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## Curricular Limitations, Cost Pressures, and Stratification in Legal Education: Are Bold Reforms in Short Supply?

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# Curricular Limitations, Cost Pressures, and Stratification in Legal Education: Are Bold Reforms in Short Supply?

Nora V. Demleitner\*

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## I. INTRODUCTION

Legal education is under pressure. The reasons are obvious: high tuition and employment challenges have questioned, and perhaps undermined, the value proposition of a law degree. Some common practices of law schools, including substantial scholarship decreases after the first year and less than transparent employment reporting, have raised the ire of bloggers and mainstream journalists alike.<sup>1</sup> Blog posts and a series of articles in the *New York Times* and other legitimate publications have attracted attention to legal education and the economic challenges facing the legal profession, which became acute with the 2007–08 recession as major law firms laid off hundreds of

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\* Dean and Roy L. Steinheimer, Jr. Professor of Law, Washington and Lee University School of Law. I am grateful to John Eller, Reference Librarian at Washington and Lee’s Law School, and Max Hyman, W&L ‘14L, for their excellent research assistance. My colleagues on the faculty and in the administration have greatly enriched my thinking on the current developments in legal education. All errors are solely mine, of course.

<sup>1</sup> See, e.g., BRIAN TAMANAHA, *FAILING LAW SCHOOLS* 71–78 (2012); Rick Schmitt, *Price and Perils of JD: Is Law School Worth It?*, DC BAR (Mar. 2013), [www.dcbar.org/bar-resources/publications/washington-lawyer/articles/march-2013-law-school.cfm](http://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/march-2013-law-school.cfm).

young lawyers and contracted their entry-level hiring substantially.<sup>2</sup>

While the number of applicants to law schools, as had been the case in recessions past, initially increased, the amplified questioning of the value proposition has led to a precipitous decline in law school applicants over the last few years. Since 2004, the number of applicants has declined by over 40 percent, with 1L enrollment decreasing by about 20 percent.<sup>3</sup> In the early days of the downturn, much of the discussion focused on the cyclical nature of the legal business as the primary explanatory variable for the economic challenges law firms experienced. After all, corporate law practice, the so-called “big law,” is closely tied to the fate of corporate America. It has become increasingly obvious that the changes in the upper-strata of the legal profession, resulting in a suppressed need for entry-level lawyers, are more permanent. Technological improvements and the growth of the outsourcing industry for legal services account in part for the depressed demand which has been aggravated by client billing pressures. A decline in government funding for legal aid and public defenders and the availability of large numbers of young lawyers on the labor market, have increased the difficulties for a law graduate in landing a first job.

As these changes in the legal profession are largely grounded in substantial, enduring alterations of the way in which legal business operates, law schools now have to confront a permanently changed reality. The changes schools have implemented in response may sometimes be difficult to detect from the outside, and those most hailed may be the least innovative or dramatic. Broad similarities between law schools may also lead to the misperception that all law schools are fungible—or perhaps only distinguishable by their *U.S. News* rank. Schools differ with respect to the markets they serve, their missions, the students they attract, the strength of their alumni bodies, the way in which they are funded, and how they are tied into a larger university, if at all. Nevertheless, legal education finds many painting with a broad swath, largely because of vast curricular similarities between law schools. It is also the curriculum that has caused the most complaints by the practicing bar. As a result, the law school curriculum

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<sup>2</sup> See, e.g., Eric Segal, *Is Law School a Losing Game?*, N.Y.TIMES (Jan. 8, 2011), [www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all](http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all).

<sup>3</sup> LSAC, *End of Year Summary: ABA Applicants, Applications, Admissions, Enrollment, LSATS, CAS*, LSAC.ORG, <http://www.lsac.org/lscresources/data/lsc-volume-summary> (last visited Sept. 29, 2014) (presenting data from Fall 2004 through Fall 2013); LSAC, *Three-Year ABA Volume Comparison*, LSAC.ORG, [www.lsac.org/lscresources/data/three-year-volume](http://www.lsac.org/lscresources/data/three-year-volume) (last visited Sept. 25, 2014) (comparing applicant volume by week from 2012 to 2014).

has been the focal point for reforms—for the last *forty* years.<sup>4</sup> This article will focus in particular on one such curricular reform—the emphasis on graduating the “practice-ready” young lawyer—while also indicating the need for additional changes in legal education, many of which may be difficult to implement and sustain in light of the hierarchical nature of the legal academy and profession.

Many critics of legal education and reformers alike demand “bold reforms,” though so far most change seems restricted to haphazard modifications of the curriculum, the hope for quick fixes, and a focus on shedding staff and faculty to balance budgets with a smaller student body. Whether those changes alone amount to bold action, defined as “not afraid of danger or difficult situations; showing or needing confidence or lack of fear; very confident in a way that may seem rude or foolish,”<sup>5</sup> is questionable.

Even more debatable is whether any of these changes are substantial *reforms*, as a reform implies an “improve[ment] by removing or correcting faults, problems, etc.”<sup>6</sup> Many of the changes consist of curricular additions to respond to the practicing bar’s challenge that law graduates are woefully unprepared for the practice of law.<sup>7</sup> The current mantra, therefore, is the production of “practice-ready” lawyers, an undefined, very likely meaningless—and altogether misleading—term. Curricular changes may merely camouflage or even

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<sup>4</sup> American Bar Association Section on Legal Education and Admission to the Bar, *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (July 1992), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_legal\\_education\\_and\\_professional\\_development\\_maccrate\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report.authcheckdam.pdf) [hereinafter “MacCrate Report”] (recommending an increasing focus on skills and values during law school); Carnegie Foundation for the Advancement of Teaching, *Educating Lawyers: Preparation for the Profession of Law* (2007), available at [http://www.carnegiefoundation.org/sites/default/files/publications/elibrary\\_pdf\\_632.pdf](http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf) (analyzing teaching and learning in law schools and calling for more integrated learning and other reforms); American Bar Association Task Force on the Future of Legal Education, *Report and Recommendations*, AMERICANBAR.ORG (Jan. 2014) [hereinafter ABA Task Force], [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf) (last visited July 30, 2014) (among other recommendations suggests still continued greater focus on professional skills).

