BEYOND ELITISM: LEGAL EDUCATION FOR THE PUBLIC GOOD

*George Critchlow**

Ring the bells that still can ring
Forget your perfect offering.
There is a crack, a crack in everything.
That's how the light gets in.[1]

PROLOGUE

DAVID, a college undergrad, is considering career options. He is Hispanic, the son of Mexican parents who immigrated to the United States to work in the agricultural fields of the San Joaquin Valley in California. David will be the first person in his family to graduate from college. He is intelligent and academically capable, but his academic performance has been adversely affected by family poverty and his need to work throughout high school and college. David is interested in a civically minded career that provides adequate, if not lucrative, compensation. He is not preoccupied with becoming rich. Although concerned about the high cost, his goal is to pursue graduate education that allows him to help people who are immigrants, marginalized, and poor. David carefully considers two options: applying to law school, the young man's unspoken passion since high school, or pursuing a master's degree in education. In either case, he hopes to attend a school that is not too distant from his family home in central California.

Although teaching is not considered a path to great wealth and status, it offers the opportunity for a stable, flexible, and rewarding public service career. After thinking about it, consulting with friends, and doing some basic research, David decides to pursue the teaching degree. The basis for his decision, in part, is that law school is too expensive and time-consuming compared to a two-year graduate program in education. He is also concerned about the employment prospects for new lawyers, and the challenge of paying off massive law school debt with the relatively modest compensation paid to public-interest lawyers. Finally, notwithstanding his many outstanding attributes and demonstrated work ethic, David fears that his mediocre LSAT score would make him less

* George Critchlow is Professor of Law, former Interim Dean and former Director of Clinical Programs at Gonzaga University School of Law. Professor Critchlow thanks Andrew Thomas and Kevin Downs (class of 2014) for their research and editing assistance.

1. Leonard Cohen, *Anthem*, *on* THE FUTURE (Columbia Records 1992), lyrics *available at* http://www.leonardcohensite.com/telc/it/2-09.htm.

competitive for admission at regional law schools whose goal is to achieve higher national rankings by accepting students who score well on the LSAT.[2]

INTRODUCTION

In July, 2012, New York City Bar Association President Carey R. Dunne announced the formation of a task force to address the challenges facing law school graduates and young lawyers in a difficult market and to examine how law schools and law firms can best form new lawyers and adapt to the changing needs of employers and clients in the global economy.[3] The Task Force for New Lawyers in a Changing Profession ("the Task Force") was comprised of leaders of law schools, firms, corporations, government agencies, legal services organizations, and career services and recruiting professionals.[4] The Task Force submitted its comprehensive report *Developing Legal Careers and Delivering Justice in the 21st Century* in November, 2013.[5] Among its central findings and recommendations are:

- Other sectors of the profession, including established practitioners and the American Bar Association ("ABA") accreditation authorities, should support law schools in their ongoing efforts to experiment and innovate. Among other important values, experimentation should help inform needed changes to the ABA accreditation requirements.
- As law schools experiment with methods for instruction, they also should consider experimenting with ways to control costs. Even as some schools implement new resource-intensive programs, others may wish to experiment with programs that use fewer resources and prioritize a reduced-cost approach.
- Despite the difficult job environment, there is a large, unmet demand for legal services, especially among moderate-income households. There must be a cultural shift in the focus of the profession away from the limited number of "BigLaw" opportunities and towards a wider range of sustainable career opportunities.[6]

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2. Jerome M. Organ, *Reflections on the Decreasing Affordability of Legal Education*, 41 WASH. U. J.L. & POL'Y 33, 55-56 (2013).

> Unfortunately, for students with the least robust LSAT/GPA profiles, for whom scholarship opportunities are much less likely to be available and for which it might not even be possible to gain admission to the public law school in the state in which they reside, law school is an expensive proposition for which the return on investment is questionable.

Id.

3. *Task Force on New Lawyers in Changing Profession*, NEW YORK CITY BAR ASS'N, http://www.nycbar.org/task-force-on-new-lawyers-in-a-changing-profession (last visited July 7, 2015).

4. *Id.*

5. NEW YORK CITY BAR ASS'N, DEVELOPING LEGAL CAREERS AND DELIVERING JUSTICE IN THE 21ST CENTURY (2013), *available at* http://www2.nycbar.org/pdf/task-force-report-executive-summary-developing-legal-careers-and-delivering-justice-in-the-21st-century.pdf.

6. *Id.* at 2-5.

Much of the scholarly debate surrounding the current crisis in legal education has sought to identify and explain why legal education has become so costly and what to do about it.[7] On one side, law professors like Professors Brian Tamanaha and Paul Campos argue that law professors and administrators have used accreditation, rankings competition, deceptive recruitment practices, and students' easy access to federal loans as a means to secure, through ever-increasing tuition, a stable and privileged sinecure in the world of higher education.[8] This argument concedes that legal education's quality has improved over the years but questions whether increased tuition has directly or proportionately benefited students. For example, tenure, low teaching loads, and institutional support for faculty scholarship are characterized as teaching perks that do not necessarily benefit students in terms of education quality and cost.[9] Tamanaha indicts legal educators for taking care of themselves while ignoring the interests of students who enter into a declining job market with massive and unmanageable debt.[10] He faults legal educators for overselling the value of a legal education.[11]

Others argue that legal education's increased cost is in line with increased cost for higher education in general, and that law graduates will generate career earnings that more than justify the cost of obtaining a J.D. Michael Simkovic, a law professor at Seton Hall, and Frank McIntyre, a professor of finance and economics at Rutgers, fault Tamanaha for failing to accurately interpret economic data that demonstrate a law degree's significant economic value.[12] They find support from Professor Phil Schrag, who points out that loan repayment is especially manageable under the terms of recent federal legislation that subsidizes graduate education by allowing students to base loan payments on

7. *See*, *e.g.*, Ronald G. Ehrenberg, *American Law Schools in a Time of Transition*, 63 J. LEGAL EDUC. 98, 109-12 (2013). *See generally* Organ, *supra* note 3; Dan Morrissey, *Saving Legal Education*, 56 J. LEGAL EDUC. 254 (2006) (predicting a law school crisis occasioned by unchecked tuition increases and the development of discounting practices).

8. BRIAN TAMANAHA, FAILING LAW SCHOOLS (2012); Paul Campos, *Welcome to My Nightmare*, INSIDE THE L. SCH. SCAM (Aug. 7, 2011, 6:40 AM), http://insidethelawschoolscam.blogspot.com/2011_08_01_archive.html (blog devoted to critiquing legal education and its value). Campos has been much criticized for not acknowledging how legal education has improved (for example, through smaller class sizes and clinics), for inaccuracies, for not offering realistic solutions to the problem of rising tuition, and for grandstanding. *See*, *e.g.*, Matt Bodie, *Paul Campos and the Future of Law Schools*, PRAWFSBLAWG (Nov. 15, 2013, 5:38 PM), http://prawfsblawg.blogs.com/prawfsblawg/2013/11/paul-campos-and-the-future-of-law-schools.html; Brian Leiter, *Paul Campos's Final Bit of Revisionist History*, BRIAN LEITER'S L. SCH. REPS. (Feb. 28, 2013), http://leiterlawschool.typepad.com/leiter/2013/02/paul-camposs-final-bit-of-revisionist-history.html.

9. TAMANAHA, *supra* note 8, at 28, 39, 52, 61. *But see* Morrissey, *supra* note 7, at 275 ("It is hard to blame the legal educators whose numerous, well-intentioned decisions over the last twenty years have made law schools so expensive. Students today do receive much better overall training than their predecessors. Yet the tuition increases that made such progress possible have had grave consequences for the careers of individual law graduates.").

10. TAMANAHA, *supra* note 8, at 107, 126.

11. *Id.* at 145.

12. Michael Simkovic & Frank McIntyre, *Populist Outrage, Reckless Empirics: A Review of Failing Law Schools*, 108 NW. U. L. REV. 176 (2014).

income and forgiving unpaid debt after twenty years.[13] For public interest lawyers, the subsidy is even greater—payments are based on a lower percentage of monthly discretionary income, and loan balances are forgiven after ten years.[14] Thus, the argument is that law schools face changed market conditions due to economic disruption and structural changes in the legal profession, but law school tuition, accreditation standards, and faculty privilege are neither responsible for lagging law school applications nor an obstacle to an individual graduate's economic success.

Still others argue that the debate is too narrow and too lacking in focus on the presumed beneficiaries of legal education—clients and society at large.[15] While there is disagreement about the causes and effects of higher tuition, there is widespread agreement that the number of recent law graduates exceeds the number of available law jobs.[16] There is also general agreement that schools should ratchet down admissions until there are more jobs.[17] Implicit in all this is the assumption that a law degree has value to the extent it produces high earnings; that law students go to law school in order to maximize income and gain career prestige; and that a primary goal of legal education is to enable graduates to obtain high status and high-paying jobs working for affluent and powerful clients.[18]

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13. Philip G. Schrag, *Failing Law Schools: Brian Tamanaha's Misguided Missile*, 26 GEO. J. LEGAL ETHICS 387, 400-05 (2013). Brian Tamanaha responded to Schrag's criticism in a blog post: Brian Tamanaha, *What's Wrong with Income Based Repayment in Legal Academia: A Response to Schrag*, BALKINIZATION (Nov. 29, 2012, 6:38 PM), http://balkin.blogspot.com/2012/11/whats-wrong-with-income-based-repayment.html.

Professor Organ describes the cost of law school and the financial viability of choosing law as a career path based on several variables, including a school's tuition discounting practices, whether a school is public or private, an applicant's LSAT score, and the average salaries of law graduates over time. Organ, *supra* note 3, at 54-56. He disagrees with Phil Schrag's conclusion that the federal income-based loan programs like PAYE ("Pay As You Earn") make law school a viable career choice for most students. He shares Tamanaha's concerns that the availability of federal subsidies do not justify ever-increasing tuition and, in any event, federal subsidy programs are easy targets for federal budget-cutting in difficult economic times. *Id*. at 57-59. *See also* Schrag, *supra* note 13, at 416-17 (arguing that we need more lawyers who, with the help of federal subsidies, can more easily afford to deliver legal services to low and medium income clients).

14. Schrag, *supra* note 13, at 405.

15. *See, e.g.*, Elizabeth Chambliss, *It's Not About Us: Beyond the Job Market Critique of U.S. Law Schools*, 26 GEO. J. LEGAL ETHICS 423 (2013) (book review).

16. *See*, *e.g.*, Adam Cohen, *Just How Bad Off Are Law School Graduates?*, TIME.COM (Mar. 11, 2013), http://ideas.time.com/2013/03/11/just-how-bad-off-are-law-school-graduates/; Joshua Wright, *The Job Market for Lawyers: Side Work on the Rise Amid Continuing Glut of New Grads*, FORBES (Jan. 10, 2014, 11:20 AM), http://www.forbes.com/sites/emsi/2014/01/10/the-job-market-for-lawyers-side-work-on-the-rise-amid-continuing-glut-of-new-grads/.

17. *See*, *e.g.*, Ashby Jones & Jennifer Smith, *Amid Falling Enrollment, Law Schools Are Cutting Faculty*, WALL ST. J. ONLINE (July 15, 2013, 4:39 PM), http://online.wsj.com/news/articles/SB10001424127887323664204578607810292433272; Debra Cassens Weiss, *Law Schools Could Be Admitting 80 Percent of Their Applicants This Fall, Statistics Suggest*, ABAJOURNAL.COM (Aug. 9, 2012, 12:45 PM), http://www.abajournal.com/news/article/law_schools_could_be_admitting_80_percent_of_their_applicants_this_fall_sta.

18. Richard Gunderman & Mark Mutz, *The Collapse of Big Law*, THE ATLANTIC (Feb. 11, 2014), http://www.theatlantic.com/business/archive/2014/02/the-collapse-of-big-law-a-cautionary-

Professor Elizabeth Chambliss' review of Tamanaha's *Failing Law Schools* faults Tamanaha for his conclusions that (1) applicants who cannot get into an elite law school should forego law school in the near term because they will not be able to secure the well-paying law jobs that will be reserved for graduates of elite institutions; and (2) recommending, in the longer term, a two-tier system of legal education where the elite schools continue providing traditional academic intensive training for corporate clients, and non-elite schools become relatively unregulated laboratories for cheaper, accelerated, practice-oriented education for students who cannot get into elite schools.[19] Professor Chambliss calls out Tamanaha because:

> He barely hints that elite law schools might have some duty to rethink *their* model, not just for themselves but for other stakeholders—despite the fact that, by his own account, educational standards are defined by those schools. Under his plan, "research-oriented law schools will remain as they are."
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> He never considers the role of law schools—elite or otherwise—in promoting the liberalization of the U.S. legal services market, so that legal services might become more competitive and accessible to ordinary consumers. He does not argue for limited licensing or simply eliminating the J.D. requirement for routine legal services, though he notes that "a law degree is an undergraduate degree in most countries" and states that "a great deal of legal work is routine." And though he acknowledges research pointing to permanent structural changes in the legal services market, he dismisses the relevance of this research to his analysis in a few paragraphs, stating that "for immediate purposes it is more pertinent to pay attention to specific indications of what the job market for lawyers will look like in the next five to ten years."[20]

Having thus defined his mission in terms of lawyers' short-term economic interests, Tamanaha proposes to double down on the elite/nonelite law school divide, to maintain the *status quo* for elite law schools and delegate the burden of innovation to new entrants and non-elite schools, where students can no longer dream of obtaining "lucrative … corporate law jobs." Thus, Tamanaha does not speak "truth to law school institutional power." Tamanaha speaks truth to the

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tale-for-big-med/283736/ ("In one respect, ranking law schools by job placement rates and law firms by profits sounds like a good idea. It provides a seemingly fair and objective basis for prospective students, employers, and clients to assess performance. But such rankings have a tendency to bring out the worst in those they evaluate. For example, as soon as law firms begin measuring their performance by the revenue each attorney generates, money begins to supplant all other means of assessing performance. Lawyers whose work is gauged above all by billable hours experience great pressure to make every minute count in the dollar column. Noble aspirations that may have drawn young people to the law in the first place—serving their fellow citizens, making the community a more just place, and securing democracy—evaporate thanks to this constant attention to money. Soon *pro bono* work seems a waste of time."). High tuition and a dearth of good paying law jobs factors into so many law graduates' anger towards law school. Maya Itah, *Why Do So Many People Hate Law School?*, FORTUNE (Feb. 24, 2014, 10:00 AM EDT), http://management.fortune.cnn.com/2014/02/24/law-school-haters/.

