DISENTHRALLING OURSELVES … NOTES FROM MY FINAL YEAR AS DEAN

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INTRODUCTION

> The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew and act anew. We must disenthrall ourselves ….
>
> Abraham Lincoln[1]

AS I approached the conclusion of my second deanship,[2] I found myself drawn to this observation of Abraham Lincoln.[3] Our situation in legal education is piled high with difficulty, and the dogmas of the quiet past are inadequate. We must think and act anew; we need to disenthrall ourselves.

Having marked my first[4] and fifth[5] years as a law school dean with essays in this Leadership in Legal Education symposium issue, it seemed appropriate to also mark my final year as a dean and to offer some thoughts on one of our most important challenges: the level of law student debt.

I focus in this Essay on steps that law schools can undertake, either unilaterally or in conjunction with others. I do not mean by taking this focus to diminish the importance of actions that students can take to reduce their own levels of indebtedness. Some could be more judicious in their use of debt. And many could be more thoughtful in their selection of a law school—carefully considering whether the marginal benefits of attending a higher-ranked law school with a less generous scholarship really justify the added indebtedness they will incur. I also do not mean to diminish the importance of actions that could be taken by the ABA and AALS to permit greater efficiencies in law school operations and thus lower tuition and debt levels.

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1. President Abraham Lincoln, Second Annual Message (Dec. 1, 1862), *available at* http://www.presidency.ucsb.edu/ws/?pid=29503.

2. I served as the dean of the University of Kentucky College of Law from 2000 to 2008, and as dean of Drake University Law School from 2009 through 2014.

3. It goes without saying that I do not equate the situation faced by the Union in the second year of the rebellion with the situation facing legal education today. President Lincoln's observations are relevant and instructive, nevertheless.

4. *See generally* Allan W. Vestal, *"Today the Administration Building Burned Down …" Notes From My First Year as Dean*, 33 U. TOL. L. REV. 251 (2002).

5. *See generally* Allan W. Vestal, *"A River to My People …" Notes from my Fifth Year as Dean*, 37 U. TOL. L. REV. 179 (2005).

But law schools have a critical role—surely the most important role—in controlling costs and lowering student indebtedness. The four initiatives I discuss could have a major impact on law student debt. They are: (1) addressing tuition-funded subsidies within the university; (2) addressing tuition-funded subsidies within the law school; (3) changing bar admission procedures; and (4), making available alternative courses of legal study.

The situation regarding law student indebtedness is a difficult one; the policies of the quiet past are inadequate. We need to think and act anew, and these four initiatives would be a good start.

I. TUITION-FUNDED SUBSIDIES WITHIN THE UNIVERSITY

It is not uncommon for law students to pay significantly higher tuition than their institutions charge undergraduates.[6] At many universities the magnitude of the tuition differential is not justified by differences in program cost. The differential is often a premium paid by law students to subsidize the undergraduate program of the university. Typically this is done without careful consideration, full disclosure, and community discussion.

Why should law students be called upon to subsidize the undergraduate program of their university? I do not believe they should, but at the very least the university ought to be candid about the existence of the subsidy and should make its case as to the rationale for the subsidy and its magnitude. Typically universities are neither candid nor convincing on this issue.[7]

What magnitude of reduction in law student debt might be realized by eliminating these subsidies of undergraduate programs? If one takes all of the law schools in the nation that are affiliated with a university and, for each, compares the tuition charged to law students with the tuition charged to undergraduates, a comparison can be done.[8] Defining the law student premium as the percentage of the undergraduate tuition rate represented by the differential between the law student and undergraduate rates, the following pattern emerges: In 236 of the 255 comparisons, the law student is charged a higher tuition than the undergraduate. In 3 of the 255, the tuition charges are equal. In only 16 cases does the law student pay less in tuition than the undergraduate. The

6. At my current university, for example, law school tuition reflects an 18% premium over undergraduate tuition. At my former deanship, a public research university, the premium charged law students over undergraduates is 97% for residents, 68% for non-residents. At many universities, the effective premium for law students is even higher than the posted differential because of higher unfunded discount rates for the undergraduate programs.

7. University administrators have occasional lapses into candor on this point, as when, addressing the board of trustees, the vice president for finance at an institution with which I was then associated described our graduate and professional program as being "a cash cow" for the support of the undergraduate program.

