Law professors and law school deans know the truth on this. Deans typically serve at the pleasure of the faculty, and a dean who

35. Ironically, one advocate of greater collegiality invokes the image of Nazis in describing those who he views as uncollegial faculty — a minority — that will not compromise with the ruling majority. Michael L. Seigel, On Collegiality, 54 J. LEGAL EDUC. 406, 407 (2004).
36. Id. at 411.
37. Id. at 413.
38. Id. at 415.
attempts to identify meaningful standards or require adherence to fair processes is likely to be a short-term dean unless those norms already exist. Indeed, to the extent a dean sees his or her role as "serving the faculty" or as an "agent of the faculty" as opposed to an agent of the stakeholders, the principal-agent problem repeats itself and the dean becomes an instrument of capture. The need to be responsive to faculty goals is exacerbated by the fact that many deans are not significantly engaged in scholarship. Obviously, they are individuals who find administrative work more attractive than scholarship. For these individuals, the decision to take an administrative career path is not one that can be easily reversed. Thus, the most important goal, like that of elected politicians, is to maintain the administrative post by pleasing those who can effectively dismiss an uncooperative dean.

III. ARE LAW SCHOOLS CAPTURED?

I have attempted to explain what shirking and capture would look like in the law school context. In addition, I have argued that law schools are characterized by institutional factors that make them uniquely vulnerable to capture by self-interested faculty and administrators. If conditions are perfect for shirking and capture, does this mean that law schools are captured and operated in a manner that is contrary to the interests of stakeholders? Not necessarily.

A great deal of evidence in the field of behavioral economics suggests that people do not act for maximum personal advantage. Moreover, the level of shirking may vary with the aspirations of a specific law school community. At very highly ranked schools, poor scholarship may elicit a more negative reaction that it would at a middle or low ranked schools simply because the production of high quality scholarship is part of the culture, and faculty derive significant personal satisfaction from the reputation of the school. Similarly, schools may take pride in their reputations for emphasis on teaching excellence. In both of these cases, the utility of each faculty member may be bound up in the reputation of the school and there is a coincidence of faculty and stakeholder interests. This does not mean faculty are any less self-interested.

It would be ideal to examine whether shirking — individually or institutionally — actually does exist. Ironically, the same factor — the impossibility of accountability — that makes shirking beneficial also makes it impossible to assess the level of shirking directly. The question

41. In order to test this assertion, I examined the scholarship of the deans of schools ranked 40-49 in 2005 by U.S. News and World Report. Of these ten deans, and putting aside forwards to symposia, in-memorial articles, and the like, six had zero or one article listed in the past five years in Westlaw.


43. See Harrison, supra note 28.
can only be addressed somewhat obliquely. From that perspective there is empirical, general, and anecdotal evidence of shirking and capture. All of it is indirect and subject to interpretation. Reasonable people can disagree about just how compelling the evidence is.

A. Empirical Evidence

Serious empirical examination of faculty ethics is a relatively new and infrequent occurrence.\textsuperscript{44} The surveys that do exist have not focused on law professors. Whether inferences about law professors can be made from these studies depends on one’s perspective. Much of the forgoing material suggests that law schools may be more vulnerable to shirking and capture than other university components. On the other hand, virtually all law professors come to teaching from a profession that requires knowledge of what is considered ethical behavior. This may mean that law professors are more sensitive to ethical issues than the general population of professors.

Perhaps the most ambitious survey of faculty ethics was conducted by Jonathan Knight and Carol Auster.\textsuperscript{45} Knight and Auster focused on the specific question of “ethical activism” or the reaction of faculty to reports of the unethical conduct of colleagues. The reactions considered in their survey were talking directly to the colleague or taking the matter up with an administrative officer. As a general matter, about half of those approached, either by a student or a faculty member, about the unethical conduct of another faculty member spoke to the accused faculty member.\textsuperscript{46} Women were less likely to be ethically active than men.\textsuperscript{47} In addition, faculty with less seniority or of lower rank were less likely to be ethically active.\textsuperscript{48} Interestingly, the likelihood of ethical activism was unrelated to the seriousness of the conduct reported.\textsuperscript{49}

Upon first impression, the Knight and Auster results appear to be a case of half full/half empty. Is the picture gloomy because half of the faculty reporting did nothing regardless of the seriousness of the complaint, or is it bright because half of those reporting did react? In fact, the picture is gloomy because the study almost certainly overstates the incidence of ethical activism. There are two problems. First is the risk that those surveyed did not provide accurate answers. In a sense, there are “right”

\textsuperscript{44} A 1993 examination of the literature found only scant evidence of any study of faculty ethics. See James Steve Counelis, Toward Empirical Studies of Faculty Ethics: A New Role for Institutional Research, 84 J. HIGHER EDUC. 74, 75-77 (1993). For a more recent examination of misconduct in the context of teaching undergraduates, see JOHN M. BRAXTON & ALAN E. BAYER, FACULTY MISCONDUCT IN COLLEGIATE TEACHING (1999).

