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## Facilitating Distinctive and Meaningful Change Within U.S. Law Schools (Part 2): Pursuing Successful Plan Implementation Through Better Resource Management

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Patrick H. Gaughan & Samantha J. Prince

## Facilitating Distinctive and Meaningful Change Within U.S. Law Schools (Part 2): Pursuing Successful Plan Implementation Through Better Resource Management

18 U.N.H. L. REV. 173 (2020)

**ABSTRACT.** In Part 1 of this series, one of the current authors used institutional theory, behavioral economics, and psychology to explain why U.S. law schools have had difficulty evolving faster and better.<sup>1</sup> The author then used institutional entrepreneurship to propose a seven-step, faculty-led, operational change process designed to overcome institutional isomorphism and to enable each law school to formulate a distinctive, meaningful, strategic plan. In Part 2, the current article addresses the typical implementation challenges to be expected within the context of existing law school governance. The article begins by discussing the Resource Based View of the firm and the role of resource management in achieving competitive advantages. These considerations lay the foundation for the critical role of faculty engagement and law school leadership in successful strategic plan implementation. Next, within this context, the article discusses four questions whose answers may foreshadow implementation problems. Lastly, the article discusses the results of several Monte Carlo Simulations. The simulations provide insight into the likely performance problems caused by faculty misaligned with, or disengaged from, their law school's strategic goals. The results suggest that even minimal faculty misalignment can have a significant deleterious effect on the ability of a given law school to achieve any distinctive position.

All told, the article concludes that U.S. law schools can successfully implement distinctive and meaningful strategic plans within existing shared governance structures. However, success will be difficult to achieve. It requires the full engagement and leadership by both the faculty and the Dean, sustained operational support for strategic change, and the active management of law school resources.

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<sup>1</sup> Patrick H. Gaughan, *Facilitating Meaningful Change Within U.S. Law Schools*, 16 U.N.H. L. REV. 243, 302 (2018).

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## INTRODUCTION

### A. Overview

Undoubtedly, in recent years, U.S. legal education has been under mounting pressure to change. The practice of law has changed.<sup>2</sup> The needs of the public have changed.<sup>3</sup> The demographics of U.S. lawyers and judges have changed.<sup>4</sup> The geographic reach of the law has changed.<sup>5</sup> The depth and scope of law in daily life has changed.<sup>6</sup> The technologies used in the practice of law have changed.<sup>7</sup> The demands upon lawyers have changed.<sup>8</sup> And, the market for legal services has changed.<sup>9</sup>

Curiously, within the broader context of extensive environmental change, U.S. legal education has remained largely constant. This relative intransigence is

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<sup>2</sup> See JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 2 (2008). See also Ray Worthy Campbell, *Law School Disruption*, 26 GEO. J. LEGAL ETHICS 341, 353–56 (2013).

<sup>3</sup> See Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 CAL. W. L. REV. 219, 220–21 (2007).

<sup>4</sup> See Gaughan, *supra* note 1, at 298. See also Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 346 (1994); Ashley Hart, Note, *Sexism “Related to the Practice of Law”: The ABA Model Rule 8.4(G) Controversy*, 51 IND. L. REV. 525, 525–26 (2018); Danielle Root et al., *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019, 8:15 AM), <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/> [<https://perma.cc/NU5W-L8TE>] (last visited Feb. 20, 2020). But see Steven A. Ramirez, *Foreword: Diversity in the Legal Academy After Fisher II*, 51 U.C. DAVIS L. REV. 979, 980 (2017).

<sup>5</sup> See generally TONYA L. PUTNAM, *COURTS WITHOUT BORDERS: LAW, POLITICS, AND U.S. EXTRATERRITORIALITY* 6 (2016); Patrick Emmenegger & Katrin Eggenberger, *State Sovereignty, Economic Interdependence and US Extraterritoriality: The Demise of Swiss Banking Secrecy and the Re-embedding of International Finance*, 21 J. INT’L REL. 798 (2018).

<sup>6</sup> See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2d ed. 2019).

<sup>7</sup> See John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3041 (2014). See also Richard K. Sherwin et al., *Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. SCI. & TECH. L. 227, 227 (2006).

<sup>8</sup> See CYNTHIA FUCHS EPSTEIN ET AL., *THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIFE, FAMILY AND GENDER* 3 (2014). See also Cheryl Krause & Jane Chong, *Lawyer Wellbeing as a Crisis of the Profession*, 71 U. S.C. L. REV. (forthcoming), <http://dx.doi.org/10.2139/ssrn.3464992> [<https://perma.cc/2V2M-YDCF>] (last visited Feb. 11, 2020).

<sup>9</sup> See Gaughan, *supra* note 1, at 259. See also Campbell, *supra* note 2, at 355.

especially surprising given that the external legal environment has created numerous opportunities for U.S. law schools to differentiate their offerings and to provide unique value.<sup>10</sup> Instead, most U.S. law schools (particularly those ranked in the middle tier) have remained largely preoccupied with supporting traditional roles and copying the practices of their peer institutions.<sup>11</sup>

As explained in the earlier article,<sup>12</sup> the failure of U.S. law schools to evolve faster and better is not caused by any inherent stubbornness. But rather, without careful planning and active support for change, law school innovation is defeated by multiple institutional forces.<sup>13</sup> Without informed and carefully managed processes, U.S. law schools tend to fixate on complying with peer expectations, complaining about the U.S. News and World Report rankings, and meeting the demands of various vested interests. With numerous interconnected but often conflicted stakeholders (including the ABA accreditation requirements), it is understandably difficult for U.S. law schools to evolve.<sup>14</sup> U.S. legal education is highly institutionalized.<sup>15</sup>

Of course, the first casualty of institutionalized legal education is not any individual law school. The first casualty is the external utility—or value—of the legal education to the “outside” world.<sup>16</sup> By failing to better adapt to the changing external wants and needs of society, institutionalization directly undermines the value of a legal education to potential applicants. It also indirectly victimizes other members of society left with unserved—or underserved—legal needs. Unfortunately, institutionalized industries rarely adapt well to the evolving needs

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<sup>10</sup> See Gaughan, *supra* note 1, at 266–69 (introducing the VRIO framework as a tool to determine how, within existing and potential resources, a given firm can create unique value).

<sup>11</sup> *Id.* at 257–58 (establishing resistance to change as an institutional problem among law schools).

<sup>12</sup> *Id.* at 302.

<sup>13</sup> *Id.* at 258.

<sup>14</sup> *Id.* at 256–57. Some researchers believe that the ABA accreditation standards should either be abolished or relaxed as they require law schools to fit into a certain model thereby repressing the ability of law schools to innovate. See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 172–77 (2012).

<sup>15</sup> See Gaughan, *supra* note 1, at 255. Cf. BENJAMIN H. BARTON, *FIXING LAW SCHOOLS: FROM COLLAPSE TO THE TRUMP BUMP AND BEYOND* 188–92 (2019).

<sup>16</sup> See Gaughan, *supra* note 1, at 255 (“As a field evolves, constituent organizations tend to increasingly align and incorporate common meanings in reference to each other. In the process, organizational focus tends to shift from competitively serving the needs of the external market to simply integrating the organization into the collective expectations of the field.”). See also Campbell, *supra* note 2, at 364–65.

of their putative constituents. U.S. legal education is no exception.

The initial question, answered in the earlier article, therefore was what U.S. law schools could do within existing frameworks to overcome institutional isomorphism and to formulate effective, distinctive and meaningful strategies.<sup>17</sup> The present article takes this effort one step further. It provides a theoretical foundation for how U.S. law schools can successfully *implement* their strategic plans.<sup>18</sup>

The present article begins by discussing the Resource Based View of the firm and the role of resource management in achieving competitive advantages. These considerations lay the foundation for the critical role of faculty engagement and law school leadership in successful strategic plan implementation. Next, the article discusses four questions whose answers may foreshadow implementation problems. Lastly, the article uses several Monte Carlo Simulations to examine the potential impact of misaligned or disengaged faculty on law school performance. These results provide insight into the challenges facing law schools in successfully implementing their strategic plans. Of course, before addressing these issues, it is first necessary to briefly review the key output of the earlier article: The Seven-Stage Process for Meaningful Change.

### ***B. The Seven-Stage Process and The Implementation Challenge***

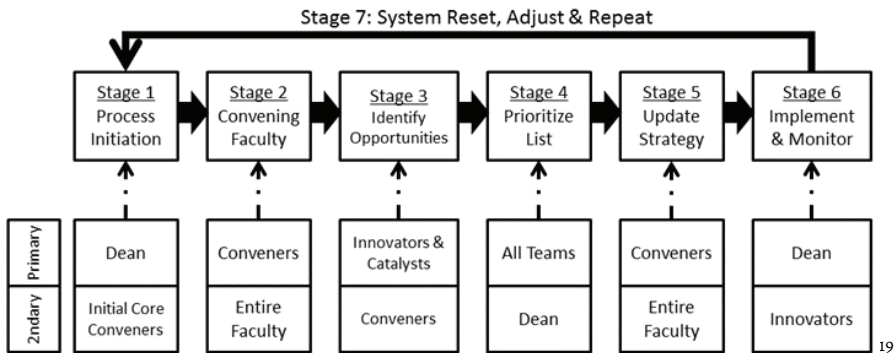
In the earlier article, after having described the institutional and psychological sources of resistance to change, a seven-stage process was proposed to facilitate the development of distinctive, meaningful, law school strategies. The seven-stage process addressed faculty engagement and leadership concerns by intentionally utilizing a faculty-led process with input from the Dean. The proposed seven-stage process is outlined below:

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<sup>17</sup> By way of further clarification, the scope of both the earlier and current article is intentionally limited to innovation generally within existing law school governance structures. The presumption is that timely corrective actions will have an opportunity to be both successfully implemented as well as reap the desired benefits.

<sup>18</sup> It is contemplated that future articles will: 1) obtain and analyze empirical data upon which to further refine the processes discussed in the first two articles; and/or 2) address the methods by which institutionalization and isomorphism might be overcome through industry-wide reforms rather than just through the efforts of some individual law schools.

## A Process Model For Meaningful Change



In Stage 1 of the process, the Dean selects a small “seed” group of widely-respected law faculty to manage the overall process. By design, the Dean empowers the widely-respected faculty (called “Conveners”) with support and commitment to achieve meaningful change.<sup>20</sup>

In Stage 2, the Conveners “convene” the entire law faculty to facilitate grass-roots support and engagement in the entire process.<sup>21</sup> Another goal of Stage 2 is to identify and address, as early as possible, faculty concerns and sources of resistance. Yet another goal is to obtain a commitment from the entire faculty to implement some number of proposals expected to result from the overall process.

In Stage 3, the Conveners delegate and empower a hand-selected group of internal, client-facing, law school personnel (Innovators). The Conveners also engage a group of external stakeholders who are supportive of the individual law school and might have access to additional resources (Catalysts). Together, the Innovators and Catalysts systematically identify law school opportunities for distinctive and meaningful change.<sup>22</sup> The opportunities—as determined from the perspective of potential applicants to the specific law school—are evaluated on the basis of being valuable, rare, inimitable (or imperfectly imitable), and organizationally appropriate.<sup>23</sup>

In Stage 4, all the teams (Conveners, Innovators, and Catalysts) work with the Dean to prioritize the identified opportunities. An additional purpose of Stage 4 is

<sup>19</sup> Gaughan, *supra* note 1, at 288.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 289.

<sup>22</sup> *Id.* at 296.

<sup>23</sup> *Id.* at 295.



to establish a base-level of consensus among the active participants regarding the identified opportunities prior to proceeding to Stage 5.<sup>24</sup>

In Stage 5, the Conveners re-convene the entire law faculty in order to present, explain, and obtain formal faculty support for the adoption of a finite number of the prioritized distinctive opportunities.<sup>25</sup> In essence, the faculty is asked to adopt and support a strategic plan.

Up until this point in the process, the primary source of faculty leadership has been the conscious delegation of support by the Dean and the engagement of a group of widely-respected law faculty leaders (the Conveners). If done properly, the completion of Stages 1-5 should result in a distinctive and meaningful strategy that has been tailored to the unique resources and potential market for the individual law school.

In Stage 6, the Dean takes primary responsibility (along with the Innovators) to begin the operational implementation of the adopted strategies. It is presumed that the Conveners remain engaged to maintain the broader faculty engagement and momentum. The intention of Stage 6 is to begin actually pursuing unique opportunities through the implementation of the adopted strategic plan.<sup>26</sup> However, given the limitations of time and space, the first article largely glossed over the likely operational challenges and pitfalls that could be expected during the implementation process. This is part of the focus of the current article.

Lastly, in Stage 7 of the process model, the Dean resets the overall process and adjusts for anything that would improve future efforts.<sup>27</sup> Again, due to the limitations of time and space, the first article largely glossed over the role of managing law school resources in support of future growth. This too is a focus of the current article.

Although the seven-stage process is (and remains) appropriate, the earlier article did very little to analyze the processes necessary to successfully *implement* the resulting strategic plan (Stage 6). The earlier article also did not seek to explain how, over time, individual law schools can adjust their resources to better align with future opportunities while resetting the entire process (Stage 7). For these reasons, the current article seeks to clarify and refine these issues. This necessarily begins with focusing on implementation through improved resource management.

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<sup>24</sup> *Id.* at 299.

<sup>25</sup> *Id.* at 300.

<sup>26</sup> *Id.* at 301.

<sup>27</sup> *Id.* at 301-02.

## I. PURSUING SUCCESSFUL PLAN IMPLEMENTATION THROUGH BETTER RESOURCE MANAGEMENT

Notwithstanding the effort and careful thought of any strategic planning initiative, it would be a huge mistake to assume that the implementation of the resulting strategic plan will be either easy or successful—especially in the context of U.S. law schools<sup>28</sup>:

Formulating strategy is difficult. [But] making strategy work—executing or implementing it throughout an organization—is even more difficult. Without effective implementation, no . . . strategy can succeed.<sup>29</sup>

Implementations fail for different reasons. The execution of any strategic plan usually requires the broader participation by more individuals across the organization than during the strategy formulation process.<sup>30</sup> The execution of most strategic plans usually takes more time and therefore requires a more sustained organizational effort.<sup>31</sup> The process of plan implementation also involves the inherent interaction between the internally formulated strategic plan and the realities of the external world.<sup>32</sup> The implementation of strategic plans also can conflict with aspects of the existing organizational culture.<sup>33</sup> And on top of all of this, within the academic context, implementation involves “trying to manage faculty members . . . like herding cats.”<sup>34</sup> The critical question—and stated purpose of the current article—is how U.S. law schools can best implement an otherwise appropriate strategic plan while avoiding common implementation pitfalls? The answer to this question begins by considering the theoretical foundation underlying any implementation process.