19. Chambliss, *supra* note 15, at 426-30.

20. *Id.* at 424 (internal footnotes omitted).

dispossessed—in this context, students (and faculty) who cannot gain access to elite schools. And his message to them is: "You cannot afford us. And you should stop pretending that you can."[21]

The crisis occasioned by reduced law school applications has generated discussion about the need for law schools designed to produce lawyers and legal technicians who serve middle- and lower-income clients.[22] Of course, law graduates who end up doing this kind of work are often seen as doing so because they cannot secure a better job—that is, a job that pays more money or is more prestigious. The assumption is that if they can get such a job, they should take it.[23] Outside of progressive elements within the established bar, community legal services circles, and, more recently, the American Bar Association Task Force on the Future of Legal Education ("ABA Task Force"), where is the discussion that seriously and explicitly addresses the fact that the legal profession and law schools do not serve the majority of Americans who need legal services?[24] Why do we retreat from challenging the assumption that the role of law schools is to enroll the best and the brightest test-takers in order to train them to serve the most affluent clients?[25] Finally, is elitism so entrenched in the modern American legal tradition that we have confused educational excellence with power, prestige, and affluence?[26] Professor Chambliss ends her review of Tamanaha's book with the admonition that legal education does not need a "justification for

21. Chambliss, *supra* note 15, at 424-25 (internal footnotes omitted) (quoting Tamanaha from various sources).

22. Michael A. Olivas, *58,000 Minutes: An Essay on Law Majors and Emerging Proposals for the Third Year of Law Study*, 45 MCGEORGE L. REV. 115, 126 n.56 (2013) (describing concerns about Limited License Legal Technician ("LLLT") programs); Chambliss, *supra* note 15, at 439-40 (citing the existence of limited assistance positions in particular areas of law); Jack Graves, *An Essay on Rebuilding and Renewal in American Legal Education*, 29 TOURO L. REV. 375, 384 n.34 (2013) (incorporating LLLTs in a three-step proposed plan to reform legal education); Renee Newman Knake, *Democratizing Legal Education*, 45 CONN. L. REV. 1281, 1291 n.40 (2013) (touching briefly on LLLTs as a jurisdictional solution to the ABA's resistance to change); Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years*, 70 WASH. & LEE L. REV. 1309, 1343 nn.182-83 (2013) (advocating the inclusion of non-lawyers in the traditional right to counsel).

23. I recall a conversation with a colleague who expressed dismay at the fact that a top student and law review editor took a job with a non-profit domestic violence program when "she could have had a job with a top-notch law firm." The colleague went on to opine that the student's choice would damage her own career and do nothing to enhance the reputation of the law school she attended.

24. *See* Henry Rose, *Law Schools Should Be About Justice Too*, 40 CLEV. ST. L. REV. 443, 446 (1992) ("[N]early 85% of the American public have very limited access to our legal systems because they cannot afford legal representation. It is intellectually outrageous as well as professionally inexcusable that the multi-dimensional problem of access to the judiciary is not analyzed in law schools.") (internal footnote omitted)).

25. *Id.* at 444 ("American law students are taught to focus on the legal problems of persons or entities able to pay for legal services.").

26. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 7, 99-100 (1983). *See generally* KURT OLSON & LAWRENCE R. VELVEL, THE GATHERING PEASANTS' REVOLT IN AMERICAN LEGAL EDUCATION (2008) (arguing that American legal education is the product of powerful interest groups, including the organized bar, and these groups have a stake in keeping the legal profession and legal services exclusive and expensive).

market elites to do nothing" but rather for all law schools to adapt to change, "ideally with the interests of not-just-elite clients in mind."[27]

This Article explores the question of how we should define quality, excellence, and admissions standards in the context of legal education. It argues that traditional assumptions regarding what constitutes high quality legal education have led to curricula, admissions practices, and resource allocations that have not always produced excellent legal education in terms of meeting either the private interests of law school consumers (a diverse range of students) or the public good (middle- and low-income people in need of competent legal assistance).[28] It asks whether it is time to think about "excellence" in terms of whether or not a school (1) admits students based on factors that show their ability to become effective lawyers or legal technicians; (2) makes law school affordable and attractive for a range of applicants by controlling tuition and allocating scholarships based on need as well as merit; and (3) benefits society by admitting and preparing public service-minded students for middle-class careers that address the needs of society's underserved middle- and lower-income population.[29]

A new definition of excellence—one that does not equate excellence with hierarchies established by the current *U.S. News & World Report* ("*USNWR*") rankings system—would focus on the private interests of students (to become licensed legal services providers and find fulfilling employment) and society's interest in having a critical mass of lawyers who are diverse, have a desire to provide access to justice for the underserved, and are admitted to law school based on their ability to serve effectively and ethically. A new standard of excellence would also allow for and promote innovative regional law schools

27. Chambliss, *supra* note 15, at 426.

28. Ehrenberg, *supra* note 7; *Task Force on the Future of Legal Education*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html (last visited July 7, 2015).

29. Commentators have started challenging the widely held perception that there are many fewer jobs in the legal market today. They argue that new lawyers can find efficient, cost-effective ways to serve middle-income clients by using technology and law office management practices that allow them to make a decent living by charging affordable fees. Kendall Coffey, *Underserved Middle Class Could Sustain Underemployed Law Graduates*, NAT'L L.J. ONLINE (Aug. 15, 2012) (archived) ("The reality is that with prudent office economics, recent law graduates could earn decent compensation and launch successful practices, with the opportunity to continue to earn more. Rather than work for a law firm at high rates, of which two thirds goes to the employer, new lawyers could charge much lower rates and keep the earnings for themselves. Rates of between $50 and $125 per hour would make new lawyers affordable to the middle class while providing the lawyers with enough income to succeed."); Lucy B. Bansal, *A Lawyer for John Doe: Alternative Models for Representing Maryland's Middle Class*, 13 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 156, 157 (2013), *available at* http://digitalcommons.law.umaryland.edu/rrgc/vol13/iss1/6 (calling for the bar in the state of Maryland to look at four models that would help provide more affordable legal services for the state's middle class: "1) mentorship of new lawyers to encourage practicing middle class representation at a novice rate, 2) using legal services brokers to lower attorneys fees in exchange for guaranteed payments, 3) deregulating the legal industry to allow investment in law practices by non-lawyers and profit-sharing between lawyers and non-lawyers to drive down prices, and 4) expanding the availability of unbundled legal services through the creation of legal cafes").

whose mission is not to become nationally prestigious, but to provide affordable legal education to a diverse range of people who are motivated by public service. Understanding excellence in a way that departs from notions of LSAT selectivity, money spent per student, national reputation, faculty status, and scholarly production could benefit society by allowing law school academic programs and budgets to do what teachers' colleges and schools of education have done for decades: train students to serve and contribute in exchange for rewarding and comfortable lives, but not with the expectation of getting rich.[30]

Part I of this Article provides a short historical description of American legal education's history, with emphasis on how elitist notions of excellence resulted from ABA and American Association of Law Schools ("AALS") regulation and the emergence of *USNWR* rankings. Part II addresses the need for a new definition of excellence that values student needs and the public good. Part III describes what an "excellent" law school might look like under this new definition. Part IV explains why measuring law schools according to a new standard of excellence is not a rationalization for a two-tier system of legal education (elite and non-elite), but a necessary and realistic metric for achieving American society's goal of achieving access to justice, if not equal justice, for all.[31]

Preliminary to the Article's substance, I wish to acknowledge that I have benefited personally and professionally from many of the perquisites that contribute to the elitist model of education of which I am critical. I have advocated for such things as higher faculty salaries, support for faculty scholarship, job security for clinical and legal research and writing faculty, a new law school building equipped with the latest technology, more support staff, and other items that have resulted in increased tuition. Together with sabbatical leave, summers off, opportunities to teach abroad, and a high degree of professional autonomy, these perquisites have certainly contributed to a very nice career and lifestyle. While I may be vulnerable to the charge of false virtue, I believe my critique of legal education is bolstered by the fact that I have

30. There is evidence that applications to law school are disproportionally down from graduates of elite undergraduate colleges and universities. The reasons for this are not clear, but it may be that students from those institutions have particularly high expectations of becoming wealthy; the perception that there are fewer high-paying law jobs may explain why interest in law school is more diminished from these students than from students in general. Keith Lee, *Top University Students Avoiding Law Schoo-2014 Edition (Statistics + Graphs)*, ASSOCIATE'S MIND (Mar. 5, 2014), http://associatesmind.com/2014/03/05/top-university-students-avoiding-law-school-2014-edition-statistics-graphs/. *See also* Nicole Black, *The Myth of the Upper-Middle-Class Lawyer*, 29 GP SOLO, Sept. 2012, at 5, *available at* http://www.americanbar.org/publications/gp_solo/2012/september_october/myth_upper_middle_class_lawyer.html (discussing the various reasons prospective law students should not assume that, as lawyers, they will be guaranteed comfortable upper-middle class lives).

31. *See generally* Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. SUPRA 75 (2013), *available at* http://mississippilawjournal.org/wp-content/uploads/2013/02/3_Holland_Final.pdf (discussing how legal education might realistically expand access to justice even though achieving the more idealistic goal of "equal justice" remains implausible).

experienced and observed both the good and bad effects of a privileged life in the legal academy.

I. LEGAL EDUCATION BEFORE REGULATION AND THE RISE OF THE ELITIST MODEL

Lawyers were neither popular nor numerous in the Colonial period or in the early years of the new nation.[32] Those who had formal legal training had either acquired it in England through the Inns of Court (the traditional apprenticeship experience that steeped students in the common law and gave them opportunities to observe practice) or listened to law-related lectures that were part of a general college curriculum.[33] Most lawyers were self-trained through reading law books (especially Sir Edward Coke's four volume *Institutes of the Laws of England*[34] and Sir William Blackstone's *Commentaries on the Laws of England*[35]) or by clerkship training.[36] Much legal work was accomplished by self-styled lawyers—untrained amateurs seeking to fill the expanding market for legal services.[37]

American attorneys, with the exception of those in Massachusetts, were not limited in the number of clerks they could have.[38] Many attorneys found that teaching was more lucrative and satisfying than practice, and their offices sometimes evolved into small teaching centers.[39] Ultimately, some of these attorneys started law schools, advertising for students in the newspaper. The first independent college of law, Litchfield Law School in Connecticut, evolved in this fashion and is recognized as the first American law school, established in 1784 and distinguished by its success and longevity.[40] The school is of interest because it "was, first and last, an entirely practical program designed solely to teach the student what he needed to know to practice law" and because many of its alumni later gained fame and distinction.[41] Academic law training gradually

32. Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI.-KENT L. REV. 429, 429-30 (1981); Brian Moline, *Early American Legal Education*, 42 WASHBURN L.J. 775, 776-77 (2004); STEVENS, *supra* note 26, at 7.

33. Stein, *supra* note 32, at 430-33.

34. *See generally* SIR EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND (1797).

35. *See generally* SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (12th ed. 1794).

36. Moline, *supra* note 32, at 779-86; Stein, *supra* note 32, at 440 ("The quality of training under such a system depended heavily upon the nature, skill and teaching interest of the attorney. Certainly some abused their clerks, their desire being only to maximize their incomes. On the other hand, some lawyers took a great deal of interest in their clerks' education. John Jay and John Adams are but two prominent examples of clerks who had the benefit of excellent relationships with fine attorneys and whose practices and professionalism were continuations of their formative training.").

37. Moline, *supra* note at 32, at 778.

38. Stein, *supra* note 32, at 442.

39. *Id.* at 442-43.

40. *Id.* at 443.