\textsuperscript{45} Jonathan Knight & Carol J. Auster, Faculty Conduct: An Empirical Study of Ethical Activism, 70 J. HIGHER EDUC. 188 (1999).

\textsuperscript{46} Id. at 197.

\textsuperscript{47} Id. at 199.

\textsuperscript{48} Id. at 199.

\textsuperscript{49} Id. at 200.
answers in the survey. Most would agree that it is better to be ethically involved, and this can lead to an overstatement. A bigger problem is the fact that the survey only asks about those instances in which there is some level of accountability. The faculty member hearing a complaint knows that at least one other party knows that he or she knows and that that party may complain to others. The inaction by the faculty member could lead to embarrassment or even challenge on ethical grounds. In effect, the survey focuses on instances in which there may be strictly self-serving reasons to act ethically. On the other hand, reporting on a colleague is likely to be a more difficult way to behave ethically than simply observing standards of ethical conduct oneself.

The Knight and Auster study tells us that approximately half of those surveyed turn a blind eye to reports of the unethical conduct of others regardless of how serious the conduct and in circumstances in which their indifference may be exposed. It is powerful evidence of shirking. What it does not address is the question of capture or the development of a "shirking norm" within a specific academic community.

B. Faculty Retention

A possible insight into capture was discovered by accident and in the context of what may be the most serious challenge to faculty ethics — retention decisions. In this context, a faculty member whose vote is influenced by anything other than the merits of a candidate with respect to the interests of stakeholders is analogous to an attorney not simply using the funds of a client but taking them. The evidence of this was discovered while engaged in an empirical study of the career paths of law teachers. My objective was to study employment patterns and what kinds of factors determined the movement of faculty from one school to another.

In order to conduct the study, I determined which individuals were beginning law teachers in 1995 in the Association of American Law Schools ("AALS") Directory of Law Teachers. I looked for the same names in the AALS Directory of Law Teachers for 2003-2004. My naive expectation was that some individuals would no longer be teaching, some would be at the schools they started at, and still others would have moved to higher or lower ranked schools as the market assessed their success. The theory was to check these movements against publications, school of graduation, teaching areas, and other factors that might explain movement.

I ended my examination prematurely after only making it to the E's in the AALS Directories. By that time I had identified sixty-five new teachers. By 2003-2004, eleven of those in the original group were no longer listed in the Directory. This effectively reduced my sample to fifty-five. Fourteen of the group of fifty-five were at different law schools, but only four of those could be viewed as having moved up. If this sample was representative, and I assumed it was, my study was destined to be a failure since I was likely to find no more than ten or twelve candidates who had
moved to higher-ranked schools — hardly the basis for reliable determinants of movement.\textsuperscript{50} In addition, thirty-nine were graduates of elite law schools — twenty-five from Harvard or Yale. In short, the idea of comparing movement on the basis of a variety of factors could not work in a population in which there was little movement and when one of my determinative or independent variables (law school of graduation) also showed little variation.

The lack of movement surprised me. Forty of the beginners had not risen in the law school ranks nor fallen. In effect, almost 80\% of those hired were just where they started. To be more specific, approximately 80\% of those hired had not received offers that they had found attractive from other schools. At the same time, the schools that hired them essentially affirmed their initial judgments by offering them life-time contracts. What makes it more perplexing is that this occurred in a market in which information about faculty productivity is readily available. After all, perhaps the most important element of a professor’s productivity is on display to all in the form of publication. In addition, at the time of tenure, the scholarship of a faculty member is typically read by reviewers at other schools. Moreover, it seems safe to say that many law professors are not shy when it comes to self-promotion. In sum, the lack of law professor movement cannot be attributed to information problems.

How is it possible that 80\% of the time schools hire people who they then determine are valuable enough to deserve life-time appointments are evidently not valuable, as a general matter, to other schools? Put differently, why do so many hiring decisions turn out to be “just right”?\textsuperscript{51} There are a number of possible explanations. One is that law school hiring committees individually are amazingly insightful. Given the imperfect information available about each applicant at the time of hiring, this is unlikely.

Other explanations seem more accurate and deal with institution-wide shirking. First, consider the question posed at the time of tenure considerations. The question is not whether a life-time commitment to the candidate is in the best interest of stakeholders. That would involve at least a modicum of comparing the candidate with other candidates. If the interests of the stakeholders — tax or tuition payers — were considered first, the risk of a life-time employment contract would be weighed against what might be available in the market. Instead, the question is whether the

\textsuperscript{50} Alternatively, I would have had to conduct the same exercise for several additional years of new teachers.

