
“CONSCIOUS” DEANING: THE ACADEMIC FIDUCIARY MODEL AND STAKEHOLDER INTEGRATION

Chris Guthrie[†]

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INTRODUCTION

Rick Matasar, one of the country’s deepest thinkers about the legal academy, has taken a “metaphorical journey” through the law school model in his published writings to date.¹ (I say “to date” because I hope for our sake that he will continue to reflect on, and write about, legal education and law school leadership.)

Like most law professors, he entered the legal academy embracing what we might call the “traditional” model of law school governance. According to this model, law schools are “faculty-centered,” and they fulfill their educational mission by facilitating the teaching, research, and service activities of an enlightened faculty.² In short, law schools are, and should be, organized around, and governed by, faculty and faculty interests.

It did not take long for Matasar to question the wisdom of this governance model, suspecting that it could undermine student needs, threaten law school finances, and lead to general mismanagement of the

[†] Dean and John Wade-Kent Syverud Professor of Law, Vanderbilt Law School.

1. See Richard A. Matasar, *Defining Our Responsibilities: Being an Academic Fiduciary*, 17 J. CONTEMP. LEGAL ISSUES 67, 69 (2008) [hereinafter *Academic Fiduciary*] (describing this journey).

2. *Id.* at 70.

enterprise.³

He therefore began to advocate for a “market” model of governance according to which law schools are businesses whose relationships and activities can best be understood in commercial terms.⁴ Students are customers; legal education is a product; placement of a student in a job is a sale; and so forth. In contrast to the traditional model, which is faculty- or employee-focused, the market model is student- or customer-focused.

Recently, however, Matasar has come to question the market model because it rests on assumptions of self-interest and profit-maximization that do not fully capture the motives and interests of faculty, students, and other law school community members. Yes, he concedes, law schools operate in markets. And yes, law school actors engage in market behavior. But, he argues, the market metaphor is “insufficient.”⁵

This realization has led him to advocate instead for what he calls an “academic fiduciary” model.⁶ According to this model, law school leaders are trustees who owe a fiduciary duty to law school stakeholders who are invested in the enterprise. This model is not employee-focused, like the traditional model, or customer-focused, like the market model. Instead, the academic fiduciary model is stakeholder-focused.⁷

Both as a descriptive matter *and* as a prescriptive matter, the academic fiduciary model provides a better account of law school governance. It is superior to the traditional model in that it acknowledges that law schools are businesses; it is superior to the market model in that it acknowledges that law schools are *not only* businesses; and it is superior to both models in that it recognizes and respects the interests of multiple stakeholders, including, but not limited to, faculty (who are given primacy in the traditional model) and customers (who are given primacy in the market model).

But how are law school deans supposed to fulfill the fiduciary duty they owe to these multiple stakeholders? Under the traditional model, law deans are supposed to orient the school’s activities around an enlightened faculty; under the market model, law deans are supposed to operate the law school like a business. How, under the academic

3. *See id.* at 70–73.

4. *Id.* at 73–74; *see generally* Richard A. Matasar, *A Commercialist Manifesto: Entrepreneurs, Academics, and Purity of the Heart and Soul*, 48 U. FLA. L. REV. 781 (1996) (exploring and embracing the commercialization of higher education).

5. *Academic Fiduciary*, *supra* note 1, at 76.

6. *See id.*

7. *See generally id.* at 76–106.

fiduciary model, are law deans supposed to lead?

Matasar argues that law schools have five categories of stakeholders and that law deans should privilege these stakeholders in priority order. Deans presumptively fulfill their fiduciary duty when they favor students over alumni, alumni over the home university, the home university over employees, and employees over intangibles. When deans make decisions that favor those lower in this hierarchy, they presumptively violate their fiduciary duty and must be able to explain and defend their actions.⁸

In this Essay, I critique Matasar’s approach to deaning, which I call “stakeholder-priority deaning,” and I propose an alternative approach to deaning, which I call “stakeholder-integration deaning.” The stakeholder-integration approach to deaning—which rests on concepts taken from the scholarly and popular literatures on team production in corporate law,⁹ alternative dispute resolution,¹⁰ and so-called “conscious leadership”¹¹—is non-hierarchical, non-zero-sum, and (perhaps hopelessly) aspirational. The primary difference between these two approaches is one of orientation: Matasar’s stakeholder priority approach advises deans to ask which stakeholder will benefit from a dean’s decision; the stakeholder-integration approach advises deans to ask how a dean’s decision can benefit all stakeholders.