<sup>5</sup> *Bold*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/bold> (last visited Sept. 29, 2014).

<sup>6</sup> *Reform*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriamwebster.com/dictionary/reform> (last visited Sept. 29, 2014).

<sup>7</sup> For a study of changes that have occurred in law school curricula, see Stephen Daniels, William M. Sullivan & Martin Katz, *Analyzing Carnegie’s Reach: The Contingent Nature of Innovation*, J. LEGAL EDUC. (forthcoming 2014) (finding substantial curricular change, even before the recession, but little adjustment of faculty incentives).

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detract from the crucial need to strategically rethink cost structures, reimagine alumni support, and respond to increasing educational stratification.

## II. CURRICULAR REFORM: THE MYTH OF THE “PRACTICE-READY” LAW GRADUATE

Many of the curricular changes currently implemented are the opposite of “bold” action. They are motivated by fear, a threat to the existing business model, and in some cases to the continued existence of some law schools. Many changes in law schools today seem to be questionable responses to the real and alleged shortcomings of legal education, as they are haphazard and not tied into an overall larger strategic change. They seem to be driven less by a strategic vision or animated by a school’s specific mission, but rather by the perennial concern of being left out.

Almost all schools now tout a practice-ready legal education, highlighting their legal clinics, externships, and simulation courses. Schools have added or expanded those offerings on top of the regular curriculum, often to avoid direct impact on faculty not involved in such ventures. In doing so they continue a movement that has started at least in the 1970’s and has accelerated in recent years in response to the McCrate and Carnegie Reports, both of which highlight the need for more skills education and greater professionalism training in law schools. Deep reforms, however, remain constrained by schools’ internal structures, including their relationship to their University, and the role of faculty governance, which often make it difficult to embark upon more substantial changes.

There also seems to be substantial risk avoidance, or perhaps fear of risk taking, inherent in all of legal education. In such a setting it might not be surprising to see more of the same rather than truly novel approaches, as both lawyers and tenured faculty members tend to be risk averse.<sup>8</sup> The hope that change may not be necessary after all, that

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<sup>8</sup> Much has been written on lawyers being more risk averse than other professionals, especially on blogs, and the negative impact of what is either viewed as a personality trait or a function of the profession’s demand and culture. See, e.g., *Dirty Words: Risk Averse*, (Apr. 7, 2013, 11:00 PM), <http://amygrimssen9.typepad.com/blog/2013/04/dirty-words-risk-averse.html>; Josh King, *Risk Aversion and the Business Lawyer*, LAWYERNOMICS.AVVO.COM (Apr. 5, 2013), <http://lawyernomics.avvo.com/business-management/risk-aversion-and-the-business-lawyer.html>. For a discussion of the impact of law school culture and faculty incentives, see, e.g., Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515 (2007). A more general discussion on all faculty’s reluctance to embrace change, see John Tagg, *Why Does the Faculty Resist Change?*, CHANGEMAG.ORG, <http://www.changemag.org/Archives/Back%20Issues/2012/>

application numbers are cyclical and therefore will recover soon again, has also animated some of the reluctance to embark upon bold reforms. It is not only law school-specific internal factors that restrict possible changes in the curricular area and beyond. Accreditation rules and the actual or perceived to be likely response of the market place will also play a role.

Even though the American Bar Association (ABA) Council on Legal Education embarked upon a substantial review of the accreditation Standards,<sup>9</sup> many accreditation requirements continue to restrict the possibility of change—and of robust market differentiation.<sup>10</sup> In addition to ABA regulations, state bar requirements have a similar impact.<sup>11</sup> The effect on individual schools may vary depending on where most of their students take the bar examination. By sheer volume of bar takers, New York and California remain among the most dominant rule setters.<sup>12</sup> The new New York requirement demanding that every person provide fifty pro bono hours before being admitted, for example, does impact law schools around the country, even though it can be fulfilled after graduation.<sup>13</sup> The New York program permitting law students to take the bar exam during the second semester of third year of law school may have a yet more substantial impact on legal curricula and educational requirements. The early bar examination is contingent upon the students being placed full-time in a public service setting after the bar examination.<sup>14</sup> This may require substantial modification of

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January-February%202012/facultychange-full.html (last visited Oct. 1, 2014).

<sup>9</sup> Randy Hertz & Don Polden, Memorandum, *Comprehensive Review of the ABA Standards for the Approval of Law Schools*, AMERICANBAR.ORG (2008), [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review.html](http://www.americanbar.org/groups/legal_education/committees/standards_review.html) (last visited July 30, 2014). The comprehensive review projected concluded with the adoption of a set of new Standards in August 2014. See American Bar Association Standards Review Committee, *Implementation of New Standards and Rules for Approval of Law Schools*, AMERICANBAR.ORG, [www.americanbar.org/groups/legal\\_education/committees/standards\\_review.html](http://www.americanbar.org/groups/legal_education/committees/standards_review.html) (last visited Sept. 29, 2014).

<sup>10</sup> See, e.g., TAMANAHA, *supra* note 1, at 28–36.

<sup>11</sup> See, e.g., The New York State Board of Law Examiners, *Rules of the Court/BOLE*, NYBAREXAM.ORG, <http://www.nybarexam.org/Rules/Rules.htm> (last visited Sept. 25, 2014) (outlining a set of course requirements and graduation from an ABA approved law school, unless the candidate studied law in a law office or graduated from a foreign law school).

<sup>12</sup> National Conference of Bar Examiners, *2013 Statistics* 10–11, NCBEX.ORG (Mar. 2014), [http://www.ncbex.org/assets/media\\_files/BarExaminer/articles/830114\\_statistics.pdf](http://www.ncbex.org/assets/media_files/BarExaminer/articles/830114_statistics.pdf).

