

AUDACIOUS IS NOT A FOUR LETTER WORD: IS BOLD BIG ENOUGH FOR LEGAL EDUCATION?

*Luke Bierman**

THE challenges facing us engaged in the enterprise of legal education are at once practical and existential. Most immediately, we must organize a program of instruction that informs our students while preparing them to enter the legal profession. More profoundly, we must consider how to adapt the century-old regimen of educating future lawyers for contemporary life while our existing paradigms shift at a breathtaking pace. Indeed, some have been so irreverent (or prescient ... it remains to be seen) as to suggest that the fundamental tenet of our work, the rule of law, is under such strain that we no longer can count on its continuing capacity as the organizing foundation of American society. In this context, it is hopeful that *The University of Toledo Law Review* even concedes to publish this issue, which perhaps should be shrouded in the colors of mourning.

With thanks to Toledo for persevering and undertaking this effort, I write this essay with more optimism than may be readily apparent. Unconventionally for a law review—but intentionally for breaking some norms—there will not be many footnotes and fewer citations here. Much of what I write is not new but rather well-discussed and dissected, though not all agree on these matters. So be it. What I hope will be new is the take, the perspective, and the message. For it is us as legal educators who have an opportunity to take hold of our conundrums and create new thinking and paths for our enterprise, which is concomitantly fraught with peril and full of opportunity. In short: we are not meeting our challenges all that well; we must recognize that it is time to do better; and we need to think audaciously.

I will start with what I know best, which is the law school where I am dean, Elon University School of Law. The story of how Elon Law has bucked the last decade's downward spiral of applicants to law school to attain almost twice as many applications, to improve our academic and demographic metrics, to stabilize a budget, and to experience improving bar results is told elsewhere and need not be repeated here.¹ Suffice to say that Elon Law's experience over the past five years demonstrates that it is entirely possible for a law faculty to identify together the weaknesses and dirty little secrets in our traditional curriculum,² to develop collaboratively a fresh model of preparation built around the outcomes that are

* Dean and Professor of Law at Elon University School of Law.

1. See *The Futures of Legal Education: A Virtual Symposium*, PRAWFSBLAWG (Mar. 2, 2018), <http://prawfsblawg.blogs.com/prawfsblawg/2018/03/the-futures-of-legal-education-a-virtual-symposium.html>.

2. Too long. Too expensive. Too disconnected from our profession.

desired in our students to succeed in our profession,³ and to work collegially toward implementation in a manner that is appealing to students.⁴

This approach is not rocket science but rather an educational commitment borne of necessity and focused on contemporary circumstances and pedagogical logic. Langdell, and his modern fictional counterpart Kingsfield in *The Paper Chase*,⁵ are long gone and the time to acknowledge their demise is nigh. No longer are law schools the bastions and repositories of “the law” where dusty law books hold the key to the legal kingdom. To be sure, “the law” is well available to anyone with a smart phone and an internet connection. No longer can law schools merely think they are taking “a skull full of mush” and molding it to be able to think like a lawyer.⁶ Indeed, we never have been able to define adequately this amorphous, if not arrogant, objective with any precision. No longer can law schools claim the moral high ground in a society based on the rule of law and a culture that values equality of opportunity and fairness in purpose. To the contrary, increasingly burdensome levels of student loan debt undermine the modern law school business model.

If this does not square us up, then we should recognize four trends that will have deep impact on our work as legal educators. The first trend is that the legal profession is changing rapidly before us but has much more room for future adaptation than we legal educators generally recognize. We know that the socialization of new lawyers has shifted dramatically with the advent of technology that takes away the work traditionally done by entry-level lawyers, whether in big law or local law. Not only is this work not coming back, the increasing sophistication and prevalence of technological advances such as artificial intelligence and predictive analytics will certainly impact the profession in significant ways affecting workforce, workload, and work roles.

These changes are important because of the second trend, which is the increasing sophistication of non-lawyers, who we should recognize in one of two categories—clients and potential clients. Those non-lawyers who buy our services have been paying attention to those technological innovations, adapting them in their lives, and becoming increasingly familiar with them. They are demanding that we use them. Now. And a lot. No longer will they pay for our inefficiencies as evidenced by the rapidly increasing proliferation, popularity, and profitability of alternative legal service providers.