I. THE ACADEMIC FIDUCIARY MODEL AND STAKEHOLDER PRIORITY

The academic fiduciary model—which Matasar aptly calls a “trust” model¹²—takes as a given that law school leaders are self-interested, but it also assumes that law school leaders can, should, and often do act on behalf of the greater good of the law school’s community of stakeholders. Indeed, according to the academic fiduciary model, law school leaders must act as trustees, and as such, they have a fiduciary duty to act primarily for the benefit of those who make up the law school rather than to act in furtherance of their own self-interest.¹³

When making an institutional decision, Matasar argues, law school leaders should examine for whom the decision is being made and justify it “by analyzing its beneficiaries.”¹⁴ The beneficiaries whom law school

8. *See id.* at 96–98.

9. *See infra* text accompanying notes 19–20.

10. *See infra* text accompanying notes 27–31.

11. *See infra* text accompanying notes 32–35, 38.

12. *Academic Fiduciary*, *supra* note 1, at 69.

13. *See, e.g., id.* at 91–106.

14. *Id.* at 97.

leaders must privilege in their institutional decision-making are the law school's stakeholders. According to Matasar, there are five categories of stakeholders: students, alumni, the university or board that "owns" the law school, law school employees (i.e., faculty and staff), and "intangibles," like reputation.¹⁵ Each stakeholder category is important to the enterprise, and law school leaders should analyze each before acting. But "[n]ot every stakeholder has an identical interest in the conduct of the school":

I suggest that there is a hierarchy of interests at stake. Students come first. Graduates come next, when their interests align with those of students. Next come the interests of the university, state, and public. These are followed by the interests of the school's employees. Intangibles like reputation come last.¹⁶

Because some stakeholders are presumptively more important than others, law school leaders should privilege those stakeholders higher in the pecking order. Decisions made on behalf of those higher in the stakeholder hierarchy are presumptively superior to those made primarily for those who rank lower in the hierarchy. For example, "If [a decision] is primarily to benefit the school's employees, it is presumptively a bad idea."¹⁷ But "[i]f it is primarily to benefit those who have entrusted the school with their investment, it is presumptively a good idea."¹⁸

II. CRITIQUE OF STAKEHOLDER PRIORITY

Matasar's academic fiduciary model, which recognizes that law schools have multiple stakeholders and that their respective interests should be taken into account, makes an important contribution to the law school literature. The academic fiduciary model bears substantial similarity to the "team production" model of corporate governance promulgated by Margaret Blair and Lynn Stout.¹⁹ Blair and Stout reject the dominant "agency" approach to corporate governance, which calls for directors to focus solely on maximization of shareholder value, in favor of a team production approach, which recognizes that corporations have several stakeholders who invest in the enterprise and

15. *Id.* at 78, 98.

16. *Id.* at 97-98.

17. *Academic Fiduciary*, *supra* note 1, at 96.

18. *Id.*

19. See generally Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (introducing "team production" approach).

who deserve to enjoy a portion of the corporation’s benefits.²⁰

I share Matasar’s view that deans and other law school leaders should take account of the interests of multiple stakeholders (much as I agree with Blair and Stout regarding corporate governance). But, as I explain below, I find Matasar’s analysis of law school stakeholders incomplete and his advocacy of a “stakeholder-priority” approach to deaning ultimately unsatisfying.

A. Stakeholder Critique

Matasar champions multiple law school stakeholders, but he ignores some stakeholders who should be included and combines disparate stakeholders into over-inclusive categories. As a consequence, there are many more stakeholders in play than Matasar’s analysis suggests.

1. Missing Stakeholders

Matasar ignores several law school stakeholders whom deans typically do, and should, consider when making institutional decisions. He identifies five categories of stakeholders—students, alumni, the home university or board, employees, and intangibles²¹—but he ignores others vested in the law school enterprise, including non-alumni donors (ask Stanford Law School and the University of Michigan Law School about Harvard Law School graduate, Charlie Munger);²² legal employers; and the prospective clients who will be served by the students who graduate from the law school.