41. Moline, *supra* note at 32, at 795-96 (stating that "28 [alumni] became United States senators; 101 members of Congress; 34 state supreme court justices; 14 governors of states and 10

came into being to provide an academic framework for philosophical and theoretical training as a means of supplementing self-learning and apprenticeship.[42] The first professorship in law was established by Thomas Jefferson, Governor of Virginia, in 1779 at the College of William and Mary.[43] Similar chairs were established during this period at Yale, Columbia, the University of Maryland, Harvard, and other institutions.[44] These early efforts to establish law as a scholarly study were not successful.

> Professorships frequently lapsed or remained sinecures, and serious professional training took place at the private law schools like Litchfield. In a very real sense the dichotomy between the teaching of law as a liberal and liberating study and the teaching of law as a technical and professional study was already established.[45]

This period also saw the development of state bar associations and efforts to regulate the practice of law, including standards for being admitted to practice.[46] The original states varied in their approaches to regulation, but, in general, an applicant to the bar who had some college experience would benefit from a reduced period of required apprenticeship.[47]

In the less-populated and wide-open western territories, the tradition of allowing easy access to the bar continued. In places like Illinois, Missouri, and Indiana, lawyers were often self-trained. They would sometimes be required to take a bar exam, but the exam itself might be comprised of a simple and brief oral examination by a local member of the bar.[48] Lawyers considered themselves lucky if they could find an experienced and capable lawyer to act as a mentor. The fabled story of Abraham Lincoln having trained himself by reading Blackstone[49] by candlelight in a log cabin was not apocryphal. Indeed, President Lincoln's experience was, to a great degree, the product of the American attitude favoring the aspirations of common people to participate in professions that had previously been exclusionary.[50]

This American penchant for a populist way of organizing society and government was accelerated during and after the presidency of Andrew Jackson, a president well known for advancing a philosophy of social and economic mobility (at least for white males). Among other things, that philosophy produced education policies predicated on giving opportunities to the common

lieutenant governors; 3 vice presidents of the United States; 3 United States Supreme Court justices; and 6 members of the Cabinet").

42. *Id.* at 797; Stein, *supra* note 32, at 445.

43. Moline, *supra* note 32, at 792-93.

44. *Id.* at 797-98.

45. STEVENS, *supra* note 26, at 5. *See also* Stein, *supra* note 32, at 444-45.

46. STEVENS, *supra* note 26, at 3-4.

47. Moline, *supra* note 32, at 783; Stein, *supra* note 32, at 439.

48. Stein, *supra* note 32, at 444.

49. *See generally* BLACKSTONE, *supra* note 35.

50. An anecdote related by Nathaniel Stevenson shows how frontier lawyers like Lincoln felt pressure and condescension from college-trained lawyers from the East. STEVENS, *supra* note 26, at 19 n.72.

man.[51] While this did not translate into affirmative systemic inclusion of common people in the professions and government, it reduced the barriers. With respect to the legal profession, society in the early and middle parts of the nineteenth century—a society comprised of immigrants and the children or grandchildren of immigrants—wanted lawyers to be something other than the aristocrats who populated the law profession in Britain.[52] By 1865, the American legal profession was comprised of rich, poor, part-time, and full-time lawyers.[53] Many were not formally educated.[54] Some had been to college. None had a *juris doctor* degree because such degrees were unknown until the development of graduate professional programs in the twentieth century. Professor Mark Jones describes the period between the founding of the United States and the Civil War as follows:

> Despite the opportunities for a formal legal education, there was a significant decline, during the course of this period, in the number of jurisdictions requiring any formal training for entry into the profession. During the early part of this first phase, almost all of the thirteen original states seem to have required some period of formal apprenticeship training. Subsequently, however, partly or even largely as a result of the atmosphere created by Jacksonian Democracy in the 1830s and 40s, there was a significant decline in educational standards and requirements for admission to the bar. In 1840, a period of apprenticeship training was required in no more than 11 out of 30 jurisdictions; in 1860 it was required in only 9 out of 39 jurisdictions, and everywhere bar examinations were oral and usually casual. In addition, very few states required even a rudimentary general education, although many states did impose a minimum age requirement of twenty-one for admission to the bar. Consequently, it seems that, due to the absence in most jurisdictions of any meaningful requirements for admission to the bar, many of those practicing law during the latter part of the period may have received no formal legal education at all.[55]

Over time, educators recognized the need for more specialized legal training and professionalism to address the needs of a growing industrial and corporate economy.[56] A new dimension of legal education developed in established universities—entire programs and curricula geared toward theoretical

51. "During the period after 1800, the graded, priest-like replicas of the English legal profession largely evaporated from the United States, and a rapid decline in formal standards for legal education and the dissolution of bar associations undoubtedly characterized the heady days of Jacksonian Democracy." *Id.* at 10. Many observers regarded the period of Jacksonian democracy as "degradation for the profession." Paul D. Carrington, *One Law: The Role of Legal Education in the Opening of the Legal Profession Since 1776*, 44 FLA. L. REV. 501, 509 (1992), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1159&context=faculty_scholarship.

52. STEVENS, *supra* note 26, at 7.

53. *See generally id.*

54. *Id.*; Stein, *supra* note 32, at 444.

55. Mar Jones, *Fundamental Dimensions of Law and Legal Education: An Historical Framework*, 39 J. MARSHALL L. REV. 1041, 1060-61 (2007).

56. STEVENS, *supra* note 26, at 22-23.

and doctrinal training. While legal education at colleges and universities stagnated during and after the Jacksonian presidency of the 1830s, there was a resurgence of institutional legal education in the 1850s. By 1860, there were twenty-one law schools in existence, including Columbia, New York University, and the University of Pennsylvania.[57]

The goal of many of these schools was explicitly elitist. The University of Georgia Law School announced in 1858 that "'[t]here is in our State a large number of young men who intend to devote themselves to the honorable employment of cultivating the estates they inherit from their fathers. To them a knowledge of the general principles of law is of inestimable value.'"[58] "'They expect to be the Legislators of the land ….'"[59] New York University shared the goal of providing legal education to "'thousands of young men in the United States who are in possession, or will come into possession, of large estates'" and to the "'class of young men, who are hereafter to control the mercantile and commercial interests of our country ….'"[60] The 1867 Columbia commencement speaker, Benjamin Silliman, affirmed the merit of Tocqueville's praise of lawyers as "natural aristocrats" and went on to explain that the role of Columbia's law graduates would be to work with businessmen, especially on Wall Street.[61]

Bar leaders throughout the country began calling for some amount of structured legal education, usually a combination of apprenticeship and law school, and more systematic bar exams. In the period of 1870 to 1890, admission to the bar tightened as jurisdictions required more structured study and established state committees to administer bar exams—with written bar exams becoming more the norm.[62] Concerns that rising standards would exclude the poor and less educated from admission to the bar were overcome by a general sense that the law should no longer be seen as a "trade" but as a "public calling" and that the "unworthy" had to be "excluded" and "rejected."[63] Still, it remained possible in most of the country to become a lawyer without formal education until well into the twentieth century.[64]

Meanwhile, Harvard Law School was busy creating a model of legal education that was destined to become the standard for law schools in the next century and beyond. Dean Christopher Columbus Langdell popularized the notion of law as "science" and introduced the casebook method of teaching, which dominates much of legal education to this day. He advanced the idea that

57. *Id.* at 21.

58. *Id.* (quoting Univ. of Georgia Law Dep't, *Announcement*, Athens (June 1, 1859)).

59. *Id.* at 28 n.10 (quoting Univ. of Georgia Law Dep't, *Announcement*, *supra* note 58)).

60. *Id.* at 21 (quoting New York Univ. Law Dep't, *Annual Announcement of Lectures, 1858-59*, at 9-10).

61. "I believe that no place on earth is daily trodden by more [men] of honor, enterprise, generosity, faith and integrity—than that on which the setting sun casts the shadow of the spire of Trinity." *Id.* at 23 (quoting Benjamin Silliman, Commencement Address at Columbia University (May 12, 1867)).

62. *Id.* at 25.

63. *Id.* at 27 (internal quotation marks and footnote omitted).

64. Moline, *supra* note 32, at 801.

law, like medicine and other scientific disciplines, should be a graduate program of study resulting in the award of a graduate degree.[65] Langdell also introduced a new breed of academic lawyer, a young Harvard law graduate, James Barr Ames, who had no practice experience.[66] Said Langdell:

> A teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often traveled it before. What qualifies a person, therefore, to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law, but experience learning law.[67]

"The size and influence of Harvard was such that almost all university-affiliated schools were only too anxious to emulate its developments."[68] "No doubt part of the [case] method's popularity was snobbism; once elite law schools had decided to approve of the system, those aspiring to be considered elite rapidly followed."[69] By 1920, virtually all national law schools had adopted Harvard's core curriculum model.[70] They used the casebook method, lectures, and Socratic dialogue as the typical methods for delivering knowledge and values to law students by professional teachers in traditional academic settings. These schools—often staffed by full-time faculty who absorbed the lifestyle, status, and expectations of traditional academics—served the needs of large corporate law firms looking for graduates who possessed the personal characteristics and attributes of white, mostly Protestant, upper-class lawyers who counseled the nation's great industrial and financial enterprises of the early twentieth century.[71] In time, the schools became the model for most of today's law schools.[72] Some saw the Harvard model and its effects as an overreaching "educational octopus," while others were relieved that there was finally a unified way of thinking about law and teaching law that would, in turn, serve as "a basis for professional unification."[73]

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65. STEVENS, *supra* note 26, at 36-37.

66. *Id.* at 38.

67. *Id.* (internal footnote omitted).

68. *Id.* at 39.

69. *Id.* at 63.

70. *Id.* at 41.

71. William D. Henderson & Rachel M. Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession?*, ABAJOURNAL.COM (July 1, 2012, 10:20 AM CDT), http://www.abajournal.com/magazine/article/the_pedigree_problem_are_law_school_ties_choking_the_profession/ [hereinafter *The Pedigree Problem*].

72. *Id. See also* DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (2004); ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND (1992). *But see* Carrington, *supra* note 51, at 501-07 (arguing that American society created conditions that opened up legal education to all, not just the privileged, and that modern legal education is substantially diversified and open notwithstanding the rise of academic standards and requirements).

73. STEVENS, *supra* note 26, at 41.

The ABA, established in 1878 to advance the interests of lawyers, hoped to raise the standards of professionalism and admission to the bar.[74] It advocated a system of training that combined institutional education, apprenticeship, and impartial bar examinations.[75] By the 1890s, the organization and bar leaders in general had embraced the model and methods of legal education introduced and developed at Harvard and other elite law schools.[76]

Something else happened that is much less known and talked about today: the development of private, proprietary law schools. These schools were local and regional schools for non-traditional students who studied law part time, usually at night. Many of these schools were sponsored by the YMCA as a pathway to the legal profession for students who could not attend more traditional schools. Admission to such schools was non-competitive, cost was low, and students could proceed at a pace tailored to their individual circumstances. Courses were taught by practicing lawyers experienced in the practice area that correlated to the subjects they taught.[77] Enrollment at these schools was largely comprised of poor students from immigrant and working class families—especially Jewish students and women who were discouraged from attending more prestigious universities by policy or tradition.[78] As Capital University Professor Emeritus John Sullivan put it, students were not "evaluated at the front door. [They were] evaluated in the class room."[79]

However, organized bar education and bar forces were working against the long-term success of proprietary schools. From the time it was established in 1879, the ABA Committee on Legal Education and Admissions to the Bar sought to standardize and improve legal education by requiring a law degree, emphasizing teaching law "scientifically," and discouraging the "proneness" of law students "to be practical."[80] This movement towards more rigorous academic education continued for the next several decades and included increasingly demanding and detailed recommendations relating to curricula and program structure.[81] It was reinforced in 1900 by the creation of the AALS, an organization of "reputable" law schools organized by career law professors—the "new breed of academic lawyer."[82] By 1905, the AALS had denied membership to two-year law schools (in favor of three-year programs of study); by 1912 it would no longer accept members with day and night programs of equal length (because night programs "tend[] inevitably to lower educational standards"); and

74. *Id.* at 27.

75. *Id.*

76. *Id.* at 60.

77. *Id.* at 73-84.

78. *Id.* at 100-03.

79. Steven C. Bahls & David S. Jackson, Essay, *The Legacy of the YMCA Night Law Schools*, 26 CAP. U. L. REV. 235, 236 (1997).

80. STEVENS, *supra* note 26, at 93 (internal quotation marks and footnotes omitted).

81. *Id.* at 92-103.

