

FUNDING LEGAL SCHOLARSHIP

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How do we fund legal scholarship? That is, what resources go toward the production of scholarship by the legal academy,¹ and how are those resources allocated? These questions have always been important, but they take on a new urgency as law schools suffer substantial hits to their enrollments and downward market pressure on the price of tuition. As budgets shrink across the country, will legal scholarship be impacted? And if so, how? In order to understand better the impacts of shrinking resources on law professor research, we need to understand how that research is funded, and then think about how it could be restructured to increase productivity in the face of financial difficulties.

This essay endeavors to provide a brief overview of the traditional model of funding for legal scholarship, discuss two alternative

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¹ For purposes of this article, I am limiting my definition of “legal scholarship” as scholarship produced by law professors. Excellent legal scholarship is produced by judges, practicing attorneys, students, and professors-in-training who fall into any of the prior groups. But this article is limited to law professors, as it endeavors to determine exactly how the research produced by those professors is funded. As for “scholarship,” the article will adopt a broad definition that includes any published research on the theory, doctrine, or practice of law, whether it be an academic book, a hornbook, a law review article, or an interdisciplinary or other-disciplinary piece that focuses on law in some respect. Legal scholarship is original research that attempts to contribute to our understandings of legal doctrine, human behavior in the context of law, or other aspects of our legal system.

models (grant funding and sales) that play a small role today, and then discuss potential changes to funding streams that would better support the production of legal scholarship.

THE TRADITIONAL MODEL

The traditional model for funding legal scholarship relies primarily on salary and other expenses provided almost entirely by law schools themselves. To take publication costs first, law schools fund the law reviews where the bulk of legal scholarship is published. Law reviews do receive revenues from subscribers (generally the libraries of other law schools) and from Westlaw, LexisNexis, and Hein Online for electronic rights. But my anecdotal understanding is that most law reviews still need additional funding from the school to actually publish the volumes and to provide support staff. However, law reviews do receive a lot of “free” labor. Students are generally not paid to either produce or publish legal scholarship, although many students receive school credit (which they pay for) and some receive bagels.² Outside of law reviews, legal scholarship is published in bar journals,³ which are funded by the affiliated bar, and by academic presses, which are likely closer to self-sustaining but also may receive university support.⁴

On the creation side, law schools pay their own professors to write scholarship. But this deserves a lengthier breakdown. Salary hinges on a professor fulfilling her job requirements, and those requirements are generally described as the tripartite combination of scholarship, teaching, and service. Most schools require a professor to write three or more articles to obtain tenure. However, after

² See Josh Blackman, *Posner Rips Harvard Law Review Editors for Lavish Lifestyles from Bluebook Profits*, Josh Blackman’s Blog, Nov. 10, 2013, at: joshblackman.com/blog/2013/11/10/posner-rips-harvard-law-review-editors-for-lavish-lifestyles-from-bluebook-profits/.

³ However, most law schools do not consider bar journal articles to count as scholarship.

⁴ See Lynne Withey et al., *Sustaining Scholarly Publishing: New Business Models for University Presses*, Association of American University Presses, at: www.uvasci.org/wp-content/uploads/2011/03/aaupbusinessmodels2011.pdf (“The technological and cultural shifts of the last decade . . . challenge not just publishers’ business models, but may even threaten many of the intellectual characteristics most valued by the scholarly enterprise itself: concentration, analysis, and deep expertise.”).

that, the scholarship “requirement” is enforced much more loosely. Some schools may attribute the bulk of any merit-based salary increases to scholarly production. While I have no empirical data on the distribution of faculty salaries vis-à-vis scholarly production, my guess is that there is a wide range, both between the amount of merit raises awarded from year to year and the percentage of those awards that are based solely on scholarship. And my experience leads me to deduce that professors cannot be fired post-tenure for failing to produce any scholarship; I have never heard of it happening, and I have seen a sizeable number of professors who have not written for extended periods of time but continue to work.