20. *Id.* at 280–81. They argue that:

[T]he primary job of the board of directors of a public corporation is not to act as agents who ruthlessly pursue shareholders’ interests at the expense of employees, creditors, or other team members. Rather, the directors are trustees *for the corporation itself*—mediating hierarchs whose job is to balance team members’ competing interests in a fashion that keeps everyone happy enough that the productive coalition stays together.

Id.

21. *Academic Fiduciary*, *supra* note 1, at 97–98.

22. Ulysses Torassa, *Stanford—\$43.5 Million Given for More Graduate Student Housing*, S.F. CHRON. (Aug. 27, 2004, 4:00 AM), <http://www.sfgate.com/bayarea/article/STANFORD-43-5-million-given-for-more-graduate-2730524.php>; *Charles Munger Pledges \$110M for University of Michigan Graduate Residence and Fellowships to Create Community of Scholars; Largest Gift in University’s History*, MICH. NEWS (Apr. 18, 2013), <http://ns.umich.edu/new/releases/21407-charles-munger-pledges-110-million-for-u-michigan-graduate-residence-and-fellowships-to-create-community-of-scholars-largest-gift-in-university-s-history>.

2. Stakeholder Category Over-Inclusiveness

In addition, Matasar's stakeholder categories are over-inclusive and therefore mask potentially meaningful within-category differences.

Consider, for example, "students," the stakeholders who rank highest in Matasar's hierarchy. Often, students will have overlapping interests. It seems likely, for instance, that all students, regardless of degree program or class year benefit from a law school's effort to ensure that it hires committed and competent classroom teachers.

But in other instances, some categories of students may be differently situated from others, and institutional decisions that benefit one group might come at the expense of another. For example, prospective students, who receive less attention than they should in Matasar's analysis, might want admissions standards to ease, facilitating their admission to a school; currently enrolled students, on the other hand, might prefer for admissions standards to tighten, thereby limiting enrollment and sustaining higher student credentials and rankings.

Likewise, J.D. students might have interests that depart from those of students involved in other degree programs;²³ the existence of multiple degree programs might, for example, create competition for courses, faculty time and attention, and staff support.

Even within the category of J.D. student, some may have different interests from others in at least some circumstances. Continuing J.D. students might resent incoming transfer students because they add competition for jobs; second-year students, immersed in fall on-campus interviewing, might have different course scheduling desires from third-year students; and students who choose to specialize in some fields (e.g., transactional practice, criminal law) might have interests (e.g., faculty hiring, course offerings) that depart from those of students pursuing other fields of study (e.g., intellectual property or civil litigation).

The over-inclusiveness problem is not limited to the student stakeholder category. Near the bottom of Matasar's hierarchy are law school employees. Often, law school employees will have similar interests. It seems likely, for instance, that all law school employees seek robust employee benefit plans. But law schools are home to a wide range of employees, which can include unionized workers with job protections, non-exempt staff earning modest wages, senior staff who are well-compensated, and a range of faculty with varying titles, terms

23. See STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 313, Rule 29 (AM. BAR ASS'N 2014-2015) (ABA acquiescence requirement is tacit acknowledgement by the ABA of different interests of different groups of students).

and conditions, and responsibilities.

Some of these employee groups have very different interests from other employee groups. Staff and faculty, for example, often have different interests in play. And within the category of faculty alone, different categories of faculty—tenured, tenure-track, clinical, practice, legal writing, adjunct, etc.—can have very different interests. For example, tenured and tenure-track faculty might prefer a curriculum heavy in traditional doctrinal classes, while clinical faculty might prefer to see the institution invest in more experiential courses. First-year faculty teaching doctrinal courses might want to limit credit hours allocated to legal research and writing; legal research and writing instructors, by contrast, might seek more credit hours for their enterprise.

B. Hierarchy Critique

Matasar’s advocacy of hierarchical decision-making is also misguided. The problem is not with Matasar’s hierarchy per se, which is a defensible one. But even if one could identify all relevant stakeholders,²⁴ and even if one took Matasar’s overly broad categories and broke them down into more discrete categories,²⁵ Matasar’s ordering of stakeholder groups, like *any* ordering of stakeholder groups, is contestable and situation-dependent. To illustrate, consider three pairwise comparisons:

First, students versus employees. Students rank higher in Matasar’s hierarchy than employees, but should deans always privilege students over faculty or staff? In most instances, students will spend one, two, or three years at a school; faculty and staff, by contrast, may spend decades at a school. True, students pay tuition dollars to support the enterprise, but they reap a return on that investment. And many faculty and staff, though compensated for their efforts, invest significant “sweat equity” in a school, and their professional identities are intimately tied to their roles as law school employees (in contrast to students, whose professional identities will be more closely aligned with their eventual employers).

