



2016

Higher Education Under Pressure: What Will the Future Hold?

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Recommended Citation

Nora V. Demleitner, *Higher Education Under Pressure: What Will the Future Hold?* 66 *Syracuse L. Rev.* 649 (2016).

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HIGHER EDUCATION UNDER PRESSURE: WHAT WILL THE FUTURE HOLD?

Nora V. Demleitner[†]

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INTRODUCTION

Richard “Rick” Matasar has influenced U.S. legal education throughout his two decades of deaning at three very different law schools—Chicago-Kent College of Law, the University of Florida’s Fredric G. Levin College of Law, and New York Law School—and his

[†] Roy L. Steinheimer Jr. Professor of Law, Washington and Lee University School of Law. I thank Hannah Arterian for inviting me to participate in this Symposium and Rick Matasar for his always thought-provoking contributions to legal education. For many of the insights in this article I am grateful to the group of law school deans who served with me during my time as dean at the Maurice A. Deane School of Law at Hofstra University and then at Washington and Lee University School of Law. Over the years I have particularly benefitted from conversations with Herman Berliner, Stephen Crawford, Robert Grey Jr., Suzanne Keen, Janet Levit, Joyce McConnell, Marc Miller, Brad Scheler, Jack Vardaman, Pam White, Michelle Wu, Daniel Wubah, David Yellen, and the participants in the Leading Edge Conferences. This article could not have been written without the assistance of John Eller, research librarian at Washington and Lee’s law library. The Frances Lewis Law Center provided financial support for this project.

service on a variety of boards, including the Access Group.¹ As important as this work may have been, Matasar has also had substantial impact through his frequent publications, talks, and panel presentations, in which he addressed legal education. Often his remarks focused on the delivery and the value proposition of a legal education.² Many of his ideas were prescient at the time he presented them, and some remain so. He has always been a trailblazer, though sometimes the moniker Cassandra might have been more fitting. Even though many of his worst predictions have come true, his optimism, his desire to find solutions to challenges, and his fervent belief in the value of legal education always win out. Many of Matasar's words remain as relevant as ever, either because he has been light years ahead of all of us in spotting trouble or because the legal academy has been slow in reacting. While one may disagree with some of Matasar's ideas and proposals, his body of work remains thought provoking and inspiring. It also reflects how deeply he cares about legal education and the value delivered to students.³

An outstanding example of the breadth and avant-garde nature of Matasar's thinking is *The Canary in the Coal Mine: What the University Can Learn from Legal Education*, in which he focuses on the challenges to legal education and the ways in which the current crisis law schools face may present opportunities for technology use, teaching, and collaboration that universities could emulate, as they find themselves under the same pressures.⁴ His arguments are informed not only by his decades of deaning, but also by his work as Vice President for University Enterprise Initiatives at New York University, where he was responsible for managing Global Executive Education, the School of Continuing and Professional Studies, and Online Education Projects, leveraging technology to enhance the value of education.

Legal education may not be the canary described as undergraduate institutions have long been experiencing similar pressures, many of

1. For Richard Matasar's biography, see *Board of Directors*, ACCESS GROUP, <https://www.accessgroup.org/board-directors> (last visited Sept. 4, 2015). The Access Group is a not-for-profit financial services, research, and advocacy organization.

2. Prior to becoming a dean, Matasar also created an impressive body of scholarship in his area of scholarly expertise. Those works, however, are not at issue here.

3. Matasar was subjected to blistering criticism while dean of New York Law School. See David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES (July 16, 2011), www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?_r=0. This paper does not address Matasar's work as dean, but engages his writings and thinking about the state of legal education.

4. Richard A. Matasar, *The Canary in the Coal Mine: What the University Can Learn from Legal Education*, 45 MCGEORGE L. REV. 161 (2013) [hereinafter *Canary in the Coal Mine*].

which have been ascribed to the rise of neo-liberalism.⁵ More importantly, law schools seem unlikely to provide effective ways out of this crisis, at least in a timely manner. Most university-based law schools appear shielded by their universities from having to engage budgetary shortfalls, curricular questions, and other challenges as aggressively and quickly as a market-driven company would. In fact the perceived market turnaround may spoil a perfect opportunity for law schools to learn from the changes all of higher education is currently facing.⁶

This Article will first focus on the cost-value proposition in higher education. The high cost of tuition and attendant student debt load have come under scrutiny in light of the questionable return of the investment in the marketplace. Universities need to focus on employment results, but even more so on learning outcomes. Technological changes will allow for the ongoing development of individualized learning tools, which hold the promise of improved learning. Even though technology will not provide the solution to the current woes of higher education, it will be a crucial element in the creation of new structures. Those, however, may further stratify higher education and the labor markets they serve. While these developments demand serious attention because of their ramifications for society, law schools are unlikely to be at the vanguard, as they are hampered by their insularity within higher education and their narrow focus on the profession and each other.

I. THE COST-VALUE PROPOSITION IN HIGHER EDUCATION

Matasar's metaphor of law schools as the canary in the coal mine has caught on in higher education.⁷ Outside the legal academy, some education critics have adopted Matasar's canary metaphor, though perhaps sometimes unwittingly.⁸ Exemplary may be Ryan Craig who has used legal education "[t]o get a sense of what the future might look

5. See, e.g., William Deresiewicz, *The Neoliberal Arts: How College Sold Its Soul to the Market*, HARPER'S MAG., Sept. 2015, at 25, 26.

6. See, e.g., Jacob Gershman, *Jump in LSAT Takers Gives Law Schools Finally Something to Cheer*, WALL ST. J.: L. BLOG (July 10, 2015, 4:38 PM), <http://blogs.wsj.com/law/2015/07/10/jump-in-lsat-takers-gives-law-schools-finally-something-to-cheer/>.

7. Some have used the canary metaphor to describe other institutions of higher education, such as Sweet Briar College in Virginia, which closed and then reopened in the spring and summer 2015. See Julia Schmalz, *Where Do Sweet Briar, and Other Liberal-Arts Colleges, Go from Here?*, CHRON. HIGHER EDUC. (Aug. 13, 2015), <http://chronicle.com/article/Video-Where-Do-Sweet-Briar/232357> (describing Sweet Briar as the "canary in the coal mine").

8. See RYAN CRAIG, COLLEGE DISRUPTED: THE GREAT UNBUNDLING OF HIGHER EDUCATION 32–34 (2015).

like for American higher education.”⁹ In his book, which is extremely critical of all of higher education, he focuses on the high cost of legal education and questions the value of his personal investment in law school.¹⁰ Even though he admits that the insufficient value he believes to have received may be tied to some decisions he made as a student and after graduation, he nevertheless holds legal education generally responsible for failing to provide sufficient value in light of its cost.¹¹

In a few pages Craig details the crucial facts of the current challenges to law schools, well known to those in legal education and mirrored in Matasar’s accounts. High tuition leads to high student debt, aggravated by the inability of law graduates to find sufficiently well-paying employment that requires a J.D. degree.¹² Craig notes the litigation over allegations of the falsification of placement data, without acknowledging that no court has found a law school liable, and ties it into the dramatic decline in law school applications. In his somewhat superficial doomsday scenario “dozens of law schools [will] close in the next decade,” with “[h]undreds of colleges and universities [not] far behind.”¹³ In the end, Craig’s canary and the crew of miners following it all perish.

9. *Id.* at 32.

10. Many of the most vocal commentators and critics of higher education attended high-price elite residential colleges, an experience that shaped much of their understanding of the education landscape. The vast majority of today’s college students, however, are past the traditional college age, attend part-time, hold at least a part-time job, often struggle with family obligations, may be the first in their family to attend an institution of higher learning, and have substantial financial pressures upon them. For them, the learning experience is vastly different from the one described in many of the recent critiques of the college experience. *See, e.g.*, Jenna Johnson, *Today’s Typical College Students Often Juggle Work, Children and Bills with Coursework*, WASH. POST (Sept. 14, 2013), https://www.washingtonpost.com/local/education/todays-typical-college-students-often-juggle-work-children-and-bills-with-coursework/2013/09/14/4158c8c0-1718-11e3-804b-d3a1a3a18f2c_story.html. While many law students still come from upper-middle class backgrounds, the law student population is also beginning to change, in part because of the changes in the college age population and the downturn in traditional law applicants.

11. “Hell hath no fury” may apply not only to jilted women, but appears at least equally applicable to former law students and lawyers, when one judges by blog posts, articles, and even books.

12. *See* DENNIS W. ARCHER, TASK FORCE ON THE FIN. OF LEGAL EDUC., AM. BAR ASS’N, THE REPORT OF THE TASK FORCE 8, 22 (2015), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_june_report_of_the_aba_task_force_on_the_financing_of_legal_education.authcheckdam.pdf [hereinafter ABA FINANCING LEGAL EDUCATION REPORT]; RANDALL T. SHEPARD, TASK FORCE ON THE FUTURE OF LEGAL EDUC., AM. BAR. ASS’N, FINAL REP. 4, 11 (2014) [hereinafter ABA FUTURE OF LEGAL EDUCATION REPORT]. *See also* Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177, 178–79 (2012).

13. CRAIG, *supra* note 8, at 34.

Whether that prediction comes to pass remains questionable—and Matasar would beg to differ, at least what concerns law schools—but in its cogent description of the challenges law schools are facing Moody's Investors Service demanded a transformed business model for law schools rather than merely changed tuition pricing strategies.¹⁴ Things may be improving, at least in the short-term, as Moody's revised the credit rating of all of higher education from negative to stable last year.¹⁵

Fiscal—and political—pressure on higher education is not new. While some trace the challenges to the 2007/08 recession, the primary pressure points have existed for at least two decades. In 1997, Congress appointed a National Commission on Higher Education Costs to study both college costs and the value received.¹⁶ It concluded that the following actions needed to be taken: (1) strengthen institutional cost control; (2) improve market information and public accountability; (3) deregulate higher education; (4) rethink accreditation; and (5) enhance and simplify federal student aid.¹⁷ Perhaps law schools should have reviewed at least the first two agenda items.

The concern of Congress and state legislatures about rising college costs did not commence in the late 1990s either. Earlier demands for greater accountability led to state level accountability systems and the federal Joint Commission on Accountability Reporting.¹⁸ The latter turned to outcomes, including graduation and placement rates, cost, and faculty activity, as major focus points of its work. Ultimately, it created much of the modern terminology surrounding outcomes measures,¹⁹ an

14. Moody's Investors Service, *Law Schools Challenged to Adapt to Fundamental Changes in the Legal Industry* (May 5, 2014).

15. See Announcement, Moody's Investors Service, US Higher Education Outlook Revised to Stable as Revenues Stabilize (July 20, 2015), https://www.moody.com/research/Moodys-US-higher-education-outlook-revised-to-stable-as-revenues—PR_330530.

16. See MICHAEL F. MIDDAGH, UNDERSTANDING FACULTY PRODUCTIVITY 157–58 (2001) (detailing cost-related issues Commission was charged with considering); see also BOYER COMM'N ON EDUCATING UNDERGRADUATES IN A RESEARCH UNIV., REINVENTING UNDERGRADUATE EDUCATION I (1998) <http://eric.ed.gov/?id=ED424840>. A 1997 study indicated that rising tuition signaled increased competition rather than a market dysfunction. Some of the competition included competition for rankings, a perennial issue on the law school front. Caroline M. Hoxby, *How the Changing Market Structure of U.S. Higher Education Explains College Tuition* (Nat'l Bureau of Econ. Research, Working Paper No. 6323, 1997), <http://nber.org/papers/w6323>.

17. Nat'l Comm'n on the Cost of Higher Educ., *Straight Talk about College Costs and Prices*, N.Y.U. (Jan. 21, 1998), <http://www.nyu.edu/classes/jepsen/costreport.html>.

