

And Now a Crisis in Legal Education

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I. INTRODUCTION

In The American Legal Profession in Crisis: Resistance and Responses to Change,¹ I chronicle the American legal profession's experience at dealing with crisis. Since its publication, a new crisis has rapidly emerged in legal education.

Legal education has long been a branch of the legal profession, but an odd one to be sure because it does not belong exclusively to the profession. Legal education is in fact jointly owned and managed by the academic branch of the profession, by the practicing branch of the legal profession through the accreditation and licensing processes, and by the universities. The universities (and the entrepreneurs of the for-profit law schools) are not at all actors in the legal profession, except that they have historically profited significantly by the legal profession's process of creating new members. That opportunity for university profit is diminishing rapidly as the demand for legal education falls and expense reduction is hampered by university policies on tenure.

The substance and style of legal education are influenced but not controlled by the practicing branch of the organized legal profession. Bar admission requirements, the nature of bar exams, and accreditation requirements have had substantial effects on legal education from the early 20th Century on. Indeed, the increase in education requirements and the dawn of bar exams, including character and fitness requirements, were part of the profession's efforts to stave off the influx of immigrants into the profession. The raising of educational barriers created a short-lived marriage between the practicing branch and the academic branch of the profession. But because the reasons supporting the marriage were shallow and fundamentally different for each side, the couple grew apart and has been largely estranged for the last seventy-five years.

The academic branch of the legal profession, connected by goal but not by interests during the boost in education requirements, has always had its own agenda, most often not shared by the practicing branch. The academic branch of the profession has been more of the university than of the legal profession and the universities have had their say in the foundational aspects of law schools, affecting their business model, including tenure for faculty and student-faculty ratios that have long supported university departments that have less income-production capacity.

¹ JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE* (Oxford 2013) (paperback 2014).

All three, the practicing branch, the academic branch, and the universities have played critical roles in shaping today's version of legal education.

How did we get to the current crisis? As law schools become financial burdens to some universities, how many law schools will not only contract as many now have, but close?

A. A Crisis for Legal Education

The current crisis in legal education coincides with a crisis in the practice of law. Law practice has changed as a result of technology, globalization, and economic pressures. The market for legal education's product, law graduates, has diminished. Law schools cannot remain the same in this environment. Except for a very small number of elite schools, those that do not adjust are at serious risk of failing.

An economic change has taken place against a system in which mostly corporate clients willingly paid for the training of beginners at major law firms. Law firms could absorb those costs if partners allowed their incomes to shrink, but so far they are not doing so. Billing for newly-minted associates' time is substantially decreasing. Far fewer law graduates find jobs in major firms, and the few who do are not given comprehensive training. Everyone from law firms and their clients to prospective law students and even to the New York Times has turned to the law schools to say, "It's your turn; you have to do this for us." The cost once borne by corporate clients of law firms is now increasingly borne by law schools. The call for law schools to produce "practice-ready" lawyers arrives as the cost of legal education is already too high and application numbers are too low for the current supply of legal education seats. Legal education can only hope to maintain relevance if it can forge partnerships with the profession's practicing branch. Another suggested antidote is the two-year J.D., or two-year legal education bar eligibility.

B. Not As Recent As One Might Think

Most of the focus on legal education's current trouble is on current events. It sounds as if these troubles are purely a result of the economic crisis of the past decade. Obviously, this is not the case. In fact, the root of the problem is found in the late nineteenth century reforms of legal education and its divergence with medical education. Both reformed as part of the general scientification of higher education and professions, but only one linked its profession with its educational process. When medical education reformed, leaders in

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that profession decided on a curriculum that effectively produced doctors. When legal education reformed, leaders decided on a curriculum that effectively produced law professors. Legal education's reform sought (for a complex set of reasons explored later) to replicate graduate programs in philosophy and history, for example, where the main product of education is a philosophy or history professor.

Legal education is still trying to figure out how to get to the place where legal education is really is about producing lawyers, and in particular lawyers who can do twenty-first century legal work. Progress toward that goal is painfully slow. The gap between what legal education does and what its graduates do is getting smaller. But not small enough.

* * *

The markets legal education contributes to cannot stand apart from legal education itself. Without abandoning legal education's aspects that have been successful and have continuing relevance to practice, including at least some version of what traditionally happens in the first year, law schools can produce a more effective legal education with increased emphasis on experiential education and increased understanding of the twenty-first century legal services industry.

My proposed solutions become clearer in light of the causes of the current crisis in legal education. I will present the causes below and follow up with a discussion on how the legal profession has poorly weathered crises historically by stubbornly resisting change. Finally, I will present specific solutions to the legal education crisis that avoid prior missteps of the profession's crisis management and then extend an argument for even greater reform: incorporating the legal services industry into the law school curriculum.

II. WHO OR WHAT IS TO BLAME?

Everyone has a favorite who or what to blame for the legal education crisis. Among them are: ABA accreditation standards and maintenance (until recently) of an opaque statistic-reporting system, selfish faculty, profit-taking universities, U.S. News and World Report rankings, stingy corporate clients, avaricious law firm partners, and the economy.

A. *ABA Accreditation and the Rising Cost of Legal Education*

To achieve ABA accreditation, law schools are of course required to meet and maintain certain standards. Capital is spent on items

crucial to the accreditation calculus, including adequate facilities, a legal education curriculum that fulfills certain benchmarks, and a body of faculty able to give students a quality legal education.²

Some suggest the woes of legal education, especially its price-tag mismatch with its value, come from the accreditation process and standards. Even after the mid-90s consent decree that got the ABA out of the practice of raising faculty salaries, the ABA's requirements on law school components inherently add costs to legal education.

For example, Atlanta's John Marshall Law School initially failed to earn ABA accreditation after falling short of composing satisfactory faculty rules. The ABA based its decision on the number of hours professors taught, at least eight hours a week.³ After wholesale changes, including a takeover of ownership by a for-profit company, the ABA accredited the school in 2009, but students faced substantial cost increases.⁴ Pursuing and sustaining ABA accreditation has discouraged efficiencies that would reduce cost.⁵

1. Non-ABA Philosophies on Legal Education

Alternatives to the ABA's version of legal education are more cost-effective, but do not have the respect of the profession. Forty-five states currently require that law students attend an ABA-accredited school before becoming a licensed lawyer in the state.⁶

2. The California Laboratory

California has legitimized alternative legal education by eliminating the barrier of graduating from an ABA-accredited school to practice in the state.⁷ A student's legal education may come from a

² See Deborah L. Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437, 455 (2013) ("Law schools could work together with other bar organizations to create an evaluation structure that did not use expenditures as a proxy for quality. . . . Uniform standards for matters such as facilities, adjunct teaching, and faculty research support could be eliminated.")

³ BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 18–19 (2012) (citing Tom Stabile, *Are Your Professors Cheating You?*, NAT'L JURIST, Oct. 1999, at 26) (discussing Atlanta's John Marshall Law School's failed attempt to earn ABA accreditation once the Georgia Supreme Court required graduation from an ABA-accredited school for bar membership).

⁴ See *id.* at 19 (discussing the dramatic debt increase the average John Marshall student faced upon the school's ABA accreditation).

⁵ Daniel Morrissey, *Saving Legal Education*, 56 J. LEGAL EDUC. 254, 255 (2006) (describing the advances in legal educations, but then noting the significant monetary costs of these advances, which are then passed down to students).

⁶ TAMANAHA, *supra* note 3, at 11.

⁷ Graduates from non-ABA-accredited law schools may not achieve admission to

school accredited by the State Committee of Bar Examiners.⁸ Admissions standards are “more lax” for these schools.⁹ For instance, a California Bar-accredited school may accept students who earn at least sixty credits at an undergraduate institution.¹⁰

In other facets, schools are monitored more closely to ensure they reach higher standards. For example, the Committee has recently taken action to bolster bar passage rates. Beginning this year, each California-accredited law school must have at least 40 percent of its graduates pass the California Bar to remain in good standing with the State Committee of Bar Examiners.¹¹ Leaders of these schools rushed to stop the Committee from adopting this guideline, arguing that it unfairly targeted their institutions because a significant portion of their students are working adults and have no desire to take the bar exam.¹² Despite recent pressure on California-accredited schools to achieve higher standards, the state’s requirements for those law schools provide an alternative to the ones determined by the ABA.

Another alternative educational path for prospective California lawyers involves attending a completely unaccredited school. There are three subgroups of unaccredited schools: Correspondence (instruction via physical forms of communication), Distance Learning (instruction via the Internet), and Fixed Faculty (instruction via a traditional campus-style setting).¹³ All unaccredited schools still must meet certain standards dictated by the State Committee of Bar Examiners.¹⁴ These institutions may generate California Bar-taking

the bar in other states. *See, e.g., In re Teel*, 150 S.W.3d 56 (Ky. 2004) (denying motion for reconsideration of Board of Bar Examiners’ decision to reject appellant’s admission to the State Bar).

⁸ THE ST. BAR OF CAL., tit. 4, div. 1, ch. 3 (July 2007), *available at* <http://rules.calbar.ca.gov/LinkClick.aspx?fileticket=2KV5j0w6Cw%3d&tabid=1227>.

⁹ *See California’s State-Accredited and Unaccredited Law Schools and the Baby Bar*, TOP-LAW-SCHOOLS.COM (Apr. 2010), <http://www.top-law-schools.com/californias-law-school-baby-bar.html> (describing the different characteristics of State-accredited schools).

¹⁰ *Id.*

¹¹ Amy Yarbrough, *New Bar Passage Rules Await Law Schools in 2013*, CAL. BAR J., Jan. 2013, *available at* <http://www.calbarjournal.com/January2013/TopHeadlines/TH5.aspx>.

¹² *See id.* (“These students tend to work while enrolled and can’t afford to take time off to study for the bar exam, [Southern California Institute of Law Dean Stanislaus Pulle, Loyola Law School professor Christopher May, and retired California Court of Appeal Justice Elizabeth Baron] wrote, unlike those who attend higher-tier schools accredited by the American Bar Association.”).

¹³ *California’s State-Accredited and Unaccredited Law Schools and the Baby Bar*, *supra* note 9.

¹⁴ THE ST. BAR OF CAL., tit. 4, div. 3 (July 2007), *available at* <http://rules.calbar>.

students, provided they pass the First-Year Law Students' Examination.¹⁵ Otherwise known as the "Baby Bar Exam," the special test for those who plan to take the state's bar exam after graduating from an unaccredited school has survived legal challenges claiming equal protection violations.¹⁶ While offering an alternative path that gives more opportunities to disadvantaged groups in society,¹⁷ California's "Baby Bar" has proven difficult for students at unaccredited law schools to pass. Students pass that assessment at percentages below 30 percent.¹⁸

California's two alternative models of law schools differ from the ABA model not just in educational requirements, but also in cost of attendance.¹⁹ Using the most current data available from the 2013–14 and 2014–15 academic years, the average California resident tuition (not including mandatory fees) for one full year of a juris doctor program at one of California's twenty-one ABA-accredited schools is approximately \$44,170.²⁰ The average one-year tuition figure for the 18 California-accredited schools is approximately \$19,779.²¹

ca.gov/LinkClick.aspx?fileticket=5LAWXeKsh6U%3d&tabid=1227.

¹⁵ THE ST. BAR OF CAL., tit. 4, div. 1, ch. 3 (July 2007), available at <http://rules.calbar.ca.gov/LinkClick.aspx?fileticket=2KV5j0w6Cw%3d&tabid=1227>.

¹⁶ Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 368 (1995) (discussing the reasoning behind the exam's creation and attempts to eliminate the requirement for unfairly targeting unaccredited schools).

¹⁷ See George B. Shepherd, *Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders*, 12 CORNELL J.L. & PUB. POL'Y 637 (2003) (discussing the alleged discriminatory practices inherent in ABA accreditation).

¹⁸ *First Year Law Students' Examination Passage Rates*, TOP-LAW-SCHOOLS.COM (Apr. 2010), http://www.top-law-schools.com/uploads/File/FYLSX_Pass_Rates.pdf.

¹⁹ See TAMANAHA, *supra* note 3, at 176–77 (explaining how state bars removing the requirement of graduating from an ABA-accredited school to practice law will lead to lower tuition costs).

* One-year tuition for Golden Gate University School of Law estimated by multiplying the per credit cost by thirty, the average number of credits typically taken in one year of law school.

²⁰ *Law Schools in California Accredited by the American Bar Association (ABA)*, THE ST. BAR OF CAL. <http://admissions.calbar.ca.gov/Education/LegalEducation/LawSchools.aspx>. Compiled from the most current data on all twenty-one ABA-accredited California law schools on May 27, 2014. Subject to adjustment once all schools have officially announced their 2014–15 tuition data.

²¹ *Law Schools in California Accredited by the Committee of Bar Examiners (CALS)*, THE ST. BAR OF CAL. <http://admissions.calbar.ca.gov/Education/LegalEducation/LawSchools.aspx>. Compiled from the most current data on all eighteen California-accredited law schools on May 27, 2014. Subject to adjustment once all schools have officially announced their 2014–15 tuition data. For some schools, to determine tuition for one school year, I multiplied the per credit cost by thirty, the average number of credits typically taken in one year of law school. For schools with tiered pricing by year, I averaged the prices together. Data from Humphreys College

Unaccredited schools, twenty-three in all, average \$7,230 in the same category.²²

The significant differences between tuition costs among the three levels of legal education in California stem from the standards each group is required to meet. Library collection requirements provide a straightforward example of the connection between costs and standards. For instance, all ABA-accredited schools must have a “core collection” of texts in their law library containing specific volumes listed in the ABA accreditation rules.²³ California’s State Committee of Bar Examiners created a less comprehensive list of mandatory materials their schools must have on their shelves.²⁴ Unaccredited schools, especially those in the Correspondence and Distance Learning categories, have an even lighter burden in regards to their “core collection.”²⁵ Schools have to spend money on library resources and on the facilities to store the collection depending on their accreditation standing. The higher the costs are to meet mandatory standards, the higher tuition students must pay to attend the school.²⁶

Laurence Drivon School of Law unavailable.

²² *Unaccredited Law Schools in California*, THE ST. BAR OF CAL., <http://admissions.calbar.ca.gov/Education/LegalEducation/LawSchools.aspx>. Compiled from the most current data on all twenty-three unaccredited California law schools on May 27, 2014. Subject to adjustment once all schools have officially announced their 2014–15 tuition data. (See above.) For some schools, to determine tuition for one school year, I multiplied the per credit cost by thirty, the average number of credits typically taken in one year of law school. For schools with tiered pricing by year, I averaged the prices together. Average Correspondence school tuition for one year in the juris doctor program: \$6,200; Average Distance Learning school tuition for one year in the juris doctor program: \$7,497; Average Fixed Faculty school tuition for one year in the juris doctor program: \$10,380. Data from the California Desert Trial Academy and the McMillan Academy of Law unavailable (both are in the Fixed Faculty category).

²³ *2013-2014 ABA Standards and Rules of Procedure for Approval of Law Schools: Library and Information Resources*, AM. BAR ASS’N, Standard 606, Interpretation 5 (2012), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.authcheckdam.pdf (“A law library core collection shall include the following . . .”).

²⁴ See The State Bar of California, *Guidelines for Accredited Law School Rules*, 8.4 (Feb. 5, 2011), http://admissions.calbar.ca.gov/Portals/4/documents/Education/Accredited_Law_School_Guidelines-R.pdf (“A law school’s law library must contain the following law library material . . .”).

²⁵ See The State Bar of California, *Guidelines for Unaccredited Law School Rules*, 6.2 (Jan. 1, 2008), http://admissions.calbar.ca.gov/Portals/4/documents/Education/Unaccredited_Law_School_Guidelines.pdf (stating the library requirements for unaccredited law schools in California).

²⁶ TAMANAHA, *supra* note 3, at 126–34 (explaining why accreditation standards, among other factors, have raised law school tuition).

Giving schools with alternative legal education models the same opportunities as ABA-accredited schools may lead to legal education evolution, lower tuition costs, and perhaps even better students.²⁷ Until this happens nationwide, ABA accreditation will continue to influence legal education in partially negative ways.²⁸

B. U.S. News & World Report Law School Rankings

Financial pressures on legal education during the 1980's and 90's weakened the power of U.S. law schools to choose their students at their own discretion.²⁹ Power shifted to prospective law students searching for the certain school that would help them succeed, especially during periods when the legal job market struggled.³⁰ In this environment, law school rankings emerged, most notably the systemic annual rankings started in 1990 by the *U.S. News & World Report*.³¹ Since then, the rankings have caused law schools to evolve in ways that cater to the ranking calculus, with some law schools even risking their integrity to improve their standing.

U.S. News set modest expectations for its first Graduate and Professional School rankings, appearing in their March 19, 1990 issue: "Of course, no academic rankings, especially those dealing with a subject as complicated and diverse as graduate studies, can do more than approximate the realities of academic quality."³² *U.S. News* expected graduate school admissions directors to believe that the rankings did not automatically tell prospective students to always attend the higher-ranked school; the "best" program may not be the "best" for everyone.³³

The institutions representing the legal education community did not buy the magazine's modesty then or now, criticizing the rankings a month prior to the list's release in a statement that "remains relevant

²⁷ See Rhode, *supra* note 2, at 456 (discussing the benefits of opening up the legal education market to different structures that are cost-effective).

²⁸ See *id.* at 455 (discussing the popularity of ABA accreditation among legal educators).

²⁹ See Paul L. Caron & Rafael Gely, *What Law Schools Can Learn From Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1509–10 (2004) (reviewing MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003)) (describing the reasons for the development of systemic law school rankings by the *U.S. News & World Report*).

³⁰ See *id.* at 1510 (discussing the concern of prospective law students to make a living in the legal profession).

³¹ TAMANAHA, *supra* note 3, at 78.