Second, alumni versus employees. Alumni interests, at least when aligned with student interests, rank higher than employee interests in Matasar’s hierarchy. Should alumni, who spent a short period of time at a school in the past, be given precedence over faculty and staff, whose investment in a school can span decades? As a Stanford Law School

24. See *supra* Section II.A.1.

25. See *supra* Section II.A.2.

graduate, do I have more of a claim on Stanford Law School's decision-making than I do on decision-making at Vanderbilt Law School, where I have served for nearly a decade and a half as a faculty member and administrator?

Third, home university versus alumni. Alumni interests also trump home university or governing board interests in Matasar's hierarchy. But where a home university chooses to invest millions of dollars in a law school,²⁶ should its interests in law school decision-making really take a backseat to alumni? All alumni? Even those alumni—for most law schools, the vast majority—who do not support the school financially?

Matasar's hierarchy is also insensitive to decision context. That is, student interests trump alumni interests and so forth regardless of the decision at hand. But consider the broad range of decisions deans might make: How many students should we enroll? What combination of 1Ls, transfers, and LL.M. students? What tuition should we charge? What scholarship support should we provide? Should scholarships privilege "merit" or "need"? If we must choose between scholarship support and loan forgiveness, how do we make that choice? How should the law school be staffed? Should we invest more heavily in development or career services? What are our faculty hiring priorities? Should we hire tenured/tenure-track faculty or clinical faculty? What raises should we award to faculty and staff? On what basis? What are our fundraising priorities? What capital projects should we undertake? How should we pay for them?

The reality is that it is difficult, if not impossible, to construct a fixed hierarchy of stakeholders that can reliably guide decanal decision-making across all decision contexts. But even if it were possible to construct such a hierarchy and make sound hierarchical decisions, this approach to deaning is problematic for an entirely different reason. Because this approach focuses on making decisions that benefit stakeholders in priority order, it treats stakeholder conflicts as zero-sum situations in which there are always trade-offs resulting in winners and losers. While I know from painful experience that deans often must privilege one stakeholder over another, shouldn't deans at least aspire for more?

26. E.g., Paul L. Caron, *Loyola-L.A. Law School Shrinks Enrollment by 20%, Taps \$20 Million from University Endowment for Student Scholarships*, TAXPROF BLOG (Apr. 17, 2015), http://taxprof.typepad.com/taxprof_blog/2015/04/loyola-la-law-school-shrinks-enrollment-by-20.html.

III. STAKEHOLDER INTEGRATION

Deans should aspire for more.

Building on Matasar’s academic fiduciary model—but departing from his stakeholder-priority approach to deaning—I propose a stakeholder-integration approach to deaning. Under the stakeholder-integration approach, deans facing an important institutional decision should identify all stakeholders who are or could be relevant to that decision, explore ways to create value for each of them, and then search for “efficient” or Pareto optimal outcomes in which most or all relevant stakeholders benefit, and no stakeholder is made worse off.

Deans, in short, should approach institutional decision-making in the same way that enlightened mediators or negotiators approach disputes. Deploying “integrative,”²⁷ “problem-solving,”²⁸ or “value-creating”²⁹ tactics, enlightened mediators and negotiators seek not merely to divide a fixed pie but to expand the pie for all disputants and thereby generate “joint gains.”³⁰ In so doing, they may obtain “win-win” solutions in which “both parties [are] better off” or at least they can “make[] one party better off without making the other party worse off.”³¹

Or, deans should behave like so-called “conscious capitalists.”³² Exemplified by John Mackey, the co-founder and co-CEO of Whole Foods, conscious capitalists focus not on “trade-offs” between stakeholders but on the “synergies” among them.³³ They view stakeholders as *interdependent* rather than *independent* and strive to “accommodate the needs and concerns of all stakeholders” and “focus on value creation rather than on value division.”³⁴ As Mackey and Sisodia explain:

[I]t is not easy to simultaneously accommodate the needs and concerns

27. See, e.g., DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 33 (1986) (contrasting integrative moves to create value with distributive moves to claim it).