18. MIDDAGH, *supra* note 16, at 25–30.

19. *Id.* at 30–38; see also *id.* at 150–51 (discussing outcomes assessment standards set out by one of the six regional accrediting bodies). For an example of the implementation of these standards and their measurement at a large university, see MICHAEL F. MIDDAGH,

area law schools are just now being forced to address systematically with respect to learning outcomes.²⁰ Nevertheless, despite the creation of outcomes measures—or perhaps because of them—a recent highly acclaimed research study found little learning and intellectual growth occurring in college.²¹ Some have even argued that neither is any longer deemed an important educational outcome.²² Increasingly the focus has been on results such as employment and salary upon graduation.²³

Despite this long-standing criticism of undergraduate education, Matasar notes much of the hyperbolic literature predicting the demise of undergraduate education and universities is much more recent and appears to follow the template of similar predictions for law schools,²⁴ therefore making law schools “the canary in the coal mine.” The underlying challenge is the same for universities and colleges as it is in legal education: how to justify the rising cost of a college degree when its value, in terms of its return in the market place, seems to be declining? Critics of higher education like Ryan Craig, for example, advise those planning to attend college or professional schools to focus on the entire cost of education, including opportunity costs, and on “promot[ing] delivery of high-return programs”²⁵ to justify the expenses

PLANNING AND ASSESSMENT IN HIGHER EDUCATION 197–202 (2010), setting out “general education skills defined by the faculty at the University of Delaware,” *id.* at 198.

20. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 302 (AM. BAR. ASS’N 2014) [hereinafter ABA STANDARDS]. For Matasar’s views on the value of learning outcomes, see Richard A. Matasar, *Teaching Federal Courts Where Outcomes Matter: A Curricular Conjecture*, 53 ST. LOUIS U. L.J. 807, 818 (2009). For a call to construct the curriculum based on outcome goals rather than reinscribe such goals upon the existing curriculum, see ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 68–69, 206–210 (2007) http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf.

21. See RICHARD ARUM & JOSIPA ROSKA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* 3–4 (2011).

22. See Deresiewicz, *supra* note 5, at 26.

23. For a critical perspective on this development, see Deresiewicz, *supra* note 5.

24. See CRAIG, *supra* note 8, at 32–34; KEVIN CAREY, *THE END OF COLLEGE: CREATING THE FUTURE OF LEARNING AND THE UNIVERSITY OF EVERYWHERE* (2015); see also *Canary in the Coal Mine*, *supra* note 4, at 171–72; Jeffrey J. Selingo, Opinion, *Colleges Struggling to Stay Afloat*, N.Y. TIMES (Apr. 12, 2013), http://www.nytimes.com/2013/04/14/education/edlife/many-colleges-and-universities-face-financial-problems.html?_r=0.

25. CRAIG, *supra* note 8, at 34. Bryant Garth has argued that much of the current rhetoric is reminiscent of that of the 1930s when more elite law schools tried to close down part-time night schools that served poorer, more immigrant populations by discouraging attendance. He admits, however, that at that time cost was not a substantial part of the conversation. Bryant G. Garth, *Crises, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, 24 STAN. L. & POL’Y REV. 503, 506–07 (2013). For a discussion of the earlier expansion of legal education despite elite opposition, see Nora V. Demleitner, *Legal Education in the United States—Reflecting Societal Changes Yesterday and Today*, in

incurred. Those exhortations continue to challenge law school recruitment and lead to fiscal challenges on the college level where scholarships and discount rates have been rising.

The value question perennially recurs with economic downturns, and subsequently seems to recede. Two other trends, however, lend urgency to the inquiry at this point. Going forward the country appears unable or unwilling to provide sufficient resources to increase the funding for a larger number of students to obtain college degrees.²⁶ In addition, the current technological disruption may provide the opportunity for a teaching and learning revolution similar to that resulting from the invention of the printing press. This confluence of circumstances may propel change. Nevertheless, even those who predict the demise of undergraduate education as we know it, do not assume college enrollment to drop dramatically as it had in law schools but rather foresee gradual adjustments on the enrollment scene. In the end, institutions unwilling or unable to change will struggle to survive.

University presidents, provosts, and chief financial officers who are scrutinizing law school enrollments and tuition discount rates, often with bated breath, are “watching the law school spectacle,” perhaps dreading to see the future.²⁷ Beyond that group which is highly aware of the pressures under which law schools and often their entire institutions operate, it is questionable that undergraduate (or graduate) faculty members are paying much attention. College faculty have noticed a drop in the number of recommendation letters requested for law school; others have been surprised to find students enroll in schools of which they could not have dreamed previously.²⁸ They may be aware of the dynamics behind these developments but many of them deem law schools sufficiently different from undergraduate institutions to find the lessons instructive. Their reaction should not be surprising. After all, law faculty have told them for decades about how distinct the educational approaches are and how much more independence law schools enjoy from the central university. In addition, much of the plight of law schools has been blamed on developments in the profession, and especially the decline in highly paying associate positions at large law firms, a further reason not to detect any parallels.

The almost-demise of Sweet Briar College has attracted

VISION OF LEGAL EDUCATION 74, 81–82 (Nilendra Kumar ed., 2015).

26. See Andrew P. Kelly & Sara Goldrick-Rab, *Introduction to REINVENTING FINANCIAL AID 1* (Andrew P. Kelly & Sara Goldrick-Rab eds., 2014). This is the case despite President Obama’s proposal for free community college education.

27. *Canary in the Coal Mine*, *supra* note 4, at 169.

28. Conversation with Suzanne Kean, Dean, Coll., Wash. and Lee Univ.

substantially more faculty attention and concern.²⁹ No longer will most smaller universities except for those with the largest endowments, and especially women's colleges, liberal arts colleges, and those located in rural areas consider themselves immune from market pressures. While private colleges have long been feeling the strain, state funding cuts for public universities have made their struggles more public.³⁰ Research universities and flagship state universities have begun to develop new funding models, but especially regional state institutions have experienced substantial financial pressure.

Matasar noted in an earlier piece that “no single, current economic model [exists] for all [law] students and law schools.”³¹ This is even more applicable to other institutions of higher learning where greater variability exists, leading to a diversity generally hailed as a positive hallmark of higher education in the United States.

U.S. higher education is considered highly effective in part because of its great diversity.³² From public two-year colleges to elite residential private liberal arts colleges, from large religious universities to regional public teaching universities, from research universities to schools that educate largely first-generation college students and immigrants, the picture of higher education is varied and at least theoretically allows every potential student to find the appropriate match. This is a unique strength of the U.S. system, in contrast with that in many countries where large public universities dominate. This variety mandates and allows for different solutions to the fiscal challenges individual schools face, even though the underlying constraints are shared.

A. How Did We Get Here?

Public discourse was initially focused on the cost of higher education. Increasingly, however it has turned to the cost-value proposition, comparing the investment in education with often short-

29. See, e.g., Sheryl Gay Stolberg, *Sweet Briar College Is Saved but Is Not in the Clear*, N.Y. TIMES (June 23, 2015), http://www.nytimes.com/2015/06/24/us/sweet-briar-collegeis-saved-but-not-in-the-clear.html?_r=0; Schmalz, *supra* note 7 (describing Sweet Briar as the “canary in the coal mine”). For a critical perspective on reversals by state attorneys general of university board decisions to address fiscal challenges, see Lawrence S. Bacow & William G. Bowen, *The Real Work of ‘Saving’ 2 Colleges Has Yet to Be Done*, CHRON. HIGHER EDUC. (Sept. 8, 2015), http://chronicle.com/article/The-Real-Work-of-Saving-/232901/?cid=at&utm_source=at&utm_medium=en.

30. See Selingo, *supra* note 24.

31. Richard A. Matasar, *Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (or Anyone Else)?*, 82 N.Y. ST. B. ASS'N J. 20, 20 (Oct. 2010) [hereinafter *Current Economic Model*].

32. For the historic background, see generally CAREY, *supra* note 24.

term career outcomes.

For decades Matasar has been ringing the alarm bells. As early as 1994—now usually heralded as part of the “good old times”—Matasar concluded that the cost of legal education is too high, but also that there is no end in sight to further cost increases.³³ The reasons for these increases have been manifold. In his writings Matasar focused on different curricular trends, from experiential education to the more recent movement toward increased interdisciplinary teaching, as factors that have added substantial cost.³⁴ Especially elite law schools have increased offerings in conjunction with other schools at their universities, perhaps drawing some inspiration from undergraduate institutions that have begun to teach outside of the departmental structure, with a greater focus on problem-solving and interdisciplinary clusters. Whether emulating the move toward interdisciplinary teaching at elite law schools has increased cost everywhere, or rather whether other factors, such as the “facilities race” and the expansion of faculties generally, may have contributed more to rising expenses, remain open questions. Some have also blamed ABA accreditation requirements, paralleled by charges of some university presidents that government mandates are substantially responsible for rising education costs.³⁵ Undoubtedly the drive for higher *U.S. News* rankings has also played a role in increasing cost.

In the last few years the focus has shifted from the cost debate to one over the value of a higher education. In a prescient 2010 article, Matasar outlined why legal education should be considered “a bad economic investment,”³⁶ and concluded that law schools should be facing financial pressures. Realities on the ground, however, seemed to prove the contrary. Applications had been soaring, and most expected college graduates to continue to flock to law schools to wait out the recession. The applicant spike in the wake of the 2007/08 financial crisis after all reflected the traditional counter-cyclical trend. Matasar himself ascribed the booming law school enrollment to the ongoing appeal of a legal education, largely because of the long-term desirability of the degree.

33. Richard A. Matasar, *The MacCrate Report from the Dean's Perspective*, 1 CLINICAL L. REV. 457, 465–68 (1994).

34. *Canary in the Coal Mine*, *supra* note 4, at 164–65.

35. See, e.g., Arthur F. Kirk, Jr., *Think College Costs Too Much? Thank the Government*, CHRON. HIGHER EDUC. (May 19, 2014), <http://chronicle.com/article/Think-College-Costs-Too-Much-/146641>.

36. *Current Economic Model*, *supra* note 31, at 21.

Only a year later, however, the tide turned.³⁷ Matasar had accurately predicted the reckoning, even though he may have been slightly off on the timing. By 2011 he was poking fun at himself in an *Iowa Law Review* article when he noted that after he had apparently been so off in his predictions, “the editors . . . must have a real sense of adventure to ask me to opine (once again) on the economic viability of the Juris Doctor degree.”³⁸ Nevertheless, he did not alter his analysis though he could have hardly envisioned how the next few years would unfold. Law schools’ placement claims came under scrutiny, and demands for greater transparency with respect to employment numbers proliferated. As changes to employment reporting over the next few years revealed the lack of demand for entry-level lawyers, at least the *short-term* value of a law degree became questionable. Those who continued to defend the desirability of a law degree based on its long-term career value have either lacked the supporting data for their claims or been overshadowed by anecdotal accounts of unemployed or unhappy lawyers.³⁹

Matasar recognized early that tuition cost alone was no longer determinative in the decision of college graduates to attend law school, a lesson law schools have learned as even heavy tuition-discounting has not filled their classes. It is the cost-value question that now overshadows the debate about law school education. This questioning is not limited to law schools but may be widespread also in other parts of professional education. There is some anecdotal indication that even graduates of elite liberal arts college, for example, forego medical school for the perceived better cost-value proposition of a nurse practitioner education.⁴⁰

In 2010 Matasar already urged long-term price decreases or an increase in value, with either or both necessitating changes within legal education.⁴¹ The time may have come for both—in all of higher

37. See *End-of-Year Summary: ABA (Applicants, Applications, & Admissions), LSATs, Credential Assembly Service*, L. SCH. ADMISSION COUNCIL, <http://lsac.org/lsacresources/data/lsac-volume-summary> (last visited March 14, 2016).

38. Richard A. Matasar, *The Viability of the Law Degree: Cost, Value, and Intrinsic Worth*, 96 IOWA L. REV. 1579, 1580 (2011) [hereinafter *The Viability of the Law Degree*].