³² Thomas Toch & Ted Slafsky, *The Best Professional Schools in America*, U.S. NEWS & WORLD REP., Mar. 19, 1990, at 47.

³³ See *id.* (describing the predicted impact of the *U.S. News* rankings).

today.”³⁴ *U.S. News* chose to directly address the legal education community critique in a short article entitled *Why U.S. News Ranks Colleges*.³⁵ In it, the magazine acknowledged the drawbacks of rankings, but ultimately argued for their necessity.³⁶ Since the 1990 rankings, the legal education community and *U.S. News* have remained at odds over the rankings of law schools. No one doubts the impact of rankings’ fluctuations on students, alumni, prospective employers, faculty happiness, and the perception of a dean’s success or failure.

Today’s *U.S. News* law school ranking calculus includes many factors, including: Quality Assessment (consisting of a peer assessment and practitioner/judge assessment score); Selectivity (consisting of the median LSAT score, the median undergraduate GPA, the acceptance rate), the placement success of graduates, and the bar passage rate in the state where the largest number of students took the bar exam); and Faculty Resources (consisting of the average expenditures per student, the student-faculty ratio, and the value of library resources).³⁷ This calculus significantly affects the choices law students, law schools, and the legal profession make. Prospective law students use the rankings to determine which law schools are most favored by future legal employers.³⁸ Law schools use the rankings to address the effectiveness of their educators and administrators, as well as strategize for the future around finding ways to raise their ranking to attract higher credentialed students and protect their revenue stream.³⁹ The legal profession not only contributes to the rankings with the practitioner assessment, but also uses the rankings to make hiring decisions and judge the quality of law graduates on the strength of their legal education.⁴⁰

³⁴ See Statement Regarding Law School Rankings, Assoc. of Am. Law Sch. (Feb. 1990), available at http://www.aals.org/about_handbook_sgp_ran.php (arguing against all efforts to rank law schools).

³⁵ Mel Elfin, *Why U.S. News Ranks Colleges*, U.S. NEWS & WORLD REP., Mar. 19, 1990, at 50.

³⁶ See *id.* (“Unfortunately, in a society that prides itself on being a bias-free meritocracy, where one goes to school matters more than it should.”).

³⁷ See Sam Flanigan & Robert Morse, *Methodology: 2015 Best Law Schools Rankings*, U.S. NEWS & WORLD REP., Mar. 10, 2014, available at <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2014/03/10/methodology-2015-best-law-schools-rankings> (describing the inputs into the 2015 school year rankings).

³⁸ See TAMANAHA, *supra* note 3, at 78–80 (describing the effects of law school rankings on the behavior of law students, law schools, and the legal profession).

³⁹ *Id.*

⁴⁰ *Id.*

Prospective students and legal employers are two external constituencies of law schools that rely on the *U.S. News* rankings to the point where management of the school's ranking is critical to the performance of a responsible law school administrator.⁴¹ While not in total control of all the factors that are calculated into the final rankings, law schools manage the figures in their control in order to maximize their ranking. For example, expenditures on students weigh on the overall score of a law school, and to some extent are within the control of administrators and are increased to the maximum amount in order to receive the best possible score in that category.⁴² As law schools raise expenditures, negative consequences are passed down to students: "To raise scores in this category, law schools spend more money per student (or use accounting tricks to claim higher expenditures)—yet another factor pushing up the spiraling cost of a legal education."⁴³

Law schools also improve or maintain their median LSAT and GPA score, both significant statistics in the *U.S. News* calculus, by offering more merit-based scholarships to higher-achieving prospective-students.⁴⁴ More of these scholarships lead to a decline in need-based financial assistance for less-wealthy students (except at the schools with the largest endowments).⁴⁵ Some suggest that poor students who are admitted by more than one school are likely to decide based on the price tag rather than the quality of the school, and may decide to attend a lower-ranked school because of the lack of need-based financial assistance at the higher-ranked school.⁴⁶ Considering that wealthier people achieve higher scores because of their

⁴¹ See MICHAEL SAUDER & WENDY ESPELAND, *Fear of Falling: The Effects of U.S. News & World Report Rankings on U.S. Law Schools*, in LAW SCH. ADMISSION COUNCIL RESEARCH REPORT SERIES 27–32 (2007), available at [http://www.lsac.org/docs/default-source/research-\(lsac-resources\)/gr-07-02.pdf](http://www.lsac.org/docs/default-source/research-(lsac-resources)/gr-07-02.pdf) (explaining how the value placed on *U.S. News* rankings by law students and employers shape the decisions of law school administrators).

⁴² See *id.* at 10 (describing common methods law schools to improve or maintain their ranking).

⁴³ TAMANAHA, *supra* note 3, at 82.

⁴⁴ See Sauder & Espeland, *supra* note 41, at 11 ("One strategy that many admissions administrators have employed to raise their schools' median LSAT scores is to increase the money spent on merit scholarships in order to encourage students with high LSAT scores to attend their school.").

⁴⁵ See TAMANAHA, *supra* note 3, at 98 (discussing the effect of reallocating scholarships on financially challenged students).

⁴⁶ See *id.* at 101–02 ("Applicants from families with money would attend the better school without hesitation. Applicants from middle-class families will be faced with the agonizing decision of whether taking on mountainous debt will be worth the advantages gained from going to the higher-ranked school.").

background and ability to pay for test-preparation resources,⁴⁷ lower-income students have a much more difficult journey to join the legal profession: “[A]s a greater proportion of middle class and poor select the lower option in the law school hierarchy for financial reasons . . . more and more elite legal positions will be in the hands of the wealthy.”⁴⁸ While reallocating resources in this manner is not necessarily against ethical mores, it is described as a way of “gaming” the system.⁴⁹

Once law schools allocate scholarship dollars to students with high LSAT scores, they seek ways to increase revenue in order to pay for these incentives. One way for schools to gain revenue is through accepting more transfer students who pay full tuition and subsidize the merit-based scholarships already granted.⁵⁰ In some urban settings with multiple law schools, there is a well-worn path from the lower ranked schools to higher ranked ones.⁵¹ Law schools encourage students seeking to transfer in and out of institutions because these paying students also do not factor into the selectivity statistics such as LSAT scores—they represent “LSAT-free money.”⁵² Five percent of law students transfer schools each year, with students evenly moving in and out towards higher-ranked institutions throughout the spectrum of law schools.⁵³ Only the very top schools (which only significantly accept transfers) and the very bottom schools (which only significantly lose transfers) have enrollments unevenly impacted.⁵⁴

⁴⁷ See SAUDER & ESPELAND, *supra* note 41, at 12 (describing the effect of law school rankings on student body diversity).

⁴⁸ TAMANAHA, *supra* note 3, at 101.

⁴⁹ Jerome Organ, *How Scholarship Programs Impact Students and the Culture of Law School*, 61 J. LEGAL EDUC. 173, 184 n.18 (2011) (explaining why law schools choose a scholarship model that hands out higher numbers of merit-based scholarships than one that hands out an even number of merit- and need-based scholarships).

⁵⁰ See William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: How Long Will it Last if Law Grads Can't Pay Bills?*, A.B.A. J., Jan. 1, 2012, available at http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills/ (discussing the financial environment of law school, including how law school cross-subsidize scholarship money with the full tuition payments of other students).

⁵¹ TAMANAHA, *supra* note 3, at 89.

⁵² *Id.*

⁵³ See Jeffery L. Rensberger, *Tragedy of the Student Commons: Law Student Transfers and Legal Education*, 60 J. LEGAL EDUC. 616, 618 (2011) (describing raw transfer student data over the past decade and arriving at an average figure of just over five percent).

⁵⁴ See TAMANAHA, *supra* note 3, at 89–96 (discussing the trickle-down effect of student transfers through the subgroups of the law school rankings).

1. Fraudulent Reporting of Law School Data

While the “transfer loophole” is still one among many accepted policies to keep median LSAT scores untouched and add more revenue from tuition at the same time, some schools have reported misleading and falsified LSAT data attain a higher ranking. *U.S. News* first took notice of incorrect scoring data in 1995, when it named twenty-nine schools reporting LSAT medians that differed from those given to the ABA.⁵⁵ The 2000’s brought many reports⁵⁶ of falsely inflated LSAT data at institutions such as the Villanova University School of Law and the University of Illinois College of Law.⁵⁷ Villanova’s Dean John Gotanda had to publicly announce his school’s dishonest three-point bump in its median LSAT score from 159 to 162. The school dipped seventeen points in the rankings after the admission.⁵⁸

At Illinois, “[e]ach year, the admissions dean falsified the LSAT, GPA, and acceptance rate just enough to meet [predetermined] targets.”⁵⁹ The gaming of the system did not end at manipulating LSAT scores for Illinois. “Creative accounting” led them to add to their student expenditures total by \$8.7 million.⁶⁰ Undergraduates at Illinois could enter the College of Law without taking the LSATs if they reached a high enough GPA, giving one *U.S. News* statistic an artificial boost while preserving another important figure.⁶¹ Illinois’ *U.S. News* ranking tumbled from 23 (2012) to 35 (2013) to 47 (2014).⁶² In 2015, the school began to recover from its past practices and improved to

⁵⁵ *Id.* at 81 (citing *LSAT Scores: Disturbing Discrepancies*, U.S. NEWS & WORLD REP., Mar. 20, 1995).

⁵⁶ Karen Sloan, *Law Schools’ Credibility at Issue*, Tex. Lawyer, Sept. 19, 2011, available at <http://www.texaslawyer.com/id=1202514909433> (describing the increase in the practice of altering GPA and LSAT statistics for their *U.S. News* rankings).

⁵⁷ See TAMANAHA, *supra* note 3, at 81 (“The multiple years of false reporting by Villanova and Illinois in the mid-2000s were not mistakes.”).

⁵⁸ *Id.* at 74.

⁵⁹ *Id.* at 83.

⁶⁰ See Alex Wellen, *The \$8.78 Million Maneuver*, N.Y. TIMES, July 31, 2005, available at http://www.nytimes.com/2005/07/31/education/edlife/wellen31.html?page-wanted=all&_r=0 (discussing how the University of Illinois calculated a “fair market value” of only legal resources such as Westlaw and LexisNexis to include in their student expenditure tally in an effort to improve the school’s ranking in the *U.S. News*).

⁶¹ See TAMANAHA, *supra* note 3, at 82–83 (“As part of its initiative, the law school developed a program that granted admission to University of Illinois students with high GPAs without requiring that they take the LSAT exam.”).

⁶² *Best Law Schools Rankings*, U.S. NEWS & WORLD REP., Mar. 10, 2014, available at <http://usnews.com/best-graduate-schools/top-law-schools>. Based on the 2014 information, Illinois is ranked #40. *Id.*

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40th.⁶³

Schools have manipulated one figure in particular more often than others—the overall employment rate nine months after graduation.⁶⁴ Until recent modifications in the reporting requirements, schools had numbers above the 90th percentile up and down the pecking order, showing prospective students an unrealistic view of their own prospects.⁶⁵

The National Association for Legal Career Professionals' (NALP) report on the law school graduating class of 2009 revealed an overall employment rate of 88.3 percent of graduates with known employment status.⁶⁶ This rate had decreased for two years in a row, decreasing 3.6 percent from the 91.9 percent for the Class of 2007.⁶⁷ The employment figure for the class of 2009 is the lowest employment rate reported since the mid-1990s.⁶⁸

But nearly 25 percent of the employed class of 2009 law school graduates worked in temporary jobs.⁶⁹ Around 41 percent worked in temporary public interest jobs, 30 percent worked in temporary business jobs, and 8 percent worked in temporary private practice jobs.⁷⁰ Many of these temporary jobs are positions as contract attorneys, often conducting document review for \$20 per hour with no benefits.⁷¹

Many law schools also provided recent graduates with short-term employment to improve their employment statistics, a practice that continues in 2014. Law schools have increasingly provided recent graduates with employment through fellowships, grant programs for public interest work, and on-campus jobs.⁷² These programs provided an estimated 2 percent of employment for the Class of 2009, over 800

⁶³ *Id.*

⁶⁴ See TAMANAHA, *supra* note 3, at 72 (discussing the rapid change towards higher employment rates in the beginning of the 21st century due to law schools “goosing” numbers, misleading prospective law school students).

⁶⁵ *Id.*

⁶⁶ *Class of 2009 Faced New Challenges With Recession: Overall Employment Rate Masks Job Market Weakness*, ASS'N FOR LEGAL CAREER PROF'LS (May 20, 2010), <http://www.nalp.org/2009selectedfindingsrelease> [hereinafter NALP].

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ David Segal, *Is Law School a Losing Game?*, N.Y. TIMES (Jan. 8, 2011), http://www.nytimes.com/2011/01/09/business/09law.html?_r=1&pagewanted=all.

⁷⁰ *Id.*

⁷¹ Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, at A1.

⁷² NALP, *supra* note 66.

jobs in total.⁷³

Law school graduates are also increasingly accepting employment that is classified as permanent, but is part-time or non-legal in nature. More than 10 percent of employed law school graduates in 2009 worked part-time, up 6 percent from the previous year.⁷⁴ The percentage of law school graduates employed as practicing attorneys has decreased: 70.8 percent of law school graduates in 2009 were employed in jobs that required a juris doctor (J.D.), compared with 74.7 percent of the graduates in the previous year.⁷⁵

2. Civil Claims

Some law schools were accused of manipulating employment statistics. Students and graduates have sued law schools for manipulating employment figures, and law schools have suffered through a number of scandalous incidents perpetrated by pressured administrators.⁷⁶ Legal action against fraudulent employment data and steady pressure by lawyers and legal academics demanding transparency have led to changes in the way law schools report this information to the ABA.⁷⁷ Prior to the change in policy, parties had challenged the ABA about its motivation for maintaining a system that allowed law schools to report deceptive numbers and yet stay within the reporting rules.⁷⁸

Only the most skeptical prospective law students could pick up on the questionable-but-permitted techniques law schools used when reporting employment rates above the 90th percentile before the recent changes in reporting requirements.⁷⁹ As the economic situation

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *E.g.*, LAW SCHOOL TRANSPARENCY, <http://www.lawschooltransparency.com> (last visited July 29, 2013).

⁷⁷ See Press Release, ABA, Reforms to Reporting of Law Graduate Employment Data Proposed by ABA's Section of Legal Education and Admissions to the Bar (Mar. 20, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/2012_proposed_standard_509.authcheckdam.pdf (announcing changes to Accreditation Standard 509, which governs employment data reporting requirements).

⁷⁸ See, *e.g.*, Press Release, Senator Barbara Boxer, Boxer Calls on American Bar Association to Ensure Accurate and Transparent Data Reporting by Law Schools (Mar. 31, 2011), *available at* <http://www.boxer.senate.gov/en/press/releases/033111b.cfm> (criticizing the ABA for lack of transparency in post-graduation data).

⁷⁹ See TAMANAHA, *supra* note 3, at 71–73 (discussing the secretive ways law schools goosed their employment numbers, including counting any job, even part-time, non-professional work, as “employed,” leaving out students who stopped looking for a job

worsened, however, the public learned about the true state of the job market.⁸⁰ Groups of students attending more than a dozen law schools took legal action against their schools for reporting fraudulent data in late 2011.⁸¹ Specifically, fifteen class action lawsuits⁸² against law schools alleged that the employment data reported masked the reality that many graduates did not take jobs requiring bar-passage or even a J.D. degree.⁸³

Some of the complaints have failed to survive the defendant-law school's motion to dismiss. The U.S. District Court for the Western District of Michigan dismissed the lawsuit against Thomas M. Cooley Law School holding that the school neither violated the state's consumer protection laws nor defrauded the students by publishing "vague" employment figures.⁸⁴ Although the statistics did not include more specific information about the kind of employment, the court's opinion candidly says the plaintiffs should have realized the nature of the numbers by common sense.⁸⁵ The U.S. Circuit Court of Appeals for the Sixth Circuit affirmed the judgment in favor of the law school.⁸⁶

or went to pursue another professional degree, and hiring their own unemployed graduates temporarily as interns). For a further discussion see Segal, *supra* note 69.

⁸⁰ *Id.* at 72.

⁸¹ See Joe Palazzolo, *A Dozen Law Schools Hit With Lawsuits Over Jobs Data*, WALL ST. J. (Feb. 1, 2012, 2:28 PM), <http://blogs.wsj.com/law/2012/02/01/a-dozen-law-schools-hit-with-lawsuits-over-jobs-data/> (discussing the three previously existing lawsuits against Thomas M. Cooley Law, New York Law, and Thomas Jefferson Law while introducing twelve more lawsuits against the following: Albany Law, Brooklyn Law, Hofstra Law, Widener Law, Florida Coastal, Chicago-Kent, DePaul Law, John Marshall Law, California Western, Southwestern, USF Law and Golden Gate).

⁸² See *Filed Complaints*, ANZISKALAW.COM, http://anziskalaw.com/Filed_Complaints.html (last visited Sept. 7, 2014) (listing fourteen law schools currently involved with class action suits for fraudulent employment data). Different attorneys are handling the proceedings against Thomas Jefferson Law School. *Motion For Class Certification: Alaburda v. Thomas Jefferson School of Law*, SCRIBD.COM, <http://www.scribd.com/doc/158698088/Motion-For-Class-Certification-Alaburda-v-Thomas-Jefferson-School-of-Law> (stating that Miller Barondess, LLP is representing the plaintiffs in the Thomas Jefferson Law lawsuit).

⁸³ *See id.*

⁸⁴ See *MacDonald v. Thomas M. Cooley Law Sch.*, 880 F. Supp. 2d 785, 799 (W.D. Mich. 2012) ("The bottom line is that the statistics provided by Cooley and other law schools in a format required by the ABA were so vague and incomplete as to be meaningless and could not reasonably be relied upon. But, as put in the phrase we lawyers learn early in law school—*caveat emptor*.").

