The Faculty Lounge

Conversations about law, culture, and academia

May 07, 2015

Heat vs. Light IV: On Conditional Law-School Scholarships and Judging Conduct "Good" or "Bad," Broadway and Hollywood Edition

The texts for today's homily are from *Guys and Dolls* and *The Little Mermaid*. Our first subject is Big Jule (alternatively pronounced, depending on the production, "jool" or "julie"), the enormous and imposing gangster from Chicago. Big Jule has come to town, flush, looking for a high-stakes crap game. Near the end of the musical, that game comes to a climax in the local sewer. After some unfortunate early losses, Big Jule has removed his coat and, with his revolver gleaming in plain view in his shoulder holster, pulls from his pocket his special "lucky dice." These dice appear to everyone else to have blank faces because, Big Jule reveals, they have spots that only he can see. Miraculously, Big Jule's luck turns, and he wins several big bets. When some of the other gamblers complain, Harry the Horse helpfully explains that "Big Jule cannot win if he plays with honest dice."

Later that evening, disarmed and on the losing end of an unconventional bet with Sky Masterson, Big Jule finds himself obligated to attend a revival meeting at the Save A Soul Mission. Compelled by his bet to participate in the meeting and confess his sins, Big Jule makes a clean breast of it: "I used to be bad when I was a kid. But ever since then I gone straight, as I can prove by my record — 33 arrests and no convictions." The prayer meeting is, improbably, a success; lovers are united; and everyone lives happily ever after. Big Jule presumably returns to Chicago to resume his blameless life.

I hope you're smiling. Now I'm going to ruin everything by explaining why this wonderful story is funny. (A quick editorial aside before we begin: *Guys and Dolls* is not timeless in every respect, of course. It includes gender stereotyping and other cultural assumptions that, from our 21st-Century vantage, seem not-all-that-quaintly anachronistic. But the features of the story that I have excerpted above seem sufficiently salient to the matter at hand that I think we can make good use of them here.) Once again, the heavy lifting begins after the jump.

Let me start by reminding you that, in my last post, I suggested that participants on both sides of the recently resurgent debate about law-school marketing practices were confusing three valid and important but importantly distinct categories of judgment: (1) whether something is unlawful; (2) whether something is unethical, immoral or otherwise blameworthy; and (3) whether something is good or bad practice in an effort to achieve a particular end. (The first two posts in this series are here and here.) Apparently I didn't do as good a job of it as I flattered myself thinking I had. Some readers, both publicly in the Comments and privately off-line, criticized me for belaboring the obvious. But many of the people whose argumentation I was trying to reform kept right on with more of the same.

The confusion among these three categories of judgment has emerged again in recent online discussion of the propriety of conditional law-school scholarships. For those unfamiliar with the practice, it involves granting a law student financial aid that continues only if the student achieves defined minimum levels of performance greater than academic good standing. At some law schools, the conditions for scholarship renewal can be quite competitive and demanding--for example, getting grades in the top half, or even top third, of the class. Some schools have lots of these conditional scholarships with competitive and demanding performance criteria; some have relatively few or none.

In the latest round of discussion on the subject, Mike Simkovic on Brian Leiter's blog (here, here, and here), and Jeremy Telman of Valparaiso Law on his own blog (here and here) argue that imposing competitive and demanding conditions on law-school financial aid is a good practice. Deborah Jones Merritt argues on her blog (here and here) that it is (at least in the manner employed at a recognizable subset of law schools) a bad one. The arguments in favor start out with the observation that colleges condition their financial aid all the time, so why be so critical when law schools do it? Or as Mike Simkovic puts it, the condemnations "follow the standard playbook of law school critics—

take something about law schools that is widespread and common out of context, claim that it is somehow unique to law schools when it is neither unique nor unusual, and then demonize it," suggesting that conditional scholarships are just "another example of critics applying a double standard to paint law schools in the worst possible light" (rhetorical question mark omitted; links in original).