Many schools have direct grants for scholarship. For example, summer research grants, which pay professors between \$5,000 and \$20,000 to produce an article over the summer, are an apparently direct payment for scholarship. A couple of provisos, however: (1) some schools have only lax enforcement mechanisms to ensure that an article was actually produced and published; and (2) the grant is limited to one piece, so any article after the first does not receive specific funding. In addition to summer research stipends, some schools provide bonuses for high-ranking journal placements, but these are generally less than four figures.

So how are law review articles funded? They are funded primarily by paying law professors’ salaries and then hoping that the professors produce scholarship. Untenured professors can be fired for failing to publish, and tenured professors may get smaller raises than their colleagues for failing to publish. But in the main, the funding is indirect: the professor is paid a salary, and then the professor publishes as the professor desires. That same salary provides for the professor’s teaching and service activities, as well. But there is a difference: the professor is terminable immediately if she fails or refuses to teach or serve on a committee at the dean’s direction. Failure to publish, however, may get one fired in a few years as a junior professor, and will not get one fired at all as a tenured one.

Several commentators have suggested that a law review article is “worth” \$100,000. Larry Cunningham has opined that a highly-placed law review article can be worth \$100,000 to a law professor

in funding,⁵ but his assumptions skew high. Cunningham argues that the article is not only worth \$12,500 to \$20,000 in summer grants, but also the 1%-3% raise that the professor receives for having written the article, which is then made a part of base pay for the rest of the person's career. Cunningham's math, however, not only assumes a relatively high summer grant, but also a high salary: \$200,000 for a mid-career scholar, or \$250,000 for a senior scholar. He admits that a junior scholar getting \$100,000 and a 2% raise would only get about \$35,000 from salary increases over a lifetime. And Cunningham also has to assume: (1) there are no salary freezes in effect the year of publication, and (2) the 2% raise is solely attributable to that one article. Richard Neumann focuses on the funding side, and argues that it costs law schools \$100,000 to produce a law review article.⁶ But his calculations seem even more problematic. His figure assumes a professor at a high-ranking school who spends 30-50% of her time producing one article per year. Thus, in his view, 30-50% of the person's salary and benefits go to that article. So if the prof produces three articles a year, they cost \$33,333 apiece, and if she writes one article in five years, it's worth \$500,000? You can see the difficulty. However, Neumann is right in one respect: some portion of a law professor's salary in theory goes to creating legal scholarship. But how to determine that portion is much less amenable to a particular figure.

Beyond paying professors to produce legal scholarship, schools also fund resources for the production of the scholarship. Schools pay their own students to act as research assistants, they pay for staff to facilitate professors' work (which includes scholarship), and they pay for libraries and data sets that are necessary to the research. Libraries also serve students and the public, but at least a substantial portion of their expenses are designed to facilitate research.

⁵ Larry Cunningham, *The Six Figure Law Review Article*, Concurring Opinions, May 25, 2010, at: www.concurringopinions.com/archives/2010/05/the-six-figure-law-review-article.html.

⁶ Debra Cassens Weiss, *What Is the Cost of a Law Review Article by a Top Prof? Estimate Is \$100K*, ABA Journal, April 21, 2011, at: www.abajournal.com/news/article/what_is_the_cost_of_a_law_review_article_by_a_top_prof_estimate_is_100k.

So how are we funding legal scholarship? As a general matter, schools are paying their own professors to research and write legal scholarship, they manage their own students in editing it, and they pay a publisher to publish it. Most law schools are funded primarily by student tuition, although state funds and alumni giving supplement to varying degrees. So students are funding at least a big chunk of legal scholarship. To the extent the federal government is funding legal education through IBR and federally-guaranteed loan programs, it too is also a source of funding for scholarship.