⁸⁵ See *MacDonald*, 880 F. Supp. 2d at 794 ("[I]t is unreasonable to think that all self-employed graduates from arguably the lowest-ranked law school in the country have bustling full-time legal practices immediately upon graduation.").

⁸⁶ See *MacDonald v. Thomas M. Cooley Law Sch.*, 724 F.3d 654, 657 (6th Cir. 2013) ("[B]ecause the Michigan Consumer Protection Act does not apply to this case's facts, because the graduates' complaint shows that one of the statistics on which they relied was objectively true, and because their reliance on the statistics was unreasonable, we

Courts in other jurisdictions dismissed student class action suits using similar reasoning. The complaint involving Brooklyn Law School was dismissed in April 2013, the court ruling that the school did not publish “materially misleading” statistics.⁸⁷ Using prior dismissals of class action lawsuits against Albany and New York Law Schools, the court also held that the relationship between a law school and a student is not fiduciary in nature and therefore the law school does not owe a student an “affirmative duty of disclosure.”⁸⁸ Despite the setbacks, plaintiffs in all of the lawsuits plan to challenge any adverse decision from any court.⁸⁹

Other jurisdictions appear willing to hear plaintiff law graduates’ claims. In New Jersey, the U.S. District Court denied the motion to dismiss the lawsuit against Widener University School of Law because it believed the school’s publishing of the data constituted an “unlawful affirmative act” and could plausibly trick the plaintiff-students.⁹⁰ The federal court in New Jersey refused the law school’s motion to reconsider dismissal.⁹¹

3. Transparency Comes to Legal Education

Websites, such as Law School Transparency (LST), are working to expand law school openness and limit the number of fraudulent employment data complaints in the future.⁹² Started in 2009 by Vanderbilt University Law School students, LST portrays prospective law students as consumers and strives to give these consumers improved access to all law school data, including employment

affirm the district court’s judgment dismissing their complaint for failure to state any claim upon which it could grant relief.”).

⁸⁷ See *Bevelacqua v. Brooklyn Law Sch.*, No. 500175/2012, slip op. at 10 (N.Y. Sup. Ct. Apr. 22, 2013) (“[T]he employment and salary statistics BLS published may have been incomplete, but they were not false.”).

⁸⁸ See *id.* at 11–12 (discussing prior dismissals of complaints based on the lack of a special relationship between a law school and a student).

⁸⁹ See Karen Sloan, *Plaintiffs Take Law School Fraud Cases to New York’s Highest Court*, NAT’L L.J. (Feb. 19, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202588733671&Plaitiffs_take_law_school_fraud_cases_to_New_Yorks_highest_court_#ixzz2YIwDu3fh (accessed through LEXIS) (discussing Plaintiffs’ express interest in winning employment fraud lawsuits against law schools).

⁹⁰ See *Harnish v. Widener Univ. Sch. of Law*, 931 F.Supp.2d 641, 651–52 (D.N.J. 2013) (“[U]nder New Jersey’s broad remedial statute, Plaintiffs have sufficiently pled an unlawful affirmative act under the [New Jersey Consumer Fraud Act].”).

⁹¹ See *Harnish v. Widener Univ. Sch. of Law*, Civ. No. 12–CV–00608 (WHW), 2013 WL 1890276, at *4 (D.N.J. May 3, 2013) (discussing Plaintiffs’ need for further fact-finding to prove financial losses caused by Defendant’s allegedly fraudulent employment data).

⁹² LAW SCH. TRANSPARENCY, *supra* note 76.

information. The group believes improved access will lead to more educated decisions, create law school data reporting reform, and work towards lessening the cost of law school.⁹³ Prospective law students who use LST's list of score reports will see law schools listed alongside an "Employment Score," an "Under-employment Score," an "Unknown Employment Score," and the non-discounted Class of 2016 projected cost over three years and its corresponding likely monthly loan payment over ten years. Rather than an employment rate, the score is a specific, calculated number tabulated from the law school's existing employment data. LST does this to make the numbers more meaningful to prospective law students.⁹⁴

Pressure from websites like LST influenced the ABA and older ranking resources, namely *U.S. News*, to change its calculations. For the 2014 edition of the rankings, *U.S. News* adjusted its employment data calculus after the ABA asked law schools to report more specific employment numbers rather than only showing the percentage of graduates employed nine months after graduation.⁹⁵ The new data available allows prospective students to compare schools that have graduates leaving for J.D.-required jobs with other schools that have graduates heading towards non-law occupations.⁹⁶

NALP has collected specific profession-wide employment data for many years, and its data reflects a reality that only this year *U.S. News* and the ABA are choosing to reflect. NALP reports on employment

⁹³ *Mission*, LAW SCH. TRANSPARENCY, <http://www.lawschooltransparency.com/about/mission/> (last visited July 29, 2013).

⁹⁴ *See Methodology*, LAW SCH. TRANSPARENCY, <http://www.lstscoreports.com/methodology/> (last updated Apr. 3, 2014) ("[W]e add/subtract various categories to produce a number we believe matters to readers. For example, the Employment Score is a proxy for a successful start to a legal career.) The Employment Score is calculated by taking all jobs requiring bar passage, subtracting part-time employment, short-term employment, and solo practitioners, and dividing the result into the total number of graduates. *Id.*; *see generally* Kyle P. McEntee & Derek Michael Tokaz, *Take This Job & Count It*, 2 J.L. PERIODICAL LABORATORY OF LEGAL SCHOLARSHIP 309 (2012) (discussing the methodology of LST score reports in greater detail).

⁹⁵ *See* Robert Morse, *How to Evaluate Law Schools' Jobs Data*, U.S. NEWS & WORLD REP, <http://www.usnews.com/education/blogs/college-rankings-blog/2013/03/12/how-to-evaluate-law-schools-jobs-data> (last visited Sept. 7, 2014) ("For this year's rankings, *U.S. News* incorporated [the ABA data] into our computation of the employment measure for the class of 2011 at graduation and nine months later. Placement success was calculated by assigning various weights to the number of grads employed in 22 of these different types of post-J.D. jobs and durations.").

⁹⁶ *See* Derek Muller, *The 2014 U.S. News Law School Rankings: Employment Data*, TAXPROF BLOG (Mar. 27, 2013), <http://taxprof.typepad.com/taxprofblog/2013/03/the-2014.html> (listing the top ten law schools with graduates going into various kinds of work, ranging from full-time, bar passage-required work to unemployed).

from the class of 2012 show that the percentage of graduates working in a part-time or full-time position that required passage of a bar is 64.4 percent, a ten percent drop from 2008's 74.7 percent.^{97**} The percentage of unemployed law school graduates has risen to nearly 13 percent.⁹⁸ Although the raw number of jobs obtained increased for the class of 2012, more graduates received their J.D. than previous years, which resulted in the continued fall of bar passage-required employment since the beginning of the Great Recession.⁹⁹

Law school administrators are not solely responsible for their dubious statistic-reporting. "Structural" forces, namely *U.S. News* and the many that are influenced by rankings, have also left law schools in a highly competitive environment in which schools that bend the rules without detection are often rewarded.¹⁰⁰ The *U.S. News & World Report* rankings hinder the evolution of legal education in a way that is unconnected to the ranking calculus.¹⁰¹

Protest of fraudulent employment data has led to changes in what the ABA asks of law schools concerning employment data. As a result, the *U.S. News* calculus for their rankings changed to reflect the new reporting requirements. While lawsuits against earlier policies persist, the trend towards more transparency continues for prospective students to gauge their career prospects in the legal profession.

C. *The Student Loan Bubble*

In part, legal education has existed in its own nearly invulnerable economy because of the historical absence of transparency about law graduates' prospects. But this false economic environment has also existed because of the ready availability of government-guaranteed student loans. Compared to private loans, federal loans offer the ability to collect the capital necessary for law school at a lower interest

⁹⁷ *Law School Class of 2012 Finds More Jobs, Starting Salaries Rise—But Large Class Size Hurts Overall Employment Rate*, NALP (June 20, 2013), http://www.nalp.org/classof2012_selected_pr. The NALP's full employment report for the class of 2013 is due out in August of 2014.

** The NALP's Full employment report for the class of 2013 is due out August of 2014.

⁹⁸ *Id.* at 2.

⁹⁹ *Id.* at 1.

¹⁰⁰ *See id.* at 84 ("The structural explanation for why honorable law school administrators ended up taking disreputable actions for ranking purposes helps explain the developments of the past two decades.")

¹⁰¹ ABA Res. 111b, 2011 H. of Del. (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/2011nov11_cdr_resolution.authcheckdam.pdf.

rate and without potential prepayment penalties.¹⁰² With cumulative student debt at an estimated \$1.2 billion nationwide, politicians and financial experts alike are keeping a close eye on the potential for the system to collapse.¹⁰³

Legal education's economic status will especially experience a precipitous fall if the student loan bubble pops.¹⁰⁴ Legal education will finally have to live in the real economic world. Tuition levels will fall sharply. The consequences will be swift and harsh for university revenues, faculty salaries, benefits and status, facility expansions and renovations, administrative support for students, and law libraries. Law schools will look more like undergraduate social science departments.

*D. It's the Economy (Stupid)*¹⁰⁵

For a brief period before the economic crisis of the last decade, the legal profession managed to steady itself after a rise in the late 90's of unofficial multidisciplinary practices (MDPs) and the Enron debacle. Early-decade calls for abolishing state-by-state licensure procedures resulted in the modest changes eventually adopted to the multijurisdictional practice restrictions.¹⁰⁶ Enron's fall and the

¹⁰² See Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 215, 218–21 (2014) (describing the two main kinds of student loans available for students such as those in law school).

¹⁰³ See *Senator Warns Of A Student Loan Bubble*, NAT'L PUB. RADIO (Mar. 27, 2014), <http://www.npr.org/2014/03/27/294858103/senator-warns-of-a-student-loan-bubble> (“There are a lot of indications that [student loans are] a drag on our economy. In other words, students who have graduated from college and just starting work can't afford to buy a new house, can't afford to invest in other things.”); but see Donald E. Heller, *Is the \$1 Trillion Student Loan Debt Really a Crisis?*, WASH. POST (May 1, 2014), available at <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/05/01/is-the-1-trillion-student-loan-debt-really-a-crisis/> (“While it may be more popular and draw more readers to focus on those student loan borrowers who are the outliers, the reality is that the great majority of borrowers are making good decisions by investing in a college degree that will pay off throughout their lifetimes.”).

¹⁰⁴ See Angie Roberts-Huckaby, *Deceiving Law Students: Employment Statistics and Tort Liability*, 44 ST. MARY'S L.J. 671 (2013) (describing how the student loan crisis is particularly distressing to legal education and the legal profession as a whole).

¹⁰⁵ “It's the economy, stupid” is a slight variation of the phrase “The economy, stupid” which James Carville had coined as a campaign strategist of Bill Clinton's successful 1992 presidential campaign against sitting president George H. W. Bush. See Caleb Galoozis, *It's the Economy, Stupid*, HARV. POL. REV., <http://www.iop.harvard.edu/it%E2%80%99s-economy-stupid-2>.

¹⁰⁶ *Client Representation in the 21st Century: Report of the Commission on Multijurisdictional Practice*, ABA (2002), available at http://www.americanbar.org/content/dam/aba/migrated/final_mjp_rpt_121702_2.authcheckdam.pdf; MODEL RULES OF PROF'L CONDUCT R. 5.5.

resulting Securities and Exchange Commission (SEC) reforms temporarily quelled the call for MDP approval.¹⁰⁷ Australia and the United Kingdom adopted major reforms allowing alternative business structures and outside investment on law firms.¹⁰⁸

Then, the economic crisis arrived.

1. A Brief Overview of the Economic Crisis

The origins of this crisis are traceable to the burst of the tech bubble in the late 1990s.¹⁰⁹ The decline in the stock market beginning in 2000 and subsequent recession in 2001 led to the Federal Reserve dramatically lowering interest rates.¹¹⁰ Lower interest rates led to greater demand for homes, which in turn increased prices.¹¹¹ Many homeowners also refinanced their homes, taking advantage of lower interest rates and taking out significant portions of their equity generated by rising home prices.¹¹² As the housing market experienced growth, banks increasingly made subprime loans, high-risk loans given to homeowners with poor credit histories.¹¹³ These high-risk loans packaged together with other assets created collateralized debt obligations that were then sold to global investors.¹¹⁴

Rising interest rates from 1 percent to 5.32 percent from 2004 to 2006 triggered a slowdown in the housing market.¹¹⁵ Homeowners began to default on their adjustable rate mortgages.¹¹⁶ The Federal Reserve took several steps to help the situation on Wall Street.¹¹⁷ Losses

¹⁰⁷ Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 (2002). See also Robert R. Keatinge, *Multidimensional Practice in a World of Inevitable Ignorance: MDB, MJP, and Ancillary Business after Enron*, 44 ARIZ. L. REV. 717 (2002) (discussing Enron's impact on the legal profession).

¹⁰⁸ See *Legal Profession Act 2004*, NEW S. WALES CONSOLIDATED ACTS, available at http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/ (last visited Aug. 11, 2012); *Legal Profession Regulation 2005*, NEW S. WALES CONSOLIDATED ACTS, available at http://www.austlii.edu.au/au/legis/nsw/consol_reg/lpr2005270/ (last visited Aug. 11, 2012).

¹⁰⁹ *Economic Crisis and Market Upheavals*, N.Y. TIMES, Jan. 11, 2011, http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/index.html [hereinafter *Credit Crisis*].

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Timeline: Credit Crunch to Downturn*, BBC NEWS, (Aug. 7, 2009), <http://news.bbc.co.uk/2/hi/business/7521250.stm#table> [hereinafter *Credit Crunch*].

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Credit Crisis*, *supra* note 109.

¹¹⁷ *Id.*

on Wall Street continued, however, and the subprime crisis spread to other sectors, including commercial property, consumer debt, and company debt.¹¹⁸ On September 18, 2008, the U.S. Department of Treasury announced a \$700 billion government proposal to bail out the U.S.'s largest banks by buying toxic assets from major banking institutions.¹¹⁹ The federal government planned to increase confidence in the U.S. markets and improve the banks' balance sheets by implementing the largest U.S. government intervention into the financial markets since the Great Depression.¹²⁰

In November 2008, stocks fell to their lowest levels in a decade while unemployment reached its highest level in fifteen years.¹²¹ Home prices fell, and retailers suffered major losses. The Federal Reserve cut its benchmark interest rate to an unprecedented rate of nearly zero percent one month later, while other nations cut interest rates as well.¹²²

In January of 2009, Congress passed a \$787 billion stimulus package to revive the U.S. economy. By the summer of 2009, banks reported large profits and began the process of repaying the bailout money they had received from the U.S. government. Despite the increased stability in the financial markets, throughout 2009, unemployment levels rose to the highest seen in a generation.¹²³ The U.S. unemployment rate rose from 5.0 percent in December 2007 to 9.9 percent in December 2009.¹²⁴

2. The Financial Crisis and the Legal Profession

The decline in the U.S. economy had a major impact on the legal market, rapidly accelerating trends in corporate practices for consuming legal services that began two decades earlier. Law firms hired more attorneys during the early economic boom of the 2000s, especially to corporate law practice groups.¹²⁵ When the economic crisis hit, however, firms drastically reduced the number of attorneys

¹¹⁸ *Credit Crunch*, *supra* note 113.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Credit Crisis*, *supra* note 109.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Labor Force Statistics From the Current Population Survey*, BUREAU OF LAB. STAT., <http://data.bls.gov/timeseries/LNS14000000> (last visited Sept. 7, 2014).

¹²⁵ Michael J. de la Merced, *The Legal Profession Feels the Pain of Recession*, N.Y. TIMES (Mar. 26, 2009, 2:02 AM), http://dealbook.nytimes.com/2009/03/26/the-legal-profession-feels-the-pain-of-the-recession/?_php=true&_type=blogs&_r=0.

in these practice groups.¹²⁶ Firms shifted attorneys in corporate practice areas, such as real estate and securitization practice groups, into other fields such as bankruptcy.¹²⁷

Other law firms suffering from the economic downturn resorted to large attorney layoffs. In 2009, law firms laid off 12,259 attorneys and staff, often in large numbers at once.¹²⁸ In early February 2009, six major law firms reported large attorney and staff layoffs.¹²⁹ On one day alone in late February 2009, Latham & Watkins LLP laid off 440 employees, a total of 190 attorneys and 250 staff.¹³⁰ During a two-week period that March, law firm layoffs totaled nearly 2,700.¹³¹ Large firms laid off an additional 745 attorneys and staffers in 2010.¹³² Several firms ceased to exist in light of the poor economic conditions.¹³³

Even as the availability of legal jobs decreased, the number of newly-minted lawyers wanting employment increased. Both the number of law schools and law degrees awarded increased. In 2006, law schools awarded 43,883 juris doctor degrees, an increase of 15 percent from 37,909 in 2002.¹³⁴ The number of ABA-accredited law schools has increased by 11 percent since 1995, with the 2010 total, at the height of the economic recession, at 196.¹³⁵ Traditionally, universities saw value in adding law schools for both high-visibility prestige and financial benefits. Law schools are often money-makers for universities, as costs per student are low compared to other graduate schools.¹³⁶ Due to the crisis in legal education, universities now view the formation of a law school with less favor, although some, such as Indiana Tech, continue to create new law schools. With a

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See Debra Cassens Weiss, *2010 Sees a Huge Dropoff in BigLaw Layoffs: Fewer than 800 Job Losses Chronicled*, A.B.A. J. (Jan. 25, 2011 9:00 AM), <http://www.abajournal.com/news/article/2010-sees-a-huge-dropoff-in-biglaw-layoffs-fewer-than-800-job-losses-chronicled/>.

¹²⁹ Martha Neil, *Bloody Thursday: Six Major Law Firms Ax Attorneys*, A.B.A. J. (Feb. 12, 2009, 2:54 PM), <http://www.abajournal.com/news/article/bloody-thursday-4-major-law-firms-ax-attorneys-more-layoffs-at-others/>.