<sup>13</sup> The New York State Board of Law Examiners, *Rules of the Court/BOLE* § 520.16 (effective Jan. 1, 2013), [www.nybarexam.org/Rules/Rules.htm#520.16](http://www.nybarexam.org/Rules/Rules.htm#520.16) (last visited Aug. 15, 2014).

<sup>14</sup> *Pro Bono Scholars Program—A Legal Education Initiative*, NYCOURTS.GOV,

curriculums at least at those schools where a large percentage of the student body takes the New York bar.<sup>15</sup> Not surprisingly, the question will arise whether other states will follow suit, and therefore perhaps change legal education more dramatically than the ABA has.<sup>16</sup>

Even though one might expect challenging times to lead to true reform, including deep curricular modifications, relatively little of that seems to be occurring, and most law schools appear to continue to respond in similar ways. The combination of fear and incredulity, together with an inherent avoidance of risk-taking, may account for the reluctance to bring about more meaningful curricular changes. When a crisis cannot galvanize action, it would be yet more surprising to see reform when times are good. After all, why change what appears to be at least serviceable and successful in the market, with all the risk that contains?

Washington and Lee's (W&L) Law School embarked on such a challenging reform at a time when applicant numbers were still on the upswing, law schools seemed to be able to command almost any price, and the legal profession's revenue and head count grew rapidly and substantially, especially in the upper tier of large law firms. It was at that time, between 2004 and 2007, that the faculty, together with the law school administration, developed and then implemented a broad and ambitious change to its 3L curriculum. After much planning and a two-year trial phase, the reform, which was developed as a response to the demands of the profession to turn out different graduates, was extensive, profession-focused, and both revolutionary and self-evident at the same time.<sup>17</sup> The program proofed to be a true reform as it has impacted many parts of the operation of the law school, teaching, and

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<http://www.nycourts.gov/ATTORNEYS/probonoscholars/index.shtml> (last visited July 30, 2014).

<sup>15</sup> *Pro Bono Scholars Program—A Legal Education Initiative*, NYCOURTS.GOV, <http://www.nycourts.gov/ATTORNEYS/probonoscholars/index.shtml> (last visited July 30, 2014).

<sup>16</sup> Though motivated by other concerns than New York, Arizona has been the first state to offer the bar exam after two-and-a-half years of law school. The University of Arizona subsequently modified its last semester curriculum to accommodate those exam takers. See Supreme Court of Arizona, *Order Amending Rule 34, Rules of the Supreme Court*, AZCOURTS.GOV, <http://www.azcourts.gov/Portals/20/2012Rules/120512/R120002.pdf> (last visited Sept. 29, 2014). See also Sally Rider & Marc Miller, *The 3L February Bar Exam: An Experiment Under Way in Arizona*, THE BAR EXAMINER 15 (2013), [http://www.ncbex.org/assets/media\\_files/BarExaminer/articles/2013/820313RiderMiller.pdf](http://www.ncbex.org/assets/media_files/BarExaminer/articles/2013/820313RiderMiller.pdf) (describing a history of the rule change).

<sup>17</sup> Lyman Johnson, Robert Danforth & David Millon, *Washington and Lee University School of Law—Reforming the Third Year of Law School*, REFORMING LEGAL EDUCATION 11 (2012) (providing an in-depth discussion of the process and implementation of the new program).

the 2L curriculum.

After two years of cloistered academic studies, the third year serves as a bridge to the profession. The structure of the curriculum is prescribed and mandates a live-client experience and a set of simulation-based offerings in addition to two two-week immersion programs focused on imparting trial-related and transactional skills, respectively. The year is designed to provide the needed connection between the classroom-centric, theory-focused 1L and 2L years, which are laden with knowledge of substantive law, to the professional setting where the lawyer is a service provider who needs to understand and communicate effectively with a client and be familiar with the client's business to advise appropriately. Some of that learning is conducted in a direct client services setting; other learning is situated in practicum courses which allow for the application of substantive law in a specific otherwise not replicable setting, simulated client interaction, reflection, and the insightful mixture of theory and practice. These courses in particular have refreshed the perspective of practitioners who frequently teach them, while also providing the students with substantive insights and professional knowledge they would have otherwise taken months, if not years, to acquire.

For the doctrinal faculty, the changes have made a difference, sometimes in small ways, sometimes in larger ones. Fewer students are available to serve as research assistants, as more of them spend their time in clinics or at their externship placement. The curricular change has had the same impact on other selective programs in which 3Ls traditionally played a substantial role, such as a library teaching fellows program. In some cases doctrinal faculty members have developed a practicum; others have bemoaned the impact of the 3L curriculum on seminar offerings.

Quite a few voices denigrated Washington and Lee for taking this profession-focused, problem- and client-centered focus, perhaps the ultimate indicator that this was a bold approach at the time. A few years later most law schools appear to have become converts to a curriculum that emphasizes practice skills more heavily.

Despite these changes, the criticism of legal education continues unabated, though that is certainly not novel either.<sup>18</sup> In earlier times

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<sup>18</sup> See Susan K. Boyd, *The ABA's First Section: Assuring a Qualified Bar*, AMERICANBAR.ORG (describing the content of the 1921 Root Report that "contain[ed] minimum standards for law schools") (last visited Sept. 29, 2014); ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: BULLETIN NO. 15, (1921), available at <https://archive.org/details/cu31924069476095> [hereinafter "Reed Report"]; see also 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. &



some of the reproach focused on the training and education of law students prior to their arrival in law school. Some of the questions about standards—for students and law schools—were wrapped up in questions of who could join the legal profession. Less than 100 years ago large groups of the population were precluded from becoming part of the profession. In August 1912 the ABA effectively banned non-Whites from membership.<sup>19</sup> Eastern and Southern European immigrants and Jews had difficulty getting admitted into prestigious law schools.<sup>20</sup> They frequently ended up enrolling in proprietary or night-law schools in urban areas.<sup>21</sup> The entry requirements of these schools were generally less and did not include a college degree, thereby allowing students of lesser means to attend, usually while working.<sup>22</sup> Many of the private night law schools ultimately closed, in part because of the profession's movement toward requiring an undergraduate degree prior to law school admission and law schools increasingly becoming part of universities.<sup>23</sup> Some of today's discourse is eerily reminiscent of those days of the past, though much of today's focus seems to be the reverse—a decrease in entry-requirements to preserve affordability and therefore presumably access for those of lesser means.<sup>24</sup>

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POL'Y REV. 503 (2013).