82. *Id.* at 96-97.

by 1917 the association recommended denial of membership for any night school program.[83]

Over the course of the next several decades, the ABA and AALS, working in close cooperation, advanced their goal of transforming legal education from non-elite forms of commercial and proprietary education into a more elite form of graduate academic endeavor, with the requirement of full-time deans, substantial libraries, and minimum full-time student-faculty ratios.[84] The ABA also worked assiduously to persuade states to limit bar admissions to persons who had graduated from an ABA-accredited law school.[85] Robert Stevens, in his book *Law School: Legal Education in America from the 1850s to the 1980s* (extensively cited in this Article), summarizes these efforts by reference to evidence that suggests the development of a cartel:

> The motives behind the urge of the AALS, eventually joined by the ABA, to reform legal education in the United States are complex. In a detailed economic study, Harry First labeled the AALS as a cartel and argued that each of the "reforms" undertaken or encouraged by the AALS had less to do with educational concerns than it did with the urge to control the market. By enforcing elitist controls, the leading law schools hoped to eliminate profitable non-AALS schools with whom they were at a disadvantage economically by "going outside the market," suppressing competition, and enforcing higher standards that would allow the schools, rather than the student population, to control the legal education market. Jerold Auerbach argued, from the perspective of a social historian, that the ideology of the case method as a "science" led legal educators to believe that they could reform society and its evils ultimately through their skills as scientists. Envisioning themselves as leaders of society, they felt they could allow into the field only those who upheld the same moral values and ideology and had the same intellectual background as they did; they had to keep out "the poorly educated, the ill-prepared, and the morally weak candidates," which inevitably included non-native-born Americans. The efforts to raise standards, in Auerbach's view, were primarily concerned about keeping out Jews, blacks, and immigrants.[86]

Competing interests vied for control of state bar admission standards and law school accreditation through the middle years of the twentieth century.[87] Concerns were raised about "the rapidly accelerating homogenization of law schools, which pressures from the AALS and ABA were promoting."[88] In time, proprietary law schools could not resist the rise of the organized bar and the elite model of legal education. "By the mid-1930s, the ABA was scenting victory in

83. *Id.* at 97.

84. *Id.* at 172-76.

85. *Id.* at 177-80.

86. *Id.* at 99-100 (citing Harry First, *Competition in the Legal Education Industry*, 53 N.Y.U. L. REV. 311, 352-53 (1978); JEROLD AUERBACH, UNEQUAL JUSTICE 76, 82 (1976)).

87. *Id.* at 175-76. "[T]he ABA managed to overpower the forces of the nonelite during the 1930s." *Id*. at 176.

88. *Id.* at 174 (internal footnote omitted).

its efforts to eliminate unaccredited schools."[89] Professor Jon Garon describes the forces responsible for the demise of low-cost, accessible, open admission legal education:

> The ABA and AALS, however, sought uniformity and quality control. In particular, the ABA pushed to eliminate the night school model of practitioner education. The 1960s saw the ascension of the modern accreditation system and the end to unregulated part-time legal education by organizations such as the YMCA.
>
> > "[N]ight law programs operated with limited budgets and part-time faculties. Local practitioners and judges provided the instruction. Admittance typically was conditioned upon only a high school diploma and payment of a nominal, annual YMCA membership fee. Notwithstanding the accessibility and affordability of the early night law school programs, students were evaluated stringently.…
> >
> > ….
> >
> > By 1960, the demands of the legal profession and the increasingly complex nature of legal education forced the YMCA-funded law schools to reanalyze their affordable, practical programs.… For example, the ABA insisted on a solid core of full-time faculty, yet the YMCA had kept costs low by drawing part-time instructors from the ranks of the practicing attorneys and judges. And ABA accreditation standards required schools with minimal facilities and library resources to spend more than the YMCA could allocate in these areas."[90]

In addition to evidence that there was a hidden design to control the market for competitive advantage and to thwart the aspirations of supposedly unworthy students served by these proprietary and night schools, there was the obvious threat to elitism that night schools presented.

> Not only did these law schools threaten the status quo by educating non-traditional law students, but these schools educated students in such numbers that the very endeavor of professionalization—the licensing of small numbers of well-trained and select experts—seemed to be at risk. What was the use of being an expert in law when any laborer or clerk could claim equal knowledge and ability?[91]

89. *Id.* at 178.

90. Jon M. Garon, *Take Back the Night: Why an Association of Regional Law Schools Will Return Core Values to Legal Education and Provide an Alternative to Tiered Rankings*, 38 U. TOL. L. REV. 517, 526 (2007) (quoting Bahls & Jackson, *supra* note 79, at 236-37).

91. Laura I. Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped Our System of Legal Education*, 39 NEW ENG. L. REV. 251, 273 (2005). *See also* Bahls & Jackson, *supra* note 79, at 236. *See generally* AUERBACH, *supra* note 86. Of particular interest to our own time is the fear of overcrowding expressed by the ABA during the Great Depression. Both state bar leaders and the ABA were concerned that there were too many lawyers competing in a limited market and "proprietary schools were seen as the major cause of the overcrowding." STEVENS, *supra* note 26, at 178. The Philadelphia Bar Association actually voted to restrict the number of lawyers who could be admitted to practice in its jurisdiction. *Id.* Notwithstanding evidence that there was a

Professor Garon continues: "Regardless of the motivation, the YMCA and many other night schools disappeared or merged and transformed into traditional educational institutions. While part-time education survives, the pricing differentials have been eliminated through merger, library requirements, and standardization of faculty, clinics and other student opportunities."[92]

Others argue that the AALS and ABA—the latter through its Section on Legal Education—deliberately pursued a more cynical and self-serving agenda designed to advance the elitist preferences, economic goals, and employment interests of established law deans and faculty. The AALS, in particular, acted as an anticompetitive trade association that advanced an elite model of education that "tended to impose a common set of objectives and practices on all law schools."[93] Lawrence Velvel, dean of Massachusetts School of Law, and Professor Kurt Olsen examined the history of law school accreditation and the success of the ABA's efforts to convince state supreme courts and the U.S. Department of Education ("DOE") to make the ABA the exclusive body for accrediting law schools.[94] Their book, *The Gathering Peasants' Revolt in American Legal Education*, is a blistering attack on academic elitism, protectionism, and fiscal entitlement that characterized and motivated accreditation standards and a system of enforcement that virtually assured "the common man either will not gain admission to law school in the first place, or will be saddled with so much debt that a good chunk of his future will be a constant struggle."[95]

The book might be regarded as a defensive diatribe against the ABA's refusal to grant accreditation to the Massachusetts School of Law, the alleged incompetence of the DOE in regulating the ABA's accreditation authority and, ultimately, the failure of the Massachusetts School of Law's antitrust suit against the ABA, AALS, and the Law School Admissions Council ("LSAC"). Nonetheless, the authors' insistence that ABA accreditation rules (and their emphasis on inputs rather than outcomes) were anticompetitive and elitist is today a topic of mainstream discussion.[96] Professor Marina Lao, for example,

need for more legal services, not less, in the late 1930s the organized bar and the ABA intentionally sought limit the number of lawyers through increased education and state licensing standards. *Id.* at 179-80.

92. Garon, *supra* note 90, at 527.

93. Harry First, *Competition in the Legal Industry (I)*, 53 N.Y.U. L. REV. 311, 401 (1978).

94. OLSON & VELVEL, *supra* note 26, at 1.

95. *Id.*

96. The ABA did enter into a consent decree with the Department of Justice in 1995 (promising to end price-fixing of faculty salaries and to create a new commission and procedures to investigate alleged anticompetitive practices). Other than that, according to Olson and Velvel, "the consent decree did little good. It left numerous other anticompetitive rules unscathed, either by not dealing with them at all or by adopting 'remedies' that in fact remedied little or nothing." OLSON & VELVEL, *supra* note 26, at 20. Among the anticompetitive rules which were not adequately dealt with were "ones dealing with the student-faculty ratio, teaching loads, overall faculty workloads, physical facilities, libraries, courses that prepared students for the bar exam, restrictions on outside work that could be done by financially needy students, the requirement of the LSAT, and secret rules that are more stringent than the publicly available ones." *Id.* The authors conclude that "[t]hese anticompetitive rules continued to make law schools high cost, high tuition, elitist

examined legal education accreditation through the lens of the antitrust laws and concluded that the ABA-mandated approach to legal education was anticompetitive, drove up costs, and prevented delivery of affordable legal services to ordinary clients because those costs were "inevitably built into the fee structure."[97] Her sweeping 2001 article, *Discrediting Accreditation?: Antitrust and Legal Education*, concludes as follows:

> The ABA's accreditation standards reflect the profession's preference for the elite-model law school. As a historical matter, that preference had little impact until the ABA succeeded in securing the backing of most states, in the form of bar admission requirements that effectively foreclosed other options. It is the states' action in giving effect to the ABA's accreditation decisions that have, in the past, shielded the organization from private antitrust challenges relating to its accreditation activities. Despite the ABA's previous successes, which were grounded on state action and petitioning immunity doctrines, I have argued that these doctrines should not extend to the setting and enforcement of the accreditation standards themselves, as distinct from the accreditation decisions and the use of those decisions.
>
> On the issue of anticompetitiveness, I have concluded that many of the standards are unreasonable and, therefore, anticompetitive, because they perpetuate the elite-model law school and exclude others, even though a nonelite legal education is perfectly adequate for many types of legal practice. However, given the broad policy implications of any decision to fundamentally change the accreditation system, courts might be reluctant to second-guess the ABA. Nonetheless, this Article argues for voluntary reforms from the profession because the elite model, though perhaps better in the absolute sense, is not only unnecessary for many practitioners, but also has the unintended consequence of keeping the profession largely a bastion of the privileged.
>
> Change is inevitable. The ABA's leadership in legal education ultimately depends on its ability to retain its reputation and credibility with the states. Should

institutions that largely were financially and academically closed to the non white and non wealthy." *Id. See also* Larry Velvel, *How the Current Situation in Legal Education Came to Pass: Part I*, HUFFINGTON POST (updated Aug. 19, 2012, 5:12 AM EDT), http://www.huffingtonpost.com/larry-velvel/how-the-current-situation_b_1608364.html [hereinafter Velvel, *Part I*]; Larry Velvel, *How the Current Situation in Legal Education Came to Pass: Part II*, SCOOP (June 25, 2012, 12:26 PM) http://www.scoop.co.nz/stories/HL1206/S00165/on-the-current-situation-in-legal-education-part-ii.htm [hereinafter Velvel, *Part II*]. Dean Velvel explains that the ABA's accreditation monopoly was made possible through the complicity of the Department of Health, Education, and Welfare ("HEW"), stating that "the ABA persuaded HEW to approve it as *the* nationally recognized accrediting body for law schools. This imprimatur aided state court acceptance of ABA accreditation;" the LSAC, which made millions sponsoring and administering the LSAT; and the AALS, which was seen by leading legal educator in 1973 as having a role "*both in defending the fiscal entitlements of legal education generally and in advancing the economic standards of law professors directly."* Velvel, *Part I*, *supra* (emphasis added); Velvel, *Part II*, *supra* (emphasis added) (quoting *News of the Association*, 25 J. LEGAL EDUC. 613, 614 (1972-73)).

97. Marina Lao, *Discrediting Accreditation*?: *Antitrust and Legal Education*, 79 WASH. U. L. REV. 1035, 1101 (2001).

> it lose that credibility because its standards are eventually perceived as elitist or self-serving, some states might withdraw their reliance on ABA approval, which would cause important changes in the profession. It would be in the profession's best interests to take the lead in the process of change than to have changes proceed without its participation or influence.[98]

The advent of *USNWR* rankings in 1987 added to accreditation pressures to increase the cost of legal education. The temptation to seek status and prestige by achieving a high ranking also contributed to increasingly restrictive admissions and homogeneity in law school curricula and structures. Law schools began to emphasize the factors valued by *USNWR* (e.g., LSAT profiles, library resources, money spent per student, national reputation, faculty scholarship), regardless of whether those factors advanced a particular institution's traditional mission, educational goals, or role in the community.[99]

It is clear from this history that the elite law schools that evolved in the twentieth century became the model that shaped accreditation and rankings standards. Until the recent crisis brought about by declining applications and revenues, few law schools and faculties were willing to depart from these parameters. Faculty hiring focused on candidates and deans from elite law schools—who replicated the teaching methods and academic norms of their alma maters.[100] Admissions committees focused on applicants with the highest LSAT scores and GPAs with little or no regard for other indicia of merit or characteristics that are known to produce effective lawyers.[101] Placement of graduates in BigLaw was thought to be both a goal and a measure of quality education.

This would not be so problematic if legal education, elitist values, and law school rankings produced affordable legal education and happy lawyers who served the public's unmet legal needs.[102] "But statistics have shown decidedly that they don't. Instead, the preference toward the so-called elite is largely rooted in vanity and identity."[103]

98. *Id.* at 1102.

99. *See generally* George Critchlow, *Kim Kardashian and Honey Boo Boo: Models for Law School Success (Or Not)*, 45 CONN. L. REV. 1319 (2013).

100. *The Pedigree Problem*, *supra* note 71.

101. *See, e.g.*, MARJORIE M. SHULTZ & SHELDON ZEDECK, FINAL REPORT-IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING (Sept. 2008), *available at* http://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf.

102. Debra Cassens Weiss, *Want Career Satisfaction? Don't Chase Money and Prestige, Lawyer Survey Suggests*, ABAJOURNAL.COM (July 1, 2013, 10:45 AM CDT), http://www.abajournal.com/news/article/want_career_satisfaction_dont_chase_money_and_prestige_survey_suggests ("Money and prestige are not key to career satisfaction, according to findings from a multiyear survey of University of Michigan law grads. Instead, work satisfaction is more closely related to the law grads' perceptions of the social value of their work and the quality of their relations with co-workers and superiors, according to the study author, University of Michigan law professor David Chambers."). *See also generally* NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER (2010).