This points out the third trend, which relates to the business model of our legal education enterprise. Most law schools are dependent on graduate student loans. As Congress almost certainly limits this broad availability of funds, whether by capping the size of loans, incorporating risk assessment into the granting of loans, or eliminating flexible repayment or other favorable characteristics of loans, the burden of revenue shortfalls will fall on the many of us whose law schools rely on tuition revenue generated from student loans.

3. Learning by doing.

4. Not as long. Less expensive. Connected to our profession.

5. JOHN JAY OSBORN, JR., *THE PAPER CHASE* (1971); *THE PAPER CHASE* (20th Century Fox 1973).

6. To paraphrase Kingsfield’s description of his craft.

If our collective revenue source issues are not worrisome enough, the fourth trend certainly is. The demographic bubble bursting over the next couple decades certainly will send fewer students to college, from where law schools currently must recruit the next generation of lawyers. As the cohort of college-bound students decreases in size and changes to include proportionately more Hispanic and fewer white students, our recruitment habits as well as our enrollments must necessarily change. This adjustment will be historic with significant alterations warranted in many aspects of our current practices, changes we have not been terribly successful at implementing in our decades-long quest for strong diversity on our campuses and in our profession.

These are the existential challenges that underlie our current predicament. In this environment, the surviving law schools will be those that have sufficient resources to withstand these likely trends or those wily and nimble enough to find a unique path that accommodates them. There is a school of thought that I have heard expressed by leaders in our enterprise that there should be 50 law schools. Period. While this number may not be stated with the precision of prediction, suggesting a reduction on the scale of more than half is a fundamental shift about the needs of society, the organization of legal education and, at root, the role of the rule of law in America. Existential challenges indeed.

It behooves us, then, to think differently so that we do not continue practices that have led us to our current place. Some might point to any number of practices that are changing in legal education and point out that our law schools currently are adaptable and innovative and nimble, just as they need to be in this environment. Certainly there are excellent examples of helpful innovations by law schools over the past decade to address the challenges in legal education. But as with most things, the wheat must be separated from the chaff. Indeed, there are those innovations that result in improvement. For example, my school implemented a two-and-a-half-year curriculum that requires each student to spend a full term working in a lawyer's office or judge's chambers and that has reduced student debt on average by some 20%.⁷ That is a helpful innovation, if I say so myself, especially with an accompanying study that will provide a useful assessment of Elon Law's approach that will be shared widely.⁸ On the other hand, pushing a three-year curriculum into a two-year period that requires summer school and does not significantly reduce cost or provide opportunities for practical experience is not a helpful innovation.

Another helpful innovation would include rethinking and redesigning admissions processes and procedures to identify more nontraditional students. Once nontraditional students were admitted, law schools would offer supportive academic and social environments for those students to succeed so as to diversify our woefully not diverse profession. On the other hand, adopting the GRE as an admission tool when interest in law school is declining seems more designed as a tactic to increase applications than to alter fundamentally our admissions practices.

7. Not enough but an awfully good start of which Elon Law is especially proud.

8. Thank you AccessLex for funding that study, and thank you Research Triangle Institute for undertaking that study.

To be sure, many in higher education are moving away from standardized testing due to inherent biases.

Another area ripe for rethinking is the legal academy's dependence on tuition dollars to fund its scholarly activities while relying on students to organize our academic publications. These funds are replaceable with those from philanthropic or other sources as is the prevalent practice for scholarship in other disciplines in higher education, and peer review might mute at least some of the critique made about the relevance of some aspects of legal scholarship in contemporary law.

Other possible innovations may arise in online learning, which the ABA Standards now permit to an unprecedented level, including in the 1L year.⁹ New pedagogical possibilities arise from this permissive approach to technology in the classroom. Super flipped classrooms including those in the 1L year now offer fresh ways to immerse students in new legal principles with iterative experiences that integrate other parts of the curriculum such as legal writing. Connections between courses within a school or even across geographic space to other law schools are now possible. New opportunities for creative teaching and learning based on new discoveries in brain science could well alter how we envision the law school curriculum for a new generation of learners who come with skills different from prior students.

