PEDAGOGICALLY SOUND CUTS, TIGHTER (NOT LOOSER) ACCREDITATION STANDARDS, AND A WELL-OILED DOOMSDAY MACHINE: THE RESPONSIBLE WAY OUT OF THE CRISIS IN LEGAL EDUCATION

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INTRODUCTION

> *There is wide disagreement about the purpose of law school[]. . . . Each different view potentially yields a different kind of law school . . . .*
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> *- American Bar Association (ABA), Task Force on the Future of*

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Legal Education[1]

With runaway tuition,[2] sky-high graduate debt[3] and unemployment, [4] plummeting law school applications,[5] and the tectonic shift in the nature and delivery of legal services further clouding the picture,[6] we must do more than bitterly bemoan the plight of law students and loosely cast aspersions over how we got here. We must decide, very quickly, exactly what in legal education should be salvaged, what should be reengineered, and what should be tossed overboard. The trouble is, with little agreement on what legal education is supposed to do, how it should do it, or who it is supposed to serve, most of the solutions posed to date are shots in the

1. ABA, Task Force on the Future of Legal Educ., Working Paper 12 (Aug. 1, 2013) [hereinafter ABA, Task Force], *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/aba_task_force_working_paper_august_2013.authcheckdam.pdf.

2. *See* Debra Cassens Weiss, *Tuition and Fees at Private Law Schools Break $40K Mark, on Average*, A.B.A. J. (Aug. 20, 2012, 5:30 AM), http://www.abajournal.com/news/article/average_tuition_at_private_law_schools_breaks_40k_mark/. As undergraduate tuition went up seventy-one percent in the twenty years between 1989 and 2009, law school tuition skyrocketed 317 percent. David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU.

3. *See, e.g.*, Mark Koba, *Courtroom Drama: Too Many Lawyers, Too Few Jobs*, CNBC (Mar. 21, 2013, 12:01 PM), http://www.cnbc.com/id/100569350 ("[M]ost law school grads come out with a student debt usually between $125,000 and $250,000, depending on where they went to school, according to Department of Education statistics. That's on top of their underclass debt which could average the same amount."); Josh Block & Janet Lorin, *Law Student Debt Exceeds $100K in Job Crunch,* BLOOMBERG BUSINESSWEEK (Apr. 18, 2012), http://www.businessweek.com/news/2012-04-18/law-school-student-debt-exceeds-100-000-amid-jobs-shortage. *See generally* Daniel J. Morrissey, *Saving Legal Education*, 56 J. LEGAL EDUC. 254, 254-55 (2006) ("Legal education in America has . . . reached a critical stage. Is it fair to recruit students into a situation where their economic futures are so perilously mortgaged? . . . [I]s the current system even sustainable if enough potential students come to realize that . . . such a career path may only afford them negative financial returns on their investments?" (footnote omitted)).

4. *See, e.g.*, Karen Sloan, *NALP: Law Grads' Jobs Rate Falls for Fifth Straight Year*, NAT'L L.J. (June 20, 2013), http://www.nationallawjournal.com/id=1202607406858/NALP%3A-Law-Grads%27-Jobs-Rate-Falls-for-Fifth-Straight-Year; Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J. (June 25, 2012, 10:18 AM), http://online.wsj.com/article/SB10001424052702304458604577486623469958142.html (reporting that, in 2011, only fifty-five percent of law graduates found work for which a law degree was necessary within nine months of graduation).

5. *See, e.g.*, Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 31, 2013, at A1 (noting that applications for the fall of 2013 are at "a 30-year low," having fallen from a high of 100,000 in 2004: "As of [January 2013], there were 30,000 applicants to law schools for the fall, a 20 percent decrease from the same time last year and a 38 percent decline from 2010, according to the Law School Admission Council.").

6. *See* William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 470-78 (2013).

dark, often liberally laced with acrimony, that will do more harm than good. Dean Erwin Chemerinsky got it right when he said that the measures recently proposed by the ABA's Task Force on the Future of Legal Education to address the crisis in legal education are "definitely not a blueprint for useful reform."[7]

With an eye to the role of legal education as a training ground, a public and private good, and a unit of the academy, this Article prescribes a clear set of pedagogically sound measures to root out the actual causes of the crisis and significantly reduce law school tuition, graduate debt, and graduate unemployment, while preserving the considerable, but underappreciated, good in legal education.

The man who sounded the general alarm with his book *Failing Law Schools*[8] lays much of the blame at the feet of the professoriate, which, he says, is overpaid, underworked, and resistant to change.[9] According to Professor Brian Tamanaha, the ABA Task Force on the Future of Legal Education,[10] and numerous others, the principal culprits are tenure, high salaries, the shunning of adjuncts, emphasis on scholarship, and the ABA accreditation standards that prop it all up, drive up tuition, and block competition and change.[11] Deregulate legal education, they advise, and allow the marketplace to develop leaner alternatives to the one-size-fits-all model.[12] Specific suggestions include replacing the third year of law school with apprenticeships[13] or lopping it off altogether to eliminate a year of esoteric filler,[14] and replace tenured faculty with adjuncts fresh from practice.[15]

This Article outlines the actual causes of exorbitant tuition and graduate unemployment, the pedagogical problems posed by the proposed solutions urged upon the ABA as the accrediting body for law schools, and the solutions that will preserve legal education as

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7. Erwin Chemerinsky, *ABA Report Lacking Solutions for Law Schools*, NAT'L L. J. (Feb. 10, 2014), http://www.nationallawjournal.com/id=1202642113799/ABA-Report-Lacking-Solutions-for-Law-Schools.

8. BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (Univ. of Chi. Press ed., 1st ed. 2012).

9. *See id.* at 28-53.

10. *See Task Force on the Future of Legal Education*, ABA, http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html (last visited Apr. 4, 2014) ("The Task Force on the Future of Legal Education was created in summer 2012, and charged with making recommendations to the American Bar Association on how law schools, the ABA, and other groups and organizations can take concrete steps to address issues concerning the economics of legal education and its delivery.").

11. *See infra* Part II.

12. *See infra* Part II.

13. *See infra* Part II.C.

14. *See infra* Part II.D.

15. *See infra* Part II.A-B.

both a public and a private good. Part I traces the underlying causes of the crisis: too many law schools flooding a contracting job market with graduates, new schools popping up all the time as revenue centers for cash-strapped universities and predatory entrepreneurs, and tuition reflexively raised each year according to what the heretofore-endless traffic—propped up by student loans—would bear.

Part II explains how the current proposals for fixing legal education are blind to the needs of most law students at the vast majority of law schools, to their future clients, and to the need for an independent, scholarly critique of law and the legal system. It is argued that, with the underdeveloped critical-thinking and writing skills of today's college graduates and with LSATs in free fall, a faculty of predominantly full-time educators is essential to the development of analytical skills and professional competency in students. The proposed deregulation of legal education, this Article argues, is no more the solution to what ails law schools than the deregulation of banking and finance would have been with the housing and derivatives bubbles. I assert that taking legal education out of the academy and dropping it into the world of trade schools is not the answer.

Part III outlines solutions that address the crisis on both its fronts: first, by cutting tuition and graduate debt as much or more than the standard proposals, but in a way that preserves the pedagogical advances of the past 140 years; and second, by facilitating a market correction in the oversupply of law schools exacerbating lawyer unemployment even now. The first goal, it is posited, will be achieved through: (1) the adoption of a new ABA accreditation standard severely restricting the central university's diversion of law school revenues and thus disincentivizing the run-up in tuition; (2) wage concessions on the part of faculty and administrators; and (3) increased teaching loads that will lead to smaller faculties and significantly leaner operations. Progress toward the second goal, it is explained, will require the ABA and the states to enforce the current regulatory mechanisms—which constitute a doomsday machine for lower-end law schools—as LSAT scores and then bar passage rates fall. And finally, this Article urges the adoption of an additional ABA standard requiring start-up schools to prove a need for their services in order to stem the tsunami of new schools.

I. THE REAL CAUSE OF GRADUATE DEBT AND UNEMPLOYMENT

If you build it, he will come.[16]

- Field of Dreams

Although medical school costs more than law school,[17] lasts

16. FIELD OF DREAMS (Universal Studios 1989).

longer,[18] and medical professors are paid more than law professors, no one questions the economic value of a medical degree. There is no curricular magic in medical education that makes this so, and newly minted MDs, who must then serve as interns and residents, may be less practice-ready than are new law graduates the day they receive their diploma. The difference? The jobs for doctors are out there[19] and the wages are sufficient for them to repay their student loans.[20]

As with the bubble in the housing market that burst in 2008,[21] a perfect storm of market forces has created a law school bubble—churning out record numbers of graduates into a contracting profession—that is about to burst. And it's not that we had no warning. Years ago, when a consortium of private lenders threatened to curb loans to students at law schools whose graduates had high default rates,[22] it was alarmingly clear that legal education had become a house of cards.

The law professoriate is not, as many make it out to be,[23] the real

17. *Compare Law School Tuition 1985-2012*, ABA, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_tuition.authcheckdam.pdf (last visited Apr. 4, 2014) (providing that the median tuition in 2011for law school was $19,788 for residents at a public institution and $39,496 at a private institution), *with U.S. Medical Schools: Tuition and Student Fees - First Year Students 2010-2011 and 2009-2010*, ASS'N OF AM. MED. COLLEGES, https://services.aamc.org/tsfreports/report_median.cfm?year_of_study=2011 (last visited Apr. 4, 2014) (providing that the median tuition in 2010-2011 for medical school was $24,150 for residents at a public institution and $43,616 at a private institution).

18. *Requirements for Becoming a Physician,* AM. MED. ASS'N, http://www.ama-assn.org/ama/pub/education-careers/becoming-physician.page (last visited Apr. 4, 2014) (stating that "[t]he education of physicians in the United States" requires: four years of undergraduate study, four years in medical school, and "three to seven years" in a residency program).

19. Indeed, there is a shortage of doctors. *See* Mark Koba, *Doctor Shortage Getting Worse*, CNBC (Mar. 13, 2013, 2:31 PM), http://www.cnbc.com/id/100546118 (discussing the shortage of doctors in the United States).

20. *See Occupational Outlook Handbook: Physicians and Surgeons*, BUREAU OF LAB. STAT. (Jan. 8, 2014), http://www.bls.gov/ooh/healthcare/physicians-and-surgeons.htm#tab-5 (noting 2012 median incomes of $220,942 for physicians practicing primary care and $396,233 for physicians practicing in medical specialties).

21. *See* Moorad Choudhry, *Another Housing Market Bubble Brewing*, CNBC (May 29, 2013, 6:17 AM), http://www.cnbc.com/id/100772095.

22. *See* Chris Klein*, A Leading Creditor Says it Will Make Student Borrowing Tougher*, 19 NAT'L L.J. 5 (1996); Ken Myers, *With Loan Default Rate Jumping, Officials Are Becoming Nervous*, 18 NAT'L L.J. 8 (1996). For Professor Daniel Morrissey's excellent exposition of the crisis, see Daniel J. Morrissey, *Saving Legal Education*, 56 J. LEGAL EDUC. 254 (2006).

23. *See generally* WALTER OLSON, SCHOOLS FOR MISRULE: LEGAL ACADEMIA AND AN OVERLAWYERED AMERICA (2011); Paul Campos, *Goodbye Is Too Good a Word*, INSIDE THE LAW SCHOOL SCAM (Feb. 27, 2013), http://insidethelawschoolscam.blogspot.com. Even the ABA Task Force on the Future

villain in this drama. Law professors are the institutional face of the problem to embittered graduates, but we are no more the architects of the bubble than bank tellers were of the derivatives debacle. Do law professors take home some of the run-up in tuition? Yes, we do.[24] Do we owe it to students to speak out about the crisis and propose solutions, even if some of the reforms are uncomfortable for us? Of course. But doing so first requires a clear understanding of the problem.

Three forces converged to create the bubble that spews out many times more law graduates than the profession can absorb and reduces the slice of the legal services pie from which those who manage to land a job can repay their loans. While the U.S. Bureau of Labor Statistics forecasts there will be 74,000 additional jobs for lawyers this decade,[25] legal education is on target to spew out 400,000 law graduates.[26] With well over a million lawyers now, our country has more than twice the number *per capita* as Germany, and almost twice as many as our common-law cousin Britain.[27]

The first factor is well known: law schools are cash cows for cash-strapped universities and private ventures, explaining the proliferation of new law schools in good economies and bad over the past fifty years.[28] As Professor Denis Binder points out, "[m]any private universities run their law schools as a profit center, drawing a relatively high percentage of law school gross revenues as 'overhead.'"[29] By robbing Peter to pay Paul, law school revenues help

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of Legal Education got into the act, saying, "[t]he culture of law schools is at the root of many aspects of current conditions" and noting "the profound importance of cultural change, particularly on the part of law faculties." ABA, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS 4 (2014), [hereinafter ABA, TASK FORCE, 2014 REPORT] *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf.

24. *See infra* note 30 and accompanying text.

25. Koba, *supra* note 3.

26. *Dean: There's No Oversupply of Lawyers*, BLOOMBERG TV (Jan. 4, 2013), http://www.bloomberg.com/video/dean-there-s-no-oversupply-of-lawyers-ko6bkAfOQtOcWZ3wPISI9w.html/. Other reports estimate that a slightly more modest number of graduates will be dumped into the market in this period, but still far in excess of the anticipated openings. *See, e.g.*, Koba, *supra* note 3 (estimating that "over the next seven years . . . . American law schools will graduate about 44,000 students each year").

27. *See* Steven J. Harper, *Pop Goes the Law*, CHRON. OF HIGHER EDUC. (Mar. 11, 2013), http://chronicle.com/article/Pop-Goes-the-Law/137717/?cid=at&utm_source=at&utm_medium=en.

28. Sixty-eight new law schools have received full or provisional ABA accreditation in that period. *See ABA Approved Law Schools by Year*, ABA, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html (last visited Mar. 12, 2014).

29. Denis Binder, *The Changing Paradigm in Public Legal Education*, 8 LOY. J. PUB. INT. L. 1, 20 (2006) (footnote omitted).

keep many universities that are operating in the red afloat.[30] As noted in *The Chronicle of Higher Education*, "law deans are increasingly complaining that larger percentages of their budgets are being diverted to subsidize money-losing parts of their universities, and that administrators essentially treat law schools as cash cows."[31] And now that the ABA accredits for-profit,[32] private ventures scurrying to draw profits from the bottomless well of student loans, the unbridled expansion has accelerated.

Florida, where I teach, is a prime example. Since 1999, the population of the state has grown a little over twenty percent,[33] and has, like the rest of the nation, experienced a severe recession.[34] Nonetheless, the number of law schools in the Sunshine State has grown one hundred percent in that time, from six to twelve.[35] In the last ten years alone, sixteen new schools received full or provisional ABA accreditation nationally, including seven since 2008 when the recession began,[36] and a number of new ventures are now vying for provisional accreditation.[37] As David Segal put it in a *New York*

30. As *The New York Times* put it, "[l]ike business schools and some high-profile athletic programs, law schools subsidize other fields in universities that can't pay their own way." David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU1.

31. Katherine Mangan, *Supporters Defend Law Dean Dismissed in Dispute Over Revenue*, CHRON. OF HIGHER EDUC. (Aug. 1, 2011), http://chronicle.com/article/Supporters-Defend-Law-Dean/128463/.

32. *See Schedule of Law School Fees*, ABA, http://www.americanbar.org/groups/legal_education/resources/accreditation/schedule-of-law-school-fees.html (last visited Feb. 7, 2014). The practice is time-honored. Robert Kaczorowski reports that the "retiring chairman of the ABA Section on Legal Education, in a speech delivered at the Section's 1929 Memphis meeting, admonished section members against using law schools as cash cows . . . . " ROBERT KACZOROWSKI, FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY 161 (2012).

33. Haya El Nasser & Paul Overberg, *U.S. Population Growth Flat; N.D. Fastest Growing State*, USA TODAY (Dec. 21, 2012, 3:03 PM), http://www.usatoday.com/story/news/nation/2012/12/20/2012-census-state-populations/1781993/.

34. *Id.*

35. Prior to 1999, the six Florida law schools consisted of the University of Florida, Florida State, the University of Miami, Stetson, Nova (now Nova Southeastern), and St. Thomas; since then, Florida Coastal, Barry, Ave Maria, Florida International, Florida A&M, and a branch of Thomas Cooley have opened their doors. *See ABA Approved Law Schools by Year*, *supra* note 28; Angela Wittrock, *Cooley Law School Expands into Florida, Welcomes First Class of Students*, MLIVE (May 7, 2012, 12:26 PM), http://www.mlive.com/lansing-news/index.ssf/2012/05/cooley_law_school_expands_into.html. And yes, I recognize that my school, St. Thomas, which was established in 1984, is a relative newcomer itself. *History*, ST. THOMAS UNIV. SCH. OF LAW, http://www.stu.edu/law/About/history/tabid/841/Default.aspx (last visited Feb. 7, 2014).

36. *See ABA Approved Law Schools by Year*, *supra* note 28.

37. *See* Karen Sloan, *Belmont University College of Law Wins ABA Accreditation,*

Times article slamming law schools, "The basic [forces] of a market economy—even . . . [the] link between supply and demand—just don't apply."[38]

The relentless creation of new law schools is not a new phenomenon. The bubble was a century in the making, with surges of twenty-nine new schools between 1968 and 1978, and fourteen new ones in the early 1950s.[39] Between 1964 and 2010, the number of students enrolled in ABA-accredited law schools exploded along with the number of schools.[40] The population of the country rose sixty-one percent in that time, while law school enrollment nearly tripled.[41]

Even in the face of today's gross oversupply of lawyers, struggling universities are spinning out new law schools. North Texas University in Dallas (in a state that already has nine law schools),[42] Indiana Tech in Fort Wayne, [43] Belmont University in Nashville, and Lincoln Memorial's Duncan School of Law in Knoxville are the latest entrants.[44] Michigan's Thomas Cooley School of Law, a massive, open-admissions operation, recently spun off a new branch in Tampa,[45] and a group of enterprising businessmen in

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NAT'L L.J. (June 11, 2013, 3:22 PM), http://www.nationallawjournal.com/id=1202603786616.

38. Segal, *supra* note 30.

39. *See ABA Approved Law Schools by Year*, *supra* note 28.

40. *See* Jennifer Smith, *Crop of New Law Schools Opens Amid a Lawyer Glut*, WALL ST. J. (Jan. 31, 2013, 8:19 PM), http://online.wsj.com/article/SB10001424127887323926104578276301888284108.html.

41. According to the U.S. Census Bureau, the population in the United States in 1964 was 191,888,791, and had risen to 308,745,538 by 2010. *See US Population from 1900*, DEMOGRAPHIA, http://www.demographia.com/db-uspop1900.htm (last visited Apr. 19, 2014); *see also 2010 Census Data*, U.S. CENSUS BUREAU, http://www.census.gov/2010census/data/ (last visited Apr. 19, 2014). According to Law School Admission Council records reprinted in *The Wall Street Journal*, enrollment at ABA-accredited law schools was 51,079 in the 1964-65 school year and peaked at 147,525 in the 2010-11 school year. Smith, *supra*, note 40.

42. *See* John G. Browning, *Will UNT's New Law School Succeed?*, D MAG. (Mar. 19, 2013), http://www.dmagazine.com/publications/d-ceo/2013/april/will-unt-dallas-law-school-succeed.

43. *See* Debra Cassens Weiss, *Fifth Indiana Law School to Open with a Fraction of Hoped-for 100 Students*, A.B.A. J. (July 29, 2013, 5:49 AM), www.abajournal.com/news/article/fifth_indiana_law_school_to_open_with_a_fraction_of_hoped-for_100_students.

44. *See* Sloan, *supra* note 37. Indiana Tech, for example, planned for an inaugural class of one hundred students to help defray, among other expenses, the cost a new $15,000,000 building. Asked, just as the first day of orientation got underway, whether the school had met its target, the Dean responded, "[W]e know we have 32 . . . . [T]here is another student whose application is complete and who expects to start tomorrow if we admit him today. We'll take him." Karen Sloan, *Nation's Newest Law School Prepares to Open its Doors*, NAT'L L.J. (Aug. 20, 2013, 4:32 PM), http://www.nationallawjournal.com/id=1202616286658.

45. *See About the Tampa Bay Campus*, THOMAS M. COOLEY LAW SCH., http://www.cooley.edu/tampabay/about.html (last visited Apr. 19, 2014).

Daytona Beach, Florida, seem poised to open that state's thirteenth law school.[46] Large state schools can be players, too, with the University of California opening up a law school at its Irvine campus in 2011.[47]

When quizzed about their timing, the schools all piously chant that *their* school will be different and serve some unmet social need, even though they will be bound to the traditional educational model under the ABA's strict accreditation standards they hope to satisfy.[48] A benefactor of Lincoln Memorial University's Duncan School of Law in Eastern Tennessee, for example, says, "'A lot of people talk about Appalachia . . . but how many people do anything for it?'"[49] New schools deny they will exacerbate unemployment among lawyers, with the associate dean at one start-up attributing lawyer unemployment instead to "disruptive innovation in the legal profession."[50] And, as the ABA begins to loosen and rescind accreditation standards, the stampede will only increase.

The problem has been exacerbated by a 1996 consent decree between the Justice Department and the ABA, the sole accrediting body in legal education, in which the ABA agreed to permit private, for-profit ventures to obtain accreditation following a lawsuit brought by one of them, the Massachusetts School of Law.[51] Since then, groups like Argosy and InfiLaw have spun out law schools like fast-food franchises, opening or buying up seven schools in the process. Argosy owns the Savannah, John Marshall (Atlanta),[52] and Western

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46. Annie Butterworth Jones, *A Law School for Daytona Beach?*, FLA. B. NEWS (July 1, 2012), http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/RSSFeed/52CD4B2A2D97E81D85257A210042CAAE.

47. *See ABA Approved Law Schools by Year*, *supra* note 28. Faced with the need to downsize incoming classes to preserve high LSATs and their position in the *U.S. News and World Report* rankings, top-tier schools are tapping into new revenue sources themselves. Karen Sloan, *USC Jumps into the Online LL.M. Competition*, NAT'L L.J. (Oct. 22, 2013, 5:30 PM), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202624710609&USC_Jumps_Into_the_Online_LLM_Competition. The University of Southern California Gould School of Law, for example, has followed Washington University in St. Louis School of Law in establishing an online degree program that allows foreign students to obtain an LL.M. in American law without ever setting foot in the country. *Id.*

48. *See* David Segal, *For Law Schools, a Price to Play the ABA's Way*, N.Y. TIMES (Dec. 17, 2011), http://www.nytimes.com/2011/12/18/business/for-law-schools-a-price-to-play-the-abas-way.html?_ r=0; *see also* Smith, *supra* note 40.