¹³⁰ Ashby Jones, *Law Firm Layoff Watch: Latham Cuts 190 Lawyers, 250 Staff*, WALL ST. J. L. BLOG (Feb. 27, 2009, 9:56 AM), <http://blogs.wsj.com/law/2009/02/27/law-firm-layoff-watch-latham-cuts-190-lawyers-250-staff/>.

¹³¹ Martha Neil, *March Mayhem: Law Firm Layoffs in 1 Week Total Nearly 1,500*, A.B.A. J. (Mar. 4, 2009 6:59 PM), <http://www.abajournal.com/news/article/march-mayhem-law-firm-layoffs-top-500-today-over-1200-since-friday/>.

¹³² Weiss, *supra* note 128.

¹³³ de la Merced, *supra* note 125.

¹³⁴ Efrati, *supra* note 71.

¹³⁵ *Id.*

¹³⁶ *Id.*

target of 100 for its first class, Indiana Tech enrolled 28 in Fall 2013.

Along with the increasing number of J.D. degrees awarded in the 2000s, tuition has also rapidly increased in recent years. Tuition almost tripled the rate of inflation during the past twenty years. In 2006, graduates of public law schools borrowed an average of \$54,509 and graduates of private law schools borrowed an average of \$83,181, up 17 percent and 18.6 percent from the same figures in 2002.¹³⁷

The economic downturn dramatically changed the nature of large law firm hiring and recruitment.¹³⁸ Law firms have completely cut or shortened summer associate programs, once the breeding grounds for associate jobs at law firms.¹³⁹ The number of students receiving employment as a summer associate also sharply decreased. In 2010, a survey reported that large law firms reduced their summer associate classes by an average of 44 percent.¹⁴⁰

Many law school graduates who did receive an offer for employment post-graduation at a law firm saw these offers deferred for a period of time. These deferrals lasted up to a year or longer.¹⁴¹ Some law firms provided stipends for their deferral period or provided an opportunity to work in pro-bono fellowships.¹⁴² Other deferred associates had to find other employment while waiting for their start dates at firms.¹⁴³ Most law firms did eventually employ their deferred associates, although some firms rescinded their employment offers entirely during the deferral period.¹⁴⁴

The economic woes affecting law practice influenced corporate clients to become highly sensitive to the long-standing practice of staffing low-level lawyer tasks to beginning law firm associates. Corporate clients began using in-house, salaried lawyers to do the work

¹³⁷ *Id.*

¹³⁸ For more information on legal employment data, see section II.B.1 titled "Fraudulent Reporting of Law School Data."

¹³⁹ de la Merced, *supra* note 125.

¹⁴⁰ Nicole Hong, *Summer Hiring Survey: 44 Percent Down in 2010*, AM. L.DAILY (July 21, 2010, 6:00 AM), <http://amlawdaily.typepad.com/amlawdaily/2010/07/summer-associates.html>.

¹⁴¹ Dana Mattioli, *First Task for Law-Firm Hires: Finding an Interim Job First*, WALL ST. J. (Oct. 6, 2009, 12:01 AM), <http://online.wsj.com/article/SB125478012114565787.html>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Debra Cassens Weiss, *Some Deferred Start Dates May Become Withdrawn Job Offers*, A.B.A. J. (May 12, 2009 11:15 AM), http://www.abajournal.com/news/article/warning_possible_associate_pile-up_ahead_and_some_will_crash_and_burn.

formerly done by outside counsel's associates. As early as 2007, clients also began to outsource work to lower cost service providers in India and Pakistan, as well as contract lawyers present at the firm for task-specific duration.¹⁴⁵

All of these changes in law firm employment and recruitment occurred slowly over the past two decades. The economic downturn simply accelerated the pace of change and reversal of these adjustments seems unlikely. While an upturn in economic activity will produce more legal work, it is hard to imagine corporate clients deciding to return to higher spending for legal services once they have established the means to avoid those costs. Rather than paying by the hour with little oversight, clients prefer paying through methods common to other commodities such as bidding and Requests for Proposals (RFPs). Corporate clients now use their procurement staff to consider how and when to spend money on legal services in the same manner they decide how and when to purchase paper clips.

Major law firms have adjusted in several ways. First, law firms have explored ways of outsourcing low-level legal tasks, allowing other firms to compete for the business of their clients.¹⁴⁶ Second, law firms have trimmed low-level staff and made the road to partner longer and more arduous.¹⁴⁷ Third, key partners from major firms have spun off into smaller firms, leaner in their own low-level staffing as well as location (and therefore rent and other overhead) and other expense factors.¹⁴⁸ These changes also seem unlikely to reverse course.

Further down the pecking order of legal services providers, the competition for the consumer legal services dollar has intensified. LegalZoom, virtual law firms and other online legal services providers have begun to compete for customers. Lawyerless dispute resolution products exist in the form of such web-based businesses as Legalfaceoff.com. The organized bar has lashed out at these low-cost, tech-savvy providers, often claiming they are engaged in unauthorized practice in particular jurisdictions.¹⁴⁹

¹⁴⁵ Cynthia Cotts & Liane Kufchock, *U.S. Firms Outsource Legal Services to India*, N.Y. TIMES (Aug. 21, 2007), available at <http://www.nytimes.com/2007/08/21/business/worldbusiness/21iht-law.4.7199252.html>.

¹⁴⁶ See Alison M. Kadzik, *The Current Trend to Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices*, 19 GEO. J. LEGAL ETHICS 731, 731 (2006).

¹⁴⁷ de la Merced, *supra* note 125.

¹⁴⁸ Rachel M. Arnett, *Ripping the Jackson Pollock Off of the Wall: Reconciling Jewel v. Boxer with the Modern Law Firm*, 26 GEO. J. LEGAL ETHICS 557, 557-58 (2013).

¹⁴⁹ See 28 LAW. MAN. PROF. CONDUCT 312 (2012) (identifying multiple lawsuits pending against LegalZoom for unauthorized practice, many of which are listed on Legal Zoom's IPO Prospectus); see also LegalZoom.com, Inc., Registration Statement

The changing practice of corporations paying law firms for legal services is well-chronicled. As important as these changes are in one segment of the legal marketplace, they are irrelevant in another; even before the economic downturn, most law graduates did not go to large law firms. Instead, most go to small or solo law practices and government offices, such as prosecutor and public defender offices.¹⁵⁰ Small practices offer only sporadic and idiosyncratic training at best. In government offices, little has changed from before the economic downturn in terms of the training programs that are available, some of which are quite good. The push away from corporate funding of large law firm training is thus exaggerated in some measure. Its prominence in the conversation is driven by the louder voice of the large law firm practice cohort and the General Counsel offices they serve.

By 2009, economic trouble left the legal profession damaged. Every corner of the profession suffered some form of economic hardship and every corner contemplated different ways in which practice forms would need to adjust, not only to economic pressure but to technological and global developments. ABA President, H. Thomas Wells, confirmed the state of crisis in the legal profession. In his President's Page, *Facing Challenges in Crisis Mode*, he stated: "[t]hese times promise a sea of change for government, private industry and the legal profession. The economic crisis is affecting every business and line of work, and lawyers have been hit relatively early and hard."¹⁵¹ His suggestion? "It's during times like these that our members can take excellent advantage of association resources, [such as] programs, publications and other activities."¹⁵² Magazines. CLEs. Seminars. In the middle of the recession, the organized profession provided little in the way of a meaningful response to prevent or mitigate the current crisis in legal education.

E. The Anachronism of the Bar Exam

The standard form of the bar exam has also inhibited reforms necessary to combat the crisis in legal education, calcifying the mismatch between legal education and the legal services industry.

(Form S-1) (May 10, 2012), available at http://www.sec.gov/Archives/edgar/data/1286139/000104746912005763/a2209299_zs-1.htm. (showing the Prospectus filed with SEC).

¹⁵⁰ See *Recent Graduates*, ASS'N FOR LEGAL CAREER PROFESSIONALS, http://www.nalp.org/employmentpatterns1999_2010 (showing sets of employment data dating back to 1999).

¹⁵¹ H. Thomas Wells Jr., *Facing Challenges in Crisis Mode Extraordinary Times Require Extraordinary Efforts From Lawyers*, 95 A.B.A. J. 9 (2009).

¹⁵² *Id.*

Each state tests a dizzying myriad of disciplines beyond the core subjects tested on the Multistate Bar Exam (MBE) and the Multistate Professional Responsibility Exam.

A typical law school requires eighty-four credits to graduate.¹⁵³ Courses average three credits each, so a typical student takes about twenty-eight courses over three academic years.

Often justified for its “gatekeeper” function of protecting the public from incompetent lawyers, the profession has lost sight of the function of the bar exam as a gatekeeper. The gate itself must relate to what is on the other side of the gate—the practice of law. A difficult macramé-skills exam keeps many from passing through the gate, but there is less confidence that those who pass can actually practice law. Purely testing knowledge of a wide array of topics fails to assure lawyer *competence* as well.¹⁵⁴ The current typical bar exam tests too much and too little. The sheer number of substantive subjects tested and the absence of serious testing of the skills of law practice combine to make the bar exam a counter-productive exercise.¹⁵⁵

No lawyer knows all the law that would be useful to know. Lawyers should have a baseline level of knowledge of the core legal subjects; beyond that, every lawyer must know how to learn what is needed to serve his or her clients. Lawyers do not solve a client’s problem solely based on what he or she learned during a particular Tuesday afternoon session of Torts or Contracts class. Client problems are more complex than that, and almost always require some measure of synthesis of topics. No matter how many subjects are tested, substantive law testing

¹⁵³ See AMER. BAR ASS’N, 2007–2008 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 25 (2007), available at http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/20072008StandardsWebContent/Chapter_3.authcheckdam.pdf (“To achieve the required total of 58,000 minutes of instruction time, a law school must require at least 83 semester hours of credit, or 129 quarter hours of credit.”); see, e.g., *Cornell Law School: JD*, CORNELL UNIVERSITY LAW SCHOOL, <http://www.lawschool.cornell.edu/admissions/degrees/jd/index.cfm> (last visited Nov. 5, 2012) (“Students must satisfactorily complete 84 semester credit hours.”).

¹⁵⁴ In *A Modest Proposal for Bar Exam Reform*, VOLOKH CONSPIRACY (July 29, 2009, 1:11 AM), <http://www.volokh.com/2009/07/27/a-modest-proposal-for-bar-exam-reform>, Ilya Somin writes:

[A]s anyone who has taken a bar exam knows, they test knowledge of thousands of arcane legal rules that only a tiny minority of practicing lawyers ever use. . . . Effectively, bar exams screen out potential lawyers who are bad at memorization or who don’t have the time and money to take a bar prep course or spend weeks on exam preparation.

¹⁵⁵ See Daniel R. Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. 1191, 1206 (1995) (“Rather than testing for competency (or incompetency), the bar exam is essentially an achievement test and does not test for what lawyers actually do.”).

will never ensure that every beginning lawyer knows all of the law that would be useful to know. There is too much law and it is too complex. If the profession hopes for legal education reform, it must stop designing a bar exam that seems aimed at that unrealistic and unnecessary goal.

Insecure students have invested upwards of \$150,000 in their legal education and will invest thousands more in bar prep courses.¹⁵⁶ They understandably fear facing the bar exam without having taken as many of the tested subjects as possible during their three years of law school.¹⁵⁷ This fear exists in inverse proportion to the status of the law school attended and the qualifications of the students. The further down the pecking order the law school is, the more insecure are the students about facing the bar exam. While elitism impedes reform at the highest ranked schools, fear of the bar exam impedes reform at the lowest ranked schools (other factors play significant roles as well, such as the ranking system itself and the inflexibility of the accreditation standards, both of which force all law schools to look as much as possible like Yale).¹⁵⁸ By pressuring students to prepare for a dizzying number of subjects,¹⁵⁹ the bar exam impedes legal education reforms.¹⁶⁰ Courses (or activities within courses) on writing, problem solving, project management, teamwork, business-savvy, and financial

¹⁵⁶ *Which Law School Graduates Have the Most Debt*, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings>. (last visited Sept. 7, 2014). The cost of a bar exam prep course may increase a student's debt load by a few thousand dollars. See, e.g., *California Bar Review Course Pricing*, BARBRI, <http://www.barbri.com/courseInfo/barReviewCourse/pricing.html?selectedState=CA> (last visited May 28, 2014).

¹⁵⁷ See Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 360 (2003) ("[S]tudents almost invariably flock to those courses which are tested on the bar examination.").

¹⁵⁸ See Rachel F. Moran, *Of Rankings and Regulation: Are the U.S. News & World Report Rankings Really a Subversive Force in Legal Education?*, 81 IND. L.J. 383, 391-93 (2006) (commenting on the impact of the *U.S. News and World Report* rankings and comprehensive accreditation standards on legal education).

¹⁵⁹ Some states test as many as twenty-eight subjects. Many test more than twenty-two. See, e.g., *Frequently Asked Questions: Question 15: What is the Format of the Michigan Bar Examination?*, MICH. CTS., [http://courts.mi.gov/courts/michigansupremecourt/ble/pages/frequently-asked-questions-\(faqs\).aspx](http://courts.mi.gov/courts/michigansupremecourt/ble/pages/frequently-asked-questions-(faqs).aspx) (last visited Sept. 7, 2014); *Texas Bar Examination Subjects*, TEX. BD. L. EXAMINERS, <http://www.ble.state.tx.us/Rules/NewRules/appendixA.pdf> (last visited Sept. 7, 2014); *Bar Exam Tests and Topics Tested*, PA. BD. L. EXAMINERS, http://www.pabarexam.org/bar_exam_information/testsubjects.htm (last visited May 28, 2014).

¹⁶⁰ See Ohio St. Bar Ass'n, *Report of the Task Force on Legal Education Reform*, OHIO ST. BAR ASS'N 16 (Dec. 2009), available at https://www.ohiobar.org/General%20Resources/pubs/OSBA_Legal_Education_Task_Force_Report.pdf; Glen, *supra* note 157, at 379 (quoting Am. Bar. Ass'n, *Legal Educational and Professional Development: An Educational Continuum* (1992) at 278).

knowledge are not tested on the bar exam. The resulting official message sent is that they are not a concern of the organized bar. They simply do not play a role in the gatekeeping function. Instead, the gate bears little relationship to what is beyond the gate.

When law schools require more writing courses, more practice-oriented courses, and more ethics courses, students and alumni ask: “But how will they pass the twenty-seven subjects tested on the Bar exam?” Students, depending on their level of insecurity, feel a need to fill up their schedules with as many bar courses as possible. Law schools feel a corresponding obligation to offer as many bar courses as possible. Ten subjects, including the MBE subjects, ethics, and state-specific procedure, would be more than sufficient to satisfy desires to make the exam a difficult, character-building rite of passage. Every additional subject tested incrementally diminishes the ability of law schools to reform their curricula to pay more attention what lawyers want law students to know when they undertake law practice.

The debate has played out at bar conclaves on legal education such as the one in New York in 2012. The Kenney Committee recommended to “streamline” the bar exam “to test more realistically for knowledge of legal rules that lawyers need to memorize before beginning practice.”¹⁶¹ But the NYSB Committee members differed sharply on what “streamlining” might mean and on whether any such move benefited legal education in the first instance.¹⁶² Proponents of the Kenney Report recommendation regarded it as

evident that we now rely too much on testing a candidate’s ability to memorize an overly technical set of legal issues chosen more by history than a careful analysis of the needs of new lawyers in our profession today. [We] emphasize that contemporary lawyers almost always have ready access to legal materials and argue that reducing the role of doctrine committed to memory will create space for testing other skills and aptitudes.¹⁶³

Opponents of bar exam reform saw

¹⁶¹ New York State Bar Association Committee on Legal Education and Admission to the Bar, *Recommendations for Implementation of the Report of the Special Committee to Study the Bar Examination and Other Means of Measuring Lawyer Competence*, N.Y. ST. BAR ASS’N 7 (Feb. 2012) (quoting “Kenney Report” at 4 (2012), available at <http://old.nysba.org/Content/NavigationMenu85/CommcommentsreKenneyReport/LEDRecommstoImplementKenneyReport.pdf>

¹⁶² *Id.* at 8.

¹⁶³ *Id.* at 7.

the current exam as a dynamic, validated instrument that tests the cognitive core of lawyering. [We] highlight that the New York portion of the exam, as distinguished from the Multistate portion over which the BOLE has no direct local control, tests important, New York-specific issues. [We] note that the BOLE regularly receives requests to add yet more subjects. And, [we] point out that the bulk of the New York portions of the exam consists of essay questions where answers are evaluated for the strength of the analysis, not merely for recitation of memorized facts. [We] express confidence that those who identify the correct principles and issues can attain a passing score even if those candidates cannot recall every bit of the legal minutiae, and [we] consider the current exam to test a core of cognitive skills as well as knowledge of the law.¹⁶⁴

The proponents of reform also focused on the diversity-diminishing effect of the costs of cramming for the bar exam after graduation:

Generally, those who see the exam as stressing memorization worry that too many applicants who would be fine lawyers [but] cannot devote resources and time to intensive preparation immediately before the bar [are disadvantaged]. Such disadvantage is most likely to fall on minorities and persons of low socio-economic status, and thus negatively impact the commitment to increasing the diversity of the bar which has been such an important goal of the NYSBA.¹⁶⁵

According to the proponents, the bar exam ultimately stunts the ability of legal education reform:

[We] also understand the exam as among the most powerful incentives for law schools and law students to continue to focus too much on doctrinal work. On this view, the current system unwisely slows the growth of a more integrated law school curriculum that would be responsive to the widespread calls for melding theory and practice needed to help young lawyers better respond to contemporary demands.¹⁶⁶

Unfortunately, the diversity issue may have gotten in the way of thorough treatment of the legal education reform point. The disagreement on the diversity-diminishing effect divided Committee members: “While others agree that diversity is critical and law schools

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

must better prepare young lawyers, [opponents of bar exam reform] view the bar exam as only tangentially related to these issues.”¹⁶⁷

In the end, because Committee members could not agree on the wisdom of “streamlining” the bar exam, it took the tried and true issue-dodging step: it recommended that the “State Bar ‘appoint a Standing Committee’ to advise the Board of Law Examiners on the content of the bar exam.”¹⁶⁸

The Committee made clear the difficulty of comprehensive bar exam reform: “bar exam reform advocates bear a heavy burden. They must demonstrate that any new version of the licensing exam will be fairly and consistently evaluated. Candidates and the public must have confidence in the results.”¹⁶⁹

A similar story occurred in Ohio, where the Ohio State Bar approved a report by one of its taskforces that recommended reduction in the number of subjects tested on the bar exam.¹⁷⁰ Absent fanfare, the Ohio Supreme Court simply declined to follow the recommendation.