Our capacity for short-sighted solutions instead of comprehensive assessment of our enterprise that leads to holistic improvements seems, well, short sighted to me. Reducing the size of our classes to maintain rankings in *US News & World Report* rather than addressing fundamental weaknesses in our enterprise is akin to the airline industry reducing the number of seats available to promote profitability.¹⁰ There is no shortage of smart people in our law schools. I have believed for a long time that if there is a problem and a lot of smart people come together, then solutions to the problem just might be identified.¹¹ So if we have the smart people in our enterprise, there must be some other weaknesses in our approach to making legal education better.

We might be slow to acknowledge that a problem even exists in our enterprise. After all, legal educators are people and people not only are fallible but also have some self-interest, both of which might inhibit innovation or other change. And as an enterprise, we are pretty isolated from our colleagues in higher education, let alone the practitioners of our profession. But the signs of disruption abound. Law schools have closed. Law schools have merged. Law schools have affiliated with stronger institutions. Law schools have increased discount rates. Law schools have made short-term business decisions.¹² Law schools even have

9. As I review this essay during the editing process, I literally am reading about Syracuse Law's hybrid JD program and the very strong recruitment of its first class, certainly a bellwether of the future ... happening now.

10. And any of us who recently have flown commercially know how that is turning out for the consumer.

11. I believe this because I saw it as an effective approach while I worked with former N.C. Governor James B. Hunt, Jr., a successful innovator in education. A corollary to this concept is that resources, like funding support, also help—that means money.

12. Bernard Burk, Jerome Organ and Emma Rasiel, *Competitive Coping Strategies in the American Legal Academy: An Empirical Study*, 19 NEV. L.J. ____ (2019).

taken away tenure by declaring financial emergencies. These events are signals, apparent to anyone paying attention, that we must adapt to contemporary circumstances or suffer real adverse institutional consequences.

The failure of our enterprise to be more cognizant and recognize these trends and events as harbingers of change may also relate to some characteristics of our leadership. The average and median terms of law school deans in their current appointment at the beginning of the 2018-2019 academic year are fewer than four years.¹³ That is shorter than the average tenure for large-cap company CEOs (7 years), college presidents (6.5 years), and even NFL coaches (4.3 years). It certainly is not the kind of tenure that provides the basis for any serious long-term strategic thought, planning, and implementation. If strong and effective leadership requires sufficient longevity for more than one year to learn the ropes, one year to realize this is really hard work, and one year to get out, the enterprise of legal education fails that test.

Moreover, our leaders typically are products of the enterprise, steeped in the standards and traditions of legal education. For a presentation at a recent Association of American Law Schools (“AALS”) meeting, I did a quick survey of deans and found that about 20% (around 40 of 204 ABA accredited law schools at the time) were what might be characterized as nontraditional deans, those whose careers were largely, although not exclusively, outside the academy—former judges, lawyers, and business leaders who found their way to a law deanship. This figure was about double an estimate from a decade earlier. Most law deans then come to their position from within the enterprise of legal education without a broad perspective of: higher education; other disciplines or other professions and how they might operate; or how to prepare their prospective professionals for careers. This might limit the creativity of the leaders of our enterprise in planning for and addressing challenges.¹⁴

Perhaps, then, it is up to our professional associations to fill that gap and provide that kind of strategic vision and judgment. Organizations like AALS, ABA, LSAC, NABE, and NALP should be attentive to these issues. After all, these organizations are made up of the members of the enterprise, like individual faculty members or law schools, or are consumers of the output of the enterprise, like bar takers or lawyers. Yet these organizations have shied away from asking questions about the most contentious issues like the viability of current business models. AALS could make its signature project a focus on how to design a more attractive

13. *Rosenblatt's Deans Database*, MISS. C. SCH. L., <http://www.law.mc.edu/deans/stats.php> (last visited Oct. 29, 2018). Indeed, at its 2019 annual meeting, the AALS reported that more than 65% of all deans at ABA approved law schools were at their current institution for three or fewer years—almost two-thirds of all law deans were new to their jobs!