\textsuperscript{51} As noted, fourteen of the beginners were not found in law teaching eight years later. Some were probably tenure denials and this would offset the “exactly right” conclusion. On the other hand, it seems just as likely that the departures were at the initiative of the professor. In these instances, they may have been tenured and still be at the hiring institution. Because I could not confirm these either way, this group played no role in the analysis.
individual has passed a test and found to be "qualified." In effect, in the context of managing a stock portfolio, this would be like asking whether to keep a stock without examining the market to determine its performance against others. The way the life-time employment decision is framed appears to be more consistent with protecting incumbent faculty than with serving stakeholders. It subordinates the interests of the stakeholders and allows faculty to avoid the social awkwardness of making hard decisions about people they may have become friends with over the preceding six years.

Aside from framing the question in a manner that protects incumbents, the system is subject to individualized forms of manipulation. Unfortunately, it is necessary here to rely on anecdotes, of which there are many. I have observed or have had examples of manipulation reported to me. A typical form of manipulation takes place in the selection of those individuals asked to review the scholarship of a tenure candidate. Reviewers in the candidate's area of expertise are sought from inside the school and from outside. Members of the selection committee may take the role of advocates of a particular or all candidates, and attempt to identify readers who are likely to produce positive reviews. This advocacy results in the selection of "friends" of two types. Some friends are friends in the traditional sense. Falling into this category may be former professors and current official and unofficial mentors. The selection of a friend/reviewer from inside the institution puts enormous pressure on the reviewer to produce a positive review.

Political friends are those who are likely to agree with the basic position in the candidate's scholarship. As already noted, the scholarship of law professors often takes the form of advocacy. In these instances the selection of reviewers can be a delicate matter. A reviewer who does not share the position of the candidate may find fault with the work while the political friend may be willing to overlook shortcomings as a means of

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52. It would be ideal to compare the productivity of law faculties in the context of no manipulation to protect incumbents with contexts in which there is manipulation. A controlled experiment of this nature is impossible. One could approach the question in reverse and attempt to characterize the hiring and tenure process at schools where the faculty are known to be productive with that at schools with less productive faculty.

53. A colleague at another school provides this anecdote. While serving on a tenure and promotion committee and selecting reviewers, he suggested an expert in the candidate's field. The proposal was rejected because it was found that the candidate and potential reviewer had discussed the topic over lunch before the article to be reviewed was written. The next year, the same committee with the same composition minus the colleague selected a reviewer for a candidate who was not an expert in the candidate's field, and even though the reviewer revealed that he had spent hours with the candidate discussing the topic.

54. Among the requirements of the "Good Practices" Statement is a willingness to serve as an evaluator of scholarship. See supra note 5.

55. It is also possible to attempt to identify those likely to write negative reviews, but I have not personally seen this.
insuring that a political ally will continue in the profession. My experience and that of colleagues at other schools suggests it is rare that a committee selects in advance a reviewer known to oppose the position of the candidate. Far more frequent is the selection of "political friends." For example, in the hundreds of scholarship review letters I have read, I do not recall seeing a negative review by an environmentalist of an article by an environmentalist, by a child advocate of an article by a child advocate, by an ADR advocate of an article by another ADR advocate, or of any article in a politically sensitive area when the reviewer shares the same political philosophy. I am sure these letters must exist, but my sense is that they are rare. Yet it does not seem possible that the quality of one's research and writing is dependent on sharing the political perspective of the reviewer.

In most instances, faculties meet to consider the evaluation letters and consider the recommendation of a committee. It is in the context of a faculty meeting that capture can be most evident. The manipulation in the context of a meeting can take the form of discounting some facts and emphasizing others. For example, in a recent meeting a faculty considered the record of a tenure candidate that included a negative letter from a neutral expert in the field. The expert pointed out that the candidate had inflated the appearance of the work done by recycling the same ideas throughout a number of articles. A faculty member studied the question and found that 30% of the work was actually recycled. The revelation was met by anger and then silence as the candidate was already socially entrenched in the faculty.