Other efforts have produced some modest success in crafting an alternative bar admission path avoiding the bar exam altogether. In New Hampshire, the Webster Scholars Program allows students who distinguish themselves in a prescribed list of courses that attend to lawyer skills to bypass the bar examination process. Meanwhile in New York, the Kenney Committee did revive a recommendation of a PSABE (Public Service Alternative Bar Exam). In 2002, the Committees on Legal Education and Admission to the Bar of the NYSBA and the New York City Bar Association endorsed the idea of a pilot Public Service Alternative Bar Exam (“PSABE”), drawing on a proposal previously made in the academic literature.¹⁷¹

The New York State Bar never intended to replace the existing bar exam with PSABE (indeed it could not, given the numbers involved). Instead, they wanted to provide an alternative means of assessment available for selection by those graduates with the appropriate prerequisites who were willing to make a substantial three

¹⁶⁷ New York State Bar Association Committee on Legal Education and Admission to the Bar, *supra* note 161, at 8.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 9.

¹⁷⁰ See Ohio St. Bar Ass’n, *supra* note 160, at 3.

¹⁷¹ See Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696 (2002). For a fuller exposition, see Glen, *supra* note 157. The proposed pilot also appeared as an alternative worth studying in SOC’Y OF AM. LAW TEACHERS, *Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 451 (2002).

year pro bono commitment to the court system or other possible public service placements. This proposal was set for a trial run in 2014. Although it is not a full-scale replacement for the bar exam and only few applicants plan to take this route, PSABE creates an alternative path for prospective New York lawyers.

In the justifiable clamor for law schools to require more courses that demand that students write, solve problems, learn business sense, practice project management, and more, the profession maintains a bar exam that compels students into enrolling in as many of the twenty-five-plus bar subjects of the twenty-eight courses they might typically take to earn their J.D. Likewise, rankings-conscious law schools are loathe to risk their bar pass rates by failing to offer the bar courses or by requiring too many courses whose disciplines do not appear on the bar topics list.

Reforms that would tackle the legal education crisis remain stuck for a variety of reasons. For the legal profession, reform amid crises has often hit impediments of its own making. To understand how to solve the legal education crisis, we must take a historical view on the legal profession's past mistakes managing crises.

III. LEGAL EDUCATION'S REACTIONS SEEN IN THE BROADER PROFESSIONAL CONTEXT

The history of the legal profession's self-regulation during self-identified crisis times (such as the present) is not a happy one. The profession has resisted change. When it has instituted change, the profession has directed it not at the existing members of the profession, but at new entrants. Mostly, the change that has come has been forced by the influence of society, culture, economics, and globalization—not by the profession itself. These crisis periods that have produced change on a recalcitrant profession include Watergate, threats of communist infiltration, the boom in immigration, the litigation explosion, the civility crisis, and the current economic crisis that blends with dramatic changes in technology, communications, and globalization. In every instance, the profession has stuck to its anachronistic ways long after their societal expiration.¹⁷² The profession seems to repeat the same question in response to every crisis: how can we stay even more the same than we already are?

The legal profession is ponderous, backward-looking, and self-preservationist. For example, the American Bar Association

¹⁷² These themes are developed in JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS* (Oxford Univ. Press 2013).

established its Ethics 20/20 Commission because of the dramatic changes in the economics of law practice, globalization, and technology.¹⁷³ While the Commission had noble intentions, its mission quote set the tone for its work: “The principles guiding the Commission’s work are protection of the public; preservation of core professional values; and maintenance of a strong, independent and self-regulated profession.”¹⁷⁴ Protect, preserve, and maintain. This most recent “reform” mission statement is strikingly similar to that of the first bar associations in the late 1800s, born of crisis and formed for their profession’s “protect[ion], pur[ification] and preserv[ation].”¹⁷⁵ The legal profession needs a more forward-looking approach, one that welcomes the views and even control of non-lawyers, innovators in business and other enterprises. My hope is that the legal profession going forward can be more like Apple, IBM and Western Union, and less like Kodak.

A. *Outside Forces Eventually Change the Legal Profession*

When change comes to the legal profession, forces outside the organized profession are responsible. At the turn of the twentieth century, immigrants eventually integrated themselves into the bar, notwithstanding the bar’s efforts to diminish and exclude them.¹⁷⁶ Other changes in demographics and culture led to the entry of women and African Americans into the profession, even if resisted by the profession at various times.¹⁷⁷ The profession aimed to stem the tide of

¹⁷³ See *About Us*, ABA CENTER FOR PROF. RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_2020/about_us.html (last visited May 29, 2014) (“The ABA Commission on Ethics 20/20 was created by then ABA President Carolyn B. Lamm to perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments.”).

¹⁷⁴ Memorandum from the ABA Comm’n on Ethics 20/20 Working Grp. on Alt. Bus. Structures to ABA Entities, Courts, Bar Ass’ns, Law Schools, and Individuals (Apr. 5, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf [hereinafter ABA Memorandum].

¹⁷⁵ *Professional Organization*, 6 ALB. L.J. 233, 233 (1872); see generally Walter B. Hill, *Bar Associations*, 23 AM. L. REV. 213 (1889).

¹⁷⁶ James E. Moliterno, *A Golden Age for Civic Involvement: The Client Centered Disadvantage for Lawyers Acting as Public Officials*, 50 WM. & MARY L. REV. 1261, 1284–88 (2009).

¹⁷⁷ See generally Kenneth W. Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925–1960*, 87 CORNELL L. REV. 1405, 1408–09 (2002) (discussing the impact of African-American women on the legal profession in the early 20th Century despite the profession’s resistance to their involvement).

Communism's professional infiltration with Cold War-era reforms.¹⁷⁸ As society generally grew more competitive and anxious, the legal profession tried to protect itself from the so-called civility crisis.¹⁷⁹ The profession's repeated efforts to protect confidentiality, even in the face of corporate frauds, finally collapsed in the post-Enron era when SEC regulations catalyzed the change in the Model Rules of Professional Conduct, adopted by the ABA over the profession's objections.¹⁸⁰

Economic and technological changes in the 2000s are what they are. Instead of resisting change, the profession should become more attuned to events and trends outside its walls. The profession should adjust and even become active in shaping change in society.

Even change occasionally wrought at the hands of the bar seems designed to leave the lives of the bar's elite as-is to the greatest extent possible.¹⁸¹ The major changes that followed in Watergate's wake raised entry barriers (the Multistate Professional Responsibility Examination (MPRE) and required ethics courses in law school),¹⁸² but had barely a wisp of effect on the already-admitted.¹⁸³

The legal profession and the society it claims to serve would benefit from more open and viewpoint-inclusive regulation. No entity, whether motivated by profit, altruism, or a mixture of the two, manages

¹⁷⁸ Cf. Mary Elizabeth Basile, *Loyalty Testing for Attorneys: When Is It Necessary and Who Should Decide?*, 30 CARDOZO L. REV. 1843, 1856-57 (2009) (recounting efforts by the bar to resist communism in part by making lawyers take loyalty oaths to the U.S. government).

¹⁷⁹ See Mark D. Nozette & Robert A. Creamer, *Professionalism: The Next Level*, 79 TUL. L. REV. 1539, 1543-45 (2005) (discussing the organized bar's effort to create standards of professionalism that preserve existing rules).

¹⁸⁰ See generally Nicole Kroetch & Samantha Petrich, *Task Force on Corporate Responsibility: Should the American Bar Association Adopt New Ethics Rules?*, 16 GEO. J. LEGAL ETHICS 727, 727-46 (2003) (discussing proposed changes to ethics regulations after the collapse of Enron and other corporations).

¹⁸¹ The ABA's Canons stood for sixty-two years (1908 to 1970) when at long last the Model Code replaced the long-standing rules. The ink on the Model Code barely dried when Watergate sent the profession scrambling for public relations cover in 1976 in the form of the Model Rules. Forces outside the profession drove the major Model Rules' amendments between 1983 and 2012. For example, the post-Enron amendments to rules 1.6 and 1.13 and the currently proposed Ethics 20/20 amendments largely reflect changes in technology that have already occurred. Otherwise, the amendments to the Model Rules are historically more stylistic than substantive.

¹⁸² See David A. Logan, *Upping the Ante: Curricular and Bar Exam Reform in Professional Responsibility*, 56 WASH. & LEE L. REV. 1023, 1025-26 (1999) (discussing the reforms of legal education in legal ethics, strengthening the gate protecting the profession).

¹⁸³ The profession repackaged rather than changed lawyer obligations when it adopted the Model Code in 1969. See James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 792-94 (1997) (explaining how the ABA focused on the enforcement and clarity of ethics rules rather than substance).

itself without an eye to the future. Successful businesses and institutions engage in forward-looking strategic planning and examine society's trends to predict future markets and to modify their own practices.

B. Legal Education's Resistance to Change

The roots of legal education's inflexibility and present difficulties date from the late 19th century when both legal and medical education underwent reform and "scientification." For many reasons, the two reformed in different ways and headed in opposite directions. Medical education decided to create doctors; legal education decided to create law professors.¹⁸⁴ Legal education and the legal profession still pay the price for that choice.

Created by a change-resistant legal profession, university legal education itself has not succeeded in innovating its methods along with the rest of society. Legal education's last transformative reform occurred in the late nineteenth century when Christopher Columbus Langdell and James Barr Ames invented the case method, the casebook, and the basic curriculum that remains the staple of nearly every U.S. law school even now, 130 years later.¹⁸⁵ Just as Kodak's film and processing business (developed at roughly the same time as the Langdell innovations) blinded it to innovation and market changes, so too has the success of the Langdell reform blinded university legal education to necessary changes in its marketplace.

Certainly, changes in legal education have occurred during those 130 years, but the core of that reform remains the core of today's legal education. The Harvard-led reform of Langdell and Ames represented higher education's move towards the scientification of disciplines.¹⁸⁶ Unless scholars could describe a discipline as a serious science, that discipline had a lower standing within the academic community.¹⁸⁷ Langdell famously said that for law study, the "library

¹⁸⁴ ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD, 188-89* (1967) (alteration in original).

¹⁸⁵ See Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906-2000s*, 22 *LAW & HIST. REV.* 277, 292-93 (2004) (discussing the contributions of Langdell and Ames to legal education).

¹⁸⁶ See Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 *VT. L. REV.* 1, 1-13 (1980) (describing the progression of legal education up to and including the use of the scientific method to study the law, advocated by Langdell and Ames).

¹⁸⁷ See M. H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 *AM. J. LEGAL HIST.* 95, 119 (1986) ("While de Tocqueville may have been correct in his belief that lawyers were the true American aristocracy, during this period popular

was its laboratory,” and that students should not engage with courts or practitioners, except for the study of appellate court opinions reported in the library stacks.¹⁸⁸ His effort was to create a hard science of law, more like the hard sciences than the softer ones. For instance, biology’s taxonomic ranks and classification trees resembles the West Key Number System for classifying decided cases.¹⁸⁹ Parallels also exist between legal education and geometry in terms of proofs based on certain axioms.¹⁹⁰

Critics resisted the professional separation strategy of Christopher Columbus Langdell and James Barr Ames. In an 1883 letter from Harvard Law Dean Ephraim Gurney to Harvard President Charles W. Eliot, Gurney lamented that Langdell’s ideal is to

[B]reed professors of Law, not practitioners Another feature to my mind of the same tendency is the extreme unwillingness to have anything furnished by the School except the pure science of the law. . . . I have never been able to see why this should be thought belittling to the School or its instructors. . . . If you[r] LLB at the end of his three years did not feel as helpless on entering an office on the practical side as he is admirably trained on the theoretical, I think he would begrudge his third year less.¹⁹¹

As legal education underwent scientification, it intentionally disconnected from the legal profession.¹⁹² The legal profession is still recovering from that choice.

Periodically, legal education has been criticized as disconnected from the profession by the profession itself. A 1992 Michigan Law Review piece by Harry Edwards began the most recent round of criticisms.¹⁹³ Chief Justice John G. Roberts, Jr. expressed the same

distrust of lawyers and the legal system was growing.”).

¹⁸⁸ See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 74–76 (1976) (describing Langdell’s scientific approach to legal education).

¹⁸⁹ John B. West first described the system in 1909. See generally John B. West, *Multiplicity of Reports*, 2 *LAW LIBR. J.* 4 (1909).

¹⁹⁰ Hoeflich, *supra* note 187, at 100.

¹⁹¹ See SUTHERLAND, *supra* note 184.

¹⁹² James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 *WM. & MARY L. REV.* 71, 82–90 (1996).

¹⁹³ See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *MICH. L. REV.* 34 (1992) (describing how the legal profession moved towards commerce while legal education moved towards theory, “leaving no middle ground for ethical practice”). See also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 *MICH. L. REV.* 2191 (1993) (recounting the immediate “extraordinary” response towards his initial critique).

sentiment at the 2011 Fourth Circuit Court of Appeals Annual Conference, explaining how the disconnect between the academy and the profession produces very little scholarship that is either helpful to the practicing bar or judges or influential on the development of law.¹⁹⁴ Indeed, Roberts stated that he could not remember the last law review article he read.¹⁹⁵ Similarly, the New York Times critiqued law schools for producing cryptic, unhelpful, and often unread faculty scholarship despite the millions of dollars devoted to such work in law school budgets.¹⁹⁶ In the shadow of this outlay, law students often leave law school with precious little practical training.¹⁹⁷

Now, legal education is in the crosshairs of multiple shooters: law firms and other legal employers; law firms' clients (General Counsels and business people alike); prospective students; the New York Times; and so on. The economy our students face is highly discouraging.¹⁹⁸ Everyone, except older lawyers opposing change for opposition's sake and some faculty members with a stake in the status quo, is demanding that law schools do better.¹⁹⁹ Now is the time for innovation in legal education.

IV. SOLUTIONS PROPOSED

A. *Third Party-Induced Transparency: Cutting the Law School Fat*

Some law schools are likely to fail as prospective students become less willing to pay \$120,000 while foregoing three years of income for an uncertain future. As the ABA belatedly unmasks deceptive employment statistics, all created in compliance with the ABA's former regime of reporting,²⁰⁰ prospective students are becoming less willing to mortgage their future to attend marginal law schools that offer little hope of remunerative employment upon graduation.²⁰¹

¹⁹⁴ *Annual Fourth Circuit Court of Appeals Conference*, at 30:30 (C-SPAN television broadcast June 25, 2011), available at <http://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts>.

¹⁹⁵ *Id.*

¹⁹⁶ David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html>.

¹⁹⁷ *Id.*

¹⁹⁸ *See id.* ("The legal services market has shrunk for three consecutive years, according to the Bureau of Labor Statistics.")

¹⁹⁹ *See id.* (mentioning the "legal academy's peculiar set of neuroses" in resisting fundamental change to the law school curriculum).

²⁰⁰ For more information on legal employment data, see section II.B.1 titled "Fraudulent Reporting of Law School Data."

²⁰¹ *See ABA COMM'N ON THE IMPACT OF THE ECON. CRISES ON THE PROF. & LEGAL*

One set of potential reforms addresses the market for legal education: increased transparency regarding employment prospects, varied accreditation standards, and decreased availability of government guaranteed student loans.²⁰² When the Japanese installed U.S.-style graduate legal education about a decade ago, seventy-plus new law schools sprang up.²⁰³ But the bar passage rate, always exceedingly low in Japan, did not increase at anywhere near the proportion of the new law schools' output.²⁰⁴ Some law schools found themselves graduating entire classes of students, none of whom passed the bar.²⁰⁵ Thanks to the established transparent behavior in the Japanese legal market, these numbers caused over thirty of those seventy-plus new schools to close.²⁰⁶ Not all of the remaining fifty or so are stable.²⁰⁷ In the United States, the difference between job prospects and supply of graduates is not as stark as zero bar passage, but as transparency comes, the public will learn that some law schools have near-single-digit employment rates at graduation. Some measure of failure will likely occur.²⁰⁸

Single-digit employment rates may create nearly single digit applicant numbers at some institutions. As transparency in the United States legal education market increases, the number of applicants at

NEEDS, THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL (Nov. 2009), *available at* <http://www.americanbar.org/content/dam/aba/migrated/lsc/legaled/value.authcheckdam.pdf> (maintaining that most law students' expected return on their investment in a legal education is challenged by both the increasing costs of that education and a bleak employment market).

²⁰² See Press Release, Am. Bar Ass'n, *Reforms to Reporting of Law Graduate Employment Data Proposed by ABA Section of Legal Education and Admissions to the Bar*, AM. BAR ASS'N (Mar. 20, 2012), *available at* http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/reforms_to_reporting.html.

²⁰³ See Takahiro Saito, *The Tragedy of Japanese Legal Education: Japanese "American" Law Schools*, 24 WIS. INT'L L.J. 197, 197 (2006) (stating that as of 2005, Japan had "more than seventy" newly established, American-style law schools).

²⁰⁴ See *id.* at 205–06.