39. But see Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249, 249, 284 (2014).

40. E-mail exchange with Winfield S. Brown, President & CEO, Heywood Healthcare (Mass.) (on file with the author).

41. *Current Economic Model*, *supra* note 31, at 22. See also ROBIN L. WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* 124–25 (2014) (confirming the business and educational value crisis of law schools but emphasizing a more existential crisis due to the long-standing neglect of justice and the relevance of politics to

education.

The fiscal crisis of higher education is widespread as cost and value appear increasingly mismatched. The reasons for the challenges, however, differ.

1. Private and Public Institutions: Tuition Increases Everywhere

In contrast to professional schools where even well-off parents are often unwilling to fund their children's education, historically parents have been willing to pay—and borrow—for their children's college education. With the decline of parental wealth due to a decrease in home values in many parts of the country, high unemployment numbers following the 2007/08 recession, and stagnant wages resulting in declining real family incomes, parental resources have been shrinking.⁴² Even though schools have largely continued to increase tuition, at the same time discounting rose as students and their families had become both poorer and more risk/debt averse.⁴³ Discounting also has extended to the wealthy who expect scholarship awards based on merit for their children as many colleges and law schools turned from need to so-called merit in their financial aid awarding. As a consequence, the poor are paying a disproportionate share of tuition while "merit" has been used to camouflage efforts to improve rankings or fill the class.⁴⁴

To some extent, increased financial aid offsets perceived value shortcomings of undergraduate degrees in the labor market, especially those from less well-recognized institutions. After all, decreased cost balances out (perceived) weaknesses in pay-off. The underlying ailment and the prescription resemble the strategy many law schools now employ. Scholarship aid increases, however, have put growing pressure on the finances of many private institutions, not just law schools. Nevertheless, they will be difficult to roll back even if the larger

law).

42. See, e.g., BERGERON ET AL., CTR. FOR AM. PROGRESS, *THE MIDDLE-CLASS SQUEEZE* 3 (Jennifer Erickson ed., 2014), <https://www.americanprogress.org/issues/economy/report/2014/09/24/96903/the-middle-class-squeeze/>.

43. See, e.g., James L. Doti, Opinion, *The Growth in College Costs Is Slowing, Particularly for Poorer Families*, CHRON. HIGHER EDUC. (May 13, 2015) (arguing that tuition increases are slowing and that high number of institutional grants have yet further slowed the cost increase).

44. Jon Marcus & Holly H. Hacker, *Poorer Families Are Bearing the Brunt of College Price Hikes, Data Show*, HECHINGER REP. (Mar. 9, 2014), <http://hechingerreport.org/data-show-poorer-families-bearing-brunt-college-price-hikes/>; see also JENNIE H. WOO & SUSAN P. CHOY, U.S. DEP'T OF EDUC., *STATS IN BRIEF: MERIT AID FOR UNDERGRADUATES* 6 (2011), <http://nces.ed.gov/pubs2012/2012160.pdf>.

economic environment changes substantially.⁴⁵ In addition, in some parts of the country, private schools, especially if recruiting locally or regionally only, will find themselves under more pressure as the number of eighteen-year-olds graduating from high school—the traditional college-age population—continues to decline.

While the most elite and well-endowed institutions in the country have experienced staggering fundraising successes and endowment increases in the last five years, the same has not been true for smaller, less well-resourced colleges and universities. With less annual support and limited endowment growth,⁴⁶ these schools have found themselves struggling for revenue in an ever more competitive admissions market. The future for them does not always look promising. On the other hand, prestigious institutions witness ever larger applicant numbers and greater selectivity. In the end, one result of the current crisis in higher education is that the rich get richer.⁴⁷

Substantial merit aid may have reinforced the often bemoaned attitude of students as customers, as applicants clearly perceive the financial pressures under which colleges labor. As they see themselves treated as important commodities who bring value to the institution for which they will be paid, they will yet be more inclined to focus on immediate pay-off rather than intrinsic learning or personal growth.⁴⁸

High nominal tuition cost carries other negative ramifications. Despite the ongoing availability of federal student loans, and to some extent, more advantageous terms of repayment, students generally have become more risk- and debt-averse. At the college level “under-matching” has become of great concern, which means the decision of poorer students not even to explore high-priced elite universities and colleges because of the sticker price even though they would be able to contribute to and benefit from this type and level of education. These

45. Law schools also may experience such ongoing pressures.

46. The stock market rally since the recession has swelled some universities' coffers even more. While highly paid money managers retained by elite institutions cannot guarantee substantial endowment returns, many of them have been able to accrue extraordinary financial benefits for their clients. *See* Press Release, Nat'l Ass'n of Coll. & Univ. Bus. Officers, Building on 11.7% Gain in FY2013, Educational Endowments Investment Returns Averaged 15.5% in FY2014 (Jan. 29, 2015), http://www.nacubo.org/About_NACUBO/Press_Room/2014_NACUBO-Commonfund_Study_of_Endowments_%28Final_Data%29.html.

47. *See also* Nora V. Demleitner, *Curricular Limitations, Cost Pressures, and Stratification in Legal Education: Are Bold Reforms in Short Supply?*, 44 SETON HALL L. REV. 1014, 1032 (2014).

48. *See* Deresiewicz, *supra* note 5, at 26. For a discussion of the belief in merit of self and its ramifications in the past and at present, see ANDREW DELBANCO, COLLEGE: WHAT IT WAS, IS, AND SHOULD BE (2012).

findings may be yet more disturbing as the college-age population will become not only more ethnically and socio-economically diverse but will also hail increasingly from less affluent strata of the population.⁴⁹

It is unlikely that this phenomenon would remain restricted to the undergraduate sector. After all, the downturn in law applicants may already indicate that a large number of talented students who would be suited to a legal career have been deterred from pursuing it because of concerns about debt. In the long run, the ramifications of demographic change may become yet more pronounced, though law schools will have slightly more time than undergraduate institutions to prepare for the “21st century student.”⁵⁰

Public universities have been facing different challenges than private universities. As the recession took its toll on state coffers, states have dramatically curtailed funding of higher education. At the same time they have encouraged, if not pressured, public institutions to increase the number of (in-state) students they educate while keeping tuition increases nominal.⁵¹ To make up for the resulting budget shortfalls, flagship state universities have been recruiting more out-of-state and international students, at a substantially higher tuition to make up for budget shortfalls. Some also increased in-state tuition,⁵² though a number of state legislatures announced caps on such increases, threatening to withdraw state funding should the universities not heed

49. See, e.g., Ron Crouch, *The United States of Education: The Changing Demographics of the United States and Their Schools*, CTR. FOR PUB. EDUC., <http://www.centerforpubliceducation.org/You-May-Also-Be-Interested-In-landing-page-level/Organizing-a-School-YMABI/The-United-States-of-education-The-changing-demographics-of-the-United-States-and-their-schools.html> (last updated May 2012).

50. See Jamie P. Merisotis, President, Lumina Found. for Educ., Keynote Address at the National Forum on Higher Education for the Public Good: Serving the 21st Century Student (Apr. 27, 2010), <http://www.luminafoundation.org/news-and-events/serving-the-21st-century-student>.

51. See *Canary in the Coal Mine*, *supra* note 4, at 178–79. For general background on state and federal funding of higher education, see *Federal and State Funding of Higher Education: A Changing Landscape*, PEW CHARITABLE TRS. (June 11, 2015), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/06/federal-and-state-funding-of-higher-education>. Ongoing state funding cuts are also due to philosophical differences and policy choices about the role of higher education. See Ellen Wexler, *Starving the Beast*, INSIDE HIGHER ED. (Mar. 22, 2016), <https://www.insidehighered.com/news/2016/03/22/starving-beast-examines-ideological-shifts-funding-higher-education>.

52. Since in-state tuition has generally been much lower than that of comparable private institutions, public universities have enjoyed much greater leeway with respect to their increases. See, e.g., THOMAS D. SNYDER & SALLY A. DILLOW, U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STATISTICS, *DIGEST OF EDUCATION STATISTICS 2013*, at 625–28 tbl.330.10 (2015), http://nces.ed.gov/pubs2015/2015011_3.pdf (documenting average cost and increases at public and private universities between 1982/83 and 2012/13).

the mandates.⁵³

State institutions have not lacked students though many students have started their higher education at yet lower cost options, community colleges, before transferring to another state—or a private—four-year college. The enrollment increases at state institutions have led to other challenges. Students, for example, have found themselves closed out of courses needed to graduate on time, which ultimately has increased the length—and cost—of a degree, has intensified state pressure and oversight of universities, and may have also fueled higher drop-out rates.

Private universities have tried to benefit from pressures on public institutions by promising smaller class sizes and guaranteed graduation in four years. Many have also eased the path from community colleges. While these are regularized paths that come after receipt of a two-year degree, they resemble the active law school transfer market as recipients of transfer students have facilitated their entry and opened more opportunities to them. The transfer agreements between some of these institutions may also mirror the now heralded 3-3 programs that promise two degrees—an undergraduate and a law degree—in six rather than seven years. These arrangements are ultimately designed to depress the cost of education.

The discourse about cost and graduation rates—an outcome measure—have reinvigorated the debates about federal funding for higher education and led to yet further demands for accountability and transparency. Here the fortunes of public and private universities reunite.

2. The Role of Federal Student Funding

Drop-out rates from all levels of higher education—as a stand-in for value and service provided—have become one of the focal points in the debate about state and federal funding of higher education and student debt.⁵⁴ They have turned into a crucial outcomes measure, with most four-year institutions trying to improve their six-year graduation

53. See, e.g., Jason Stein & Karen Herzog, *Walker Moves to Tie Future UW Tuition Increases to Inflation*, J. SENTINEL (Milwaukee) (Apr. 13, 2015), <http://m.jsonline.com/news/statepolitics/scott-walker-moves-to-limit-future-uw-tuition-increases-to-inflation-b99480643z1-299613051.html>.

54. See, e.g., Nick Anderson, *New College Data Give Fuller Picture of Graduation Rates—And Show Challenges*, WASH. POST (July 18, 2014), https://www.washingtonpost.com/local/education/new-college-data-give-fuller-picture-of-graduation-rates—and-show-challenges/2014/07/18/92578f92-0dba-11e4-8341-b8072b1e7348_story.html. For data on completion rates, see *Fast Facts: Graduation Rates*, U.S. DEP'T EDUC.: NAT'L CTR. FOR EDUC. STATISTICS (2015), <https://nces.ed.gov/fastfacts/display.asp?id=40>.

rate.

A low graduation rate may be the harbinger of serious problems as college drop-outs often carry substantial debt and decimated income opportunities.⁵⁵ A high default rate may ultimately threaten the institution's ability to enroll students who finance their education with federal loans. At this point, however, the default threshold is set so high that it has impacted only a handful of for-profit institutions and one two-year college that serves students who are particularly economically deprived.⁵⁶

For most law schools academic attrition has not been a substantial concern.⁵⁷ It has been one of the markers that may have distinguished some of them from the undergraduate institution with which they are affiliated. In recent months, however, the morality of such attrition—and its financial impact—has been debated in conjunction with indications that the quality of law students overall may have fallen and that academic markers, especially the LSAT, have substantially decreased at some law schools.⁵⁸ An ABA committee has proposed better data collection and greater transparency with respect to drop-out rates.⁵⁹

In contrast to colleges, law schools regularly fear the withdrawal of all federal loan funding. Despite America's pride in its legal system and rule of law, some surmise that law schools are perceived as having less social utility than colleges. Strong advocates of free markets may also

55. This is particularly true for for-profit institutions. *For-Profit College Dropouts Most Likely to Default on Student Loans*, COLL. FIN. GRP. (June 2, 2015), <http://www.collegefinancinggroup.com/student-loan-repayment/profit-college-dropouts-likely-default-student-loans/>.

56. See Press Release, The Inst. for Coll. Access & Success, *Despite Lower Rates, More Than 650,000 Defaulted on Federal Student Loans* (Sept. 24, 2014), http://ticas.org/sites/default/files/legacy/pub_files/CDR_2014_NR.pdf.