THE GRANT-FUNDING MODEL

Under the traditional law school model, scholarship is an expense that the school shoulders as part of its mission. In many academic disciplines, however, research is a revenue generator. The primary way in which schools generate income from their research is through grant-funding: a third party agrees to pay the school a certain amount of money in exchange for the production of a specified research project or agenda. So instead of the school paying for the research, the grant-funder pays the school to pay the professor for the research. In those disciplines where grant-funding is substantial, it is common to refer to the school's or division's research portfolio by a dollar amount, signifying the amount of grant-funding in play at any given time. And no wonder – the funding can be quite substantial. For example, a 2011 report on University of Texas-Austin found that the faculty generated \$161 million in tuition revenue and \$397 million in external research funding.⁷

The grant-funding model differs from the traditional legal scholarship model in several key respects. First, and most obviously, grant-funding is usually supplied by a non-profit or governmental agency that operates outside of the school. The NIH provides over \$30 billion annually in medical research funding to over 300,000 researchers at more than 2,500 research institutions.⁸ A myriad of other grant-

⁷ Mark A. Musick, *An Analysis of Faculty Instructional and Grant-based Productivity at The University of Texas at Austin*, Nov. 2011, at: www.utexas.edu/news/attach/2011/campus/32385_faculty_productivity.pdf

⁸ National Institutes of Health, *NIH Budget*, at: www.nih.gov/about/budget.htm.

funders exist, reaching out to a variety of different disciplines. Grant-funding also differs in how the money is provided to researchers. Here are a few of the salient differences between grant-funding and the traditional law school model:

- Grant-funders provide money not as salary to a particular person, but as an allocation for a particular project. Of course, part of any grant includes salary or salary reimbursement, but the grant is directed toward a project, not a person.
- Grants are generally awarded through a peer-review process, in which the researchers and the project are scrutinized to determine if the research is deserving of the award.
- Grants are limited in time, and may or may not offer an opportunity to renew.
- Universities generally take a big chunk of the grant as overhead, and may or may not have restrictions on how this overhead is allocated.
- Although grants do not generally have financial penalties for failure to produce the research, they may be structured to require deliverables. Some funders use contracts or “cooperative research agreements” to maintain even more control over the research and the disbursement of funds.

How does grant-funding affect the salaries of researchers? It’s hard to say as a general matter, but in those fields with significant grant-funding, researchers are expected to get grant-funding. Faculty may even be expected to get almost their entire salary covered through grants. Tenure generally protects tenured researchers from being terminated for failing to obtain grants. However, grant success is a factor for tenure in many fields, and failure to get grants post-tenure may have a significant impact on salary. Grant-funding may also affect how much money a particular school is allocated from the university.

My assumption is that grant-funding in legal academia is relatively small but growing. As the academy becomes more interdisciplinary, it will be easier for law professors to hop onto projects with other researchers in grant-funding fields. It may also be the case that foundations and government agencies are looking for more legally-related research projects to fund. However, federal government funding is getting squeezed, making overall grant-funding dollars scarcer. So it seems unlikely that significant grant-funding sources for legal research will soon spring up on their own.

THE SALES MODEL

Under the sales model for supporting research, scholars act as individual entrepreneurs selling their research to publishers or other entities for personal payment. Much of the action between professors and publishers is in teaching materials, which do not count under the research rubric. However, professors sell their IP interests in academic books and treatises to publishers in exchange for advances and/or royalties. Purely academic books do not offer much remuneration. So even though a law professor might “sell” her book to an academic press, the relatively low return to the prof means that that book has been funded, in large part, by the professor’s salary and thereby by the law school itself. However, treatises provide more compensation, at least as a general matter. One advantage of doctrinal publications is the broader audience, which includes not only libraries and fellow academics, but also students and practitioners. The money incentivizing the production of treatises is more substantial. And it flows directly to the author, rather than the author’s institution like a grant.

A big benefit of the sales model, like the grant-funding model, is that third parties provide funding and support for the research. But the sales model is more business-oriented; rather than spending their funds for the public good, publishers buy materials that (they believe) will make the most money. And professors get the money directly, rather than funnelled through their home institution. To that extent, it is more responsive to demand in a traditional capitalistic way. The sales model of research is likely limited by the limited

market for doctrinal, generalized legal research itself. But at least some percentage of the research going on out there will find funding from publishers who are willing to bet on a market for the material.