C. Hubris

Evidence of shirking and institution-wide acceptance of shirking comes from a fascinating study of decision-making by judges conducted by Professor Tracey George.\footnote{56} Professor George examined the variables that were correlated with a number of factors including how ideological a judge's decision-making was.\footnote{57} The basic measure of ideological voting was how much the judge did or did not stray from the ideology of the President appointing him or her. One could see this as a test of whether, when one becomes a judge, he or she accepts the role of deciding cases on the basis of neutral principles or approaches the job from the perspective that he or she "knows best." Professor George found that full-time law professors who were appointed to the bench were, in fact, more ideological than non-law professor appointees.\footnote{58}

There may be explanations for this difference that are laudable rather than troubling. For example, law professors may actually "know best" in

\begin{itemize}
\item \footnote{56} Tracey E. George, \textit{Court Fixing}, 43 ARR. L. REV. 9 (2001). This connection was brought to my attention by my colleague Amy Mashburn.
\item \footnote{57} \textit{Id.}
\item \footnote{58} \textit{Id.} at 43-59.
\end{itemize}
the sense that they may have a broader vision and a greater appreciation for the subtle theoretical underpinnings of the law. The problem is that the propensity to vote more ideologically than non-academic judges was not found just among liberal or conservative appointees. In other words, the "knows best" explanation would mean that both sides of the political spectrum "know best" and hold opposite views. In effect, without question, law professors as judges more aggressively promote their views of what the law should be and are more likely to depart from precedent.

If law professors/judges on both sides of the political spectrum are equally confident that they are "right," the question in the context of this essay is not who is right but what accounts for these attitudes and what it tells us about shirking and capture. Put differently, when a judge is appointed to the bench and arrives with an attitude that results in less respect for precedent than other judges, can we draw any inferences about the environment from which the judge came and his or her likely behavior in that context? Certainly there is room for disagreement on how much can be read into this, but there is little reason to expect that law professors who become judges displayed different behavior when they were law professors. In fact, as a judge, decisions are examined closely by peers and subject to relatively public reversal. Certainly, the law school world is more cloistered and the risks of scrutiny are significantly less. The point is that if law professors as judges are willing to view themselves as apart from and not answerable to others, it seems likely that they would display the same level or a greater level of hubris in the context of a law school. Does this equate to being unethical? Not necessarily, since a general focus on one's own interests may not mean that interests of stakeholders are subordinated. For example, a single-minded interest on scholarship in hopes of job mobility may also benefit stakeholders. On the other hand, stakeholder interests may have little chance of competing with more personal ones.

D. Play the Ranking Game

More than an inference of shirking can be drawn from the reaction of law schools to the recent efforts by U.S News & World Report and others to rank law schools. In a recent article, Professor Dale Whitman identifies practices that are deeply troubling. For example, one of the factors that determine a law school's rank is the percentage of applicants accepted —

59. One of the consequences is the time spent by professors monitoring their schools' rank. It can become something of an obsession. At my school there is one professor who is self-designed to determine whether there are any new rankings of any kind that are indicative of our appearance to others. We get emails that say things like "Up from 55 to 53." Or "Down to 58 but that was before Jack's article was accepted by Harvard."

60. Whitman, supra note 2.
the lower the better. Thus, one way to move up in the rankings is to encourage applications even from those who the school knows ahead of time will not qualify for admission. According to Professor Whitman, this is a measure that one or more law schools have taken action to improve, knowingly inflating their application figures by encouraging application by those with little or no chance of admission.

Another factor in the U.S. News & World Report ranking is the percentage of graduates employed after nine months. This has led to the practice of locating unemployed graduates and offering them temporary positions with the law school in order to be able to report a higher percentage employed figure. Finally, and perhaps most tragically, admissions decisions have been affected by efforts to move up in the rankings. This is the result of the fact that the rankings are affected by the grade point averages of students as well as LSAT scores. When examining these two criteria, a school may, and evidently does, decide to select applicants on the basis of which one will increase its score in the category that will be most advantageous to the school’s overall ranking.

A further reaction is evident nearly every day at faculty mailboxes. Not a day now goes by that my mailbox does not include a glossy brochure telling me who is speaking at the University of Alabama, who is visiting at the University of Tennessee or what the faculty at Florida State have published. For example, on a single day last year, most of my colleagues and I received four separate pieces of promotion mail. To be sure, this was unusually high. Next to our mailbox there is a box for recycling and one for garbage. When no one was looking, I gathered the discarded promotion mail. Between the two boxes there were a total of ninety-five pieces of law school promotional mail left unopened. Vast sums are spent on creating

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63. U.S. News & World Report rankings of the top 100 law schools, supra note 61.

64. Id.

65. According to Professor Whitman, the practices all did occur. Whitman, supra note 2.

66. A factor that enters into the rating is the student/faculty ratio. My own school’s contribution to ways to move up the rankings was allowing non-tenure track teachers to vote on all but appointments and retention questions. This meant they could be counted as faculty and allowed our faculty/student ratio to increase. The number of these people — close to twenty — and the difference in their priorities compared to those of tenure-track faculty means that the faculty potentially lost control of school policy for the benefit of a possible modest move up in the rankings.

this illusion, but to what end? Most of the efforts of mid-level schools involved in this promotional proliferation are simply off-setting each other.  