<sup>19</sup> See *ABA Timeline*, AMERICANBAR.ORG, [http://www.americanbar.org/about\\_the\\_aba/timeline.html](http://www.americanbar.org/about_the_aba/timeline.html) (last visited Sept. 28, 2014).

<sup>20</sup> See, e.g., ANTHONY T. KRONMAN, *HISTORY OF THE YALE LAW SCHOOL* 14 (2004) (even in the early 1950's Yale College did not admit Jewish applicants; the law school did, though it remained less worldly than its major competitors).

<sup>21</sup> See, e.g., ROBERT J. KACZOROWSKI, *FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY* 121–22.

<sup>22</sup> For a discussion of entrance requirements and continued lobbying for an increase in the number of years of college education required before law school admission, see Warren A. Seavey, *The Association of American Law Schools in Retrospect*, 3 J. LEGAL EDUC. 153 (1950).

<sup>23</sup> For a discussion of part-time law schools, see JOSEPH F. KETT, *THE PURSUIT OF KNOWLEDGE UNDER DIFFICULTIES: FROM SELF-IMPROVEMENT TO ADULT EDUCATION IN AMERICA, 1750-1990* 261–69 (1994); Michael J. Mazza, *The Rise and Fall of Part-time Legal Education in Wisconsin*, 81 MARQ. L. REV. 1049 (1998).

<sup>24</sup> The proliferation of 3-3 degree programs serves as an example. The ongoing discussion of a two-year law degree does not require less to enter law schools, but focuses on a shorter legal education to decrease cost and attendant student loan debt. See Matt Barnum, *The Two-Year Law Degree: A Great Idea That Will Never Come to Be*, THE ATLANTIC (Nov. 12, 2013, 8:53 AM), <http://www.theatlantic.com/education/archive/2013/11/the-two-year-law-degree-a-great-idea-that-will-never-come-to-be/281341/>. Year-round accelerated law programs that can be completed in twenty-four months continue to proliferate.

Both the legal academy and the legal profession continue to struggle with diversity, though the population groups currently disproportionately excluded have changed from those days.<sup>25</sup> Proposals have resurfaced to make law an undergraduate degree; schools are moving toward 3-3 degrees, thereby cutting the required college education down to three years; and many free-standing law schools are the ones most under economic pressure.<sup>26</sup>

Criticism of the content and quality of legal education also continues. It seems to have reached a new crescendo in the last few years, as the employment market has been compressed and tuition has increased considerably, though neither is likely directly or causally related to much of the critique. Some of the curricular critique assumes a law school curriculum that no longer exists. At least since the early 1970's, law schools have focused more on bringing law practice into their walls through clinical education and through externships (with a required classroom component),<sup>27</sup> rather than merely permitting their students to work in law offices during their second and third year of law school.<sup>28</sup> In many urban areas the latter has occurred for a long time, though the model has come under more pressure during difficult economic times. The dearth of training and apprentice opportunities, combined with external pressures to provide those, has motivated many law schools in recent years, to offer more

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<sup>25</sup> For research on diversity in the profession today, see *Minorities & Women*, NALP.ORG, <http://www.nalp.org/minoritieswomen> (last visited Sept. 29, 2014). While women continue to be underrepresented in the profession, their enrollment numbers in law schools almost equal those of men. Jews and Catholics no longer experience systematic exclusion. For a discussion of discrimination against Jews in the legal profession, see generally *JEWS AND THE LAW* (Ari Memelstein et al., eds., 2014).

<sup>26</sup> See *Moody's Downgrades Vermont Law School to Ba1; Outlook Negative*, MOODY'S (Apr. 14, 2014), [https://www.moodys.com/research/Moodys-downgrades-Vermont-Law-School-to-Ba1-outlook-negative-PR\\_297223](https://www.moodys.com/research/Moodys-downgrades-Vermont-Law-School-to-Ba1-outlook-negative-PR_297223); Debra Cassens White, *Law School Misses Bond Payment, Sees to Restructure Obligations*, ABA JOURNAL (Sept. 17, 2014), [http://www.abajournal.com/news/article/law\\_school\\_misses\\_bond\\_payment\\_seeks\\_to\\_restructure\\_obligations](http://www.abajournal.com/news/article/law_school_misses_bond_payment_seeks_to_restructure_obligations).

<sup>27</sup> Within law schools there continues to be some conflict between those two types of live-client opportunities. Many clinicians and other faculty members consider externships a less optimal teaching and learning setting, as it lacks the direct faculty supervision typical of other curricular experiences. Whether this concern about externship offerings reflects protection of pedagogical methods and styles or rather some inherent uneasiness with the practice of law remains an open question.

<sup>28</sup> For the history of clinical legal education, see New York State Judicial Institute, *Partners in Justice: A Colloquium on Developing Collaborations Among Courts, Law School Clinical Programs and the Practicing Bar* (May 9, 2005), <https://www.nycourts.gov/ip/partnersinjustice/Clinical-Legal-Education.pdf>. Laura Holland presents the growth of the clinical program in one law school. See Laura G. Holland, *Invading the Ivory Tower: The History of Clinical Education at Yale Law School*, 49 J. LEGAL EDUC. 504 (1999).

practice opportunities through their curriculum.<sup>29</sup>

Despite these curricular changes and the attempt to provide law students with more practice experience, the criticism of the training students receive continues.<sup>30</sup> The drumbeat that legal education and law practice are ever further apart has only grown louder over the last few years, often couched in the terms that legal employers would be inclined to hire more if law students were better trained. That argument presupposes that such paid employment is in fact available, and begs the question why it would not be filled by even inadequately trained young lawyers, albeit at a reduced salary.