49. *Id.*

50. *See* Michael L. Coyne, *ABA and Legal Education: Change Won't Come from* Within, NAT'L L.J. (May 8, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202599229647&ABA_and_Legal_Education_Change_Wont_Come_from_Within.

51. United States v. Am. Bar Ass'n, 934 F. Supp. 435 (D.D.C. 1996).

52. *See History*, ATLANTA'S J. MARSHALL L. SCH.,

State law schools, and InfiLaw, backed by a private-equity fund based in Chicago, is responsible for bringing us the Phoenix, Charlotte, and Florida Coastal schools of law,[53] and is attempting to acquire the struggling Charleston School of Law in Charleston, South Carolina.[54] With over 1,200 students each, Florida Coastal and Charlotte are two of the largest law schools in the country.[55]

The second force behind the law-school bubble is the practice, primed by the central university's thirst for law school revenues, of raising tuition annually according to whatever level the market will bear.[56] They do because they can.[57] Investment advisors know full well that money, compounded at a little over five percent per annum, will almost quadruple in twenty-five years. University presidents know this too, and it explains exactly what has happened with law school tuition—and the university's cut of it—over the twenty-five years between 1985 and 2009, when tuition at private law schools

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http://www.johnmarshall.edu/about/history/ (last visited Feb. 7, 2014); *Accreditation*, SAVANNAH L. SCH., http://www.savannahlawschool.org/about/accreditation/ (last visited Apr. 19, 2014); *Western State*, ARGOSY UNIV., http://www.argosy.edu/colleges/western-state.aspx (last visited Apr.19, 2014).

53. *Our Schools*, INFILAW SYS., http://www.infilaw.com/our-schools (last visited Apr. 19, 2014).

54. Debra Cassens Weiss, *Are InfiLaw's For-Profit Law Schools Succeeding? Plan to Buy Fourth School Spurs Concerns*, A.B.A. J. (Oct. 22, 2013), http://www.abajournal.com/news/article/are_infilaws_for-profit_law_schools_succeeding_purchase_of_fourth_school/. Following a decline of nearly fifty percent in first-year enrollment, Phoenix changed its name to Arizona Summit Law School, with the Dean explaining "[t]he new name highlights our commitment to the success of our students . . . and provides a supportive academic environment." Karen Sloan, *Phoenix School of Law Adopts New Brand*, NAT'L L.J. (Nov. 4, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202626366212&Phoenix_School_of_Law_Adopts_New_Brand.

55. Weiss, *supra* note 54.

56. TAMANAHA, *supra* note 8, at 128-30. The law-school rankings fetish does not help. As David Segal explains:

> There are many reasons for this ever-climbing sticker price, but the most bizarre comes courtesy of the highly influential US News rankings. Part of the US News algorithm is a figure called expenditures per student, which is essentially the sum that a school spends on teacher salaries, libraries and other education expenses, divided by the number of students.
>
> Though it accounts for just 9.75 percent of the algorithm, it gives law schools a strong incentive to keep prices high. Forget about looking for cost efficiencies. The more that law schools charge their students, and the more they spend to educate them, the better they fare in the US News rankings.

Segal, *supra* note 30. Further exacerbating the increase in law students was the ease with which law schools could and, until now, did expand the size of their entering classes to enhance revenues and satisfy university demands—a couple more chairs in the classroom, in essence, are all that is required. *See id.*

57. *See* Segal, *supra* note 30.

rose 375 percent[58] and at public law schools rose at an even higher clip.[59]

The third force behind the bubble is, of course, universally available student loans for tuition and living expenses.[60] That is the dark side of the federal loan program that helps provide equal access to education and diversity in the professions.[61] And student loans are another bubble that may soon burst.[62] The late Senator Daniel Patrick Moynihan observed as far back as the early 1970s that the program would result in skyrocketing college tuition and "was a 'national disaster'" waiting to happen.[63] And now, with law schools leading the way as tuition soars at colleges and universities nationally, it is happening.[64] Law school is now like the lottery, with the biggest difference between students at lower-level law schools who will soon be hunting for work and those eyeing Powerball jackpots being that, although the former have a better chance of winning, they must mortgage their future to play.[65] If the federal

58. Equal Justice Works, *Rising Law School Tuition Examined in New Book*, U.S. NEWS & WORLD REP. (Aug. 22, 2012), http://www.usnews.com/education/blogs/student-loan-ranger/2012/08/22/rising-law-school-tuition-examined-in-new-book. A 375 percent increase over twenty-five years represents an annual average increase of 5.43 percent.

59. TAMANAHA, *supra* note 8, at 129.

60. Peter Wood, *Student Loans—Sequel to the Mortgage Mess?*, MINDING THE CAMPUS (Jan. 3, 2008), http://www.mindingthecampus.com/originals/2008/01/student_loans_sequel_to_the_mo.html.

61. *See id.*

62. *See id.*

63. Debra Cassens Weiss, *Two-Year Law School Was a Good Idea in 1970, and It's a Good Idea Now, Prof Tells ABA Task Force*, A.B.A. J. (Feb. 9, 2013, 8:36 PM), http://www.abajournal.com/news/article/two-year_law_school_was_a_good_idea_in_1970_and_its_a_good_idea_now.

64. Some see student loans as the next bubble to burst. *See Nope, Just Debt*, ECONOMIST (Oct. 29, 2011), http://www.economist.com/node/21534792. As Professor William Henderson put it, "Arguably, law schools are the bleeding edge of the growing problems facing all four-year colleges and universities: growing tuition and debt loads in combination with flat or declining earning for graduates." William D. Henderson, *The Calculus of University Presidents*, NAT'L L.J. (May 20, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202600579767&The_Calculus_of_University_Presidents&slreturn=20130630181058.

65. Professor Deborah Rhode says that "applicants, subject to biases toward optimism, have engaged in 'magical thinking.'" Deborah L. Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437, 444 (2013). *See also* Press Release, Kaplan Test Prep, Kaplan Survey: Despite Challenging Job Market, Tomorrow's Lawyers Appear to Have a Healthy Outlook on Their Own Job Prospects, but Not Their Classmates' (Apr. 12, 2010), http://press.kaptest.com/press-releases/kaplan-survey-despite-challenging-job-market-tomorrow%E2%80%99s-lawyers-appear-to-have-a-healthy-outlook-on-their-own-job-prospects-but-not-their-classmates%E2%80%99. Or perhaps today's matriculants at non-elite schools are like jurors in headline-dominating cases, who were chosen because they had not heard anything about the case.

government were ever to cut back significantly on law student loans, a tier or two of law schools would vanish instantaneously.

The only two restraints on tuition, as Professor Tamanaha has aptly described, are the levels set by the price leaders, the Harvards and Yales,[66] and the annual caps on federal student loans.[67] A gap of around ten thousand dollars, give or take a few thousand, between tuition at elite and non-elite schools reflects this market pricing.[68]

In the world of corporate franchising, the corporation normally charges franchisees a percentage of the franchise's gross income to cover administrative expenses and boost its own bottom line.[69] To attract and motivate franchisees, the corporation must exercise some restraint in the amount of revenues it siphons off in franchise fees.[70]

Universities operate much like franchisors vis-à-vis their law schools, only they've shown little restraint in what they siphon off. The university's "overhead" charges (also known as "the tax") purport to cover the cost of providing administrative services, maintenance, and utilities to the law school,[71] but there is a lot happening subcutaneously: (1) law schools cover most of their administrative services out of their own budget; (2) intricate formula for calculating overhead charges often have little to do with the university's real expenditures on the law school, grossly inflating the charge; and (3) a number of additional charges are often levied against the law school outside the overhead formula.[72] As Professor Binder explains:

> The problem occurs, when law schools incur a disproportionate share of a university's operations, such that revenues from the law school are used to subsidize other academic units. In this common scenario, tuition revenues must thereby serve the financial needs and demands of both the law schools and their parent universities, and hence inflate the cost of tuition above that actually needed to provide a quality education.[73]

One difference between overhead charges and franchise fees is that the latter are normally locked down in the franchise

66. TAMANAHA, *supra* note 8, at 130-33.

67. *See* Kelsey Sheehy, *Explore Graduate Student Loan Options for 2014*, U.S. NEWS & WORLD REP. (Mar. 13, 2014), http://www.usnews.com/education/best-graduate-schools/paying/articles/2014/03/13/explore-graduate-student-loan-options-for-2014 (describing the limits on Stafford, Graduate PLUS, and Perkins loans).

68. TAMANAHA, *supra* note 8, at 131.

69. *See generally* ABA, FUNDAMENTALS OF FRANCHISING (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2009).

70. *Id.*

71. Professor Binder notes that law schools, like other schools within the university, "can reasonably be expected to cover costs assumed by the parent university on their behalf, such as maintenance and security, and a proportionate share of the costs of running the university." Binder, *supra* note 29, at 20-21.

72. *See id.*

73. *Id.* at 21; *see also supra* note 30 and accompanying text.

agreement.[74] When the university wants more money, though, it's simple: just raise the overhead rate. It is done all the time.

Typically, the central university's take of gross law school revenues exceeds twenty percent,[75] can rise much higher,[76] and often includes additional charges.[77] (By comparison, the franchisor's fees, which are averaged at 6.7 percent of gross sales,[78] are minuscule.) Law school deans, of course, are not in a position to complain too much about the practice. Object to the university's take—or the annual ratcheting up of law school tuition that increases the take—and you may soon be looking for a new job.

This is exactly what happened in a celebrated case at the University of Baltimore in 2011. When law school dean Phillip Closius objected that the central university was taking forty-five percent of the law school's revenues, a charge the university president disputed, Closius was summarily dismissed.[79]

And all of the players in the reform of legal education must understand an awkward truth that the ABA Task Force, in its recently released Report and Recommendations analyzing the troubles of our enterprise, failed to emphasize: the dynamics of runaway tuition, debt, and unemployment extend far beyond the faculty suite and the law school itself. In explaining that "[t]he dynamics of price are strongly affected by the financing of legal education, the cost structure of law schools, and the nature of the

74. *See* Howard Yale Lederman, *What Makes a Franchise? The Franchise Fee*, MICH. B. J. Sept. 2008, at 23, 24 (describing how, pursuant to Federal Trade Commission rules, the franchisee must pay a fee as set out in the franchisor/franchisee agreement).

75. *See* Thomas L. Shaffer, *Commentary: Four Issues in Accreditation of Law Schools*, 59 WASH. U. L. REV. 887, 895 n.38 (1981); Segal, *supra* note 30; Mangan, *supra* note 31. Professor Tamanaha places the figure between fifteen and thirty. TAMANAHA, *supra* note 8, at 127.

76. *See, e.g.*, Mangan, *supra* note 31.

77. *See id.*

78. *The Profile of Franchising 2006: Series III—Royalty and Advertising Fees*, INT'L FRANCHISE ASS'N (Oct. 25, 2006), http://www.franchise.org/industrysecondary.aspx?id=31612.

79. Mangan, *supra* note 31. In a subsequent letter to the law school community, Closius wrote:

> The unwillingness of the University to discuss in a meaningful way the growing imbalance in the financial relationship was also becoming a matter of principle to me. . . . I was becoming increasingly uncomfortable justifying tuition and fee increases to law students when the money was actually being used to fund non-law University initiatives.

Read the UB Dean's Letter to the Law School Community, BALT. SUN (July 29, 2011, 1:01 PM), http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-law-dean-letter,0,3949860.story. Forty-five percent would have seemed like a bargain to Fordham's former longtime law dean John Feerick, who "believed that the university was taking 60 percent . . . of the Law School's revenues when he became dean in 1982." KACZOROWSKI, *supra* note 32, at 323.

market for legal education[,]"[80] the Task Force omitted the key ingredient in the mix: the role of the central university and private ventures in the proliferation of law schools and the maximization of tuition. As Associate Dean Debra Post put it, "'Prices are driven by the desire on the part of universities to subsidize the undergraduate programs. Somehow, this is not part of the discussion.'"[81] The only hint of the university's role in pricing was buried deep in the report: "In some cases universities are unwilling or unable to support law schools as they attempt to make a transition to a new market-oriented way of conducting their affairs."[82] And the Task Force got it wrong at that—market-based pricing, rather than cost-based pricing, is what got us in trouble in the first place.

The failure to fully appreciate the causes of high tuition and graduate unemployment, and the boogey men we have created in the rush to lay blame, will prevent us from fashioning effective solutions. The argument that law professors write the accreditation standards and control the accreditation process that drives tuition to its current levels[83] is conspiracy theory.[84] Even Professor Tamanaha, who lays plenty of blame at the feet of the professoriate, warns us against the error of *post hoc ergo propter hoc* with respect to the run-up in tuition: "[W]e must be careful not to misapprehend effect for cause—mistaking what law schools have spent their stream of tuition dollars on for the reasons tuition rose."[85]

Recognizing the university's central role in high tuition and graduate unemployment is not to say that law school deans and professors have not benefited in the process—more money flows into law school coffers and faculty pockets through the exercise. It is merely to say they are neither the architects nor the principal operators of the scheme. On the other hand, as Professor Tamanaha correctly reminds us in his piece *The Failure of Crits and Leftist Law Professors to Defend Progressive Causes*, neither does it relieve us of the obligation to speak out and identify solutions to the hardships visited on our students. [86] Indeed, that is one of things legal scholarship and tenure are for (as Professor Tamanaha's work amply

80. ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 4.

81. Karen Sloan, *Law Schools Gain Greater Autonomy*, NAT'L L. J. (Aug. 19, 2013, 12:00 AM), http://www.dailyreportonline.com/id=1202616031529.

82. ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 15.

83. *See, e.g.*, Coyne, *supra* note 50. ("[The ABA's law school accreditation process had been captured by full-time academics at ABA law schools who then used that process for their own economic benefit at the expense of students and the public.").

84. Most of the members of the ABA Council of the Section on Legal Education are lawyers and judges. Rhode, *supra* note 65, at 447.

85. TAMANAHA, *supra* note 8, at 128 (footnote omitted).

86. Brian Z. Tamanaha, *The Failure of Crits and Leftist Law Professors to Defend Progressive Causes*, 24 STAN. L. & POL'Y REV. 309, 343 (2013).

demonstrates, despite his opposition to tenure).[87] And while I applaud Professor Tamanaha for clearly and courageously raising the issue of exorbitant tuition and debt,[88] I would point out that disagreement with the changes he has put forward and the vision of legal education they reflect should not be—as it routinely has been—conflated with the self-interested obstruction of progress.

The ABA Standards have become another stray target. Clearly, a number of provisions unnecessarily raise tuition and must be pruned, like the requirement of redundant print and electronic library collections,[89] but the Standards are, to a great extent, a straw man in the argument for reform. As Professor Paul McGreal points out, in light of the practice of setting tuition at the rate the market will bear, "it would be the purest of coincidences that the cost of an ABA-approved legal education just so happens to equal the amount of revenue that a law school generates in the current market."[90]

While the Task Force's Report references the tension between the public and private good in legal education,[91] the Task Force, and most of the critics of law schools, fail to recognize two vital points set forth below in Parts II and III of this Article: (1) dramatically lowering the costs of the private good need not and must not come at the expense of the substantial public good, and (2) the social and educational costs of the proposals they've put forward are incalculably onerous.

II. THE PROBLEMS WITH THE PROPOSED SOLUTIONS

Come writers and critics
Who prophesize with your pen
And keep your eyes wide
The chance won't come again
And don't speak too soon
For the wheel's still in spin . . . .
- Bob Dylan, "The Times They Are A-Changin"[92]

The dangers of attempting to fix an economic problem through

87. *See id.*

88. *See id.* at 342-43.

89. *See* ABA, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2013-2014, at 47-48 (2013) [hereinafter ABA STANDARDS AND RULES OF PROCEDURE], *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.

90. Paul McGreal, *Brian Tamanaha on the Rising Cost of Legal Education*, FACULTY LOUNGE (Aug. 17, 2012, 10:00 AM), http://www.thefacultylounge.org/2012/08/brian-tamanaha-on-the-rising-cost-of-legal-education.html.

91. ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 6-8, 29.

92. BOB DYLAN, THE TIMES THEY ARE A-CHANGIN' (Warner Bros., Inc. 1963).

pedagogical reforms are clear in most of the proposals advanced to date to repair legal education. The reforms suggested so far ignore the biggest problem, the ever-expanding glut of law schools in a contracting job market for lawyers,[93] and would seriously undermine sound pedagogy, professional competence, and an independent critique of law and the legal system.

The proposals, to date, include substituting apprenticeship for the third year of law school[94] or lopping it off altogether,[95] transitioning from full-time law faculty to cheaper adjunct instructors from practice,[96] eliminating tenure for the remaining full-time professors,[97] replacing the ABA as the law school accrediting body,[98] and deregulating legal education to allow the marketplace to provide cheaper alternatives.[99]

A. Eliminating Tenure

The question of tenure is at the heart of whether law retains its place in the American academy or is relegated to trade school fare, and whether American legal education is to be molded by educators or carved up by marketplace forces. As goes tenure, so goes legal

93. There is more than irony in the fact that, while the job market in law is contracting, the need for affordable legal services, particularly among the poor and middle class, remains strong and unmet. For a discussion of the problem, see Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129 (2009); DOCUMENTING THE JUSTICE GAP IN AMERICA, LEGAL SERVS. CORP. (2009), *available at* http://www.lsc.gov/JusticeGap.pdf; Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 990-91 (1999). Professor Tamanaha understands this as well: "Perversely, the United States has an oversupply of law graduates at the same time that a significant proportion of the populace–the poor and lower middle class–go without legal assistance." TAMANAHA, *supra* note 8, at 170.

94. TAMANAHA, *supra* note 8, at 173.

95. *Id.*; *see also* Weiss, *supra* note 63; Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. TIMES, Feb. 11, 2013, at A11, *available at* http://www.nytimes.com/2013/02/11/us/lawyers-call-for-drastic-change-in-educating-new-lawyers.html?_r=0; Daniel B. Rodriguez & Samuel Estreicher, Op-Ed., *Make Law Schools Earn a Third Year*, N.Y. TIMES, Jan. 18, 2013, at A27, *available at* http://www.nytimes.com/2013/01/18/opinion/practicing-law-should-not-mean-living-in-bankruptcy.html.

96. TAMANAHA, *supra* note 8, at 173; *see also* Bronner, *supra* note 95; Weiss, *supra* note 63.

97. Jennifer Smith, *Law-School Professors Face Less Job Security*, WALL ST. J. (Aug. 11, 2013, 7:18 PM), http://online.wsj.com/news/articles/SB10001424127887323446404579006793207527958.

98. TAMANAHA, *supra* note 8, at 176-77; Coyne, *supra* note 50.

99. TAMANAHA, *supra* note 8, at 173-77; *see also* Bronner, *supra* note 95; Coyne, *supra* note 50; Weiss, *supra* note 63; ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 6, 9, 21-28.

education. Professor Tamanaha and many others have recommended eliminating tenure as a primary means of cutting costs. The "standard and official interpretations . . . that provide job security for professors," Professor Tamanaha tells us, "must be deleted."[100] And at the ABA's annual meeting in the fall of 2013, the Council of the Section on Legal Education and Admissions to the Bar agreed, proposing to drop the tenure requirement from the ABA accreditation standards.[101] As Dean Maureen O'Rourke, a member of the Council, put it, "I understand the need for academic freedom . . . . But as an industry we have a need for flexibility that we just don't have right now."[102]

Half a year later, following an outcry by law professor over the importance of academic freedom, the Council—now deadlocked on the issue—withdrew the proposal.[103] Given the intensity of feeling among the proponents of eliminating the tenure requirement, including many on the Council, the issue is almost certain to arise again.

Tenure, it is argued, drives up labor costs and tuition by saddling law schools with professors who do not pull their weight.[104] And for the full-timers who remain after the demise of tenure, the reasoning goes, less job security will mean more productivity in light of the legions of lower-priced faculty wannabes beating down the door each fall at the American Association of Law Schools (AALS) Faculty Recruitment Conference.[105] All this will happen with the loss of tenure. The real questions, though, are at what cost and with what savings?

The observation that tenure provides scholars with the shield of academic freedom to criticize powerful interests and inequities in the status quo has been met by two assertions. The first is that coddled professors are hypocritically defending privilege while masquerading

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100. TAMANAHA, *supra* note 8, at 173.

101. Smith, *supra* note 97; Karen Sloan, *ABA Panel Favors Dropping Law School Tenure Requirement*, NAT'L L.J. (Aug. 12, 2013), http://www.njlawjournal.com/id=1202614832071/ABA-Panel-Favors-Dropping-Law-School-Tenure-Requirement?slreturn=20140419154517.

102. Smith, *supra* note 97 (alteration in original).

103. Karen Sloan, *ABA Council Abandons Bid to Drop Tenure Requirement*, NAT'L L. J. (Mar. 17, 2014), http://www.nationallawjournal.com/home/id=1202647168997&back=law.

104. TAMANAHA, *supra* note 8, at 5-7.

105. Many hundreds of talented prospects vie for a relative handful of entry-level positions each year, and the number of openings is shrinking drastically as deans curtail hiring in the face of the crisis. Dawinder Sidhu, *Get Rid of Tenure for Law Schools: Column*, USA TODAY (Aug. 25, 2013, 6:03 AM), http://www.usatoday.com/story/opinion/2013/08/25/law_school_tuition_column/2678487/.

as defenders of the oppressed.[106] In response to my statement in a UCLA piece defending legal scholarship on the grounds that it "enriches teaching as it refines the practice of law and advances justice and . . . requires the academic freedom provided by tenure,"[107] one professor commented, "I find it ironic that Prof. Silver cares so deeply about challenging the existing power structures but writes in favor of the status quo when it comes to the power structures that benefit him."[108]

In his article entitled *The Failure of Crits and Leftist Law Professors to Defend Progressive Causes*, Professor Tamanaha paints the same argument with a broader brush: "Seduced by the allure of prestige and material comforts, Crits and progressive law professors have become a part of the system they set out to reform."[109]

Being a law professor is undoubtedly one of the best jobs in the world, and tenure is certainly one of the reasons why. Nonetheless, to dismiss out of hand the arguments for it because it is a valued benefit is a classic *ad hominem* where self-interest alone is invoked to discredit the speaker's argument. The fact that tenure protects free expression is critical to *why* it is a benefit.