8. The comparison excludes stand-alone law schools, Puerto Rican law schools, and law schools affiliated with for-profit universities. Where the school differentiates between residents and non-residents or people of the faith of the religious school and others, two comparisons were included. This analysis produced 255 data points.

percentage premium paid by the law student ranges from 1% up to 417%, from $320 to $41,784. The average premium is 84%, or $11,600.[9]

It is impossible to know with any confidence the rationale for these differential tuition rates or the use to which the law student premiums are put. It might be suggested that the higher tuition for law students is a function of generally higher salaries for law professors, but that would not consider the other cost factors involved,[10] nor would it explain the tremendous variation among law schools in the tuition differential. It might also be suggested that the subsidies between the law school and the university might change over time, reflecting changing circumstances. But that is not supported by the fact that at the present time, after several years of financial stresses on law schools, the tuition differentials still favor the universities 236 to 16.

Given the arcane nature of internal university accounting, it is impossible to know with precision the magnitude of the subsidies flowing from law students to their universities, but it is certain that such subsidies do exist, and the tuition comparisons suggest that the amount of the subsidies is in many cases quite substantial. Assume a university with law school tuition of $35,000 and undergraduate tuition of $28,000, a 20% premium. If the premium represents the amount of the subsidy, a law student over three years would subsidize the undergraduate program of the university in the amount of $21,000, almost 25% of the reported average indebtedness for students at public law schools and more than 17% of the average figure for students at private law schools.

The first step is to identify and disclose these internal subsidies, and I welcome the efforts to gather data on this issue. Deans face delicate choices in terms of the information they share with faculty members, students, and other stakeholders. Especially in my second deanship, I tried to involve my faculty and our national advisory council in these issues in an informed way. Both faculty meetings and national advisory council meetings featured briefings on our budgetary relationship with the university and regular updates on our performance. The results were quite productive. The challenge is to extend this knowledgeable discussion to include our students. There are legitimate concerns about privacy and competitiveness involved, but I believe their participation in these dialogues is important.

Questioning these internal university subsidies in this period of financial challenge in higher education will be difficult. But the potential benefit to our students in terms of a move to fairer tuition levels and a consequent reduction in law student indebtedness is compelling. And there would be a substantial benefit

9. To provide perspective, in the 16 cases where the law student pays less than the undergraduate, the averages are 11% and $4,329.

10. Such cost factors can cut both ways. Law schools do not have expensive labs like bench sciences, but they do have expensive clinical programs. Many law schools have in-house programs—admissions, career services, alumni affairs, development, and registrars are examples—which duplicate central university services. But law schools typically do not have expenses from residence halls, food service, and athletics, and often law schools have a lower unfunded discount rate than undergraduate programs.

to our law schools if we could eliminate revenue-driven university intrusions into our enrollment decision-making.

II. TUITION-FUNDED SUBSIDIES WITHIN THE LAW SCHOOL

If it is appropriate to question the use of law student tuition dollars to subsidize other programs within the university, it is also appropriate to question the use of law student tuition dollars to subsidize non-instructional activities within the law school. Here, the primary activity at issue is the scholarly writing of the faculty.

Typically law professors have smaller teaching assignments than our undergraduate colleagues. We justify this in large measure as being necessary to permit our faculty to engage in legal scholarship. Thus, law schools incur higher faculty costs in order to facilitate scholarship.[11] The higher tuition costs for law students required to have larger faculties are the measure of the student subsidy. As the expense of faculty salaries and benefits is typically by far the largest single expense of law school operations, this subsidy is significant.

Estimating the magnitude of this subsidy is challenging, in part because of the variation in teaching assignments among law schools. Average teaching assignments range from about 6 credit hours per year to almost 20, with an average of about 10. At many institutions faculty members who teach primarily in the undergraduate program teach between 15 and 18 credit hours per year, although there are significant variations here, as well.

What could be the impact on tuition of moving law schools to an average teaching assignment of 12 hours, or even 15 hours—at some schools essentially moving from a four-course annual teaching assignment to a five-course assignment? Because there are so many variables at play—teaching assignments, compensation levels, seniority mix, student-faculty ratios, and the like—it is difficult to project with any precision. But, by making some reasonable assumptions and modeling several variations, we can do an analysis that suggests an order of magnitude for the potential savings.

Consider a law school with an enrollment of 450 students, a fairly typical 10-credit teaching assignment, a student-faculty ratio of 14:1, and an average comprehensive faculty cost of $156,000.[12] For such a law school, moving from a 10-credit teaching assignment to a 12-credit assignment could generate law student debt savings of $5,200 per student—about 6% of the average debt of law students in public schools, 4% for those at private schools. Moving to a 15-credit teaching assignment—a favorable assignment for many undergraduate professors—could generate savings of $11,440 per student, 13% of average

11. Law school faculty costs are also driven by salary levels that are typically higher than professors in other areas, other than medicine and business, and by faculties at many law schools that are in excess of levels required by current enrollments. Those are matters for further discussion.