²⁰⁵ See Setsuko Kamiya, *Law Schools Grope to Create Better Lawyers*, JAPAN TIMES, Nov. 4, 2006, <http://www.japantimes.co.jp/news/2006/11/04/national/law-schools-grope-to-create-better-lawyers/> (discussing the challenges of legal education in Japan).

²⁰⁶ Cf. Miki Tanikawa, *A Japanese Legal Exam that Sets the Bar High*, N.Y. TIMES, July 10, 2011, <http://www.nytimes.com/2011/07/11/world/asia/11iht-educLede11.html?pagewanted=all> (noting rapidly decreasing enrollment and the closure of several Japanese law schools).

²⁰⁷ Cf. *id.*

²⁰⁸ See David Segal, *For 2nd Year, A Sharp Drop in Law School Entrance Tests*, N.Y. TIMES, Mar. 19, 2012, <http://www.nytimes.com/2012/03/20/business/for-lsat-sharp-drop-in-popularity-for-second-year.html> (arguing that fewer applicants will force lower-ranked institutions to accept lower-quality students, which will decrease bar passage rates and ultimately lead to institutional failure).

some law schools is down significantly. Nationwide, the Law School Admissions Council recorded less than 60,000 Class of 2016 applicants for the first time since 1983, the organization's first year of keeping such statistics.²⁰⁹ A lower number of applicants led to a lower number of matriculating students and staff cuts at some institutions in 2013.²¹⁰ The trend will likely continue for the Class of 2017.²¹¹

The emerging transparency in legal education has resulted from the hard work of mainly third-party actors is leading towards rapid, if not ruthless, change. While a leaner legal education field has its benefits, it does not reform legal education itself. On this issue, the profession's response as a whole is less robust and is more akin to the typical action taken by the legal profession when it faces crises.

B. BigLaw's Response

With some notable exceptions, the large law firms of the profession have struggled to provide a meaningful response to legal education's failings and about the changing economic patterns of the legal services industry.

In one respect, BigLaw has reacted to legal education's troubles by protecting their own profitability. This development is neither surprising nor does it reflect badly on law firms as businesses. Firms are pinched by the corporate move to stop paying for new associates' training. Law firm partners could have eaten some of the loss and reduced partner shares while continuing to use beginning lawyers as always. Instead, law firms have restored their profitability by hiring fewer beginners, outsourcing work, changing fee arrangements, and cutting internal training. Their move is self-preservationist. Partners could undoubtedly manage quite well with less income, but a major change in culture and expectations would have to precede this odd decision by businesspeople to freely accept less profit. Instead, law firms' self-preservationist moves have made the outcomes for law graduates much less favorable. Profits per partner are the BigLaw

²⁰⁹ *Three-year Applicant Volume Graphs*, LAW SCH. ADMISSIONS COUNCIL, <http://www.lsac.org/lscresources/data/three-year-volume> (last visited May 20, 2014).

²¹⁰ See David Gialanella, *Law Schools' Applicants Decline, Leading to Trimming of Faculties*, 231 N.J. L.J. 21 (2013) (describing the necessary adjustments at New Jersey law schools due to the fall in applicants in 2013); see also Paul Caron, *Law School Season of Discontent*, TAXPROF BLOG (Aug. 2, 2013), http://taxprof.typepad.com/taxprof_blog/2013/08/law-school.html#sthash.aqQ7G0VG.dpuf.

²¹¹ See *Three-Year Applicant Volume Graphs*, *supra* note 209 ("As of 5/09/14, there are 337,978 Fall 2014 applications submitted by 49,907 applicants . . . Last year at this time, we had 92% of the preliminary final applicant count.").

equivalent to U.S. News rankings for law schools. Volunteering to drop in rank is a highly unlikely scenario.

Make no mistake: Although only the number of high-paying, large law firm jobs are directly affected by this change, the ripple effect has reduced the prospects for all graduates at virtually all law schools. High ranking students who would once have landed the \$160,000 per year jobs now accept the next-most-desirable jobs and this effect continues on down the line. At every level of school, the percentage of graduates landing high-paying, large law firm jobs has been reduced dramatically from 2007 through 2012. In 2013, hiring at large firms increased slightly, but the overall employment rate continued to decline.²¹² The exceedingly low rate of hiring by federal and some state agencies has had the same effect.²¹³

BigLaw has reacted as one would expect businesspeople to react: By protecting their profits at the expense of others. One does wonder, however, where the next generation of wizened law firm partners will come from. It may be that short-term profit taking will produce long-term loss.

C. *State Bars to the Rescue?*

The Virginia and Indiana Bar Associations recently held “conclaves” on legal education, at which participants highlighted the shortcomings of legal education’s preparation of students for practice.²¹⁴ Such events typically allow for an airing of the practicing branch’s complaints about law schools, and law schools’ efforts to persuade the practicing branch of their good will and earnest efforts. These discussions have provided a line for communication but have

²¹² See Karen Sloan, *Large Firms in a Hiring Mood Again*, 35 NAT’L L.J. 1 (2013) (describing employment figures for law school graduates from 2012).

²¹³ See *Federal Employment Reports*, OFF. OF PERSONNEL MGMT., <http://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/#url=Employment-Trends> (last visited May 20, 2014) (quantifying the size of federal government); see also Adam Looney & Michael Greenstone, *A RECORD DECLINE IN GOVERNMENT JOBS: IMPLICATIONS FOR THE ECONOMY AND AMERICA’S WORKFORCE* (Aug. 2012), available at http://www.hamiltonproject.org/papers/a_record_decline_in_government_jobs_implications_for_todays_economy_an/ (discussing the decline in local, state, and federal government positions).

²¹⁴ See IND. STATE BAR ASS’N, *THE NEW NORMAL: HOW OUR PROFESSION IS FACING THE CHALLENGES POSED TO ITS STRUCTURES, VALUES AND DIVERSITY BY TRANSFORMATIONAL CHANGES IN THE LEGAL ECONOMY*, (2010), available at <http://www.inbar.org/Portals/0/downloads/legal%20news/Conclave-Final-Report.pdf> (listing talking points, recommendations and proposed actions); see also *20th Anniversary Conclave on the Education of Lawyers in Virginia*, VA. STATE BAR ASS’N (updated Nov. 13, 2013), <http://www.vsb.org/site/members/20th-anniversary-conclave> (containing all materials used in the 2012 conclave).

not produced any meaningful results.

Rather than stage “conclaves,” some states such as Illinois and California created task forces to study the crisis in legal education and its relationship with problems facing the profession generally.

The Illinois State Bar created a Task Force to study legal education, focusing on debt as the root of legal education’s and law practice’s evils: debt results from the high cost of legal education. High cost of legal education results from the guaranteed loan system, excessive emphasis on faculty scholarship, restrictions on the use of adjunct faculty, and requirements for law school physical plants and libraries (all factors linked to law school rankings). Student debt results in misallocation of lawyers between urban and rural settings and the inability of lawyers to lower fees to serve middle-income people, among other consequences. In total, the Report claims the current crisis flows from unacceptably high levels of student debt.²¹⁵

The extensive and detailed list of academic recommendations made covered topics such as the law school curriculum (encouraging more experiential education, a bar review course, less traditional doctrinal course in the second and third year, and fewer specialty courses), faculty (encouraging less focus on faculty scholarship), accrediting authorities (encouraging relaxed requirements for law school physical plant and libraries, faculty scholarship, and physical presence of students), licensing authorities (encouraging allowance of early bar exam taking), and the organized bar (encouraging mentoring programs, pro bono programs, and the sale of rural practices to young lawyers).²¹⁶

The Illinois Bar’s fiscal recommendations focused specifically on loan restrictions, encouraging the federal government to restrict student loan borrowing and insist that law schools demonstrate the worth of their degree to the student’s future earning capacity. In addition, it encouraged law schools to more carefully guard their resources from the clutches of raiding universities.²¹⁷

The California State Bar Task Force issued a “Phase I” report in June 2013 extensively reviewing the causes and effects of legal education’s current configuration. Like the Illinois Task Force, the

²¹⁵ See ILL. STATE BAR ASS’N, FINAL REPORT, FINDINGS & RECOMMENDATIONS ON THE IMPACT OF LAW SCHOOL DEBT ON THE DELIVERY OF LEGAL SERVICES (Mar. 8, 2013), available at <http://www.isba.org/sites/default/files/committees/Law%20School%20Debt%20Report%20-%203-8-13.pdf> (recommending better options for law school students to handle the cost of law school).

²¹⁶ *Id.* at 42–52.

²¹⁷ *Id.* at 38–42.

California Task Force recommended increasing experiential education, even if at the cost of somewhat reduced doctrinal teaching.²¹⁸

Arizona has moved to a system that allows students to take the bar exam in February of their third year, following which, their remaining semester is largely devoted to experiential education.²¹⁹ This approach allows for a bar exam result by graduation, facilitating earlier job placements, especially in government and public service offices.

Some states have started to move toward actual reform, but one national organization has surprisingly suggested legal education reform as well.

D. The ABA's Attempts to Not Make Past Mistakes

I have criticized the ABA for its backward-looking, status quo-preserving tendencies that have contributed mightily to the legal profession's woes.²²⁰ I am far from ready to pronounce the ABA cured from the disease that has afflicted it since its founding. Still, I am encouraged by two statements made at the 2013 Annual Meeting and by the Task Force's working paper.

ABA President Jim Silkenat announced the Association's "development of a Legal Access Job Corps, which seeks to address both the country's growing, unmet legal needs and the underemployment of recent law graduates. Instead of looking at the dearth of legal jobs and the large number of unmet legal needs as two separate silos, we will find ways to match young lawyers who need practical job experience with disadvantaged clients who need legal assistance."²²¹

This idea, although suggested before without much action, could have great promise. It represents the kind of thinking in which the

²¹⁸ See ST. BAR OF CAL., TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE I FINAL REPORT (June 24, 2013), available at [http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/STATE_BAR_TASK_FORCE_REPORT_\(FINAL_AS_APPROVED_6_11_13\)_062413.pdf](http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/STATE_BAR_TASK_FORCE_REPORT_(FINAL_AS_APPROVED_6_11_13)_062413.pdf) (questioning existing legal education methods and suggesting change for more practical instruction).

²¹⁹ Sally Rider and Marc Miller, *The 3L February Bar Exam: An Experiment Under Way in Arizona*, 82 THE BAR EXAMINER 15 (Sept. 2013), available at http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2013/820313RiderMiller.Pdf.

²²⁰ JAMES E. MOLITERNO, THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE (Oxford Univ. Press 2013); James E. Moliterno, *Ethics 20/20 Successfully Achieved Its Mission: It "Protected, Preserved, and Maintained,"* 47 AKRON L. REV. 149 (2014).

²²¹ *ABA Leadership Pledges to Continue Fight for Justice, Efforts to Advance the Legal Profession*, AM. BAR ASS'N (Aug. 13, 2013, 3:23 PM), <http://www.abanow.org/2013/08/aba-leadership-pledges-to-continue-fight-for-justice-efforts-to-advance-the-legal-profession/>.

legal profession should engage, seeks a forward-looking response to a pair of serious problems and provides a creative proposal for ameliorating the problems.

Even more encouraging from a long-term perspective is a statement by President-elect William Hubbard: “We must discuss and think about the future of the legal profession and the American justice system . . . We must bring together the best minds from the bench and the bar *and even from other professions.*”²²²

Indeed the legal profession needs the best minds from professions other than law to solve its problems. Non-lawyers know things that lawyers do not; non-lawyers have talents that lawyers do not; non-lawyers have mindsets that lawyers do not. In order to engage in forward-looking regulation, problem-solving and management, the legal profession needs input—and even some measure of control—from creative technologists, social scientists, economists, businesspeople and others.²²³

The organized profession has a genuine opportunity to make progress pursuant to a 2013 report of the Task Force on Legal Education of the ABA.²²⁴ The Task Force paper is a thoughtful presentation regarding the challenges facing legal education and the profession. Although it provides less analysis than is optimal, it nonetheless proposes a relaxation of accreditation standards, changes in bar licensing requirements that would be productive and changes, mainly of attitude, for law faculty. In March of 2014, the Massachusetts Bar Association became the first state to endorse these “key findings” within the ABA Task Force Report and recommend them to its Supreme Judicial Court for adoption.²²⁵

Despite historical inertia favoring the status quo, the ABA has

²²² *Id.* (emphasis added).

²²³ See James E. Moliterno, *The Trouble with Lawyer Regulation*, 62 EMORY L.J. 885, 889–91 (2013) (“Lawyer regulation needs the talents of those who can see the road ahead. Such people are more likely to be nonlawyers than lawyers—more like Steve Jobs than John W. Davis.”).

²²⁴ See AM. BAR ASS’N, REPORT AND RECOMMENDATIONS: AMERICAN BAR ASSOCIATION TASK FORCE ON THE FUTURE OF LEGAL EDUCATION (Jan. 2014), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf (summarizing the current state of legal education and suggesting potential reform strategies).

²²⁵ Mass. Bar Ass’n, *Endorsement of the Report and Recommendation of the American Bar Association’s Task Force on the Future of Legal Education*, AM. BAR ASS’N (Mar. 13, 2014), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mba_endorsement_of_aba_task_force_report.authcheckdam.pdf.

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attempted to reform in the face of the current legal education crisis. The Association's success will depend in part upon what those in legal education itself will do. Still, the more likely course is that progressive state bars, such as California and New York, will get out ahead of the ABA by creating bar admission requirements that will effectively change the law school curriculum.

E. Legal Education's Internal Response

Legal education is responding to the crisis, but slowly. There is a welcome move toward more experiential education, but it is misguided in some respects. As discussed above, transparency now runs through law graduates' employment statistics, but that has been a move forced by circumstances outside legal education's walls. Discounted tuition is falling, as are sticker prices at some law schools, albeit only because of market forces.²²⁶ Class sizes are shrinking with the market in charge. Genuine internal reforms for reform's sake are still too few.

A partnership of the academic and the practicing branches holds the greatest promise to solve the current crisis in legal education.

1. The Clinical Community

Many of the clinical community's (CC) founding members were themselves students in the fledgling clinics of the 1960s and 1970s. They have long advocated for more clinical education in the form of additional in-house law school clinics, but usually not in the form of externships or simulation teaching.

The advances that find their roots in the CC are among the most significant in legal education's past century. Some might reasonably suggest that there were few changes from Langdell to the dawn of the clinical movement in the 1960s and 1970s. Current movement towards experiential education bar entry requirements owe some credit to lobbying work of the Clinical Legal Education Association,²²⁷ which is referenced in California's Task Force report discussed previously. Still, the CC's sometimes narrow insistence that in-house clinics are the only worthy experiential education undercuts the full impact the CC could have toward reform.

The CC has always projected a mixed message. On one hand, it

²²⁶ See Elizabeth G. Olson, *The Financial Aid Arms Race at Law Schools*, FORTUNE (Aug. 15, 2013, 2:16 PM), <http://management.fortune.cnn.com/2013/08/15/law-school-financial-aid-negotiation/> (discussing legal education's move to secure more financial aid amid falling application numbers).

²²⁷ CLINICAL LEGAL EDUC. ASS'N, <http://www.cleaweb.org/> (last visited May 24, 2014).

is about pedagogy. The CC advocates for hands-on teaching, guidance by expert mentors, and students' experiencing the "real world" of law practice. On the other hand, it is about social justice in at least two forms. First, the clinic itself typically does work for the poor, either through service work or "impact work." The message and goal not only is about the immediate service provided by the clinic and its students, but also is about sensitizing students to issues facing the poor in hopes that they will go forth from the law school and become lawyer-leaders of poverty relief efforts.

This mixed mission has led to some incongruent moves. For example, although the core clinical pedagogy is also used in well-supervised externships and simulation courses, and as such it seems as if the CC should support these offerings, the CC has for the most part belittled those law school offerings as alternatively lacking an effective teaching dimension or realism. Is the real reason for the belittling because neither externships nor simulations serves social justice goals?

Pedagogically, the three forms of experiential education (clinics, externships, and simulations) each has an advantage over the other two. For all of the realism in in-house clinics, most law practice is not much like most in-house clinical experiences. Well-supervised externships are closer to reality than in-house clinics are, and simulations are designed to have more consistent exposure to instructor-planned issues than the clinics can provide. The live client clinic does have its advantage, though: it provides the exposure to social justice issues and the genuine feel of actual representation. Thus, the blend of the three is more educationally advantageous than a steady diet of any one of the three.

Although the CC is a long-standing, core legal education reform group, the group has not evolved much itself. In-house clinics are expensive to run, yet only a few members of the CC are willing to advocate for a blend of in-house clinics, externships, and simulations, mainly on the ground that only the in-house clinic is "the real thing."

Instead of being the powerful force for experiential education and reform generally, the CC has become an interest group that is not much different from the traditional faculty, advocating that legal education do more of what it now does. More in-house clinics are not on the horizon in times of reduced revenues for law schools and their universities.

2. The Traditional Faculty

The majority of traditional faculty feels threatened by changes in law practice and legal education, although a significant number

remain blissfully unaware of what has happened more generally in the legal services industry. The latter resembles philosophy and history academics, for example, whose discipline has no direct connection with making a living. They are the purest descendants of the Langdellian reform. The distance sought by this group from the profession is as wide as it was in Langdell's time. The scholarship produced by this group of law faculty is the scholarship criticized by Harry Edwards in the early 1990s, and more recently, by John Roberts and *The New York Times* journalists.

By contrast, most traditional faculty genuinely care about what happens in the legal services industry, some because they genuinely see the connection between their work and lawyers' work, and others only because they see the disastrous effect that changes in the industry could have on their own personal lives.

A modest number of otherwise traditional legal academics has advocated for reform. The remainder persists in the belief that traditional approaches to legal education will survive, either because a recovering economy will reverse current trends in enrollment and placement or because past recessions have barely affected legal education.