The second rebuttal to the defense of tenure is that it is simply too costly, that the value of legal scholarship is overestimated, and that much of what law professors write is impractical and self-indulgent.[110] The ABA Task Force weighed in on the cost of scholarship, recommending that deans "[m]anage the [e]xtent of [l]aw [s]chool [i]nvestment in [f]aculty [s]cholarly [a]ctivity."[111] And Professor Tamanaha responded to my statement about scholarship enriching teaching, refining practice, and advancing justice this way: "Lofty justifications" of legal scholarship "make it easy for legal educators to rationalize: the onerous debt taken on by law students is a small price to pay for knowledge, justice, and the rule of law."[112] "Belief in the value of scholarship," he added, "almost amounts to a shared ideology, or faith, among some law professors that our research is an 'unqualified' good beyond measure and, therefore, priceless."[113]

The Task Force places less value on scholarship than that. While the group's report gives lip service to legal education as a public good,

106. John Steele, Comment to *To Avoid a Pile-On*, PRAWFSBLAWG (Dec. 12, 2012, 1:40 PM), http://prawfsblawg.blogs.com/prawfsblawg/2012/12/to-avoid-a-pile-on.html.

107. Jay Sterling Silver, *The Case Against Tamanaha's Motel 6 Model of Legal Education*, 60 UCLA L. REV. DISC. 50, 54 (2012).

108. Steele, *supra* note 106.

109. Tamanaha, *supra* note 86, at 343.

110. *Id.* at 342.

111. ABA, TASK FORCE, 2014 REPORT *supra* note 23, at 34.

112. Tamanaha, *supra* note 86, at 342.

113. *Id.*

it never recognized the scholarly critique of law and the legal system as part of the good. Scholarship, according to the Task Force's original Working Paper, is merely a form of "status competition . . . result[ing] from the prevailing faculty culture, which takes scholarship as a defining characteristic of a law professor and as central to professional identity."[114] About the best the Task Force can say for legal scholarship is that "there are different views about whether law schools should . . . contribute to the advancement of knowledge or progress of the legal system."[115]

In *Failing Law Schools*, Tamanaha went into a bit more detail about exactly why legal scholarship lacks the significance defenders assign to it:

> Theory has scholarly cachet. . . . Theories of constitutional interpretation, normative arguments about what the law should be, legal philosophy, critical race theory, sociological studies of law, legal history, economic analysis of law, quantitative studies of judging . . . occupy legal academics. Most of this is not immediately relevant to the daily tasks of judges and lawyers. . . .[116]

"Riding one intellectual fad after another," Professor Tamanaha observes, "law professors are spinning wheels going nowhere."[117] Chief Justice John Roberts agrees:

> Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.[118]

Similarly, Walter Olson, author of *Schools for Misrule: Legal Academia and an Overlawyered America*, calls what most law professors write "daffy, eccentric, or bonkers."[119] Olson, it might be noted, rules differently from Justice Roberts and Professor Tamanaha on the issue of relevance of legal scholarship, holding instead that "[j]udges draft their opinions with one eye on the law

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114. ABA, Task Force, *supra* note 1, at 9.

115. *Id.* at 12.

116. TAMANAHA, *supra* note 8, at 57.

117. *Id.* at 56.

118. Debra Cassens Weiss, *Law Prof Responds After Chief Justice Roberts Disses Legal Scholarship*, ABA J. (July 7, 2011, 5:29 AM), http://www.abajournal.com/news/article/law_prof_responds_after_chief_justice_roberts_disses_legal_scholarship/. The argument was made long ago in—what else—a classic law review article by federal judge Harry Edwards, who himself was a law professor before ascending to the bench. *See* Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992), *available at* http://www2.law.columbia.edu/faculty_franke/CLT2009/Edwards%20article%20on%20Training%20edited.pdf.

119. OLSON, *supra* note 23, at 3-4.

commentators."[120]

The condemnation of law reviews and legal scholarship is by no means a new phenomenon. More than seventy-five years ago, in *Goodbye to Law Reviews*, Fred Rodell wrote that law reviews only had two problems: "One is [their] style. The other is [their] content."[121]

One of the leaders of Law School Transparency, a group pressing for more candor in the employment data released by law schools, questions the entire enterprise. "Why," he asks, "is scholarship even seen as a [part of the] profession to begin with, rather than an interest you can pursue on your own time?"[122] In what sounds like the ultimate *defense* of legal scholarship, Olson decries what he sees as its evil effects, charging that it has "revolutionized (or created from scratch) whole fields of law, from products liability to sexual harassment to class action law."[123]

If there is anything of a consensus among law professors as to the utility of legal scholarship, it may be that some, but not all, has value. Opinions on the question seem to range on the one hand from that of a new faculty, who, blogging as "Anon First Year Prof," opined

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120. *Id.* at 2.

121. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936); *see also, e.g.*, Edwards, *supra* note 117. Several law deans, such as Frank Wu of the University of California Hastings College of Law, who has called legal scholarship "useless verging on absurd" and a "mass of heavily-footnoted nonsense," share Professor Rodell's opinion. Frank H. Wu, *The Problem with Legal Education*, HUFFINGTON POST, (Dec. 19, 2012, 1:31 PM), http://www.huffingtonpost.com/frank-h-wu/the-problem-with-legal-ed_b_2331698.html. For recent scholarship condemning legal scholarship, *see* Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803 (2009) (belittling legal scholarship). Two decades ago, Professor John Paul Jones addressed a related criticism:

> I have heard it said that there are too many law reviews. . . .
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> . . . .
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> [T]he growth in journals has been dramatic, but the growth in the law has outstripped it by far, in the legislatures, the courts, and the bureaucratic agencies.
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> . . . .
>
> [R]egulations newly proposed or adopted by the regulatory agencies multiply at a breathtaking rate.
>
> . . . .
>
> The need for a healthy and prolific fourth estate of law reviews in our legalistic society ought to be clear.

John Paul Jones, *In Praise of Student-Edited Law Reviews: A Reply to Professor Dekanal*, 57 UMKC L. REV. 241, 244-45 (1989).

122. Derek Tokaz, Comment to *To Avoid a Pile On*, PRAWFSBLAWG (Dec. 12, 2012 10:49 AM), http://prawfsblawg.blogs.com/prawfsblawg/2012/12/to-avoid-a-pile-on.html. Mr. Tokaz is the group's director of (what else?) research. *See* Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. TIMES, Feb. 11, 2013, at A11.

123. OLSON, *supra* note 23, at 2.

that "a huge amount of it is pretty bad and is destined to go off into the ether"[124] and the view of a veteran that "95% of legal scholarship is a waste,"[125] to Professor Sherrilyn Ifill's remark, in response to Justice Roberts' assessment, that:

> Legal scholars will on occasion indeed take up Kant (and there's no shame in that), but more often than not, published law review articles offer muscular critiques of contemporary legal doctrine, alternative approaches to solving complex legal questions, and reflect a deep concern with the practical effect of legal decisionmaking on how law develops in the courtroom.[126]

"[T]he problem of articulating the value of legal scholarship has existed for some time," point out the editors of the *Journal of Legal Education*, but

> the case for the value of a robust and extensive scholarly market that produces new understandings of the role of law in addressing social problems, new syntheses of law and ideas current in the rest of the university, and arguments about what national and transnational legal institutions need to do to establish and maintain their credibility and legitimacy, is strong . . . .[127]

Granted, not every piece breaks new ground or effects change. Few do. And if we could sift out in advance the work that falls into Professor Ifill's category from that described by "Anon First Year Prof," we would be able to answer the question posed by another skeptic: "Why are professors at all universities expected to produce scholarship . . . ?"[128] Alas, though, as each of us is possessed of our own predilections, we cannot,[129] and so we must take the good with the bad.[130]

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124. Anon First Year Prof, Comment to *To Avoid a Pile On*, PRAWFSBLAWG (Dec. 12, 2012 1:39 PM), http://prawfsblawg.blogs.com/prawfsblawg/2012/12/to-avoid-a-pile-on.html.

125. Jeffrey Harrison, Comment to *The Utility of Scholarship—Round Two*, THE FACULTY LOUNGE (Feb. 13, 2013, 8:37 PM), http://www.thefacultylounge.org/2013/02/the-utility-of-scholarship-round-two.html.

126. Sherrilyn Ifill, *What the Chief Justice Should Read on Summer Vacation*, CONCURRING OPINIONS (July 1, 2011, 4:06 PM), http://www.concurringopinions.com/archives/2011/07/sherrilyn-ifill-on-what-the-chief-justice-should-read-on-summer-vacation.html/print/.

127. *From the Editors*, 63 J. LEG. EDUC. 171, 171 (2013).

128. Tokaz, *supra* note 122.

129. Some, however, feel they can: "[A]ny sensible group of people could predict which [articles] are likely to make a difference before the effort and cost of research and publication are incurred." Harrison, *supra* note 125.

130. As Professor Tamara Piety observes,

> I submit that in legal scholarship, just as in other research, it is very difficult to say in advance which theories will bear fruit and which will not, which are "useful" and which will be forgotten. And it may well be the case that a very great deal of work needs to be produced in order for *any* good work to be produced. But that inability to say in advance what is "useful" should not be

If the only measure of legitimacy of the enterprise of legal scholarship is how many pieces break new ground or effect new law, then undoubtedly criticism like Anon First Year Prof and Professor Tamanaha's are damning. If the sole measure of utility of a piece is whether it has wended its way into a lawyer's brief or a judge's opinion, then we ought to question the whole endeavor. And, I suppose, from a formalist's point of view, most scholarship could be viewed as wasteful: just as two objects cannot occupy the same space at once, all competing theories—save the one we ascribe to, of course—must mislead.

But judging the utility of scholarship by holding pieces of it up to the light is like inspecting a drop of water to understand waves. While individual pieces of it can, on rare occasion, be game changers, the body of scholarship has vital properties, dynamics, and effects not seen at the cellular level. As in the ocean where the drops form waves, the waves interact, and the interaction can dramatically affect the environment, scholarship shapes intellectual movements, intellectual movements clash and influence one another, and the effects can often be felt, as Olson points out, in the practice of law, in judicial attitudes and opinions, in legislation, and in society at large.[131]

Many charge that the real audience of legal scholarship is law professors.[132] To an extent, this is true. Rather than the indictment it is intended to be, though, it shows scholarship hard at work. A writing need not be quoted in an opinion, though many are, or result in the enactment of a law, though some do, to have played its role.[133] Everything from legal theory to the wording of proposed legislation is formed in the pressure-cooker of legal scholarship. A major new paradigm or small tweak in the law constitutes original thought, but original thought does not spring forth in a vacuum. It forms over time in the incubator of existing scholarship and the responses to

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> a reason to abandon legal scholarship or to disregard its very profound and continuing influence on the law . . . .

See Tamara Piety, *The Utility of Scholarship*, FACULTY LOUNGE (Feb. 6, 2013), http://www.thefacultylounge.org/2013/02/the-utility-of-scholarship.html.

131. OLSON, *supra* note 23, at 3-5.

132. *But see* Orin Kerr, *The Audiences for Legal Scholarship,* VOLOHK CONSPIRACY (Jun. 4, 2012, 2:44 PM), http://www.volokh.com/2012/06/04/the-audiences-for-legal-scholarship/ (opining that there are many audiences for legal scholarship).

133. Even the spirited debate at the Faculty Lounge website over the utility of legal scholarship, and Professor Piety's sensible point that relevance and utility are hard to measure since influential pieces can have a delayed impact and show up in the footnotes of an opinion, overlooks the "wave effect" of scholarship. *See* Piety, *supra* note 129; *see also* Martha Minow, *Archetypal Legal Scholarship: A Field Guide*, 63 J. LEGAL EDUC. 65, 65 (2013) (cataloguing a broad array of some of the most influential pieces of modern legal scholarship); Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1321 (2001).

initial ideas thrown into the fire. What we see in a groundbreaking article or book is the final twisting of the lid off the jar, not all the effort that preceded it.[134] What many dismiss as mental masturbation is actually the painstaking, foundational work in building the edifice.

Dean Emeritus Joseph Tomain observes that the scholar has the "freedom to reflect deeply on the law and wonder about the connection or connections between law and justice or about the nature and elements of a good society."[135] These reflections, however, do not occur in a void. As Professor Brian Galle explains,

> [L]aw is policy . . . .
>
> . . . .
>
> We debate with each other because that is how we move closer to a fully-informed truth. . . . Doctrine emerges at the end of this process, in spinning out the consequences of consensus theoretical positions for discrete applications. We do what judges should do, would do, if they had endless time.
>
> . . . .
>
> [T]he emerging role for legal scholarship: moving foundational ideas from elsewhere in the academy closer towards some possible real-world implementation.[136]

Which is what Kurt Lewin told us when he said, "There is nothing so practical as a good theory."[137] Dean Tomain agrees: "Without the scholarly work in law and economics or jurisprudence or behavior psychology or other disciplines, the ability to analyze and criticize rules and principles of law is made more difficult if not

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134. As Dean Erwin Chemerinsky observes: "The [ABA] task force fails to recognize the value of legal scholarship in the development of ideas." Chemerinsky, *supra* note 7.

135. Joseph P. Tomain, *ABA Task Force on the Future of Legal Education, Working Paper*, LEITER LAW SCH. (Aug. 1, 2013), http://leiterlawschool.typepad.com/leiter/2013/08/more-thoughts-on-the-aba-task-forces-working-paper-on-the-future-of-legal-education.html.

136. BDG, *Who Should Be the Audience for Legal Scholarship?*, PRAWFSBLAWG (June 16, 2011 2:47 PM), http://prawfsblawg.blogs.com/prawfsblawg/2011/06/who-should-be-the-audience-for-legal-scholarship.html. The New Haven School of Jurisprudence—which "offers a rich framework of interdisciplinary analysis of societal problems and a heuristic for inventing policy alternatives and recommending solutions that apply across cultures, throughout the planet, and over time"— is a shining example of interdisciplinary legal scholarship aimed at solving pressing problems. Siegfried Wiessner, *The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law*, 18 ASIA PAC. L. REV. 45, 45 (2010); *see* Michael W. Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575 (2007).

137. Kurt Lewin, *Problems of Research in Social Psychology*, *in* FIELD THEORY IN SOCIAL SCIENCE: SELECTED THEORETICAL PAPERS 155, 169 (Dorwin Cartwright ed., 1951).

impossible."[138]

Professor Tamanaha and others, however, indict legal scholarship for the very reason Professor Galle and Dean Tomain hold it dear. Says Tamanaha: "Much of the research produced by law professors is . . . indistinguishable from scholarship one finds in political science, history, economics, and women's studies departments, for example, except that law professors focus on law-related matters."[139] Which is precisely Professor Galle and Dean Tomain's point: it's the application of interdisciplinary thought to those "law-related matters" that advances law and justice.[140] Professor Tamanaha's criticism that "[f]aculty speakers and workshops bounce from one academic field to the next—and law professors in the audience are expected to have the competence to engage with a range of specialized fields"[141] should be music to our ears.

Professor Stephen Diamond puts American legal scholarship in global perspective, noting that "American law schools have assumed a leading role in spreading concepts like democracy, human rights and the rule of law in the post Cold War era."[142] Olson's indictment of scholarship—"[b]ad ideas in the law schools have a way of not remaining abstract. They tend to mature, if that is the right word, into bad real-life proposals[]"[143]—is, once again, high praise.[144] And tenure, of course, deserves its share of the credit.[145]

While not priceless, legal scholarship has great and irreplaceable value as an independent critique of law and the performance of the legal system. I stand by my assertion, characterized by Professor

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138. Tomain, *supra* note 135. Professor Robert Condlin puts it this way: "Scholarship is the legal system's seed corn, and destroying seed corn eventually makes an ecosystem uninhabitable." Robert Condlin, *'Practice Ready Graduates': A Millennialist Fantasy* 9 (Univ. Md. Legal Studies Research Paper No. 2013-48) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316093.

139. TAMANAHA, *supra* note 8, at 57.

140. *See supra* notes 129-30 and accompanying text.

141. TAMANAHA, *supra* note 8, at 57.

142. Stephen F. Diamond, *The Future of the American Law School or, How the "Crits" Led Brian Tamanaha Astray and His Failing Law Schools Fails* 30 (Santa Clara Univ. Sch. of Law, Working Paper No. 3-13, 2013), *available at* http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1612&context=facpubs.

143. OLSON, *supra* note 23, at 4.

144. This, as Professor Horwitz points out, is a pretty neat trick for all the daffiness. *See* Paul Horwitz, *What Ails the Law Schools?*, 111 MICH. L. REV. 955, 965 (2012).

145. *See* Diamond, *supra* note 142, at 30 ("[T]he United States has long protected and nurtured, in ways that other countries deeply envy, what we call 'intellectual capital.' Our universities are a vital part of an ecosystem that allows thousands of smart creative people the time and space to come up with new ideas, new solutions, and new problems. The legal culture as well as academic culture is a vital source of support for this effort.").

Tamanaha as "glorious language,"[146] that it would be difficult to "replace the law professor—protected by tenure and unbound to clients or special interests—to reflect on and identify abuses of power and solutions to perplexing social problems."[147]

One might have thought that saying legal scholarship often speaks on behalf of groups that cannot buy their spokespersons and sometimes confronts those who wield power would not be controversial. Nonetheless, the idea was met with skepticism by several law professors and others on law blogs. Professor Orin Kerr, for example, responded: "Who are these wielders, and how do law professors take them on? . . . [H]ow do we know if that goal is in the common interest or not?"[148]

The wielders? Elected officials, government regulators, corporate CEOs and directors, judges, agency officers, and police and prison administrators come to mind. How do we take them on? Through scholarship that addresses their roles, their practices, their abuses, and their responsibilities and constraints under law. And how do we know that doing so is in the common interest? While there is no way to prove to everyone's satisfaction that any particular piece of scholarship or intellectual movement represents the common interest, leaving the critique of law to lobbyists, political-action groups, and think tanks ensures that only the special interests of their sponsors will be put forward. As Professor Tamara Piety asks, "Do we really want to go to a system where the only funding for scholarship comes from those who want to use it [to] promote a particular agenda?"[149]

"Without the protections of tenure and its underlying value of academic freedom," warns the Executive Committee of the AALS's Section on Minority Groups, "the ability to write about potentially controversial subjects, such as racial and intersectional discrimination, civil rights, criminal justice, affirmative action, structural inequities in the tax system, and the role of corporation in public life, without fear of reprisal will be threatened."[150] And the charge we've heard from others that "[l]aw faculties [are] locked into

146. Tamanaha, *supra* note 86, at 341.

147. Silver, *supra* note 107, at 55.

148. Orin Kerr, *Law Professors and the Public Interest*, VOLOKH CONSPIRACY (Dec. 12, 2012 3:09 AM), http://www.volokh.com/2012/12/12/law-professors-and-the-public-interest/.

149. Tamara Piety, *The Utility of Scholarship—Round Two*, FACULTY LOUNGE (Feb. 13, 2013, 7:26 PM), http://www.thefacultylounge.org/2013/02/the-utility-of-scholarship-round-two.html.

150. Letter from Barry A. Currier, Managing Dir. of Accreditation and Legal Educ., to The Hon. Solomon Oliver, Jr., Council Chairperson (Feb. 4, 2014) [hereinafter Letter to the Hon. Oliver, Jr.], *available at* http://blurblawg.typepad.com/files/law-professors-letter-to-the-aba-on-tenure.pdf.

traditional positional competition over published legal scholarship"[151] and that *U.S. News*'s heavy weighting of peer assessment throws fuel on the fire[152] is a bit like decrying schools' emphasis on LSATs or bar passage just because they are used in the rankings; the problem lies in attempting to rank schools in the first place, not in the particular qualities used as yardsticks.[153]

One might wonder, as Professor Piety has, whether something else is at play here: "One gets the sense that what bothers some critics is the subject matter. . . . The usual suspects are anything having to do with feminism or critical race, or perhaps critical approaches generally."[154] Walter Olson's harsh critique of the dire effects of legal scholarship, for instance, omits law and economics and originalism from the list of dangerous ideas we spread.[155] And former AALS President Michael Olivas sees the proposed evisceration of tenure as "a plan to reconstitute the law professoriate into a contingent, part-time, untenured faculty, apparently to strengthen the hand of school administrators in the service of 'flexibility' and 'business-like efficiencies.'"[156]

The Executive Committee of the Minority Groups Section agrees with Professor Olivas. In a letter to the chair of the ABA's Council on Legal Education, the Committee members observed that the "flexibility" provided by the evisceration of tenure:

> has long been craved by some career administrators in education—it is the flexibility to rid institutions of those professors who take faculty self-governance seriously. . . . [T]he consequences of

151. Henderson, *supra* note 64.

152. Peer assessment and selectivity, the two most influential factors in the rankings, are assigned equal weight. *See* Sam Flanigan & Robert Morse, *Methodology: Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Mar. 11, 2013), http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2013/03/11/methodology-best-law-schools-rankings_print.html.

153. This, by the way, is an example of the "straw man" fallacy, in which one premise (the value of scholarship in this case) is purportedly rebutted by attacking another premise. *See* PATRICK HURLEY, A CONCISE INTRODUCTION TO LOGIC 129-30, 706 (11th ed. 2012).

154. Piety, *supra* note 149. The executive committee of the Minority Groups Section expressed the view that "the Critical Race theory literature that evolved from Derrick Bell, Richard Delgado, Mari Matsuda, Kimberle Crenshaw, and other professors would not have been possible without a system of tenure protection." Letter to the Hon. Oliver, Jr., *supra* note 150, at 2. At least one law professor seems bothered by all points of view: "The truth is that a huge amount of what law professors view as scholarship is actually slanted to promote one view or another." Jeffrey Harrison, Comment to *The Utility of Scholarship—Round Two*, FACULTY LOUNGE (Feb. 13, 2013, 12:29 PM), http://www.thefacultylounge.org/2013/02/the-utility-of-scholarship-round-two.html.

155. OLSON, *supra* note 23, at 3-5.

156. Michael A. Olivas, *Academic Freedom and Academic Duty*, AALS (Jan. 7, 2011), http://www.aals.org/services_newsletter_presMarch11.php.

> "flexibility" in the University setting is not equivalent to those in the private sector, where some see short-term maximization of shareholder profit as the primary value. Legal education . . . has prioritized core values that include academic freedom and debate, intellectual curiosity and rigor, diversity and social justice. Too often . . . "flexibility" has resulted in the exclusion of minority professors.[157]

Professor Olivas and the Executive Committee are right on the money. Without advertising its efforts to many law faculties, the American Law Deans Association, which counts most American law deans among its members, has for years intently lobbied the Department of Education, the Council of the Section on Legal Education, and the ABA Task Force on Accreditation to remove tenure from the ABA accreditation standards.[158] In a letter from the Association's Board of Directors to the Council, the Board insisted that "terms and conditions of employment have no place in the Standards and should be removed," and that "tenure and similar security provisions *not be required,*" thus allowing the deans to avoid "incurring permanent obligations to specific individuals."[159]

The Council and the Deans Association, it turns out, have important people in common. Former law dean Kent Syverud, for example, who chaired the Council when it recommended purging tenure and had served on the Council's Standards Review Committee and its Accreditation Policy Task Force,[160] had previously chaired the

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157. Letter to the Hon. Oliver, Jr., *supra* note 150, at 5.