103. *The Pedigree Problem*, *supra* note 71.

The current crisis has shaken the status quo. Law schools are looking for ways to reinvent themselves, attract more students, produce practice-ready graduates, reduce costs, and respond to a changing profession. The time has come to evaluate legal education in terms of core and priority public and private interests. Nowhere is this more evident than in the *Report and Recommendations of the ABA's Task Force on the Future of Legal Education* ("ABA Task Force Report"), reported in January, 2014, and discussed in the next Part.[104] A new perspective on what constitutes excellent legal education may enable our hypothetical student David (described at the opening of this Article) to pursue his passion and fulfill his career goals by attending a regional law school that is affordable, innovative, practical, and committed to the public good.

II. A NEW DEFINITION OF EXCELLENCE

There are at least three significant and overlapping considerations for a law school that desires to achieve excellence by serving both student and societal needs: (1) Does an applicant have the capacity to be an effective lawyer or otherwise contribute to solving the population's legal problems? (2) Is the law school willing to develop models of legal training that address real problems, especially the problems of underserved members of society, even if the type of training involves something other than a traditional J.D. program? (3) Is the law school, together with other actors, willing and able to price its educational products in such a way as to attract worthy students who want to serve society—knowing that such service will allow students to live comfortably, pay their student debts, and pursue middle-income employment opportunities?

A. Admissions and Students

In a previous article, I used sarcasm and satire to make the point that we should honestly evaluate our admissions policies in light of historical admissions practices that changed with the advent of rankings and prestige-driven law school strategic planning.[105] The impact of rankings obsession on diversity is especially troubling (and ironic in light of the fact that most law schools claim to be committed to the goal of diversifying student populations and the profession).[106]

104. AM. BAR ASS'N TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS (Jan. 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf [hereinafter ABA TASK FORCE REPORT].

105. Critchlow, *supra* note 99, at 1323-24 (suggesting that if law schools simply adopted the mission of becoming famous, students of all stripes and colors would be attracted). "No longer will law professors have to lower their eyes or check their smartphone messages when asked why their school does not reflect the diversity that exists in the larger world. Fame is no respecter of race or privilege." *Id.* at 1326.

106. John Nussbaumer, *Misuse of the Law School Admission Test, Racial Discrimination, and the de Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN'S L. REV. 167, 174 (2006) (showing that schools who raised their twenty-fifth percentile LSAT score saw their African-American student populations decline quicker than the national

There is solid evidence that tells us the LSAT does not measure many of the qualities and attributes that make for effective lawyering.[107] There is evidence that the LSAT is culturally biased in a way that is detrimental to people of color.[108] We also know that LSAT scores are not closely correlated to predicting law school performance other than in first-year courses.[109] Trial evidence in *Grutter v. Bollinger* indicated that "the LSAT predicts law school grades rather poorly (with a correlation of only 10-20%) and that it does not predict success in the legal profession at all."[110] ABA accreditation standards cannot be entirely blamed. They do not specify a minimum LSAT score for admission to an ABA-approved law school. For that matter, the standards do not require law schools to use the LSAT at all so long as alternative means are used to evaluate applicants' ability to succeed.[111]

Historically law schools accepted students based on a review of the whole person with a focus on the aspects of the applicant's life that indicated likelihood of success in law school and the profession.[112] Most of those admitted students became successful lawyers.[113] Today, because rankings are partly derived from LSAT scores and undergraduate grade point averages, many of those students would not be accepted.[114] The effect on diversity has been mentioned. But there

average). Research consistently shows that heavy emphasis on LSAT scores in admission decisions substantially reduces the presence of African-Americans, Native Americans, and Latino students in law school and the legal profession, and also diminishes the prospects of admission of those from most non-elite families. *Id.* at 170, 175, 179.

107. *See, e.g.*, Schultz & Zedick, *supra* note 101; Pamela Edwards, *The Shell Game: Who Is Responsible for the Overuse of the LSAT in Law School Admissions?*, 80 ST. JOHN'S L. REV. 153, 159-62 (2006).

108. *See*, *e.g.*, Sarah Salwen, *Research reveals racial bias in LSAT*, THE CAVALIER DAILY (Aug. 31, 2001, 12:00 AM), http://www.cavalierdaily.com/article/2001/08/research-reveals-racial-bias-in-lsat; Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121 (1993); Eulius Simien, *The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action*, 12 T. MARSHALL L. REV. 359 (1987).

109. Edwards, *supra* note 107, at 159-62.

110. Grutter v. Bollinger, 137 F. Supp. 2d 821, 870 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U. S. 306 (2003).

111. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2013-2014, app. 2 (Aug. 2013), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.authcheckdam.pdf.

112. *See* Critchlow, *supra* note 99, at 1336.

113. *Id.* at 1344.

> Schools seeking a way out of the rankings game might ask the following question with regard to the obsession for higher LSAT profiles: How is it that students admitted with comparatively low LSAT scores 30, 40, and 50 years ago and who went on to become perfectly fine lawyers and judges could be deemed unqualified for admission today?

Id. & n.82.

114. *See* Shultz & Zedeck, *supra* note 101, at 53-55 (finding that LSAT and undergraduate grade point average were not good predictors of lawyer performance and suggesting that alternative predictors be explored). Professor Brent Newton supports the broadening of admissions protocols:

> ….

is a larger irony. If LSATs do not predict good lawyering, law schools may well be producing graduates who are not necessarily well suited for the work they do—with concomitant effects on clients, professional outcomes, costs, and lawyer career satisfaction. While their cognitive skills may enable them to perform well in first-year law courses, applicants may lack maturity and emotional intelligence. They may, for example, lack an ability to tolerate difference, to recognize different problem-solving styles, to communicate effectively with a range of diverse people, to help identify realistic goals and strategies, to persuade, to be ethical, and to avoid the untoward temptations associated with money and power.[115] The impact of social, political, and economic hierarchies in admissions (as well as in the law school culture in general) is a topic of discussion by critical legal studies scholars such as Duncan Kennedy, whose early denunciation of law school elitism and alienation led to

3. *The LSAT should be jettisoned, or at least retooled, so as to serve as a better predictor of success as a lawyer*.

A recent study by two professors at the University of California at Berkeley makes a convincing case for abandoning or modifying the LSAT as a significant part of the admissions calculus for law school. As they note, and as the Law School Admission Council appears to confirm, the LSAT does not accurately predict an applicant's overall success in law school, but instead, only predicts first-year grades. More importantly, the LSAT does not predict success in the legal profession, because it assesses only a narrow range of cognitive competencies. Therefore, law schools should either abandon their heavy reliance on applicants' LSAT scores or, assuming it were possible, replace it with some type of assessment that considers the many types of intelligence needed to be a competent attorney.

4. *The law school admissions process should give meaningful consideration to other types of intelligence besides those academic and analytical abilities tested in written form*.

In addition to "hard" analytical and cognitive skills, the successful practice of law requires many "soft" competencies such as "emotional intelligence," maturity, a strong work ethic, and integrity. The law school admissions process, which currently focuses almost exclusively on undergraduate GPA and LSAT scores (both of which are largely the product of written testing), should incorporate a meaningful assessment of an applicant's potential in these other areas. Such an assessment need not be done (and perhaps could not be done) in a standardized test. Instead, it could occur through an evaluation of a candidate's strengths and weaknesses evinced in other facets of his or her life, such as two years or more of full-time work experience between college and law school. Additionally, law schools should conduct mandatory interviews of applicants, either live or via video conference, in order to assess their interpersonal and oral communication skills.

Critchlow, *supra* note 99, at 1342 n.80 (quoting Brent E. Newton, *The Ninety-Five Theses: Systematic Reforms of American Legal Education and Licensure*, 64 S.C. L. REV. 55, 63-65 (2012) (internal footnotes omitted)). "In an analogous manner, Indiana Law Professor Bill Henderson and his colleagues at Lawyer Metrics.com are attempting to offer law firms a scientific, or evidence-based, method to hire and promote attorneys based on the types of competencies needed for a successful legal career." Newton, *supra*, at 64 n.35 (citing Aric Press, *Getting Beyond the Conventional Wisdom: A New Look at Firm Recruiting, Hiring, and Promotion*, AM. LAW. DAILY (Nov. 2, 2010, 12:06 PM), http://amlawdaily.typepad.com/amlawdaily/2010/11/pressconventionalwisdom.html). *See also What We Offer*, LAWYER METRICS, http://www.lawyermetrics.com/what-we-offer.html (last visited July 8, 2015) (discussing services that Lawyer Metrics provides).

115. Shultz & Zedeck, *supra* note 101, at 55-58.

his recommendations for equitable admissions and other progressive change in his 1982 article *Legal Education and the Reproduction of Hierarchy.*[116]

Admission decisions affect both private student interests (in finding a profession in which they can both succeed and be happy) as well as societal interests (in having affordable, ethical, civic-minded lawyers who reflect all segments of society and who are effective problem-solvers). Law schools that strive for excellence will want to formulate admissions policies and procedures that account for both the cognitive and non-cognitive dimensions of those attributes known to contribute to both these areas of interest. They may want to use alternative tests of the type devised by Marjorie M. Shultz and Sheldon Zedeck, whose studies have identified the personal characteristics that enable individuals to be effective lawyers.[117] Law schools may want to conduct

116. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 615 (1982). To counteract what he called illegitimate hierarchy and alienation in legal education, Kennedy proposed the following to his Harvard faculty colleagues:

> 1. *Admissions*: There should be a test designed to establish minimal skills for legal practice and then a lottery for admission to the school; there should be quotas within the lottery for women, minorities and working class students. There should be a national publicity campaign about our goal of modifying the social composition of the Bar.
>
> 2. *Hierarchy among Students*: A program designed to reduce disparities in educational attainment of students while at law school, through a combination of redesign of the curriculum (see the [NMC] above) and investment of large sums of money and resources in students at the bottom of the academic hierarchy. Abolition of the current law review selection system; modification of the grading system to eliminate perverse incentives; new forms of feedback at all levels.
>
> 3. *Channeling of Students*: A program to give students accurate information about hierarchical and moral realities of different kinds of practice, combined with training designed to give them technical, social, and psychological resources necessary for real freedom of choice between large law firms and other kinds of work. Overhaul of the placement system to equalize the chances of competitors of large firms, even at the price of making our graduates less attractive to the large firms. Studies aimed to discover possibilities for viable publicly oriented and small-scale practice, including development of proposals for curricular or statutory reform where necessary.
>
> 4. *Faculty Hierarchy*: Hire most qualified women, minority, and working-class candidates until those groups occupy a reasonable number of faculty positions. Abolish the distinction between tenured and untenured faculty—all tenured or none tenured. Democratize hiring through an elected appointments committee with representation of all groups in the school. Develop a program to reduce existing disparities in teaching and scholarly capacity of different faculty members, analogous to the attack on disparities among students.
>
> 5. *General School Hierarchy*: Equalize all salaries in the school (including secretaries and janitors), regardless of educational qualifications, "difficulty" of job, or "social contribution." Encourage (without violating the [NLRA]) the formation of unions of employees at all hierarchical levels. Faculty should push for: (a) everyone should have some version of the faculty's unscheduled work experience, or the faculty should have less of that experience; (b) the division of labor should be reduced by adding functions within existing job classifications and reducing the total number of kinds of jobs; (c) every person should spend one month per year performing a job in a different part of the hierarchy from his [or her] normal job, and over a period of years everyone should be trained to do some jobs at each hierarchical level.

Id.

117. Schultz & Zedick, *supra* note 101, at 55-58..

interviews (in-person, by telephone, or by Skype) and affirmatively reach out to applicant groups who are not well represented at the law school. They could investigate ways of moving available scholarship resources away from rankings-driven LSAT/GPA tuition discounts to need-based programs designed to populate the law school with students who reflect the larger society, have the skills to operate effectively in that society, and need financial help.[118]

B. Education for the Public Good

Law schools should be willing to develop models of legal training that address real problems, especially the problems of underserved members of society. This may involve something other than a traditional J.D. program. The need to move to more responsible admissions, financing models, and educational models that are responsive to social needs and less to the client cliques and hierarchies associated with elitist, self-replicating legal education is underscored by comments in the recent ABA Task Force Report.

1. *Misdistribution of Legal Services*

The supply of lawyers appears to exceed demand in some sectors of the economy. Yet in other sectors demand very much exceeds supply. In some rural areas, for example, there are few lawyers, and it is difficult for communities to encourage new ones to set up practice, either because of low prospective return on investment or lack of interest in small town or rural life. Most strikingly, poor and lower-income populations remain underserved because lawyers can be made available to clients like these only if the lawyers are paid or subsidized by a government or private benefactor. Funding for lawyers to serve these populations is far less than what is needed and, except as noted below, there are few alternatives to fully trained lawyers as providers of law-related services. This lack of access to affordable legal assistance affects segments of the middle-income population as well.[119]

2. *Broader Delivery of Legal and Related Services*

The delivery of legal and related services today is primarily by J.D.-trained lawyers. However, the services of these highly trained professionals may not be cost-effective for many actual or potential clients, and some communities and constituencies lack realistic access to essential legal services. To expand access to justice, state supreme courts, state bar associations, admitting authorities, and other regulators should devise and consider for adoption new or improved frameworks for licensing or otherwise authorizing providers of legal and related services. This should include authorizing bar admission for people whose preparation may be other than the traditional four years of college plus three

118. *See*, *e.g.*, TAMANAHA, *supra* note 8, at 96-99; ABA TASK FORCE REPORT, *supra* note 104, at 30.