57. Drop-out rates from law schools tend to be higher for schools that recruit students with lower incoming credentials. For an extreme example, see Jason Song et al., *Times Investigation: Nearly 9 in 10 Students Drop Out of Unaccredited Law Schools in California*, L.A. TIMES (July 25, 2015), <http://www.latimes.com/local/education/la-me-law-schools-20150726-story.html>.

58. The drop in the number of law school applicants overall initially camouflaged the non-linear decline within that group. High-end applicants, as measured by LSAT score, have decreased more than others. See Erica Moeser, *President's Page*, B. EXAMINER 4, June 2015, at 4, 7–11, http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Farticles%2F2015%2F840215-PresidentsPage.pdf (charting by school changes in first-year enrollment and LSAT score at the 25th percentile from 2010 to 2014).

59. See Mark Hansen, *Law Schools Would Have to Break Down Attrition Info if Proposed Changes Get Green Light*, ABA J. (May 1, 2015), http://www.abajournal.com/magazine/article/law_schools_would_have_to_break_down_attrition_info_if_proposed_changes.

assume that law students should borrow in the private market as they are in a stronger position to repay their education debt. This reductionist conversation between the current student loan system on the one hand and its demise on the other, however, misses the nuanced debate at the college level about a host of possible ways of restructuring the existing model.⁶⁰ One possible change that would impact many law schools is a cap on graduate student loans.⁶¹

In the end the vast majority of universities and their students depend on the availability of student loans. That dependency, however, also creates leverage for the federal government to demand cost controls, the implementation of outcomes measures and an attendant showing of meeting goals, and greater transparency.

B. Cost Control and New Revenues

Driven by the decline in tuition revenues, law schools have downsized. They have offered buyouts to senior faculty and cut down on adjuncts and other contingent faculty; some have had to lay off staff; others have decreased operating costs and faculty support. For most the largest parts of the cost structure are financial assistance and personnel costs, especially for faculty.

Matasar has identified some specific reasons for faculty growth beyond striving for a better student-faculty ratio and increased scholarly output, both of which impact law school rankings. He indicates that law schools have become “mini-universities of their own,” which is a function of an expanded curriculum focused on “legal education training” rather than on preparing graduates for the profession.⁶² This insight raises larger questions about the (re)focus of legal education. Should law schools return to teaching primarily a relatively narrow core group of legal subjects? Could another entity offer the rest of the current curriculum more effectively and more efficiently? What are the synergies between the legal profession, undergraduate and graduate programs, and other, non-legal professional organizations? And how could the answers to these questions serve cost reduction?

Those schools that are part of universities, and especially universities with other graduate programs, should create bridges to

60. See Kelly & Goldrick-Rab, *supra* note 26, at 9–12 (outlining different approaches to the design and delivery of educational loan programs).

61. See, e.g., Janet Lorin, *Schools Want the Sky to Be the Limit on Loans*, BLOOMBERG BUSINESSWEEK (Sept. 3, 2015), <http://www.bloomberg.com/news/articles/2015-09-03/student-loans-schools-want-the-sky-to-be-the-limit> (discussing universities’ responses to proposal limiting graduate student debt annually and in total).

62. *Canary in the Coal Mine*, *supra* note 4, at 165.

those other parts to enhance connections within the institution. Dual degree programs are a relatively facile answer to leverage the inherent strengths of different departments. They will allow students to earn two credentials in a shorter period of time, and therefore be cost effective. For universities they may bring additional revenue.

Cross-teaching by specialists on both the graduate and undergraduate level in courses ranging from history and art to sports and education—with lawyer-academics to cover legally relevant materials and non-lawyer-academics to teach within their area—would enhance and improve knowledge dissemination and application within many departments, though current structures of credit counting and departmentally based course loads may militate against such proposals. In the long run, novel graduate degrees and undergraduate minors and majors may emanate from such joint teaching. Those would advance interdisciplinary problem-solving, as exists already in problem-based, cross-disciplinary majors but with the addition of integrated legal knowledge. As undergraduate programs and many professional schools may underestimate the role and importance of law in all parts of life and its relevance to the most pressing challenges for society and the global community, it is upon law schools to provide the necessary education and propose this integration.

In some schools, law faculty may be in a position to offer undergraduate legal courses. College faculty may be receptive to such overtures, especially at large public universities where the influx of ever more students despite cuts in state assistance has stretched teaching resources. Countervailing structural pressures in some private universities or philosophical concerns about embedding professional courses in a liberal arts curriculum, however, may make an undergraduate faculty reluctant to allow law faculty to teach large numbers of undergraduates or to lobby for an undergraduate law major.⁶³

In the end, such collaborations could enhance student learning, decrease cost as existing faculty resources could be maximized, and even build new revenue as these programs may be attractive to a group of students that would otherwise not consider the university. Whether general or specific legally focused offerings on the undergraduate level would increase or depress student interest in law school would remain

63. See *The Viability of the Law Degree*, *supra* note 38, at 1621. This does not appear to be a universal attitude in all private universities. At some, undergraduate faculty seem to have equally welcomed this addition to the curriculum, and the relief it has brought as law faculty have taken on some of the undergraduate teaching obligations.

to be seen.

The minimal level of collaboration across universities reflects the lack of connectivity between law schools and the larger educational enterprise. That comes at a great loss to the learning enterprise. By definition undergraduate faculty work with students much earlier than law faculty. They spot trends, discover challenges with a new student cohort, and experiment with teaching innovations long before law faculty even meet these students. Impressions formed on earlier levels of education in turn inform student expectations.

Legal academics may also be well positioned to educate non-legal professionals about law in a meaningful, and to them professionally relevant, way.⁶⁴ As an undergraduate education should serve personal growth and character-building and enhance analytical and communication skills generally, a professional education by definition is more narrowly focused. General knowledge about contract formation, litigation, and employment law as well as upper-level specialized materials should be especially suitable for many non-legal professionals who desire focused legal knowledge. Alternatively, junior lawyers could benefit from specialized courses and training, at a time when they are immediately relevant to them.

If law schools could unlock these markets, they would become less dependent on J.D. revenue. Only programs that provide concrete value for the cost they charge, understand the needs of their target audience, and facilitate access to instruction will thrive. Most important for the long-term health of legal education would be the greater value law schools could provide to the profession and beyond in this manner.

While cost control and expanded revenues will remain essential aspects of higher education budgeting, an enhanced value proposition is a crucial component of the financial viability of higher education institutions.

C. Value-Based Outcomes

As the worth of a legal education has increasingly been questioned, the definition of “value” remains under construction. While value has traditionally been assessed in terms of the *U.S. News* rank of the law school, which was determined largely by student quality input measures and reputation of the law school, increasingly value has come to depend more heavily on outcomes—employment in full-time, long-term, non-

64. See Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y.L. SCH. L. REV. 465, 500 (2004) [hereinafter *The Rise and Fall of American Legal Education*].

school funded J.D. required positions—as compared to net cost.⁶⁵

The calibrated data on employment outcomes, in conjunction with published tuition cost, has contributed to the decline of law school applicants.⁶⁶ Even though many have attended law school because they consider law an important tool to change and improve society, others have long seen the legal profession as a means to a higher status and income. Being a lawyer, in literature and public consciousness, has promised respectability and a comfortable—though not necessarily wealthy—lifestyle throughout much of this country's history.

With the rise of the large national and international law firm whose entry-level salaries today are many times what a young lawyer in a government position or with a smaller law firm could expect, the allure of law school became closely tied to these positions.⁶⁷ For many law schools recruiting centered on the implicit promise of these positions and the financial remuneration that follows. Even though only about a quarter of law students nationally—with substantial variations based on the law school attended—are placed in such firms, (perceived) wealth seemed to have been an important motivator in the decision to attend law school before large firms dramatically cut their hiring.⁶⁸ With these highly paid positions decimated, the value of a legal education has become ever more questionable.

Colleges have also come under attack for the uncertain value they provide. Heavy emphasis has been put on employment and salary upon

65. For a discussion of the value of a legal education, see *id.* at 467–76.

66. For the compilation of detailed employment data, see generally Am. Bar Ass'n, *Employment Summary Report*, SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, <http://employmentsummary.abaquestionnaire.org> (last visited Feb. 27, 2016). Matasar's criticism that "[l]aw schools are more transparent in comparison" to other academic disciplines and other parts of the academy is well taken. *Canary in the Coal Mine*, *supra* note 4, at 168. Reporting changes for law schools, however, have also been quite recent and been due to outside pressure. See LAW SCH. TRANSPARENCY, <http://www.lawschooltransparency.com> (visited last Feb. 27, 2016). Change is coming quickly on the undergraduate front through the federal—and some state—governments which are developing tools to measure outcomes. Because of the multiplicity of undergraduate institutions, student populations, and potential outcomes, it may be more difficult to achieve agreement on the underlying values and measurements for such a system.

67. Entry-level salaries in these firms rose sharply from the mid-1990s until about 2009. Since then they have been stagnant or even declining. *How Much Do Law Firms Pay Associates? A Look Back at 20 Years of Findings from the NALP Associate Salary Survey*, NALP BULL. (Oct. 2014), <http://www.nalp.org/1014research>.

68. See Bernard A. Burk, *What's New About the New Normal: The Evolving Market for New Lawyers in the 21st Century*, 41 FLA. ST. U. L. REV. 541, 576 (2014). Entry-level salaries at large law firms have not increased in the last few years; posted tuition, however, has generally continued to go up since the recession. *Id.*

graduation.⁶⁹ The state of Virginia has developed a unique tool to track salary information up until twenty years after graduation to assess the long-term impact of a college degree.⁷⁰ While some have counseled that dropping out of college may be more remunerative than graduating, aggregate data—in contrast, to the anecdotal accounts about Bill Gates, Mark Zuckerberg, and Steve Jobs—demonstrate that in the long run college graduates do better in the marketplace—and in terms of personal satisfaction—than high school graduates or college drop-outs.⁷¹ For those reasons a dramatic decline in college attendance is most unlikely, at least unless cheaper methods that provide equal success in the labor market can replace it. On the other hand, not all colleges or majors are equally situated. For decades certain majors have lost while others have gained students. Increasingly that selection is connected to assumptions of and predictions about economic success.⁷² Therefore some programs have suffered the same fate as many law schools: a dearth of applicants.⁷³

Value of a degree has traditionally been measured not just in labor market results but also in terms of educational gain. The Pew Research Center has added personal satisfaction as a variable. Educational benefit, nonetheless, appears to be increasingly defined by the end-customer, employers.

The legal profession has long accused law schools of preparing law graduates insufficiently for the practice of law.⁷⁴ While law schools

69. See, e.g., MARK SCHNEIDER ET AL., COLL. MEASURES, THE EARNING POWER OF RECENT GRADUATES FROM VIRGINIA'S COLLEGES AND UNIVERSITIES 1–2 (2012), http://www.collegemeasures.org/file.axd?file=Virginia_EMS_Report1.pdf.

70. *Guide to the Mid-Career Wages Report*, ST. COUNCIL OF HIGHER EDUC. FOR VA., <http://research.schev.edu/apps/info/Reports.Guide-to-the-Mid-Career-Wages-Reports.ashx> (last visited Mar. 16, 2016). See also Paul Fain, *The Long View on Wages*, INSIDE HIGHER ED: ASSESSMENT & ACCOUNTABILITY (Sept. 9, 2014), <https://www.insidehighered.com/news/2014/09/09/new-data-virginia-agency-tracks-graduate-earnings-two-decades-later>.

71. See, e.g., *The Rising Cost of Not Going to College*, PEW RES. CTR. (Feb. 11, 2014), <http://www.pewsocialtrends.org/2014/02/11/the-rising-cost-of-not-going-to-college/>.

72. See ANTHONY P. CARNEVALE ET AL., GEORGETOWN UNIV., CTR. ON EDUC. & THE WORKFORCE, *HARD TIMES—NOT ALL COLLEGE DEGREES ARE CREATED EQUAL* 4 (2011), https://cew.georgetown.edu/wp-content/uploads/2014/11/Unemployment.Final_update1.pdf.