158. Letter from the Bd. of Dir. of the Am. Law Deans Ass'n to the ABA Council on Legal Educ., 2-3 (July 21, 2008), http://apps.americanbar.org/legaled/committees/subcomm/security%20of%20position_comment_ALDA.pdf [hereinafter Letter from the Bd. of Dir., July 21, 2008]. Two years earlier, the Deans Association attempted an end run around the ABA, imploring the Department of Education to "require the ABA to revise or rescind these standards [requiring tenure] prior to granting continued recognition" of the ABA as the accrediting body for legal education. Am. Law Deans Ass'n, Public Comment on the Application of the ABA for Reaffirmation of Recognition by the Secretary of Education ("Secretary") as a Nationally Recognized Accrediting Agency in the Field of Legal Education, 2, http://www.nacua.org/documents/ALDA_Comment.pdf (last visited Dec. 1, 2013). In a letter to ABA Task Force on Accreditation, the Dean's Association said it "urges the Task Force to recommend that the Council remove from the Standards all references to terms and conditions of employment and urges that the Council do so as soon as possible." Letter from the Bd. of Dir. of the Am. Law Deans Ass'n, ALDA Board Statement: Hearing of the ABA Accreditation Task Force (Jan. 3, 2007) (letter on file with author).

159. Letter from the Bd. of Dir., July 21, 2008, *supra* note 158, at 2-3.

160. *See* ABA Section of Legal Educ. and Admissions to the Bar, Council Meeting Minutes (Aug. 9, 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/december_2013_council_open_session/2013_august_council_open_session_minutes.authcheckdam.pdf.

Deans Association.[161]

There is an irony in the deans' efforts to dump tenure and consolidate control that has repercussions for the crisis in legal education. A dean who is unprotected by tenure may well be less willing to confront the university president over the need to constrain law school tuition, class size, and overhead rates.

But the deans did not stop at attempting to gut tenure. In the same letter, they urged the Council to eliminate the standard mandating faculty co-governance in academic affairs: "[L]aw schools should be able to adopt whatever governance structure that they or their parent universities choose."[162] The removal of both standards would get those annoying faculty members, with their own ideas about sound educational policy, out of the deans' hair.[163]

In the letter it sent to the Council, the Executive Committee of the Minority Groups Section added that the Council's recent recommendation to yank tenure out of the Standards jeopardizes an important anti-discrimination protection "just as such protections are beginning to accrue increasingly to nontraditional groups," and referred to the move as a "spectacle."[164] The Committee noted that the Council lacked sufficient representation from "important demographic groups" to be sensitive to the issue, and that "the fact that the Council did not have a more diverse makeup is a process failure."[165]

The Executive Committee pointed to another omission: "The Council includes too few law teachers."[166] That is actually a bit misleading. Of the twenty-one members of the Council at the time it recommended jettisoning tenure (and at the time of this writing), there were *no* law professors outside of those who now also serve, or previously served, as the very administrators who "crave" that "flexibility" to "reconstitute the law professoriate . . . to strengthen the hand of school administrators."[167] Not one. The Council was composed of the federal judge who was the chair-elect (and who has

161. *Law School's Syverud Named President of American Law Deans Association*, DAILY REG. (Jan. 16, 2003, 10:00 AM), http://www.vanderbilt.edu/Register/jan13_03/20030116syverud.html.

162. Letter from the Bd. of Dir., July 21, 2008, *supra* note 158, at 3 n.1.

163. Funny, but in interviewing legions of dean candidates over the years, including many who had been dean before, my colleagues and I do not recall any of them speaking against tenure— their own or the faculty's—or faculty co-governance.

164. Letter to the Hon. Oliver, Jr., *supra* note 150, at 3 ("Tenure's substantive and procedural safeguards are bulwarks against discriminatory dismissals.").

165. *Id.* at 5.

166. *Id.*

167. ABA Section of Legal Educ. and Admissions to the Bar, *2013-2014 Council*, ABA, http://www.americanbar.org/groups/legal_education/about_us/leadership.html (last visited Apr. 25, 2014) [hereinafter ABA, *2013-2014 Council*]; Letter to the Hon. Oliver, Jr., *supra* note 150, at 5; Olivas, *supra* note 156.

lifetime tenure because the Founding Fathers understood the need to protect particular groups from outside pressure),[168] two state supreme court justices, no fewer than nine present or former deans and associate deans, four attorneys in private practice (one of whom had served as a law dean), one retired Army general, one former university president, one university administrator, one certified public accountant, and one law student.[169] Even so, after listening to the arguments posed in the public comment stage of the proposal to eliminate the tenure requirement, enough Council members grew concerned about the threat to academic freedom and minority representation in the academy that the Council, at least for now, reversed itself on the issue.[170]

As the efforts to remove the hand of the faculty from the law school tiller in the name of "business-like efficiencies" get revived, we would do well to heed Thorstein Veblen's warning, issued a century ago in *The Higher Learning in America: A Memorandum on the Conduct of Universities by Business Men*:

> [T]he system and order that so govern the work [of scholars] are the logical system and order of intellectual enterprise, not the mechanical or statistical systemization that goes into effect in the management of an industrial plant or the financiering of a business corporation. . . . Neither can that intellectual initiative and proclivity that goes in as the indispensable motive force in the pursuit of learning be reduced to any known terms of subordination, obedience, or authoritative direction.[171]

Scholarship plays another role, as well. Though students often scorn it as a consuming and indulgent distraction from the job of teaching, they, too, benefit. Even a laser-like focus on a narrow scholarly topic necessitates a broader exposure to, and a deeper feel for, many of the surrounding concepts that the author will soon be teaching in class. Though under the radar of students, and often professors themselves, scholarship enriches teaching. And, as the Executive Committee explained: "[C]reativity and innovation in the classroom will be stifled if a teacher is overly concerned that her job may be jeopardized if she asks her students to tackle provocative topics."[172]

This all goes to explain why scholarship and tenure are part of the job—at least presently. To criticize scholarship and the need for

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168. U.S. CONST. art III, § 1 ("The Judges . . . shall hold their Offices during good Behaviour.").

169. *See* ABA, *2013-2014 Council*, *supra* note 167.

170. Sloan, *supra* note 103.

171. THORSTEIN VEBLEN, THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN 57 (1918), *available at* http://www.ditext.com/veblen/veb3.html.

172. Letter to the Hon. Oliver, Jr., *supra* note 150, at 2.

tenure on the basis that few pieces are game-changers seems little different from discouraging voting because many of the ballots cast do not change the outcome. And tenure, like the voting rights laws we enjoyed until recently, protect the meaning and legitimacy of the process.

One might ask the defender of tenure exactly where the threats to tenure are coming from and what they consist of. There are four responses. First, the fact that there are not more overt threats than at present to a law professor's job security when she voices unpopular views in print, in the classroom, in faculty meetings, or directly to the dean, or when a clinic takes up a case that threatens powerful interests outside the school or displeases donors, alumni, or the administration is not an argument against the necessity of tenure. It is the opposite: it is proof that tenure is working. As economist Ronald Ehrenberg points out, "[I]f one wanted to single out a single academic discipline in which . . . academic freedom is absolutely essential, it certainly would be law, where many faculty members debate and write about controversial public policy issues frequently."[173] "As law professors," the Society of American Law Teachers (SALT) noted in a letter to the director of the U.S. Bureau of Prisons seeking the release of a seventy-four-year-old model prisoner with only months to live, "we are . . . afforded latitude in taking positions on issues where other legal practitioners may be constrained; however, attendant with such autonomy is an obligation to pursue justice."[174]

Second, intimidation still occurs. The cases outlined in SALT's Statement on Tenure/Security of Position, for example, are just the tip of the iceberg.[175]

Third, threats to job security come in many forms and are not the only risks deterred by tenure. The risks to academic freedom—the right (with its corresponding obligation) to speak what one sees as the truth wherever it leads them—are large and small, overt and subtle, and can contort and disfigure the *way* we perform our job, not just our ability to hang onto it. More than the ability to "speak truth to power"[176] would be lost. The truth itself—whether it's about law,

173. Ronald G. Ehrenberg, *American Law Schools in a Time of Transition*, 63 J. LEGAL EDUC. 98, 103 (2013).

174. Letter from the Soc'y of Am. Law Teachers to Charles E. Samuels, Jr., Dir., U.S. Bureau of Prisons (Nov. 23, 2013) (on file with author).

175. *See* SOC'Y OF AM. LAW TEACHERS, STATEMENT ON TENURE/SECURITY OF POSITION (2011) [hereinafter STATEMENT ON TENURE/SECURITY OF POSITION], *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/20110328_comment_security_of_position_salt.authcheckdam.pdf; Olivas, *supra* note 156.

176. STATEMENT ON TENURE/SECURITY OF POSITION, *supra* note 175, at 1.

injustice, course content, classroom discussion, or the way the school should run—would be fitted to the Procrustean Bed of what year-to-year or at-will employees can think and say. To the extent legal education is a public good and a part of that good is an unfettered critique of the system, making bedfellows of truth and self-interest will not improve the critique.

The absence of tenure would radically transform the enterprise of legal education itself. Whether or not the ABA maintained Standard 402 granting the faculty, as professional educators, co-governance with respect to academic matters,[177] the faculty's hand in academic affairs would be severed. No one could, without fear it would affect their pay or teaching assignments or continued employment, speak a word or cast a vote in a faculty meeting if it did not reflect the dean's will. Classroom rigor and meaningful grading would give way to the need to obtain favorable student evaluations to secure next year's (or next semester's) contract.

The SALT Statement summarized the need for tenure nicely:

> Faculty must have the freedom, without fear of reprisal, to choose what to research, and to communicate their conclusions, no matter what they are. They must have the freedom to choose how to teach their courses, to shape the classroom experience for their students through selection of material, choice of pedagogy, and expression of viewpoint. They must have the freedom to advocate, whether on legal issues or on behalf of clients, no matter whose interests they may cross. And they must have the freedom to fulfill their roles in the shared governance of their schools: to set academic standards for students, to evaluate the performance of their colleagues, to shape the law school through hiring, to establish and review the curriculum, and to speak their minds about the implementation of law school policies and the work of the law school administration.[178]

The gelding of the faculty would, not coincidentally, consolidate authority in the hands of the law school administration and the university, and serve the Task Force's interest in experimenting with models of legal education that are more responsive to what the bench, the bar, and the students think law school should be.[179]

Not much different from a statute beseeching people to do the right thing, one of two alternative revisions to the current standards

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177. ABA STANDARDS AND RULES OF PROCEDURE, *supra* note 89, at 31.

178. STATEMENT ON TENURE/SECURITY OF POSITION, *supra* note 175, at 4. A number of studies have found that, contrary to the contention that tenure promotes waste, it adds value. Richard W. Meyer, *A Measure of the Impact of Tenure*, 60 C. & RES. LIBR. 110, 118 (1999) (regarding tenure for librarians); *Tenure*, UPDATE (Higher Educ. Research Ctr., Nat'l Educ. Ass'n, Washington, D.C.) June 2001, at 1, 4 tbl.1.

179. *See, e.g.*, GEORGE J. STIGLER, THE INTELLECTUAL AND THE MARKETPLACE 3-9 (1984) (providing anecdotal evidence).

approved for Notice and Comment by the Standards Review Committee would replace tenure with a provision in the accreditation standards mandating that schools respect academic freedom.[180] However, "there is a difference between saying it and making it so," as SALT put it in a letter to the Committee.[181]

The removal of tenure is thus the key to the paradigm shift in which legal education is viewed as a commodity shaped by the marketplace, rather than a unit of the academy. The argument that tenure comes at the cost of being able to more easily dislodge a handful of poor performers, while true, is pre-textual. More than union busting is going on here, though. At stake is the role that professional educators get to play in shaping legal education and the critique of law that legal scholars provide.

Ironically, Professor Tamanaha—and other authors of books[182] and articles[183] and op-eds[184] about the crisis in legal education and how to overcome it—demonstrate the necessity and the power of an unfettered critique of pressing problems and the value of the shield of tenure that enables it. Without tenure, Tamanaha himself may never have penned *Failing Law Schools*, and I would not be criticizing deans and writing that there are too many law schools. But what's good for the goose is good for the gander: there is a world of other problems out there that remains to be addressed by the diverse and independent voices in the legal academy, and, as Veblen said, "A free hand is the first and abiding requisite of scholarly . . . work."[185]

In his article entitled *The Failure of Crits and Leftist Law Professors to Defend Progressive Causes*, Professor Tamanaha calls out the professors who support progressive causes for ducking the issue of the hardship their privilege visits on students.[186] While the

180. Memorandum from the Hon. Solomon Oliver, Jr., Council Chairperson and Barry A. Currier, Managing Dir. of Accreditation & Legal Educ., ABA Section of Legal Educ. & Admissions to the Bar, to Interested Persons and Entities (Sept. 6, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20130906_notice_comment_chs_1_3_4_s203b_s603d.authcheckdam.pdf.

181. STATEMENT ON TENURE/SECURITY OF POSITION, *supra* note 175, at 4.

182. *See, e.g.*, PAUL CAMPOS, DON'T GO TO LAW SCHOOL (UNLESS): A LAW PROFESSOR'S INSIDE GUIDE TO MAXIMIZING OPPORTUNITY AND MINIMIZING RISK (2012); STEVEN J. HARPER, THE LAWYER BUBBLE: A PROFESSION IN CRISIS (2013); OLSON, *supra* note 23.

183. *See, e.g.*, Ehrenberg, *supra* note 173; Harper, *supra* note 27; Henderson, *supra* note 6; Horwitz, *supra* note 144; James E. Moliterno, *The Future of Legal Education Reform*, 40 PEPP. L. REV. 423 (2013); Rhode, *supra* note 65.

184. *See, e.g.*, Coyne, *supra* note 50; Henderson, *supra* note 64; John J. Farmer, *To Practice Law, Apprentice First*, N.Y. TIMES, Feb. 18, 2013, at A17; Rodriguez & Estreicher, *supra* note 95.

185. VEBLEN, *supra* note 171, at 58.

186. Tamanaha, *supra* note 86, at 338-44.

criticism applies to anyone who ignores the plight of today's law grads, he must be careful not to paint with too broad a brush. As noted above, the failure to endorse his particular remedies[187] and the proposal of alternative solutions constitute neither denial nor the defense of privilege.

B. Transitioning to Adjuncts

Professor Tamanaha calls for deletion of the standard "written in for the benefit of faculty . . . that mandate[s] law schools to rely heavily on tenure-track full-time faculty," [188] and many others agree with him, [189] including the ABA Task Force and the Standards Review Committee of the Section on Legal Education charged with reviewing and recommending changes to the accreditation standards.[190]

Standard 403 of the ABA Standards, recognizing that full-time faculty understand the need for, and provide, academic rigor in a way that adjuncts and the practitioners under whom students would apprentice do not, requires that most courses, and particularly required courses, be taught by full-time faculty.[191] The Task Force and the Standards Review Committee, however, have recommended that Standard 403 and the present student-faculty ratio requirement be modified or rescinded.[192] Should these changes be made—and they both seem likely to under the intense pressure to deregulate—law faculties are sure to grow top heavy with adjuncts. The transition would, we are told, accomplish two ends. Adjuncts do piece work, require no insurance, office space, or travel budgets, and therefore reduce costs. But they also appeal to students in way that full-time professors often do not. Coming straight from the trenches each day they meet their class, they possess a credibility and cachet that full-time occupants of the ivory tower do not.

So what's the problem? Don't adjuncts know the rules of law and local procedure at least as well as the full-time professors removed by

187. *Id.*

188. Tamanaha, *supra* note 8, at 173.

189. *See* Weiss, *supra* note 63.

190. ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 16, 27-28.

191. ABA STANDARDS AND RULES OF PROCEDURE, *supra* note 89, at 33.

192. ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 31; *see also Standards Review Committee of the ABA Section on Legal Education Considers Student to Faculty Ratio*, PRAIRIE BLOG (July 18, 2013, 3:09 PM), http://prairielb.blogspot.com/2013/07/standards-review-committee-of-aba.html. The Standards Review Committee has recommended doing away with the student-faculty ratio under the rationale that the complex formula for factoring non-full-time faculty into the ratio was unwieldy. Karen Sloan, *ABA May Ditch Law School Student-to-Faculty Ratio Rule*, NAT'L L.J. (July 16, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202611159120&ABA_May_Ditch_Law_School_StudenttoFaculty_Ratio_Rule#ixzz2a3zcQekJ.

many years from practice? And can't they impart them equally well, and at a much lower cost?

They certainly do and can. The views of students and adjuncts notwithstanding, however, imparting law and training law students are not the same thing. In the view of one associate dean, which, incidentally, reflects my own experience over many years in the position and the opinion of the other associate deans I've spoken with on the subject of adjuncts:

> As an academic dean, it's part of my job to hire adjuncts, orient and train them, observe their classes, . . . read their evaluations, and intervene when problems arise. We have well over 100 adjunct faculty. Here's what I find. . . . [T]he teaching of most of our adjunct faculty is inferior to that of full-timers. Many of their classes resemble extended CLE courses. Often they don't really "teach" in the sense of engaging the students, diagnosing their problems, and working flexibly to respond to what they see before them. No doubt this is partly because they are too busy, partly because they lack the same professional incentives as full-timers, and partly because some of them just aren't very talented as teachers, whatever their skills as practitioners. My experience has made me a big believer in the value of full-time, professional teachers.[193]

Over the last century or so, law-school classroom instruction has been conducted in a highly particularized manner. Classes are taught via the Socratic Method, and the material is presented through the casebook method. Students, who would generally prefer to be handed lists of rules, typically are not enamored of either. And, as it turns out, neither are some law professors.[194] Indeed, one wrote that my statement that the Socratic and casebook methods are "a snug fit with the pedagogical needs of future attorneys"[195] is an unsupported "bromid[e]."[196]

It may be understandable if a professor at an elite law school does not fully appreciate the soundness of the Socratic and casebook methods as instructional tools. Many or most of the students at elite schools possess, as generally reflected by their astronomical LSATs, the steel-trap analytical abilities that must, at other schools, be more rigorously cultivated.

Three facts of life are important to recognize here. The first is that the competent practice of law where a client's rights are fully

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193. Academic Dean, *Why More Elite Schools, and Judging Adjuncts*, PRAWFSBLAWG (July 24, 2012, 11:57 AM), http://prawfsblawg.blogs.com/prawfsblawg/2012/07/judging-adjuncts.html.

194. *See* Patricia Mell, *Taking Socrates' Pulse*, 81 MICH. BAR J. 46 (2002), *available at* www.michbar.org/journal/pdf/pdf4article442.pdf.

195. Silver, *supra* note 107, at 58.

196. Paul Horwitz, *To Avoid a Pile-On . . .*, PRAWFSBLAWG (Dec. 12, 2012, 8:54 AM), http://prawfsblawg.blogs.com/prawfsblawg/2012/12/to-avoid-a-pile-on.html.

understood and vindicated is more a matter of clear, precise thought, and logical, thoughtful argumentation, than it is of rote memorization of rules. Holmes understood this when he observed that "[t]he law is the calling of thinkers."[197]

The second fact of life here is that the analytical skills and abilities of law students vary as much as their scores on the LSAT, which, for all its flaws, is still the best indicator we have in assessing those qualities.[198] And the LSAT scores of entering classes, as everyone now realizes, are in severe decline along with applications.[199] Students at elite law schools are still drawn from those performing in the very top percentiles on the test, usually the top five and ten percent.[200] With applications in free fall, it is the entering classes at the remaining schools that are experiencing the brunt of the decline, with many at the low end of the pecking order dipping down into the 130s to fill their classes.[201] An LSAT of 140

197. OLIVER WENDELL HOLMES, JR., *The Profession of the Law, in* COLLECTED LEGAL PAPERS 29 (1920), *reprinted in* THE OXFORD DICTIONARY OF AMERICAN QUOTATIONS 372 (Hugh Rawson & Margaret Miner eds., rev. ed. 2006).

198. A recent LSAC-commissioned report on the predictive validity of the LSAT echoed what law professors on their schools' admissions committees understand:

> Results reported in the current study indicate that LSAT scores alone tend to be a better predictor of law school performance compared to UGPA alone. The combination of LSAT scores and UGPA, however, continues to be superior to either predictor variable alone for predicting FYA. These results, combined with similar results from previous studies, support the validity of the LSAT for use in the law school admission process.

LISA ANTHONY STILWELL, SUSAN P. DALESSANDRO & LYNDA M. REESE, LSAC, PREDICTIVE VALIDITY OF THE LSAT: A NATIONAL SUMMARY OF THE 2009 AND 2010 LSAT CORRELATION STUDIES 1 (2011).

199. Debra Cassens Weiss, *Law Schools Could Be Admitting 80 Percent of Their Applicants This Fall, Statistics Suggest*, A.B.A. J. (Aug. 9, 2012, 7:45 AM), http://www.abajournal.com/news/article/law_schools_could_be_admitting_80_percent_of_their_applicants_this_fall_sta ("[L]aw schools should expect further declines in enrollment and further erosion of test scores and grade point averages . . . ."). In October of 2013, LSAT takers dropped by eleven percent from the year before, the fourth straight year and the thirteenth straight administration in which the number of test takers has declined. Overall since 2009, the number has fallen off by forty-five percent. Karen Sloan, *Big Slump for LSAT*, NAT'L L.J. (Nov. 4, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202626211107&Big_Slump_for_LSAT.

200. *See* Jordan Weissman, *The Wrong People Have Stopped Applying to Law School*, ATLANTIC (Apr. 10, 2012, 10:37 AM), http://www.theatlantic.com/business/archive/2012/04/the-wrong-people-have-stopped-applying-to-law-school/255685/.

201. *See, e.g.*, *Texas Southern University—Thurgood Marshall School of Law*, LSAC, https://officialguide.lsac.org/Release/SchoolsABAData/SchoolPage/SchoolPage.aspx?sid=149 (In 2013, Thurgood Marshall School of Law admitted sixteen students who scored in the 130 range on the LSAT).

represents the bottom fourteenth percentile of the test takers,[202] not all of whom score high enough to bother applying to law school. Many schools reported a drop of two points or more in LSATs of students in the twenty-fifth and seventy-fifth percentiles of the 2012 entering class,[203] a similar decline in 2013,[204] and, with applications continuing to nosedive, a similar drop is anticipated for 2014.