12. This would equal a base salary of $120,000 and benefits at 30%, or $36,000, for a total of $156,000. The analysis does not include the associated costs for each faculty member, such as research stipends, travel funding, administrative assistant support, and research assistants.

public debt, 9% of private debt.[13] Other savings could be realized for schools moving from an 8-credit teaching assignment[14] or a 12-credit teaching assignment.[15]

The rough numbers suggest this is an option well worth discussing. There are some clear implementation problems—coverage issues, administrative assignments, contractual commitments—but moving to an increased teaching assignment could generate substantial savings to students.

Could a convincing argument be made that our students receive commensurate benefit from faculty scholarly activities? I am doubtful that it could. But going through the exercise would at least require us to frame a justification for the policy. It would require us to explain why we think the premium of a reduced teaching assignment is necessary to incentivize our faculty to write. We would have to explain why the policy treats faculty members the same regardless of the benefit to students generated by their work. And we

13. Moving from a 10-credit base to assignments of 12, 15, or 18 credits could generate substantial savings in terms of student debt:

Credit Base	Faculty	Faculty Net Cost	Faculty Cost Savings	3-Year Student Savings	% Avg Public Debt	% Avg Private Debt
10-credit base	32	$4,992,000				
Go to 12 credits	27	$4,212,000	$ 780,000	$ 5,200	6%	4%
Go to 15 credits	21	$3,276,000	$1,716,000	$11,440	13%	9%
Go to 18 credits	18	$2,808,000	$2,184,000	$14,560	17%	12%

14. Moving from an 8-credit base to assignments of 12, 15, or 18 credits could generate even more substantial savings in terms of student debt than moving from a 10-credit base:

Credit Base	Faculty	Faculty Net Cost	Faculty Cost Savings	3-Year Student Savings	% Avg Public Debt	% Avg Private Debt
8 credit base	40	$6,240,000				
Go to 12 credits	27	$4,212,000	$2,028,000	$13,520	16%	11%
Go to 15 credits	21	$3,276,000	$2,964,000	$19,760	23%	16%
Go to 18 credits	18	$2,808,000	$3,432,000	$22,880	27%	19%

15. Moving from a 12-credit base to assignments of 12, 15, or 18 credits could generate less substantial savings in terms of student debt than moving from a 10-credit base:

Credit Base	Faculty	Faculty Net Cost	Faculty Cost Savings	3-Year Student Savings	% Avg Public Debt	% Avg Private Debt
12 credit base	27	$4,212,000				
Go to 15 credits	21	$3,276,000	$ 936,000	$6,240	7%	5%
Go to 18 credits	18	$2,808,000	$1,404,000	$9,360	11%	8%

would have to explain why, at many schools, the policy of having a teaching assignment lower than the undergraduate faculty extends to faculty members who are not productive scholars, who have not been productive scholars in many years, and who provide no other equivalent benefit to the law school.

To whom would the argument for continuation of the existing reduced teaching assignment be made? In the first instance, it would be made to the law school faculty at most schools and to the university administration. One would expect a variety of responses. But, in the end, the argument would have to be made to prospective students in the form of tuition differentials between law schools that adopted a higher teaching assignment and passed the savings on to their students in the form of lower tuition and law student debt and those that elected to retain the present assignments with the resultant higher tuition and debt levels.

III. BAR ADMISSION REFORMS TO LESSEN STUDENT DEBT

A third initiative on law student debt levels involves the process for admission to the bar. At present, in all but two states—Wisconsin and New Hampshire[16]—all law school graduates are required to take a bar examination. In almost every state, taking the bar exam involves at least one component of the multi-state exam.[17] There are variations among the states in terms of the schedule, but, for purposes of illustration, the schedule in my home state of Iowa is fairly representative. For the majority, who take the bar examination in the summer, graduation is in May, the bar exam is in mid-July, and results are available and the successful examinees are sworn in at the end of September.

For graduates who have taken jobs requiring bar admission, this schedule often results in adverse economic consequences. Especially with public and small-firm employers, graduates are not asked to begin work until they are sworn in. So they receive no practice income from May graduation until October. In addition they have the costs of bar preparation courses and living expenses.