73. Despite Matasar's contention that the law degree continues to hold value, *The Viability of a Law Degree*, *supra* note 38, at 1587–88, the most qualified college graduates have found alternatives to law school.

74. See, e.g., Alfred Z. Reed, *Recent Progress in Legal Education*, 5 AM. L. SCH. REV. 695, 695 (1926). For a modern critique, with a set of proposals for change, see BEN W. HEINEMAN, JR. ET AL., HARVARD LAW SCH., CTR. ON THE LEGAL PROFESSION, *LAWYERS AS PROFESSIONALS AND AS CITIZENS: KEY ROLES AND RESPONSIBILITIES IN THE 21ST CENTURY* 49–64 (2014), https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_

have attempted to respond—over generations—to such criticism,⁷⁵ they have never successfully assuaged the critics. Increasingly, the demands as to what should and needs to be taught in three years of legal education are going up, as Matasar notes. Might it be that the profession asks too much?

The J.D. degree may be a degree for beginners rather than experts. A 1936 Association of American Law Schools Committee soundly rejected the title “doctorate in law” as misleading for the first law degree. It noted that as the undergraduate degree is unrelated to the law degree, the latter only merits being called a baccalaureate degree.⁷⁶ Ultimately the J.D. title replaced the bachelor of law, but perhaps for reasons unrelated to educational goals.

The claim that legal learning remains incomplete after three years led to frequent suggestions during the middle of the last century that law school be lengthened by a year to four years.⁷⁷ During the last recession there seemed to be a movement to supplement the J.D. degree with a specialized LL.M. As that combination merely increased cost but did not seem to provide enhanced value, the model did not flourish.

Similarly, colleges frequently find themselves under pressure to provide more specialized, “job-ready” degree programs. In addition, employers increasingly question universities’ ability to teach fundamental skills, such as written communication or analytical skills.⁷⁸ As universities add more vocational programs, the measure of the value of higher education appears to be ever more employment and salary upon graduation.⁷⁹

Law schools have been somewhat responsive to the curricular criticism aimed at them, though they have often been slow to adapt. In the 1970s, for example, clinical programs multiplied in law schools, in

11.20.14.pdf.

75. See, e.g., ROY STUCKEY ET AL., *supra* note 20, at 1–5 (discussing criticism of legal education and indicating that improvement of legal education is necessary and must be aligned with “sound educational theories and practices”).

76. See Earl C. Arnold et al., *Report of Committee on Advanced Academic and Professional Degrees*, 1936 AALS PROC. 302, 316–17.

77. Contrast this with the ongoing discussion that law school training takes too long and should be cut down to two or two-and-a-half years, largely for financial reasons. For example, the University of Dayton School of Law offers a two-year program and Elon University School of Law offers a 2.5 year program.

78. See, e.g., Julian L. Alssid, *A New Gallup Survey Says Colleges and Employers Disagree About How Workforce-Ready Graduates Are—Who’s Right?*, HUFFINGTON POST (Apr. 29, 2014), http://www.huffingtonpost.com/julian-l-alsid/a-new-gallup-survey-says-_b_4862669.html.

79. For a critique of what he labels neo-liberalism in higher education, see Deresiewicz, *supra* note 5.

part to provide the practical training the profession considered missing. Nevertheless, the most recent critique continued to assail legal education for being insufficiently practice-oriented. This led to the implementation of an experiential credit requirement in the ABA Standards, and steered at least two state bars to discuss a further increase in such credits for those taking the bar examination there.⁸⁰

In the legal academy values and compensation structures reward individual research and therefore counsel directly against a comprehensive curricular overhaul or mandated changes to syllabi or in teaching style.⁸¹ Especially time-consuming teaching alterations or additions, often adopted on undergraduate campuses, such as service learning and student-faculty research, would be unwelcome within that structure.

A provocative commentator noted that Langdell's method elevated law to a science and allowed the creation of law schools as parts of graduate education, with the perks associated with that. "Thus, in the case method is found both the distinctiveness of and protective coloration for the modern American law teacher."⁸² This observation provides a powerful explanation for the reluctance of law faculty to change, which goes well beyond the assertion that the personal and professional make-up of law faculties makes them generally resistant to change.

While undergraduate faculties certainly also often struggle with change, modern technology, student expectations, and the economics of education have brought them to face realities in teaching and curricular design which law schools remain reluctant to embrace.

80. ABA STANDARDS, *supra* note 20, Standard 303(a)(3); see Jennifer A. Gundlach & Kevin McElroy, *Rebalancing the Curriculum to Give Students a Competitive Advantage*, N.Y. L.J. (Aug. 17, 2015), <http://www.newyorklawjournal.com/id=1202734593499/Rebalancing-the-Curriculum-to-Give-Students-a-Competitive-Advantage> (discussing various state bar proposals to add an experiential credit requirement).

81. For a discussion of general faculty reluctance to change, in particular with respect to learning assessments, see John Tagg, *Why Does the Faculty Resist Change?*, CHANGE: MAG. HIGHER LEARNING (Jan.-Feb. 2012), <http://www.changemag.org/Archives/Back%20Issues/2012/January-February%202012/facultychange-full.html>.

82. Alfred S. Konefsky & John Henry Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833, 844 (1982). The authors proceed to note that the case method "informs [the law professor's] identity as a teacher and scholar whose method is unique, and at the same time allows him to be just one of the boys at the faculty club." *Id.* (the gendered comment reflects faculty realities in the early 1980s).

II. CHANGES IN HIGHER EDUCATION: A NEW FOCUS OR JUST NEW TOOLS?

Legal education has remained largely sheltered from its critics as the monopoly in training lawyers has rested with law schools.⁸³ If alternative certifications or ways to provide some types of legal services without a J.D. degree became more widespread,⁸⁴ the existing monopoly would likely come under pressure and questions about how and where legal knowledge could be acquired may become more pressing.⁸⁵

For positions that do not require licensing as is the case for most post-college employment, employers may prefer knowledge to mere credentials if those do not guarantee applicable skills. As studies have indicated that only limited skills and knowledge development occurs during college, how to acquire meaningful knowledge—and whether college is the most effective way of accomplishing such—has become ever more important. This query has become more urgent in light of the ongoing complaints of employers that their skills expectations and the

83. See Debra Cassens Weiss, *Students Try to Avoid Law School Costs with 'Reading Law' Path to Law License*, ABA J. (July 30, 2014), http://www.abajournal.com/news/article/want_to_avoid_the_costs_of_law_school_these_students_try_reading_law_path_t/ (“reading the law” has traditionally been the only alternative to formal law studies to become qualified as a lawyer). Some states still allow bar takers to have studied the law with a practitioner. See, e.g., *Summary of Educational Requirements to Take the California Bar Examination*, ST. B. CAL., <http://admissions.calbar.ca.gov/Education/LegalEducation.aspx> (last visited Oct. 18, 2015); *Law Reader Rules & Regulations*, VA. BD. B. EXAMINERS, <http://barexam.virginia.gov/reader/readerrules.html> (last visited Oct. 18, 2015). However, the number of licensed lawyers who did not attend law school and obtain a J.D. degree is minuscule.

84. See *Legal Technicians*, WASH. ST. B. ASS'N, www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians (last visited Oct. 15, 2015) (describing purview of the limited license program and the select areas of law in which legal technicians may provide legal advice). The ABA Task Force on the Future of Legal Education also recommended states explore the licensing of legal service providers without requiring a J.D. degree. See, e.g., Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, ABA J. (Jan. 1, 2015) http://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the.

85. The Washington legal technician model may appeal to those less inclined to invest in a J.D. degree or to those most interested in the “helping” side of law or in a limited practice area. Other professionals, such as accountants or human resource managers, may be motivated to take on limited legal consulting tasks, perhaps facilitated by the legal training some law schools offer to them.

Major law firms are coming under greater pressure to admit other professionals into their circles, as is the case in the United Kingdom. See David Barnhizer, *Redesigning the American Law School*, 2010 MICH. ST. L. REV. 249, 256–57 (2010) (discussing changes in Britain). In a global competition for resources, the current regime may become untenable quickly.

abilities of college graduates do not match.⁸⁶ That discourse is eerily reminiscent of the long-standing complaints of the legal profession, albeit now various groups are working on providing measurements of the desired knowledge and skills and alternative ways of providing them.

While funding and enrollment woes have befallen undergraduate and graduate education alike, though at different magnitude, the discussion about the value of education has been driven by learning and skills development for the labor market.⁸⁷ For law schools, that has meant revisiting the perennial issues of skills—including some more novel demands for expanded financial literacy and project management training—and practical experience. On the undergraduate side, the focus has been on the expansion of internships, but also on how learning can be made more effective and the role technology will play in that process. Matasar refers to it as “MOOC mania,”⁸⁸ even though he knows better than most that instructional technology includes much more and holds great promise.

A. *Technology: Boon or Bane?*

Some argue that technology will make education less expensive.⁸⁹ For those who have watched the technology budgets of universities bulge, that belief seems ephemeral. University IT specialists are well aware of the fiscal pressures that emanate from merely fulfilling the expectations of current students who bring ever more IP-enabled technology to campus.⁹⁰

The over-hyping of Massive Open Online Courses (MOOC)

86. See HART RESEARCH ASSOCS., FALLING SHORT? COLLEGE LEARNING AND CAREER SUCCESS: SELECTED FINDINGS FROM ONLINE SURVEYS OF EMPLOYERS AND COLLEGE STUDENTS CONDUCTED ON BEHALF OF THE ASSOCIATION OF AMERICAN COLLEGES & UNIVERSITIES (2015), https://www.aacu.org/sites/default/files/files/LEAP/2015employer_studentsurvey.pdf; Alssid, *supra* note 78.

87. Whether this discussion is too reductionist and narrowly focused remains subject to debate. See, e.g., Deresiewicz, *supra* note 5, at 32 (blaming neo-liberalism for the labor market focus of higher education); Gary Gutting, *Why College Is Not a Commodity*, CHRON. HIGHER EDUC. (Sept. 11, 2015), <http://chronicle.com/article/Why-College-Is-Not-a-Commodity/233011/> (calling for better teachers at K–12 level to facilitate knowledge dissemination and labor market preparation there reserves to colleges the unique task of “nourish[ing] a world of intellectual culture”).

88. MOOC stands for “Massive Open Online Course.” *Canary in the Coal Mine*, *supra* note 4, at 172–73.

89. *Id.*

90. Carl Straumsheim, *In Due Time*, INSIDE HIGHER ED (Apr. 1, 2015), <https://www.insidehighered.com/news/2015/04/01/oral-roberts-u-smartwatches-provide-entry-internet-things>.

dominated the discourse about technology and new learning experiments for a short while.⁹¹ Longer experience with MOOCs has demonstrated that their attractiveness and value have been greater for those who already have a degree than for those beginning higher education. One of the outstanding challenges for MOOCs, should they be offered for free, will be the financing model. Production and delivery of MOOCs are costly as is the mining of data that becomes available about individual learning progress. The financing issue, however, may be only a short-term challenge reminiscent of the early days of Amazon and Google, especially as the demand for life-long education in a rapidly changing work environment will continue to grow.⁹²

At least in the short run, the MOOC experiment, however, has died down on the college level as a result of some less successful learning results.⁹³ It stands for a larger theme, nevertheless: the use of technology to enhance teaching and especially learning. Ultimately it reflects the dual quests for learning more effectively, and for making effective learning cheaper.⁹⁴ Even if on its own, technology does not promise cost reduction, it could enhance and improve the learning process so that more students gain more from higher education than they currently do. It can also help to individualize education when society increasingly expects—and receives—technologically supported individualization in all facets of life. Broader consumer behavior has certainly shaped the experience of this generation of college and professional students, and will lead to greater use of online services in

91. At least initially, MOOCs appeared to have escaped the scorn with which the educational establishment has generally looked down upon online education. On the law side that attitude is reflected in the restrictions on online education included in the ABA Standards on Legal Education and state rules on admission to the bar.