Another disturbing aspect of the fall-off in applicants is that it is most pronounced at the higher levels of LSAT performance, thus exacerbating the dip in median LSAT scores at all but the highest ranking schools. For example, in 2012, there was a 20.7 percent decline in applicants with LSATs between 170-174 and an 18.5 percent decline in applicants with scores of 165-169, but only a 4.3 percent drop in applicants scoring 140 or less and a 6.2 percent decline in those with a 140-144.[205]

When one adds to the decline in LSATs the general failure of primary and secondary education to develop strong reading, writing, and critical-reasoning skills,[206] it is clear that law schools—at least those below the top tier—have a desperate need for pedagogy that effectively inculcates critical-thinking skills. It is time to focus *more* on thinking, not less. Even colleges have gotten into the act, requiring critical-thinking courses (also known as "Baby Logic")[207] in light of studies showing that many graduates are unable "to sift fact from opinion, make a clear written argument or objectively review conflicting reports of a situation or event . . . without being swayed by emotional testimony and political spin."[208]

The third fact of life that must be taken into account in fashioning the contours of legal education is that the Socratic and casebook methods are, each in their own way, indispensable tools for developing legal reasoning and critical thinking skills. It is their utility in these tasks, rather than blind tradition, that explains why

202. *LSAT Score Conversion,* ALPHASCORE, http://www.alphascore.com/resources/lsat-score-conversion/ (last visited Feb. 7, 2014).

203. *See* U.S. NEWS & WORLD REP., BEST GRAD SCHOOLS 76-80 (Anne McGrath, ed., 2014).

204. *See Best Law Schools*, U.S. NEWS & WORLD REP., http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings?int=992008 (last visited May 19, 2014).

205. Weissman*, supra* note 200.

206. *See* Richard Arum & Josipa Roksa, ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES 34-35 (2011) ("Commitment to [critical reasoning] skills appears more as a matter of principle than practice.").

207. Mark Bauerlein, *Critical Thinking in the Curriculum—Donald Lazere*, CHRON. OF HIGHER ED. (July 7, 2011), http://chronicle.com/blogs/brainstorm/critical-thinking-in-the-curriculum-donald-lazere/37094.

208. Sarah Rimer, *Study: Many College Students Not Learning to Think Critically*, MCCLATCHYDC (Jan. 18, 2011), http://www.mcclatchydc.com/2011/01/18/106949/study-many-college-students-not.html#.Ue_N6mTEqpo.

they have been staples of legal education for well over a century.

Despite the sense of law students that the Socratic Method is a form of hazing,[209] a mental rack upon which students are publicly drawn in a rite of passage, no better technique has been offered to help foster clear, precise, and logical thought, or to refine what we loosely call reason.[210] Properly conducted, Socratic discourse is an engaging and non-threatening method of active learning that, over the course of a law school career, promotes the important lawyering skills of preparation and speaking effectively on one's feet, and helps disabuse students of the illusion that law is as cut-and-dried as their commercial outlines suggest.

Socrates accomplished at least two things with his students in the marketplace in Athens that he could not have by lecturing. Upon soliciting a general statement or principle about a subject, be it truth or justice or wisdom, he would expose through his subsequent questions the gaps in logic, unproved assumptions, and contradictions in his students' answers.[211] In doing so, he taught a broader lesson about the need to critically assess basic assumptions, the structure of non-porous arguments, the uncertainty inherent in rules and principles,[212] and the elements of reason that lecturing simply does not. It is also fair to assume that his students—who often did not realize they *were* his students until after a dialogue had

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209. *See, e.g.*, THE PAPER CHASE (Twentieth Century Fox 1973) (portraying the Socratic Method in the classic scene of protagonist James Hart's first classroom encounter with the merciless Professor Kingsfield).

210. As Professor Elizabeth Garrett describes in an article posted on the website of the University of Chicago:

> Socratic discourse requires participants to articulate, develop and defend positions that may at first be imperfectly defined intuitions. . . . The law will change over the course of our lifetimes, and the problems we confront will vary tremendously. Law professors cannot provide students with certain answers, but we can help develop reasoning skills that lawyers can apply, regardless of the legal question.

Elizabeth Garrett, *The Socratic Method (Green Bag Article)*, Univ. Chi. L. Sch. (last visited May 19, 2014), http://www.law.uchicago.edu/socrates/soc_article.html (quoting Elizabeth Garrett, *Becoming Lawyers: The Role of the Socratic Method in Modern Law School*, 1 GREEN BAG 2D, 199 (1998)) (reviewing LANI GUINIER ET. AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE (1997)), *available at* http://www.greenbag.org/v1n2/v1n2_review_garrett.pdf.

211. *See, e.g.*, DONALD PALMER, DOES THE CENTER HOLD? AN INTRODUCTION TO WESTERN PHILOSOPHY 28-31 (2010).

212. As Professor Sherman Clark observes:

> The Socratic questioning and answering central to the law school classroom aims to overcome the tendency to rely on easy but inadequate answers to hard but unavoidable questions. It requires us to become comfortable with, or at least capable of, confronting uncertainty. . . . This capacity is essential to the study and practice of law, because important legal questions often do not have clear and easy answers.

Sherman J. Clark, *Law School as Liberal Education*, 63 J. LEG. EDUC. 235, 241 (2013).

concluded[213]— were a lot more likely to remember the material they had discussed.

The University of Chicago Law School's website tells us that the Socratic Method is not a mere bromide there:

> We are teaching reasoning skills, and the process of discovering a right answer is often more important than the answer itself. Mistakes—or perhaps, more accurately, tentative steps toward a solution that lead us down unavailing but illuminating paths—are part of learning. . . . [T]he Socratic Method is an important part of modern law teaching. . . . [O]ne reason the University of Chicago is known as the place that trains the finest lawyers in America is our faculty's long-standing and continuing commitment to this challenging method of teaching the law.[214]

The principal problem with apprenticeships and adjuncts, and one that often occurs with externships, is that full-time faculty are normally adept at and committed to Socratic instruction and academic rigor in the development of legal-reasoning and critical-thinking skills, but adjuncts who rush in from practice to teach a class here and there and practitioners who would supervise apprentices are not.[215] As one observer notes: "[T]here is an art to teaching well and it is not an art that all possess or can easily learn, particularly after a 60-hour week at the firm."[216]

Adjuncts have an important place in legal education, especially in highly specialized areas of law, but there are drawbacks. Too often, they regale students with endless war stories,[217] as student evaluations often reflect,[218] and, as many associate deans will attest, tend to grade high.[219] The latter trait is not lost on students, who

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213. PALMER, *supra* note 211, at 30.

214. Garrett, *supra* note 210.

215. Michael L. Seigel, *The Effective Use of War Stories in Teaching Evidence*, 50 ST. LOUIS U. L.J. 1191, 1191-92 (2006).

216. Diamond, *supra* note 142, at 15.

217. Seigel, *supra* note 215, at 1191 ("The main worry about hiring an experienced attorney as an adjunct professor is the fear that the adjunct will rely too heavily on 'war stories' to teach."). As one satisfied student reported in *The Best 168 Law Schools*, many of the professors are "real, live working attorneys with loads of hilarious horror stories." ERIC OWENS ET AL., THE BEST 168 LAW SCHOOLS 346 (2013).

218. As one professor who has supervised adjuncts explains, "I tell the adjuncts that they can tell war stories if they have pedagogic value. But then, somewhat facetiously, I tell them that if their evaluations say that the course was mostly war stories, they will be fired and probably so will I." Tina Stark, *The Role of Adjuncts in Transactional Skills Education*, CONGLOMERATE (Aug. 11, 2008), http://www.theconglomerate.org/2008/08/the-role-of-adj.html.

219. Studies on the university level reflect the tendency of adjuncts to grade higher than their full-time peers, and favor the "leniency" hypothesis to explain the phenomenon:

> [I]nstructors who have more generous grading standards will in turn receive more positive student evaluations. . . . [S]tudent evaluations are weighed

must sign up in sufficient numbers for their courses in order for the adjunct to get paid and assigned future courses.

As Professor Michael Seigel explains,

> [L]aw school administrators do not consider a class consisting primarily of the reminiscences of a successful lawyer about "the glory days" to be a worthwhile pedagogical experience. . . . [E]ffective teaching requires students to be engaged as active learners. . . . Listening to story after story—some perhaps not even particularly relevant to the topic at hand—is the polar opposite of active learning. Even though a practitioner might not initially decide to teach through the "war story method," she might be tempted to do so after realizing the difficulty of the Socratic method. Especially for a new teacher, anything resembling Socratic teaching requires many hours of preparation for each hour of class, along with significant pedagogical skill in the classroom itself. Storytelling is so much easier. And besides, she was hired to share her accumulated wisdom and knowledge with the students, was she not?[220]

The cultivation of analytical skills is not just a central component of a legal education; by and large, it *is* legal education. And with plummeting applications and many schools now perilously close to open admissions, challenging instruction is more vital than ever.

A faculty of primarily adjuncts poses another problem. Professor Tamanaha and a number of others have criticized law faculty for being largely unavailable outside class to students experiencing difficulty with the material they are covering, for consultation on seminar papers, or for academic or career counseling.[221] At one of his former schools, he related that "[m]any faculty members were hardly present in the building, coming in only to teach, leaving immediately thereafter. When they did stay on the premises, their office doors frequently were closed – an implicit 'don't bother me' sign to

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> more heavily in adjunct faculty performance evaluations than they are in ladder faculty performance evaluations. Faculty performance reviews include indicators of quality of instructions, which many institutions measure through student evaluations. This creates an incentive for faculty to deliver classes in a way that yields favorable evaluations, such as using easy grading standards. Unlike ladder faculty who are evaluated on research output, service, and teaching, institutions gauge adjunct faculty solely on instructional activities. Therefore, the extent to which student evaluations influence faculty employment is far more pronounced among adjunct faculty.

Andrew Litt & Stephen Perez, The Work of the University: the Adjunct Phenomenon 43-45 (unpublished manuscript) (citation omitted), *available at* http://www.academia.edu/2100902/The_Work_of_the_University_The_Adjunct_Phenomenon (last visited Feb. 7, 2014).

220. Seigel, *supra* note 215.

221. *See, e.g.*, TAMANAHA, *supra* note 8, at 2. (noting that faculty members had become "so busy that their professor[ship] position had become their side job").

students."[222]

While the criticism may hold true at some law schools, especially elite ones, full-time faculty at non-elite law schools, where students frequently require more help with conceptually difficult material, generally spend long hours meeting individually with students outside class. And, moreover, many of them genuinely enjoy it.[223] While there are exceptions, the stereotype of the self-absorbed prima donna who is too busy or special to meet with students is grossly inaccurate,[224] as anonymous student evaluations and the candid feedback students provide to the national publications that query them on such matters reveal.[225]

Perusing *The Best 168 Law Schools* for student assessments of faculty availability and helpfulness outside of class gives the strong impression that most full-time professors at the vast majority of law schools are accessible and genuinely concerned. Comments that

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222. *Id.*

223. Professor Olivas agrees: "Professor Tamanaha resorts to anecdotal stereotypes of faculty self-interest and selfishness that do not ring true, and do not square with my own experiences of service on the ABA Council, the AALS Executive Committee, the Association's Membership Review Committee, and eighteen site inspections." Michael A. Olivas, *Ask Not for Whom the Law School Bell Tolls: Professor Tamanaha, Failing Law Schools, and (Mis)Diagnosing the Problem*, 41 WASH. U. J. L. & POL'Y. 101, 130 (2013).

224. The ABA Task Force, it is interesting to note, actually has a slightly different, but equally unflattering, take on full-time law faculty, characterizing them as "people who have sought out their positions because of a desire to avoid a market- and change-driven environment." ABA, Task Force, *supra* note 1, at 15. That finding ruffled Professor Brian Leiter's feathers: "It is a bit scandalous for an ABA Task Force to make a fact-free pronouncement about the motives of people who go into law teaching." Brian Leiter, *The ABA Task Force Working Paper (WP) on "the Future of Legal Education," Part II,* BRIAN LEITER'S L. SCH. REP. (Aug. 7, 2013, 8:14 AM), http://leiterlawschool.typepad.com/leiter/2013/08/the-aba-task-force-working-paper-on-the-future-of-legal-education-part-ii.html. And, as much as we might vary when we first sign on, we will, according to the Task Force, all fit the mold pretty soon: "Law faculty are socialized by each other and new faculty absorb beliefs, practices, and expectations from more senior faculty." ABA, Task Force, *supra* note 1, at 14. While I am not sure how far *ad hominem* bullying advances the debate on the proper contours of legal education, as Professor Sherrilyn Ifill has remarked, "[I]t's always good fun to disparage members of the academy as pampered and isolated egoists." Danielle Citron, *Sherrilyn Ifill on What the Chief Justice Should Read on Summer Vacation*, CONCURRING OPINIONS (July 1, 2011, 4:06 PM), http://www.concurringopinions.com/archives/2011/07/sherrilyn-ifill-on-what-the-chief-justice-should-read-on-summer-vacation.html. Not to worry. The Task Force knows what to do about these character flaws: "A law school's successful embrace of solutions . . . requires a reorientation of attitudes." ABA, Task Force, *supra* note 1, at 15. I suppose the proper response is the one given by Sylvester Stallone in the forgettable film *Demolition Man* after he is revived in the twenty-second century and warned that "[y]our fascination with the twentieth century is affecting your judgment." "Thank you for the attitude adjustment," he responds. DEMOLITION MAN (Warner Bros. 1993).

225. *See, e.g.*, OWENS ET AL., *supra* note 217.

professors are "very accessible and happy to help"[226] and "have open-door policies and are available for discussions with students about class, a job, or just life in general"[227] are highly representative, with only a handful of reports that "not all of them are focused on students"[228] or "[w]ord on the faculty is mixed."[229]

The most negative comments in *The Best 168 Law Schools* from students about the availability of their professors are reserved for adjuncts. For example: "Some of the evening professors are practicing attorneys during the day and are not as accessible or as devoted as the full-time day professors,"[230] and, "Meeting with adjunct professors without an office on campus can be so difficult to arrange, it's headache-inducing."[231]

In a regime of adjuncts busy with their successful practices, instruction outside the classroom would be a thing of the past. Could the full-time faculty at many law schools do better than we do now? Certainly. Would adjuncts represent a serious decline in the extent and quality of the instruction students get inside and outside of class? That is equally certain.

And there is another catch with adjuncts. Large chunks of a full-time professor's time and energy go into the business of making the law school run. Cumulatively, the full-time faculty work on admissions, curriculum, academic standing, academic support, student discipline, technology, strategic planning, student organizations, university committees, and the like. In painful detail, they oversee the academic program in endless faculty and committee meetings. Adjuncts, by definition, possess neither the time nor the expertise to perform the committee work, attend the steady stream of meetings, and make the calls on sensitive educational issues necessary to make the school run smoothly and effectively and ensure high quality education.

So the final catch is that, to whatever extent the full-time faculty is slashed, these functions would have to be performed by a team of additional administrators who lack sensitivity to curricular and pedagogical issues and whose salaries eat into the savings from a predominantly adjunct faculty. When Professor Olivas said that "[i]ncreasing the number and percentage of contingent and transitory faculty will diminish the overall quality of the enterprise,"[232] he was

226. *Id.* at 66 (discussing Arizona State University).

227. *Id.* at 286 (discussing University of Illinois).

228. *Id.* at 352 (discussing University of Texas).

229. *Id.* at 394 (discussing Yale University). One might note that the editors of *The Princeton Review* would seem to have little interest in shading the perception about a school's faculty one way or the other.

230. *Id.* at 216 (discussing Southern University).

231. *Id.* at 220 (discussing St. John's University).

232. Olivas, *supra* note 223, at 125-26.

significantly understating the matter.[233]

A faculty consisting of adjuncts would, of course, have its own appeal to the administration: adjuncts do not vote on hiring or academic policy, reducing the number of voices that might speak up against the wishes of the dean with respect to policy.

C. Replacing the Third Year with Apprenticeship

A number of commentators have urged substituting a one-year apprenticeship with a local practitioner for the third year of law school. "[S]tudents would work as lawyers at an office earning basic wages," Professor Tamanaha explains, thereby "reviving a form of apprenticeship."[234] Apprenticeships, it is argued, would kill two birds with one stone: student debt would be cut by a third, and students would get the practical, hands-on training that is said to be lacking in legal education today.[235]

Apprenticeship is not, *per se*, a dirty word. Apprenticeship *after* a rigorous, well-rounded legal education, like internship and residency after four years of medical school or the Canadian practice of "articling" [236]—a year of apprenticeship following three years of law school—is a good idea. Post-graduate apprenticeship would ease many grads into the profession, providing training and remuneration along the way. Indeed, a group of twelve schools is experimenting with a form of post-graduate apprenticeships.[237]

As a *substitute* for the third-year of law school, though, apprenticeships—standard-less, text-less, unregulated, and without Socratic instruction—would be a pedagogical nightmare. One of the

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233. Or, as Dean Chemerinsky put it, "Although adjunct faculty are important in supplementing the curriculum, they cannot substitute for full-time faculty in their availability to students or their expertise as teachers." Chemerinsky, *supra* note 7.

234. TAMANAHA, *supra* note 8, at 175.

235. John Caher, *ABA Approves Resolution on 'Practice Ready' Legal Education*, N.Y. L.J. (Aug. 15, 2011), http://www.alm.law.com/jsp/article.jsp?id=1202509595910&slreturn=20130630110700; John Caher, *N.Y. State Bar Asks ABA to Support 'Practice Ready' Law School Education*, LAW.COM (Aug. 5, 2011), http://www.law.com/jsp/article.jsp?id=1202509595910 [hereinafter *N.Y. State Bar Asks*]; *see also* ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 103 (1992) (also known as the *McCrate Report*).

236. *See Articling*, N.S. BARRISTERS' SOC'Y, http://nsbs.org/become_a_lawyer/articling (last visited Feb. 7, 2014).

237. They include Boston College, California-Hastings, Colorado, Denver, Emory, Georgetown, Northeastern, Northwestern, Ohio State, University of the Pacific, Southern California, and Vanderbilt. *See* Karen Sloan, *They're Learning the Law Through Apprenticeships*, NAT'L L.J. (Feb. 24, 2014), http://www.nationallawjournal.com/law-school-news/id=1202644115326/Theyre+Learning+the+Law+Through+Apprenticeships%3Fmcode=1202615496822&curindex=6.

many drawbacks of apprenticeships would be the absence of the casebook method, where students plod through the philosophical thicket of law making, legal reasoning, and policy analysis, which also plays an important role in the honing of lawyering skills.

The casebook method, Langdell's invention that now undergirds graduate education in business and medicine as well,[238] is not warmly regarded by students, who would generally prefer an abstract presentation of hard and fast rules. It has also come under attack in the press, but for roughly the opposite reason. A *New York Times* editorial, conflating Langdell's reputation as a formalist[239] with the nature and utility of the casebook method, complained that the study of law through appellate cases "treated law as a form of science and as a source of truth."[240]

In fact, the casebook method, used in conjunction with the Socratic Method, demonstrates the very point that law is not science, that rules break down in their application to complex fact patterns, that ideology and perspective shape facts,[241] and that human experience is a critical element of legal reasoning. And it does all this in a way that makes law come alive. Socratic discourse and the case method are not, of course, the only roads that lead to Rome—there is the problem method, simulation, and group projects, to name a few—but they are the main highways.

To those who dismiss the casebook method as passé or see the recognition of its utility as a bromide, I offer the following highly relevant (if extended) account of the first year Langdell employed it, in conjunction with the Socratic Method, at Harvard:

> The introduction by Langdell of a new teaching method had no immediate effect on his colleagues who . . . [a]ssigned portions of a text [that] would to be read in class, with the instructor making

238. *See* David Garvin, *Making the Case: Professional Education for the World of Practice*, HARVARD MAG. (Sept.-Oct. 2003), *available at* http://harvardmagazine.com/2003/09/making-the-case-html.

239. See Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1, 37 (1980) for a discussion of Langdell's method as being one that questions old formalities.

240. Editorial, *Legal Education Reform*, N.Y. TIMES, Nov. 25, 2011, at A18. Some academics have criticized the casebook method for its failure to treat the "human, subjective side of conflicts." Gary D. Finley, Note, *Langdell and the Leviathan: Improving the First-Year Law School Curriculum by Incorporating Moby-Dick*, 97 CORNELL L. REV. 159, 189 (2011).

241. *See, e.g.*, Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 600-16 (1981) (describing, *inter alia*, how the expansion and contraction of the window in time within which an event is considered to have occurred can decisively affect fact finding). Kelman's insights on "time-framing"—which can apply equally to perspectival shifts in distance, specificity of detail, and so on—are important tools to provide future lawyers. Jay Sterling Silver, *On the Appropriate Breadth of Coverage*, 19 L. TCHR. 24 (2012).

any comments or citing any cases that he felt illuminated the subject. A student might occasionally ask a question or, even more rarely, *mirabile dictu*, the whole class might engage in a general discussion. It was accepted that the text writer had mastered the cases and had found out the true rules of law relative there to. This was the expected instructional method when the goal of going to law school was the accumulation of the largest number of legal principles that could be remembered.

Langdell's first Contracts students were provided with the advance sheets of his casebook. When Langdell began the class by questioning students about the cases, most of the students responded that they were not prepared . . . . The nonplussed students felt they had come to be taught the law, and not to teach the professor. Attendance in his classes fell off as the differences in the two systems became clear. The lecture-textbook method depended on passive absorption and acquiescence by the student who was presumably satisfied with hearing the rule read and accepting the conclusion of someone else. This was easy or, at least, made a minimal demand upon the student. Langdell's system was harder, since it stressed an active search and inquiry and required work and discussion outside class. Langdell attempted to foster an excitement in earnest inquiry, and encouraged accurate thought and expression. In a real sense, his method suggested an underlying respect for the law student as both scholar and junior colleague.

Attendance at Langdell's sessions fell off to as few as seven or eight students. . . . They simply did not recognize the value of the new method, since they faced a job market that valued practical experience and knowledge of the principles of law as reflected in treatises and books of maxims. . . . .

The seven or eight faithful students who attended Langdell's classes became set off from the rest of the student body. They used the library heavily, constantly discussed law among themselves, asked questions in other courses, and even had the temerity to criticize the decisions of judges. This group formed a new club, the Pow Wow, which met weekly and held discussions and moot courts. The success of the members of the Pow Wow and their enthusiasm finally infected at least some of the other members of their class. By the middle of the year attendance at Langdell's course picked up, and those who had missed classes sought to copy the notes of those who had attended.