In response to this blame levied upon them, law schools have quickly increased clinical capacity—with differing definitions of the meaning of “clinic”; some clinics are staffed in-house in a traditional model, while others appear to be outsourced or resemble more strongly robust, more supervised and guided externships than the clinic model. They have also expanded externship offerings, with more or less supervision, and tried to respond with more simulation courses. Many of those remain focused on the litigation area, though transactional simulation courses are also increasingly being offered, at least to some students.<sup>31</sup> “Practice-ready” through exposure to the practice of law has become the mantra.

To some extent that reaction to the critique of law schools may not be surprising, as it allows for an expansion of curricular models that existed already. It is likely an insufficient response, however. If graduates were truly practice-ready, would it not imply that they could practice law on their own? Even law schools committed to producing sole practitioners and small firm lawyers, however, do not advocate for entering sole practice immediately upon graduating law school. Too great are the need for broad substantive and procedural knowledge, the pressures of working with clients, abiding by professional responsibility mandates, and developing business. For that reason, some law schools have now developed an incubator model to support young sole practitioners, not only through reduced rent and support arrangements, but also through a network of mentors.<sup>32</sup> In the end,

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<sup>29</sup> See ABA Task Force, *supra* note 4.

<sup>30</sup> See *id.*

<sup>31</sup> See, e.g., Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, JALWD 118 (2008). At Washington and Lee all 3Ls must go through a two-week long immersion program in transactional skills. See Washington and Lee’s New Third Year Reform, WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW, <http://law.wlu.edu/thirdyear/> (last visited Sept. 29, 2014).

<sup>32</sup> For a description of incubator/residency programs, see *Incubator/Residency*

three years of law school cannot get law students ready to practice law on their own.<sup>33</sup>

### III. THE “PROFESSION-READY” LAW GRADUATE OR “READY TO BEGIN TO PRACTICE”

The concept of “law practice,” mentioned as if law were a unitary profession, conceals the various strata and forms the modern practice of law takes. Ultimately, that misleading view—and the need of most law schools to service different practice areas and settings—has also led to the development of a relatively homogeneous educational model. None of this is recent or particularly novel. Even in the 1920’s as the ABA’s Reed Report indicated, at least two strata of law practice existed: lawyers who serve corporations and those who serve individuals. As many large corporations today are multi-nationals, corporate practice requires yet additional legal and non-legal skills, including intercultural competence. Law has also become more specialized as the regulatory state has grown and technological development accelerated. The profession is now more varied and diverse than it has ever been, and will continue to spawn collateral and lateral areas which may (or may not) require the services of more trained lawyers.

Despite these differences in substantive law and practice setting what connects U.S. lawyers, is the socialization process that occurs in law school along with the developed analytical thinking taught so effectively in U.S. law schools. Independent of the substantive area of practice in which the lawyer engages, the type of client the lawyer serves, the practice setting in which the lawyer works, these experiences and the common training connect lawyers in a way that transcends practice areas and settings.

For these reasons, we may not make law graduates practice-ready but rather “profession-ready.” While that term may appear to emphasize theory rather than practical knowledge, it reflects our reality more accurately, is more realistic in the goals it sets for legal education, and ultimately responds appropriately and effectively to the demands of a splintered profession.

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*Programs*, AMERICANBAR.ORG, [http://www.americanbar.org/groups/delivery\\_legal\\_services/initiatives\\_awards/program\\_main.html](http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main.html) (last visited Sept. 29, 2014).

<sup>33</sup> The occasional exception exists, of course. It may be, for example, that an older law student who already has substantial business experience, a strong network of potential clients, perhaps even a more circumscribed and focused practice area, and good judgment developed over years of life experience may be ready to practice law on her own after three years of law school.

The term implies that law graduates are ready to join the legal profession as they have been exposed to its practices and values. They have learned some of the crucial underlying substance and gained special skills, such as sophisticated oral and written communication and research abilities. In addition they have either acquired or honed some of the personal characteristics that will allow them to succeed throughout their career, including mastery of a foreign language and the requisite cultural knowledge, time management, and self-directedness. Law school remains the first and critical step into the profession. How far that step is to reach into the practice of law may be questioned. Is it designed to drop one at the doorstep or rather deposit one in the house?

How do law schools build the bridge from college to a professional graduate school and from there into the profession? Law faculties and curriculum committees have traditionally turned to the first year of law school for reform while the current focus is almost exclusively on the second and especially the third year, though a number of law schools have begun to build an experiential component into their first year. But the third year does not stand on its own—it follows two years of legal training. It can reinforce and strengthen the mission of a law school while preparing its graduates to embark upon the practice of law.

Writing is taken for granted in today's discussion about the preparation for practice and experiential education though it remains a perennial source of complaints. Because of the way it is built into the curriculum and staffed—by legal writing faculty members, most of whom are not on tenure-track—many students view it as a course of secondary importance, and therefore the skill itself becomes undervalued and underappreciated. Equally challenging is that many students build their closest professional relationship with a (transitory) legal writing faculty member who is often asked to serve as a reference and help students with developing their career strategy.