92. Even though the leading universities that have entered this market have bemoaned the cost, presumably they envision their initial investments to pay off in the long run, or at least they consider the market too promising to leave it to others. *See, e.g., Top Universities Continue to Invest in Massive Online Courses*, CCTV AM. (Apr. 3, 2015), <http://www.cctv-america.com/2015/04/03/top-universities-continue-to-invest-in-massive-online-courses>.

93. *See* Cassandra M.D. Hart et al., *Online Course-Taking and Student Outcomes in California Community Colleges* (Apr. 15, 2015) (unpublished manuscript) (manuscript at 14–15), <http://www.aera.net/Portals/38/Newsroom%20-%20Recent%20Research/Online%20Course-taking%20and%20Student%20Outcomes.pdf>; Scott Jaschik, *Study Finds Student Success Lags Online in California Community College Students*, INSIDE HIGHER ED (Apr. 20, 2015), <https://www.insidehighered.com/news/2015/04/20/study-finds-student-success-lags-online-california-community-college-students> (discussing study showing performance gap between online students and those taking traditional classroom courses in California's community college system).

94. For a set of major educational goals, see L. DEE FINK, *CREATING SIGNIFICANT LEARNING EXPERIENCES: AN INTEGRATED APPROACH TO DESIGNING COLLEGE COURSES* 37 exhibit 2.2 (2013).

both learning and attendant amenities as consumers expect to have easily navigable, personalized services at their disposal at all times.

The true revolution technology use may bring is a shift from the focus on teaching to an emphasis on learning, which would turn the attention off the teacher and onto the student.⁹⁵ Technology could enable that shift, but would not inexorably lead in that direction.

1. *About Degrees, Knowledge, and Credentials*

Matasar takes issue with the three themes he considers underlying the claim that MOOCs can help provide individualized learning at a more affordable price: “knowledge . . . should be free,” services colleges provide outside the classroom “are only tangentially related to learning,” and the value of residential colleges is in “credentialing and related networking.”⁹⁶ First, should education be free?⁹⁷

Since nobody can prevent teachers and schools from sharing their content, as many do already, Matasar fears that the “content” of higher education will be “commoditized.”⁹⁸ A number of universities have put many or even all of their course materials online,⁹⁹ but with no noticeable decline in applications. One reason may be that the materials without instruction are not as conducive to skills acquisition. Another reason may be that employers continue to hire employees with credentials—especially from elite universities—rather than based on individual knowledge assessments which they may find too challenging to administer, even though Matasar indicates that appropriate tools are available for those employers that look for *directly* applicable skills sets.¹⁰⁰ Nevertheless, it remains problematic for many employers to judge the skills an applicant brings, especially if those consist of more general characteristics, such as perseverance, drive or ability to work in

95. See generally Robert B. Barr & John Tagg, *From Teaching to Learning—A New Paradigm for Undergraduate Education*, 27 CHANGE 12 (Nov.–Dec. 1995).

96. *Canary in the Coal Mine*, *supra* note 4, at 174.

97. As K–12 public education is free, should that lead to post-secondary education also be free? Should free post-secondary education, as in the proposals to make community colleges free, for example, be viewed as a labor market subsidy? Internationally free education is mandated only for primary and secondary education. The Convention on the Rights of the Child sets out free primary education as a human right and notes that secondary education should be accessible to all, which would include making it free to those who cannot otherwise access it. Convention on the Rights of the Child, art. 28(1)(a), (b), Sept. 2, 1990, 1577 U.N.T.S. 3. The United States is a signatory to the Convention but has not ratified it.

98. *Canary in the Coal Mine*, *supra* note 4, at 174.

99. See, e.g., *Courses*, MITOPENCOURSEWARE, <http://ocw.mit.edu/courses/> (last visited Mar. 14, 2016).

100. *Canary in the Coal Mine*, *supra* note 4, at 176.

a team.

As colleges have recognized the difficulty employers experience in deriving much information from transcripts, especially at a time of rampant grade inflation, some have adopted digital portfolios to provide greater information to potential employers.¹⁰¹ Other efforts are potentially much broader in their service to the labor market. A research consortium is working on developing a set of skills and qualifications required for a wide array of positions. Based on those, college courses could be grouped based on requisite skills and students could select courses on a progression of such skills. Even though this development is currently in its infancy, it could ultimately provide meaningful information to both students and employers.¹⁰²

While Matasar calls those who focus on the credentialing value of degrees “cynics,”¹⁰³ they might be realists who correctly assess the crucial value of a degree not as a marker of knowledge acquisition, but rather as shorthand for the general intelligence and the network value of an applicant. Major employers increasingly hire through referrals rather than open resume calls.¹⁰⁴ That development may be surprising in a time when job openings are widely publicized online and applications can be quickly submitted. However, it is precisely those developments that appear to have led to a greater focus on in-network vetting and hiring. Application overload and difficulties assessing the qualifications of the multitude of applicants have made credentials—in the form of degrees from name-brand universities and connections, often created in college—more rather than less important.¹⁰⁵ This hiring approach could

101. See, e.g., *Creating an Electronic Portfolio*, OLD DOMINION U., <https://www.odu.edu/academics/student-computing/instructional-tools/eportfolio> (last visited Mar. 14, 2016). The potential value of digital portfolios is yet greater as a learning tool. See, e.g., JOHN ZUBIZARRETA, *THE LEARNING PORTFOLIO: REFLECTIVE PRACTICE FOR STUDENT LEARNING* ch. 4 (2009), reprinted in Rick Reis, *Electronic Learning Portfolios*, STAN. U.: TOMORROW'S PROFESSOR POSTINGS, <https://tomprof.stanford.edu/posting/568> (last visited Oct. 17, 2015).

102. See *Improving Transparency, Quality and Trust in Credentialing*, GEO. WASH. INST. PUB. POL'Y (Aug. 1, 2013), <https://gwipp.gwu.edu/improving-transparency-quality-and-trust-credentialing> (the author had a conversation with Stephen Crawford, one of the lead researchers on this project, on May 17, 2016).

103. *Canary in the Coal Mine*, *supra* note 4, at 175.

104. See Nelson D. Schwartz, *In Hiring, a Friend in Need Is a Prospect, Indeed*, N.Y. TIMES (Jan. 27, 2013), http://www.nytimes.com/2013/01/28/business/employers-increasingly-rely-on-internal-referrals-in-hiring.html?_r=0; see generally Stephen V. Burks et al., *The Value of Hiring Through Employee Referrals*, 130 Q. J. ECON. 805 (Apr. 24, 2015). Parents, often chided for their relentless efforts to coach their children into elite universities, may have intuitively understood the value of those credentials to their children's future.

105. See *Canary in the Coal Mine*, *supra* note 4, at 184–85 (“Institutions seek those

change through a robust competency regime that would provide an employer with relevant details on the candidate's skills and abilities.¹⁰⁶ One of the salutary side effects of such developments would be a greater focus on merit in hiring decisions and perhaps decreased stratification on the educational landscape. In addition, students should be more willing to pay for the acquisition of knowledge and the attendant credentials as they will lead directly to employment. Education that is individualized and skills-based in such a way, would not have to be free.

Matasar also argues that residential colleges charge for services and values other than knowledge.¹⁰⁷ Those include, for example, direct services such as a career office, but also indirect values, including the ability to build a personal and professional network developed through close connections with peers, many of whom hail from different backgrounds and cultures. Matasar is concerned that many of these services could be disaggregated and provided individually more cheaply, thereby undermining the heralded college experience.

While some of these tasks, such as placement, career, and personal counseling, might be disaggregated relatively easily,¹⁰⁸ even placement could not be separated entirely from the educational setting as it would be the educators who are attesting to academic achievements, but also to other characteristics of the students, such as dependability and perseverance.¹⁰⁹ It is yet more difficult to imagine how some of the unscripted learning will occur outside a residential college setting. One should not forget, however, that is it only a small fraction of students

with credentials from trusted sources because the credentials signal that those having them also have related knowledge and skills.”).

106. Because of decreased recruitment costs associated with hiring through employee referrals, it is unlikely that those would be replaced entirely. *See* Burks et al., *supra* note 104, at 827–30.

107. *Canary in the Coal Mine*, *supra* note 4, at 175.

108. In universities that have created academic advising and counseling services, separate from the faculty, some of this disaggregation has already occurred. Historically, this task would have been an integral part of a faculty member's role, as remains true today in small residential liberal arts colleges. In research driven or adjunct heavy institutions, however, much of this function is increasingly located outside faculty ranks. It may also be cheaper to employ professional counselors, often housed in student services, than full-time, tenured faculty. Many colleges have already outsourced other functions viewed as non-essential to teaching, such as dining services. National fitness companies may also be willing and able to run the gym and exercise facilities universities provide. Alternatively, universities may open those for a fee to the paying public, and thereby operate more like for-profit entities.

109. For an interesting early account of how placement services worked at elite law schools, see James P. Gifford, *The Placement of Law Students and Law Graduates—A Survey of Methods and Objectives*, 9 AM. L. SCH. REV. 1063 (1941).

who have the type of residential experience that Matasar describes.¹¹⁰ For most students those services and learning experiences are already unobtainable.

2. *New Ways of Teaching and Learning*

Because of fiscal pressures, labor market demands, and the availability of new forms of learning technology, change will be inevitable on college campuses and in law schools. The infatuation with MOOCs, however, may have eclipsed ongoing technological developments that are more interesting, hold greater promise, and will change expectations for learning. Hybrid teaching is likely to leave more of an imprint on traditional higher education than exclusively online instruction.¹¹¹

The ABA's Section of Legal Education's grant of a variance to William Mitchell College of Law to experiment with an executive style J.D. degree opens the door for the hybrid model even in legal education.¹¹² The hybrid J.D. replicates executive MBA programs, some of which are now dispensing with the on-campus component while others are keeping a balance between on-campus sessions, synchronous learning, and asynchronous learning.¹¹³ The online J.D. may be

109. Forty-five percent of U.S. college students are enrolled in community colleges. *2014 Fact Sheet*, AM. ASS'N COMMUNITY COLLEGES, http://www.aacc.nche.edu/AboutCC/Documents/FactSheet_2014_bw_r2.pdf (last visited Mar. 14, 2016). On the other hand, only 0.4% of college students are enrolled in one of the eight schools that are part of the Ivy League.

110. *But see* Carl Straumsheim, *MOOCs for (a Year's) Credit*, INSIDE HIGHER ED (Apr. 23, 2015), <https://www.insidehighered.com/news/2015/04/23/arizona-state-edx-team-offer-freshman-year-online-through-moocs> (discussing Arizona State's Global Freshman Academy in which a freshman year of academic credits will be provided through MOOCs); *see also* DAVID I. C. THOMSON, *LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE 73–120* (2009) (setting out the use of some technology in the classroom). At the time of Web 3.0, this book may appear quaint to some but many law faculty members remain unaware of or do not use the technologies discussed in that book.

111. *The Hybrid Program*, WM. MITCHELL C. L., <http://web.wmitchell.edu/admissions/hybrid-program/> (last visited Mar. 14, 2016). William Mitchell College of Law and Hamline University have petitioned the ABA to merge their law schools and become the Mitchell Hamline School of Law. *See, e.g.*, Alex Friedrich, *Approval of Hamline, William Mitchell Law Schools Merger Expected in December*, MPR NEWS (June 16, 2015), <http://www.mprnews.org/story/2015/06/16/william-mitchell-hamline-merger>. Some exclusively online LL.M. programs already exist. *See, e.g.*, *About the Center*, LOY. U. CHI.: CIVITAS CHILDLAW CTR., <http://www.luc.edu/law/centers/childlaw/aboutthecenter/> (last visited Mar. 14, 2016) (Loyola University Chicago School of Law's Master of Jurisprudence for professionals working with children and families); *Online Degree Programs from Washington University School of Law*, WASH. U. ST. LOUIS, <https://onlinelaw.wustl.edu/> (last visited Mar. 14, 2016) (Washington University School of Law's online Master of Legal Studies for non-legal professionals and LL.M. in U.S. Law for non-U.S. lawyers).