Predictably, members of the bar feared that the innovations at Harvard of selecting non-judges as professors, coupled with Langdell's case method, would doom the law school. In fact, enrollment did dip for a short time. This fear so motivated some members of the Boston bar that they caused the founding of the Boston University Law School to continue the old lecture-textbook method. Notwithstanding these alarms, two results of the innovations of Langdell insured the future of the law school. The

> case method caught hold with the students and stimulated them in their academic endeavors. Secondly, graduates of Langdell's method proved to be very successful attorneys in practice. Langdell's method was not accepted totally for many years, least of all by the legal educators who were generally slow to abandon the lecture as the prime teaching tool, but the bar recognized the skill and abilities of his students.[242]

If the instructor chooses to inject nothing more into classroom discussion than exists within the four corners of a narrow holding, then criticisms of the casebook method, like those in *The New York Times*, would hold true. The ratiocination of the holding, however, is merely the jumping off point for a fuller discussion of the opinion, including its social and political context, human consequences, hidden assumptions, and ideological implications. Lawyers are not trained in law and cannot effectively advocate for particular interpretations of it, and outcomes under it, until they first come to understand its ingredients.

Unaware of, or unconcerned with, the pedagogical costs of apprenticeship,[243] some of its proponents have pointed out that Lincoln learned to lawyer this way.[244] "Just remember," one law professor tells us, "Abraham Lincoln did not go to law school. And you . . . are not a better lawyer than Abraham Lincoln."[245] Perhaps wistful for the simplicity of an earlier age, the advocates of apprenticeship would return a good portion of the study of law to the dark days of frontier justice.

D. Two-Year Programs

Another popular call for reform is to lop off the third year of law study entirely. A panel at New York University recently discussed the idea,[246] which has been around for a while. Back in 1970, Professor Paul Carrington oversaw an AALS report concluding that the final year is, in essence, a waste of time.[247] A parade of

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242. Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI.-KENT L. REV. 429, 450-52 (1981) (internal citations and quotation marks omitted).

243. *See* Stephen Bainbridge, *Instead of Cutting Law School to Two Years, Why Not Up It to Four Undergraduate Years?*, PROFESSORBAINBRIDGE.COM (Feb. 2, 2013, 9:52 PM), http://www.professorbainbridge.com/professorbainbridgecom/2013/02/instead-of-cutting-law-school-to-two-years-why-not-up-it-to-four-undergraduate-years.html.

244. Walter Sobchak, Comment to *A Blueprint for Change*, LEGAL WHITEBOARD (Jan. 22, 2013, 4:30 PM), http://lawprofessors.typepad.com/legalwhiteboard/2013/01/a-blueprint-for-change.html.

245. *Id.*

246. *The Two-Year Itch*, ECONOMIST, Feb. 2, 2013, at 52, *available at* http://www.economist.com/news/business/21571213-could-law-schools-be-ready-change-their-ways-two-year-itch.

247. Weiss, *supra* note 63.

advocates,[248] including President Obama himself,[249] and at least one recent study[250] based (for some reason) on student perceptions of the value of the third year, have echoed the sentiment.

While eliminating a third of legal education would cut sharply into graduate debt, it would leave untouched the problem underlying graduate unemployment. Two-year programs spew just as many graduates into the bloated job market as three-year programs; they just do it a year sooner. Professor Tamanaha understands this, conceding that a move to two-year schools "raises the specter of increasing the flow of lawyers onto an already oversupplied market."[251]

One third less course coverage and clinical training represents a huge and unacceptable sacrifice, and, as discussed in Part III, there is a pedagogically sound way of trimming as much or more of the cost of law school.[252] There are three principal problems with a two-year program beyond its effect on unemployment.

First, most state bar exams test on subjects that take two full years of study.[253] Students—who, with plummeting LSATs, already

248. *See, e.g.*, Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School,* 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599 (2012); Rodriguez & Estreicher, *supra* note 95.

249. Peter Lattman, *Obama Says Law School Should Be 2, Not 3, Years*, N.Y. TIMES, Aug. 24, 2013, at B3.

250. *See* Mitu Gulati, Richard Sander & Robert Sockloskie, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, *in* 2 NYU SELECTED ESSAYS ON LABOR AND EMPLOYMENT LAW 157, 168 (2002).

251. TAMANAHA, *supra* note 8, at 174.

252. *See infra* Part III.A.

253. California, which is representative of other states, tests on: Contracts, Property, Torts, Civil Procedure, Criminal Law, Criminal Procedure, Constitutional Law, Evidence, Professional Responsibility, Business Associations, Wills & Trusts, Sales, Secured Transactions, Family Law, and Remedies. STATE BAR OF CAL., SCOPE OF THE CALIFORNIA BAR EXAMINATION 1 (2013). Eight of the courses in that group that fall outside the traditional first-year lineup (i.e., Criminal Procedure, Evidence, Professional Responsibility, Business Associations, Wills & Trusts, Secured Transactions, Family Law, and Remedies) are typically allocated three to four credits each in the law school curriculum, which comes to a total of about twenty-four, and represent just about a full second year of study. *See, e.g.*, *Advanced Schedule*, UCLA SCH. OF LAW, https://curriculum.law.ucla.edu/Guide/ScheduleAdvanced (last visited May 19, 2014). Constitutional Law, at many schools, is a two-semester, second-year course, which would bring the total at those schools up to thirty. *See, e.g.*, *Juris Doctor Degree Requirements*, U. MINN. L., http://www.law.umn.edu/current/degreerequirements.html (last visited May 19, 2014). New York, another very typical jurisdiction as far as the subjects eligible for coverage, tests on the same array of subjects, except it includes Conflict of Laws and New York Constitutional Law in place of Remedies. *See* N.Y. STATE BD. OF LAW EXAM'RS, CONTENT OUTLINE FOR THE NEW YORK STATE BAR EXAMINATION 10, 11 (2013). Texas, while it covers neither Remedies nor Conflicts, requires Income Tax and Bankruptcy. *See* TEX. BD. OF BAR EXAM'RS, TEXAS BAR EXAMINATION SUBJECTS app. A (2013).

do poorly on standardized tests—would be presented with a Sophie's Choice: take only bar tested courses and forgo electives in any area of concentration or which may kindle interest in a particular career path, [254] or enroll in a handful of electives and increase the chance they'll fail the bar exam.

The ABA Task Force has recommended that the ABA loosen the three-year requirement and that states reduce the number of subjects tested on their bar exams.[255] The Task Force's statement that it "does not take the position that there is a universal core or minimum set of core competences that every graduate of every law school must have"[256] is at odds with the independent judgment of fifty jurisdictions, and, taken together, its recommendations underscore the fact that three years is not enough to learn what the state supreme courts feel all lawyers need to know. At the same time the Task Force would permit the abbreviation of law study and reduce bar coverage to save money, it calls on law schools to expand expensive, labor-intensive clinical instruction: "The balance between doctrinal instruction and focused preparation for the delivery of legal services needs to shift still further toward developing the competencies and professionalism required of people who will deliver services to clients."[257] The task force thus performs a neat trick with respect to the existence of core competencies: now you see them, now you don't.

Competent lawyering, however, requires that a practitioner in one area of the law be familiar with general concepts in many areas. Whatever one's area of expertise—from mergers to divorce to criminal defense—the specialist draws frequently on concepts

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Illinois covers the same national courses as New York, except for Tax, but adds Administrative Law, Commercial Paper, Federal Taxation, and Equity to the mix, for a total of twelve second year courses, excluding Constitutional Law, amounting to roughly thirty-six credits. *See Illinois Bar Exam*, BAREXAM.INFO, http://barexam.info/state-bar-info/illinois-bar-exam/ (last visited May 19, 2014).

254. As long-time Dean Doug Ray told one entering class:

> Law school is a transforming experience and you may be best suited for a career that is different from what you have in mind now. Very often, the most shy of people turn into outstanding courtroom litigators. Those who come in wanting to be trial lawyers often end up finding the satisfactions of helping people with immigration, tax, or estate planning. Don't close the door to opportunities.

Douglas Ray, Dean, St. Thomas Univ. Sch. of Law, Remarks to First Year Class (Aug. 14, 2013) (email excerpt from speech on file with author).

255. *See* ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 33.

256. ABA, Task Force, *supra* note 1, at 25.

257. ABA, Task Force on the Future of Legal Educ., Working Paper 2-3 (Sept. 20, 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/task_force_on_legaleducation_draft_report_september2013.authcheckdam.pdf.

learned outside of her particular practice. And especially in the beginning of their careers, lawyers change jobs and specialties, with one study finding new attorneys average three jobs in their first seven years.[258] And, of course, there are generalists—by choice or necessity—who, by definition, must draw on a broad range of subjects. Chopping the length of law school and the subjects tested on the bar is not much better than requiring medical students to learn the anatomy of either the top or bottom half of the body. Law, like anatomy, is interconnected, and lawyers have and exercise the freedom to change specialties.

Cutting the final third of the program would also come at the expense of the vital and recent progress in law school curriculum. A robust one or two year legal-writing program, in-house clinics, moot court and appellate advocacy requirements, and the requirement of a well-researched and written seminar paper would, to the substantial detriment to the average law student, be squeezed out of the law school experience. Eliminating instruction in effective writing at a time when students are severely and increasingly challenged in this regard[259] and cutting back on clinical education in the face of twenty years of pressure to produce more practice-ready attorneys[260] is foolhardy. As Professor Olivas put it, "If we weren't doing it well enough in three years . . . how are we supposed to do it in two?"[261] Professor Jeremy Telman agrees: "I think many of our law students need more schooling, not less, to help them to develop cognitive abilities that they should have worked on in college but didn't."[262]

And where does it end? As Professor Darryl Wilson says about the proposed reduction to two years: "I foresee the natural followup being that the economic rationale justifies a later rejiggering to save

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258. *See* RONIT DINOVITZER ET AL., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 57 tbl. 7.2 (Am. Bar Found. & NALP Found. for Law Career Res. & Educ. 2009).

259. Azadeh Alai, *Why Can't College Students Write Anymore,* PSYCHOL. TODAY (Feb. 21, 2014), http://www.psychologytoday.com/blog/the-first-impression/201402/why-can-t-college-students-write-anymore.

260. *See N.Y. State Bar Asks*, *supra* note 235.

261. Kenneth Jost, *Law Schools: Is a Legal Education Worth Its Costs?*, 23 CQ RESEARCHER 353, 361 (2013). Dean Chemerinsky echoes the sentiment: "[A] two-year juris doctor degree . . . is a terrible idea. The profession needs law schools to produce lawyers who are better prepared for the practice of law, which is not possible to do in two-thirds the time." Chemerinsky, *supra* note 7. Indeed, Professor Edward Zelinsky proposes to add a fourth year to law school: "[E]xpanded clinical education should not come at the expense of substantive legal education but in addition to it." Edward Zelinsky, *Add a Fourth Year to Law School*, OUPBLOG (Nov. 14, 2013, 8:30 AM), http://blog.oup.com/2013/11/add-a-fourth-year-to-law-school/.

262. Jeremy Telman, Comment to *Rodriguez & Estreicher NY Times Op-Ed in Support of Two-Year Law Degree*, BRIAN LEITER'S L. SCH. REP. (Jan. 19, 2013, 10:03 AM), http://leiterlawschool.typepad.com/leiter/2013/01/rodriguez-estreicher-ny-times-op-ed-in-support-of-two-year-law-degree.html.

1/2 or 2/3 the present costs, or more, by requiring one year of law school or a move toward the global system of folding law school into what we call the undergraduate degree."[263] The latter proposal, which would revert to the days of the LL.B., has already been floated,[264] and the University of Vermont and Vermont Law School are exploring a partnership to condense college and law school to five years, cutting off one year from each.[265]

Professor Tamanaha tells us that, with deregulation, the schools' training of local practitioners "will be two years, others [ushering graduates into what is left of Big Law] will remain at three,"[266] and concedes that "the two-year law school advocated here would be dumping grounds for the middle class and the poor."[267] What he doesn't tell us is why the corporate clients of the Wall Street firms need or deserve better prepared lawyers than the middle-class clients of the solo practitioner on Main Street. For someone worried about "the implications of class and race on access to a legal career"[268]— "the current economic barrier to a legal career is one of the most important social justice issues of our age"[269]— Professor Tamanaha is curiously inattentive to their implications for legal *services*. The poor will get what they pay for. It's the American way. As Professor Elizabeth Chambliss puts it: "Tamanaha may be wearing a backpack, but he is pitching the interests of entrenched, elite clients and the shrinking circle of law schools that serve them—the old market winners whose continuing privilege depends on the rest of us going quietly (or taking the heat)."[270]

Professor Tamanaha and others might argue that that is better than what they get now—which is Main Street lawyers so burdened with debt that the underserved middle class and poor cannot afford

263. Darryl Wilson, Comment to *Rodriguez & Estreicher NY Times Op-ed in Support of Two-Year Law Degree*, BRIAN LEITER'S L. SCH. REP. (Jan. 24, 2013, 8:55 PM), http://leiterlawschool.typepad.com/leiter/2013/01/rodriguez-estreicher-ny-times-op-ed-in-support-of-two-year-law-degree.html.

264. *See* Bainbridge, *supra* note 243; Henderson, *supra* note 64; Douglas A. Kahn, *Time for Radical Change in Legal Education*, NAT'L L.J. (May 20, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202600580055&Time_for_Radical_Change_in__Legal_Education; John McGinnis & Russell Mangas, *First Thing We Do, Let's Kill All the Law Schools*, WALL. ST. J. (Jan. 17, 2012), http://online.wsj.com/article/SB10001424052970204632204577128443306853890.html.

265. *See* Free Press Staff, *UVM, Vermont Law School Consider Joint Degree*, BURLINGTON FREE PRESS (Sept. 27, 2013),
http://www.burlingtonfreepress.com/article/20130927/NEWS07/309270024/.

266. TAMANAHA, *supra* note 8, at 174.

267. *Id.* at 27.

268. Tamanaha, *supra* note 86, at 325.

269. TAMANAHA, *supra* note 8, at 186.

270. Elizabeth Chambliss, *It's Not About Us: Beyond the Job Market Critique of U.S. Law Schools*, 26 GEO. J. LEGAL ETHICS 423, 437 (2013).

what they have to charge.[271] And if this were the only solution to the seemingly paradoxical ills of underrepresentation and oversupply, they would be right. But it's not. As outlined in Part III, the same reduction in tuition and debt can be accomplished in a pedagogically responsible manner where the lawyers for the poor and middle class are trained as rigorously as those of the rich.[272] And, of course, it is the very students whose more modest performance on the LSAT lands them on Main Street who need more rigorous training in critical and legal reasoning.[273]

The market for legal services has evolved in ways we struggle today to understand, and it will be different tomorrow in ways we cannot begin to anticipate. The evolution of the nature and delivery of legal services, the joblessness and crushing debt of new graduates in the midst of widespread underrepresentation, and the shakeout in Big Law[274] are rough and uncharted waters, and law schools must adapt or perish. Jettisoning one third of the training of those most in need of it, though, is throwing the oars overboard to lighten the boat.

A number of schools have created what they refer to, for marketing purposes, as a two-year option.[275] The third year is not eliminated, though; three years is merely condensed into two by forgoing summer and winter breaks.[276] The number of courses taken remains the same, as it must under the ABA Standards requiring a minimum of eighty-three hours of credit for graduation,[277] as does the cost of tuition.[278] The benefit, assuming one can avoid a nervous breakdown with no vacations, is saving a year's worth of living expenses and, hopefully, obtaining employment one year earlier.

The rush to ditch the one-size-fits-all model and to abbreviate and dumb down legal education ignores the diversity in critical thinking—and writing—skills of students at some schools compared to other schools; and it ignores the fact that, at the schools where students bring lesser analytical skills to the table, more—and more

271. ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 22; Rhode, *supra* note 65, at 445.

272. *See infra* Part III.

273. *See supra* text accompanying notes 195-200.

274. Noam Scheiber, *The Last Days of Big Law: You Can't Imagine the Terror When the Money Dries Up*, NEW REPUBLIC (July 21, 2013), http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries.

275. *See, e.g.*, Debra Cassens Weiss, *Brooklyn Law School's Two-Year Degree Program Eliminates Breaks*, A.B.A. J. (May 13, 2013, 6:00 AM), http://www.abajournal.com/news/article/brooklyn_law_schools_two-year_degree_program_eliminates_breaks/.

276. *Id.*

277. ABA STANDARDS AND RULES OF PROCEDURE, *supra* note 89, at 23 (stating in Interpretation 304-4 of Standard 304 that "a law school must require at least 83 semester hours of credit").

278. Weiss, *supra* note 275.

rigorous—training is needed. In this way, Tamanaha's formula of adjuncts and two-year schools for the students with LSATs too low to go to the handful of elite schools retaining three-year programs ignores the needs of the very students he is attempting to assist, and stands legal education on its head. And, to the extent that legal education serves a public interest, it is a bad idea in another way. As Professor Amy Mashburn puts it, "legal educators must consider not only their students' needs, but also the well-being of their future clients . . . who will pay the price for inadequacies in their training."[279]

E. "Heterogeneous" and "Differentiated" Legal Education

[T]he higher learning is not a business proposition.

- Thorstein Veblen[280]

Employing slightly different terminology, the Task Force and Professor Tamanaha call on the ABA to scrap the one-size-fits-all model of legal education mandated by the Standards.[281] "The present system of accreditation . . . administered by the ABA Section of Legal Education and Admissions to the Bar," says the Task Force, "reinforces a far higher level of standardization in law schools and legal education than is necessary to turn out capable lawyers."[282] The Standards should allow and encourage programmatic "innovation,"[283] "heterogeneity,"[284] "experimentation,"[285] and risk-taking,[286] rather than impede it by requiring, as is currently the case, advance approval of variations with the rules, major changes in the program, and new programs.[287]

The push to break away from the standard model is not a new one. In a 2007 letter to the ABA Task Force on Accreditation, the American Law Deans Association argued that "[t]he Standards should permit a law school to pursue its own mission in any way that it deems appropriate" as long as it provides a sound legal

279. Amy R. Mashburn, *Can Xenophon Save the Socratic Method?*, 30 T. JEFFERSON L. REV. 597, 647 (2008). Professor Horwitz, despite his frosty attitude toward the Socratic and casebook methods, agrees: "the client is practically nonexistent in much of the current discussion focusing on the 'law school crisis.'" Horwitz, *supra* note 144, at 973. Horwitz adds, referring to the Occupy Wall Street mantra, "law students are not the 99 percent. Clients are." *Id.* at 975.

280. VEBLEN, *supra* note 171, at 75.

281. ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 2; TAMANAHA, *supra* note 8, at 174.

282. ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 2.

283. *Id.* at 2.

284. *Id.* at 2, 23-24.

285. *Id.* at 2, 12, 19, 27.

286. *Id.* at 27.

287. *Id.* at 27-28, 31-32.

education.[288]

As the Task Force sees it, if you allow the providers of legal education to be sensitive to the needs of the consumers and the massive changes taking place in the nature and delivery of legal services, the marketplace will ultimately sculpt the right solutions.[289] Unleash American ingenuity and watch the free-market system work its magic. Tuition and debt will settle, access to legal services will expand, several schools will still pump out research, whatever its value, and peace will come to the valley. Some want the ABA taken out of the accreditation picture entirely, reasoning that the fox is guarding the henhouse.[290]

The Task Force asks us "to imagine a system in which law schools with very different missions might be accommodated."[291] We are told "[i]t is useful to compare the system of law schools with the college and university system in the United States," with selective research universities and high-access community colleges focused more on teaching.[292] One can, the Task Force tells us, "acknowledge the success of the general model . . . and still believe that it may not be the exclusive way of preparing people to be good lawyers."[293] "[E]xperimentation," it is urged, "should be fostered."[294]

The point seems reasonable enough at first glance; after all, community colleges serve an important interest in expanding access to secondary education. But the comparison of undergraduate education to the training of those who will soon bear responsibility for protecting the most basic rights of others is inherently flawed. English lit students won't be called on to recover the medical expenses of a victim of negligence, and philosophy majors won't hold the life or liberty of a criminal defendant in their hands any time soon. We want our lawyers, like our doctors, to have state-of-the-art professional training, which, as discussed above, is what Socratic instruction, clinical education, and a strong legal-writing curriculum conducted by full-time professional educators represents.

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288. Letter from the Bd. of Dir., July 21, 2008, *supra* note 158, at 2.

289. *See* ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 14-15.

290. Coyne, *supra* note 50 ("The Department of Education should terminate recognition of the ABA as a federally approved accreditor of law schools.").

291. ABA, Task Force, *supra* note 1, at 23.

292. *Id.* at 24. The Task Force's call for "heterogeneity" in legal education echoes Professor Tamanaha's earlier call for "differentiation":

> The law school parallel . . . of vocational colleges and community colleges will come into existence . . . . This is not the race to the bottom prophesied by AALS.] It simply recognizes that every law school need not be a Ritz-Carleton [sic]. A Holiday Inn–type law school would provide a fine education for many . . . .

TAMANAHA, *supra* note 8, at 174.

293. ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 24.

294. *Id.*

Particularly in light of the superior means of cutting tuition and graduate unemployment outlined in the Part III, there is no more need to experiment with short cuts to legal education than there would be with short cuts to medical education. Indeed, the Task Force would do better to compare the standardization of the law school model to that of medical school, and recommend to keep it state-of-the-art. The Task Force gives lip service to legal education as both a public and a private good, but its Grand Experiment will come at the expense of both.

Some innovation seems reasonable. The Task Force recommended, for example, the creation of "limited license legal technicians" who, perhaps along the lines of the British model, fall somewhere between lawyers and paralegals.[295] Something akin, perhaps, to the assistant physician in medicine. Others have explored these possibilities.[296] Caution must be taken, too, though. While the creation of a hybrid provider might furnish much-needed services to those who cannot presently afford them, the idea is not without risk. If the tasks performed by limited practitioners involve any interpretation of cases or statutes, advocacy or negotiation, or a knowledge of other areas of law—and most areas of practice potentially involve all three—we would be licensing a product of dubious quality.

The call for innovation will also be answered by ever-more start-up ventures, many hawking questionable wares, all looking to draw from the bottomless well of the student loan program.[297] The law school bubble will grow ever larger. The Southern California Institute of Law, with campuses in Santa Barbara and Ventura, is a shining example of heterogeneity and differentiation in the highly innovative, deregulated law school market in California. That school's innovation was to challenge the rule that it post its graduates' bar passage rate on its website on First Amendment grounds.[298] Its passage rate was reportedly seven percent.[299]

The problem with forging legal education in the fire of consumer

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295. ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 25.

296. *See* Elizabeth Chambliss, *Organizational Alliances by U.S. Law Schools*, 80 FORDHAM L. REV. 2615, 2646-47 (2012) (forecasting the "emergence of a variety of paraprofessional and law-related non-J.D. positions and credentials in specially-regulated areas").