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<sup>28</sup> Nancy B. Rapoport, *Eating Our Cake and Having it, too: Why Real Change is so Difficult in Law Schools*, 81 IND. L.J. 359, 359–60 (2006).

<sup>29</sup> Lawrence G. Hrebiniak, *Obstacles to Effective Strategy Implementation*, 35 ORGANIZATIONAL DYNAMICS 12, 12 (2006).

<sup>30</sup> *Id.* at 14.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See Amarjeev Kaul, *Culture vs Strategy: Which to Precede, Which to Align?*, 12 J. OF STRATEGY AND MGMT. 116, 119 (2019). See also Anna Pietruszka-Ortyl, *The Impact of Organizational Culture for Company's Innovation Strategy*, 3 MKTG. AND MGMT. OF INNOVATIONS 178, 178 (2019).

<sup>34</sup> John McCormack et al., *Herding Cats? Management and University Performance*, 124 THE ECON. J. F534, F534 (2014). See also Nancy B. Rapoport, *Of Cat-herders, Conductors, Tour Guides, and Fearless Leaders*, 33 U. TOL. L. REV. 161, 163 (2001).

### A. *The Theoretical Foundation for Managing the Implementation Process*

As an initial matter, the reality is that the successful implementation of any strategic plan revolves around the deployment of resources. At some level within an organization, resource management provides the common nexus between the day-to-day operations and the implementation of organizational strategy. As a result, resource management is integral to both meeting operational demands and the ability to realize the benefits of any distinctive and meaningful strategy.<sup>35</sup> Moreover, given that the resources of U.S. law schools are almost always greatly limited, the ability to prioritize and coordinate resources is critical. Accordingly, it is submitted that the Resource Based View provides the best theoretical framework for any implementation effort.

#### 1. The Resource Based View

According to the Resource Based View, a law school—just like any other firm—“is basically a collection of resources.”<sup>36</sup>

Strictly speaking, it is never [the] resources themselves that are the ‘inputs’ in the production process, but only the services that the resources can render. The services yielded by resources are a function of the way in which they are used—exactly the same resource when used for different purposes or in different ways and in combination with different types or amounts of other resources provides a different service or set of services . . . it is largely in this distinction that we find the source of the uniqueness of each individual firm.<sup>37</sup>

According to the Resource Based View, even if all law schools were to begin with identical resources, one or more law schools could still achieve a sustainable competitive advantage simply by being either more efficient or effective (or both) in strategically deploying their resources.<sup>38</sup> It is possible to simply “out manage” competitors by being better at deploying, developing, acquiring and disposing of resources.<sup>39</sup> This applies equally to a law school’s ability to successfully implement

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<sup>35</sup> Rick Staisloff, *Want Breakthroughs that Last? Consider Your Business Model*, CHRON. OF HIGHER EDUC. 45 (Oct. 23, 2016) (“Once an institution has identified its economic engines (the programs and services that make the largest contribution to financial sustainability), it can direct resources toward them and to its strategic academic and financial goals.”).

<sup>36</sup> EDITH PENROSE, *THE THEORY OF THE GROWTH OF THE FIRM* 68 (4th ed. 2009).

<sup>37</sup> *Id.* at 22.

<sup>38</sup> A similar argument has been advanced through something called Resource-Advantage Theory. See, e.g., Shelby D. Hunt & Robert M. Morgan, *Resource-Advantage Theory: A Snake Swallowing Its Tail or a General Theory of Competition?*, 61 J. OF MKTG. 74, 78 (1997).

<sup>39</sup> Cf. Christos N. Pitelis, *Introduction to EDITH PENROSE, THE THEORY OF THE GROWTH OF THE FIRM* ix, xviii (4th ed. 2009).

a strategic plan.

Undoubtedly, all law schools inherently serve the same basic, noble, purpose. They provide their law students with a means for learning about the law and of ultimately passing the bar exam. This is inherent in the ABA accreditation standards.<sup>40</sup> However, these attributes alone are not sufficient to assure the success of any particular law school. If *all* law school resources were expended only on assuring bar exam passage, a particular law school would be unlikely to provide any unique value. The education supplied by the particular school would be a commodity. More is necessary. Individual law schools must identify the subtle differences in the wants and needs of potential law school applicants—and then determine how to best manage the law school resources to serve these particular groups *better* than others.

Although law schools have little control over the extent of their starting resources or the external environment in which they operate, individual law schools have significant control over how they develop and deploy the resources under their control.<sup>41</sup> Even within the context of academic institutions, recent studies suggest that the appropriate management of faculty can lead to improved departmental performance.<sup>42</sup> Other studies have shown that improved management of faculty can even improve the quality of the education provided.<sup>43</sup> Improved resource management therefore provides a substantive means by which an individual law school can deliver distinct value to a specific group of potential law students. It is a

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<sup>40</sup> See, e.g., *Program of Legal Education, Standard 301(a), Objectives of Program of Legal Education, 2019–2020 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS* ch. 3 (stating “A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar . . .”); *Standard 316, Bar Passage* (stating “At least 75 percent of a law school’s graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation.”).

<sup>41</sup> Note that “resources under their control” is broader than a law school’s “internal resources.” Internal resources are usually owned by a law school. However, a law school may control resources beyond what they actually own. This was part of the reason for including the “Catalysts” in Stage 3 of the process described in the earlier article. Gaughan, *supra* note 1, at 295–96. Not only do the Catalysts possess an external perspective, they also are more likely to control or otherwise be aware of external resources that might be available to the individual law school. *Id.* Often, these types of resources are available by virtue of an engaged alumni association or similar network connected to the particular law school. *Id.*

<sup>42</sup> McCormack et al., *supra* note 34, at F537.

<sup>43</sup> Nicholas Bloom et al., *Does Management Matter in Schools?* (NBER Working Paper Series, No. 20667, Nov. 2014); see also Seng Kiat Kok & Claire McDonald, *Underpinning Excellence in Higher Education: An Investigation into the Leadership, Governance and Management Behaviours of High-Performing Academic Departments*, 42.2 *STUD. IN HIGHER EDUC.* 210 (2017).

means of overcoming institutionalization at the organizational level and achieving a sustainable competitive advantage.<sup>44</sup> Of course, all of this starts with the rather fundamental question of what, exactly, are the resources of an individual firm—or law school?

## 2. Three Types of Firm Resources

At its most fundamental level, “firm resources include all assets, capabilities, organizational processes, firm attributes, information, knowledge, etc. controlled by the firm that enables the firm to conceive of and implement strategies that improve its efficiency and effectiveness.”<sup>45</sup> However, all resources are not of equal value. For resources to create a lasting advantage, the resources must be “imperfectly imitable,” and “organizationally appropriate.”<sup>46</sup> Further, only resources that are “valuable” and “rare” to a relevant group of existing or potential customers create unique economic value for the organization.<sup>47</sup> In essence, “valuable” resources are those that are especially “meaningful” goods or services. “Rare” resources are those that are uniquely “distinctive.”

Fortunately, organizational resources that are not currently “valuable” or “rare” can sometimes be redeployed or combined with other resources in innovative ways that become more “meaningful” and “distinctive.”<sup>48</sup> This is where the critical role of resource management comes in.<sup>49</sup> Ordinarily, without conscious management, resources will continue to be used as they have been in the past or otherwise drift.<sup>50</sup>

If the firm has no [focus on] strategy, . . . the types of competencies available from [resources] is likely to be largely opportunity driven. The result is more often than not that the strengths built in terms of relationships and competencies are ad hoc and not further leveraged . . . [in the future].<sup>51</sup>

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<sup>44</sup> See Gaughan, *supra* note 1, for further discussion of these issues.

<sup>45</sup> Jay B. Barney, *Firm Resources and Sustained Competitive Advantage*, 17 J. OF MGMT. 99, 101 (1991).

<sup>46</sup> Gaughan, *supra* note 1, at 268–73.

<sup>47</sup> Robert S. Nason & Johan Wiklund, *An Assessment of Resource-Based Theorizing on Firm Growth and Suggestions for the Future*, 44 J. OF MGMT. 32, 35 (2018).

<sup>48</sup> Gaughan, *supra* note 1, at 261–76.

<sup>49</sup> Deans are “expected to deploy or redeploy faculty in ways that meet the needs of the institution as well as the specialized interest of individual professors.” Wallace D. Loh, *The Longevity of Deans: Leadership, Community, and Governance*, AALS NEWSLETTER (Assoc. of Am. Law Sch., Washington, D.C.), Aug. 1996, at 3.

<sup>50</sup> BENTE R. LOWENDAHL, *STRATEGIC MANAGEMENT OF PROFESSIONAL SERVICE FIRMS* 75 (2d ed. 2000).

<sup>51</sup> *Id.* at 73.

Without focus on any strategic priorities, resources may be unnecessarily depleted meeting the operational needs of the law school—without regard to the creation of anything distinctive and meaningful to existing or potential students. Undoubtedly, some operational activities are necessary and may incidentally create some value. However, without sustained focus and support for aspects that are distinctive and meaningful to potential students, the perceived value of the education provided by the particular law school will likely diminish.

To be clear, every law school needs to support *some* resources that may not be overtly distinctive. Quite often, resources must be exerted in order to comply with the qualifying requirements of some authorities (such as complying with the requirements of the university to which the law school belongs or the ABA). However, according to the Resource Based View, the key to unique law school success is in assuring that all remaining resources are consciously managed to achieve both a meaningful *and* distinctive market position. If *all* remaining resources are instead expended on indistinguishable qualifying requirements, like the *generic* provision of bar preparation,<sup>52</sup> then the law school has essentially assured that its education will not be viewed by potential students as being particularly unique or valuable.

By recognizing that some resources are more valuable than others, the Resource Based View recognizes that there are some areas where prioritized investment and focus can provide a unique advantage for the particular law school.<sup>53</sup> Even though law is a “public good,” differentiation is both appropriate and necessary as to the

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<sup>52</sup> It should be noted that bar preparation, by itself, is not inherently undistinctive. If the law school creates its own distinctive approach to bar passage, and it works, then the Resource Based View would recognize the investment as distinctive. For example, consider the distinctive bar passage reputation achieved by Florida International University, College of Law. *See, e.g.,* Andrew Pantazi, *Which Florida Law Schools have the Highest Bar Passage Rate? New Florida Bar Results Posted*, FLA. TIMES UNION (Sept. 16, 2019, 2:51 PM), <https://www.jacksonville.com/news/20190916/which-florida-law-schools-have-highest-bar-passage-rate-new-florida-bar-results-posted> [<https://perma.cc/G7JW-W36H>] (last visited Feb. 8, 2020); Mike Stetz, *An Unexpected Leader*, NAT'L JURIST, Winter 2020, at 11, <https://bluetoad.com/publication/frame.php?i=641735&p=11&pn=&ver=html5> [<https://perma.cc/8R72-XGUR>] (last visited Feb. 20, 2020). *See generally* Jeffrey S. Kinsler & Jeffrey Omar Usman, *Law Schools, Bar Passage, and Under and Over Performing Expectations*, 36 QUINNIPIAC L. REV. 183 (2018).

<sup>53</sup> Campbell, *supra* note 2, at 359 (citing Michael Porter, *What is Strategy?*, HARV. BUS. REV. 61, 64 (1996) “Strategy requires making choices and making choices that make an institution different in some important and sustainable way from its competitors. ‘Competitive strategy is about being different. It means deliberately choosing a different set of activities to deliver a unique mix of value.’”).

type and value of the legal education delivered.<sup>54</sup> At the other extreme, there are firm resources that are admittedly “unavoidable waste.”<sup>55</sup> The challenge for any organization is to optimally support high value resources while triaging or redeploying lesser value resources. In the short term, this support can possibly be achieved by lightening a teaching or service load for a professor who is considered “a high value resource” because they are heavily involved in implementing the *current* strategic plan or other high priority activity. Such a lightening of teaching or service load would require the redeployment of another professor to fill the teaching or service gap created. Ideally, the redeployment would utilize a professor otherwise engaged in low value activities (in reference to the organization’s strategic priorities). Ultimately, however, the challenge for every law school is to acquire, develop and support high value resources while disposing or minimizing the cost of resources that continually constitute waste.

In a worst-case scenario, an individual law school will completely succumb to the isomorphic pressures of institutionalization and mindlessly mimic other law schools. This school will use most of its limited resources to meet operational demands and address the minimum requirements for ABA accreditation. If there are any remaining resources, they will likely be allocated in an ad hoc manner. Some distinctive and meaningful resources may coincidentally receive minor support—to the same degree as the perpetually less productive resources. However, law schools of this type will achieve little in the way of creating any competitive advantage. Not perceiving any unique value, potential students will decide to attend another school, or select the particular law school based upon purely financial and/or convenience considerations.<sup>56</sup>

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<sup>54</sup> Although legal knowledge is a “public good,” the premise of this paper is that the provision of legal education extends more broadly. Even though legal knowledge is non-excludable and non-rivalrous, the same cannot be said regarding the means of structuring, communicating, and applying the knowledge. It is in these later attributes that the Resource Based View focuses on the distinctiveness and meaning of organizational resource deployment in order to deliver unique value.

<sup>55</sup> PENROSE, *supra* note 36, at 60.

<sup>56</sup> Theoretically, one of the easiest ways to get a feel for the distinctiveness and meaning of a particular law school’s brand would be to consider the extent to which cost plays a role in student decisions to attend the particular school. Less distinctive law schools will need to price aggressively to recruit students—either through lower tuition, larger scholarships or financial aid. In contrast, law schools with stronger brands would largely use scholarships and financial aid to assure class diversity rather than to assure minimum class sizes. Curiously, an accurate measure of price sensitivity might be a better measure of reputation or brand value than any survey of law school applicants. *Cf.* 2012 *Law School Applicant Survey*, LAW SCH. ADMIS. COUNCIL (2013) (on file with authors).

In sharp contrast, according to the Resource Based View, innovative law schools will actively examine their existing resources and intentionally optimize the value of their configurations and uses. Innovative law schools will realize when some resources are really just “waste”—and manage accordingly through a carefully prioritized distribution of support. Of course, innovative law schools will appreciate both the actual and potential uses of all resources in achieving strategic goals. Sometimes it is not the resource, but the manner of its current deployment, that is the problem. Other times, adaptation of the resource may be necessary. But for innovative law schools, any given resource will be managed consistent with its highest value (either directly, indirectly or in combination with other resources) in reference to a distinct population of tuition paying students. Of course, innovative law schools will achieve these goals through the engaged cooperative input and participation of both the faculty and Dean.

Looking further, in considering how different types of resources might be configured during the implementation process to create a sustainable competitive advantage, law schools should be aware that there are three main categories of resources: physical capital resources, organizational capital resources and human capital resources.<sup>57</sup> Each of these are discussed immediately below.