Prof. Merritt and others (including Northwestern Law prof Steve Lubet in comments to Telman's first post) point out in response that the comparison to college scholarships is not an apt one in many cases because virtually all law schools (especially in the first year) grade on a rigid curve, while most colleges don't. The result is that some law schools offer conditional aid on terms that make it highly likely, even mathematically certain, that many students will lose much or all of their financial aid after their first year, while losing financial aid is much less common and rarely so competitive in college. In fact, Telman forthrightly notes that in 2013, 25 accredited law schools revoked or reduced the financial aid of *over 50%* of their entering students receiving aid after their first year. Merritt colorfully refers to such elimination-tournament-style financial aid as "Hunger Games scholarships." Maybe those "neither unique nor unusual" "double standard" epithets from the critics' critics were a little hasty?

Undeterred, Telman and Simkovic then argue that the "Hunger Games" features concentrated in law-school as opposed to undergraduate aid don't matter because law students have always understood, or could have understood, the terms on which the aid was offered. Except that's just not true. Telman's post relies for this assertion on a single source: a characteristically thoughtful and thorough 2011 article by Jerry Organ of the University of St. Thomas School of Law on conditional scholarship practice at American law schools. (Simkovic relies on a single source for the same proposition, which is Telman's post.) Telman argues:

> Professor Organ was able to find information about how scholarships work at 160 law schools. That means that the information was out there. Since Professor Organ was able to gather information about 160 law schools, it should not be difficult for students to gather relevant information about the one law school that they are considering attending.

Flatly and inexcusably wrong. As Prof. Organ himself explains on Legal Whiteboard and in his 2011 article, after protracted effort searching multiple sources with the aid of several research assistants, he was *unable* to discover the rates of scholarship renewal at all but four American law schools. In short, Prof. Organ was *not* in fact able to gather the information that mattered, and it was in fact *impossible* for students to gather "relevant information about the one law school they [were] considering attending" (leaving aside the fact that the students Telman is writing about should want *comparative* information about *multiple* schools in order to make an informed choice about which offer they prefer). Organ's article concluded with a call for the ABA to require disclosure of this information, a step the ABA took beginning with the 2011-12 academic year (see ABA Standard 509(d)(1)).

This failure to make renewal rates accessible until forced to do so by regulation is particularly striking in light of the fact that most prospective law students finishing their undergraduate degrees (as well as many of the professional-school advisors they consulted at their colleges) apparently were accustomed to the non-"Hunger Games"-style financial aid prevalent at the undergraduate level, and thus many could be expected to assume that law-school aid would be administered similarly. As I argued in my last post, when you present information in a context and format that an appreciable portion of its intended audience can be expected to materially misunderstand, in my estimation you are acting badly, whether what you are doing is illegal or not. Let me hasten to point out that many law schools never engaged in "Hunger Games" financial aid practices, and these concerns don't apply (as far as I'm concerned, anyway) to aid conditioned on more common non-competitive terms, such as maintaining academic good standing. But it appears that a fair number of law schools did engage in elimination-tournament financial aid, and failed to give their students any meaningful warning of what they had to expect until the schools were forced to do so.

Telman and Simkovic make one other argument I want to address before returning to our friend Big Jule. They assert that "Hunger Games"-style financial aid is really good for students because it incentivizes them to work hard. That needs some scrutiny. It's worth observing at the outset that this "incentive" theory smells of post-hoc rationalization given that incentives are generally thought to work best when those they are supposed to incentivize are thoroughly

informed of the nature and consequences of the incentive—and that is exactly what most law schools most invested in the tactic *failed* to do until forced by regulators. That suggests that perhaps some of those schools really had another purpose in mind, and while I'm no mind-reader it would not be irrational to infer from the facts just related that some administrators may have intended to induce students to enroll at their institutions by encouraging them to assume that they were being offered much more, and much more certain, financial aid than in fact they were. Does this apply to everyone? Of course not. Could it apply to some? You be the judge.