297. *See, e.g.*, Karen Sloan, *Ex-Profs: Phoenix Values Profits Over Students, Faculty*, NAT'L. L.J. (June 3, 2013),
http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202602752758&ExProfs_Phoenix_Values_Profits_Over_Students_Faculty&slreturn=20130715105410.

298. Jacob Gershman, *Law School Claims Bar Passage Rate Is Meaningless*, WALL. ST. J. L. BLOG (Aug. 8, 2013, 6:20 PM),
http://blogs.wsj.com/law/2013/08/08/law-school-claims-bar-passage-rate-is-meaningless/.

299. *See id.*

demand is that many of the consumers of legal education, like students everywhere, prefer a shoddy, undemanding product. Value in this marketplace varies directly with the ease with which the diploma is obtained, not with the quality of training. Which, since these consumers will soon bear responsibility for the welfare of clients, is a major part of the problem with the business model of legal education. As Professor Deborah Rhode observes:

> [S]tudent interests are not necessarily consistent with those of the ultimate consumers—clients and the public. Education is one of the rare contexts where buyers may want less for their money. . . . In the absence of accreditation standards, law schools would need to compete for applicants who view "less as more" in terms of academic requirements.[300]

And the assessment of value, according to the Task Force, is to be left to the individual providers crammed into the marketplace, and those yet to come: "the Task Force believes that each law school should make an assessment of the particular value it believes it can and should deliver."[301] Little different from the F.D.A. delegating to drug companies the assessment of the medical value of the drugs they would like to throw onto the market, it is a singularly dangerous prescription. The present standards mandate some wasteful expenses, like the duplication of print and electronic materials in the library collection, but they are, by and large, educationally sound.

Professor Tamanaha's brave new "differentiated"[302] legal education, with most law schools devolving into two-year dumping grounds for poor and middle-class kids training to be local practitioners and a handful of elite research institutions funneling rich kids to Big Law,[303] is even scarier. Carving out separate schools for the rich and poor reproduces hierarchy in a way that would astonish even Duncan Kennedy.[304]

What Professor Tamanaha calls differentiated legal education, others see as the formalization of social stratification. As Professor Diamond put it, "differentiated" legal education would produce "a new two tier system . . . , one where minorities, immigrants, women and other groups with fewer resources and less successful backgrounds would be ghettoized . . . on the road back to the era of 'separate but equal.'"[305] Only the lower tier, as with separate but

300. Rhode, *supra* note 66, at 446.

301. ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 26.

302. TAMANAHA, *supra* note 8, at 172.

303. *Id.* at 174. "Few children of the rich," says Tamanaha, "will end up in these [two-year] law schools, if they are allowed to exist." *Id.* at 27.

304. *See* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982).

305. Diamond, *supra* note 142, at 14.

equal, won't be equal.[306]

Dean Emeritus Joseph Tomain believes the attorneys produced by regional schools serve a broader need than divorces and home closings:

> The graduates of standard model regional law schools go into the region's most prestigious public and private sector positions . . . . If the standard model is good for elite schools whose graduates fill elite positions, than [sic] the standard model may well serve the more local communities in which most of the nation's law schools are situated.[307]

Professor Chambliss characterizes the solutions proposed by Professor Tamanaha and others this way: "[A]ll law schools except those that most directly feed the corporate market . . . should shake off the fetters of tenured faculty, modern facilities, and a commitment to scholarship, and run free!"[308] "Free," she goes on, "to become bar-cram trade schools . . .[f]ree to abandon any pretense of independence from immediate market forces . . .[f]ree to give up training non-elite students to think critically about the role of lawyers . . . ."[309] Some see a broader, neo-con agenda underlying the push to deregulate. As Professor Diamond sees it, there is a "strong dose of deregulatory politics at the heart of the agenda for law school critics like . . . Brian Tamanaha and Paul Campos" that represents the "exploitation of macroeconomic crisis."[310] Whatever underlies the

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306. *See generally* RONIT DINOVITZER ET AL., AM. BAR FOUND. & NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS (2004), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf (reporting various gender-based and race-based disparities in legal practice). At the very least, separate schools for local practitioners and corporate attorneys eliminates the traditional choice of careers provided to law students before they even step through the door, requiring career-defining decisions about their areas of interest and practice around the same time they take the LSAT. As one professor notes, "law schools play a critical role in sorting students for employment as well as in socializing students about the appeal and demands of different types of jobs." Chambliss, *supra* note 270, at 440-41.

307. Tomain, *supra* note 135, at 4.

308. Chambliss, *supra* note 270, at 423-24.

309. *Id.*

310. Stephen F. Diamond, *Academic Freedom (and Due Process) Under Threat at Brooklyn Law School?*, STEPHEN-DIAMOND.COM (Apr. 26, 2013), http://stephen-diamond.com/?m=20130426. Professor Diamond is not the only one who sees it this way. A commenter on the Faculty Lounge website noted:

> [T]he crisis facing recent graduates is being used to breathe new life into the idea that law schools should predominantly function as trade schools, particularly as many of the suggested reforms (from loosening accreditation requirements, to eliminating the third year of law school, to certifying paralegal practitioners) are likely to exacerbate the oversupply problem that is at the root of the crisis faced by many recent graduates.

Milan, Comment to *The Utility of Scholarship—Round Two*, FACULTY LOUNGE (Feb.

push, deregulating legal education is not the answer to troubles spawned by the exploitation of market forces.

Sensible change in legal education requires a holistic view of the enterprise. We must first explore its role in society and its place among our institutions; whether it is a public good only in good times, or in good times and bad; and who, exactly, the public is—the heavy corporate consumers of legal services, those who need but cannot afford a lawyer, or everyone touched by law. Over four decades ago, Professor Thomas Bergin put his finger on the root tension in legal education between the faculty's scholarly mission within academe and its role as the "trainer of Hessians."[311]

Apart from an empty platitude about legal education being a public *and* a private good, the Task Force has no feel for these issues. The public good in the education of those who will steward a system of justice would seem to have something to do with justice. As Dean Tomain points out, though, "The word justice does not appear . . . not even once" in the Task Force's discussion of the purpose of legal education.[312] He believes, as I do, that:

> The standard model's concentration on legal methodology and analysis; critical thinking and problem solving; *introductions* to skills and experiential learning; and, the commitment to scholarship and law reform are sound and valuable. . . . The standard model projects to students that law is academically rigorous [and] has a relationship with justice.[313]

The Task Force's plan, based on a vision of legal education as a concoction of consumer demand and provider improvisation cooked over student loans and the chaos in the legal services marketplace, is bad theory. In fact, since the plan consists largely of faith in marketplace forces—the very forces that got us into the jam in the first place[314]—it's more religion than judicious reform. Blind to the pedagogical needs of students, the interests of clients in competent representation, and the public interest in a critique of the legal order, we are simply to roll the deregulatory dice and hope for the best. We are, as advocates of deregulation like Professor William Henderson

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14, 2013, 12:17 AM), http://www.thefacultylounge.org/2013/02/the-utility-of-scholarship-round-two.html.

311. Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 638 (1968) (Bergin himself was a student of Myres McDougal, who, along with Harold Lasswell, developed the New Haven School of jurisprudence). *See generally* Harold D. Lasswell and Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203, 206 (1943) (discussing legal education reform and advocating for a "training for policy-making" approach).

312. Tomain, *supra* note 135.

313. *Id.*

314. TAMANAHA, *supra* note 8, at 126-34.

unabashedly tell us, "making business decisions designed to get our institutions to a place of safety; we are not making pronouncements of our social . . . values."[315] And in doing so, we do exactly what Veblen's warned us about: "[B]usiness enterprise is . . . incompatible with the spirit of the higher learning. Indeed . . . these two lines of endeavour . . . are as widely out of touch as may be."[316] "'The customer is always right' may have worked for Marshall Field," observes Professor Robert Condlin, "but it is a prescription for disaster in legal education."[317]

There is, however, a way out the thicket. The path will require massive, but pedagogically sound, budget cuts and the insulation of legal education from the market forces that perpetually breed new schools and ramp up tuition each year. The steps outlined in Part III will reduce tuition by at least as much as the ill-advised proposals examined in this section and simultaneously address graduate unemployment, which the above proposals would not. At the same time, they preserve 140 years of progress in the legal education and recognize that its public good is inextricably tied to its place in the academy.

III. THE REAL SOLUTION: PEDAGOGICALLY SOUND CUTS, TIGHTER STANDARDS, AND A WELL-OILED DOOMSDAY MACHINE

> *In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.*
>
> *- Felix Frankfurter*[318]

Any real solution to exorbitant graduate debt and unemployment must, in addition to significantly reducing law school expenditures, address the central university's insatiable appetite for law school revenues, its tendency to maximize tuition, and the relentless creation of new law schools. This double-barreled approach will require the adoption of two additional, eminently simple ABA standards, along with a set of equally straightforward cost-cutting measures.

A. Pedagogically Sound Cost Cutting

Taken together, the following steps will reduce law school tuition by at least as much as the proposals addressed in Part II, but in a way that preserves sound pedagogy.

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315. Henderson, *Blueprint*, *supra* note 6, at 463 (emphasis omitted).

316. VEBLEN, *supra* note 171, at 48.

317. Condlin, *supra* note 138, at 10, n.28.

318. Letter from Felix Frankfurter, Professor, Harvard Law School, to Mr. Rosenwald 3 (May 13, 1927), *quoted in* JACK RAND & DANA C. JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 156 (1989).

1. Limiting the University's "Overhead" Charges

The central university's thirst for law school revenues can be curbed by the addition of a single sentence to ABA Standard 210.[319] Standard 210 provides that "[t]he resources generated by a law school that is part of a university should be made available to the law school to maintain and enhance its program of legal education."[320] Interpretation 210-1 of the Standards appears to drive the point home: "A law school does not comply with the Standards if the charges and costs assessed . . . leave the law school with financial resources so inadequate as to have a negative and material effect on the education students receive."[321]

Sounds good so far. However, as is highlighted by the fireworks at the University of Baltimore over the central university's overhead expenses,[322] the ABA does not view the university's diversion of law school revenues over and above its actual overhead expenses as an impediment to education. Narrowly interpreting education as what is happening in the classroom, rather than what is happening to the student, the ABA simply looks the other way. Indeed, Interpretation 210-2 greases the skids, telling the university it need merely "provide the law school with a satisfactory explanation for any use of resources generated by the law school to support non-law school activities."[323] All you can eat; just let us know what you took.

A gastric bypass is in order. The language in Interpretation 210-2 enabling the university to divert law school funds for its own use should be replaced by a firmly worded provision *limiting the central university's take to actual overhead expenses*, and requiring an accounting of the specific services provided and their costs.

Adding this sentence would have widespread repercussions. In addition to lowering the current level of law school tuition, it would remove the university's incentive to ratchet up tuition as high as possible each year. It would also, by removing the incentive of cash-strapped universities to open new law schools as revenue centers, stop the epidemic of new schools dead in its tracks. *Do not* build it, and he *will not* come.

This is not to say that university-affiliated law schools shouldn't pay their own way, fully reimbursing the central university for its actual, documented expenses, but the vigorish underlying the proliferation of law schools must be verboten. Struggling universities would have to look elsewhere to plug their leaks.[324]

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319. ABA STANDARDS AND RULES OF PROCEDURE, *supra* note 89, at 14.

320. *Id.*

321. *Id.*

322. *See* Mangan, *supra* note 31, at 1-3.

323. ABA STANDARDS AND RULES OF PROCEDURE, *supra* note 89, at 12.

324. On the subject of adding, rather than deleting, ABA standards, Professor Brian

2. Wage Concessions

The salaries of full-time faculty and deans are also fair game, and can be cut through voluntary concessions or—as is more likely to be necessary—administrative fiat. If autoworkers,[325] school teachers,[326] state employees,[327] and those who work in other depressed industries can make significant wage concessions in times like these, so can law professors and administrators to pare down outrageous tuition. A twenty percent reduction, for example, would not be unreasonable—the job would remain the best in the world. Sabbaticals and research stipends can go as well without disrupting the educational process, and the entry level pay scale can be adjusted downward to keep expenses in check when the time comes, down the road, to fill vacated slots. "In the same way that the market for graduates is adjusting," observes Professor Gene Nichol, "it would not be absurd for our salaries to adjust as well."[328] Feeling a bit of our students' pain, especially when it eases theirs, is not such a terrible thing.

Professor Tamanaha and others have noted that faculty jealously guard privilege,[329] and that deans, fearful of no-confidence votes, will not step on faculty toes.[330] As the ABA Task Force put it, "Deans are blamed for . . . failing to stand up to certain constituencies. Faculty are blamed for supposedly self-seeking behavior . . . ."[331] It's a good

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Leiter has a sensible suggestion: "[T]he ABA should prohibit all member law schools from participating in 'evaluation' exercises by profit-making organizations, such as *U.S. News*," which, he correctly points out, "creates the idiotic incentive to spend as much as possible, without regard to efficiency." Leiter, *supra* note 224. One law school dean, Al Garcia of St. Thomas University in Florida, bravely tried to get the ball rolling in this regard and refused to return the *U.S. News* questionnaire, but the effort failed to catch on. *See* Julie Kay, *Florida Law School Dean Boycotts 'U.S. News' Rankings Survey*, LAW.COM (May 3, 2010), http://www.law.com/jsp/article.jsp?id=1202457535997.

325. *See, e.g.*, Joseph R. Szczesny, *UAW Agrees to Concessions with Automakers*, TIME (Dec. 3, 2008), http://www.time.com/time/business/article/0,8599,1864085,00.html.

326. *See, e.g.*, Matthew DeFour, *Madison Teachers' Union Agrees to Wage, Benefits Concessions in New Contract*, WIS. ST. J. (Mar. 12, 2011, 6:45 PM), http://host.madison.com/news/local/education/local_schools/madison-teachers-union-agrees-to-wage-benefit-concessions-in-new/article_08e4dde4-4ce5-11e0-83f1-001cc4c03286.html.

327. Thomas Kaplan, *State Employees' Union Accepts Wage and Benefits Concessions*, N.Y. TIMES, Aug. 16, 2011, at A22.

328. Jack Crittenden, *How to Cut Tuition*, NAT'L JURIST (Mar. 2013), at 26.

329. TAMANAHA, *supra* note 8, at 28-36, 176 ("Path dependence, inertia, and entrenched economic interests, especially on the part of law professors and law schools, will conspire against [reform].").

330. TAMANAHA, *supra* note 8, at 6-8.

331. ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 9.

time—and may be the last opportunity—to dispel these charges.[332]

3. Increasing Teaching Loads

Another method of substantially trimming labor costs is to increase teaching loads. Law professors at most schools teach two courses a semester[333] (sans teaching assistants, as in college), although at elite schools the number has dwindled to around three a year.[334] A study of teaching loads at the top ten ranked schools found the average load to be a bit less than eight credits hours of class per year.[335]

Without a fatal decline in scholarly productivity, professors at every law school could teach three courses each semester, a modest concession should lead, over time, to a thirty-three to fifty percent boost in teaching productivity and to a large reduction in labor costs as baby-boom faculty retire. After all, as Professor Edward Zelinsky remarked, "there is nothing sacrosanct about current teaching loads."[336]

Whether or not faculty are comfortable with the idea, higher teaching loads are probably in the stars in light of the coming contraction of full-time faculties, discussed immediately below. Assuming no massive layoffs—a questionable assumption at this point[337]—modest savings would come from the adjunct budget line in the first few years, and the savings would grow in subsequent years as full-timers retire and a large number of them are not replaced.

4. Downsizing the Faculty

The inevitable contraction of faculties is already underway, and it will be significant.[338] While teaching loads at non-elite schools have

332. *But see* David Barnhizer, *Redesigning the American Law School*, 2010 MICH. ST. L. REV. 249, 252 (2010) ("[I]t seems delusional to contemplate a situation in which traditional law faculties will collectively decide on coherent and effective strategies that will inevitably alter their workplace conditions and focus."). As the ABA Task Force put it, "The Task Force recommends that . . . law faculties move to reconfigure faculty role and promote change in faculty culture . . . ." ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 28.

333. TAMANAHA, *supra* note 8, at 6.

334. *Id.* at 42.

335. Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493, 546 (2007) (citation omitted).

336. Zelinsky, *supra* note 261.

337. *See* Debra Cassens Weiss, *'Massive Layoffs' Predicted in Law Schools Due to Big Drop in Applicants*," A.B.A. J. (Jan. 31, 2013, 7:27 AM), *available at* http://www.abajournal.com/news/article/massive_layoffs_predicted_in_law_schools_due_to_big_drop_in_applicants.

338. Ashby Jones & Jennifer Smith, *Amid Falling Enrollment, Law Schools Are Cutting Faculty*, WALL ST. J. (July 15, 2013, 4:39 PM), *available at* http://online.wsj.com/article/SB10001424127887323664204578607810292433272.html

held fairly steady over the last couple of decades at four courses a year, the size of law faculties has not.[339] The forty percent increase in law faculty at ABA-accredited schools from 1998 to 2008 was, as Professor Nichol points out, "driven more by U.S. News & World Report's [annual rankings]," which factor in student-faculty ratios, "than by rigor."[340]

New faculty hiring has virtually ground to a halt, and a confluence of factors is now compressing the size of many full-time faculties. The trend is spreading quickly and will intensify. Indeed, Professor William Henderson predicts "massive layoffs" of full-time professors beginning almost immediately.[341] A number of schools have offered voluntary buyouts of senior faculty.[342] Anxiety is rife about layoffs,[343] and for good reason. Seton Hall, for example, has informed seven junior faculty members that their contracts may not be renewed,[344] and Albany has mixed buyout offers with talk of layoffs.[345]

Four developments are at work here: (1) as noted above, the ABA may well abandon the formula for calculating student-faculty ratios that discounts adjuncts;[346] (2) *U.S. News* has announced it will scrap the rankings metric of per student expenditures; (3) public pressure keeps intensifying to reduce tuition;[347] and, more than anything else, (4) significant revenue shortfalls are resulting from the contraction of the entering classes necessitated by the nosedive in applications and the concomitant fear of a plunge in LSATs, national rankings, and bar passage.

The contraction of full-time faculties and the resultant reduction in the law school expenses represents the opportunity—assuming the central university is willing—to take an additional bite out of law

("Law schools across the country are shedding faculty members as enrollment plunges. . . . [T]he trend is growing, most noticeably among middle- and lower-tier schools, which have been hit hardest by the drop-off.").

339. *See* TAMANAHA, *supra* note 8, at 62-68.

340. Crittenden, *supra* note 328, at 24.

341. Weiss, *supra* note 337.

342. Jones & Smith, *supra* note 338.

343. Dan Filler, *Law School Faculty Contraction in the Modern Era*, FACULTY LOUNGE (July 8, 2013), http://www.thefacultylounge.org/2013/07/law-school-faculty-contraction-in-the-modern-era.html?cid=6a00e54f871a9c883301910422b471970c.

344. David Lat, *A Law School's Possible Purge of its Junior Faculty Ranks*, ABOVE THE LAW (July 1, 2013, 4:05 PM), http://abovethelaw.com/2013/07/a-law-schools-possible-purge-of-its-junior-faculty-ranks/.

345. John Caher & Tania Karas, *Albany Law Offer Buyouts to Offset Lower Enrollment*, N. Y. L. J. (Feb. 4, 2014), http://www.newyorklawjournal.com/id=1202641330977/Albany-Law-Offers-Buyouts-to-Offset-Lower-Enrollment?slreturn=20140202170221.

346. *See* ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 31.

347. *See supra* Part III.

school tuition. The law school must pick and choose carefully, however, among the ways it adjusts to the contraction. The heavier teaching loads for full-timers, as espoused above, is the path between the Scylla of overreliance on adjuncts and the Charybdis of larger classes and fewer electives.

5. Downsizing the Administration

Along with the run up in tuition and the expansion of faculty, law school administrations have swollen, as well.[348] And the crisis in legal education itself has only worsened the situation.[349] As applications fall, admissions offices put on more recruiters. As graduate unemployment rises, placement offices beef up with additional personnel to locate openings, conduct job-hunting workshops, and review resumes.[350] And as LSAT's decline, academic support personnel are loaded onto the payroll to help get matriculants through their course work and past the bar exam. Florida Coastal School of Law in Jacksonville, for example, has no fewer than 19 "academic success counselor[s]" as of the date this is written.[351]

All this hiring serves double duty, of course. By hiring recent grads to these positions, as schools routinely do, they artificially boost their employment statistics that prospective students now weigh.[352]

The pendulum has begun, as it must, to swing the other way. Vermont Law School, for example, axed a dozen staff positions in the winter of 2012, cut back in other ways, and must tighten its belt some more.[353] Many other schools are following suit.[354]

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348. TAMANAHA, *supra* note 8, at 126.

349. *See* Karen Sloan, *Data Trove Reveals Scope of Law Schools' Hiring of Their Own Graduates*, NAT'L L. J. (Apr. 16, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202549157393&Data_trove_reveals_scope_of_law_schools_hiring_of_their_own_graduates_ (discussing the growing occurrence of law schools bolstering their payrolls and graduate employment numbers by hiring recent graduates).

350. *See, e.g.*, Karen Sloan, *It's Their Job to Find the Jobs for Law Students,* NAT'L L. J. (Feb. 24, 2014), http://www.nationallawjournal.com/law-school-news?slreturn=20140202194432.

351. *See Meet the Academic Success Team*, FLA. COASTAL SCH. OF L., http://fcsl.edu/blogs/academicsuccess/2011/02/01/meet-the-academic-success-team/ (last visited Feb. 7, 2014).

352. *See* Sloan, *supra* note 349.

353. Alicia Freese, *Vermont Law School Makes More Cuts as Class Size Drops*, VTDIGGER.ORG (June 27, 2013), http://vtdigger.org/2013/06/27/vermont-law-school-makes-more-cuts-as-class-size-drops/. In addition to buyouts and layoffs of staff, Vermont Law School "has cut down on cleaning services and changed the hours and offerings of its food service . . . . At one point, there were conversations about whether coffee would continue to be available in offices . . . ." *Id.*

354. *See, e.g.*, Caher & Karas, *supra* note 345 (noting staff reductions at three New

6. Paying Attention to a Tension

There is an inherent, but overlooked, tension between cost cutting and the clinical training necessary to enhance the "practice readiness" that the bar and the ABA have been calling for for years.[355] Indeed, the Council on Legal Education recently increased the required hours of "experiential learning" from one to six.[356] Sound clinical training requires labor intensive, in-house clinics where student performance is closely supervised by full-time clinical faculty.[357] Externships in which students are unleashed in law offices without much in the way of close or professionally-trained guidance serves more of a placement function for students (and free help for understaffed law offices) than an educational function.[358] The danger here is that, with the ABA's call for increased practice readiness through clinical training, externships will provide a cheap, though inferior, alternative to the in-house clinics that would boost expenses.