Adoption of a Wisconsin-style diploma privilege for bar admissions could change the income and cost situation—and thus potentially the amount of law student indebtedness—dramatically. Under the Wisconsin bar admissions

16. Wisconsin allows graduates of the University of Wisconsin Law School and the Marquette University Law School to be admitted to the practice of law without sitting for the bar exam by complying with SCR 40.03, under which the law school certifies graduates' legal competence, and graduates undergo the standard character and fitness review. *See Diploma Privilege 2015*, WIS. CT. SYS., https://www.wicourts.gov/services/attorney/bardiploma.htm (last visited Apr. 13, 2015). New Hampshire allows graduates of the University of New Hampshire School of Law, who have completed the Daniel Webster Scholar Honors Program, to be admitted to the bar without examination. *See Bar Admissions—General Information*, N.H. JUD. BRANCH, http://www.courts.state.nh.us/nhbar/ (last visited Apr. 13, 2015).

17. Louisiana uses only the MPRE. *Frequently Asked Questions*, LA. SUPREME CT. COMMITTEE ON B. ADMISSIONS, https://www.lascba.org/faq.asp (last visited Apr. 13, 2015) (describing the Louisiana Bar Exam's contents as a written portion and the MPRE). Every other state uses at least the MBE or the UBE. *See General MBE FAQs*, NAT'L CONF. B. EXAMINERS, http://www.ncbex.org/about-ncbe-exams/mbe/mbe-faq/ (last visited Apr. 13, 2015) (listing states using the MBE).

protocol, graduates of law schools within the jurisdiction who have passed 30 credits from one specified list of courses and 60 credits from another and who have successfully completed the standard character and fitness screening are admitted to the bar without having to take the bar examination.[18]

Under the Wisconsin protocol, qualified graduates are sworn into the bar at graduation, thus allowing them to earn practice income from May graduation through October 1. They also avoid the costs of the bar preparation class. Using some reasonable assumptions, the opportunity cost to students from having to take the bar exam and not being able to practice between graduation and October 1 approaches $33,332, or 39% of the average law student debt at public law schools, 28% at the private law schools.[19]

In my home jurisdiction of Iowa, we have proposed a diploma privilege along the lines of the Wisconsin model, with an additional requirement that students take a state practice and procedure course. The proposal, which was submitted to the Iowa Supreme Court on the unanimous recommendations of a blue ribbon committee appointed to student legal education and bar admissions and the Iowa State Bar Association Board of Governors, has proved controversial. I served on the blue ribbon committee and am a strong advocate of the proposal. To me, the record is compelling. Over the past five years the state's two law schools, the University of Iowa College of Law and the Drake University Law School, have a combined ultimate pass rate of 97%. We project that our average graduate has opportunity costs from not being able to practice from mid-May to the first of October equivalent to 20% to 25% of that student's total law student debt. Given that graduates admitted under the diploma privilege would still have to pass the rigorous character and fitness evaluation, proponents argue the public would be well served by the proposed bar admissions procedure.

I readily admit that the Wisconsin model would not be appropriate in every jurisdiction. But in jurisdictions suited to the Wisconsin model, students could potentially reduce their student law school indebtedness significantly.

IV. ALTERNATIVE COURSES OF LEGAL STUDY

A final initiative to reduce law student debt is the creation of courses of legal study, alternatives to the J.D., which will allow students to get the legal education they need as efficiently as possible.

We understand that not everyone who goes to law school will end up taking the bar and practicing law. A good number of our students enter law school knowing that they want to pursue careers that do not require legal licensure. For example, students who plan to do public policy work, want to lobby, intend to go

18. *See generally* WIS. SUP. CT. R. 40.03, *available at* https://www.wicourts.gov/sc/rules/chap40.pdf (describing the diploma privilege).

19. If one assumes a comprehensive annual salary of $81,250 ($65,000 in salary and 25% benefits) and adjusts for the 143-day period from a May 10 graduation to an October 1 swearing in, the opportunity cost for salary is $31,832. Adding bar preparation expenses of $1,500, the total rises to $33,332. This is 39% of the average public law student debt of $86,000 and 28% of the average private law school debt of $121,000.

into business, or want to resume careers in other sectors may be best served by a course of studies that does not include all of the classes required for J.D. and includes a smaller number of electives.

By crafting courses of legal studies specifically designed for such individuals, we can save them time and tuition dollars. At my law school, we have instituted an alternative course of studies, the Masters of Jurisprudence. Our M.J. is a one-year, 24-credit course of studies. Admission to the M.J. program requires that the candidate have an undergraduate degree, although the program is designed to also be of value to individuals with a masters-level degree.

Who would benefit from the M.J. program? Consider a mid-level, mid-career executive in a large construction company who uses the M.J. course of studies to take courses in contracts, remedies, administrative law, construction law, and environmental law to increase his value to the company in his role supervising major construction projects. Or, consider a recent college graduate with a degree in biology who uses the M.J. course of studies to take courses in property, contracts, intellectual property, patents, and agency to pursue work overseeing patent licensing for a biotech company. Or, consider an entry-level law enforcement agent who structures an M.J. course of studies to include work on criminal law, evidence, constitutional law, criminal procedure, and civil rights to accelerate her career advancement.

