REFLECTIONS ON STUDENTS AS CONSUMERS AND STUDENTS AS CAPTIVE MARKETS: COMPLEXITIES AND CONTRADICTIONS ACADEMIC CAPITALISM

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In our recent book, Academic capitalism: politics, policies and the entrepreneurial university (1997), Larry Leslie and I used the term academic capitalism to define the way public research universities were responding to neoliberal policy that treated higher education policy as a subset of economic policy. In this policy environment faculty and professional staff increasingly had to expend their human capital stocks in competitive situations. In these situations, some university employees are simultaneously employed by the public sector and are increasingly autonomous from it. They are academics who act as capitalists from within the public sector: they are state-subsidized entrepreneurs.

Academic capitalism deals with market and market-like behaviors on the part of universities and faculty. Market-like behaviors refer to institutional and faculty competition for monies, whether these are from external grants and contracts, endowment funds, university-industry partnerships, or institutional investment in professors’ spin-off companies, or student tuition and fees. What makes these activities market-like is that they involve competition for funds from external resource providers. If institutions and faculty are not successful, there is no bureaucratic recourse; they do without. Market behaviors refer to for-profit activity on the part of institutions, activity such as patenting, and subsequent royalty and licensing agreements, spin-off companies, arms-length-corporations (corporations that are related to universities in terms of personnel and goals, but are chartered legally as separate entities) and university-industry partnerships, when these have a profit component. Market activity also covers more mundane endeavors, such as the sale of products and services from
educational endeavors (for example, logos and sports paraphernalia), profit-sharing with food services and book-stores and the like. When we talk about restructuring of higher education, we mean substantive organizational change and associated changes in internal resource allocations (reduction or closure of departments, expansion or creation of other departments, establishment of interdisciplinary units); substantive change in the division of academic labor with regard to research and teaching; the establishment of new organizational forms (such as arms-length companies and research parks); and the organization of new administrative structures or the stream-lining or re-design of old ones.

Although our 1997 conceptualization of academic capitalism was extremely useful, we began to see academic capitalism as more than a concept defining the behavior of certain groups of resource dependent academics in techno science fields. We began to expand the concept as a way of explaining behavior across a wide variety of units in research universities, including units composed of academic professionals and administrators. We still saw decreased state resources as the trigger for academic capitalism, but began to think about the enactment or adaptation of academic capitalism by concrete actors and organizational units in terms of: external and internal mechanisms; organizational restructuring or interstitial emergence of new organization; products, processes and services and their markets (public and private); managerial rewards and incentives, penalties and disincentives; and ideology.

The external mechanisms varied. Market contraction and increased competition prompted institutions and the actors within them to seek out new revenue streams. Legislative and administrative branches of the state, through mechanisms such privatization, commercialization and deregulation of public entities, created opportunities for groups of organizational actors to move closer to the market. The courts, through case law, affirmed, legitimated and expanded the opportunities offered by the market and the state.

Internally, loosely coupled (Cohen and March 1986) U.S. research universities were staffed by large numbers of highly educational professional employees, many of whom are accustomed to a work world with (relative) autonomy. Under certain conditions, these staff (professors, support professionals, administrators) are able to form themselves into new units, often in ways such as Mann (1984) suggests when he speaks to promiscuity of organization form and function. According to Mann, function does not necessarily follow form, so existing units can often restructure themselves to take advantage of mechanisms that enable them to engage market opportunities. Mann also suggests that organizations change through processes of interstitial organizational emergence. Actors from different units within organizations (or from a number of organizations) recognize new opportunity structures and join together to respond to their changing environment. More rarely, managers can restructure units.

These groups of reconfigured organizational actors have to have a product, process or service to purvey to markets that can be either private (individuals, corporations) or public (government research markets, states, municipalities, even other segments of public research universities). University administrators (managers) may encourage such activity, discourage or penalize it, or promote their own market activity strategies. We think university managers prefer some markets over others, are indifferent to a number of markets, and actively discourage market activity in some areas. Organizational units often intersect managerial strategies with regard to markets, but sometimes persist with market activity despite indifferent response from institutional managers.