113. Carl Straumsheim, *Online M.B.A. Reboot*, INSIDE HIGHER ED (Apr. 29, 2015),

indicative of further loosening of the current Standards on Legal Education that allow J.D. students to take only a very limited number of credits entirely online.¹¹⁴

Matasar takes issue with some of the critics of higher education for their reductionist portrayal of knowledge as “nuggets of information” rather than allowing for a broader definition of the term to include higher-level integrative, analytical, and evaluative thinking.¹¹⁵ The latter provides the added value of education in a time when information itself has become easily available online.¹¹⁶ The limited portrayal prevents detractors from acknowledging that institutions of higher learning have long provided creative ways of instruction and one-on-one learning.

In the college realm, much of the focus on technology-induced teaching changes has been on replacing the lecture of old with other methods, such as the “flipped classroom.” The flipped classroom may name a practice, or take it to a new level, that has already been going on in many universities. It expands upon in-class interactive discussions—problem-solving and hands-on learning—and replaces lecturing by altering the types of assignments provided. Clearly this pedagogical change is also a reaction to the critique of instructions-by-lecture whose success is most limited. Technological enhancements, such as short video lectures, mini-clips, and others, make the flipped classroom approach easily accessible to faculty and students. The disaggregation of the primary teaching activities with the help of technology removes lecture and drill from the classroom to turn teaching into “expert guidance and mentorship.”¹¹⁷

The focus on online learning has shifted the emphasis from the faculty member to the student as it allows for competency based learning,¹¹⁸ systems that are customizable, and self-correcting.¹¹⁹ Only

<https://www.insidehighered.com/news/2015/04/29/technological-advances-spur-creation-new-online-mba-programs>; see also *The Viability of the Law Degree*, *supra* note 38, at 1619–21.

114. See ABA STANDARDS, *supra* note 20, Standard 306 (permitting up to fifteen credits after the 1L year to be taken online).

115. *Canary in the Coal Mine*, *supra* note 4, at 185.

116. The ease of information availability and its oversupply makes the teaching of analytical skills ever more important. It also increasingly demands the services of information specialists to unearth and assess the value of the information available.

117. *The Viability of the Law Degree*, *supra* note 38, at 1627.

118. See, e.g., Paul Fain, *Moving Ahead with Competency*, INSIDE HIGHER ED (Feb. 17, 2015), <https://www.insidehighered.com/news/2015/02/17/two-year-colleges-washington-state-expand-competency-based-project-business-degree> (discussing online competency-based business degree programs at Washington State community colleges).

119. See FINK, *supra* note 94, at 13 exhibit 1.2 (detailing “Higher Education in the Industrial Age and the Information Age”).

once a student has achieved competency, for example, can she move ahead. This is akin to the apprentice-to-mastery teaching model with which some law faculty have experimented,¹²⁰ and which is an integral part of Khan Academy modules.

This form of teaching is an important aspect of gaming technology, which is slowly making inroads into legal education, but is already widely being used in both primary and secondary education and in colleges. Glenn Harlan Reynolds has predicted that both “customization,” what I would term “individualization” in education, and “gamification” are inevitable in both K–12 and higher education.¹²¹ His predictions also include “cheapification.”¹²² That, however, is unlikely to occur on its own in light of the cost pressures emanating from the development and implementation of the technology needed for individualized education and gaming.

Ultimately the debate about technology in the classroom will return to the broad underlying questions about learning: what should be learned in any education setting? How should these learning objectives be accomplished and in what order?¹²³ “[T]he online future is already here.”¹²⁴ What we make of it remains the open question.

B. Structural Changes

Despite the potential online learning holds for a dramatic reorientation off the teacher onto the student, the impact will be felt only if traditional structures change as well. Clayton Christensen, who is considered the authority on disruptive innovation, indicates that novel value networks and business models rather than technological changes are “the most important drivers of disruptive innovation.”¹²⁵ That will presumably also hold true in legal education where the current cost pressures ultimately mandate broader change. Technology will play an

120. See, e.g., Martin J. Katz et al., *Improving Legal Education Through Carnegie Apprenticeship Integration*, INST. FOR L. TEACHING & LEARNING (June 8, 2013), <http://lawteaching.org/conferences/2013/handouts/3a-Whole-CourseSimulations.pdf>.

121. GLENN HARLAN REYNOLDS, *THE NEW SCHOOL: HOW THE INFORMATION AGE WILL SAVE AMERICAN EDUCATION FROM ITSELF* 89–92 (2014).

122. *Id.*

123. See, e.g., STUCKEY ET AL., *supra* note 20, at 117–19.

124. Andrew Delbanco, *MOOCs of Hazard: Will Online Education Dampen the College Experience? Yes. Will It Be Worth It? Well . . .*, THE NEW REPUBLIC (Mar. 31, 2013), <http://www.newrepublic.com/article/112731/moocs-will-online-education-ruin-university-experience>.

125. Robert Sheets et al., *Rethinking Higher Education Business Models*, CTR. FOR AM. PROGRESS 5 (Mar. 28, 2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/higher_ed_business_models.pdf.

important role in these new models.

The prospect of technologically inspired change leads to two almost predictable responses: exuberant enthusiasm on one hand and prophecies of failure on the other. Those ascribing to the latter usually feel vindicated quickly as meaningful adjustments and adoption of new technologies always take longer than anticipated.

Within the legal profession technological change is occurring rapidly, as are adjustments of the dominant business model, though often law faculty members remain unaware, or doubtful, of these developments. What has been said about lawyers applies perhaps even more to (law) faculty: “lawyers do not find it easy to innovate, especially in the way in which they deliver their services.”¹²⁶ Many faculty—and others—believe that the only effective way of teaching is through personalized, one-on-one interaction, as has been the case historically.¹²⁷ Studies indicate that that is not necessarily the case. A mixture of computerized and personalized instruction seems to be highly effective, though what mixture and how to accomplish it remain subject to experimentation.

Technological openings bring with them opportunities—and need—for structural innovation. Early experiments, especially those that ally employers and higher education, in using online and hybrid models, are ongoing. The Arizona State/Starbucks example may be the most public, but small Champlain College has built such relationships with private companies and the federal government by promising to fill “mission-critical skills gaps.”¹²⁸ Alliances between law firms and law schools remain rare, though some law schools have formed relationships with the in-house legal departments of major corporations.¹²⁹ Those focus on training current students rather than providing training to in-house lawyers, however. As much of the future of education is focused on life-long learning, the relevance and value of

126. RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 280 (2008). Some literature indicates that the structure and pedagogy of law schools promote or reinforce risk averse tendencies. *See, e.g.*, Susan Sturm & Laini Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 *VAND. L. REV.* 515, 519 (2007) (contending law school is characterized by “a culture of competition and conformity”). Others have claimed that the ways in which legal practice is structured leads to risk aversion. *See, e.g.*, Samantha A. Moppet, *Lawyering Outside the Box: Confronting the Creativity Crisis*, 37 *S. ILL. U. L.J.* 253, 296 (2013).

127. The tutorials at Oxford and Cambridge University are built on this model.

128. Carl Straumsheim, *Small College, Big Online Partners*, *INSIDE HIGHER ED* (May 15, 2015), <https://www.insidehighered.com/news/2015/05/15/champlain-college-expands-online-adult-learner-market>.

129. *See Current Economic Model, supra* note 31, at 26.

law schools will remain under attack until they are willing and able to participate in that market effectively.

Technological change will continue unabated. The next technological revolution is already upon us, with the development of wearables, which are part of the “Internet of Things.”¹³⁰ Law faculty, on the other hand, continue to exhort the advantages of banning laptops from the classroom.¹³¹ Despite the benefits of that practice, it seems curiously out of place to require handwritten notes when middle school students now work with Chromebooks and iPads.

The effectiveness of the large classroom lecture as a learning tool has been debunked, though it remains an efficient cost-control mechanism. In recent years, legal education has moved to smaller classes in the areas of writing and other skills development. As it has apparently staked its future on experiential education—simulations, clinics, and externships—to respond to the demand for practice-ready graduates,¹³² legal education has reified the traditional instructional model, just within smaller class settings. The belief that more one-on-one teaching, perhaps especially in a clinical setting, leads to superior learning outcomes dominates, even though little systematic empirical research exists that assesses the timing, amount, or effectiveness of such teaching.

Evidence-based assessments of teaching effectiveness will become more important, though currently that discourse appears restricted to primary and secondary education. Overall greater flexibility in curriculum, timing, and instructional forms will replace the current rigid structures. On the undergraduate level, module-based rather than semester-based teaching has attracted interest. Such a change allows also for a greater variety of teaching methods, ranging from entirely online to fully face-to-face instruction, with hybrid models and blended learning in the middle. The most effective pedagogy should be tied to the types of materials to be learned.¹³³

While elite institutions extoll the virtue of flexibility in teaching

130. Straumsheim, *supra* note 90.

131. See, e.g., Steven M. Eisenstat, *A Game Changer: Assessing the Impact of the Princeton/UCLA Laptop Study on the Debate of Whether to Ban Law Student Use of Laptops During Class*, 92 U. DET. MERCY L. REV. 83 (2015).

132. The call for more hands-on experience goes back decades. See, e.g., Jerome Frank, *Why Not A Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 914–15 (1933) (calling for more practical experience in legal education).

133. Carl Straumsheim, *A Flexible Future*, INSIDE HIGHER ED (Dec. 2, 2014), <https://www.insidehighered.com/news/2014/12/02/some-research-universities-flexibility-and-modularity-influence-long-term-plans>.

inherent in this modular, mixed teaching approach, community colleges and public universities see them as potential assets in improving social mobility.¹³⁴ As the United States has become a socio-economically stratified society, it may be difficult to imagine how technological changes in learning can reverse the current trend. If the potential exists, however, law schools should explore them as both racial and socio-economic diversity appear to escape the legal profession.¹³⁵

Technology will also allow for flexibility beyond time. The insularity of law schools within the university and their focus on each other (and the profession¹³⁶) have detracted from knowledge about teaching improvements and technological expectations of students, both issues widely discussed on the undergraduate level. As universities will increasingly collaborate with each other around technology, in part for cost reasons,¹³⁷ their law schools may be expected to join those consortia or develop them with other law schools.¹³⁸ Because of modern technology, teaching—and even some physical—resources can be shared across longer distances.

Finally, Matasar mentions unbundling as a result of the need of universities to focus on the teaching/learning component of their mission rather than attendant student services.¹³⁹ The core enterprise of

134. See, e.g., Fain, *supra* note 118 (discussing online competency-based business degree at Washington state community colleges).

135. See, e.g., AM. BAR ASS'N, ABA PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 25 (Apr. 2010), http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.auth_checkdam.pdf.

136. The focus on the profession, however, has led to few collaborative efforts. For a discussion of collaboration between law schools, law firms, and in-house legal departments, see HEINEMAN ET AL., *supra* note 74, at 65–66. While Matasar described legal education and the profession once as “colleagues whose futures are inextricably tied to each other,” *Current Economic Model*, *supra* note 31, at 26, today the profession seems more like the taskmaster of law schools, complaining about insufficiently practice-preparatory education and too high a debt load, see ABA FINANCING LEGAL EDUCATION REPORT, *supra* note 12, at 1; ABA FUTURE OF LEGAL EDUCATION REPORT, *supra* note 12, at 3.

137. NEW MEDIA CONSORTIUM, HORIZON REPORT: 2015 HIGHER EDUCATION EDITION 10 (2015). Some consortia are driven by geographic location, such as the relationship between the Claremont colleges. Others are specifically focused on particular issues. See, e.g., *Welcome*, NEW ENGLAND CONSORTIUM ON ASSESSMENT AND STUDENT LEARNING, web.wellesley.edu/NECASL/index.html (last updated Feb. 2012); *Wellesley and Other Leading Liberal Arts Schools Met This Week to Establish Online Teaching and Learning Consortium*, WELLESLEY C. (May 13, 2015), www.wellesley.edu/news/2015/05/node/61901.