*a. Physical Capital Resources*

The first type of resource, “physical capital resources,” includes the “physical technology used in the firm, a firm’s plant and equipment, its geographic location, and its access to raw materials.<sup>58</sup> In this way, an individual law school may establish a competitive advantage (for some duration) by investing in an impressive, unique building or upgrade.<sup>59</sup> Similarly, an individual law school could combine investment or access to state-of-the-art technology with related curricular programming.<sup>60</sup> However, these types of resources usually require continued investment in order to remain a source of sustainable competitive advantage. The continued investment keeps these types of resources from either becoming obsolete or otherwise enables them to maintain their distinctiveness relative to other law schools. Although these types of resources are meaningful, they cease to be

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<sup>57</sup> Barney, *supra* note 45, at 101.

<sup>58</sup> *Id.*

<sup>59</sup> Ann W. Parks, Editor, *Superblock! The Vision for Georgetown Law*, GEORGETOWN LAW 30, 31 (Fall/Winter 2019).

<sup>60</sup> See, e.g., *Law, Science, and Technology*, HARV. L. SCH., <https://hls.harvard.edu/dept/academics/programs-of-study/law-science-and-technology/> [<https://perma.cc/T9AH-JGRW>] (last visited Jan. 2, 2020).



distinctive once they are copied by other law schools or once they start to wear out.

In a far less depreciable way, some law schools also may be able to take advantage of their unique geographic location as a form of a physical capital resource. For better or worse, this can take the form of their proximity to unique attractions—like being near Washington, D.C., a state capital, or local county seat.<sup>61</sup> Geographic location can also provide easier access to qualified adjunct law faculty, student jobs<sup>62</sup> and internships. And, it can take the form of a convenient proximity to a local population of students interested in attending law school.<sup>63</sup> Generally speaking, physical capital resources either require a long-term investment to maintain distinctiveness, or are largely fixed by the location(s) of the given law school.

*b. Organizational Capital Resources*

The second type of resource, “organizational capital” “involve[s] the firm’s reporting structure, planning processes, control and coordination systems, and information relations among workers within the firm, between firms, and within the business environment.”<sup>64</sup> Another definition of organizational capital is:

[T]he combination of explicit and implicit, formal and informal knowledge which in an effective and efficient way structure and develop the organizational activity of the firm, that includes culture—implicit and informal knowledge; structure—explicit and formal knowledge; and organizational learning—implicit and explicitly, formal and informal renewal knowledge processes . . . .<sup>65</sup>

Given existing ABA regulations, organizational capital is inextricably linked to

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<sup>61</sup> See BARTON, *supra* note 15, at 182 (explaining that the location of Washington & Lee Law School “is lovely, but it presents a challenge for an aspirational top-twenty law school . . . it is pretty, but in terms of drawing faculty is a little too isolated . . .”).

<sup>62</sup> See *id.* at 194 (discussing innovation challenges at the University of Cincinnati and several Ohio law schools and the unfavorable Ohio job prospects for their graduates.).

<sup>63</sup> Cf. *id.* at 182 (discussing how Washington & Lee Law School “finds itself in a crowded Virginia/D.C. marketplace for law schools.”).

<sup>64</sup> Rajshekhar (Raj) G. Javalgi & Patricia R. Todd, *Entrepreneurial Orientation, Management Commitment, and Human Capital: The Internationalization of SMEs in India*, 64 J. BUS. RES. 1004, 1005 (Sept. 2011).

<sup>65</sup> Gregorio Martin-de-Castro et al., *Organizational Capital as Competitive Advantage of The Firm*, 7 J. INTELL. CAP. 328 (2005). This article subdivided intellectual capital assets between human capital, technological capital, organizational capital, business capital and social capital. *Id.* However, for present purposes, the division of physical capital assets, knowledge capital assets and organizational capital will suffice.

law school shared governance and internal decision making.<sup>66</sup> Its continued linkage is assumed by the current article. Nonetheless, existing law school organizational capital is likely to have been negatively impacted by the institutionalization of U.S. legal education. To a large extent, one purpose of the current article is to work around these challenges to provide a means (within existing shared governance structures) to implement a strategic plan. The successful implementation of any strategic plan (including during Stage 6 of the Process Model) relies upon the proper deployment and potential modification of a law school's resources—including its organizational capital.

*c. Human Capital Resources*

The third type of resource, “human capital” includes the “training, experience, judgment, intelligence, relationships, and insight of individual managers and workers in a firm.”<sup>67</sup> As might be expected, “human capital” includes much of the core resources relied upon by law schools to create value for their students. To a large extent, human capital resources begin with a foundation based upon the education and experience of the faculty.<sup>68</sup>

[T]he human capital pool refers to the stock of employee skills that exist within a firm at any given point in time. Theorists focus on the need to develop a pool of human capital that has either higher levels of skills (general and/or firm specific), or achieving a better alignment between the skills represented in the firm and those required by its strategic intent.<sup>69</sup>

Traditionally, U.S. law schools have focused more on the former “need to develop a pool of human capital that has . . . higher levels of skills.”<sup>70</sup> However, it is the position of the current article that, in order to successfully implement a strategic plan, law schools need to spend far more time on the latter task of “achieving a better alignment between the skills represented [and deployed] in the firm and those required by its strategic intent.”<sup>71</sup> Achieving this alignment would address some of

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<sup>66</sup> *Organization and Administration, Standard 201, Law School Governance, 2019-2020 A.B.A. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS* ch. 2 (a) (“The dean and the faculty shall have the primary responsibility and authority for planning, implementing, and administering the program of legal education of the law school, including curriculum, methods of instruction and evaluation, admissions policies and procedures, and academic standards.”).

<sup>67</sup> Barney, *supra* note 45, at 101 (emphasis omitted).

<sup>68</sup> See, e.g., Theodore W. Schultz, *Capital Formation by Education*, 68.6 J. POL. ECON. 571 (1960).

<sup>69</sup> Patrick M. Wright et al., *Human Resources and The Resource Based View of The Firm*, 27 J. OF MGMT. 701, 704 (2001).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* See *infra* p. 14 for a discussion on vertical fit.

the most destructive aspects of institutionalization. Given the importance of this issue to implementation success, the following section explains the connection between the Resource Based View and Strategic Human Resource Management (“SHRM”).<sup>72</sup>

### 3. RBV and Strategic Human Resource Management

As noted by two of the founding scholars in the field of Strategic Human Resource Management, “[SHRM, is a] . . . pattern of planned human resource deployments and activities intended to enable an organization to achieve its [strategic] goals.”<sup>73</sup> “The basic premise underlying SHRM is that organizations adopting a particular strategy require HR practices that are different than those required by organizations adopting alternative strategies.”<sup>74</sup> This is particularly true where, as here, an organization relies heavily upon human resources in attempting to overcome institutionalization and to implement a distinctive and meaningful strategy.

In looking at the challenge this way, it could be said that there are actually two dimensions to human resource management. On one hand, there is a pressing need for the configuration and deployment of human resources to align with the externally-looking strategic priorities of the organization. On the other hand, there is a pressing need for the alignment of internal rules and policies governing internal human resource management to optimize the potential productivity of “employees” in ways that are beneficial to the organization. These dimensions are directly reflected in the structure of SHRM.

First, “vertically, [SHRM] entails the linking of human resource management practices with the [externally focused] strategic management process of the

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<sup>72</sup> Here, and throughout this article, the term SHRM is used to abbreviate “Strategic Human Resource Management” and is not to be confused with the Society of Human Resource Management at [www.shrm.org](http://www.shrm.org).

<sup>73</sup> Patrick M. Wright & Gary C. McMahan, *Theoretical Perspectives for Strategic Human Resource Management*, 18 J. OF MGMT. 295, 298 (1992). See also Li-Qun Wei, *Strategic Human Resource Management: Determinants of Fit*, 14 RES. AND PRAC. IN HUM. RES. MGMT. No. 2, at 49 (2006) (“Although there is still no consensus on an exact definition of SHRM among scholars, broad agreement has been reached on its basic function, which involves designing and implementing a set of internally consistent policies and practices that ensure the human capital of a firm contributes to the achievement of its business objectives.”).

<sup>74</sup> John E. Delery & D. Harold Doty, *Modes of Theorizing in Strategic Human Resource Management: Tests of Universalistic, Contingency, and Configurational Performance Predictions*, 39 ACAD. OF MGMT. J. 802, 802 (1992).

organization.”<sup>75</sup> Second, “horizontally, [SHRM] entails the coordination or congruence among the various [internal organizational] human resource management practices . . . through a pattern of planned action.”<sup>76</sup> In essence, SHRM is a tool through which U.S. law schools can operationally apply the Resource Based View both “vertically” and “horizontally” to human capital deployment in connection with any strategic plan implementation. This will improve both resource management in general and increase the likelihood of implementation success (i.e. in Stage 6 of the Process model).<sup>77</sup>

a. *The Concept of Vertical Fit*

The concept of “vertical fit” rests on the “perspective that the effectiveness of an HR system depends on the extent to which it supports the employee contributions required to achieve an organization’s strategic goals.”<sup>78</sup> In effect, vertical fit focuses on how the alignment of individual faculty capabilities enable a law school to distinctively compete.<sup>79</sup> This has obvious implications for overcoming institutionalization and the success of any implementation effort.

At its simplest level, vertical fit relates to how an individual law school facilitates the possession of faculty with the skills and interests sufficient to achieve the organization’s strategic goals. For instance, vertical fit implicates the desirability of faculty members possessing particular specialties in order to both fulfill the minimum requirements of the school (scholarship, teaching, etc.) as well as enable the school to achieve its distinctive, strategic goals. Ordinarily, faculty members

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<sup>75</sup> Wright & McMahan., *supra* note 73, at 298.

<sup>76</sup> *Id.*

<sup>77</sup> See Natalia Garcia-Carbonell et al., *Is Double Fit a Sufficient Condition for SHRM Success? The Missing Link Between Intended and Implemented HRM Strategy*, 23 INT’L J. OF ORG. ANALYSIS 264, 265 (2015). “By achieving both [vertical and horizontal fit], HR strategies should influence organizational performance positively.” (citing Lloyd Baird & Ilan Meshoulam, *Managing Two Fits of Strategic Human Resource Management*, 13 ACAD. OF MGMT. REV. No. 1, at 116–28 (1988); Karen A. Golden & Vasudevan Ramanujam, *Between a Dream and a Nightmare: On The Integration of The Human Resource Management and Strategic Business Planning Process*, 24 HUM. RES. MGMT. No. 4, at 429–52 (1985); Mick Marchington et al., *Alignment, Integration and Consistency in HRM Across Multi-Employer Networks*, 53 HUM. RES. MGMT. No. 3, at 313–39 (2011); Patrick Wright & Scott A. Snell, *Toward An Integrative View of Strategic Human Resource Management*, 1 HUM. RES. MGMT. REV. No. 3, at 203–25 (1991)).

<sup>78</sup> Joo Hun Han et al., *The Goldilocks Effect of Strategic Human Resource Management? Optimizing the Benefits of a High Performance Work System through the Dual Alignment of Vertical and Horizontal Fit*, 62 ACAD. OF MGMT. J. 1388, 2 (2016).

<sup>79</sup> “[D]istinctiveness . . . is principally related to vertical fit.” Garcia-Carbonell et al., *supra* note 77, at 272.

can easily fulfill the minimum requirements. But as can be seen in the Monte Carlo simulation (later in this article), faculty skills must still properly align and be deployed so that law schools can achieve their distinctive, strategic goals.

One common example where vertical fit is often left to chance relates to the traditional use of “job talks” in law faculty hiring. Assume, for instance, that there is a job posting indicating that a position requires “quality teaching” in one or more specific subjects. After a preliminary review of curricula vitae and possibly a phone interview or maybe some viewing of youtube presentations, a handful of finalists are invited to campus. Traditionally, each of the finalists is then asked to give a “job talk” related to their recent scholarship. The faculty then vote on who to hire. A critical omission is that there is no effort to directly evaluate the quality of the candidates’ teaching abilities.<sup>80</sup>

The traditional use of the “job talk” is certainly appropriate for hiring someone primarily responsible for a law school’s strategic priorities related to scholarship. However, vertical fit is lacking if a “job talk” is used to evaluate candidates for a position primarily intended to support strategic priorities regarding quality teaching. Even if there is some positive correlation between quality scholarship and quality teaching,<sup>81</sup> there is no legitimate reason to rely upon any indirect measures.<sup>82</sup>

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<sup>80</sup> “[T]he candidate review process fails to allow for any in depth observations of the candidate’s teaching abilities . . . .” Daniel Gordon, *Hiring Law Professors: Breaking the Back of an American Plutocratic Oligarchy*, 19 WIDENER L. J. 137, 145 (2009).

<sup>81</sup> The current article takes no position regarding the sometimes contentious “view that teaching and research are harmonious and mutually beneficial activities.” Simon Cadez et al., *Research, Teaching and Performance Evaluation in Academia: The Salience of Quality*, 42.8 STUD. IN HIGHER EDUC. 1455, 1455 (2017). Suffice it to state that there are apparent inconsistencies in the literature. See, e.g., John Hattie & Herbert W. Marsh, *The Relationship Between Research and Teaching: A Meta-Analysis*, 66 REV. OF EDUC. RES. 507 (1996). But see Craig S. Galbraith & Gregory B. Merrill, *Faculty Research Productivity and Standardized Student Learning Outcomes in a University Teaching Environment: A Bayesian Analysis of Relationships*, 37 STUD. IN HIGHER EDUC. 469 (2012).

<sup>82</sup> The use of direct assessments—by actually seeing a candidate teach—has the benefit of “face validity and credibility.” Hunter M. Breland & Judith L. Gaynor, *A Comparison of Direct and Indirect Assessments of Writing Skill*, 16 J. OF EDUC. MEASUREMENT 119, 119 (1979). This is particularly true where the correlation between scholarly quality and teaching quality has been found to be weak—even if still statistically significant. Under these circumstances, an indirect assessment is likely to be quite inferior to a direct assessment. For example, consider the positive relationship between quality scholarship and teaching found in Cadez et al., *supra* note 81. In Cadez, a one unit improvement in scholarship quality (measured as “the proportion of papers published in high-quality journals relative to all papers published by a particular researcher”) resulted in an improvement in measured teaching quality of between just 0.002 to 0.003 (where teaching quality

Curiously, other disciplines routinely require teaching demonstrations during the interview process—even for faculty candidates with scholarly priorities.<sup>83</sup> If quality teaching is a strategic priority for a specific law school, the failure to provide mechanisms to directly evaluate the teaching abilities of candidates indicates a clear defect in the hiring process.<sup>84</sup> As a result of the omission, the determination of vertical fit is left to chance. Over time, the quality of law school teaching will reflect the random nature of success and failure. The quality of law faculty teaching will reflect no coherent strategy—even if the minimal hiring requirements are fulfilled.