In a recursive process, these groups or units, including managers, draw on market ideology to justify their course of action and enact or demonstrate and confirm the ideology to the organization as a whole. Ironically, these groups of organizational actors do not necessarily
have to be successful at what they do. Although many of these groups may make a profit, generate new resources for university, demonstrate they have satisfied their customers, others need only engage in market-like activity to continue to receive institutional resources. This is partly due to the lack of clear rules for accounting, clear norms about how much profit is enough, clear measures of customer satisfaction, but also due to the prestige of the market/client/customer.

We think this expanding concept of academic capitalism is a way to move toward development of a theory that better explains uneven moves toward the market by public research in the United States over the past 25 years. We explore the expanded approach to academic capitalism through two examples, both of which focus on students. The first illustrates the way academic capitalism shapes undergraduate student recruitment. The second looks at the way patents have shaped undergraduate and graduate students' education and status by examining those cases that reached the appellate court of the United States in the 1990s (Baez and Slaughter 2001).

"Getting the right mix": How academic capitalism shapes undergraduate student recruitment. This illustration deals with how "enrollment management" offices approach the undergraduate student market and how representatives of these offices get their student/parent customers to "buy" a particular "brand name" in higher education. The discourse itself is painfully obvious in its adaptation of business talk. Student services professionals who bring in classes are no longer recruiters, they are "enrollment managers," selling a product (future degree)/service (education) to students who are customers or consumers.

The mechanisms that initiated academic capitalism in student personnel services involved federal, state and (public) institutional deregulation. At the federal level, in 1972 student financial aid money shifted from aid from colleges and universities to students: vouchers, in effect, radical deregulation. This gave students and their parents buying power and was designed to stimulate market-like competition among colleges and universities. At the level of the several states, further deregulation occurred: in 1974, State Student Incentive Grants were initiated. These created a federal program that matched with states to create state "vouchers" to supplement those at the federal level. Federal and state policy created distinct market segments through their voucher system: students who chose to attend private institutions received vouchers for more money to pay for the higher cost of education (Leslie, Martorana and 1974). In other words, deregulation segmented student markets.

To compete for these students, student personnel services, often prompted by central administration, re-structured or organized new units, creating offices of "enrollment management" to take advantage of new market opportunity. These "enrollment management," offices began to sell higher education as product and service to student/parents who were conceived as consumers and customers. Marketing budgets (direct mail brochures sent to zip codes with affluent students, "view books," recruiters) expanded while service budgets (counseling, remediation, recreation) diminished.

Enrollment management offices received incentives from central administration. They saw the greatest growth of all the areas in student personnel services. Indeed, to some extent, they fractured student personnel services because "enrollment management" was evaluated on the basis of the numbers of students they brought in. This moved student personnel services away from its traditional emphasis (Komives and Woodard 1996) on student moral development and toward "bottom line," external norms.

Enrollment managers developed a market discourse that drew on metaphors from a successful capitalism; this was shared with central administrators who were developing their
own market discourse around initiatives like TQM. So, we see ideology working as a jointly developed, reinforcing and recursive discourse, giving power to academic capitalism.

**Increased competition and further deregulation:** "Getting the right mix" demonstrates the refinement of marketing. This phrase, "getting the right mix" is one that enrollment managers use to describe the properties of the students/parents to whom they "sell" their institution to bring in a freshman class. It speaks to the care enrollment managers devote to securing who attest to the quality and value of their product, the attention they give to market niche that secures their prestige. Both private and public institutions sought students with high scores, from good neighborhoods, and good high schools: these were the students likely to persist, be successful, become donors. For private schools, enrollment managers "good mix" meant recruiting enough (usually white) wealthy students with minimally acceptable scores (uncharitable, dumb rich students) to whom they could charge full tuition to carry the costs of the institution, but balancing them with high scoring, usually upper middle class students likely to do well after college whom they enticed with discounted tuitions(McDonough1997). At first glance, there seems to be a rudimentary social justice: the rich or willing to pay subsidize the meritorious. However, the meritorious are also able to pay, and those left out are most often lower middle class and working class students who don’t know how to negotiate for discounts. "Getting the right mix" means the institutional product is enhanced in terms of exclusivity and "quality" while meeting costs in a more competitive era.