A few law schools approach legal writing differently. At Washington and Lee, for example, the first semester substantive courses are identical to those at most U.S. law schools—civil procedure, contracts, criminal law, and torts—but the crucial ability of legal writing is taught differently. The decision to dedicate a full-time doctrinal faculty member to teach legal writing in conjunction with their doctrinal course is closely tied to the self-perception of the institution and its faculty as dedicated to students and to educating outstanding lawyers. As they perceive writing as perhaps the most important skill of a lawyer, a faculty of teacher-scholars would, not

surprisingly devote extensive resources to training their students in that skill. It is an expensive choice, in terms of cost to the institution, since these doctrinal faculty members do not teach other substantive courses that semester. But it is also costly to these faculty members who often find no time for scholarship during a semester of intensive writing and substantive teaching for a group of twenty or fewer 1Ls.

On the other hand, it is the regular one-on-one meetings with a tenured faculty member, which lead faculty to get to know their students very well. This becomes important with respect to recommendations, employment and placement, and overall student satisfaction. The challenge often consists of managing students' expectations as all faculty members are frequently supposed to provide the same level of access and guidance. Should a faculty member not adhere to that ethos, student disappointment may ensue.

At Washington and Lee, as at so many other law schools, the first semester serves primarily analytical training, generally with a focus on the written word. The goal is to learn the so-called "language of the law" or "thinking like a lawyer" and to present arguments effectively and persuasively. The second semester broadens the student's approach by focusing on the modern application of law and begins to build the connection between the classroom and the profession. In light of our location near Washington, D.C. and the desire of so many of our students to practice in the nation's capital, we offer an introduction to the legislative process and administrative law. In recognition of the increasingly global rather than local character of law practice, Washington and Lee also has a Transnational Law course, an offering that remains surprisingly rare in law schools despite the greater need for cross-cultural knowledge and international and comparative legal understanding.<sup>34</sup> Perhaps the most obvious bridge course is Professional Responsibility, required by all law schools but rarely taught in the first year. These themes—enhanced skills, professionalism, and broad legal knowledge—continue throughout the second year, which broadens the foundation so that students can effectively use their third year as a springboard into the profession.

At the start of their third year, all 3L law students must take a two-week pre-trial/trial immersion course, designed to expose all of them to oral advocacy and apply those skills. Many of them have participated in student-run advocacy competitions in the year before, but here professionals—faculty members and practitioners—will guide and

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<sup>34</sup> See Nora V. Demleitner, *Stratification, Expansion, and Retrenchment: International Legal Education in U.S. Law Schools*, 43 INT'L L. NEWS 1, 2 (2014). See also American Bar Association, *A Survey of Law School Curricula: 2002-2010* (Catherine L. Carpenter ed.).

critique them. Some discover their true passion, for others it reinforces the professional choice toward – or against—litigation and trial practice. The corollary to this requirement is the two-week transactional immersion at the beginning of the spring term with a focus on financial analysis, understanding of corporate documents, and the practice of negotiation and bargaining skills.<sup>35</sup>

Traditional coursework is limited to an elective, as the remainder of the 3L curriculum consists of a live-client experience and practicum courses, which may be built around a problem, such as a merger. While many of the practicums consist of a simulation experience, others go beyond it. One practicum, taught by a lawyer/businessman/developer/philanthropist, requires students not only to engage in hands-on legal work, but also to collaborate with professionals in other areas. The adjunct faculty member bought a house in a larger adjacent city, which he planned to turn into a community center. The law students worked closely with business school, design, and engineering students as well as community activists in developing the plan to make the project become reality and seeing it through to implementation. This is an ideal learning experience as it requires knowledge of different areas of substantive law and demands collaboration of professionals from different disciplines to work successfully with their client. It also allows law students to craft written work product and hone their oral communication skills in formal and informal settings.

New curricular developments and even bold reforms, however, become stale if they are not regularly revisited, do not respond to changes in the profession and the make-up of the student body, and are not being reviewed and updated in accordance with the mission. One of the changes in the Washington and Lee curriculum, for example, has been the addition of a Washington, D.C. semester that heavily emphasizes federal government externships, paired with practicums focused on D.C.-related practice problems and issues. This curricular addition is a natural extension of our first year administrative law introduction, our 3L practice requirement, and our students' interest in government positions.

To address students' and faculty interest in legal work beyond the United States, Washington and Lee offers some practicums that include an abroad component. One practicum has served to train Liberian law students, the defense bar and judges there; another one has allowed students to assist defense counsel in cases pending before

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<sup>35</sup> The exposure of all students to these areas changes the way in which practicum courses can be taught and clinics can be conducted.

the International Criminal Tribunal for the former Yugoslavia. With the Ebola outbreak in Sierra Leone and its spread to neighboring countries,<sup>36</sup> the faculty member teaching the Liberia practicum changed its geographic parameters and focus out of necessity and in response to an international health emergency. Especially with abroad programs, such flexibility is required.

As the world appears to grow together ever faster, it is still a relatively small global elite that crosses borders easily, though a growing number of individuals and companies will face cross-border issues. In contrast to this development and the rise of global universities, many law schools appear to become less national, perhaps even less regional, and more local. With students living at home to decrease living expenses, fewer students will stray farther from their childhood home, as perhaps reflected in the curious reversal of applicant versus application numbers. For the first time, we have seen a steeper decrease in the number of applications than applicants,<sup>37</sup> and that in more of a buyer's market. The job market may also contribute to the local focus as local networks are increasingly important in obtaining an entry-level position.

The first semester of 3L year at Washington and Lee is bracketed by a Legal Profession course designed to expose all students to every part of the profession so that they do not become narrowly focused on the first professional setting in which they find themselves, appreciate the entire *gestalt* of the legal profession, and understand the rapid changes it is currently undergoing. The goal is for students to recognize the challenges and pressures under which the profession finds itself but also the opportunities that come with such dislocations. In contrast to the 1930's—when religion, race, and gender, combined with attendance at certain law schools, predetermined one's professional path<sup>38</sup>—movement from one professional setting into a different one is typical over a lawyer's career in modern practice.