Unfortunately, the determination of an appropriate vertical fit is often more challenging than simply identifying an omitted teaching evaluation. For instance, vertical fit is often implicated when considering the desirability of hiring faculty with varying intellectual interests across both scholarship and teaching. This problem often begins with an innocuous job posting simply looking for someone with a passion to teach a particular subject. For instance, consistent with the strategic plan, a law school may seek to hire someone focused on Environmental Law. The posting may correctly stress that the desired person should have a passion for Environmental Law and will teach courses in that area.

The problem sometimes arises during the interview process when an otherwise intelligent, promising, scholarly candidate indicates that they have never taught Environmental law but are “thrilled” to learn how. The candidate then adds that their real scholarly passion is for something completely unrelated—like Criminal Law. Invariably, some faculty will focus on the scholarly appeal of the candidate’s brilliant publications and job talk. While singing the candidate’s praises, these faculty often implicitly or explicitly assert that anyone can learn how to teach Environmental law. These faculty will also likely point out how much stronger the Criminal Law capabilities would be with this candidate to the faculty. And yet, if any attempt is made to require the candidate to produce scholarship in

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was measured on a scale of 1 to 5). See Cadez et al., *supra* note 81, at 1464 and 1468, Table 4 respectively. According to the positive results from Cadez, if a researcher were to increase the number of their “high-quality” journal publications by 10%, their average teaching evaluation would only improve between .02 and .03 (on a scale of 1 to 5). For a discussion of problems inherent in both direct and indirect assessments, see Deborah Crusan, *An Assessment of ESL Writing Placement Assessment*, 8 *ASSESSING WRITING* 17, 18–21 (2002) (noting that direct assessment is “authentic” but “unreliable due to inconsistencies in scoring by independent raters”—something that exists equally in both direct and indirect assessments during any law school job interview).

<sup>83</sup> By implication, if a law school has a strategic priority as to both scholarship and teaching, all candidates should be required to both give a job talk and provide a teaching demonstration.

<sup>84</sup> See Gordon, *supra* note 80, at 145.

Environmental Law, multiple faculty members would likely object to the requirement as being an improper restriction of “academic freedom.”<sup>85</sup>

If successful (and the particular candidate is hired), the organization’s immediate strategic goals will have been effectively ignored. Even worse, the hiring decision will have a sustained impact on the resource configuration of the law school (potentially) for years to come. Ultimately, it may be that the law school will benefit from having an additional Criminal Law scholar on the faculty. However, without informed strategic consideration, it is at least as likely that the law school will fail to distinguish itself in any area of strategic importance. If this is a long-term pattern, the subject matter expertise of the law faculty will not reflect any coherent strategy—even if the teaching requirements are fulfilled.

In sum, the failure to control for vertical fit in hiring decisions presents a significant challenge for any law school looking to implement a strategic plan. Long-term success requires a hiring process that does more than just randomly meet minimal requirements. Consequently, a law school should anticipate, address and avoid likely vertical fit challenges as early as possible. Otherwise, at best, vertical fit will be left to chance and the ability of the given organization to achieve its strategic goals will be undermined.

*b. The Concept of Horizontal Fit*

Horizontal fit focuses on the extent to which internal policies and practices “interrelate, reinforcing each other to achieve strategic synergies.”<sup>86</sup> Such policies and practices “must be connected and complemented internally to work efficiently.”<sup>87</sup> Ideally, horizontal fit appropriately relates, rationalizes, aligns and streamlines rules governing the operation of a given law school. Where vertical fit is concerned with effectiveness, horizontal fit is concerned with efficiency. Ideally, horizontal fit makes it easier for faculty to do the right things while making it more difficult to do things that fail to add organizational value. If horizontal fit is not achieved, an implementation effort is likely to be undermined by bureaucratic

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<sup>85</sup> See generally Philip G. Altbach, *Academic freedom: International Realities and Challenges*, 41 HIGHER EDUC. 205, 206–07 (2001).

<sup>86</sup> Garcia-Carbonell et al., *supra* note 77, at 269 (citing Clint Chadwick, *Theoretic Insights on The Nature of Performance Synergies in Human Resource Systems: Toward Greater Precision*, HUM. RES. MGMT. REV. 85 (2010); Yongmei Liu et al., *The Value of Human Resource Management for Organizational Performance*, 50 BUS. HORIZONS 503 (2007); Al-Karim Samnani & Parbudyal Singh, *Exploring the Fit Perspective: An Ethnographic Approach*, 52 HUM. RES. MGMT. 123 (2013)).

<sup>87</sup> *Id.* See also Fernando Martín-Alcázar et al., *Strategic Human Resource Management: Integrating The Universalistic, Contingent, Configurational and Contextual Perspectives*, 16 THE INT’L J. OF HUM. RES. MGMT. 633–59 (2005).

intransigence and misaligned faculty obligations.

For instance, the authors recently heard about a great example of a university-based rule that clearly lacked horizontal fit. In an effort to improve expense management, a particular university dramatically increased the requirements of credit card expense reports. The new rules included the typical receipts, basic form, and supervisory sign-off. However, the university added additional requirements regarding detailed narrative descriptions and the proper selection of billing account numbers. Undoubtedly, the new system was an accountant's dream.

In order to encourage faculty to submit their expense materials on time, the university also started to disable university issued credit cards if the required materials were not submitted promptly. Exceptions were not freely given. The university even went so far as to threaten to deny any reimbursement requests that did not use the university credit card.

Undoubtedly, the new rules were well-intended. The proper use and reporting of university credit cards is certainly important. However, the new rules were so burdensome that some faculty members simply avoided doing any work that required the use of the university credit cards. University trips were cancelled—even ones clearly for the benefit of the university. Regular purchases were redirected through purchasing. Invitations for university-related dinners were declined. The lack of horizontal fit essentially deterred many faculty members from voluntarily doing anything beyond the absolute minimum for their job. Undoubtedly, expenses were reduced, but at what cost? Faculty disengaged. The valid pursuit of university interests was strangled. Horizontal fit was missing.

Horizontal fit also presents a challenge for some law schools regarding the manner in which faculty performance is evaluated. Rather than have detailed job descriptions and evaluation criteria, law faculty are generally evaluated across three general categories: scholarship, teaching and service. The problem for horizontal fit is not so much in the categories themselves, as in the failure to clearly communicate the standards within these categories that would optimally support the individual law school's goals. In an effort to be flexible, the formal standards only communicate the minimally acceptable behavior. In turn, the ambiguous criteria fail to encourage faculty members to align their behavior with the law school's strategic priorities. Instead, the rules encourage "satisficing" faculty behavior as to the law school's interests. Once the minimal requirements are met, each faculty member is free to pursue individual interests (without regard to furthering any strategic priorities of the law school).

"Satisficing" is a term coined by Nobel Prize Winning Economist Herbert A. Simon to describe decision making where the search for a "right" answer stops as



soon as a minimally acceptable solution is found.<sup>88</sup> For many law faculty, the personal choice is to either attempt to determine optimal performances supporting the law school (in the absence of any express guidance), or to simply meet the minimal requirements for continued employment.<sup>89</sup> Under these circumstances, some faculty members will rationally focus on meeting only the minimum requirements.

Just as before, the failure to control for horizontal fit does not necessarily imply that law faculty will consciously work against the best interests of the law school. That is unlikely. However, if the presence of horizontal fit is left to chance, only some faculty members will successfully align their behavior with the law school's strategic goals. Others will not. Over time, this omission is likely to present yet another challenge to successful plan implementation.

Given the likely issues concerning both vertical and horizontal fit within many law schools, it is submitted that additional mechanisms are necessary to better align law faculty with any implementation effort. This is especially true given recent research that indicates successful implementation needs more than just consistent vertical and horizontal fit. The research suggests that the implementation effort “be positively perceived and accepted by employees, so that their attitudes and behaviors [can] be oriented towards strategic objectives.”<sup>90</sup> What is necessary is to cooperatively address any existing defects while also focusing on achieving a successful implementation. It is submitted that the best approach is simply to maintain meaningful faculty engagement and law school leadership.

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<sup>88</sup> Denise E. Agosto, *Bounded Rationality and Satisficing in Young People's Web-Based Decision Making*, 53.1 J. OF THE AM. SOC'Y FOR INFO. SCI. AND TECH. 16, 17 (2002). See also HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR 118–20 (1947).

<sup>89</sup> William F. Massy, an expert in economic and leadership issues confronting colleges and universities, utilizes the term “satisficing” in the higher educational context. “Satisficing . . . means that, although faculty want to do a good job for their students and usually will expend enough time and effort to achieve what they believe to be satisfactory performance, they are quick to turn their attention to research once they have attained the quality threshold . . . . The mantra of the quality movement, which also applies to productivity is ‘Good enough isn’t.’ The implication of satisficing is ‘Good enough is’ which stops continuous improvement in its tracks.” WILLIAM F. MASSY, *Creative Paths to Boosting Academic Productivity*, in REINVENTING HIGHER EDUCATION: THE PROMISE OF INNOVATION 73, 78 (Ben Wildavsky et al. eds. 2011).

<sup>90</sup> Garcia-Carbonell et al., *supra* note 77, at 276.

#### 4. The Critical Role of Engagement and Leadership During Implementation

Considering some of the implementation challenges likely to face many U.S. law schools, one remedial option could be to simply endorse abandoning the shared governance structure of U.S. law schools.<sup>91</sup> However, such drastic structural changes are probably not necessary for the vast majority of U.S. law schools. Recall that the earlier article addressed “faculty engagement and leadership concerns by intentionally utilizing a faculty-led process with input from the Dean.”<sup>92</sup> For implementation success, this cooperative integrated approach is now even more imperative.

Existing research suggests that meaningful communication can be particularly effective in fostering voluntary support for implementing improvements to any human resource system:

Implicit . . . is the importance of organizational communication in the transition from HRM strategy formulation [designed to improve vertical and/or horizontal fit] to implementation. Communication processes are particularly relevant to create and manage . . . meanings [regarding vertical and horizontal fit] that will be translated to employees, affecting their perceptions of the . . . system . . . [E]fficient communication can help organizations to obtain desired employee behaviours, and clarify what is expected from them to carry out the business strategy.<sup>93</sup>

Moreover, the benefits of clear communication extend beyond just managing perceptions:

[O]rganizational communication is not only important to guide employees’ perceptions but it also helps line managers to implement practices, by providing consensual and coherent HRM messages. In these situations, it will be easier to build shared understanding about the HRM system, avoiding gaps between intended HR strategies and implemented practices.<sup>94</sup>

This advice would appear to apply with even greater force where the “employees” and “line managers” are combined with executive management in the context of U.S. law school shared governance. “[I]nformal persuasion and collaboration”<sup>95</sup> is

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<sup>91</sup> See, e.g., Brenton E. Newton, *The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure*, 64 S.C. L. REV. 55, 72 (2012).

<sup>92</sup> *Supra* intro. pt. B, *The Seven-Stage Process and The Implementation Challenge*. See also Gaughan, *supra* note 1, at 261–66.

<sup>93</sup> Garcia-Carbonell et al., *supra* note 77, at 275.

<sup>94</sup> *Id.* (citations omitted).

<sup>95</sup> Nancy B. Rapoport, “Venn” and the Art of Shared Governance, 35 U. TOL. L. REV 169, 176 (2003); see also Rapoport, *supra* note 28, at 371; see also Hrebiniak, *supra* note 29, at 18 (“Leading effective

necessary to achieve a consensus and focus on supporting the implementation effort.

As part of this cooperative effort, the Dean's role is primarily providing clear leadership and communicating clear goals.<sup>96</sup> Additionally, the more subtle leadership provided by the widely-respected faculty members<sup>97</sup> provides a critical peer-based mechanism for clarifying meaning and encouraging a more aligned effort by all faculty members. The continued participation of the widely-respected faculty members<sup>98</sup> should be used to continuously provide for faculty involvement and input into resource allocation decisions. Otherwise, efforts to improve resource management could inadvertently lead to faculty burnout<sup>99</sup> or revolt.<sup>100</sup>

Beyond providing for cooperative leadership, recent research also suggests that positive incentives can be effective in motivating positive behavior by academic faculty. Care should be taken to avoid any appearance of punitive intention in the resource allocation process. Instead resource allocation decisions should perhaps include policies, processes and incentives that: 1) Reward high performers; 2) Deal with poor performers; 3) Base Promotion on Performance; 4) Emphasize talent management; 5) Support Retaining talent; and 6) Attract talent through a "clear employee value proposition."<sup>101</sup> Of course, the meaning of the specific terms can be adjusted to comport with the general consensus of the faculty. This should be facilitated through the support of both the Dean and the widely-respected faculty

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change, the number one requisite for successful strategy implementation, also presupposes an ability to influence and move others into purposeful action.").

<sup>96</sup> Ann Gilley et al., *Characteristics of Leadership Effectiveness: Implementing Change and Driving Innovation in Organizations*, 19 HUM. RES. DEV. Q. 153, 164–65 (2008) (Human resources scholars, Ann Gilley, Pamela Dixon and Jerry Gilley, have researched the most important characteristics of leadership effectiveness in implementing change and driving innovation in organizations. These scholars name six characteristics in total and their two-year research indicates that these four are the most critical to successful implementation: ability to communicate, ability to motivate, ability to involve and support others, and ability to coach. Communication and the ability to motivate were found to be the most critical.).

<sup>97</sup> As used throughout, the reference to "widely-respected faculty members" refers to the Convener group established in Stage 1 & 2 of the Process Model discussed in the earlier article.

<sup>98</sup> *Supra* intro. pt. B, *The Seven-Stage Process and The Implementation Challenge*.

<sup>99</sup> Robin Bauwens et al., *Performance Management Fairness and Burnout: Implications for Organizational Citizenship Behaviors*, 44.3 STUD. IN HIGHER EDUC. 584, 585 (2019).

<sup>100</sup> Cf. BARTON, *supra* note 15 at 188–96 (discussing the response by law faculty at the University of Cincinnati to extremely unpopular austerity measures implemented by their dean).

<sup>101</sup> The list of six incentive areas was extracted from McCormack et al., *supra* note 34, at F541.

members.<sup>102</sup>

For instance, leadership and collaboration can be used to define the appropriate limits on “dealing with poor performers.” Similarly, the Dean and the widely-respected faculty members<sup>103</sup> can cooperatively work to clarify exactly what constitutes “good performance,” “poor performance,” and a “clear employee value proposition.” Within the context of optimal resource management, it is submitted that all of these determinations can be cooperatively formulated in terms that are fair, clear to the faculty and relate directly to implementing the school’s strategic plan. The effort is unlikely to be easy or simple. However, implementation success is still achievable.