In the public sector, the "good mix" was somewhat different. Over time, public universities began to have difficulty competing with private institutions for the most desired students because smart consumers understood that by going to the private sector they enhanced the value of their voucher and perhaps the prestige of their degree: ironically, public policy served to valorize "the private." Public research universities most likely to compete with elite privates for the same students began discounting their tuition to attract high scoring (possibly white) upper middle class students, both from out-of-state and in-state (Heller 2001). Enrollment managers in flagships, then, used institutional funds to "buy" students who would enhance their profile and increase their standing in ratings like *U.S. News and World Report*. Ironically, by discounting the tuition of those able to pay, enrollment managers and administrators market preferences lower institutional revenues, and shift costs to those less knowledgeable, less able to pay, but perhaps equally meritorious. The market preferences of enrollment managers and administrators illustrate the contradictory nature of academic capitalism: market alone is not enough; some markets are preferred over others. If affirmative action is further dismantled, providing yet another instance of deregulation, higher education institutions will have almost no constraints on how they construct their "good mix" and freshmen classes, particularly at (relatively) inexpensive flagship public research universities may look very different.

and commercialization (Slaughter 1990, Slaughter and Rhoades forthcoming), making it
difficult to separate external and internal mechanisms with regard to intellectual property.

Within universities, new units, often called Offices of Technology Transfer, were created to
respond to the opportunities created by privatization, deregulation and commercialization.
Their purpose was to commercialize research, with an emphasis on patents. These units
were often strongly encouraged by university managers and they flourished. The
professionals who led Technology Transfer Offices quickly developed their own professional
association, the Association of University Technology Managers (AUTM), complete annual
meeting and journals. Many universities also developed intellectual property policies that
provided incentives, often in the form of shares of royalties, for faculty who patented.
Individual faculty and groups of faculty, sometimes located in Centers, also began to
commercialize their research, sometimes working with Offices of Technology Transfer,
sometimes working on their own. In other words, administrators and faculty used multiple
paths to try to reap rewards offered by new market opportunities.

However, engagement with the market sometimes shifts the status of actors involved in the
pursuit of academic capitalism. Legal cases that feature students and patents illustrate this
point. Generally, these cases do not conceive of students either as consumers or learners.
Instead, students are seen as producers of potentially valuable commodities. The external
mechanism that redefines student status is case law, and the internal mechanism is
university litigation. Given the cost of intellectual property litigation, universities make a
significant financial commitment to re-shaping student identity to more closely fit market
needs. That commitment is also symbolic and ideological, recursively reinscribing the
increasing centrality of markets to higher education.

In re Cronyn (1989). A corporation sought to declare invalid a Reed College professor’s
patent application for a chemical compound used in the treatment of cancer because the
information had previously been published in three undergraduate student theses. According
to patent law, if the knowledge were previously published, it would be in the public domain
and, therefore, unpatentable. The corporation argued that the Reed College student theses
should be considered as published even though they were indexed in a shoe box in the
chemistry department, and listed in the college library by the students’ last name with no
reference to their contents. The Board of Patent Appeals and Interferences found for the
corporation, holding that the three theses were printed publications that anticipated the
patent. The Court reversed the Board’s ruling, following earlier decisions that students’ work
was in the public domain and accessible, and, thus unpatentable, if they were indexed,
catalogued, and shelved in a university library. In this case, the court reasoned that the
theses were not accessible because the cataloguing was not sufficient for anyone else to
make use of the information.