The advantage of the 3L modular, profession-focused curriculum is that it allows for relatively quick adjustment to market-based changes. While it may rely on either a strong and diverse alumni base or the depth of the legal community in a large city, such a curriculum can respond in nimbler ways to the changes in the profession than

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<sup>36</sup> See, e.g., Erin Brodwin, *12 Alarming Numbers About the Ebola Crisis*, BUSINESS INSIDER (Sept. 25, 2014), <http://www.businessinsider.com/scary-ebola-facts-and-numbers-2014-9> (last visited Sept. 29, 2014).

<sup>37</sup> LSAC, *Three-Year Applicant Volume Comparison*, LSAC.ORG, <http://www.lsac.org/lscresources/data/three-year-volume> (visited last Sept. 29, 2014).

<sup>38</sup> See generally Garth, *supra* note 18.



would usually be possible through tenure-track faculty members, especially when those are involved in research and scholarship that dictate some of their teaching assignments. With a strong foundation in the 1L and 2L years, 3L practicums can be built to focus on growth areas, such as at present health law, intellectual property, and energy. Adding practicums in those areas will provide graduates with some substantive knowledge of the area of the law and the industry in which they hope to practice. Market-based legal knowledge gained through a substantial, simulation-based immersion can provide a six- to nine-month head start over the average law school graduate—a not insubstantial market advantage.<sup>39</sup>

The creation of a curriculum that forces all students to move from the comfort of the classroom to the client meeting and the courtroom does not come without cost. Students become again unsettled, after they have mastered doctrinal materials and law school exams. Traditional doctrinal faculty may not see themselves directly impacted, though ultimately they will experience the effect of such a curricular change, through decreased enrollments in seminars, for example, which may lead to demands to modify the curriculum again. Unless they can be persuaded of the direct benefits to the students and the institution and ultimately themselves, a partial curricular modification, such as the addition of a few clinical opportunities, witnessed in so many law schools, will be more easily defended, though it represents much less of a “bold reform.” It may, nevertheless, get the student closer to being ready to practice law than she would be without such an experience.

#### IV. THE UNRESOLVED CHALLENGE: COST

Curricular change may also carry anticipated—and unanticipated—financial costs. For a school that is located in a less urban setting, such as Washington and Lee, transportation (and lodging) costs, for example, are higher than for schools in urban settings when one brings in instructors to teach sophisticated practicums who themselves have the deep and specialized practice experience desired for this type of a learning experience. Logistical problems may also be more substantial than originally envisioned. To plan a full day of mock trials for every member of the 3L class requires extensive administrative support and oversight, combined with a vast amount of teaching resources, drawn from inside and outside the

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<sup>39</sup> This information is based on discussions with adjunct instructors and employers hiring from Washington and Lee.

building. Supervised externships, with training of externship supervisors, also put a substantial burden on the faculty member and administrator overseeing externships. Depending on the pre-existing size of the experiential program,<sup>40</sup> an additional administrator may be required and the faculty member or dean overseeing the program will have to expect changes in their portfolio.

Personnel additions often tend to be difficult to justify to University finance officials, especially if they do not lead to (immediate) results in the form of financial returns. Under budget pressures many schools almost reflexively shrink their administration and faculty, if possible, as the largest expense items for most law schools are personnel cost and student financial aid.<sup>41</sup> In light of a nationally declining applicant pool and the demand by all law school constituencies for quality students, frequently measured in *U.S. News* terms, financial aid expenditures will remain high, and perhaps even increase for those law schools that can afford them. As long as the applicant pool continues to decrease, the more necessary will be cuts in staff, administration, and faculty. As administrators have taken over roles that used to be filled by faculty—admissions, student affairs, career services, and development—losing them will have a detrimental impact on the long-term functioning of an institution. Even a smaller student body requires the same type and level of services. The impact of administrative downsizing is likely to become obvious once lay-offs entail the shedding of expertise and experience. At that point challenges arise for the effective functioning of an institution. The savings from the elimination of these positions tend to be substantially smaller than savings that could be achieved if a long-serving, full-time, tenured member of the faculty were to retire. For those reasons, many law schools have tried to incentivize faculty retirements and discontinue some, more easily cut non-tenured lines, though the latter amount generally to fewer cost savings.

All of these tactics, however, carry a price tag. Some of the impact will be visible immediately, some will only be palpable over a longer term. As an industry, law schools—as all of higher education—have not figured out how to control costs effectively. Because of the “bespoke,” custom-made, personnel-driven mode of teaching, there is

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<sup>40</sup> For a definition of experiential, see David I.C. Thomson, *Defining Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING (forthcoming 2014).

<sup>41</sup> At least in the past many law schools also paid a substantial percentage of their (gross) revenue to the university to cover overhead expenses, including building usage, utilities, and their share of centralized services, which vary widely between institutions.

no coherent strategic approach, as opposed to a reflexive, market pressure-based response, to address this challenge. Just a short while ago, it seemed that MOOCS might provide the solution to these challenges—or perhaps foreshadow the end of education as we know it. Predictions of the demise of the brick-and-mortar university, however, were premature. Even though law schools—and their accrediting and testing bodies—appear to adhere mostly to the notion that all teaching has to be done in person,<sup>42</sup> the number of online courses has nevertheless increased. Some result from the obvious constraint on hiring faculty members in every specialized area when only a handful of students take advantage of such an offering, others stem from the creation of for-profit businesses.<sup>43</sup> Some law schools have begun to develop online courses, in the post-J.D. market, at least in part to help their financial bottom line by creating a national or even international market for their product. While the J.D. degree may be less suited for online teaching,<sup>44</sup> at least in certain areas, for those who are trying to add to their skills portfolio or pursue some other intellectual interests, an online certificate or graduate degree may fit their life circumstances and learning style. For a law school the upfront cost and need for expertise, however, are substantial, and generally, the added expense for IT-related investments—and constant upgrades on both hardware and software—should not be underestimated. While information technology offers great learning potential, ultimately the savings possibilities are less than imagined. Nevertheless, the general investment in this infrastructure cannot be avoided as the skill and knowledge to use technology are important for all law students, perhaps even crucial for obtaining a legal position today.