How are these promotional efforts related to shirking and capture? There are direct and indirect connections. First, it is important to note that even though many of these measures are undertaken by the law school's administration, it is very unlikely that a dean could ignore a faculty's demand that the practices stop. Very clearly, faculty are complicit in the effort. In fact, the faculty lounge at my school is filled with theories on how to move up the rankings. For example, "[b]e sure to acknowledge anyone you know at a top-ranked school in the introduction to your article and then send them a reprint." Or, "[t]he next time you are asked to rank the top twenty International Programs just list us — otherwise you are giving credit to our rivals."

Unless playing the ranking game benefits stakeholders, there is probably no better example of shirking and capture. Does it? It seems very unlikely. First, it is not clear how moving up or down in any ranking actually accrues to the benefit of the stakeholders. The principle possibility is that the initial salaries of graduates may increase if a school moves up in the rankings. This probably means little to future income possibilities as actual performance is more likely to take over as the income-determining factor. In addition, at a public school, the principal stakeholders are taxpayers and higher initial incomes for attorneys seems unrelated to their welfare and is actually counter to it. Furthermore, the connection between increased promotional efforts and movement in the law school polls has not been established at least as far as permitting a school to leap-frog enough other schools to make a difference. Finally, even if market value made a difference to stakeholders, there remains the question of whether the increase is justified by the costs.

So, what motivates the investment in making a law school look better without changing the substance of the school in a way that benefits stakeholders? It seems likely that law school deans prefer to have a higher rank than a lower one even if the only purposes are impressing university presidents and attracting applicants. Moreover, as Professor Whitman suggests, it is just as likely that the ranking game is more related to  

69. Deans at mid-level schools do essentially what the faculty directs them to do. Levinson, supra note 42, at 929; see also supra text accompanying note 42.
70. In the case of the example involving LSAT and grade point average, faculty complicity is even more obvious since admissions committees are often composed of faculty.
“institutional and personal egos”\textsuperscript{71} as much as to any sense the stakeholders are better off.

This is actually a generous picture of the impact of the institutional efforts at self-promotion. It presupposes that the rankings are expensive but that the substance of the law school itself does not change. In fact, the emphasis on rankings may influence how faculties choose to perform their duties. For example, the reputation of a school is one of the factors affecting the \textit{U.S. News & World Report} ranking. The reputation of a law school is based on tangible evidence of productivity as perceived by outsiders. Clearly, this means research as opposed to teaching is a more important factor. Thus, while the interests of the stakeholders may be best advanced by one balance between teaching and research, the ranking may be influenced by a different one. Similarly, it is doubtful that any ranking has been influenced by time spent advising students or service-related activities.

Less certain is the impact of the ranking game on the quality of faculty publications. At least one possibility is that deans and those promoting law schools desire more news and, thus, more reasons for announcements. Here personal experience comes into play. My impression is that the greater emphasis on institutional image over substance may have carried over to scholarship. Those who publish shorter, possibly less substantive and time-consuming articles will appear to be adding more to the status of the school than those involved in longer efforts simply because they make the faculty appear more ubiquitous.

A final concern is a more general reaction to the rankings. One possibility is to view the ratings as exposing weaknesses in various programs that could be addressed by improving law school programs. In fact, the opposite seems to be true. Just as the shortcomings of law schools may be exposed by various ratings, a massive campaign of advertising and deceptions seems to have evolved,\textsuperscript{72} the purpose of which is to convince others that law schools embrace and operate in a manner that is consistent with stakeholder goals. At my school, and at others I am confident, the need to look good has taken on an additional dimension. We have the usual assortment of announcements and brochures that extol our “publications” (with everything beyond an email regarded as a publication), centers, and institutes, some of which are composed of one person and a box of letterhead, etc. We are also encouraged to be named in as many press reports as possible and have a staff member who keeps track of our number of “hits.”

\textsuperscript{71} Whitman, \textit{supra} note 2.

\textsuperscript{72} There is also the possibility that some of the data is not reported accurately. Ted Gest, \textit{Combating Legalese: Law Schools are Finally Learning that Good English Makes Good Sense}, \textit{U.S. News & World Report}, Mar. 20, 1995, at 82.
The obsession with image is sometimes comical and involves "making news" in the most literal sense in that events occur only because they can be reported. Schools create centers, international study programs, hold conferences and create awards with little or no thought to stakeholders. Sometimes it reaches absurd proportions. For example, a recent press release by one school announced that a faculty member had received a very prestigious award (properly named to give that impression) recognizing that faculty member's contribution in a particular field. Someone seeing this from the outside would certainly be impressed. Scraping away the surface, it seems significantly less impressive — even embarrassing. The award had actually been created by the school itself and the recipient was a close friend of the initiator, also a faculty member. In short, the award had simply been declared to exist with no apparent institutional process other than promotional. The publication of the event suggests that the department making the award is of sufficient consequence that it should be in the award-giving business. And, perhaps hardest to understand, the award becomes a source of true feelings for the recipient and even part of future claims of success by the school or department.