It's also worth taking a moment to imagine the kind of institution that would emerge around the "incentives" proposed. Yes, it's fair to say that if everyone given elimination-tournament-style financial aid at a particular law school were fully apprised that over half of them would have the price of the final two years of their legal education jacked up from little or nothing to a sticker price of roughly $40,000 per year unless they outperformed their classmates, that would create a certain, um, "incentivized" atmosphere. So would a policy assigning public beatings to the losers. But many people might not want to attend a school with the atmosphere such policies created, or take the chance of losing the bet that "Hunger Games" scholarships creates if another school presented an alternative. Maybe that's why some schools faced with falling applications and falling revenues failed to take the step (namely impressing the nature and rules of the competition on the players) necessary to use conditional financial aid as the "incentive" now proposed to justify it. Maybe (as Jerry Organ observes) that's why the number of institutions widely employing the tactic and the number of competitive financial aid awards has started to fall since the ABA required disclosure. Maybe Harry the Horse is right that "Big Jule cannot win if he plays with honest dice"—that is, ones with spots that everyone can see. Or maybe it's all just a coincidence.

There's another tie between Big Jule and my last post. Both Big Jule and the resurgent defenders of certain long-discredited law-school practices are not thinking clearly about the differences among the three categories of judgment described in my last post and above. (To be fair, Big Jule probably has other issues that he does *not* share with my friends in the blogosphere or the law-school administrators they defend.) Were any of the financial-aid practices described above unlawful? Apparently not. But "no convictions" (in Big Jule's words) doesn't make what you do admirable or good practice. And as I said above, if you present information in a context and format that an appreciable portion of its intended audience can be expected to materially misunderstand, you are behaving badly, and you deserve to be criticized.

The quick and easy answer I anticipate is that, whatever may have happened in the past, the new ABA disclosure rules eliminate any problem going forward. Of course, that doesn't excuse past excesses. ("I used to be bad," Big Jule confesses. "But ever since then I gone straight, as I can prove by my record." It's not obvious Big Jule feels he has much atoning to do.) But as far as I know, the new ABA disclosure rules do improve the situation. I would hope that there will be empirical research testing their effectiveness, but they look like they should help and are helping.

Does that end the discussion? I don't think so. Because in my world, there are categories of ethical and practical discourse beyond what's legal. You don't have to live in my world, but I believe a lot of folks live in one more or less like it. Let me offer you a glimpse of what things look like there:

Some law schools are complying with all relevant ABA disclosure requirements, but are recruiting and accepting increasing numbers of students with seriously limited academic ability or preparation (LSAT scores in the 30th, 20th, or even 10th percentile), whose chances of success in law school, on the bar exam, and in the legal workplace are poor. These schools effectively depend on these students' optimism bias and other cognitive biases to overcome their better judgment. Sometimes these prospective students are offered exploding conditional financial aid to draw them in, and when they predictably lose that aid, the schools depend on human inertia, the sunk cost fallacy, and other cognitive biases to induce the students to continue their studies at a price that has become irrational. Again, let me be clear: Many schools do little or none of this kind of marketing; those that do may not do it with respect to all their students; and how disreputable you find the practice in any particular human instance is a question of degree and values.

Is any of this illegal? No, it isn't. Do such institutions have any legal obligation to connect the dots for these marginal applicants (some of whose applications they actively solicit from lists of LSAT-takers who would not otherwise apply)

and warn them of the cognitive biases that will naturally come into play and induce them to underestimate their risks? No, they don't. Do I believe that people should be paternalistically prevented from taking irrational risks? Well, occasionally, depending on the extent to which information asymmetry and cognitive bias create too great a risk of too much ill-considered waste. But sometimes irrational risks pay off, and the freedom to make a great many bad choices is essential to the functioning of a liberal democracy. Which is why I say only "occasionally."

What I do think is that such practices are shameful, and I think you should too. There is nothing novel or radical about that idea. There are all kinds of people in our economy who tell all the truth the law requires and take advantage of others' cognitive biases and perceived needs to walk them into what could objectively be described as poor or irrational risks. We tolerate these actors, but most of us don't admire them. And when they turn out to be people or institutions in whom we have invested special trust, because for example we view them conventionally as helpers or educators, we admire them even less, and in my view that's as it should be. As I have said in this space before, if you act like a door-to-door encyclopedia salesman, you deserve to be treated like one.