14. This sounds much like the situation observed by Voros McCracken as chronicled by Michael Lewis in *Moneyball*. (“The problem with major league baseball ... is that it’s a self-populating institution. Knowledge is institutionalized. ... They aren’t equipped to evaluate their own systems.”), which permitted the Oakland Athletics under the leadership of Billy Beane to develop innovations in talent identification so that low-resourced baseball teams could compete with, if not beat, those enjoying (or suffering with) significantly greater payrolls. MICHAEL LEWIS, *MONEYBALL* 240-241 (2004). With open eyes, we may find that inspiration abounds outside our enterprise.

and effective curriculum for a new generation of students or how to encourage greater stability in leadership through longer tenures for the deans of its member and fee-paid law schools. LSAC could use its enormous resources to design a more predictive test or a more probing admission process regarding who can succeed as a lawyer. NABE could share information about how it designs and scores its bar exam. NALP could create robust partnerships with firms, businesses, judges, and others who hire law students to identify better the skills and knowledge employers prefer. Meanwhile, the ABA struggles to serve multiple purposes representing law schools and their lawyer faculties while also accrediting them. This stew of professional associations could organize themselves into a much more helpful pot of enterprise assistance.

Of course, it remains necessary that our enterprise be steadfast in its responsibility to prepare our students for the rigors of the bar exam. This antiquated test, managed in each jurisdiction by those whose perception of the bar exam generally emanates from their experiences decades earlier, seems to have become a shield of protection rather than a reasonable assessment of readiness for entry into the profession. Not only has the rapid and dramatic decline in bar pass rates around the nation not been satisfactorily explained, but the absence of transparency to assess those explanations further dilutes the legitimacy of this exam.

These circumstances seem especially disappointing when functional and timelier alternatives to the traditional bar exam successfully identify those ready to work as lawyers. For example, New Hampshire's Daniel Webster program provides admission to law practice for students who satisfy a variety of practice-oriented hurdles. Wisconsin, ironically the home of the NCBE, exempts in-state law graduates from the bar exam by providing home school advantage. Both New Hampshire and Wisconsin seem none the worse for their unique avenues of assessing readiness for admission to the profession and maybe it is high time for the rest of us to test that hypothesis. I am particularly pleased that a Commission on the Administration of Law and Justice convened by the Chief Justice of my home state of North Carolina recommended that comprehensive examination be undertaken to identify if there are better and more effective ways to test readiness for practice than a bar exam that is based on a design for an earlier era of the legal profession.

So, then, what's a law school dean to do? This is a confounding challenge as the enterprise simultaneously must work within the existing parameters that include ABA accreditation, tenured faculty, and bar exam preparation, while educating students for a profession with a future that is not fully known but most certainly does not mirror the present. And do not even get me started on the pernicious effects that emanate from the lunacy of our enterprise's continuing complicity participating in the *U.S. News & World Report* rankings. This is not an easy path to navigate. Indeed, if it were easy, we deans would all be doing it, and doing it for more than three years.

From my perspective, there is a short decision tree under these circumstances. If you are at one of the few law schools with deep resources, then the path is to run basically two law schools—one for the present and one that is preparing for the future. The law school of the present likely will look like that with which we are familiar, organized around the traditional 1L courses, standard bar preparation, and

some more modern version of legal writing. The law school of the future likely will begin to harness the power of technological innovation through online learning, predictive analytics, artificial intelligence, alternative legal providers, global legal issues, brain science, and other contemporary topics. New pedagogies, curricular emphases, admissions processes, and professional partnerships can be explored and implemented. These aspects of the law school of the future can be incorporated into the enterprise over time as their presence becomes more accepted and their use more facile. There are elements of this going on at some law schools though it is not entirely clear these adaptations are part of strategic and comprehensive choice or direction.

If your law school is like most law schools and not deep in resources, it is time to develop a culture of distinctiveness. Survival will depend on the law school's ability to establish a unique character that will be attractive to the next generation of students. For example, the only law school in a state might concentrate on emphasizing service to the judiciary, the bar, and citizens in that state so as to become indispensable. A law school might develop a specialty so that students are attracted by the expertise of that subject matter and a faculty that is contributing to the profession and to society based on that specialty. A law school might provide a curriculum that offers material in a particular way, perhaps online to older students or to those far away from the physical location of the campus. A law school might find itself able to provide service to its affiliates whether through a university setting or through a consortium with other institutions. A concentration in health law could be appealing to a university with a medical or nursing school or outside partners like hospitals or other health science institutions. Through these distinctions, a law school might demonstrate the kind of innovation and nimbleness that will carry it through the highly competitive market for law students that currently exists and is likely to continue if not exacerbated for the foreseeable future.