E. Addiction to Illusion

The final category of evidence is wholly anecdotal and based on personal observation. It involves the inability of professors I have observed to separate themselves from events in a way that allows them to evaluate those events from an ego-free perspective. What I observe, or think I observe, has a Matrix-like quality. For those of you who have not seen the film, it portrays the battle between being "real" and feeling good. In effect, machines have taken over the world and cultivate humans as an energy source. They — the humans — actually grow in little pods. They are content because whatever consciousness they have is simply the result of a computerized reality.

Some humans are actually fighting for real reality even though it means some unhappiness. The evil forces are those who want to perpetuate the sense of well-being. Thus, the movie assumes, counter to what the current demand for mood-altering drugs indicates, that we are instinctively on the side of those who fight for the "real" reality. The movie skips over a question that philosophers have addressed one way or another for years. Are we actually on the side of the real? Descartes saw the issue as whether our consciousness is imposed by some outside force or the result of our free will. The idea is reflected in Robert Nozick's Anarchy, State, and Utopia when he asks the question of whether we would willingly enter an experience machine. In the machine everything is dandy, and you do not

recall that you opted into the machine. Nozick makes the case that there are reasons for not entering the machine.

Many law professors I have observed seem to crave the painlessness of the unreal world. In terms of the experience machine it amounts to a preference for sensing that one is part of a productive endeavor over actually being part of a productive endeavor. Having gone through the contortions to change perceptions of themselves or their schools, they then begin to take satisfaction from those appearances as though they were real. In terms of the film, it is comparable to constructing the Matrix or Nozick's experience machine and then happily jumping in. Obviously this pulls them even further apart from stakeholders because institutional and individual self-promotion measures divert effort from ones that are faithful to stakeholders. The pull, however, seems irresistible to many. Indeed, the unhappiest people I have known in the academic world are those who are unable to suspend their disbelief sufficiently to enjoy the illusion.

It is this inability to see individual and institutional efforts from an ego-free perspective that makes faculty governance especially dangerous. Stakeholders are not simply subordinated, they are not part of the analysis at all. Here are three anecdotes that serve as examples. In the preceding section, I described the incident of the award given by one friend to another for the purpose of creating news. I suggested it was another example of institutional action designed to elevate the image of the school without benefit to the stakeholders. Now consider that the recipient actually took pleasure in receiving the award out of a sense that it was genuine recognition. This raises the danger even further. It is one matter to dispute faculty and institutional actions when perceptions are the same and quite another when the need for illusion is powerful.

A similar example was provided to me from a friend at another school. His school has three programs through which students may study overseas. Two or more professors travel with the students, but these programs had come under increasing scrutiny due to their expense and low enrollments. The programs were closely guarded by those who had founded them and those who had participated. Eventually, in defense of them, a supporter stated that the programs led to the preparation of "comparative law materials." My friend who had taught in the program was dumbfounded and consulted with others about whether they had prepared comparative law materials. The answer was no. He reports that he asked the supporter

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75. Id. at 42-43.
76. Id. at 43-45.
77. Another example involves those who teach in a department at my school. Their program is ranked second nationally, a source of great pride and a ranking that is aggressively protected. The ranking is posted on the faculty bulletin board. Two qualifications are not permitted in the Matrix. One is that only a handful of competitors exist. The second is that the ranking could well tumble if the faculty at any number of other schools decided to band together and call themselves a "department."
about the claim and the supporter became agitated but would not relent, identifying a single instance in which one teacher had noted in a class differing reactions of foreign and United States students to a common legal problem. In effect, the claim had become entrenched in the supporter's reality and any suggestion otherwise resulted in unacceptable dissonance.

The only of these anecdotes that is personal to me involves serving on an appointments committee. Early in the year the dean visited the committee to explain the hiring need for the year. Among them was "trusts and estates," and another colleague and I were assigned to a subcommittee to find qualified candidates. We promptly put the assignment aside. Several months later the dean visited the committee again and expressed disappointment that the committee had not yet found a trusts and estates specialist. That night, I confided in my spouse that I felt guilty that my colleague and I had failed our assignment. Indeed we had not even tried. The next day, the dean visited the committee again, and the issue of the trusts and estates position came up. I was feeling sheepish when my colleague began speaking. He was red-faced and trembling with anger. "I'll have you know," he informed the dean, "we have conducted a nationwide search. Based on that search there were simply no qualified candidates in this field that we had a chance of attracting." There was no question that my partner in neglect believed what he was saying. After the meeting, I asked him what we had done. He reminded me that when we received resumes that were mailed in by candidates, we had looked to see if any of them taught trusts and estates. Our realities of what constituted doing an acceptable job could not have been more different.