These ideas are deeply embedded in our culture. For a more diverting illustration, I invite you to watch the brilliant performance of Ursula the Sea Witch in "Poor Unfortunate Souls" from Disney's *The Little Mermaid*. (I'm totally serious. Stop reading, click on the link, and watch it right now. You almost certainly don't remember how stunningly artful it is.) Portraying herself as a selfless supporter of the disadvantaged and unfortunate who need her help to pursue their dreams, Ursula makes a complete, and completely truthful, disclosure to Ariel the Mermaid of all the terms and risks of a horrifically costly Mephistophelian deal. She does it so skillfully that Ariel voluntarily surrenders her voice and foolishly risks her freedom by signing on the dotted line.

Most of us feel sorry for Ariel. Most of us despise Ursula, though she undeniably tells the truth and breaks no rules. (Hint—she's an evil witch.) And what does Ursula sing about herself?

> I admit that in the past I've been a nasty
>
> They weren't kidding when they called me, well, a witch
>
> But you'll find that nowadays I've mended all my ways
>
> Repented, seen the light and made a switch--
>
> True? Yes!

Word.

--Bernie

Posted by Bernie Burk at 07:02 PM in Academia, Accreditation, Advertising, Current Affairs, Economy and Markets, Education, Legal Education | Permalink

Comments

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The Guys and Dolls character was named Big Jule (not Julie), and he was from Chicago (not Detroit).

Other than that, good post.

Posted by: S. Lubet | May 07, 2015 at 07:41 PM

Oops, you're absolutely right; thank you. The post is corrected.

Bernie

Posted by: Bernie Burk | May 07, 2015 at 07:50 PM

"and the resurgent defenders of certain long-discredited law-school practices"

Simkovic might say that he previously wasn't hiding the fact of where his funding is coming from these days (pro-law school interest groups), but I really think that there has a been a sea change in his partisanship since that disclosure.

Posted by: out in the open | May 07, 2015 at 07:56 PM

Bernie,
I think the "critics" are absolutely right on this one. I'm biased, because I drafted the conditional scholarship disclosure proposal when I was on the ABA's Standards Review Committee. One notable fact is that since disclosure of this information has been required, a number of law schools have eliminated conditional scholarships (meaning that students keep their scholarships as long as they remain enrolled and in good standing). This suggests to me that the conditional scholarship "game" only worked when students could not figure out their chances of retaining their scholarship.

Posted by: David Yellen | May 07, 2015 at 08:20 PM

Bernie,

Thank you for speaking up for the integrity of legal academia. It is embarrassing that law professors would now rise up to defend employment reporting standards condemned by courts (per your last post) and scholarship policies criticized by outsiders (see New York Times "Bait and Switch" piece), practices which have since been repudiated and reformed by new ABA standards. I do not understand why Simkovic is re-raising these resolved issues, but it does not help us regain our collective credibility.

After reading these posts, I have begun to wonder whether a sense of professional responsibility is what separates the two sides in this discussion. It is not a coincidence that John Steele, you, and others who strongly condemn these practices have taught legal ethics.

Posted by: Brian Tamanaha | May 07, 2015 at 10:18 PM

Ha, ha, The New York Times? You're seriously offering them up as a respectable source? The same rag that posted an infamously terrible piece about higher education by that noted obesity expert? Why should anyone take them seriously when it comes to law schools?

Posted by: Anon | May 07, 2015 at 10:45 PM

Geez, Bernie, sit down -- sit down, you're rocking the boat.

(Seriously, another excellent post.)

Posted by: Orin Kerr | May 07, 2015 at 11:56 PM

Powerhouse post.

Every villain sees him or herself as a misunderstood hero.

The implosion of cultural capital law schools once enjoyed is a direct result of unethical and immoral profiteering through practices now defended by Sim.

Ethics, yes. Also a lack of any form of shame. If you were raised right, you know that taking advantage of the unwise is wrong. full stop.