In fact, in looking at the four most common implementation problems below, many of the underlying problems can be attributed to the failure to clarify, communicate and execute with an aligned faculty. Many of these basic problems can be solved through the cooperative engagement with faculty by both the Dean and the widely-respected faculty members.<sup>104</sup>

**B. Four Key Questions Related to Achieving an Optimal Implementation**

Although the following four questions could be asked and answered in any order, the presentation of the questions in this article is prioritized in the order that they are likely to be relevant to any implementation effort (i.e. Stage 6 of the Process Model). Practically speaking, defects in the answers to the earliest questions will have the most immediate, obvious and significant detriment. However, all are important to achieve the optimal benefits of a distinctive and meaningful strategic plan.

1. Does Your School Have a Clearly Understood and Supported Strategy?

Theoretically, the answer to the first question should not be any problem for a law school that has just completed Stage 5 (Update General Faculty on Strategy) and is ready to begin Stage 6 (Implement & Monitor) in the Process Model.<sup>105</sup> The answer *should* be an easy “yes.” However, given the importance of vertical and horizontal fit (discussed previously), it may be wise to re-confirm the faculty understanding and support for the proposed strategy prior to actually attempting

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<sup>102</sup> *Supra* note 97.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Supra* intro. pt. B, *The Seven-Stage Process and The Implementation Challenge and accompanying model.*

the implementation.<sup>106</sup> Just because a majority of the faculty previously voted in favor of a strategic plan does not necessarily mean that the faculty remembers, understands and currently supports the strategy.

Aside from confirming the continued faculty recollection and support, it is equally important at this point that the proposed strategy be perceived by faculty as being fully supported by law school leadership.<sup>107</sup> This is specifically why the Dean is primarily responsible for leading the implementation process in Stage 6.<sup>108</sup> In attempting to implement any change process within an institutionalized industry, it is critical to remember that actions “speak louder than words.”<sup>109</sup> Where an organization—such as a typical U.S. law school—has a history of minimally adaptive behavior, the baseline expectations of many law faculty may be that the current efforts are doomed to fail. Communicating active support by leadership throughout the implementation process will tend to negate this.<sup>110</sup>

Of course, the resistance to change may extend beyond faculty apathy.<sup>111</sup> Making the implementation even more challenging may be the behavior of individual faculty members who are actively opposed to the proposed strategic changes.<sup>112</sup> Having failed to convince their colleagues that strategic priorities

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<sup>106</sup> Robert H. Jerry, II, *A Primer for the First-Time Law Dean Candidate*, 49 J. LEGAL EDUC. 564, 569 (1999) (“[I]nstitutions prosper when the faculty and the Dean work together to achieve shared goals under a shared plan.”).

<sup>107</sup> Victor L. Streib, ed., *AALS LAW DEANSHIP MANUAL: REPORT OF THE AALS SPECIAL COMMITTEE ON THE STATE OF THE LAW SCHOOL DEANSHIP at 14–15* (1993) (“With regard to the faculty, probably the most important leadership role for the dean is to stimulate and implement the collective vision of the law school community.”).

<sup>108</sup> See Gaughan, *supra* note 1, at 283, 301 (explaining the role of the Dean and discussing Stage 6 implementation).

<sup>109</sup> John Duffy & Nick Feltovich, *Do Actions Speak Louder Than Words? An Experimental Comparison of Observation and Cheap Talk*, 39 GAMES AND ECON. BEHAV. 1, 1 (2002).

<sup>110</sup> Gilley et al., *supra* note 96.

<sup>111</sup> It has been acknowledged that “Professors have a reputation . . . when it comes to change—skeptical, recalcitrant, resentful, even obstructionist, the Party of No.” Further, “Faculty members have also learned that a plan for big changes typically means, ‘all of a sudden, I’m on a bunch of committees, and it’s just added to my workload without any extra compensation for me,’ says [James] Lang, of Assumption [College].” LEE GARDNER, *The Barriers to Innovation*, in *THE INNOVATION IMPERATIVE*, 22–23 (2019).

<sup>112</sup> Campbell, *supra* note 2, at 362 (When law schools have past successes from which they developed processes, resources and values that helped them achieve those successes, it is harder for faculty to be on board with new, innovative change. “Disruptive innovation theory shows that established processes . . . work almost like an immune system in rejecting radically new

should be modified or abandoned, dissident faculty members may attempt to enlist an “override” by the Dean. If the Dean does not appreciate the threat posed by this back-channel dissent, the Dean may choose to avoid conflict by disengaging from the implementation effort altogether. This presents a danger to the implementation effort in the form of “absentee leadership.”<sup>113</sup>

Within the context of law schools, absentee leadership (either by the Dean or the widely-respected faculty members<sup>114</sup>) tends to undermine the consensus supporting both the coordination and commitment of the general faculty.<sup>115</sup> Without clear leadership, some law faculty members may become unsure of what to do to help.<sup>116</sup> Other faculty members—even ones otherwise supportive of the implementation effort—will be more likely to disengage from making coordinated contributions.<sup>117</sup> After all, if the law school leadership does not consider the successful implementation to be important, why should the faculty? As explained by a recent Harvard Business Review article (generally referencing an unidentified law school dean), absentee leadership “kills engagement and productivity.”<sup>118</sup> It undermines the successful implementation of any plan.

In fact, absentee leadership does not even need to occur intentionally. The negative impact is the same regardless of intentions. Undoubtedly, Deans and faculty members experience distractions on a daily basis. However, as long as the

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approaches (and that the incumbents almost always pass from the scene, unable to adapt to the new situation).”).

<sup>113</sup> Scott Gregory, *The Most Common Type of Incompetent Leader*, HARV. BUS. REV. (Mar. 30, 2018), <https://hbr.org/2018/03/the-most-common-type-of-incompetent-leader> [<https://perma.cc/BYR8-HNGE>] (last visited Feb. 11, 2020) (“Absentee leaders are people in leadership roles who are psychologically absent from them. They . . . avoid meaningful involvement with their teams. Absentee leadership resembles the concept of rent-seeking in economics—taking value out of an organization without putting value in. As such, they represent a special case of laissez-faire leadership, but one that is distinguished by its destructiveness.”).

<sup>114</sup> *Supra* note 97.

<sup>115</sup> Roger Gill, *Change Management – or Change Leadership?*, 3 J. OF CHANGE MGMT. 307, 317 (2003) (“Change requires good management, but above all it requires effective leadership.”).

<sup>116</sup> *Cf. id.* at 312–14. *See also* Hrebiniak, *supra* note 29, at 17 (“Without guidance, individuals do the things they think are important, often resulting in uncoordinated, divergent, even conflicting decisions and actions. Without the benefit of a logical approach, execution suffers or fails because managers don’t know what steps to take and when to take them . . . Having a model or roadmap positively affects execution success; not having one leads to execution failure and frustration.”).

<sup>117</sup> *Cf. Gill, supra* note 115, at 307–17 (2003) (“Change requires good management, but above all it requires effective leadership.”).

<sup>118</sup> Gregory, *supra* note 113.

leadership is preoccupied with collateral matters, it will be more difficult for the individual law school to maintain the “strategic consensus” necessary to sustain an operational implementation.<sup>119</sup> “Consensus is . . . critical in resolving differences, promoting a unified direction for the [law school], increasing strategic commitment, and enhancing the successful implementation of a given strategy.”<sup>120</sup> To maintain this consensus, and avoid the risks of absentee leadership, the law school leadership needs to make sure that the implementation remains a sustained top priority.

In short, the optimal probability for successful implementation (in Stage 6) begins with a clearly understood strategy (from Stage 5) that is unambiguously supported by both talk and definitive action by law school leadership—especially the Dean.<sup>121</sup> If the individual law school really does *not* have a clearly understood and supported strategy, it is critical that these defects be addressed before proceeding any further.

## 2. Does Your School Have Objective Goals Linked to a Timetable?

The next priority in attempting an implementation is to assure that objective goals have been agreed upon and that the goals are expressly linked to a calendar or timetable. Given the previously discussed concerns related to faculty evaluation of performance and horizontal fit, it is critical that any law school implementation effort include specific and measurable goals. First, measurement enables the objective comparison of the expected versus actual organizational performance. This provides a reality check as to whether or not the implementation and/or strategies are achieving their intended results. Secondly, establishing specific and measurable goals facilitates individual accountability.<sup>122</sup> “Measurement monitors continuous improvement, and individual, team and business unit performance.”<sup>123</sup>

Of course, the operational steps that are necessary for a successful implementation may not neatly align with the traditional measures of law faculty performance. Moreover, some faculty may not contribute to the law school in ways

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<sup>119</sup> Molly Inhofe Rapert et al., *The Strategic Implementation Process: Evoking Strategic Consensus Through Communication*, 55 J. OF BUS. RES. 301, 301 (2002).

<sup>120</sup> *Id.* at 302.

<sup>121</sup> Cf. Duffy & Feltoich, *supra* note 109, at 1.

<sup>122</sup> Joseph A. De Feo & Alexander Janssen, *Implementing A Strategy Successfully*, 5 MEASURING BUS. EXCELLENCE 4–6 (2001).

<sup>123</sup> *Id.* at 5.

that directly link to the implementation effort.<sup>124</sup> Nonetheless, unless special care is taken by law school leadership, it is all too easy for the evaluation of “scholarship, teaching and service” to be completely devoid of any accountability for the implementation process. The measurement and evaluation of individual implementation support is therefore critically important. Moreover, to the extent that the performance is objectively verifiable, measurement helps to maintain a focus on the important implementation benchmarks without inviting subjective evaluations.<sup>125</sup>

Ideally, the question of objective goals and faculty evaluation should be expressly addressed up front at the very beginning of the implementation process. The law faculty should expressly agree on how and where implementation support will be measured for faculty evaluation purposes. It may be that the faculty decide to add a fourth category of evaluation. However, it may suffice to appropriately add subcategories to scholarship, teaching and service that expressly integrate critical dimensions of the implementation project. In either case, it is highly likely that both the dean and widely-respected group of faculty members will need to establish a cooperative environment with the broader faculty in order to agree on the necessary measurements and control.

Aside from the linkage of implementation to faculty evaluation, it is also important that certain objective benchmarks be established that are linked to a mutually agreed upon calendar or clearly defined timeline. A defined timeline provides several benefits. All participants can easily determine what is supposed to be accomplished, when, and by whom. Additionally, a timeline will enable everyone to know whether or not the plan is on schedule. If it is delayed, an updated timeline can easily be put into place. There is also the added benefit of making it easier for everyone involved to determine who is responsible for what deliverables. Depending upon the culture of the individual law school, some aspects of the objective, time-referenced goals may not be necessary. However, given the common challenges existing in traditional law school governance, it is generally best to include accountability measures before starting an implementation effort.

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<sup>124</sup> To be clear, all faculty do not need to be working, or producing scholarship, on a specific program or project. However, the allocation of faculty time and attention should not be left up to chance. The evaluation of faculty performance should include all aspects of how the faculty member provides value to the law school.

<sup>125</sup> With respect to the strategic plan, a question could be posed by the Dean, “What have you done to support the implementation of the strategic plan?” Answers from faculty could include examples of how they have supported the resources that further the plan.



### 3. Does Your School Align Its Operations with Its Strategic Priorities?

Having confirmed that the implementation strategy is clearly understood, supported, measured and calendared within the law school, the focus can now shift to the actual implementation. Indeed, strategic management literature is often divided between the “initial goal setting and planning stage” and an “action-oriented, operational stage.”<sup>126</sup> Specifically, in order to achieve the strategically intended benefits, law school operational resources must be *deployed* so as to add “unique value” to the school’s existing and potential “customers.”<sup>127</sup> As discussed earlier in the context of vertical and horizontal fit, any successful implementation requires the alignment of operations with the law school’s strategic priorities.<sup>128</sup>

In remembering why strategic priorities are so important, the implementation effort needs to focus on the primary decisionmaker—the individual law school applicant.<sup>129</sup> Surprisingly, there is very little scholarship examining how U.S. law students actually select which law school to attend.<sup>130</sup> However, this certainly should not stop law schools from trying to address these goals.

At its most fundamental level, virtually all law students come to law school to “develop new skills, sharpen existing skills, acquire new knowledge, and gain new insights.”<sup>131</sup> Students attend law school to learn about something they either care about, or something they otherwise feel that they need to know (such as the

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<sup>126</sup> Randall L. Schultz et al., *Strategy and Tactics in a Process Model of Project Implementation*, 17 INTERFACES 34, 35 (1987).

<sup>127</sup> Loh, *supra* note 49, at 4 (“Faculty and other constituents have to be mobilized to share in the creation and ownership of the vision, for only they can make it happen.”).

<sup>128</sup> Michael E. Porter, *What is Strategy?*, HARV. BUS. REV. 2 (Nov.–Dec. 1996) (“Operational effectiveness and strategy are both essential to superior performance, which, after all, is the primary goal of any enterprise.”).

<sup>129</sup> While it may be tempting to shift focus to include all other interested “stakeholders,” such inclination may invite the attenuation between the law school services—education—and the “unique value” perceived by potential applicants. In this regard, the only other stakeholder that systematically has a significant impact on the perspective of potential applicants would be the views of their future potential employers. Undoubtedly, these stakeholders are very important. While all other stakeholders are undoubtedly important too, losing sight of the ultimate consumer can be potentially disastrous to any strategic plan implementation.

<sup>130</sup> Christopher J. Ryan, *Analyzing Law School Choice*, 2020 U. ILL. L. REV. (forthcoming 2020), <https://ssrn.com/abstract=3309815> [<https://perma.cc/L3J2-B3KF>] (last visited Jan. 25, 2020). But see a 2012 LSAC survey containing charts and data, *2012 Law School Applicant Survey*, LAW SCH. ADMIS. COUNCIL (2013) (on file with authors).

<sup>131</sup> Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing in Law School*, 31 U.S.F. L. REV. 941, 942 (1997).

knowledge necessary to pass the bar) or otherwise obtain (such as the credentials sufficient to obtain a desired job).

To some extent then, it is safe to assume that the individual decision to attend any particular law school is a function of perceived “differential expectations” about the individual law school offerings.<sup>132</sup> These expectations relate to “how satisfactory [a particular law school] is perceived to be in enabling the decision maker[s] to achieve [their] explicit and implicit objectives.”<sup>133</sup> This reduces individual law school attractiveness to being a function of applicant perceptions about the differential quality and value provided by competing law schools—as determined by the different wants and needs of different groups of potential law school applicants.<sup>134</sup> This is why the differentiation of individual law school offerings (and law school resources) is so important.