Does the M.J. program raise implementation issues that need to be addressed with care? Of course, and the issues include current ABA rules that prevent M.J. students from migrating from the M.J. program to the J.D. program. The rule is presumably designed to keep law schools from using an M.J. program as a backdoor way to recruit J.D. students without reporting their credentials. But, we ought to consider whether the burden on students who are prevented from transferring to a program better suited to their needs is justified by our need to keep our peers from cheating.

Another issue raised by the M.J. option is whether we are blurring the line between legal practice requiring a J.D. and bar admission and activities that are facilitated by legal education but do not constitute the practice of law. There are genuine issues of public perception and public protection that are made more complicated by the creation of programs such as the M.J. But, I would suggest that the overall benefits of having such courses of studies justify the efforts required to meet any potential confusion.

The potential savings for students who elect the M.J. course of studies instead of the J.D. course are very substantial. But the benefit to students in terms of law student debt—and the effect on the law schools—is uncertain because we simply do not know how many of the M.J. students will be diverted from the J.D. program and how many will be individuals who would not undertake the J.D. course if the M.J. was not available.

V. THE COMMON UNDERLYING FLAW

One common feature of these four initiatives is that each holds the possibility of a significant reduction in law student indebtedness. Another is that

each reflects a common underlying flaw: a chronic inability or unwillingness to integrate financial considerations into our decision-making processes. Having been a dean at both a large public research university and a private masters-level institution under the Carnegie Classification and having spoken with colleagues at a wide variety of universities, I am convinced that this problem is pervasive.

We tolerate a system that charges our law students excessive tuition in order to subsidize undergraduates in part because the transfers are obscured in an opaque accounting system and masked by a decision-making process that never requires such preferences be identified, defended, and endorsed.

We perpetuate a faculty teaching assignment regime that inflates student tuition to incentivize faculty scholarship where we have left essentially unexamined the social value of the scholarship, the value of the scholarship to our students, and the efficacy and efficiency of the subsidy.

We have allowed by accretion a bar admissions regime that, in some jurisdictions, imposes substantial direct and opportunity costs on our graduates unjustified by any social benefit, without identifying and justifying such burdens.

And finally, we have, through inertia and a collective lack of creativity, failed to devise new forms of legal education to more efficiently meet the individual needs of our students.

We need, in short, to be much more transparent and thoughtful in our resource allocations. This need not determine allocation outcomes. But it does, for example, mean that people like me, who advocate for robust programs of need-based scholarships and for race- and class-based affirmative action, will need to convince our colleagues that these programs justify the resource allocations they require.

It may be that, in periods of abundance, we can get away with postponing consideration of resource allocation issues—although it is always unwise to do so—but in periods of shortage we cannot afford to ignore these considerations. Over the past five years, I have become an advocate of the responsibility-centered management ("RCM") approach. Having operated in a modified-RCM environment,[20] I believe it is essential to identify the available resources, prioritize the proposed expenditures, and vest the allocation authority in the units that generate the resources.

20. At Drake, the law school is the only unit operating under an RCM model. The arrangement is unusual, but highly successful. For more on RCM, see generally HANOVER RESEARCH COUNCIL, RESPONSIBILITY CENTER MANAGEMENT AT MAJOR PUBLIC UNIVERSITIES (2008). Responsibility-centered management is a budgetary model that decentralizes a level of budgetary decision-making within a university and couples the financial ramifications of decisions with the authority to make the decisions. Properly implemented, RCM results in a university budgetary environment that is characterized by transparency, accountability, equity, and predictability. *See, e.g.*, *Introduction to Responsibility Centered Management*, Oregon Budget Model, University of Oregon, http://budgetmodel.uoregon.edu/content/introduction-responsibility-centered-management; *RCM Budget Model On Track, New Information Resources Available*, UNIV. OF ARIZONA (Nov. 4, 2014), http://rcm.arizona.edu/article/rcm-budget-model-track-new-information-resources-available; *RCM at Indiana University*, INDIANA UNIV., http://www.indiana.edu/~obap/rcm-iub.php (last visited Apr. 13, 2015) (providing nine basic concepts of RCM).

CONCLUSION

Legal education is too expensive. Law student debt levels are too high. We need to do something about the problem, not just talk. We need to disenthrall ourselves and act.

The admissions-driven challenges we have faced in legal education the last few years have been difficult. Clearly, existing policies are inadequate. But if as a result of these short-term challenges we think and act anew to address the long-term issue of law student debt, it will not have all been unproductive.