119. ABA TASK FORCE REPORT, *supra* note 104, at 13.

years of classroom-based law school education and licensing persons other than holders of a J.D. to deliver limited legal services. The current misdistribution of legal services and common lack of access to legal advice of any kind requires innovative and aggressive remediation.[120]

The ABA Task Force Report recommends curriculum innovation, more flexible accreditation standards, skills training, and broader delivery of legal services. It also emphasizes the need to rethink the system of "discounting" tuition that law schools adopted to attract high-achieving students (whose enrollment will help the law school's ranking). That system, as everyone knows, puts a disproportionate financial burden on less-credentialed students, many of whom will have a lower return on their law school investment.[121] The ABA Task Force minces no words in detailing the system's other "deleterious features." Discounting contributes to the rise of tuition.[122] It reduces resources available for students who have financial need.[123] It "tends to impede the growth of diversity in legal education and in the profession."[124]

Education for the public good is not likely to happen if law schools continue to equate success with rankings. The silver lining in the current crisis is that schools are forced to innovate in order to attract students and survive. The survival instinct and the public good may have fortuitously converged in such a way as to create an opening for serious change. That opening may last for years, or it may close relatively soon if the economy bounces back robustly, baby boomers retire en mass, and the legal profession returns to traditional hiring patterns.[125] The latter prospect is wishful thinking. The evidence of permanent

120. *Id.* at 3.

121. *Id.* at 22. *See generally* James B. Stewart, *Dewey's Fall Underscores Law Firms' New Reality*, N.Y. TIMES, May 4, 2012, at B1, *available at* http://www.nytimes.com/2012/05/05/business/deweys-collapse-underscores-a-new-reality-for-law-firms-common-sense.html ("Clients have figured out that much of what lawyers do is a commodity that can easily be outsourced far more cheaply."). *See*, *e.g.*, Daniel B. Rodriguez & Samuel Estreicher, *Make Law Schools Earn a Third Year*, N.Y. TIMES, Jan. 17, 2013, at A27 (commenting positively on New York State proposal to permit law students to sit for the bar examination after two years of school, making the traditional third year discretionary); Paula Littlewood, *Let's Seize the Moment*, NW. LAWYER, Dec.-Jan. 2013, at 11, *available at* http://nwlawyer.wsba.org/nw_lawyer/201301#pg13 (reviewing demographic data about the profession, and concluding, "[I]f this trend continues we may be looking at a shortage of lawyers in the future"); Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 30, 2013, at A1, *available at* http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html (noting that the volatile legal market has prompted "[s]ome … [to] call[] for one- or two-year training programs to create nonlawyer specialists for many tasks currently done by lawyers," and that "the decline [in the legal market] is creating what many see as a cultural shift").

122. ABA TASK FORCE REPORT, *supra* note 104, at 2.

123. *Id.*

124. *Id.*

125. Rene Reich-Graefe, *Keep Calm and Carry On*, 27 GEO. J. LEGAL ETHICS 55, 66 (2014) (arguing that "recent law school graduates and current and future law students are standing at the threshold of the most robust legal market that ever existed in this country—a legal market which will grow, exist for, and coincide with, their entire professional career").

structural change in the legal profession is compelling.[126] The impacts of advancing technology on business and the professions are undeniable. Those law schools that suffer most from what the ABA Task Force describes as a "conservative" culture that has a "strong" tendency to "resist change" will ironically be taking the greatest risk by placing their belief in the assumption and hope that everything will return to normal in a few years.[127] Those schools that embrace change will, on the other hand, potentially discover that innovation can produce a trifecta of good outcomes: public benefits, a law school's financial survival, and an escape from rankings enslavement.

Each law school will have to create its own new educational delivery system based on the institution's mission, its demographic and geographical setting, its values, and how it balances and reconciles interests such as the public's need for broad and affordable legal services and students' desire to live fulfilling lives that are not always measured by career earnings or prestige jobs.

One version of what a truly innovative, affordable, and public interest-minded law school might look like is sketched out in the next section. But the possibilities are endless once an institution has unshackled itself from elitist traditions, copycat curricula and cultures, and the belief that law schools exist primarily to serve the needs of affluent clients, students who want to be rich, and faculty who want protection from markets and the demands of practice. A plethora of new models and approaches have been suggested.[128] Examples are:

126. ABA TASK FORCE REPORT, *supra* note 104, at 13; Deborah J. Merritt, *How Many Lawyers?*, LAW SCH. CAFÉ (Jan. 7, 2014, 7:55 PM), http://www.lawschoolcafe.org/thread/how-many-lawyers/ (a blog that discusses Bureau of Labor Statistics that project far fewer job openings for lawyers as compared to the anticipated number of new law graduates). Professor Merritt also emphasizes the BLS projection of a significant increase in paralegal and other legal support workers. *Id.*

127. ABA TASK FORCE REPORT, *supra* note 104, at 16 ("*Resistance to Change.* People are generally risk-averse. Organizations, which are composed of people, tend to be conservative and to resist change. This tendency is strong in law schools (and higher education generally), where many people in the organization find their positions especially attractive because they are largely outside market- and change-driven environments. A law school's successful embrace of solutions to the challenges, problems, and demands described in this Report and Recommendations requires a reorientation of attitudes toward change, including market-driven change, by persons within the law school."). *See also* Erwin Chemerinsky, *Keynote Speech: Reimagining Law Schools*, 96 IOWA L. REV. 1461, 1462 (2011) ("And there is another reason why law schools are resistant to change. If there is going to be change, it is going to have to largely come from law faculties, and they are the group with the least incentive to bring about change. Being a law professor is probably the best job on the planet. You get paid a great deal of money for relatively little in terms of required expectations, certainly when I compare it to what elementary or high school teachers have to do or even my colleagues across campus, let alone all the other jobs one can think of. Short of course of being shortstop for the Chicago Cubs, I cannot think of many better jobs.").

128. TAMANAHA, *supra* note 8, at 172-75 (discussing ways in which law schools could train lawyers more cheaply and effectively). For other ideas about changing legal education, see, e.g., Rodriguez & Estreicher, *supra* note 121 (commenting positively on New York State proposal to permit law students to sit for the bar examination after two years of school, making the traditional third year discretionary). *See also* Bronner, *supra* note 121 (noting that the volatile legal market has prompted "[s]ome … [to] call[] for one- or two-year training programs to create nonlawyer specialists for many tasks currently done by lawyers," and that "the decline [in the legal market] is creating what many see as a cultural shift").

- An undergraduate option for legal education;[129]
- A hybrid law school that combines distance education with face-to-face learning opportunities;[130]
- Law school partnerships with legal services organizations and firms (modeled, to some degree, after medical education teaching hospitals);[131]
- Accelerated two-year programs that compress three years of school into two;[132]
- Elimination of the third year of law school altogether or in combination with a discretionary third year of practice-oriented experience (organized by the law school, the bar association, or a combination of the two);[133]
- Law school partnerships with undergraduate institutions to create five- or six-year programs of legal studies that offer both an undergraduate degree and a J.D.;[134]
- Law school participation in clerkship (or apprenticeship) programs that allow law clerks to satisfy part of their requirements by clerking and part by taking law school classes;[135]

129. John O. McGinnis & Russell D. Mangas, *An Undergraduate Option for Legal Education*, 38 INT'L REV. L. & ECON. 117 (2014).

130. For example, William Mitchell College of Law received a variance from the ABA to combine a substantial amount of online learning and campus-based learning. The four-year part-time program, meant for students whose location or work commitments prevent them for pursuing a legal education full time, will mix recorded lectures and quizzes with video conferences and online discussion forums when it launches in January 2015. Students will also be required to complete externships and attend weeklong on-campus simulations at the end of each semester to practice their legal skills. Carl Straumsheim, *Law School Hybrid*, INSIDE HIGHER ED (Dec. 18, 2013), http://www.insidehighered.com/news/2013/12/18/american-bar-association-approves-experimental-hybrid-jd-program.

131. *See*, *e.g.*, *About Lawyers for America*, UC HASTINGS C.L., http://www.uchastings.edu/academics/clinical-programs/lawyers-for-america/index.php (fellowship program for 3Ls) (last visited July 8, 2015); *College of Law to Launch Teaching Law Firm in Summer*, ASU NEWS (Mar. 7, 2013), https://asunews.asu.edu/20130307_lawteachingfirm; NEW YORK CITY BAR ASS'N, *supra* note 5, at 44-47; Michael Martinez, *Legal Education Reform: Adopting a Medical School Model*, 38 J.L. & EDUC. 705 (2009); Karen Sloan, *Think of It As Residency for Lawyers*, NAT'L L.J. ONLINE (June 4, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202556661573.

132. Several law schools are planning or have implemented such programs. *See*, *e.g.*, *Gonzaga Law Announces Two-Year, Accelerated JD Program*, GONZAGA U. SCH. L. (Sept. 30, 2013), http://www.law.gonzaga.edu/blog/2013/news/2-year-accelerated-jd/; *Accelerated JD*, NORTHWESTERN L., http://www.law.northwestern.edu/academics/ajd/ (last visited July 8, 2015).

133. Jennifer Smith, *Legal Education on Trial: Is the Third Year Necessary?*, WALL ST. J. ONLINE (updated Aug. 25, 2013, 8:15 PM ET), http://online.wsj.com/news/articles/SB10001424127887324906304579035040993030928.

134. Kyle P. McEntee et al., *The Crisis in Legal Education: Dabbling in Disaster Planning*, 46 U. MICH. J.L. REFORM 225, 251-63 (2012) (recommending the concept of a "Legal Academy" that allows high school graduates to obtain legal and non-legal training and become licensed lawyers, over a period of five years). The model would require extensive cooperation with the legal community and state licensing regulators, but would reduce educational costs and student opportunity costs. *Id.* at 252-55.

135. For example, Washington's Admission to Practice Rule 6 generally allows students to sit for the state bar exam if they have finished a four-year course of study under the supervision of an experienced lawyer/tutor. The rule also provides for advanced standing in the program for students

- Law schools could reduce costs and improve preparation for practice by using a mix of faculty—some traditional scholars (with tenure or long-term contracts), some talented local lawyers and former judges who might leave practice (or take sabbaticals) to teach full time, some full-time classroom and skills teachers with no expectation of scholarship, and some adjuncts who can enrich curricula offerings;[136]
- Clinical programs can seek cost savings without impairing educational quality by entering into "hybrid" arrangements that have the attributes of live client law school clinics and externship programs. For example, a law school can place a full-time faculty member at a community legal services provider to train students in skills. Such a model would balance educational goals with service goals, reduce clinical overhead, and create meaningful law school partnerships with community based public interest entities;[137]
- Online distance learning that allows students to take classes in remote places during the academic year and summer semesters.[138]

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who have completed law school courses. Law schools could work with bar regulators to create such apprenticeship programs that incorporate law curricula that interact with and support a student's desire to combine apprenticeship training and academic training. *See APR 6 Law Clerk Program*, WASH. ST. B. ASS'N, http://www.wsba.org/Licensing-and-Lawyer-Conduct/Admissions/Law-Clerk-Program (last visited July 8, 2015).

136. The ABA is currently considering amending Standard 404(a) and (b) relating to policies for recruiting competent faculty, tenure, and academic freedom. Richard Gerson, a former law dean, supports tenure for law faculty but nonetheless opines:

> That being said, if a school can attract and retain competent faculty members, and it offers job security and academic freedom, why should it be required to offer tenure as a matter of accreditation? We talk a great deal about innovation in our profession. Why are we so resistant to allowing other schools to try new ways of doing things, even if we would not choose the same path for our own schools? The proposed Standards simply allow that opportunity.

I. Richard Gershon, *Law Schools and Tenure*, L. DEANS ON LEGAL EDUC. BLOG (Jan. 9, 2014), http://lawprofessors.typepad.com/law_deans/2014/01/law-schools-and-tenure.html.

137. *See, e.g.*, *Entrepreneurial Law Clinic*, U. WASH. SCH. L., http://www.law.washington.edu/Clinics/entrepreneurial/Default.aspx (last visited July 8, 2015); *Domestic Violence Prosecution Hybrid Clinic*, ALBANY L. CLINIC & JUST. CENTER, http://www.albanylaw.edu/cjc/clinics/domestic-violence/Pages/Domestic-Violence.aspx (last visited July 8, 2015); Renata Turner, Bridgett E. Ortega, & Lisa Graybill, Presentation, *Thinking and Working Inside and Outside the Box: The Hybrid Externship Clinic*, http://www.law.du.edu/documents/externships-7/Friday-145/Turner-Ortega-Graybill-Final-Denver-PPT-Presentation.pdf (last visited July 8, 2015); Deborah Maranville et al., *Re-Vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering*, 56 N.Y.L. SCH. L. REV. 517 (2011/2012). There is also a great deal of innovation in the area of hybrid teaching methods that combine traditional classroom teaching with online learning, a topic to which the Institute for Law Teaching and Learning devoted a major conference. *See*, *e.g.*, *Hybrid Law Teaching Session 8 Workshops*, INST. FOR L. TEACHING & LEARNING (June 9, 2013), http://lawteaching.org/conferences/2013/workshops/session8.php.