These kinds of approaches will carry through for some time with, we can surmise, some winners and losers. But over a longer time frame, it is likely that more dramatic adaptations will be necessary, or forced, because our profession is not standing still. At some point, either from within or without, the law profession will be changed—and likely changed dramatically. Perhaps the notion of a stratified profession will take hold, with non-JD and highly specialized practitioners providing legal services in a manner akin to the medical profession. Perhaps the profession will abandon relatively routine matters, as it has with real estate contracts, and concentrate on more complex legal issues, leaving a much lower demand for traditionally trained lawyers while others pick up the difference. Perhaps the long avoided combinations with other professions, especially accountancy (which already has expanded aggressively its reach into law globally), will take place, upsetting the profession's traditional business model even more and creating a wholly different way of imagining what lawyers do. Perhaps the technology revolution and information age will create even more finely attuned clients with a need for a different version of lawyer adept at skills we have not yet identified. Perhaps we will find inspiration from colleagues around the globe and turn to undergraduate education, itself undergoing challenges and transformations, to find our future roots, preparing students for civic participation if not different

versions of professional employment in law than we know today. I certainly can imagine a rigorous five-year curriculum leading to undergraduate and JD degrees that prepares students for the bar exam and readies them for law practice.

One thing that is certain, however, is that what we are doing now already is passing us by. We may still be required to prepare our students for that anachronistic bar exam but that does not mean we are doing them any service if we do not prepare them for real professional experiences. The bar exam, at least to me, looks less and less like what our students will be doing the day after the bar exam. That is one of the main reasons that Elon Law has put its proverbial eggs in the experiential and engaged learning basket. While Elon Law recognizes that it must prepare its students to pass the bar exam, Elon Law also wants to be sure that our students are at least cognizant of their likely first and second professional experiences, which are already more and more likely not to be like my generation's first and second professional experiences.

These prevailing circumstances mandate that our enterprise be a bit audacious. That is a characteristic that law schools and the legal profession generally do not adopt. Yet, let me suggest that a touch of audacious is essential in this day and age. As we cannot prepare for a future we do not know, we must be thinking about how to prepare this generation of lawyers to be ready for anything. We learn in Jon Gertner's *The Idea Factory* that in the 1920s Bell Labs was motivated by its audacious goal to connect every person on the planet.¹⁵ In the 1920s when cars were still novelties navigating ruts and cow paths and planes were still oddities falling from the sky, Bell Labs undertook to create innovations and inventions that over a century led to devices that accomplished their audacious goal. Perhaps what legal education needs is some audacious rethinking of its goals and principles. Perhaps it is time to take inspiration from outside the enterprise to remind us that to improve ourselves, we must imagine our enterprise's work and purposes in new ways.¹⁶ Perhaps it is time to think audaciously.

15. JON GERTNER, *THE IDEA FACTORY: BELL LABS AND THE GREAT AGE OF AMERICAN INNOVATION 2* (2012). Thanks to Claremont McKenna College President Hiram E. Chodosh and other participants at a recent conversation about legal education for reminding me that a book I keep on my bedside might hold the foundation for fresh thinking about the enterprise of legal education. And thanks to Professor Martha Davis at Northeastern University School of Law for introducing me to *The Idea Factory*.

16. Perhaps the only new point that I wish to convey is, ironically for this piece, here in a footnote: Since at least 1979, when I went off to law school, the members of our profession generally and our enterprise specifically, have loudly bemoaned the failure of access to legal services for some 80% of Americans and the lack of diversity in our law schools and our array of legal service providers, whether public, private, or non-profit. That is at least 40 years of bemoaning—a pretty long time without making serious dents in these areas. After 40 years, perhaps our profession and our enterprise really do need to acknowledge our collective lack of adequate progress and think fundamentally differently, if not audaciously, about how to fix these glaring omissions. The risks inherent in not doing so, considering the dramatic scope of demographic change already inevitable over the next quarter-century, are not existential, they are catastrophic. Perhaps a good place to start for us in the enterprise of legal education is to recall our basic commitments to teaching and learning that derive from the objectives of legal education as specified by ABA Accreditation Standard 301, which requires a “rigorous program ... that prepares [graduates] for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.