138. See also *The Rise and Fall of American Legal Education*, *supra* note 64, at 501–02; *The Viability of the Law Degree*, *supra* note 38, at 1623–24.

139. See also Sheets et al., *supra* note 125, at 13.

universities may not escape unbundling either.¹⁴⁰ Why does the person who assesses assignments necessarily also teach the course and develop the curriculum?¹⁴¹ While an unbundling of such services may be reminiscent of Ford's assembly line, the assembly line allowed for low-cost mass production. Drawbacks became obvious over time and today many car manufacturers have replaced or supplemented assembly lines with production teams and robots, and enhanced production with 3-D printing and virtual manufacturing.¹⁴²

The fear of being replaced by a computer or a robot often dominates public perception of technology. Matasar's view of technology, however, implies synergy, augmentation, and cooperation rather than replacement. How can technology and humans interact most fruitfully? How will technology free teachers to provide the special value technology cannot deliver?¹⁴³

Matasar sets out a new focus for teachers on guiding team-based learning and turning students into teachers.¹⁴⁴ At one point he notes the role of teachers as "role models whose behavior can be emulated"¹⁴⁵ and concludes that the goal of teaching is to turn the student into the teacher. Others, on the other hand, have viewed the best teachers as those "help[ing] students develop a strong and proactive sense of themselves as learners."¹⁴⁶ That goal would cement the view of the student as a life-long learner who is at the center of the learning enterprise.

Teachers are more than subject-matter focused role models. Ideally they demonstrate fairness and equity, professionalism, ethics, and a host of other professional and civic values. One of the reasons for advancing diversity in teaching, for example, has been to provide students with such models. Teachers demonstrate success on a professional path and commitment to a cause. In those ways humans will always augment any technological advance we may be able to conceive.

Nevertheless, as the unbundling of the different aspects of teaching

140. CRAIG, *supra* note 8, at 110.

141. See Sheets et al., *supra* note 125, at 12 (detailing how such a system would function and indicating current hurdles to a fully effective regime).

142. See *Game Changer: Ford Celebrates 100 Years of the Moving Assembly Line*, FORD MOTOR COMPANY (Oct. 7, 2013), <https://corporate.ford.com/innovation/100-years-moving-assembly-line.html>.

143. See Thomas H. Davenport & Julia Kirby, *Beyond Automation*, HARV. BUS. REV. (June 2015), <https://hbr.org/2015/06/beyond-automation>; see also *Canary in the Coal Mine*, *supra* note 4, at 188.

144. *Canary in the Coal Mine*, *supra* note 4, at 191–92.

145. *Id.* at 191.

146. FINK, *supra* note 94, at 278.

into curricular development, content creation and learning assessment is likely to occur, many also predict or even advocate for the separation of the teaching and the research function.¹⁴⁷ Matasar would defend the confluence of teaching and scholarship as mutually enriching and as essential to the improvement of teaching. In an unbundled world, however, the question arises which aspect of teaching would be (most) enriched through research and scholarship. The broader issue may be whether it is affordable to have a large cadre of people who are engaged in both, or whether the traditional model of the research university will be further upended.

How structural changes will impact technology use and vice versa ultimately depends on values based decisions. Those, however, may continually be overshadowed by questions of cost, especially for the most highly priced aspects of higher education.¹⁴⁸

III. STRATIFICATION AND DISTINCTIVENESS: WHY LAW SCHOOLS ARE UNLIKELY LEADERS

Nobody will disagree with Matasar when he notes that “real changes are bubbling—changes that threaten to deeply disrupt the dominance of high priced, residential university education.”¹⁴⁹ All of higher education is being disrupted, though it remains to be seen whether the quite limited slice of the relatively elite residential education Matasar describes will lose its dominance. Those who are unwilling to recognize the deep ongoing disruptions and who are unwilling or unable to respond, do so at their own peril and that of their institutions.

As Matasar also indicates, little attention appears to be paid to these developments, with the defenders of the status quo acknowledging the challenges but rejecting their importance by arguing that the demise of higher education has been predicted before or that technology has never provided as substantial an interruption as previously predicted. Law schools are even more complacent than universities. Many faculties do not view the downturn in applicants as a structural challenge but rather as a short-term dislocation. Any increase in the

147. See Robert G. Sheets & Stephen Crawford, *Harnessing the Power of Information Technology: Open Business Models in Higher Education*, EDUCAUSE REV., Mar./Apr. 2012, at 34, 38, <http://er.educause.edu/~media/files/article-downloads/erm1222.pdf>. But see Nicholas B. Dirks, *Rebirth of the Research University*, CHRON. HIGHER EDUC. (Apr. 27, 2015), <http://chronicle.com/article/Rebirth-of-the-University/229585/>.

148. A discussion of for-profit education is beyond the purview of this Article but the exponential growth of that slice of the education market bears mentioning.

149. *Canary in the Coal Mine*, *supra* note 4, at 176.

number of those taking the LSAT¹⁵⁰ or applying to law school appears to promise change, and holds for many the hope for a return to the business model of old. The ongoing adjustments on the undergraduate level, however, should serve as a harbinger of the need for constant renewal as part of the new status quo.

Another aspect of this reality will be ongoing tension between different stakeholders within and between institutions over both power and resources. Matasar indicates that the most salient differences with respect to the forms the struggles will take and the constituencies involved will be between public, private, and for-profit institutions.

Ultimately Matasar predicts that greater rather than lesser stratification of higher education will result. The most renowned institutions will be able to command high—and increasing—tuition;¹⁵¹ generic education will be provided cheaply; and the more amorphous middle tier will use technology to provide high quality at a lesser price presumably than today.¹⁵² While Matasar's outline of the future lacks nuance,¹⁵³ his Armageddon scenario ultimately reflects the current trend—"the rich get richer."

Others who have also projected increasing stratification have indicated their belief that "[p]rivate institutions will retreat from their commitment to discounting tuition for needy students and will serve mainly the affluent, while public colleges, in order to cut costs, will rely more on technology and part-time faculty."¹⁵⁴ The former is likely to be an option available solely to the most prestigious institutions, as only they could attract a sufficient number of highly qualified students willing and able to pay. They are unlikely to do so, however, as many of them have recognized the value of socio-economic diversity. All other private schools will have to develop hybrid strategies that include cutting costs.

150. See Gershman, *supra* note 6.

151. Fundraising and endowment payouts will reinforce existing prestige rankings but also allow institutions that are rich on both financial and intellectual resources to move yet further ahead. See *The Rise and Fall of American Legal Education*, *supra* note 64, at 488.

152. *Canary in the Coal Mine*, *supra* note 4, at 201. For law schools, Matasar had earlier predicted a similar tripartite separation. *The Rise and Fall of American Legal Education*, *supra* note 64, at 497–98.

153. Higher education can be classified in many different ways. For the most influential classification regime, see *About Carnegie Classifications*, CARNEGIE CLASSIFICATION INSTS. HIGHER EDUC., <http://carnegieclassifications.iu.edu> (last visited Mar. 14, 2016) ("The Carnegie Classification[] has been the leading framework for recognizing and describing institutional diversity in U.S. higher education for the past four decades.").

154. Andrew Delbanco, *Illiberal Arts: 'Is College Worth It?' and 'College Unbound'*, N.Y. TIMES (June 21, 2013), http://www.nytimes.com/2013/06/23/books/review/is-college-worth-it-and-college-un-bound.html?_r=0.

Matasar provides some insights into “what higher education can do to avoid (or postpone) this zero sum conflagration,”¹⁵⁵ with law schools serving as the model for the restructuring that needs to occur. He focuses on mission driven changes that include lower cost, a shorter educational path for students, and a more effective match between the curriculum offered and the needs of the legal profession.¹⁵⁶ Matasar criticizes accreditation standards as impediments, though some limited progress may have been made on that front.

While Matasar envisions law schools as the leaders in diversification and controlling cost,¹⁵⁷ little structural change has been visible so far. Some schools have held tuition steady and a few have even decreased it, but for most tuition increases continue despite cuts in operations expenses, faculty, and support staff. Tuition hikes may reflect competition but ultimately strengthen schools that are already considered elite as only they are able to retain more tuition revenue and enhance student quality.¹⁵⁸

Efforts to diversify revenue sources have also been limited, with the exception of general attempts to recruit more foreign LL.M. students or to set up often ill-defined and expensive general master’s programs for non-lawyers. Only a few schools have successfully built non-J.D. revenue. The assumption that “we will build it, they will come,” nevertheless, appears to continue to reign in many parts of the legal academy.

Mission statements appear to have been largely ineffective in making law schools truly distinctive. Competition has reinscribed the hierarchy of law schools, and meaningful differentiation remains lacking, at least for now. Law schools seem tied into a mutual battle embrace for survival, still driven by often relatively generic missions. Now it appears they may be waiting for the tide of applicants to turn while their universities continue to nurture them through this trough. Their parent institutions, however, may not have the luxury of pursuing this approach.

155. *Canary in the Coal Mine*, *supra* note 4, at 199.

156. *See also* GREGORY S. MUNRO, OUTCOMES ASSESSMENT FOR LAW SCHOOLS 3–4 (2000).

157. “Change will come. Schools will diversify, stratify, cooperate, accelerate, and disaggregate in the quest for high quality and lower cost . . . legal education needs to be bigger, better, cheaper and faster.” *The Viability of the Law Degree*, *supra* note 38, at 1627–28.

158. *See, e.g.*, Angela K. Dills & Kurt W. Rotthoff, *Price-Increasing Competition: Evidence from Higher Education* (Oct. 1, 2014) (unpublished manuscript) (manuscript at 23), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2375522.

To what extent the market would accept truly differentiated legal education and whether or how it would impact the hierarchy of law schools remain open questions.¹⁵⁹ Much discussion centers around the impact legal education has on the profession, or more accurately how little impact it has because of the perceived lack of connection. On the other hand, a highly stratified profession may limit rather than enhance experimentation in most law schools. As a function of the economic crisis, law schools themselves may inevitably have already become even more stratified. Schools that feed largely major law firms and other parts of the profession considered most prestigious will set themselves further apart from the others, as their perceived (economic) value proposition is convincing. Such stratification may in turn also reinscribe the hierarchical system within the profession itself.¹⁶⁰ The relatively limited number of law schools and their feeding into one profession may make this symbiotic relationship unique and replicated only by a small group of graduate schools. That might be another reason why law schools are unlikely to be the avant-garde of change.

CONCLUSION

Transformative energy is unlikely to emanate from law schools. After all, the legal academy has generally been impervious to change, and has served its own needs poorly. Because of its lack of engagement in the major debates impacting higher education—from individualized teaching to increased technology in learning, from financial assistance to unbundling—it may have a steeper road ahead than other parts of the academy.¹⁶¹

The fate of law schools may not provide guidance for universities as so many have heavily subsidized their law schools, therefore distorting the market and allowing needed opportunities for change and renewal to bypass legal education. Nobody may come to save universities, however, and they should not rely on law schools to develop models they could emulate.

159. See Garth, *supra* note 25, at 529–30.

160. For a comparative discussion in the English context, see Fiona Westwood, *Vocational Legal Education—Its Pivotal Role in the Future of the Legal Profession*, in *THE CALLING OF LAW: THE PIVOTAL ROLE OF VOCATIONAL LEGAL EDUCATION* 36–52 (Fiona Westwood & Karen Barton eds., 2014).

161. Cf. STUCKEY ET AL., *supra* note 20, at 3 (“It is time for legal educators, lawyers, judges, and members of the public to reevaluate our assumptions about the roles and methods of law schools and to explore new ways of conceptualizing and delivering learner-centered legal education.”).