138. *See, e.g.*, *JD Law Courses Online*, JOHN MARSHALL L. SCH., http://www.jmls.edu/academics/jd/jd-online.php (last visited July 8, 2015).

Perhaps the most radical idea whose time has come is incorporating non-J.D. programs into a law school program of study. As exemplified in the next section, a law school (or law schools collectively) might consider altogether discarding the traditional definition of a law school as an educational institution that trains future lawyers. Instead, legal education might remake itself in such a way as to respond seriously to the legal needs of society's underserved middle- and lower-income citizens. It might do so, in concert with the ABA or via individual state licensing policies, by training for a range of legal services authorized under state licensing and practice of law rules.[139] For example, a law school could offer a paralegal certificate program, a legal technician training program, a real estate closing program, a program of study for using online legal information and forms, a two-year accelerated J.D. program, a three-year J.D. program, a theory-oriented J.D. program, a practice-oriented J.D. program, certificate programs of varying lengths for non-lawyers in a range of specialties, and specialized masters programs.

At least one of these approaches appears to be gaining momentum. The legal technician limited licensing model is currently being investigated or considered for adoption by several states, including California.[140] It has been adopted by Washington State after years of controversy and debate.[141] While protectionist elements within the organized bar resisted a perceived incursion into the monopoly of law practice by licensed lawyers, other bar groups and the Washington Supreme Court ultimately understood the need to find meaningful strategies for meeting the substantial unmet civil legal needs of middle- and lower-income people throughout the state.[142] Gregory Dellaire, a legal services leader in Washington, framed the effort to broaden legal services as follows:

> The problem [of unmet legal needs] is just too big for solution without supplemental resources born of creative thinking. Certified technicians will not, and should not,

139. *See, e.g.*, Wallace B. Jefferson, *Liberty and Justice for Some: How the Legal System Falls Short in Protecting Basic Rights*, 88 N.Y.U. L. REV. 1953, 1976-77 (2013) (citing limited license legal technician ("LLLT") programs, such as Washington State's, as a potential solution to a lack of availability of legal services); Luz E. Herrera, *Educating Main Street Lawyers*, 63 J. LEGAL EDUC. 189, 196 (2013) (discussing the Washington LLLT rule); Mark Hansen, *Two Different Animals: ABA Entities Pursue Separate Paths in Search of Ways to Improve Legal Education*, A.B.A. J., July 2013, at 62, 62 (addressing the ABA Task Force on the Future of Legal Education microconference which took suggestions on reducing law school to two years and creating LLLT programs); David Yellen, *The Impact of Rankings and Rules on Legal Education Reform*, 45 CONN. L. REV. 1389, 1406 & n.74 (2013) (citing the LLLT program as a way to enhance the legal profession by engaging in a state effort to limit the barriers to legal practice); Holland, *supra* note 31, at 75 (analyzing Washington State's LLLT Rule); Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 414-15 (2013) (suggesting a new committee that would seek to lead the movement toward LLLTs if it is found that they help clients with moderate means); Schrag, *supra* note 13, at 420 (describing Washington's LLLT program and discussing it as an alternative to limiting law school to two years).

140. *See*, *e.g.*, *Limited License Working Group*, ST. B. CAL., http://www.calbar.ca.gov/AboutUs/BoardofTrustees/LimitedLicenseWorkingGroup.aspx (last visited July 9, 2015).

141. Holland, *supra* note 31, at 94-111.

142. *Id.* at 106-07, 111.

> take the place of lawyers …. But just as a combination of nurses, nurse practitioners, and EMTs augment the resources available to patients of MDs, trained, tested, and certified legal technicians can supplement the resources available to the segment of the public that falls between free legal aid and those who have the resources to retain private counsel.[143]

The Legal Technician Rule adopted in Washington allows trained legal technicians to assist clients in limited legal matters, such as family law, within a framework that balances the interests of clients in obtaining affordable routine services against the need for quality legal representation by licensed lawyers when a dispute requires such attention because of its complexity or adversarial nature. Washington Supreme Court Chief Justice Barbara Madsen said this about the program's intended benefits:

> [I]f market economies can be achieved, the public will have a source of relatively affordable technical legal help with uncomplicated legal matters. This may reduce some demand on our state's civil legal aid and pro bono systems and should lead to an increase in the quality and consistency of paperwork presented by pro se litigants.
>
> Further, it may be that non-profit organizations that provide social services with a family law component (e.g., domestic violence shelters; pro bono programs; specialized legal aid programs) will elect to add limited license legal technicians onto their staffs. The cost would be much less than adding an attorney and could enable these programs to add a dimension to their services that will allow for the limited provision of individualized legal help on many cases—especially those involving domestic violence. Relationships might be extended with traditional legal aid programs or private pro bono attorneys so that there might be sufficient attorney supervision of the activities of the limited license legal technicians to enable them to engage in those activities for which "direct and active" attorney supervision is required under the rule.[144]

Professor Brooks Holland has written a comprehensive article on the history, policy arguments, and mechanics of Washington's Legal Technician rule.[145] The ABA Task Force included this article in the bibliography that supports the Task Force's recommendation that the ABA, state supreme courts, bar associations, and law schools explore ideas for broadening the provision of affordable legal services through limited licensing programs.[146] All three law schools in Washington are contributing curricula and teaching resources to

143. *Id.* at 103.

144. *In re* Adoption of New APR 28-Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-10005, at 9 (Wash. June 15, 2012), *available at* http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf.

145. *See generally* Holland, *supra* note 31.

146. ABA TASK FORCE REPORT, *supra* note 104, at 37.

training legal technicians under the new rule.[147] Other states are showing interest.[148]

Finally, law schools might consider an approach to admissions and financial aid that restores social responsibility and integrity to a system that, for reasons of rankings, marginalizes or penalizes students who have financial need and do not score well on standardized exams. If a law school genuinely commits itself to evaluation of the "whole" student, including an application process that uses in-person or remote interviews, reference checks, and alternative tests, the school should be able to identify applicants who have both the capacity to succeed in law school and also be effective, socially responsible lawyers.[149] A law school that offers a flat, low-cost tuition rate that is competitive with the net cost of higher priced schools that engage in "merit"-based discounting might, over time, acquire a reputation for being fair, honest, diverse, and committed to both students and the public good.[150] If a school is fortunate enough to have additional funds (real money) for scholarship assistance, it might set up an easy-to-use need-based system for allocating these resources in a way that truly contributes to the ability of economically and historically marginalized people to become lawyers or other legal services providers.

III. WHAT AN EXCELLENT PRIVATE LAW SCHOOL EDUCATION MIGHT LOOK LIKE

Let us return to our hypothetical young Hispanic man described in the Prologue of this Article. Recall that his ambition is to be trained for a profession where he can live a comfortable life while contributing to society in a meaningful way. He is not wealthy and does not have a high LSAT score, but he has distinguished himself as being hardworking, goal-oriented, capable, and public-interest minded. His passion is to be a lawyer, but he is concerned about taking on huge debt and possibly having to move far from home to attend a law school that will accept him. He considers a graduate program in education as a cheaper and quicker alternative to a law degree—one that he can pursue close to home and one that will allow him to make a difference as a teacher and give back to the community in which he grew up.

As he is ready to apply to graduate programs in education, he hears of a new school, New School for Legal Services ("NSLS"), which has opened a few

147. Marilyn Odendahl, *Limited Licensing Programs Gain Traction in the Legal Community*, IND. LAW. (Nov. 6, 2013), http://www.theindianalawyer.com/limited-licensing-programs-gain-traction-in-the-legal-community/PARAMS/article/32749.

148. *Id.*

149. In order to succeed, such an approach would utilize faculty and staff who are sensitized through training and experience to consciously counter biased notions of how the ideal law school applicant looks and acts.

150. The University of North Texas Dallas College of Law ("UNTDCL") appears to have embraced this strategy. It advertises in-state tuition of $14,040 (for 2014-2015) with a uniform $1,500 tuition waiver for full-time resident students. *Costs*, UNT DALLAS C.L., https://lawschool.untsystem.edu/financial-aid/costs (last modified June 2, 2015, 10:24 AM).

hours driving distance from the student's home. It is a school that proudly announces and describes:

> [A] different approach to legal education, one that provides excellent, inexpensive, and accelerated training for students who seek knowledge and skills that will enable them to provide affordable legal services to clients at all levels of society. Students have the option of being trained in the law according to the student's career goals, aptitude, and desired investment in time and educational expense. Options include:
>
> A J.D. program for students who hope to take the bar exam and practice law. This curriculum is a combination of online, campus, and community-based learning and can be completed in two or three years. It costs a total of $45,000 for ninety credits and emphasizes practical skills.
>
> A Masters in Immigration Law for international and domestic lawyers who seek intensive training in American immigration law, practice, and procedure. This is a one-year online and campus-based program that costs $15,000 for thirty credits.
>
> A Legal Technician program for students who hope to represent clients in specified areas of practice under a limited license. This program is online, campus-, and community-based; can be completed in one or two years; costs a total of $30,000 for forty-five credits; and permits students to specialize in Family Law, Immigration Law, or Public Benefits Law.
>
> A Paralegal program for students who seek certification and training in the knowledge and skills necessary for providing effective assistance to clients under the supervision of a licensed lawyer. This program is online and campus-based and can be completed in one or two years at a total cost of $15,000 for thirty credits.

NSLS's literature elaborates on curriculum offerings, skills-training opportunities, faculty and staff composition, and the interface among the various programs. It specifies that many foundational courses for the J.D. program are also available for students in the legal technician and paralegal programs. It advises that immigration classes available for masters students are also available for J.D. students. It also details the requirement for J.D. students to take fifteen credits of skills courses through a combination of simulation classes provided at the law school and experiential learning opportunities with live clients offered through faculty-supervised clinics housed in local law offices. Students who expect to graduate with a J.D in two years would spend their last semester in an intensive experiential learning setting. Three-year students could spread their experiential learning requirement over the second and third years of law school.

Target enrollment for the new school is a total of 360 students, comprised of 300 J.D. students, twenty legal technician students, twenty paralegal students, and twenty masters students.

The annual revenue for law school is $5,400,000. Twelve percent of this ($648,000) is paid to the main university to support the law school's overhead, leaving $4,752,000 for the educational program.

The NSLS faculty and personnel costs consist of:

- Ten full-time tenure or tenure-track professors who are expected to divide their time between teaching and scholarly activity. They are paid an average of $100,000 per year plus benefits that average $25,000 each. The Virtual Library Director is counted among these ten faculty. Total cost: $1,250,000;
- Eight full-time professors on renewable five-year contracts who are not expected to engage in traditional scholarship. Five of these are former practicing lawyers who teach primarily in the classroom and online. Three are former practitioners who teach skills in simulated settings. They are paid an average salary of $100,000 per year plus benefits that average $25,000 each. Total cost: $1,000,000;
- Three full-time professors who are experienced lawyers, who have faculty status and renewable contracts, and who are placed in local for-profit and non-profit legal services offices with responsibility for training students how to practice law in the context of representing real clients. These faculty members have no faculty committee or other administrative responsibilities. They are paid an average of $100,000 annually plus $25,000 in benefits. Total cost: $375,000;
- Ten adjunct professors who teach two classes each year for a total of $10,000/yr. Total cost $100,000;
- Total faculty personnel expenses: $2,725,000
- Total full-time faculty/student ratio: 17/1

The dean's budget, including the dean's salary, travel, and discretionary expenses is $400,000.

The total budget for a virtual library is $250,000. This includes funds for Westlaw and Lexis, select databases, interlibrary loan service, hardware, software, and miscellaneous expenses. The library director is one of the tenure-track faculty members listed above. There is no additional paid staff as faculty will be responsible for training students in research skills. NSLS has no permanent collection of hard copy materials. Students are expected to have their own computers.

The combined budget for the registrar's office, admissions office, and career services office is $800,000, an amount sufficient to support each office with at least three persons plus travel.

Additional staff for faculty support and administration is budgeted at $300,000. Miscellaneous student support is budgeted at $80,000. The IT budget is $160,000, mostly for audio-visual classroom support, on the assumption that most data will be stored in the cloud, email communication will incorporate existing online services for free, and students should not expect the law school to maintain and support personal computers. Finally, $30,000 is set aside for faculty and staff travel and conferences not otherwise covered by the dean's budget.

There is no overhead (beyond salaries) for students' extensive experiential learning because those learning settings are in for-profit and non-profit offices that underwrite educational costs in exchange for a paid faculty member and uncompensated legal services contributed by students. Additional support for

faculty scholarship, student research assistants, moot court competitions, and a development director would be generated through external fundraising efforts.