Since the Court has indicated that student theses catalogued and shelved in a university
library puts that research in the public domain, it has supported the practice of withholding
students’ research results from publication, or even placement in the open shelves of
university libraries, so that professors or students’ corporate sponsors can patent.
Publication, construed to include placement in libraries, precludes patenting. As universities
have moved aggressively to patent, this has led to a standard practice, endorsed by the
Government University Research Roundtable, of allowing universities to withhold students’
work for sixty days (Campbell 1997). Cases have been reported, however, in which
students’ work was withheld anywhere from ninety days to three years (Slaughter et al,
forthcoming).

Academic capitalism thus emphasizes students identity as producers of knowledge that can
be commodities, yet their rights to that knowledge are constrained. Universities and
professors, presumably because they sponsor and supervise the process of student knowledge production, claim title to intellectual property that students work to create. In a recursive pattern, the students learn to create knowledge that can be turned into marketable products and learn as well that they are valued as knowledge workers more than learners, extending the lived practice of academic capitalism.

**National Research Development Corporation v. Varian Associates (1994).** Hoult, while a graduate student at Oxford University under the supervision of Professor Richards in the early 1970s, invented a method and apparatus for eliminating systemic noise in a Nuclear Magnetic Resonance (NMR) spectrometer. Hoult received a U.S. patent for his invention and assigned his rights to the National Research and Development Corporation (NRDC). However, while Hoult was working on his discovery, Richards attended a 1973 experimental NMR Conference in the United States, and as the court stated:

> While traveling to the conference one morning, Dr. Richards had an informal, one-on-one conversation on a bus with Dr. Stejskal, a Monsanto Corporation research scientist. During that conversation, which took place without Dr. Hoult’s knowledge or explicit permission, Dr. Richards disclosed the essence of Dr. Hoult’s invention to Dr. Stejskal. It is undisputed . . . that Dr. Richards at that time did not ask Dr. Stejskal to keep the information confidential and did not inform him that either he or Dr. Hoult intended to file for a patent thereon (p. 3-4).

When he got back to Monsanto Corporation (Monsanto), Stejskal and his colleagues incorporated Hoult’s invention, as disclosed by his professor, into one of its spectrometers and has used it ever since. NDRC filed a lawsuit against Varian Associates in 1989 for infringing its patent, and Varian claimed that the NDRC patent was invalid because Monsanto had been using the invention for years. NDRC argued that the information was understood to be confidential, but the court disagreed, relying on Richard’s testimony and the 1973 Conference’s intended purpose of encouraging the “free disclosure of information” (p. 8).

This case underscores how the possibility of commercialization permeates relations between students and professors. Because student research has value as intellectual property, the commercial world intruded on the professor-student, teaching-learning relationship, constraining the ability of both professor and student to freely discuss the results of their research. Ironically, a professor’s unguarded disclosure of information to an industrial scientist at a conference designed to encourage collaboration between academe and industry later penalized his student and university through the loss of patent rights. The case also illustrated the contradictory demands of the university on faculty and students who create intellectual property. On the one hand, universities encourage university-industry exchanges; on the other hand, they encourage patenting, precluding such exchanges. Professors and students have to calculate how they will best serve themselves as market actors, whether working through industry or institution.

**Johns Hopkins University v. Cellpro, Inc. (1998).** The intellectual property at issue were the Civin patents, which were used to make bone marrow transplants safer. Johns Hopkins University sued Cellpro for patent infringement. Cellpro charged that after patenting the University was unable to convert the patents to practice again, rendering the patent invalid. The University responded that the reason for this was that its lab used undergraduates, who could be not considered “skilled in the art” of this research. The court agreed with the University, and upheld its claims against Cellpro.
Although the court held undergraduate students to a less demanding standard than it would professional researchers, it nonetheless affirmed the use of these students in creating intellectual property for the university. The institution’s commitment to academic capitalism revalued students as workers who learned, rather than as learners who worked for the university in return for instruction. Because the university construed the students as workers, they were able to claim their intellectual property. Not incidentally, students learned that even though the patents were crucial to saving human lives and were likely financed in part by public tax dollars used for research, the court gave Hopkins a potentially profitable monopoly on the knowledge they helped to create. Education and ideology combined to recursively reinscribe academic capitalism on the institution and its actors.