There are a number of clichés for this — believing one's own press, saying something does not mean it is true — and all counsel us to look at things from a different perspective. As the Tracey George study strongly suggests, the ability to view things from different perspectives is not the strong suit of law professors. The propensity to create a new reality is not limited to law professors. An excellent example is the approach of students to grading curves. At my law school the faculty recently enacted a 3.25 mandatory curve. An average grade is now a B+. The reality that actual student performance is no different from their predecessors who made Cs is irrelevant. If you get a B, you must be "above average" even though, as an empirical matter, two-thirds of the class did even better than that. Unlike the faculty, however, the students must deal with those who are not in on the Matrix. Any employer with an ounce of sense will ignore the GPA and look at class rank. Ultimately, the higher curve exists because it feels better. It is evidently irrelevant that nothing actually is better.

78. George, supra note 56, at 43-59; see also supra text following note 56.

79. Outside the world of the law school, the emphasis on form over substance is also pervasive. In those contexts, however, it is more difficult to maintain the illusion because there are constant reminders of what is real. For example, one enjoys the loss of twenty
The empirical work discussed above along with law school retention decisions, the attitudes of law professors appointed to the bench, the generalized reaction to the ratings game and an overriding need to be perceived as successful suggest that shirking and capture are at work in legal education. This does not mean that every faculty member is involved or that shirking at any one school rises to the level of capture. However, any school that turns out to be “right” about who it hired nearly all the time and engages in efforts to affect rankings that actually do not make the school more responsive to stakeholders is probably fairly regarded as captive.

IV. CONCLUSION AND PROPOSALS

It is impossible in the context of this essay to provide a standard by which each school can be evaluated with respect to shirking and capture. On the other hand, this essay argues that the conditions are close to perfect for capture to occur and that there is substantial indirect evidence that capture does exist. The question is whether this is enough to justify further self-examination on a school-by-school basis. The answer to this is easy: yes. If law schools were people who had genetic and environmental propensities to contract a disease and there were symptoms, further testing would certainly be advised. In more conventional contexts in which conditions are such that corruption may occur and there are signs that it does occur, audits are a normal course of business.

In the context of law schools, one may argue that the visit every seven years by AALS and ABA accreditation teams are a form of audit. I trust any law professor reading this will agree that those visits are not comparable to an audit. Reports are prepared in advance by the school. Those reports involve judgments that are likely to be influenced by all the factors that make faculty governance itself questionable. Moreover, an inspection is about meeting minimum standards, not whether the school and faculty are acting in good faith to serve stakeholders.

Discussions of faculty governance are sensitive matters. No one likes to have his or her good faith questioned. Faculties are sometimes justifiably resistant to outside scrutiny because reasonable actions may seem unreasonable when taken out of context and examined by the ill-informed. Nevertheless, what is missing in the governance of law schools is transparency and accountability. Obviously, these two complement each other; a lack of transparency permits decision-makers to remain unaccountable. In the context of law schools, this means the need to involve stakeholders in the process in some form. The crucial task is to change the culture of law faculties so that the following would routinely be

pounds by adjusting one’s scales or takes pride in becoming a top-ranking sales person by exaggerating sales figures on an accounting statement.
asked: "Could this decision be explained, truthfully and fully, so that stakeholders would believe it is in their best interest?"

Stakeholder participation would not, and from a practical standpoint could not, involve participation in the day-to-day operation of a law school. Nor should it involve an evaluation of individual faculty in any other instance than when faculty also assesses individuals. Stakeholder involvement should focus on the four major resource-affecting decisions faculties make: hiring, tenure, curricular changes, and the establishment of new programs or the expansion of existing programs.

Unfortunately, there are no public interest groups or watch dog organizations that focus on the operation of law schools and, thus, represent stakeholder interests. The impact of law school decisions are hardly significant enough to attract that type of attention. Moreover, in the case of public law schools, the idea that there is there some overriding control by virtue of an elected legislature is unrealistic and a little bit frightening. Thus, the public participation would have to be invited by law schools themselves.

Precisely what form stakeholder participation should take is difficult to say. The range includes actual voting on faculties and their committees, a "notice and hearing" process, or the formation of an independent compliance board that would assess the impact proposed by a faculty decision. Perhaps it would vary depending on the issue. For example, student and stakeholder involvement when interviewing new candidates would be relatively easy to establish. In other instances, like the establishment of a new program or curricular changes, the faculty decision could be subject to a "Stakeholder Impact Statement" that would be assessed by the compliance board. In all cases, but especially if a notice and hearing approach were employed, the internet could greatly reduce

80. The tenure recommendations of law faculties are typically subject to review by central campus committees and other boards. The effectiveness of these reviews is unclear. In my personal experience I have not seen a law school decision reversed. In the case of a university-wide committee, this may be accounted for by the same type of log-rolling that affects law faculties.