Posted by: terry malloy | May 08, 2015 at 06:24 AM

"Simkovic might say that he previously wasn't hiding the fact of where his funding is coming from these days (pro-law school interest groups), but I really think that there has a been a sea change in his partisanship since that disclosure."

He has been on a one-person campaign to discredit himself ever since that first paper.

There comes a time in certain people's lives when it later becomes clear that they sold out, and sold out 100%.

Posted by: Barry | May 08, 2015 at 07:07 AM

Going back to my days in law school, one of my Professors - if I recall correctly it Richard Allen Gordon - in contracts law - was at pains to teach a key point to law students "that there could be a wrong without a remedy." This was demonstrated by conduct that was clearly facially and morally wrong, with a clear victim - but a complete absence of remedies of consequences for that wrong. I forget the fact patter (it was more than a couple of decades ago) but I found myself explaining this issue recently in respect of a limited liability company that was judgment proof because it had effectively distributed its wealth to shareholders more than 18 months ago (not US law by the way.) Similarly, suppose in Baltimore the defendants in the Freddie Grey case all deploy the SODDI (or in this case TODDI) defence - since there are perhaps different occasions on which Grey could have been injured, they might all create reasonable doubt with respect to their own individual liability.

We can as lawyers (or maybe law professors) all accept that something has happened here that is morally reprehensible, but also that there is no legal remedy. I can accept that sly law school administrators can search around until they come up with some BLS unemployment reporting criterion used in some contexts and then argue that this criterion used in reporting law school employment data is not legally wrongful (at a stretch), but don't ask me to accept that it is morally correct - to demand that is "to p!ss down my leg and tell me its raining." Similarly, to claim that deceptive use of so-called scholarships is OK as is section stacking is legal may be true, but it is morally reprehensible, as is defending the practice.

Moreover, having read Simkovic's explanation of his views and the way he tried to justify the practice, I had to conclude that he quite simply an astonishingly callous individual.

Posted by: (M)([a)(c)(K) | May 08, 2015 at 07:27 AM

Have any of the critics objected to conditional scholarships in general? All I've seen is an objection to a lack of disclosure, especially when the odds of losing the scholarship are high.

It's as if the critics are saying "Ground beef really ought to be marked with the date it was packaged on," and Telman and Simkovic are responding with "Critics would have you believe hamburgers aren't delicious."

I expect better from the freshmen I teach.

Posted by: Derek Tokaz | May 08, 2015 at 07:56 AM

I don't object to conditional scholarships in principal, provided the school explains how it explodes, and an honest likelihood of it going away based on the curve. There are still the same cognitive biases that make young people think they are special snowflakes, but if we found a way to combat that, half half the law schools would close tomorrow.

The way these worked in the past for many was like the movie "speed" except no one told the bus driver that he had to stay above 55mph. 1L grades come out and Bang, you're paying full freight. When you ask, Ursula says "didn't you read the fine print?"

Section stacking with conditional scholarship students, however, is immoral.

Posted by: terry malloy | May 08, 2015 at 09:19 AM

Thank you for this, Bernie. I find it appalling that people like Telman and Simkovic seem to honestly think there is nothing wrong with what you described above, and, in fact, it's actually a good thing! It's not a bug, it's a feature!

Particularly distressing and damning is the lame "students had access to this information the whole time..." blame-shifting and misdirection that has been going on for decades. Not in the early 2000s, they didn't. Or before. These arguments are spoken like true self-serving, cloistered academics who apparently don't worry about what impacts and externalities are derived from these theoretical positions.

In short, give people scholarships. Or don't. Take your pick. Uphold your "high academic standards" to boot. But law schools must stop stacking sections and then act with shock and amazement as if they had nothing to do with it when half the scholarships have to be "given back."

Posted by: dupednontraditional | May 08, 2015 at 10:08 AM

Terrific post, Bernie! In addition to presenting an eloquent defense, you make some points that others (including me) hadn't thought to make. Thanks for all of your thoughtfulness.