3. Reform Proposals from within Legal Education

Among the more prominent recent (or revived) reform proposals from within the legal academy is the elimination of the third year. Others envision a "technology law school" that trains students in critical aspects of twenty-first century lawyering.²²⁸

Interest in eliminating the third year has largely been driven by the rapidly rising cost of legal education, which is now out of sync with the income prospects of most law graduates. Thanks to greater transparency alerting applicants to the downward trend of income prospects, the cost of attending law school is falling. Although the sticker price has not gone down, the discounted rate—what students actually end up paying—is dropping.²²⁹

The recent adjustments in law school tuition disprove some who advocate cutting law school to two years instead of three as the only major cost reduction technique. Paul Carrington became one of the first to suggest this move in 1971 although, historically speaking, the move would reinstate the conditions of the early twentieth century

²²⁸ Daniel Katz, *The MIT School of Law? A Perspective on Legal Education in the 21st Century*, __ U. ILL. L. REV. __ (forthcoming 2014).

²²⁹ Olson, *supra* note 226.

when educational requirements for lawyer qualification were increasing and passed through two years on the way to three. Today, prominent among third-year abolitionists is The Coalition of Concerned Colleagues. Even President Obama suggested law schools should consider a two-year curriculum and a third-year practice apprenticeship.²³⁰

Steve Gillers and others are not persuaded.²³¹ They advocate doing something far more productive with the third year. No credible person advocates that the third year continue to be the wasteland where “they bore you to death.” Reduction to two years, to the extent it happens, is unlikely to result in a two-year J.D. More likely, as is being considered in New York, states may grant permission to take their bar exam after two years, without a law degree. Students will choose (and to a great extent employers will choose) whether a law license after three years with a J.D. is preferable to a law license after two years without a J.D.²³²

In May of 2014, Justice Antonin Scalia spoke in favor of not only keeping the third year, but also disallowing students from taking a bar exam without a J.D. after two years:

It seems to me that the law-school-in-two-years proposal rests on the premise that law school is—or ought to be—a trade school. It is not that. It is a school preparing men and women not for a trade but for a profession—the *profession* of law. One can practice various aspects of law without knowing much about the whole field. I expect that someone could be taught to be an expert real-estate conveyancer in six weeks, or a tax advisor in six months. And maybe we should train such people—but we should not call them lawyers. Just as someone might become expert in hand surgery without knowing much about the rest of the human body, so also one can become expert in various segments of the law without

²³⁰ Peter Lattman, *Obama Says Law School Should Be Two, Not Three, Years*, N.Y. TIMES DEALBOOK (Aug. 23, 2013), <http://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three/> (“This is probably controversial to say, but what the heck. I am in my second term, so I can say it,” Mr. Obama said at a town hall-style meeting at Binghamton University in New York. “I believe that law schools would probably be wise to think about being two years instead of three years.”) (internal quotations omitted).

²³¹ Stephen Gillers, *The Two-Year Law Degree: Undesirable But Perhaps Unavoidable*, 2013 N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM 4 (2013), available at <http://www.nyujlpp.org/wp-content/uploads/2013/03/Quorum-2013-Gillers-Law-School1.pdf>.

²³² Paul Caron, *New York to Consider Making Third Year of Law School Optional*, TAXPROF BLOG (Jan. 14, 2013), http://taxprof.typepad.com/taxprof_blog/2013/01/new-york-pushes.html.

knowing much about the rest. We should call the former a hand surgeon rather than a doctor; and the latter a real-estate conveyancer, or H&R Block—but not a lawyer.²³³

Justice Scalia's premise that lawyers should know all the law is akin to the bar examination's testing 27 subjects in some states. Substantive knowledge of a core of the law is necessary, to be sure, but the day when all the law worth knowing could conceivably be taught in three years was already long passed when Justice Scalia (and I) studied in the 1960s and 1970s. The administrative law course we took then was meant to teach students how administrative law works, not to teach them even the rudiments of a wide range of administrative law topics. Rare is the student who takes all of the UCC courses after taking Contracts, or all of the Tort or Property or Criminal Law or Constitutional Law electives, let alone all of the substantive law that might be of value. Law school cannot and should not teach all the law that would likely be useful to a lawyer. But with the idea that it takes three years to become an educated lawyer, I agree. The third year must be used differently than Justice Scalia might like it. It must truly be a transition to the sophisticated mental processes of successful lawyers.

All who propose an end to the third year, or an optional third year, suggest some apprenticeship activity to replace it, or imagine law school reform that would make the third year more useful and attractive.²³⁴ Rather than abandon the opportunity for education in the third year, legal education should produce value in the third year by incorporating apprenticeship aspects into the third-year curriculum.

4. Washington and Lee's Efforts to Keep the Third Year and Make it Useful

Before the onset of the legal education crisis, in 2007, Washington & Lee's ("W&L" or "W&L's") faculty adopted a reformed third year, requiring each student to engage in a full-credit load of experiential courses, clinics and externships. The new curriculum was launched as

²³³ The Honorable Antonin Scalia, Assoc. Justice of the Supreme Court of the United States, *Commencement Address at William & Mary Law School: Reflections on the Future of the Legal Academy* (May 11, 2014), available at <http://law.wm.edu/news/stories/2014/documents2014/2014WMCCommencementSpeech.pdf>.

²³⁴ See, e.g., Daniel B. Rodriguez & Samuel Estreicher, *Make Law Schools Earn a Third Year*, N.Y. TIMES (Jan. 17, 2013), http://www.nytimes.com/2013/01/18/opinion/practicing-law-should-not-mean-living-in-bankruptcy.html?_r=0 ("A two-year option, in our view, would provide young lawyers with the training they need to get started, lift a heavy financial burden off the backs of many—and vastly improve third-year curriculums in the process.").

an option for 3Ls in 2009 and 2010, and became required for the third year class beginning in 2011.

At bottom, the W&L reform has allocated a year to experiential education and required it for graduation.²³⁵ It is really simple and straightforward. The first and second years are largely unchanged (although, the subjects required in our first year curriculum already include some that are forward-thinking; “The Administrative State,” “Transnational Law” and “Professional Responsibility” stand alongside the traditional offerings). Teaching in the first and second years, however, looks a lot like it has for a very long time. There are some people who have come to the mistaken conclusion that W&L is provide exclusively experiential education from start to finish, first year through third, and that traditional first-year teaching is not done. That is not the case. W&L is still doing the things that have been really brilliant about legal education in the first and second years, but the reformed third year involves students being engaged in a full-credit load of experiential education, all in the role of lawyers.

a. Learning Law As Lawyers Do

At the center of what happens to students in this third-year curriculum is that they learn law the way lawyers do. Our students still do the pure “student thing” for two years, but the third year places them into a “mental pathways transition time.” They move from being students to being lawyers and thinking like lawyers. For example, one of the many semester-long, elaborate simulation courses is called “The Lawyer for Failed Businesses.” In that course, the students learn bankruptcy law, but they learn it the way lawyers do to solve a client’s problem. That is how lawyers interact with the law. Lawyers do not learn law in order to pass a three-hour, closed-book exam. They learn law in context and with a purpose.

In the new courses, students are not only learning the traditional basket of skills such as negotiation, client relations and advocacy. They learn law. They learn theory. They learn business sense. They learn to be members of teams. They experience what experienced lawyers face managing projects. They solve problems. Almost every day, they solve problems, generate plans for client action and implement those plans.

²³⁵ *Washington and Lee’s New Third Year Reform: Leading the Way in Legal Education Reform*, WASH. & LEE UNIV. SCH. OF LAW, <http://law.wlu.edu/thirdyear/> (last visited May 19, 2014).

b. Our Progress to Date

In 2013–14, participation was required for the third consecutive year, following two years of phase-in time (2009–10 and 2010–11) when the program was optional. After examining bar exam results, no statistically significant difference was found between the students in the new curriculum and those who remained in the traditional curriculum. The costs associated with the reform were studied and found to be no more expensive to run than our first or second years. Every new course was reviewed. We both taught and learned from the new instructors. The Curriculum Committee did a very early, extensive review with of student evaluations and focus groups. Hours of faculty discussion ended with a vote of confidence.

c. What Is in the Reformed 3L Curriculum?

So, “what is it?” It is two, two week immersions, clinics, externships, practicum courses (i.e., elaborate simulations), law-related service, and exposure to the profession’s culture, economics, and cutting-edge issues.²³⁶

Each semester starts with a two-week skills immersion. In both immersions, there are large group meetings to deliver theory. There are small group meetings for drills, practice, and strategy discussions. And then the students apply what they have learned in their simulated cases.

In the fall, every student in the third-year class participates in a litigation immersion. They each represent a person in a simple piece of litigation from start to finish. Students interview the clients, draft the pleadings, do a little bit of discovery, do some motion practice, negotiate, counsel with their clients, and eventually take their simple cases to a truncated trials at the end of the two weeks.

In the spring, the students do a transactional immersion and, again, all of our third-years participate. Every student represents either the buyer or the seller in a transaction for the sale of a multi-million dollar furniture manufacturing business that was created to facilitate the course. Every student represents someone who is role-playing the client, whether buyer or seller. They deal with employment issues, executive compensation, decisions about the deal’s structure, representations and warranties, indemnity clauses, and more. Students learn law, negotiate, counsel their clients, draft documents, and work with peers, lawyers who represent the opposite party, and supervising lawyers.

²³⁶ *Id.*

“Intense” is the word most often used by students to describe the immersions. “Like a job.” From the beginning of the fall immersion until the end of the third year, students are on a transition path, moving from student to professional.

Following the immersion in each semester, each student enrolls in at least two, twelve-week experiential courses, or four total for the third year. Most students have taken five. One of these four or five experiential courses has to be a clinic or externship featuring a live client. The simulation courses, or “practicums,” include courses like “The Lawyer for Failing Businesses,” “The Litigation Department Lawyer,” “Poverty Law Litigation,” and “Corporate Counsel.”²³⁷ Each of these is built around a practice setting. Some of our regular faculty teach these courses, and many courses are taught by talented lawyers who come in and essentially teach what they do. The instructors put the students in the role of a lawyer in their practice group, such as a litigation department lawyer, an M&A lawyer, or a securities lawyer. They design the simulations, come in and run their courses, putting the students in the role of the lawyers in the course’s practice setting.

In addition to the immersions, clinics, externships and practicum courses, every third-year student is enrolled in a course called “The Legal Profession.” It is not the course on professional responsibility law, which is required in the first year. Instead, this course is a one-unit course that exposes students to critical, cutting-edge issues facing the legal profession. There are sessions on the law firm economic system and alternative business structures. There are sessions on legal culture, relationships between prosecutors and defense lawyers, and gender issues. There are sessions on special skills that are rarely addressed in the curriculum, like empirical skills and financial statement-reading skills for lawyers. The idea is to move the students closer to being “of the profession.”

Students must also do at least forty hours of law-related service during their third year. There is room for one traditional course per semester, if the student wants to take it. Most students take one of the traditional courses they feel they need for the bar or for a job offer they have received.

d. Replicating the Reform

This reform is really quite replicable. It is not a top-to-bottom

²³⁷ For a list and description of the “practicums” offered at Washington and Lee University School of Law, see *Prepared for the Profession*, WASH. & LEE UNIV. SCH. OF LAW, [http://law.wlu.edu/deptimages/career%20planning/3L%20\(2\).pdf](http://law.wlu.edu/deptimages/career%20planning/3L%20(2).pdf) (last visited May 29, 2014).

redesign of the curriculum. There is room for most faculty to do as they have always done, and because of partnerships with the practicing branch, it is not more expensive. Many W&L faculty who think that this curriculum is a great idea would not want to teach in it. They still teach the courses they have always taught in the first and second years.

Adoption of this curriculum reform is really just a statement that experiential education, education in the role of lawyer, is as important as the first-year thinking skills. Every law school has clinics and at least some courses that would fit the W&L description of a practicum course, maybe not quite enough to make them a requirement, but every school has the resources in place to do this. It is just a matter of saying, “the way we require students to do the first year the way it is, we require students to do experiential education in the third year; it is just as important.”

e. A Partnership with the Practicing Branch

Excellent lawyers and law firms teach their courses for very little monetary compensation. They teach for the love of doing it. And they are teaching students who are not at their law firm, but instead are whoever signs up for the course at Washington and Lee. Some of the resources that the practicing branch is no longer able to give to its beginning lawyers are given to law students who sign up for the courses.

Not only are costs lowered by the generous teaching contributions of our practicing colleagues, but our practicing colleagues are also more effective at teaching these courses. In general, there is not a precise skill-set overlap between law professors and the role to which the vast majority of our students aspire. There are some things law professors do exceedingly well. For example, for first year courses, there is nothing like learning the first-year courses from accomplished scholars of the specific topic. By contrast, law professors are not all excellent problem solvers, managers of teams, and “business people.” Not all law professors can convey the techniques and traits involved in high-level interpersonal skills. In most cases, experienced, excellent lawyers know how to practice in their areas better than most law professors. With some guidance regarding teaching issues, management of classrooms, and management of simulations, experienced lawyers can transform into capable teachers of their practice area. The law school of the future must take advantage of the relative strengths of all possible teaching resources.

f. Early Empirical Data

There is a survey called the Law School Survey of Student Engagement (the “LSSSE”).²³⁸ It is managed by staff at the University of Indiana. At participating schools, students are asked questions about study habits, how often they show up for class without preparing, how many papers they write of different lengths, how often they work with other students on projects, and how much of their time is spent applying what they have learned to real-world problems.²³⁹ At bottom, the survey is trying to capture the measure of student engagement in activities that will enhance their preparedness for practice.

On the charts printed here, the prompt is at the top and the answer or answers illustrated by the graph are in parenthesis after the prompt. The two bars on the left illustrate the percentage of students at Washington and Lee giving the answer indicated in the parenthetical (light blue for 2008, before the start of the new curriculum, dark blue for 2012, the first class to be required to take the curriculum in full). The two bars on the right are the composite percentage giving the same answers by our peer schools (again, light blue for 2008, dark blue for 2012). The survey organizers do not release any particular school’s numbers and scores. They solicit a list of peers from each school and provide a composite set of answers and scores for the group of peers. Our peer schools are those with whom Washington and Lee competes most closely in various markets.

i. Overall, how hard are students working in their third-year in the reformed curriculum?

In 2008, 28 percent of our students said often or very often they come to class without completing reading assignments (for third-year students). Our peer schools showed close to the same number in 2008 (25.5 percent) and a few more “often or very often” unprepared students in 2012 (29.5 percent). Now, however, very few of our third-year students come to class unprepared (only 4.5 percent). The third-year students cannot afford to come to class unprepared anymore.

²³⁸ *LSSSE Reports: LSSSE 2013 Results Released*, LAW SCH. SURVEY OF STUDENT ENGAGEMENT, available at <http://lssse.iub.edu/reports.cfm> (last visited July 16, 2013).

²³⁹ For all the questions and responses in the 2012 report on legal education, see *LSSSE 2012 Mean Comparisons Report*, LAW SCH. SURVEY OF STUDENT ENGAGEMENT, available at [http://lssse.iub.edu/pdf/2012/LSSSE%202012%20Mean%20Comparisons%20\(Lssseville%20Law\).pdf](http://lssse.iub.edu/pdf/2012/LSSSE%202012%20Mean%20Comparisons%20(Lssseville%20Law).pdf) (last visited May 29, 2014). For the 2008 data, see *2008 Annual Survey Results: Student Engagement in Law School: Preparing 21st Century Lawyers*, LAW SCH. SURVEY OF STUDENT ENGAGEMENT, available at http://lssse.iub.edu/2008_Annual_Report/pdf/LSSSE_Annual_Report_2008.pdf (last visited May 29, 2014).

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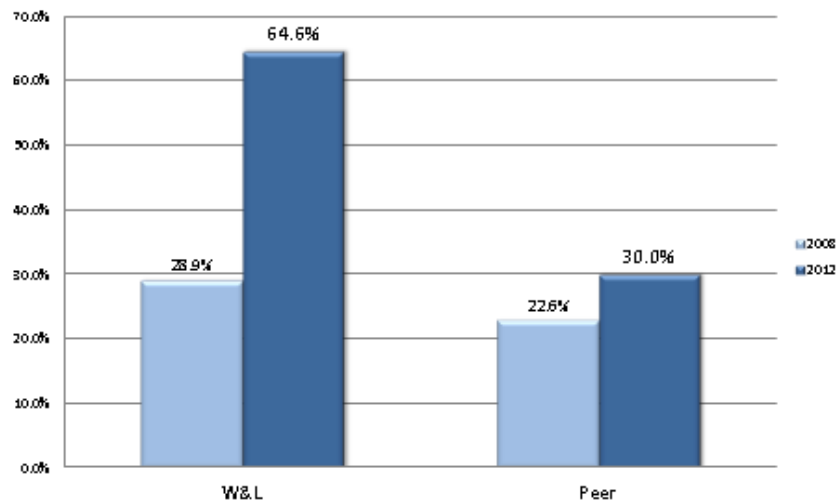
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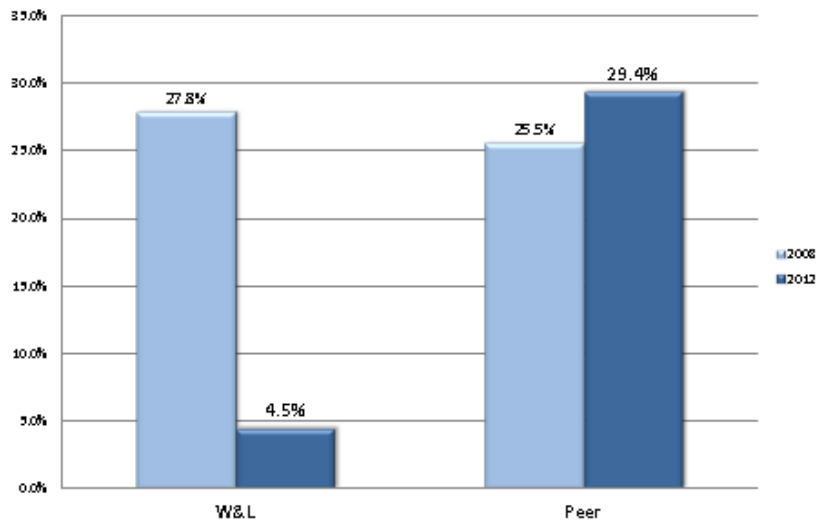
How many hours do they work outside of class other than reading? Again, the change at Washington and Lee between 2008 and 2012 is striking. In 2008, only 28.9 percent of our third-years reported working eleven hours or more, while, in 2012, 64.6 percent said they work eleven hours per week. At our peers, the number reporting eleven or more hours of work outside of class has moved only a modest amount from 2008 to 2012 (22.6 percent in 2008 and 30.0 percent in 2012).