B. The Doomsday Machine

A couple of dozen law schools now live in the shadow of a doomsday machine. Interpretation 301-6 of the *Standards for Approval of Law Schools* dictates that, to stay in business, a school must meet one of two conditions with respect to bar passage. In at least three of the past five years, either seventy-five percent of the graduates of a law school who sat for a bar exam must have passed or its average pass rate for first-time takers must have been within fifteen points of the state average (of the state where they most frequently sat for the exam).[359] In a normal year, more than fifty schools hover around the seventy-five percent mark, with many in

York law schools—Brooklyn, Hofstra, and New York Law School).

355. *See, e.g.*, ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992).

356. Sloan, *supra* note 103.

357. "[Clinical and experiential learning] programs are by their nature expensive and require very small faculty-student ratios" and thus "add to the cost per capita." Diamond, *supra* note 142, at 16 n.25.

358. "[S]upervision of off-campus law externs in a structured field placement program has traditionally been the chimera of law school curriculum. In an off-campus field placement, the primary concern of the supervising attorney must be the work of the agency or judicial chambers, while the concern for the education of the field extern must by nature be a secondary goal." Barbara Blanco & Sande Buhai, *Externship Field Supervision: Effective Techniques for Training Supervisors and Students*, 10 CLINICAL L. REV. 611, 611-12 (2004) (footnotes omitted); *see generally* Robert F. Siebel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 CLINICAL. L. REV. 413 (1996) (researching and analyzing nationwide externship programs); *see also* Silver, *supra* note 107, at 59.

359. *See generally* ABA STANDARDS AND RULES OF PROCEDURE, *supra* note 89, at 20 (Interpretation 301-6 of Standard 301).

jeopardy of falling below.[360] In 2011, for example, fifty-one schools had passage rates below eighty percent, with eleven below seventy-five percent.[361] In 2012, the number below seventy-five percent climbed to thirty-one, nearly tripling.[362]

Each of these schools has a deathly fear of entering classes with lower LSATs. Dread of falling in the *U.S. News* rankings aside, these schools have perfectly good reason to worry that low scores on the standardized Law School Admission Test will necessarily translate into low scores on another standardized test—the bar exam. Professor Dan Filler, Associate Dean at Drexel, put it bluntly: "[L]aw schools are going to be admitting a large number of sure-fire bar failures."[363]

Third- and fourth-tier schools do not compete over LSATs just to climb up to the next rung in the rankings—they do so to stay on the ladder at all. Experience teaches that graduates who score in the mid-140s or lower on the LSAT are at unusually high risk of failing the bar. If that's not scary enough, the drop in applicants scoring 145 or above is nearly three times greater than those getting a 144 or below.[364] There should be, then, a fairly precipitous decline in bar passage rates when the next several entering classes sit for the bar exam and consistent with the accelerating rate of decline in applicants, it should go down each year until applications level off.

The best hope for the schools at the bottom of the LSAT and bar passage ladder is that the decline in bar passage will occur in lockstep among all the schools in their jurisdiction so they won't fall more than fifteen percent below the state average. Hope notwithstanding, the numbers may not work out this way; bar passage rates may not be dropping in lockstep, particularly in states where one or two of a larger number of schools have significantly lower LSAT scores.

The data in *U.S. News* reflect this peril. At over a quarter of all ABA-accredited law schools, the twenty-fifth percentile LSAT score of the 2012 entering class had fallen into the 140s, and into the lower 140s at many schools.[365] In 2013, ten more schools joined that group,[366] and LSAT scores are headed downward next year, as well.[367] It should not be long before the median for all admitted

360. *See, e.g.*, U.S. NEWS & WORLD REP., *supra* note 203.

361. *Id.*

362. *See id.*

363. Filler, *supra* note 343.

364. *See* Weissman, *supra* note 200 (the data in Weissman's chart reflect a 16.8 percent decline in test takers scoring 145 or above, and only a 5.12 percent decline those scoring 144 or below).

365. *See, e.g.*, U.S. NEWS & WORLD REP, *supra* note 203.

366. *See id.*

367. *See id.*

students at schools at the bottom of the food chain dips into the mid-140s, where bar passage is known to drop off sharply. When those and subsequent classes sit for the bar exam a few short years later, the bar passage rates at many low lying schools should fall well south of seventy-five percent, and the gap between many of their rates and the state average may well exceed fifteen percent. Plummeting applications, in other words, may activate the doomsday machine. And, of course, there is no indication that applications will rebound any time soon . . . or ever.

The bubble could pop at another point, as well. The median LSAT score at Lincoln Memorial's Duncan School of Law, which according to the ABA, was denied provisional accreditation in part because its students' LSAT scores did not suggest success in school and on the bar,[368] was 147, according to school officials.[369] The median LSAT at several accredited schools is thought to be less than 147.[370] When the median at any number of fourth-tier schools drops to the mid and low 140s, as it is almost certain to with applications in free fall, then—assuming any consistency on the part the ABA—the bubble may burst at this point, as well.

In business parlance, the closure of a number of law schools would represent a market correction. As in other industries where market forces are suppressed or distorted and an unsustainable bubble develops, it must burst for the sake of long-term stability.[371] And while a tragedy for many, it should come as no surprise. Indeed, over the last decade, many of Japan's law schools were forced to either close or reorganize to account for a near forty percent drop in new enrollments since 2006.[372]

If a dozen or so law schools closed their doors over the next decade, and the remainder downsized, a good chunk would be taken out of graduate unemployment.[373] For this to occur, however, the

368. *See* Joe Palazzolo, *ABA Details Reasons for Flunking Duncan Law School*, WALL ST. J. L. BLOG (Jan. 4, 2012, 11:36 AM), http://blogs.wsj.com/law/2012/01/04/aba-details-reasons-for-flunking-duncan/.

369. LEGAL SKILLS PROF BLOG, *New Tennessee Law School Denied Provisional Accreditation by ABA,* (Dec. 21, 2011), http://lawprofessors.typepad.com/legal_skills/2011/12/new-tennessee-law-school-denied-provisional-accreditation-by-aba-.html.

370. *Id.*

371. *See* Kevin Rudd, *The Global Financial Crisis*, THE MONTHLY (Feb. 2009), http://www.themonthly.com.all/issue/2009/February/1319602475/kevin-rudd/global-financial-crisis.

372. Miki Tanikawa, *A Japanese Legal Exam that Sets the Bar High*, N.Y. TIMES, July 11, 2011, *available at* 2011 WLNR 13b52537.

373. In a recent poll on Professor Brian Leiter's *Law School Reports* website asking how many ABA-accredited law schools would close over the next decade, roughly one quarter of the respondents believed eleven or more would, while a majority selected the choice of between one and ten. *Predictions about Closings of ABA-Accredited Law*

doomsday machine must stay oiled—the seventy-five percent rule must be vigorously enforced by the Council of the Section of Legal Education. The proposed provision to limit overhead to actual expenses could help dissuade some university presidents from trying to keep the law school's doors open. Professor Henderson suggests that university presidents, faced with shortfalls from smaller law-school entering classes, may want to voluntarily shut the law school down.[374]

Professor Olivas warns that "[a] gentleman's agreement leads to virtually no school having its taxi medallion taken away."[375] Recently, though, the Council took two schools to the precipice and back. Whittier Law School, which was placed on probation in 2005 for running afoul of the bar passage rule then in effect, was brought back into the fold two years later after its passage rate improved.[376] And the University of La Verne College of Law lost its provisional accreditation in 2011 for the same reason, but regained it in 2012 after its rate rebounded.[377] If Professor Olivas is right and the Council was only bluffing, then here is where a culture change actually *is* in order.

Another requirement for the doomsday machine to activate is that states not tinker with their passage rates to bail out schools in jeopardy. In most states, the state's highest court regulates the passage rate.[378] Some difficulties here are the pressure that alumni of an endangered school will bring to bear on the justices, and the possibility that some of the justices themselves are alumni.

The ABA has been toying with the idea of toughening the present bar passage rule, either by requiring that seventy-five percent of a school's graduates pass within a two-year period, rather than in three of the last five years, or that eighty percent pass within

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Schools Over the Next Decade, BRIAN LEITER'S L. SCH. REP. (Oct. 3, 2013), http://leiterlawschool.typepad.com/leiter/2012/10/predictions-about-closings-of-aba-accredited-law-schools-over-the-next-decade.html. I recognize, of course, that any lower-ranked school could become a casualty, including my own, and thus in openly discussing the idea I'm demonstrating how tenure affords one the protection to speak what he or she believes to be the truth.

374. Henderson, *supra* note 64.

375. Olivas, *supra* note 223, at 128.

376. Felicia Dominguez, *Whittier Law School, Whittier, California*, LAW CROSSING, http://www.lawcrossing.com/article/3998/Whittier-Law-School-Whittier-California/# (last visited Feb. 7, 2014).

377. Kimberly Pierceall, *Law: La Verne Law School ABA Accredited Again*, PRESS-ENTERPRISE (Mar. 26, 2012, 1:48 PM), http://www.pe.com/business/business-headlines/20120326-law-la-verne-law-school-aba-accredited-again.ece.

378. *See, e.g.*, Order Amending the Rules and Procedures Governing Admission to the Practice of Law (Wyo. 2012), *available at* http://www.wyomingbar.org/pdf/Dec_14_Order_Amending_Admission_Rules.pdf.

two years.[379] Either change, but particularly the latter, would significantly extend the damage done by the doomsday machine and intensify the market correction. The proposals, which have powerful supporters like Erica Moeser, president of the National Conference of Bar Examiners,[380] have been tabled for the moment[381] after running into opposition from groups like the National Bar Association and the Society of American Law Teachers who point out that the burden of ratcheting up bar failure would fall disproportionately on the minority groups that traditionally score lower on standardized tests, and thus erode diversity in the profession.[382] "This issue is not going away," promises Moeser, a former chair of the Council and member of the Standards Review Committee, "In fact, it might become more acute because . . . schools are going deeper into their applicant pool to fill their seats."[383]

The shuttering of a law school would, like the closing of any other business, represent a tragedy for its employees. While students would be afforded the opportunity to complete their studies before final closure or at another school, most administrators, faculty, and staff would, in the current market, be forced to look for another type of work. And, of course, the central university would experience a shortfall. But such is life in free-market economy, at least one actually based on supply and demand. Unless law school enrollment shrinks radically, the only alternative to the activation of the doomsday machine is continued high unemployment among graduates and the hosing of those still standing in the interminable, though shrinking, line for admission.

If, however, the doomsday machine is never activated, or takes out only a small handful of schools, keeping it well oiled by not lowering the seventy-five percent rule or state bar passage requirements will still help alleviate graduate unemployment. Scared of admitting poor standardized-test takers unlikely to pass the bar

379. Karen Sloan, *Panel Near Decision on Law School's Bar Exam Passage Rates*, NAT'L L. J. (Feb. 6, 2014), http://www.nationallawjournal.com/id=1202641943246/Panel-Near-Decision-on-Law-Schools'-Bar-Exam-Passage-Rates.

380. Karen Sloan, *ABA Moves Toward Allowing Paid Student Externships*, NAT'L L. J. (Feb. 10, 2014), http://www.nationallawjournal.com/id=1202642365436/ABA-Moves-Toward-Allowing-Paid-Student-Externships.

381. Mark Hansen, *ABA Committee Throws in the Towel on New Bar Pass Standard*, A.B.A. J. (Feb. 9, 2014), http://www.abajournal.com/mobile/article/aba_committee_throws_in_the_towel_on_new_bar_pass_standard.

382. Sloan, *supra* note 379; Karen Sloan, *ABA Proposal Alarms Law School Diversity Advocates*, NAT'L L.J. (June 25, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202608371465&ABA_Proposal_Alarms_Law_School_Diversity_Advocates.

383. Sloan, *supra* note 380.

exam or maintain a school's position in the rankings, the bulk of law schools are contracting their enrollment,[384] thus diminishing the flow of law grads into a flooded job market in a shape-shifting profession.[385] Down another eight percent in the fall of 2013, the number of students entering the study of law has fallen a total of twenty-four percent over the last three years.[386]

C. The Restraint on Downsizing

There is, nonetheless, a barrier to downsizing at the very schools that need to the most. Many of the schools living in the shadow of the doomsday machine cannot, for the same reason so many law schools are started up in the first place, reduce the size of the entering class. Propped up on law school revenues, the university simply cannot take the hit. As Associate Dean Filler puts it: "[U]niversity subvention of law school deficits . . . at less affluent universities . . . is simply impossible."[387] Indeed, of the thirty-one schools with bar passage rates south of seventy-five percent in 2012, less than half reduced the size of the incoming class by more than eight percent,[388] and nine tempted fate by increasing the size.[389]

Such schools are caught in a double bind. If the university permits them to adjust admissions targets downward, it would simply raise law school tuition, the overhead rate, or both to make up for the shortfall. The economics underlying the proliferation of law schools will, as with addicts dependent on their drug, prevent the rational response to mortal risk. The reduction of graduate unemployment will require the ABA and the states to keep that doomsday machine well oiled.

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384. Joe Palazzolo & Chelsea Phipps, *With Profession Under Stress, Law Schools Cut Admissions*, WALL ST. J. (June 11, 2012, 6:45 PM), http://online.wsj.com/article/SB10001424052702303444204577458411514818378.html.

385. Karen Sloan, *Consider the Legal Educator's Dilemma*, NAT'L L. J. (Mar. 10, 2014), http://www.nationallawjournal.com/id=1202646107210?kw=Consider%20the%20Legal%20Educator%27s%20Dilemma&et=editorial&bu=National%20Law%20Journal&cn=20140311&src=EMC-Email&pt=Daily%20Headlines&slreturn=20140212022815.

386. *Id.*

387. Filler, *supra* note 343, at 1. As an alternative to downsizing, Penn State has lowered tuition for in-state students to lure students from its competitors. Karen Sloan, *Penn State Law to Cut Tuition for In-State Residents*, NAT'L L.J. (Nov. 26, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202629809404&Penn_State_Law_to_Cut_Tuition_for_InState_Residents.

388. *See* U.S. NEWS & WORLD REP., *supra* note 203; *see* ABA-Approved Law School 1L Matriculants: 2012-2013 Comparison, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/aba-approved_law_schools_2012_2013_1l_enrollment_comparison.authcheckdam.pdf.

389. *See* U.S. NEWS & WORLD REP., *supra* note 203.

D. Tightening Accreditation Standards to Disincentivize Start-Ups

As long as there are starry-eyed lawyer wannabes willing to sign for student loans, and cash-strapped universities and for-profit outfits willing to plunge them into debt, there will be new law schools. Even now, at the peak of the crisis, new schools are opening their doors.[390] Although the ultimate prize is accreditation, filling the first class to keep the operation afloat is, at the moment, their singular concern.[391] Bar passage and graduate placement rates are worries for another day.

To stem the tide of start-up law schools, the ABA should adopt a standard requiring any new venture applying for provisional accreditation to demonstrate two things: first, that its graduates will provide legal representation for an underserved region or group that would otherwise remain underserved; and second, that the new venture will not exacerbate lawyer unemployment. The first is consistent with legal education as a public good and the ABA's goal of "[a]ssur[ing] meaningful access to justice for all persons,"[392] and the second fulfills the ABA's responsibility to protect both the students cast into a saturated job market and the profession itself from even higher unemployment.[393] Neither requirement restrains trade inconsistent with the ABA's mandate to oversee legal education as, in the words of the Task Force, a "public and private good."[394]

While start-up law schools now dutifully claim that their mission is to serve the underserved in their region,[395] few will be able to prove it. As one member of the Council told the Duncan School of Law, "[y]our stated mission is to produce graduates who will go back to the underserved communities in East Tennessee and serve them, and yet the documentation suggests that paid employment that would support such a service has shrunk in the region . . . . "[396] And, for quite a long time, anyway, no new law school will be able to show that its graduates will not be expanding the herd of unemployed

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390. *See supra* notes 33-47 and accompanying text.

391. *See* Sam Favate, *Daytona Beach: Site of the Nation's Next Law School?*, WALL ST. J. L. BLOG (Apr. 16, 2012, 12:06 PM), http://blogs.wsj.com/law/2012/04/16/daytona-beach-site-of-the-nations-next-law-school/.

392. *See ABA Mission and Goals*, ABA, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited May 19, 2014).

393. *Id.* ("The American Bar Association Mission: . . . Eliminate [b]ias and [e]nhance [d]iversity . . . [by p]romot[ing] . . . *full* and equal participation in the . . . profession . . . .") (emphasis added).

394. ABA, TASK FORCE, 2014 REPORT, *supra* note 23, at 29.

395. Jack Crittenden, *An Accreditation Fight*, NAT'L JURIST, Feb. 2012, at 7.

396. *Id.*

lawyers.[397] The regulation I proposed above to limit the central university's take of law school revenues should also serve as a disincentive to hard-pressed universities tempted to go into the law school business.

E. The Bottom Line

Let's do the math on the proposed savings, using some very rough estimates, and see what we've come up with. In *Failing Law Schools*, Professor Tamanaha, who was once a law school dean,[398] estimates that fifty percent of a law school budget goes to faculty salaries and faculty support.[399] Most of it, say ninety-five percent, goes to full-time faculty.[400] Wage concessions of twenty percent would thus represent a 9.5 percent budget reduction.[401] After this, a one-third increase in productivity from teaching three courses per semester rather than two would represent, in time, a reduction of another 12.5 percent.[402] The elimination of semester-long, seventh-year sabbaticals would reduce law school budgets by another three percent.[403] That's approximately a twenty-five percent reduction in law school expenditures so far.[404] Throw in an additional five to ten percent savings from cuts in administrative positions and wages, and we are in the neighborhood of a thirty or thirty-five percent reduction.

The rule I've proposed limiting the central university's take of law school revenues to actual expenses would save another fifteen percent or so, taking the cumulative budget reduction into the vicinity of fifty percent. A fifteen percent savings in overhead charges is an eminently reasonable expectation. During the fireworks between the dean and president at the University of Baltimore over overhead, the president himself asserted that, of the law school revenues captured by the University in the year in question, *only*

397. See *supra* text accompanying notes 25-38.

398. TAMANAHA, *supra* note 8, at 3.

399. *See id.* at 52.

400. *See id.* at 173.

401. *I.e.*, 0.5 (the proportion of the budget spent on faculty) x 0.95 (the proportion of faculty expenses going to full-time faculty) x 0.2 (a 20% reduction in pay) = 0.095.

402. *I.e.*, 0.5 (the proportion of the budget spent on faculty) x 0.95 (the proportion of faculty expenses going to full-time faculty) x 0.33 (the one-third reduction in labor costs over time from the one-third increase in productivity) x 0.80 (downward adjustment in savings based on the 20% decrease in wages) = 0.1254. *See id.* at 181-82.

403. *I.e.*, 0.5 (the proportion of the budget spent on faculty) x 0.95 (the proportion of faculty expenses going to full-time faculty) x 0.074 (the effective average one-fourteenth reduction in labor costs, realized immediately, from the elimination of semester-long, seventh-year sabbaticals) x 0.80 (downward adjustment in savings based on the 20% decrease in wages) = 0.0281. *See id.* at 40.

404. *I.e.*, 9.5% (savings from faculty wage concessions) + 12.54% (from increased teaching loads) + 2.81% (from scuttling sabbaticals) = 24.8%.

13.7 percent were used to pay for non-law school operations,[405] a figure which the Dean asserted to be one-half to one-third of the real amount.[406]

The resultant savings could be used to cut law school tuition in half, halve the size of entering classes, or some combination of the two, thus addressing the twin evils of high tuition and graduate unemployment. The figures may and will vary from school to school, but the cuts recommended above are at least as substantial as the pedagogically irresponsible proposals propounded to date.[407]

CONCLUSION

The current condition of legal education requires strong medicine. Sky-high tuition and graduate unemployment and debt must be drastically cut, but in a manner that preserves sound pedagogy and protects the public interest in competent representation.[408] As Trevor Morrison, the new dean at N.Y.U., observed:

> What sometimes frustrates me in discussions about the crisis in legal education is that phrases like "critical thinking," "analytical reasoning," and "problem solving" often get caricatured or treated as clichés. Great law schools like N.Y.U. must be attentive to the changing demands of a legal marketplace, but need not give up on the more enduring values of a legal education.[409]

But the experimentation and deregulation favored by the ABA Task Force and Professor Tamanaha, which seem to be the order of the day, will denature the product and ignore a major cause of the problem—graduate unemployment.[410] And the problem will only be exacerbated by the failure to facilitate the market correction necessary to bring the supply of new lawyers more in line with demand, and by allowing ever more start-up ventures to seine for guileless college grads in the sea of student loans. Moreover, transplanting legal education from the academy to the marketplace denies it a voice in the advancement of law and human welfare, and attempting to have it straddle two worlds will deny it an identity and

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405. Childs Walker, *University of Baltimore President Responds to Ousted Law Dean*, BALT. SUN (Aug. 1, 2011, 6:09 PM), http://www.baltimoresun.com/news/maryland/bs-md-law-dean-response-20110801,0,1206152.story.

406. *Id.* Dean Closius claimed that "the university seized 45 percent of law school revenues in 2010-11." *Id.*

407. *See supra* Part II.

408. *See supra* Part III.A.

409. Peter Lattman, *Columbia Professor Is Chosen Dean of N.Y.U.'s Law School*, N.Y. TIMES (Apr. 3, 2013, 6:03 PM), http://dealbook.nytimes.com/2013/04/04/columbia-professor-is-chosen-dean-of-n-y-u-s-law-school/?_php=true&_type=blogs&_r=0.

410. *See supra* Part II.D.

a focus.[411] Veblen would be aghast.

The right medicine will confront some uncomfortable truths: law faculties and administrators must sacrifice, the stream of law school revenues into the university must go dry, and the gusher of start-up schools must be capped. The specific proposals set forth in this article will accomplish these tasks, bringing tuition down to or below the level of the recommendations backed by the Task Force and permitting the law school bubble to burst and the market correction to take place. More fledgling lawyers will find work, be less burdened by debt, and charge less for their services, thereby expanding the workload, further reducing unemployment, and extending access to legal services. Equally important, the proposals above will preserve the pedagogical advances of the last century and a half in legal education that safeguard the consumers of legal services, and maintain an unfettered, independent critique of law and the legal system. It is medicine that, by simultaneously protecting the interests of law students, their future clients, and society, will treat what ails legal education without killing it in the process.

411. *See supra* Part II.A.