Derek, I think most of the critics have objected to conditional scholarships even with disclosure. Bernie does so at the end of this post, and I did on mine at Law School Cafe (noting that disclosure addressed two of my objections but not the third). I suspect others have as well, although haven't gone back to check their writings.

The very fact that a significant number of law schools don't use these scholarships is telling in itself. Also, note that among schools reporting conditional scholarships, 20 have 0-2 students who lose those scholarships. These are schools that set a very low condition but one that is slightly above good standing. Almost half of all law schools have decided that high-forfeiture scholarships are the wrong way to treat their students.

Posted by: Deborah Merritt | May 08, 2015 at 11:49 AM

Derek: "

Have any of the critics objected to conditional scholarships in general? All I've seen is an objection to a lack of disclosure, especially when the odds of losing the scholarship are high.

It's as if the critics are saying "Ground beef really ought to be marked with the date it was packaged on," and Telman and Simkovic are responding with "Critics would have you believe hamburgers aren't delicious."

I expect better from the freshmen I teach."

Your analogy is poor. The critics are pointing out *yet again* that many law schools are being slimy, and their defenders (1) claiming 'caveat emptor' without the honesty of explicitly saying it and (2) lying about the availability of information.

Going back to the title of this post, 90% of the light here and everywhere has been provided by the scambloggers, while 90% of the heat has been provided by the scammers.

Posted by: Barry | May 08, 2015 at 11:58 AM

DJM,

I read the ending of Bernie's post as objecting not to merit-based scholarships in general, but schools intentionally exploiting optimism bias and giving scholarships to students who are expected (by the school) to lose them. That's different from objecting to merit-based scholarships writ large.

Your "hunger games" post seems to be making a similar argument, that there is something wrong about offering conditional scholarships with the expectation that students won't be able to keep them.

Compare that to a conditional scholarship where the is to have at least a C+ average where the curve is B/B+, and only 5% ever gets a C or lower in any class. Would you find that sort of condition problematic?

Posted by: Derek Tokaz | May 08, 2015 at 12:01 PM

Derek: "Would you find that sort of condition problematic?"

It could indeed be problematic. But I think one could accidentally miss the forest for the trees here in that your point is not the major thrust of the discussion in this particular case. We can debate where that line should lie and run Monte Carlo simulations to our heart's content as a related-but-separate discussion.

Posted by: dupednontraditional | May 08, 2015 at 12:15 PM

It is incredible that as misleading disclosures about employment outcomes and sharp (if not illegal, ok Bernie: yes, we get it) practices with respect to exploding scholarships fall away, it becomes easier to see where the tiny trickle that is the source of the entire river of opprobrium heaped on the "scammers" can be found.

That is, to defend the indefensible is a signal not of intellectual prowess (as in a good defense attorney in an adversarial system) but of sheer, unadulterated self interest.

Posted by: anon | May 08, 2015 at 12:16 PM

Reading this post and these comments gives one great insight into life in a non evidence based reality. It's quite disturbing.

Posted by: anon | May 08, 2015 at 12:18 PM

TLDR version of the arguments in support of conditional scholarships by law schools:

1. they are disclosed
2. they motivate students to perform better
3. undergraduate programs use them
4. scarce scholarship dollars are used to reward those who work hard

I'd like to focus on Item 2 on the list. I agree that conditional scholarships probably do motivate law students to perform better. That does not make using them the right thing to do. Are there better ways to motivate students that don't involve this form of punishment? There are certainly those in legal education who are more than OK with the idea of punishment as a motivational tool. I mean above and beyond doling out bad grades and the consequences they may bring in a student's job search. Perhaps schools that want to use punishment to motivate should enact a pre-disclosed policy of posting the grades of poor performers publicly along

with the students' picture next to their grades. Or perhaps a policy of caning the poor performers. These alternatives might achieve most of the motivational effects without imposing the large financial hit on the students.

I would also ask whether any professor with protection from poor performance due to tenure should be taken seriously when defending conditional scholarships.

Posted by: confused by your post | May 08, 2015 at 12:34 PM

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