28. See, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754, 757–58 (1984) (advancing a problem-solving approach to negotiation).

29. See, e.g., ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 12–17 (2000).

30. ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 71 (2d ed. 1991).

31. MNOOKIN, PEPPET & TULUMELLO, *supra* note 29, at 12.

32. See generally JOHN MACKEY & RAJ SISODIA, *CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS* (2013).

33. *Id.* at 70, 170.

34. *Id.* at 170 (emphasis omitted).

of all stakeholders. But it is fundamentally necessary. The way to enable it is to focus on value creation rather than on value division; we should not ask how best we can distribute the burdens and benefits across the stakeholders, but how we can create as much value as possible for all of them. We need to think in terms of expanding the pie, rather than just slicing it up more equitably.³⁵

To illustrate the difference in orientation between Matasar's stakeholder-priority approach and the stakeholder-integration approach I am advocating here, consider an example taken from Matasar's paper—scheduling classes.³⁶

Suppose, for example, that students come to the dean to request a course on ERISA by Professor *X*. Suppose, further, that Professor *X*, though an employee benefits expert, wants to teach a seminar on his current research project, which has little to do with ERISA.

Consider first how a dean *might* address this issue following the stakeholder-priority approach:

Assuming the dean thinks the students are better served by Professor *X*'s ERISA class than by Professor *X*'s seminar, the dean will schedule Professor *X* to teach the ERISA course because student interests take precedence over employee interests.

Now consider how a dean *might* address this issue following the stakeholder-integration approach:

The dean begins by identifying the stakeholders relevant to the decision. Clearly, the students and Professor *X* are relevant, but perhaps other stakeholders are relevant, too. The dean knows a leading ERISA lawyer and alumna in town who has expressed interest in serving as an adjunct professor for free. The dean contacts her, asks her if she would like to teach, and she agrees.

As a consequence, the ERISA students are happy because they get the course they wanted. Professor *X* is happy because he teaches his seminar, and the students enrolled in his seminar are happy because they are captivated by the passion he conveys for the subject. Moreover, because the seminar connects with the topic Professor *X* is exploring as a scholar, teaching the seminar actually helps rather than hinders his scholarly productivity. That productivity, in turn, redounds to the benefit of the law school because it enhances the law school's reputation as well as its standing with university administrators, who monitor publication rates, placements, and citation counts. And the adjunct professor who teaches the ERISA course is so impressed by a

35. *Id.* (emphasis omitted).

36. *Academic Fiduciary*, *supra* note 1, at 96–97.

couple of the students that she lobbies her firm to hire them. Likewise, she is so grateful for the opportunity to claim faculty status and to teach at the law school that she increases her annual giving to the school!

Thus, rather than one stakeholder winner (i.e., the students)³⁷ and one stakeholder loser (i.e., Professor X), the stakeholder-integration approach creates the opportunity for “wins” on the part of the students in the adjunct’s course, the adjunct herself, Professor X, Professor X’s students, and the university.

CONCLUSION

I recognize that deans must often choose one stakeholder over another; in the hustle and bustle of deaning, it is often easier, and always quicker, to make a win-lose decision and brace for the fallout than it is to work with stakeholders to explore win-win possibilities. It is certainly a lot easier for me to advocate for a stakeholder-integration approach in this Essay than it is for me to credibly claim that this is how I actually lead!

But I do think there are more opportunities than one might imagine to expand the pie for law school stakeholders and to create value for many of those who are invested in a school and its success. Mackey and Sisodia’s description of these moments in business is equally apt in law schools:

The business is more than just the sum of the individual stakeholders. It is also the interrelationship, the interconnection, the shared purposes, and the shared values that the various stakeholders of the business cocreate and coevolve together. The mortar that connects the bricks is as important as the bricks. When we fully comprehend the larger business system in action, with all the interdependencies and opportunities for voluntary cooperation for mutual benefit that exist within it, it can be beautiful and even awe-inspiring.³⁸

Here is to more moments of beauty and awe in our law schools.

37. Frankly, it is unclear whether the students would benefit in this scenario either, given the resentment that Professor X might feel and evince if he is directed to teach the ERISA course.

38. MACKAY & SISODIA, *supra* note 32, at 168.