81. At some schools, including my own, students already interview new candidates and report to the faculty. Through teaching evaluations, they communicate on tenure and promotion decisions.

82. One possibility is some form of public hearing including students when directly relevant issues are involved. Practical limitations make it more difficult when a law school is isolated geographically. For a discussion of the nature of participation at public hearing, see Katherine A. McComas & Clifford W. Scherer, Reassessing Public Meetings as Participation in Risk Management Decisions, 9 RISK: HEALTH, SAFETY & ENVIRONMENT 347 (1998).
participation costs. The response could be advisory or binding. In all cases, the outcome of all decisions should be public.

The actual form is less important than the most critical requirement that the stakeholders act independently. Stakeholders should have no professional or social connections — past, present, or anticipated — with any member of the law school faculty. Independence also requires that any review panel have information-gathering capacity. Reliance on the law school itself is one way to encourage capture by that law school. Because of the need for information and the high costs of independently generating information, it may be advisable to appoint stakeholders with knowledge of higher education and the issues that arise. If members of the panel are appointed for staggered terms, continuity of membership would lower information costs. In addition, there is no reason why one panel could not serve all the needs of a number of law schools.

One concern about such a body is its lack of expertise. It is not necessary that the public participants understand every facet of the decision. The public's role is to assess the relationship of the decision to stakeholder interests from the standpoint of procedural fairness and common sense. In order to understand the possible influence of independent stakeholders, consider the following proposals made at a faculty meeting, first with faculty only present and then with stakeholder representatives present.

1. A popular faculty member is proposed for tenure. His teaching evaluations are good to average. His volume of scholarship is high. In the file is a negative letter from a national expert asserting, correctly, that 30% of the candidate’s work is recycled from earlier work. After ten minutes of laudatory commentary nothing has been said about the negative letter and its claim.

2. Another popular candidate is proposed for tenure. She, her husband, and their children are regulars at faculty social events. Dinner at her house is always fun. Her teaching evaluations are average and class visits reveal that she is, at best, an average teacher. In addition, even though she has met the numerical requirements for number of articles to be granted tenure, most of her writing came in the last year. Both of her last two articles — one of which was a fifteen-page symposium piece she submitted at the request of a friend — were in manuscript form when evaluated.

3. Another candidate is proposed for tenure. He is not well-liked principally because he has spoken out at faculty meetings, usually in favor of a conservative position. He has written the required number of articles

in a timely way. His teaching evaluations are above average. Unlike every other candidate, there is no discussion of this one.

4. A faculty member travels to Italy where he has family members. He proposes starting a summer program in Italy. None of the students at your school speak Italian, the state has little trade with Italy, and United States law would be taught at the summer school. At least two other faculty would travel to Italy, at the school’s expense, in order to do the teaching.

5. A faculty committee has recommended that the law school initiate a sabbatical program. Under the terms of the sabbatical, the faculty member receives full pay and is not obligated to do any teaching, research, or scholarship for a semester. In order to qualify for a sabbatical, a faculty member must have been employed by the school for six years whether or not engaged in full-time teaching or research.

6. A faculty committee recommends a summer research program. Under the program, a faculty member receives summer pay to do research. The faculty member is entitled to the summer pay whether or not any research is actually conducted.

7. A law faculty teaches twelve credit hours per academic year. This translates into six sixty-minute teaching hours per week. A faculty committee proposes reducing the teaching load to nine credit hours per academic year and reducing the class period to fifty minutes.

8. A wealthy graduate has contributed $1,000,000 to the school to underwrite the establishment of a Chair in Property Law. A committee is assigned to conduct a search and proposes Candidate B. B has co-authored a couple of articles with the chair of the committee. B has not taught Property nor published in the area. He does say he is willing to teach Property if hired.

If you are on a law faculty, let’s keep score. Imagine each situation in the context of your faculty only and in the context of five voting stakeholders. Give yourself zero points if the presence of stakeholders would have no impact on your comments. Give yourself two points if the presence of stakeholders would not alter your position but how you express it. Give yourself four points if you would have decided not to say something you would have said. If you think the presence of voting stakeholders would have no impact on the final decision, give yourself zero points. If you think the presence of voting stakeholders would lead to a closer vote, give yourself two points. If you think the presence of voting stakeholders would alter the vote or mean that the proposal would not be made in the first place, give yourself six points.

Now add up the points. If your total is in excess of sixteen, you are part of a captive faculty and should consider additional accountability and transparency.