Our hypothetical student investigates further and is heartened to learn that if he applies, he will have an opportunity to make his case for admission in a face-to-face interview with a member of the admissions committee. He also discovers that if accepted, his required fifteen credits of experiential learning can be earned by working in a local non-profit immigration assistance program under the supervision of a full-time faculty member who is an immigration law expert. He is also eligible to take a range of substantive and skills classes that will help him represent mostly Hispanic clients in his community who have employment problems, immigration concerns, consumer problems, family law issues, and housing disputes. Finally, he learns that he can elect to take several online three-credit courses during the summer semesters while living at home with his family. He also has the option of taking an online three-credit required course, *Introduction to the Anglo-American Common Law Tradition*, before he starts his full-time curriculum in the fall.

The student calculates the amount of money he would have to borrow to attend NSLS. He also calculates how much his monthly payments would be under the PAYE federal loan repayment program, in accordance with his expectation of earning $40,000 to $50,000 a year when he graduates and passes the bar. The numbers pencil out and compare favorably with how much the student would have to pay in order to obtain a graduate degree in education and become a public school teacher. The student decides to follow his passion and become a lawyer.

Three years later, our student passes the California bar. Based on his intensive clinical experience practicing immigration law, he is confident enough to open a private practice in central California. He hires a Spanish-speaking paralegal that he met and became friends with while at NSLS. He also enters into a referral arrangement with a legal technician specializing in immigration and family law. The student expects to make income-based student loan payments of approximately $250 during his first few years in practice. The student's family and friends welcome his return to the community following law school. Almost no one considers him a failure for not pursuing BigLaw and great wealth.

IV. LEGAL EDUCATION FOR THE PUBLIC GOOD CANNOT AFFORD TO BE DEFINED IN TERMS OF THE CURRENT MODEL OF ELITE LEGAL EDUCATION

Could the law school described above actually produce competent lawyers? Should the ABA accredit such a school? If not, should states nonetheless consider allowing the school's graduates to take a bar exam or become legal technicians and paralegals? Or, is this simply a recipe to exploit students who have little chance of passing the bar or being successful professionals? Skeptics will undoubtedly dismiss the idea of a private law school that charges tuition of

$15,000.[151] But any such disdain would necessarily imply a baseline metric for what is minimally acceptable, what works, and the relationship between inputs and outcomes. The pressure of rankings and the steady increase in accreditation standards, especially the "input" of dollars per student, make it almost impossible to determine what that baseline might be—at least in the world of ABA-accredited law schools.

Much hoopla and attention accompanied the opening of California's and the nation's newest elite law school, the University of California Irvine School of Law, in 2009.[152] The school hired acclaimed scholars and a famous dean, modeled itself after other elite law schools, and set tuition at $47,790.50 per year (for in-state students).[153] It accepted high-scoring LSAT students who presumably had the opportunity to go to other elite schools.[154] Its explicit goal is to be ranked among the top twenty law schools by *USNWR*.[155] Its graduates will undoubtedly become part of BigLaw and represent powerful and wealthy clients. Our hypothetical student with a mediocre LSAT would have no chance to attend UC Irvine School of Law. Even if he were to gain admission, he could not afford to attend without substantial need-based financial aid.

However, our hypothetical student could probably gain admission to a new law school in Texas that has adopted many of the pricing and public interest ideas suggested in this Article. The University of North Texas Dallas College of Law ("UNTDCL") opened its doors in the fall of 2014.[156] It targets non-traditional students, historically marginalized people of color, and poor students. Its yearly tuition cost is $14,040 for in-state residents, each of whom also receives a uniform $1,500 tuition waiver.[157] Its mission is to produce lawyers for

151. One of the problems in evaluating the viability of innovative models of "affordable" legal education is the lack of structural and economic transparency with regard to the internal workings of conventional law schools.

> Creating a thorough model for affordable legal education requires comprehensive data about law school finances, among other information, that is not *yet* publicly available. Being able to claim that a new model can be done for *X* price or without a particular feature are both key to moving forward with reforms. But without structural transparency, skeptics of a new model can rest their dismissive retorts on statements like 'you don't understand enough about law schools,' or on appeals to authority. Structural transparency is therefore essential to falsify unjustly powerful objections and analyze the true potential of these models; otherwise, the inmates will continue to run the asylum.

McEntee et al., *supra* note 134, at 264.

152. *Our History*, U. CAL. IRVINE SCH. L., http://www.law.uci.edu/about/our-history/ (last visited July 9, 2015).

153. *Id.*; *School of Law Fees 2014-15*, UCI U. REGISTRAR, http://www.reg.uci.edu/fees/2014-2015/law.html#2014-2015%20Tuition%20and%20Fees (last visited July 9, 2015).

154. *Our History*, *supra* note 153; *School of Law Fees 2014-15*, *supra* note 153.

155. *UC Irvine Law School to Offer Free Tuition to First Class*, L.A. TIMES, Dec. 25, 2008, at B3, *available at* http://articles.latimes.com/2008/dec/25/local/me-uci-law-school25.

156. Holly K. Hacker, *Low Cost of New UNT Dallas Law School Draws High Interest*, DALL. MORNING NEWS (updated July 21, 2014, 10:42 PM), http://www.dallasnews.com/news/education/headlines/20140721-low-cost-of-new-unt-dallas-law-school-draws-high-interest.ece. *See also Costs*, *supra* note 150.

157. *See* Hacker, *supra* note 156; *Costs*, *supra* note 150.

the underserved middle class and groups who cannot afford conventional legal services.[158] The school's dean, a former United States District Court judge, has said, "We're not going to chase LSAT scores or GPAs.… We're also looking at other things, like overcoming obstacles."[159] The law school expected around 350 applicants for its first class but received over 600.[160] It will apply for provisional ABA accreditation after a year of operation.[161]

So the issue is framed: Should the ABA and the legal education establishment support innovative, affordable education for our hypothetical student who has much to offer society but who is unwilling to take on massive debt to attend a low-ranked or unaccredited school and who does not fit the desired profile for law schools competing for national prestige? Do legal educators, state supreme courts, and the organized bar have the willingness to let go of obsolete, fixed, and elitist notions of what legal education has to look like? Is there anything more than lip service paid to the goal of providing a meaningful and affordable opportunity for a diverse range of students to become lawyers and law services providers? Do legal educators and the bar really care about society's need to create affordable legal services for the underserved majority?

These questions pose real conundrums for legal educators whose lives and attitudes have been shaped by their own law school experience, law school teaching cultures, and career ambitions.[162] We all decry the corrosive effects of rankings but wait anxiously for the release of the next *USNWR* rankings report. We support innovation but start feeling queasy when it threatens our own turf, perks, and ambitions. As teachers, we often enjoy working with the best and the brightest—those most likely to obtain prestige employment—because it is easier, more stimulating, and leaves us time for reflection and research. We support diversity in admissions but frequently abandon a meaningful strategy for enrolling more diverse students if it means lowering desired admissions' profiles or channeling resources into need-based scholarships or academic support programs. We believe in access to justice, as a matter of principle and policy, and we write checks and sit on boards to support access to justice programs in our respective jurisdictions; some of us provide *pro bono* representation to individuals and organizations. But we do not always reflect on the connection between access to justice and the role of law schools to educate for the broad public good. For many of us who have drilled down deeply and now live in the depths and relative isolation of our areas of esoteric academic specialization, the law school has become a bunker for intellectual inquiry empty of meaningful

158. *See* Hacker, *supra* note 156; *Costs*, *supra* note 150.

159. *See* Hacker, *supra* note 156; *Costs*, *supra* note 150.

160. *See* Hacker, *supra* note 156; *Costs*, *supra* note 150.

161. *See* Hacker, *supra* note 156; *Costs*, *supra* note 150.

162. Similar questions were raised and debated during the ascendant years of the ABA and AALS in the 1920s and 1930s. The fear of a permanent two-tier system of legal education was effectively used by both organizations to "forc[e] the smaller law schools into the mold of the elite." STEVENS, *supra* note 26, at 174. In time, the elite's fears were assuaged by education and bar admission standards that insured that schools catering to immigrants, the poor, and women could not survive.

discourse on the question of legal education's mission to produce lawyers for middle- and low-income citizens.

Professor Chambliss is correct when she criticizes Professor Tamanaha for giving elite law schools a pass in connection with the problem of society's underserved legal needs. However, she is on shakier ground in asserting her fear that relaxed accreditation standards will create an unacceptable two-tier system of legal education.[163] Her argument seems to be that the ABA should consider forcing all law schools to provide cheaper, accelerated, practical training for the benefit of all clients, including corporate and global clients. While that might be a desirable goal, it seems patently obvious that elite, well-resourced law schools will continue their tradition of educating for the benefit of society's affluent and privileged even if law schools are required to provide a non-traditional model of education designed to meet the legal needs of the non-wealthy.

Access to legal education for the public good is the goal. Equal access to the kind of expensive education afforded at elite schools is neither practical nor necessary. The fact that an educational service costs less does not make it inequitable or inadequate. It may simply be different. Students who can afford expensive legal education may nonetheless choose less costly education that equips them with what they need to serve the broader public. Students who can gain admission to and can afford traditional elite law schools because they hope to have an edge getting prestige jobs may wish to forego training in skills and practice areas geared for immediate practice for a different clientele. What is important is that legal education understands educational excellence and educational outcomes in the context of a universe of clients who traditionally have not been able to afford legal services.

Commentators who argue against a so-called two-tier arrangement do so on the assumption that the "elite" model of legal education is not only the preferred model but a model to which all law students are entitled as a matter of principle. My colleague, Professor Dan Morrissey, has written persuasively on the need to rein in rising tuition. But he undercuts his own argument by insisting that "[a] two-tier arrangement would be an implicit repudiation of the American ideal that all people should be entitled to first-class legal representation by well-trained attorneys."[164] Huh? What about the American ideals of access to justice for poor people or persons of modest income? What of access to educational opportunity for students seeking affordable legal education? In the face of compelling evidence of the deficiencies in traditional legal education compiled in studies like the *MacCrate Report*, the *Carnegie Report*, and *Best Practices*, why is there this festering myth that the traditional elite model of legal education produces the "first-class representation by well-trained attorneys" envisioned by Professor Morrissey?[165] While law school pedigree may be important to some clients,

163. Chambliss, *supra* note 15, at 423-26.

164. Morrissey, *supra* note 7, at 275.

165. AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM (1992) (commonly referred to as the *MacCrate Report*); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 9 (2007) (commonly referred to as the *Carnegie Report*); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007),

others simply want affordable and capable legal representation. This is the segment of society that has often been neglected by the traditional legal education model. These are the clients that are likely to be drawn to the lawyer or legal technician who received training at a relatively inexpensive regional law school that emphasizes skills training, admits students based on their aptitude to be effective problem-solvers, and hires faculty who know how to practice law.

It is hackneyed to use cars and hotels as metaphors for differentiation among law schools.[166] Still, there is value in acknowledging that not everyone needs or wants a Cadillac or Mercedes Benz automobile. Yes, they are well-engineered cars, but they get lousy gas mileage, are expensive to maintain, and are not very versatile. Similarly, a Best Western Hotel may be far more efficient, accessible, and user friendly than a Four Seasons Hotel for the motorist who simply wants a clean, secure, and reliable place to rest. To limit cars and hotels to high-end brands would not only be elitist, it would be inimical to the public interest by denying people products and services that fit their needs. There is no reason to deny all of society a Subaru simply because some people prefer, and can afford, the look and feel of a Cadillac. Does that mean we have a two-tier market for automobiles? Indeed. But if the market increasingly demands reliable transportation at an affordable price, investment in the production of Subarus would be a sensible thing to do.

CONCLUSION

Legal education's primary purpose is to serve society's legal needs. Corporate legal needs have been accommodated by law schools for many years, and those needs will not likely be neglected any time soon. What has been neglected is the need to design and price legal education to train a diverse group of lawyers and other legal services providers who can serve society's substantial unmet legal needs. The current challenges facing legal education afford us the opportunity to reflect and act on the relationship between legal education and the availability of legal services to the ordinary public. We have an opportunity to reassess the assumptions and costs associated with years of copying an elitist model of legal education. Is this high-priced legal education model really the most excellent system for training lawyers and serving society?

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available at http://lawteaching.org/resources/books/bestpracticesforlegaleducation2007/stuckey-roy-bestpracticesforlegaleducation2007.pdf.

166. *See, e.g.*, Lawrence Velvel, *We Must Break the Law School Cartel*, MASS. SCH. L. (Jan. 3, 2013), http://mslaw.edu/we-must-break-the-law-school-cartel-by-lawrence-velvel/.

> What we need is some Honda law schools—i.e., good but low-cost, low-priced schools dedicated to teaching students *all* of what they need to know—i.e., both the academic side of law and the practical skills needed by lawyers. The problem, however, is that there are only two states in which it is possible to start such a law school, Massachusetts and California. In those two states the rules allow for competent *non*-ABA schools. Everywhere else a law school must be accredited by the ABA for its graduates to be permitted to take the bar exam immediately upon graduation. Such permission is a *sine qua non* of a law school's existence.

Id.

My thesis is simple: society needs legal service providers—lawyers, legal technicians, paralegals, etc.—who have hands-on training, are good problem-solvers, are emotionally intelligent, can relate to their clients, and have the capacity to be happy and fulfilled by a profession that allows them to live comfortable middle-income lives. If that proposition is true, we have to ask ourselves what changes are needed to bring it to fruition.