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<sup>42</sup> See, e.g., *Chapter 3: Program of Legal Education*, Standard 306, AMERICANBAR.ORG, [http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/20072008StandardsWebContent/Chapter\\_3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/20072008StandardsWebContent/Chapter_3.authcheckdam.pdf) (last visited Sept. 29, 2014) (distance education limited to a maximum of fifteen credits); The New York State Board of Law Examiners, *Rules of the Court/BOLE* § 520.3(6), NYBAREXAM.ORG, <http://www.nybarexam.org/Rules/Rules.htm#520.3> (up to twelve credits of distance education may be counted toward the law degree). But see William Mitchell College of Law, *The Hybrid Program*, WMITCHELL.EDU (noting that the ABA recently granted a variance to William Mitchell Law School for an e-hybrid, on-campus/online J.D. degree program) (last visited Sept. 30, 2014).

<sup>43</sup> See iLaw Ventures: Our Mission, INFILAW.COM, <http://www.infilaw.com/ilawventures> (last visited Sept. 30, 2014).

<sup>44</sup> But see William Mitchell College of Law, *supra* note 42.

## V. "THE RICH GET RICHER" OR THE POWER OF ALUMNI

The legal academy is undergoing a substantial stratification. Parallel to the societal developments in which the gap between the haves and the have-nots has been expanding over the last thirty years, the same development seems to accelerate with law schools. There has always been some stratification by endowment wealth, brand, and *U.S. News* ranking, but the current market pressures have enhanced it dramatically.<sup>45</sup> Wealthy institutions have benefitted from substantial alumni giving that will allow them to expand their investment in faculty scholarship, student financial aid, and innovative changes. The wealthiest institutions in the country—measured by endowment, often combined with total annual giving—can develop curricular reforms and build areas of specialization that are unimaginable on that scale by other schools. Sometimes it is lack of imagination or ineffective faculty governance that may inhibit or block decision-making to thwart reform and innovation. Equally often monetary constraints will render certain innovations haphazard, less than fully executed, and in the end unsuccessful.

Longevity and prestige of an institution, which have not changed much in almost a hundred years,<sup>46</sup> dictate wealth. In part, the size of endowments is a function of luck, especially with respect to founding contributions, and the age of an institution but over time also of the loyalty—and capacity—of alumni. It is difficult to measure loyalty directly, other than perhaps through giving percentages, but it is also visible in alumni engagement, in alumni responsiveness to students requesting (informal) mentoring and to formal mentoring programs and career assistance, and in the hiring of students. While some bold approaches to legal education may make a difference because they help prepare students more effectively, increase the brand recognition of a law school, or otherwise contribute to its fiscal and intellectual health, it is ultimately alumni loyalty over decades that will determine an institution's success. It is this loyalty that will make everything else possible.

In many law schools the mere mention of alumni leads to a reflexive call for the alumni and development officers. It is not, however, these professionals who create alumni loyalty. Alumni loyalty builds from the first contact with an admissions recruiter or the initial communication a prospective student receives, continues through

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<sup>45</sup> See, e.g., Olufunmilayo Arewa, Andrew P. Morriss & William Henderson, *Enduring Hierarchies in American Legal Education*, 89 INDIANA L.J. (forthcoming 2014).

<sup>46</sup> See *id.*

meetings with current students, is enhanced by the relationships the students have with each other and with the faculty, inside but especially outside the classroom. These relationships may be strengthened—or diminished and stifled—even by the physical layout of the building. Today, increasingly alumni loyalty may be determined by a successful job search and career-enhancing post-graduate employment as well as alumni support throughout one's career.<sup>47</sup> It matters what students experience during their years in law school, but it may be more the life-long connections and experiences outside the classroom that dictate the strength of the alumni bond. Creating those ties, if they are not present in a student and alumni body, would require deep reforms and a substantial cultural shift in the institution. That is, however, unlikely to accomplish in a short period of time.

#### VI. WHERE DO WE GO FROM HERE?

Many law schools have had strained relations with their universities over the decades. In recent years at least some law schools have believed that the university requires too much of a contribution, have felt micromanaged, misunderstood, but also often forgotten and not included in campus-wide initiatives. Some of the silo-type nature of law schools results from ABA Standards that have allowed law schools to avoid engaging with their university or do so in a less than productive way; some undoubtedly stems from the perception universities have of their law schools and vice versa.

For most law schools, the mutual lack of interest has begun to change, though it is uncertain how fundamental this development will be. Some of the change has arisen from the altered market situation as law schools see the need to develop new applicant funnels and revenue sources. A meaningfully reconfigured relationship between the main university and the law school will have to go beyond an occasional co-taught class, let alone the often ill-conceived but now widely adopted 3-3 programs. It will require an unprecedented give-and-take. It might be an ideal time for this type of a bold approach, as especially regional liberal arts colleges find themselves beleaguered and their students—and their parents—clamor for more value, usually in the form of additional credentials. In light of the importance of law in our society, the law school can offer that missing additional training for non-lawyers. The next bold reform, already incipiently present in some law—and some undergraduate—programs, will include

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<sup>47</sup> Whether this remains an accurate proposition for the future is questionable as students view merit and responsibility differently than past generations. See ANDREW DELBANCO, *COLLEGE: WHAT IT WAS, IS, AND SHOULD BE* 125–49 (2012).

interdisciplinary training and learning across the different divisions of an institution in a more comprehensive manner. To some extent legal training at the non-professional level fulfills the same purpose as a liberal arts education, “preparing undergraduates to be democratic citizens,”<sup>48</sup> a venture that may strengthen the rule of law, prepare more college graduates for the dominance of law in all areas of life, and inspire some to devote themselves to the profession of law. How the exchange of resources between the central university, the undergraduate division, and the law school will occur in an already financially strained relationship remains for another day.

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<sup>48</sup> *Id.* at 149.