MOVING FROM SCHOOL & SALARY FUNDING TO FIELD & GRANT FUNDING

Under the basic law school model, individual law schools fund scholarship. And to a large extent, law schools fund only their own faculty's scholarship. Yes, law schools do fund law reviews, which generally publish the work of outside scholars. But schools pay their own faculty's salaries, provide special financial incentives for research, and pay for research assistants and research travel. A professor's research is largely funded by her own institution.

A strength of this model is that it encourages schools to compete against each other based on academic reputation. Although the most prominent ranking system (the U.S. News and World Report Law School Rankings) does not directly assess research productivity, school reputation is a strong factor, and all of the top-ranked schools enjoy strong scholarly profiles. Schools regularly compete against each other in the entry-level and lateral markets to nab the best scholars for their faculties. In a world that rewards a school's graduates for the reputation of its faculty, it make sense for individual schools to use some portion of their funds to get the best scholars.

However, the school-funded system also has significant weaknesses. Paying for scholarly productivity through salary is a flawed mechanism. When professors can't be fired for a lack of scholarly productivity post-tenure, scholarship essentially becomes optional. And many, if not most, schools do not have the significant disparities between faculty salaries that could tangibly reward significant distinctions in production. Moreover, if salaries cannot go down, then merit raises get locked in, and a professor is paid for past productivity long into the future.

Law school funding also encourages an insularity to legal scholarship. The professor need really only please the dean in order to get the salary and other research funding that the school makes available.

Even assuming that the dean looks to outside markers such as placements and citation counts, a professor need not engage with her colleagues at the beginning of a project. The stereotypical law scholar sits amid books and Westlaw, working in solitary seclusion on a piece. Workshops, the star footnote, SSRN, and even blogs all encourage a scholarly conversation. But collaboration or peer input is not built as concretely into the beginning part of the process as it is in other disciplines through the grant-funding process, which puts articulation of goals and peer review at the front end of the process. And in this time of scarce law school resources, the inward focus can make professors look selfish when they are working or getting paid for scholarship. Since individual law professors control their own scholarly agendas, scholarship takes on an individualistic quality. Add in the fact that some kinds of scholarship (under the sales model) provide payments directly to the professor, and you can get the notion that a law school is just a bunch of independent contractors working under one roof. The professoriate has insulated itself – perhaps to better protect against outside influences, but at a significant cost.⁹

In order to better incentivize the production of legal scholarship with the money it spends, the legal academy should shift away from an individual-school, salary-based funding model to a field- and grant-funding model. The grant-funding model uses third parties (of some kind) to judge the value of a particular project, and these parties then offer funding for that project on an incremental basis. Such a

⁹ See, e.g., David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. Times, Nov. 19, 2011, at: www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html (“Law schools have long emphasized the theoretical over the useful, with classes that are often overstuffed with antiquated distinctions, like the variety of property law in post-feudal England. Professors are rewarded for chin-stroking scholarship, like law review articles with titles like ‘A Future Foretold: Neo-Aristotelian Praise of Postmodern Legal Theory.’”); Debra Cassens Weiss, *Law Prof Responds After Chief Justice Roberts Disses Legal Scholarship*, ABA Journal, July 7, 2011, at: www.abajournal.com/news/article/law_prof_reponds_after_chief_justice_roberts_disses_legal_scholarship/ (quoting Chief Justice Roberts as saying at a conference: “Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.”).

system has the following advantages over the school-funded, salary-based system:

- It takes at least some of the funding responsibility off of individual schools, thereby making that school's students shoulder less of the expense.
- It provides for more accountability for scholarly output over time.
- It provides some form of peer review and peer connection for projects at the beginning stages, rather than simply at the end.
- It can be structured to encourage collaboration and interdisciplinarity.