Indeed, an applicant’s price sensitivity regarding an individual law school’s tuition cost is likely to be inversely related to the perceived distinctive and meaningful nature of the law school’s offering. This is part of the problem presented by the combination of law school institutionalization and the U.S. News law school rankings.<sup>135</sup> If an individual law school has not otherwise established a distinctive and meaningful market position (probably to both applicants and prospective employers),<sup>136</sup> prospective applicants will have no choice but to heavily rely upon the published rankings to estimate the relative value of the different law schools. Even if the individual schools *do* establish a distinctive and meaningful market position, experience suggests that there will still be negative enrollment consequences if the changes undermine bar passage rates, job placement success, or law school rankings.<sup>137</sup>

Undoubtedly, some applicants may truly only value the prestige of law school

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<sup>132</sup> Jagdish N. Sheth, *A Model of Industrial Buyer Behavior*, 37 J. OF MKTG. 50, 52 (1973).

<sup>133</sup> *Id.*

<sup>134</sup> Cf. BARTON, *supra* note 15, at 186–87 (An important caveat, not currently based upon any known data, is that the perceived attractiveness of a particular school is the result of both the direct perceptions of a potential applicant about the school offering and the perceptions of potential employers about the school offerings (as indirectly perceived by the applicant). If this is true, the ability to achieve market progress will need to be communicated to both groups before there is any appreciable market change.).

<sup>135</sup> *Best Law Schools*, US NEWS AND WORLD REPORT, <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings> [<https://perma.cc/7NK4-KW7M>] (last visited Jan. 25, 2020).

<sup>136</sup> BARTON, *supra* note 15, at 186–87.

<sup>137</sup> BARTON, *supra* note 15, at 184, 187.

rank over the substantive characteristics of the law program.<sup>138</sup> However, it is much more likely that most applicants actually value bar passage rate and job placement success—as indirectly reflected in the rankings.<sup>139</sup> This reduces to the realization that the failure to communicate meaningful distinctiveness to both applicants and their future potential employers will indirectly encourage some law school applicants to simply continue to reference the law school rankings as a considerable part of their selection criteria.

Moreover, if after looking at the rankings, law school applicants still cannot perceive of any meaningful difference between competing law schools, the ultimate selection will simply be determined by the school with the lowest cost or most convenience. For this reason, rather than just bemoaning defects in the U.S. News law school rankings (some of which appear to be justified), individual law schools should use the experience as a reminder. Law schools need to aggressively pursue meaningful differentiation in as many aspects as possible. This includes operations as well as strategic priorities—all without undermining their bar passage or job placement rates.

In the very least, partially successful differentiation will diminish some of the negative impacts of the rankings. This will be hastened to the extent that a law school aligns its operations with its strategic priorities. To achieve this will require engaged law school leadership throughout the implementation process.

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<sup>138</sup> The challenge in establishing meaningful and distinctiveness to potential applicants was recently shown in a recent survey of 546 LSAT takers. In that limited survey, potential law school applicants were asked to identify the most important characteristic in selecting a law school to attend. They were given the choice of law school rank and several separate components of distinctiveness. The number one choice remained law school rank. See Paul L. Caron, *Survey: Rankings are the Most Important Factor in Students' Decision on Which Law School to Attend*, TAXPROFBLOG (Aug. 31, 2017), [https://taxprof.typepad.com/taxprof\\_blog/2017/08/survey-rankings-are-most-important-factor-in-students-decision-on-which-law-school-to-attend.html](https://taxprof.typepad.com/taxprof_blog/2017/08/survey-rankings-are-most-important-factor-in-students-decision-on-which-law-school-to-attend.html) [<https://perma.cc/FNE9-5ZMG>]. Additionally, in the 2012 LSAC Law School Applicant Survey, respondents were asked to rate the importance of various considerations on a scale of 1 to 5 (with 5 being the most important). The most frequently cited priorities (with a score of 4 or 5) in selecting any given law school were: location (77%), employment of recent graduates (73%), bar success (68%), clinics/internships (68%), likelihood of being admitted (66%), and then reputation (66%). While it is unclear how survey respondents could have identified more distinctive considerations, it is clear that there can be a substantial challenge in establishing the distinctiveness of any given law school. *2012 Law School Applicant Survey*, LAW SCH. ADMIS. COUNCIL (2013) (on file with authors).

<sup>139</sup> See BARTON, *supra* note 15, at 187.

4. Does Your School Pursue Characteristics that are Both “Meaningful” and “Distinctive”?

In order for any organization—including U.S. law schools—to achieve a competitive advantage, it is necessary that the organization create “value in a way that is rare and difficult for competitors to imitate.”<sup>140</sup> This “distinctive” challenge is completely separate from the determination of “meaningfulness.” “Distinctive” and “meaningful” attributes do not always exist together. In fact, more often than not, the two attributes exist separately.

For example, virtually all U.S. law schools are accredited by the Council of the ABA Section of Legal Education and Admissions to the Bar.<sup>141</sup> Undoubtedly, the vast majority of potential law students find ABA Accreditation to be “meaningful.”<sup>142</sup> There is “value” in possessing ABA accreditation. However, with 203 accredited U.S. law schools<sup>143</sup> and no other official designations, there is no obvious way that possessing ABA accreditation can be distinctive.<sup>144</sup> ABA accreditation is not “rare.” Consequently, “[b]y nature and because of American Bar Association (ABA) regulation, American law schools that are not at the very top or very bottom of the market have herded together in virtual indistinguishability.”<sup>145</sup> All law schools must have ABA Accreditation; but as a result, no individual law school can achieve much of any competitive advantage by virtue of it. Accreditation is therefore meaningful but not distinctive.

In fact, many law programs have similar problems and this too can undermine achieving the goals of any implementation effort. Virtually all areas of legal study

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<sup>140</sup> Brian Becker & Barry Gerhart, *The Impact of Human Resource Management on Organizational Performance: Progress and Prospects*, 39 THE ACAD. OF MGMT. J. 779, 781 (1996). See also, e.g., Barney, *supra* note 45, at 102; Jay Barney et al., *The Resource-Based View of the Firm: Ten Years After 1991*, 27 J. OF MGMT. 625 (2001); Robert M. Grant, *The Resource-Based Theory of Competitive Advantage: Implications for Strategy Formulation*, 33(3) CAL. MGMT. REV. 114 (1991); Margaret A. Peteraf, *The Cornerstones of Competitive Advantage: A Resource-Based View*, 14 STRATEGIC MGMT. J. 179 (1993).

<sup>141</sup> ABA-Approved Law Schools, AM. BAR ASS'N, [https://www.americanbar.org/groups/legal\\_education/resources/aba\\_approved\\_law\\_schools/](https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/) [https://perma.cc/BV2B-YFVF] (last visited Feb. 20, 2020).

<sup>142</sup> As they should. Many states require graduation from an ABA-accredited school to be able to sit for the bar exam. See NAT'L CONF. OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC., COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 9–12 (Judith A. Gundersen et al. eds., 2019).

<sup>143</sup> Although there are currently 203 ABA-accredited law schools, one of these schools is under provisional approval. AM. BAR ASS'N, *supra* note 141.

<sup>144</sup> BARTON, *supra* note 15, at 180.

<sup>145</sup> *Id.*

are important to someone. The question is whether they are both meaningful and distinctive to the relevant population of potential or existing law school students? With focused and sustained effort by law school leadership, otherwise meaningful (only) resources can eventually acquire distinctive qualities too. Listed below are just a handful of examples of law school programs that have achieved some level of distinctiveness and meaning. It is the position of the current paper that there needs to be more programs like these and that their success needs to be supported by the internal coordination of resources at their respective law schools as well.

For example, consider the Cooperative Legal Education Program at Northeastern University School of Law.<sup>146</sup> According to their website, Northeastern integrates cooperative full-time employment into its curriculum.<sup>147</sup> This means that Northeastern “guarantees [students] three, full-time legal work experiences” while pursuing legal studies.<sup>148</sup> The uniqueness of the program has resulted in Northeastern receiving a top ranking from the National Jurist for “practical training.”<sup>149</sup> It is easy to see how the coop program would be viewed as both distinctive and meaningful to a significantly large number of potential law school applicants.

As another example, consider the Environmental Law Specialization at Vermont Law School.<sup>150</sup> According to their website, “Since 1978, Vermont Law School has offered the largest and top-ranked graduate environmental law program in the country. VLS offers more degrees, more certificates, more faculty, and more research centers than any other school focused on environmental law.”<sup>151</sup> For 2019, Vermont Law School was ranked 4<sup>th</sup> (tie) in environmental law programming by U.S. News and World Report.<sup>152</sup> Given its perennial ranking at the top of Environmental Law programming, it is easy to see how it would be viewed as both distinctive and meaningful to applicants interested in environmental matters.

Using a slightly different approach, consider how CUNY School of Law

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<sup>146</sup> *Experiential Learning/CO-OP*, NE. UNIV. L. SCH., <https://www.northeastern.edu/law/experience/co-op/index.html> [<https://perma.cc/TVE3-SNVZ>] (last visited Feb. 9, 2020).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Environmental Law Specialization*, VT. L. SCH., <https://www.vermontlaw.edu/academics/specializations/environmental-law> [<https://perma.cc/54CP-RAQD>] (last visited Feb. 9, 2020).

<sup>151</sup> *Id.*

<sup>152</sup> *Best Environmental Law Programs*, U.S. NEWS AND WORLD REPORT, <https://www.usnews.com/best-graduate-schools/top-law-schools/environmental-law-rankings> [<https://perma.cc/Y2JF-37LX>] (last visited Feb. 9, 2020).

configured their three main centers to achieve distinction in social justice: the Center for Latino and Latina Rights and Equality; Center for Urban Environmental Reform; and the Sorenson Center for International Peace and Justice.<sup>153</sup> Additional offerings, such as an Immigrant and Non-Citizens Rights Clinic, clearly support the CUNY mission of “Law in the Service of Human Needs.” CUNY Law has also been recognized as being a leading school for diversity.<sup>154</sup> It is easy to see how CUNY would be viewed as both distinctive and meaningful to applicants either interested in social justice or coming from more diverse backgrounds than commonly found in other law schools.

An example where local commerce has been used to develop a distinctive law program can be found at Tulane’s Center for Energy Law.<sup>155</sup> According to the U.S. Energy Information Administration, “Over 45% of total U.S. petroleum refining capacity is located along the Gulf coast, as well as 51% of total U.S. natural gas processing plant capacity.”<sup>156</sup> This provides a unique geographic, as well as economic, region in which Tulane has distinguished itself. The mission of Tulane’s Center for Energy Law therefore simply states “The energy sector is going through a significant transition. Law and regulation must respond to this global transition.”<sup>157</sup> The center provides Tulane law students with direct opportunities to learn about global energy companies like Valero Energy, Blessey Marine, and Energy.<sup>158</sup> Once again, it is easy to see how Tulane would be viewed as both distinctive and meaningful to applicants interested in legal issues related to the energy industry.

Of course, not all law schools have access to resources that are as geographically distinctive as Tulane. Based upon more general service histories, many law schools face greater challenges in developing distinctive and meaningful programs that extend beyond traditional legal education. However, even programs that are

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<sup>153</sup> *Justice Centers*, CUNY SCH. OF L., <https://www.law.cuny.edu/academics/social-justice/> [https://perma.cc/MA3U-6P9Y] (last visited Feb. 9, 2020).

<sup>154</sup> *CUNY Ranked #1 in Nation for Diversity*, CUNY SCH. OF L. (Feb. 5, 2019), <http://www1.cuny.edu/mu/law/2019/02/05/1diversity/> [https://perma.cc/ZCP6-L5XA].

<sup>155</sup> *Tulane Center for Energy Law*, TUL. UNIV., <https://law.tulane.edu/centers/energy/> [https://perma.cc/PV3A-EXSK] (last visited Feb. 9, 2020).

<sup>156</sup> *Gulf of Mexico Fact Sheet*, U.S. ENERGY INFORMATION ADMIN., [https://www.eia.gov/special/gulf\\_of\\_mexico/](https://www.eia.gov/special/gulf_of_mexico/) [https://perma.cc/US7G-JFBL] (last visited Feb. 9, 2020).

<sup>157</sup> *Tulane Center for Energy Law: Mission*, TUL. UNIV., <https://law.tulane.edu/centers/energy/mission> [https://perma.cc/MK97-AVN7] (last visited Feb. 9, 2020).

<sup>158</sup> *Tulane Center for Energy Law: Student Opportunities*, TUL. UNIV., <https://law.tulane.edu/centers/energy/students> [https://perma.cc/8ZYM-HMKM] (last visited Feb. 9, 2020).

constrained to less distinct efforts can—with careful and sustained focus—develop uniquely successful programming.

For example, consider the Entrepreneurship Law program at Penn State Dickinson Law. This program attracts applicants who want to further current entrepreneurial endeavors, become entrepreneurs, or represent them in practice. As a starting point, the program is meaningful but not particularly distinctive. The Dickinson program consists of two Entrepreneurship Law experiential courses; a Certificate in Entrepreneurship<sup>159</sup>; the Inside Entrepreneurship Law blog<sup>160</sup> (that is professor-moderated with posts predominantly written by law students); and provides opportunities to engage with community entrepreneurs through programs such as the U.S. Small Business Association's Boots to Business program.<sup>161</sup> Individually, the components of the Dickinson Entrepreneurship Law program are not particularly distinctive. However, as assembled and deployed, distinctive meaning has emerged for potential applicants, existing students, and the entrepreneurial beneficiaries of the program.<sup>162</sup>

Within the careful configuration of the “quasi-distinctive” components, the blog is probably the most unique. The Inside Entrepreneurship Law blog is the only one we know of that is offered by a law school with this precise format.<sup>163</sup> The blog is written and maintained primarily by volunteer law students, featuring helpful

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<sup>159</sup> *Certificate Programs*, PENNSTATE DICKINSON L., <https://dickinsonlaw.psu.edu/certificate-programs> [<https://perma.cc/GP5N-RUK7>] (last visited Feb. 3, 2020).

<sup>160</sup> *Inside Entrepreneurship Law*, PENNSTATE DICKINSON L., <https://sites.psu.edu/entrepreneurshiplaw/> [<https://perma.cc/N49J-FNX4>] (last visited Feb. 3, 2020).

<sup>161</sup> Boots to Business (B2B) is an entrepreneurial education and training program offered by the U.S. Small Business Administration (SBA) as part of the Department of Defense's Transition Assistance Program (TAP). B2B provides participants with an overview of business ownership and is open to transitioning service members (including National Guard and Reserve) and their spouses. See *U.S. Small Business Administration, OFFICE OF VETERANS BUSINESS DEVELOPMENT*, <https://www.sba.gov/offices/headquarters/ovbd/resources/160511> [<https://perma.cc/F4FF-26KH>] (last visited Feb. 2, 2020).

<sup>162</sup> Sarah Phillips, a current 3L student was recently quoted as saying: “I discovered my passion for business law through Dickinson Law's entrepreneurship courses. My legal education has provided me with the foundational skills necessary to help clients navigate and resolve their business-related legal matters and achieve their entrepreneurial goals.” Penn State University – Dickinson Law (@dickinsonlaw), INSTAGRAM (Dec. 5, 2019), <https://www.instagram.com/p/B5tZDZdJru6/?igshid=tygoe27g3fyn> [<https://perma.cc/9F6H-XYJL>].