Students are working harder in the reformed curriculum.

**Preparing for class and clinical courses other than reading
(studying, writing, doing homework, trial preparation, and other
academic activities more than 11 hrs/wk)**

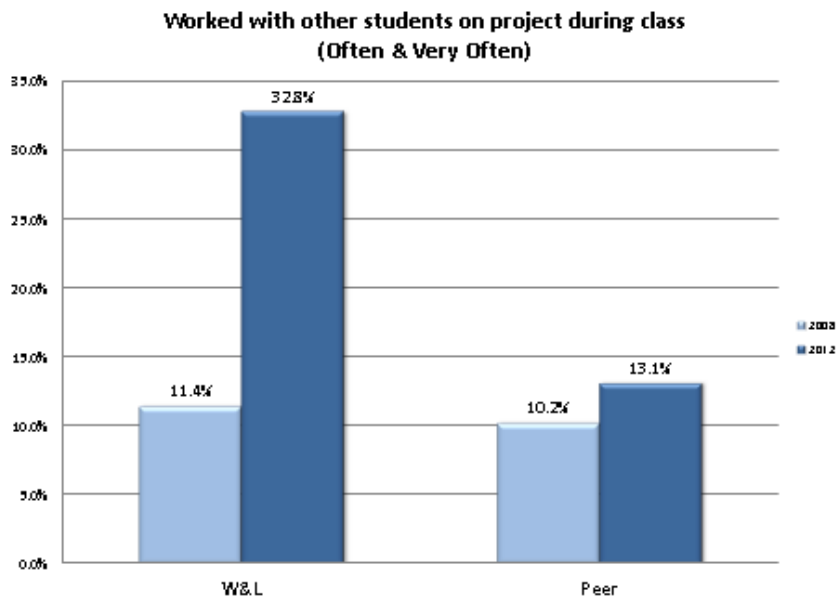
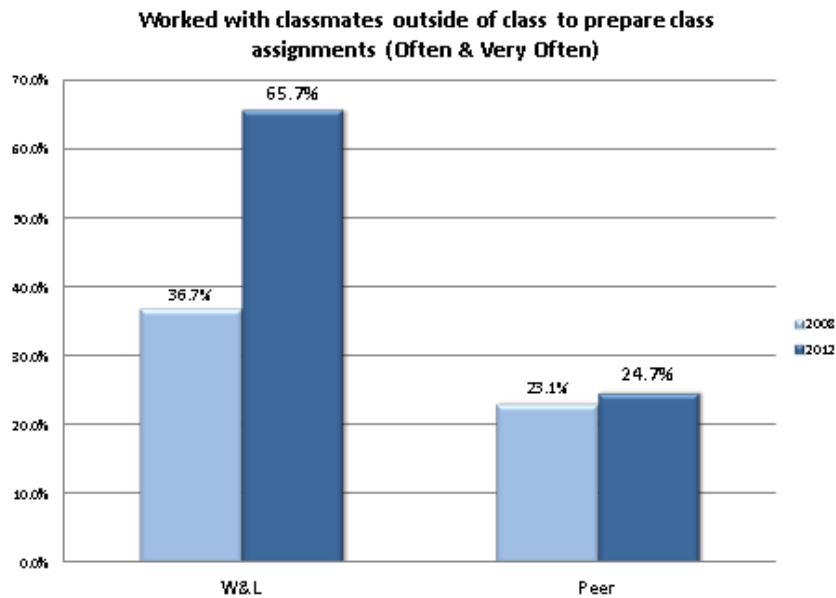


**Come to class without completing readings or assignments
(Often & Very Often)**



ii. What Are They Doing in This Additional Work-time?

For one thing, they are collaborating with one another more. The survey asked, “How often do you work with other students on projects in and outside of class?” Washington and Lee students in 2012 were doing those collaborative activities two or three times as much as in 2008. Peer schools had almost no change in their numbers on these questions from 2008 to 2012.



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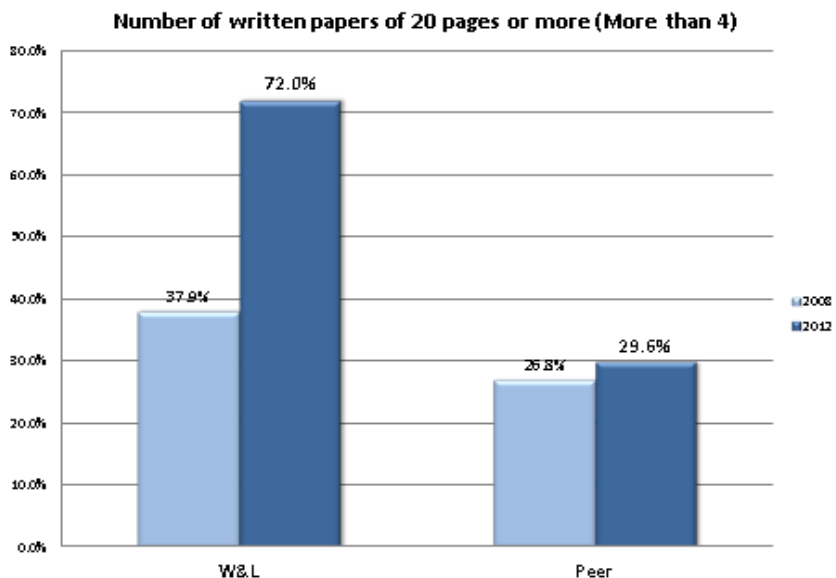
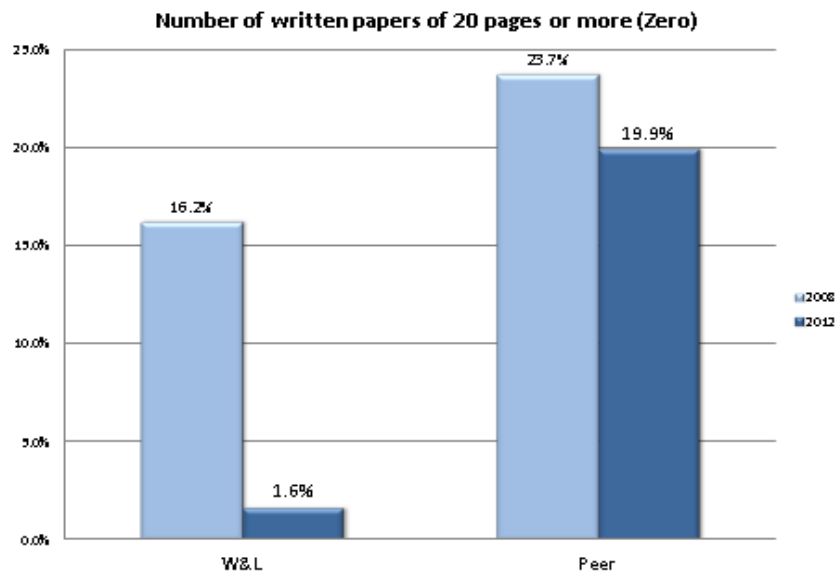
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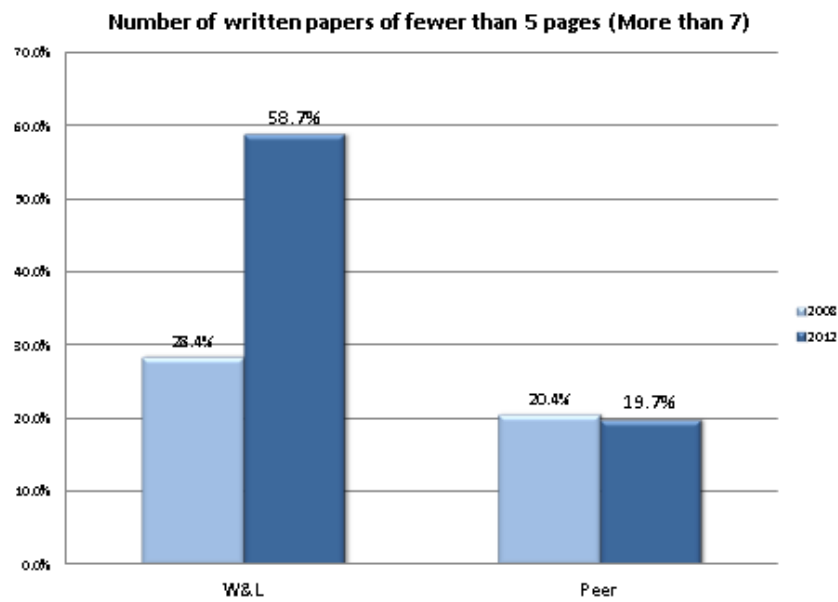
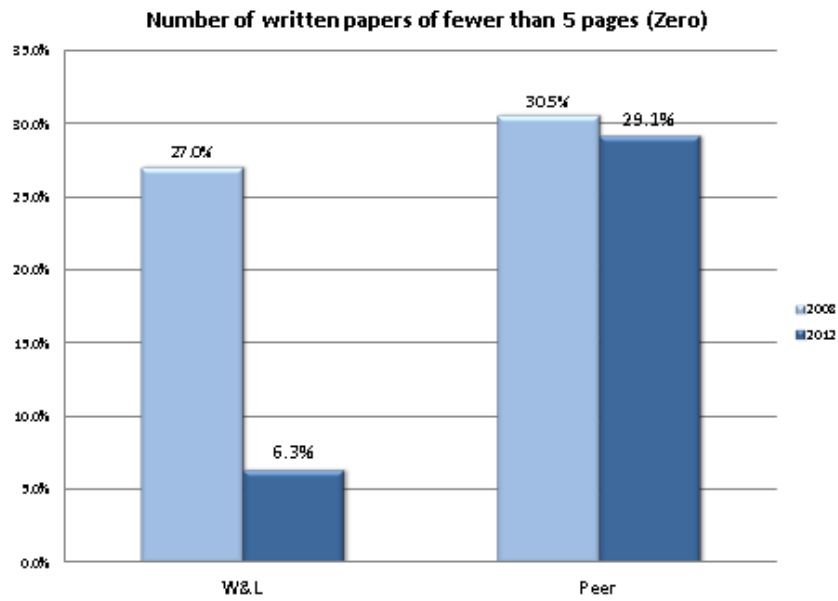
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iii. What Else Are They Doing?

They are writing more. “How many written papers of twenty pages or more”—16 percent of 2008 students said, “I did zero.” Now, virtually no one (1.6 percent) says that. The number of students doing four or more twenty-page papers has nearly doubled from 2008 to 2012, from 38 percent to 72 percent. All the while, students at our peer schools continue to report close to 2008 numbers.

Perhaps even more significant is the frequency of writing papers of five pages or less, a very common occurrence in law practice. Again, in 2008, 27 percent said, “I haven’t done that at all this year.” Now, nearly all of them have done five page papers (94 percent), and most of them (58.7 percent) have done more than seven such papers. But our peers have not improved from their similarly poor 2008 numbers.





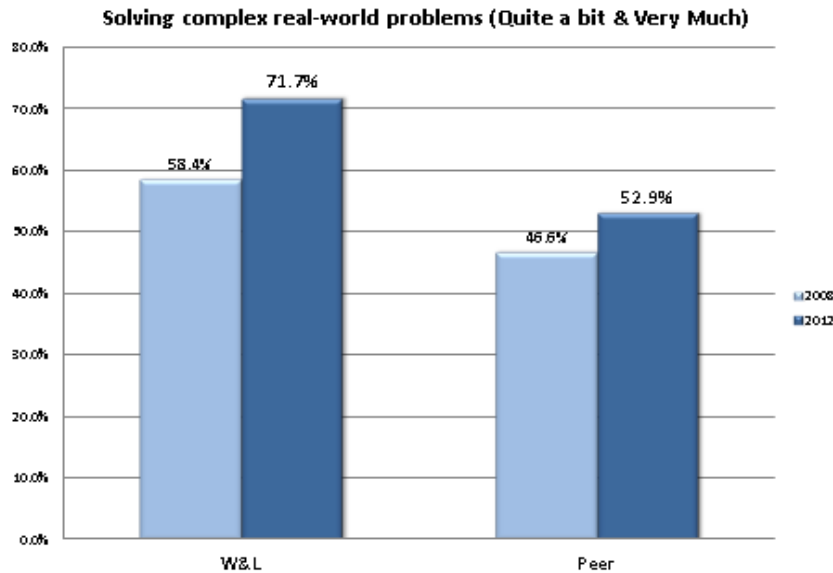
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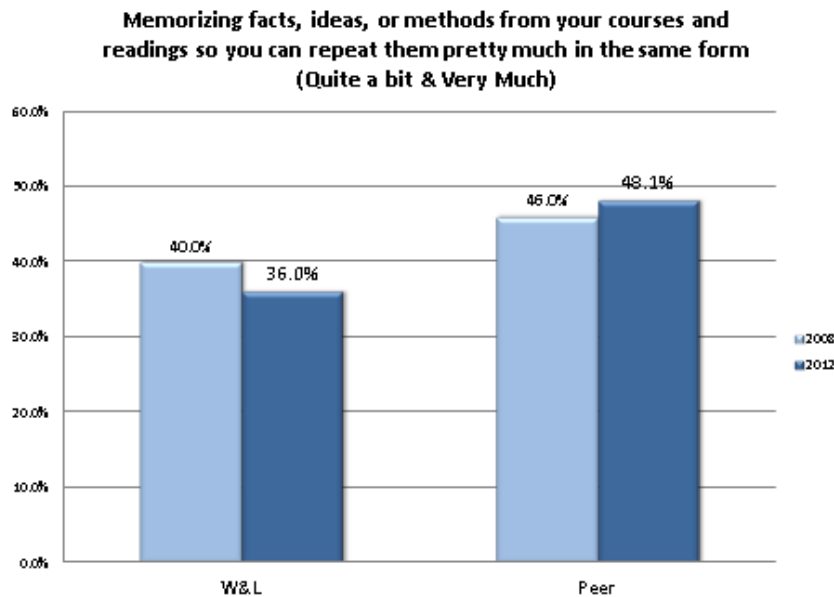
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iv. What Else Are They Doing More Of?

They are solving real world problems with their legal knowledge more than they did prior to the reformed curriculum.



One thing they do not do more of in the reformed curriculum is *memorize things* any more than they used to. This is one number that did not go up between 2008 and 2012. It is not what the new curriculum is about. The reformed curriculum does not require any more memorizing than the traditional curriculum. Students learn how to use information, not just pack it into their brains.



What has really happened is that students are spending more time being more productive on things that will matter for them as lawyers. That is what our new curriculum has meant to us and our students.

V. CONCLUSION

Legal education only taught one skill from about 1880 until 1980. It taught the critical thinking skills necessary to analyze appellate opinions. To this day, legal education does this brilliantly. It should not stop. But it never took three years to teach this critical skill. Two is enough. Perhaps one is enough.

Beginning in the 1970s and 80s, more clinical courses entered the curriculum as electives. My generation of law students received courses on writing and elective courses on interviewing, negotiating, mediation, advocacy, and trial practice. These courses added in the 1970s and 1980s added new practice-teaching dimensions to the critical thinking taught for over a hundred years, but they are not enough for the 21st Century lawyer. Not even close.

New 21st Century lawyers need more than skills of critical analysis, writing, interviewing, negotiating, and advocacy. They need problem-solving skills. They need business sense and savvy. They need to know how to work as a member of a team. They need to know how projects are managed, how they fit in the role of a person on that project-team, and eventually how to serve as managers of those projects.

Seasoned lawyers who have succeeded in today's practice environment teach many of these tools with greater success than veteran law professors. Senior attorneys previously taught these skills to new lawyers. With some exceptions, this process of post-graduate education has broken down. Recent developments in technology, economics and globalization have necessitated the teaching of these skills while in law school. Today the expectation is that law schools will deliver at least an introduction to these skills.

Law schools should not expect to graduate students who are "practice ready" if the term means ready to produce sophisticated work on day one. It is unrealistic to think that a three-year J.D. (let alone a two-year J.D.) can produce law graduates who are like 3rd, 4th, or 5th year attorneys. Reformed law schools, however, *can* give students a substantial head start on their development. Legal education can give students a head start on the process of becoming valued in practice. If it used to take such a graduate three years to develop into an asset whose work GCs are willing to pay for, perhaps they can get there in a year or a year in a half now after graduation.

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A partnership must be forged between the academic and practicing branches to achieve the adjusted list of goals. Although law firm partners are not willing to support beginning lawyers and continue to train them in the absence of corporate client support, the practicing branch can contribute to law school efforts to meet their new obligations. Excellent lawyers and law firms teach courses as part-time faculty for very little monetary compensation. Their law firm compensation level makes the traditionally small part-time faculty compensation irrelevant. When they teach, practicing lawyers teach for the love of doing it, and are teaching students who are not at their law firm, but for whoever signs up for the courses. Legal education must take advantage of the relative strengths of all possible teaching resources to meet the new adjusted list of goals.