And here are some specific suggestions about ways of implementing the new model:

1. *Do not pay professors to produce scholarship if they don't produce scholarship.* If we can't expect all professors to write post-tenure, we at least shouldn't pay them for writing that they are not doing. There are a variety of ways of restructuring salaries to tie scholarship dollars to actual production, some of which I discuss below. Ideally, a school would cut back all salaries to some baseline "competent teaching & service" level, and then build up from there, each year, for superior teaching, committee work, and scholarship. Rather than maintaining the fiction that all legal academics produce scholarship, we should acknowledge that not all do and alter compensation accordingly. This change would free up funds to use for some of the reforms discussed below.

2. *Individual schools should provide grants for scholarly production.* Right now, most schools likely tie some portion of yearly salary increases to scholarship. Two problems: these increases are locked in over time, and the amount of merit pay available is often unrelated to the quality of scholarship produced. Moving towards a grant-based system would allow schools to reward specific production, but then not lock it in. If a school is pressed for funds, it could also restructure teaching and/or service packages so that productive

scholars have reduced course or service loads to “compensate” for that productivity. But the reduced loads would be year-to-year, rather than offered to all faculty or to a permanently blessed set of faculty.

3. *Law reviews should pay authors for their works.* Although it’s a nice professional touch that law review authors provide their works for free, the incentives would work better throughout the system if the reviews paid at least some small amount to the authors. Under the current system, the prestige is seen as enough. But schools should care not only about the production of their own scholars, but also about the quality of articles published in their law reviews. If reviews paid, that would take off some of the pressure for individual schools to pay for placements. High-ranked schools could offer more money to supplement the payment in prestige that they provide.

4. *AALS should provide grant funding for scholarship.* An AALS fund which provided grants to schools and scholars for legal scholarship would provide a number of tangible benefits: it would incentivize scholarship with dollars, rather than just reputation; it would provide peer review at the beginning of the process, as well as connections and publicity for new projects; it would take some of the funding pressure off of individual schools; and it would give a concrete expression to AALS’s mission to encourage the production of quality research. For those of you imagining an AALS secretariat with massive power to disburse funds to various schools, fear not: AALS president Dan Rodriguez has essentially called my idea politically unviable.¹⁰ But AALS should do more to encourage a culture of grant-funding by starting a small grant-funding arm that provides seed money for a small set of scholarly projects.

5. *AALS should advocate for more grant funding from interdisciplinary grant-funders.* Individual legal scholars have a tougher row to hoe when applying to the NSF, NIH, or NEH, since they are not part of the traditional disciplines that get funding from these places. If AALS makes grant-funding a priority, it could work to make foun-

¹⁰ Dan Rodriguez, *AALS Should Fund Scholarship?*, PrawfsBlawg, Feb. 24, 2014, at: prawfsblawg.blogs.com/prawfsblawg/2014/02/aals-should-fund-scholarship.html (“[T]he AALS grant idea is really a non-starter.”). Of course, my response is: if you say so!

dations and government agencies more receptive to law school applications. AALS could also host a grant-funding resource center for law professors looking to understand and utilize grants.

6. *The ABA should provide grant funding for scholarship.* Are law professors spending too much time on Bulgarian evidentiary questions and not enough on common-law contract quandaries? The ABA could create a funding arm to provide grants for legal scholarship that deals more closely with doctrinal issues. Or ABA sections could each create small grant-funding programs for subject-specific scholarship. This may already be happening at some small level, in the form of awards or conference funding. But grant-funding would recognize a more tangible role for the bar in encouraging the production of legal scholarship.

There are solid arguments against these proposals. There's the scale issue: these reforms could range from being so small as to be meaningless, to so large as to be frightening in their power. The bigger the funder, the more power that funder would have to play politics or press an ideological or commercial agenda. At the very least, many of these reforms would impose a layer of bureaucracy on already busy law faculties, struggling to deal with their current responsibilities. Our current model is pretty independent and flexible. But the time has come for us to trade some of that independence for some outside review and accountability. Law schools will continue to care about the scholarship that their faculties produce and will compete on scholarly reputation. But legal academia as a whole has to think about how we fund legal scholarship and learn to do more with less.