<sup>163</sup> Michigan Law's Entrepreneurship Clinic maintains a terrific startup blog with posts written primarily by students involved in its clinic. See MICHIGAN LAW ENTREPRENEURSHIP CLINIC, <https://entrepreneurship.law.umich.edu/blog/> [<https://perma.cc/T6X5-V4GX>] (last visited Feb. 4, 2020).

advice from successful entrepreneurs, and designed to provide legally relevant information to entrepreneurs and their advisors. Some blog topics are selected by student authors;<sup>164</sup> others are specifically requested by the Pennsylvania Department of Community and Economic Development.<sup>165</sup> As implemented, the program is both distinctive and meaningful to a relevant population.

Another example of a law program that originally was meaningful but not particularly distinctive is the Reentry Clinic at the University of Akron School of Law. Typical of multiple law schools, the Reentry Clinic provides learning opportunities for Akron law students while also furthering the Mission of supporting justice.<sup>166</sup> Typical of so many law school programs, the clinic has always been meaningful. However, as implemented and developed, it has become distinctive too.

Most recently, on December 3, 2019 Ohio Governor Mike DeWine announced the creation of a special Expedited Pardon Project for Ohio residents.<sup>167</sup> As explained by the governor:

“There are decent people all over the state who are living in the shadow of a long-past and regretted mistake—people who, despite becoming law-abiding citizens, can’t get ahead because their criminal records are holding them back . . . .”<sup>168</sup>

Notably, only two law schools will participate in the Expedited Pardon Project: The Reentry Clinic at the University of Akron School of Law and the Ohio State Moritz

<sup>164</sup> Students typically select topics of interest to them. For example, one student wrote about pay secrecy and the Paycheck Fairness Act because she was marginalized at a job before she came to law school. See Rachel Tunney, *Let Them Know Their Worth: Pay Secrecy Policies and the Paycheck Fairness Act*, INSIDE ENTREPRENEURSHIP L. (Nov. 25, 2019), <https://sites.psu.edu/entrepreneurshiplaw/2019/11/25/let-them-know-their-worth-pay-secrecy-policies-and-the-paycheck-fairness-act/> [<https://perma.cc/6Z77-Q9Q2>].

<sup>165</sup> The blog also features an Entrepreneur-of-the-Month who provides advice and wisdom through an interview-style post written by a student. See, e.g., Elikem Tsikata, *Grace Adovor Entrepreneur of the Month*, INSIDE ENTREPRENEURSHIP L. (Jan. 6, 2020), <https://sites.psu.edu/entrepreneurshiplaw/category/entrepreneur-of-the-month/> [<https://perma.cc/9VYL-PCJR>]. Additionally, the Entrepreneur-of-the-Month typically visits the law school for a day to engage with students. This feature has had direct impact on entrepreneurs seeking advice from other entrepreneurs—as well as delivering unique value to the law students attending Penn State Dickinson Law.

<sup>166</sup> See generally *Reentry Clinic*, U. OF AKRON SCH. OF L., <https://www.uakron.edu/law/curriculum/clinical-programs/reentry.dot> [<https://perma.cc/DG8C-N45F>] (last visited Jan. 20, 2020).

<sup>167</sup> *Expedited Pardon Project Created*, THE DAILY ADVOC. (Dec. 6, 2019) <https://www.dailyadvocate.com/news/81965/expedited-pardon-project-created> [<https://perma.cc/6H9T-JXEN>].

<sup>168</sup> *Id.*



College of Law. This is distinctive.<sup>169</sup>

Importantly, the distinctive success of many of the examples provided above is the result of sustained law school focus and investment over time. Without this effort, the distinctiveness of the programs would eventually “disappear” either as the school shifts resources to other priorities, or as other schools mimic the behavior. The problem of “disappearing” distinctiveness is demonstrated in the somewhat colorful story below:

While driving through France a few years ago, my family and I were enchanted by the hundreds of storybook cows grazing in lovely pastures right next to the road. For dozens of kilometers, we all gazed out the window, marveling at the beauty. Then, within a few minutes, we started ignoring the cows. The new cows were just like the old cows, and what was once amazing was now common. Worse than common: It was boring.

Cows, after you've seen them for a while, are boring. They may be well-bred cows, Five Sigma cows, cows lit by a beautiful light, but they are still boring. A Purple Cow, though: Now, that would really stand out. The essence of the Purple Cow—the reason it would shine among a crowd of perfectly competent, even undeniably excellent cows—is that it would be *remarkable*. Something remarkable is worth talking about, worth paying attention to. Boring stuff quickly becomes invisible.<sup>170</sup>

In this same way, consider how U.S. law schools often fail to present any uniqueness regarding their respective programs. To conduct your own test of this, go to the list of the websites of AALS member schools. It is available at [www.AALS.org/member-schools/](http://www.AALS.org/member-schools/). Then do as follows:

Just randomly click on any two law schools on the list that are not one [of the top twenty or so law schools] . . . just start clicking and scrolling through. I promise that if you cover up the names of the school and the geographic location and just read the descriptions, you will have a very, very hard time figuring out which law school you are reading about. The faculties basically look the same . . . The curricula look basically identical same first-year classes, same upper-level mix of bread-and-butter classes . . . same claims of clinical and externship offerings that will produce “practice-ready” graduates, and similar random seminars based on the interests of the tenured faculty . . .<sup>171</sup>

The same rule that applies to cows also applies to law schools. If they are unable to

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<sup>169</sup> But see BARTON, *supra* note 15, at 181, where Barton suggests that distinctiveness is linked to data “suggesting that graduates obtain jobs in the specialty.” While supporting data are certainly helpful, the authors would suggest that even lacking these traits that their examples are distinctive too.

<sup>170</sup> Seth Godin, *In Praise of the Purple Cow*, FAST COMPANY (Dec. 19, 2007), <http://www.fastcompany.com/magazine/67/purplecow.html> [<https://perma.cc/DB79-EKDY>] (last visited Feb. 10, 2020).

<sup>171</sup> BARTON, *supra* note 15, at 180. While these offerings may not be completely identical, they are marketed in rather similar fashion on the law school websites.

achieve any distinctive and meaningful position, they might as well be invisible. To be successful, any implementation effort must plan accordingly and provide for sustained focus and the necessary resources.

Aside from the challenges in achieving and sustaining distinctiveness, some law schools sometimes stumble into a slightly different problem. The law school pursues a resource that is meaningful and distinctive—just not to the relevant population.

For example, assume that Law School “A” has identified a segment of potential law students that are enthusiastically committed to supporting environmental activism and practicing environmental law. This segment of potential students would prioritize environmental law offerings in deciding where to apply to law school. Assume that Law School “A” has the other resources and a reputation in this area that would enable Law School “A” to successfully recruit these environmentally focused students. For Law School “A,” it certainly would be beneficial and appropriate to hire a law faculty member who has expertise as an environmental lawyer and activist.

In stark contrast, consider a different law school—Law School “B”. Assume the *faculty* at Law School “B” believe in the importance of environmental activism. However, unlike Law School “A,” assume that Law School “B” does *not* have students who share this view and does not have any available resources or ability to recruit environmentally active students. Unlike Law School “A,” without more, Law School “B” should not expend resources to hire a law faculty member who has expertise as an environmental lawyer and activist. Unlike Law School “A,” the environmental lawyer and activist is not meaningful to the relevant population—the existing or potential students of Law School “B.”<sup>172</sup>

To a large extent, this example highlights the insidious problem presented by one law school simply mimicking the “best practices” of other law schools. Often, mimicry ignores critical differences between the organizations. In the process, one law school may unnecessarily consume scarce resources while failing to create any value for the school’s existing or potential students. As explained earlier, there are multiple ways that institutionalized law schools lose focus regarding these realities. It is only through the sustained leadership and focus by both the Dean and widely-respected faculty members that the full promise of the strategic plan can be

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<sup>172</sup> Of course, this example is not intended to single-out environmental law faculty. The same concepts apply with equal force whenever resources are expended without direct reference to the actual or perceived value of the investment to the relevant population—the existing or potential students at the respective law school.

achieved.<sup>173</sup>

Consequently, beyond just aligning operations with its strategic plan, law schools must be careful in how they invest and develop their resources. To be a source of competitive advantage, a resource must be both distinctive *and* meaningful.<sup>174</sup> Even if a resource is initially both distinctive and meaningful, it is necessary that the distinctiveness be sustained through continued focus and investment.<sup>175</sup> Additionally, even resources that are both distinctive and meaningful must be so to the correct relevant group—existing and potential students. To achieve these goals requires the sustained support of law school leadership. Otherwise, the established mechanisms for institutionalization will persist and the distinctiveness of any law school accomplishment will eventually disappear—assuming they ever exist in the first place.

### ***C. Modeling the Impact of Faculty Alignment on Implementation Success***

Throughout this article, a central claim has been that the optimal ability of U.S. law schools to achieve distinctive and meaningful change requires both faculty engagement and law school leadership. This is necessary to achieve the maximum faculty alignment with the law school's strategic plan.<sup>176</sup> An underlying question is therefore how “complete” faculty alignment needs to be in order to substantially achieve the intended strategic goals? To find out, a Monte Carlo simulation was created and then tested on several different scenarios involving different degrees of faculty alignment.

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<sup>173</sup> This applies equally to both Stage 6 and Stage 7 of the Process Model.

<sup>174</sup> Of course, combining cows and law schools would not accomplish anything either. A law school having a purple cow certainly would be distinctive but would hopefully be meaningless to any relevant population.

<sup>175</sup> Even if a law school adopts an outstanding innovation, it will likely take time for the benefits to appear in the form of improved employment prospects for graduates. *See* Campbell *supra* note 2, at 360–61. Campbell relays the story of the focused strategy of Peking University's School of Transnational Law (where students receive a JD degree based on a U.S. style law school curriculum and a JM degree based on a Chinese graduate curriculum). *Id.* “Employers seeking students ready to step into sophisticated transnational Asian rim practice could not find as deep and talented a pool anywhere else. Students seeking to engage in transnational practice could not find as focused an offering or as extensive a network of fellow students and future alumni anywhere else. The school graduated its first class in 2012, and those graduates had to overcome the lack of established placement pipelines, absence of STL alumni in hiring positions, and undeveloped brand awareness.” *Id.*

<sup>176</sup> *See generally* Frank T. Read, *The Unique Role of the Law School Dean in American Legal Education*, 51 J. LEGAL EDUC. 392 (2001).

FACILITATING DISTINCTIVE AND MEANINGFUL CHANGE (PART 2)

A Monte Carlo Simulation is “a useful technique for modeling and analyzing real-world systems and situations.”<sup>177</sup> A “Monte Carlo simulation uses random sampling and statistical modeling to estimate mathematical functions and mimic the operations of complex systems.”<sup>178</sup> For current purposes, the Monte Carlo Simulation consisted of modelling the expected law school performance given varying degrees of aligned/unaligned behavior by the individual law school’s faculty members.

Conceptually, the actual success or failure of a law school implementation effort will be a function of the overall faculty support and cooperation in pursuing given strategic priorities. This same question also can be framed as merely representing the extent of organizational success in cooperatively achieving effective vertical and horizontal fit. In either case, the inputs represent the various degrees of faculty alignment with the given strategic goals. The outputs represent the composite, resulting, law school performances.

As a starting point in determining how to further conceptualize the basic problem, it is instructive to consider how both the general law faculty and law school leadership would answer the same identical question: To what extent will you actively support the implementation of the strategic plan? When framed in this way, the basic conditions likely to impact faculty alignment presents as a “2x2” matrix corresponding to how each—the general faculty and law school leadership—effectively responds to the question.

A Basic Matrix For Engagement  
In Implementation Process

		Faculty Active Support and Engagement	
		NO	YES
Leadership Active Support and Engagement	NO	A. Likely result?	B. Likely result?
	YES	C. Likely result?	D. Likely result?

<sup>177</sup> Young Hoon Kwak & Lisa Ingall, *Exploring Monte Carlo Simulation Applications for Project Management*, 9 RISK MGMT. 44, 44 (2007).

<sup>178</sup> Robert L. Harrison, *Introduction to Monte Carlo Simulation*, AIP CONF. PROC. (Jan. 1, 2010) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2924739/pdf/nihms219206.pdf> [<https://perma.cc/DKM9-H6UW>].

However, looking more closely, it is unclear whether or not there would be any difference in the extent or nature of faculty alignment between quadrants B - "yes/no" and C - "no/yes." With no rational basis to distinguish between these two situations, it was decided that these two quadrants could be tested together.

In determining if the model could be improved further, it was unclear how (given the absence of any data) to separately model either leadership or faculty engagement. For this reason, the decision was made to simply manipulate the varying degrees of individual faculty alignment as reflecting the overall success or failure of the engagement/leadership process. Greater success would be reflected by input with greater individual faculty alignment to the goals of the modelled law school; less success would be reflected by input with less individual faculty alignment to the goals of the modelled law school. Faculty "alignment" would be varied based upon the number of similar or identical intended priorities by faculty within the modelled law school. From this input, representing all the faculty within the given law school, the law school performance output would be calculated as representing the composite average result of the decisions of all the individual faculty members.

From the matrix above and related discussion, the model was tested using three different scenarios. The first scenario estimated the distinctive law school output where there was neither faculty engagement nor law school leadership (corresponding to quadrant "A" in the matrix). The second scenario estimated distinctive law school output where one of two situations existed. Either the general faculty supported an effort but not the law school leadership (corresponding to quadrant "B" in the matrix); or, the general faculty did not support the effort but the law school leadership did support it (corresponding to "C" in the matrix). The third scenario estimated law school output where both the general faculty and law school leadership supported the implementation process (corresponding to "D" in the matrix).

Next, in order to develop a measure of faculty performance, recall that most U.S. law schools only evaluate the performance of individual law faculty members across scholarship, teaching, and service. Although these measures present serious concerns about lack of horizontal fit relating to measuring relevant performance, the decision was made to replicate this common reality in the basic model.<sup>179</sup> Therefore, each law faculty member was presumed to perform across values in three

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<sup>179</sup> Please note that the somewhat obtuse relationship between the implementation goals and the separate average measures for scholarship, teaching and service reflects a common reality at many U.S. law schools while also highlighting the likely lack of horizontal fit between faculty performance evaluation and law school implementation success.

separate categories: scholarship, teaching and service. Furthermore, it was generally assumed that each law faculty member possessed and applied the same amount of total energy equal to “9” units.<sup>180</sup> Each individual faculty member was presumed to be able to distribute their “9” units according to their own intentions across the three categories. For instance, a faculty member could decide to be perfectly balanced in their efforts and intend values of 3-3-3 for scholarship, teaching and service.