The patent infringement cases indicate courts’ preference for institutional and private rights to profit from knowledge rather than the public rights to obtain and benefit immediately from that knowledge. In other words, the courts have generally affirmed the bipartisan legislation that made possible opening universities to academic capitalism. Universities, strengthening units that litigate, have moved to defend their intellectual property, firmly committing themselves to academic capitalism, even when it puts them in awkward positions with regard to their treatment of students and the public trust. However, movement toward the market is not without difficulties. Academic capitalism unleashes the entrepreneurial energy not only of the institution, but also of professors and students with the consequence that professors, students and institutions frequently follow their own paths to the market, sometimes working at cross purposes, yet all legitimating universities engagement with the market.

**Conclusion.** Our illustrations of how an expanded concept of academic capitalism might work show some of the complexity and contradictions of colleges and universities engagement with markets. Students are treated very differently, depending on whether they are being recruited as members of the freshman class or are working with professors on research. When they are being recruited, colleges and universities treat them as customers or consumers. Once they matriculate, they are treated variously: as commodities or products that advertise and embody excellence, thereby enhancing institutional prestige, or, if they participate in the production of intellectual property, as workers whose products the institution, individuals or corporations (but not the students) can claim. These conceptions of students are contradictory and suggests institutions’ flexible construction of student identity. Indeed, student identities seem to be redeployed, depending on market opportunities. What units the student being recruited to the freshman class and the student who works on the development of intellectual property that they are framed by market discourse and treated as market actors.

Although institutions may construe students relation to very differently (consumers v workers), the processes that lead to these different student statuses are similar. Staff in loosely coupled U.S. research universities came together, often intersititually, to create new offices—enrollment management, technology transfer—in response to university administrators’ encouragement of academic capitalism, as signaled by new opportunities created by markets and various branches of the state. These new or redefined units drew on market ideology to justify their action and to demonstrate and confirm their commitment to the markets. Although these units engaged in market discourse, they did not necessarily bring external revenues to their institutions. The "good mix" may generate resources for private colleges and universities, but in public institutions, tuition discounts may sharply undercut tuition revenue—although unclear accounting practices make this difficult to determine. Some institutions now have technology transfer institutions that bring in considerable external revenues, others do not. Many technology transfer offices engage in protracted multi state litigation in an effort to defend patents and increase external revenues.
for their colleges and universities. However, it is not clear the at income from licenses and royalties bring in more dollars than go out for patent litigation because litigation costs are not usually balanced against royalty income.

In this chapter, we wanted to point out that despite the market discourse that now surrounds institutions of higher education, they do not constitute a conventional market or markets, such as economists would model (Leslie and Johnson 1974). Despite researchers now standard win-win treatment of these institutions engagement with market, especially in the area of intellectual property and economic innovation (Etzkowitz, Healey, and Webster 1998), the costs to institutions are not yet clear. If costs are construed as more than monetary—for example, political, ideological, symbolic—calculating benefits becomes even more complex. We hope that our illustrations that feature students and academic capitalism will alert researchers to several points. First, research on markets and academic capitalism should use a variety of units of analysis—what is successful for one part of the university may not work well for others, or for different actors within the same unit. Second, the processes through which academic capitalism is enacted are neither linear nor hierarchical, so more fluid concepts of organizations and organizational boundaries need to be developed. Third, standard accounting procedures and categories may have to be rethought if we are to understand the costs and benefits of academic capitalism. Fourth, academic capitalism is complex, contradictory and ambiguous, but can be studied and captures how universities articulate with the new economy.
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