Next, the model converted the nominal “intended” performance value for each individual faculty member, in each of the three categories, into the modelled “actual performance” values. This was achieved by using the inverse function of the cumulative normal distribution.<sup>181</sup> A randomly generated probability (between 0 and 1) was used, along with the pre-determined “intended” value as the mean of the distribution (with standard deviation set at 1). The resulting value was the modelled individual “actual performance.”

Functionally the calculation of the individual “actual performance” was equivalent to simply asking, if you have an intended given value, “X,” with a normal distribution and standard deviation of 1, what would be the observed value on this distribution if you randomly selected the cumulative probability of “P” on that distribution? For example, if the cumulative probability were exactly 0.5, then the value would be exactly in the middle of the normal curve and the observed value would be the same thing as the mean, or “X.” In this way, random variation was statistically modelled based upon the individual faculty member’s intended output.<sup>182</sup> This process was repeated for each individual faculty member for each of their three categories. Additional steps were then taken to ensure that the total of the three categories equaled “9.”<sup>183</sup>

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<sup>180</sup> The selection of the value of “9” for energy was for convenience purposes given that there were three categories that each faculty member could allocate across. The selection of this number has absolutely no impact on the relative results of the model.

<sup>181</sup> This conversion of the individual intended priorities to actual performance was accomplished by embedding input value to the NORMINV function in Microsoft Excel 2019. The variation was accomplished by setting the standard deviation equal to 1, and the probability being determined by an embedded RAND function.

<sup>182</sup> For instance, if an individual intended a teaching value of “6,” the model calculated a random number representing the “actual” value performed by the individual. This number was based upon a normal distribution, with a population mean of “6” and standard deviation of “1.” The actual calculation was achieved in Excel 2019 using the function, NORMINV(RAND(),μ,σ).

<sup>183</sup> Where the randomly generated values did not initially total 9, the individual values across each of the three categories was converted into a fraction with the numerator equaling the

For simplicity purposes, each law school was assumed to have only ten (10) individual faculty members. As explained above, the model potentially permitted each of these ten (10) faculty members to individually select their own “intended” values as to scholarship, teaching and service. Faculties that were more aligned with the organization’s strategic goals had more faculty members who selected the same priorities. For instance, a perfectly aligned law school would have all ten (10) faculty members pick the same respective values in each of the three categories. However, in order to reflect some faculty members not aligning with strategic goals, some individual priorities (in appropriately selected scenarios) sometimes applied three completely random values (still totaling “9” across all three categories). Other times, as noted in the scenario, different but specifically intended values were intentionally set to represent other “defecting” faculty members.

The law school’s subsequent “performance” for each iteration was represented by calculating the composite average of the modelled “actual performance” outcomes in each category across all ten (10) individual faculty members.<sup>184</sup> Each scenario, keeping all basic faculty inputs the same, was then repeated 10,000 times. The resulting average law school performance (and other statistical values) was then recorded reflecting impact of different aligned/unaligned intended individual inputs.<sup>185</sup>

#### 1. Scenario 1: Neither Faculty Alignment Nor Leadership

This scenario, corresponding to quadrant “A” in the Basic Matrix, represents the likely outcomes if neither the law school leadership nor general faculty engage in any part of the strategic plan implementation. In order to approximate the absence of any consistent control, each of the ten (10) individual law school faculty were permitted to randomly vary across all values of scholarship, teaching, and service. The only restriction was that, for each individual faculty member, the total units across the three areas still had to equal “9.”<sup>186</sup> The process was then repeated 10,000 times and the long-run average for law school performance was calculated for scholarship, teaching and service. The result was as follows:

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individual random number and the denominator equaling the total of all three random numbers. The resulting fraction was then multiplied by 9.

<sup>184</sup> The selection of ten (10) faculty members was merely for convenience purposes. It was assumed that ten faculty members would provide enough potential variation to make the model somewhat representative of typical law school faculty.

<sup>185</sup> Comprehensive summary descriptive statistics are included at the end of this article.

<sup>186</sup> See *supra*, note 183, for an explanation of adjustment mechanism.

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#1 10,000 Iterations, L.S. W/10 Faculty, All Random		
L.S. Avg. Scholarship	L.S. Avg. Teaching	L.S. Avg. Service
2.56	3.43	3.01
Std. Dev. of Scholarship	Std. Dev. of Teaching	Std. Dev. of Service
0.26	0.27	0.27
Max. L.S. Scholarship	Max. L.S. Teaching	Max. School Service
3.64	4.55	4.14
Min. School Scholarship	Min. School Teaching	Min. School Service
1.65	2.37	2.08

Where individual faculty values were completely free to randomly vary, after 10,000 iterations, the highest composite law school values (on a scale of 0 – 9) for Scholarship, Teaching, and Service were 3.64, 4.55, and 4.14, respectively. Looking at the calculated composite (mean) values for the law schools, the individual category values only varied from 2.56 to 3.43. Presumably, these values all would have been closer to “3” if the law schools had been modelled with more than 10 faculty members. According to this Monte Carlo Simulation, if there is no engagement or leadership, the law school performance averages clearly all tend toward decidedly non-distinct average values of “3.”

To provide further testing of the first scenario, the model was then run where the intended input priorities for each of the ten (10) law faculty was specifically set at “3” in all categories (but still subject to individual random variation). This situation would reflect the unlikely situation where the law school intentionally wanted to achieve thoroughly “average” performances. The results where as expected with all organizational measures also essentially being “3”:

#1 10,000 Iterations, L. Schools W/10 Faculty, All 333		
L.S. Avg. Scholarship	L.S. Avg. Teaching	L.S. Avg. Service
3.01	3.00	2.99
Std. Dev. of Scholarship	Std. Dev. of Teaching	Std. Dev. of Service
0.27	0.27	0.28
Max. L.S. Scholarship	Max. L.S. Teaching	Max. L.S. Service
4.10	4.04	4.00
Min. L.S. Scholarship	Min. L.S. Teaching	Min. L.S. Service
1.81	2.03	1.62

Comparing the results of the two runs, it appears that providing neither leadership nor any faculty engagement will lead to results similar to intentionally seeking mediocre law school performance. This suggests that the failure of both the general faculty and law school leadership to participate in the strategic plan



execution essentially guarantees a non-descript “average” outcome. This also highlights likely problems caused by omitting consideration of vertical and horizontal fit. In all of these instances, law schools will behave as if they have no strategy at all.

With the possible (but highly unlikely) exception where the individual law school’s strategic plan actually indicates the desirability of “average” performance, this scenario underscores the risk of failing to effectively manage the implementation process. These would be the same expected results as if the implementation was never even attempted.

## 2. Scenario 2: Incomplete Faculty Alignment and Leadership

This scenario corresponds with quadrants “B” and “C” in the Basic Matrix. The scenario represents the likely outcomes if either the general faculty engage or the leadership engage—but not both. In both situations, it was assumed that some portion of the faculty would attempt to align their priorities while others would defect to pursue their own interests. The only question was whether the faculty would defect randomly to pursue other interests, or specifically target distinct other interests.

The first Monte Carlo simulation for this scenario permitted three of the ten faculty to individually vary on a purely random basis in their prioritization of scholarship, teaching and service. Moreover, it was assumed that the seven coordinated faculty collectively selected somewhat distinctive performance goals. The seven faculty were presumed to pursue a moderately high scholarship focus (with scholarship=6, teaching=2 and service=1). Of course, for the purpose of this simulation, the high scholarship focus was also assumed to reflect the particular characteristics necessary to implement the law school’s strategic plan and to deliver distinctive and meaningful value. The results of this model were as follows:

#1 10,000 Iterations, L.S. W/10 Faculty, 7 – 6/2/1, 3 – Random		
L.S. Avg. Scholarship	L.S. Avg. Teaching	L.S. Avg. Service
5.55	2.05	1.41
St. Dev. of Scholarship	Std. Dev. of Teaching	Std. Dev. of Service
0.30	0.26	0.25
Max. L.S. Scholarship	Max. L.S. Teaching	Max. School Service
6.85	3.11	2.49
Min. School Scholarship	Min. School Teaching	Min. School Service
4.39	1.08	0.46

What is most notable about the results of this model run is the impact of permitting just three “independent” faculty members to randomly pursue their own

**FACILITATING DISTINCTIVE AND MEANINGFUL CHANGE (PART 2)**

interests. Even though the seven remaining faculty members pursued, lock-step, clearly defined goals (scholarship=6, teaching=2, service=1), the average scholarship performance was still visibly distorted downward. Additionally, the maximum observed value for scholarship was only 6.85 across 10,000 iterations. However, as a counterbalance, the average value for service was visibly increased upwards.

In order to test the impact of focused (rather than random) defection of three faculty members, the “6, 2, 1” model was re-run. As before, seven (7) faculty members pursued the “6,2,1” priorities. This time, however, the three (3) faculty members pursued an alternative, focused, priority of “2,5,2.” This could approximate what would happen when three divergent faculty members decide to pursue an approach using moderate teaching priorities. The impact of the clearly focused dissident approach on the modelled composite law school performance was as follows:

10,000 Iterations, L.S. W/10 Faculty, 7 – 6/2/1, 3 – 252		
L.S. Avg. Scholarship	L.S. Avg. Teaching	L.S. Avg. Service
4.81	2.88	1.31
Std. Dev. Avg. Scholarship	Std. Dev. of Teaching	Std. Dev. of Service
0.30	0.28	0.26
Max. L.S. Scholarship	Max. L.S. Teaching	Max. School Service
6.04	4.04	2.31
Min. School Scholarship	Min. School Teaching	Min. School Service
3.73	1.82	0.36

Under these circumstances, the impact of the three focused, divergent faculty members had an even greater impact on the resulting law school performance. This time, the composite scholarship performance (both average and maximum) was reduced even further away from the intended distinctive target. The composite teaching performance was increased away from the intended distinctive target too. Of course, the actual impact of a focused, divergent faculty will depend upon the differences between the intended law school distinctive goals and the divergent goals. However, the tendency appears—in varying degrees—to be a central convergence toward more “average” performance. Values that were intended to be higher are reduced; values that were intended to be lower are increased. In the process, the actual performance of the law school simply becomes less distinct and more “average.”

3. Scenario 3: Complete Faculty Alignment and Leadership

In order to determine if distinctive law school performance was actually achievable, the model was re-run with all ten (10) faculty members pursuing the same distinctive goal of “6”, “2” and “1”. Given the higher, focused, participation of

all faculty, the intended individual goals translated into the long-run law school performance that effectively met the intended goals:

#1 10,000 Iterations, L.S. W/10 Faculty, All 6/2/1		
L.S. Avg. Scholarship	L.S. Avg. Teaching	L.S. Avg. Service
6.03	1.94	1.03
Std. Dev. of Scholarship	Std. Dev. of Teaching	Std. Dev. of Service
0.30	0.27	0.25
Max. L.S. Scholarship	Max. L.S. Teaching	Max. School Service
7.22	2.90	2.11
Min. School Scholarship	Min. School Teaching	Min. School Service
4.86	0.79	0.23

Lastly, resources permitting, it was assumed that many law schools might be interested in achieving even more extreme, distinctive, performances. The model was run one last time with all faculty targeting extreme scholarship performance coded as (scholarship=9, teaching=0, service=0). This essentially set the model with one value at the maximum level and two values at the minimum value. Nonetheless, each value still represented the only mean of the distribution. Therefore, it was foreseeable that the transformations might occasionally result in non-extreme values. This was supported by the following results:

#1 10,000 Iterations, L.S. W/10 Faculty, All 9/0/0		
L.S. Avg. Scholarship	L.S. Avg. Teaching	L.S. Avg. Service
8.29	0.36	0.36
St. Dev. Avg. Scholarship	Std. Dev. of Teaching	Std. Dev. of Service
0.21	0.16	0.16
Max. L.S. Scholarship	Max. L.S. Teaching	Max. School Service
8.94	1.02	1.02
Min. School Scholarship	Min. School Teaching	Min. School Service
7.40	0.00	0.00

As expected, the modelled law school performances exhibited the intended results with minimal distortion at the extreme values. The extreme example established that law schools with fully aligned faculty could successfully achieve even the most extreme strategic goals. The real limitation was in the ability of individual law schools to align their faculty behavior.

#### 4. Implications of the Different Scenario Outcomes

In looking across the various Monte Carlo simulations, one thing that clearly

emerges is that (as expected) the failure of faculty to align with strategic priorities undermines achieving organizational priorities. What we further glean is that the actual impact on law school performance due to the lack of faculty alignment depends upon: 1) the intended “distinctiveness” of the strategic goals; 2) the extent of “sub-alignment” of the dissident faculty members; and 3) the extent of difference between the strategic goals and the goals of the dissident faculty members. Generally speaking, the greater the intended distinctiveness of the implementation process, the greater its sensitivity to faculty alignment.

Without meaningful faculty engagement and law school leadership, implementation efforts will be less successful. Without special care, individual law schools will remain invisible. The long-run performance of U.S. law schools will tend to continue clustering in a nondescript central position. “The truth is that implementation demands *ownership* at all levels of management.”<sup>187</sup> This is especially true of U.S. law schools.

## CONCLUSION

Without any doubt, U.S. law schools need to adapt better, faster, and more distinctively. In pursuit of this goal, the earlier article focused on how law schools can formulate distinctive and meaningful strategies. But law schools also need to execute their strategies by properly deploying their resources. Implementation is necessary.

In the present article, the Resource Based View and Strategic Human Resource Management were used to identify the theoretical challenges to, and mechanisms supporting, a successful implementation. Specific reference was made to the need to establish vertical fit in hiring law faculty and to assure horizontal fit through appropriate faculty evaluation criteria.

Next, the article clarified that the implementation process should start with a strategy that is clearly understood and supported by faculty and leadership alike. The implementation process should have objective goals containing individual accountability and a clear timeline. The implementation process should assure that law school operations align with the strategic priorities. And, law schools should prioritize resources that are both distinctive and meaningful to the relevant population of existing and potential students.

Lastly, a Monte Carlo simulation tested how different degrees of faculty alignment with strategic priorities might impact the resulting law school performances. The results suggest that the absence of any faculty alignment largely

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<sup>187</sup> Hrebiniak, *supra* note 29, at 13.

guarantees mediocre “average” results. At the other extreme, strong faculty alignment is essential to successfully achieve any distinctive change. Real commitment is necessary.

All told, the article concludes that U.S. law schools can successfully implement distinctive and meaningful strategic plans within existing shared governance structures. However, success clearly requires the full engagement and leadership by both the faculty and the Dean. It requires sustained operational support for strategic change. It also requires the improved, active, management of law school resources.

But most importantly, before any individual U.S law school can implement an otherwise distinctive and meaningful strategic plan, there must first be a cooperative will and commitment to change.