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OVERCOMING BARRIERS TO DELIVERING AN EFFECTIVE LEGAL EDUCATION: REPAIRING A FLAWED INSTRUCTIONAL MODEL

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As the destructive effects of the Great Recession on the American economy slowly abate, economic problems continue to roil law schools. Perhaps the clearest manifestation that the law school business model is at a crossroads is the significant decline in overall student applications and enrollment.¹ Among the more sobering figures is a 36% reduction in the size of the entering class of 2013 as compared with that of 2010, according to data from the Law School Admissions Council.² In 2014 there were 65,119 applicants to law school, 14% lower than the prior year.³ The 350 largest U.S. law firms grew by 1.7% in 2011 and 1.1% in 2012, relatively low rates compared with the past

¹ From 100,000 applications in 2004, applications to law schools now stand at approximately 54,000 annually. First year enrollment is now less than 40,000 students, down from 50,000 in 2010. Richard A. Epstein, *The Rule of Lawyers*, WALL ST. J., May 6, 2013, at A13. A survey by Kaplan Test Prep disclosed that 51 of American law schools had cut the size of their classes. *Declining Law School Applications and Challenging Job Market Continue to Force Changes in U.S. Legal Education*, Kaplan Test Prep Press Release, October 1, 2013, available at <http://press.kaptest.com/press-releases/kaplan-test-prep-survey-law-schools-cut-their-incoming-classes-and-increase-practice-ready-curricula>. The ABA is currently considering proposals to dilute tenure protections for full-time faculty even as some schools have shed administrative staff, offered buyouts to tenured professors and left some vacated posts unfilled. Jennifer Smith, *Law-School Professors Discover Their Jobs Less Secure*, WALL ST. J., August 12, 2013, at B1, <http://online.wsj.com/article/SB10001424127887323446404579006793207527958.html>.

² Ashby Jones and Jennifer Smith, *In Rate Step, Law Schools Trim Faculty*, WALL ST. J., July 16, 2013, p. B1.

³ Joe Palazzolo and Chelsea Phipps, *With Profession under Stress, Law Schools Cut Admissions*, WALL ST. J., June 11, 2012, available at <http://online.wsj.com/news/articles/SB10001424052702303444204577458411514818378> (citing data from the Law School Admissions Council).

20 years.⁴ In addition, around 40% percent of those firms shrank the size of their staff in 2013 as compared to the prior year.⁵

In a market where the supply for legal services well exceeds demand, law firms are seeking competitive advantages through mergers that tend to reduce staff and are seeking other ways to lower costs and operate more efficiently. Increased competition and a progressive shift of control in the power over strategic litigation decisions from outside firms to general counsel have been hallmarks of the post-recessionary environment, leading a Georgetown University study to conclude that the legal industry can expect to see more “sluggish demand growth, persistent challenges of low productivity, ongoing client pushback on rate increases, and a continuing struggle to maintain discipline on expenses.”⁶

These conditions have significantly reduced the number of entry-level opportunities for newly minted lawyers and have created an enduring pool of graduates with poor career prospects even as it has burdened them with significant debt that many will likely find difficult to put behind them for years. For example, employment rates for the class of 2011 are currently at lows not seen in 18 years.⁷ The Law School Admissions Council estimated that only approximately 86% of those graduates found work, and less than 66% of those positions actually required a license to practice law.⁸ At the same time, law schools – faced with persistent pressures to increase tuition - have been

⁴ “The NLJ 350,” *THE NAT’L. L.J.*, July 6, 2013.

⁵ *Id.*

⁶ “2014 Report on the State of the Legal Market,” Georgetown Law Center for the Study of the Legal Profession & Thompson Reuters Peer Monitor Press Release, p. 2, <http://www.law.georgetown.edu/news/press-releases/2014-report-state-of-the-legal-market.cfm>. Indeed, so competitive has the search for clients become that at some large law firms previously noted for their civility partners are not above attempts to poach each others’ clients. *See, e.g.*, “The Last Days of Big Law,” *THE NEW REPUBLIC* (July 21, 2013), *available at* <http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries> (noting additionally that during the past decade, 12 major firms which collectively consisted of more than 1,000 partners have collapsed in the past decade and that law graduates fortunate to find work are frequently reminded of their expendability). The stability and status that was once associated with law firm partnership has faded as some firms have moved to eliminate or “de-equitize” under-producing partners or chosen to create separate tiers of partners who do not participate in equity sharing and have no voting power. *See, e.g.*, James B. Stewart, *A Lawyer and Partner, and also Bankrupt*, *N.Y. TIMES*, Jan. 24, 2014, *available at* http://www.nytimes.com/2014/01/25/business/partner-in-a-prestigious-law-firm-and-bankrupt.html?_r=0. In a survey conducted by the consulting firm Altman Weil in March and April 2012 in which managing partners and chairs of 238 law firms responded, 67.6% of firms believed that the creation of fewer equity partners than in prior years is now a permanent trend. Respondents included 40% of the largest American law firms. Thomas S. Clay & Eric A. Seeger, *Altman Weil Flash Survey, Law Firms in Transition*, 2012, p. 1, *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDMQFjAC&url=http%3A%2F%2Fwww.altmanweil.com%2Fdir_docs%2Fresource%2F1667e5c8-b99e-4557-93ac-73174118ea29_document.pdf&ei=qvcU4WfN8aqkAeyjCIDw&usq=AFQjCNHqa2o8xgabetDKfTOXCToDGgAR4A&bvm=bv.62578216,d.dmQ.

⁷ Sam Favate, *Law School Class of 2011 Jobs Data Shows 18-Year Low*, *WALL ST. J. LAW BLOG*, June 8, 2012, *available at* <http://blogs.wsj.com/law/2012/06/08/law-school-class-of-2011-jobs-data-shows-18-year-low/>.

⁸ Palazzolo and Phipps, *supra*, note 3.

forced to confront hard questions about the value of a law degree as an investment and their roles in contributing value to society.⁹

The downturn clearly caught a broad swath of the law school administrators and business planners unprepared. In evident anticipation of a continuously expanding market for legal services, the American Bar Association accredited or provisionally accredited eight law schools between 2006 and 2012.¹⁰ By mid-2009, plans for the construction of almost a dozen new projected law schools were scaled back or canceled due to a slowdown in contributions as well as state budget cuts.¹¹

The recession's enduring impact on the legal industry has been widely documented and is prompting ongoing scrutiny of the legal education model itself.¹² In response to trends that the recession created or accelerated and that necessitate fundamental structural change to the profession of law, many law schools - as well as law firms - will need to reconsider their business models in order to thrive, and in some cases survive. For many law schools, the institutional pressures discouraging reformist thinking are particularly robust because of their roles as profit centers for their parent institutions and as resources which enable universities to subsidize relatively less financially viable programs or activities.¹³

Ironically, the culture of the legal teaching profession itself shoulders some responsibility for the struggle many schools now face in maintaining both their societal relevance and in providing students with essential practice tools. An impediment to the continuing viability of the law school business model lies in the entrenched attitudes of law faculty, who collectively have demonstrated an

⁹ Based on tuition data compiled by the American Bar Association ("ABA"), tuition for in-state residents at approximately 80 public law schools increased an average of 8.6% annually during the period 2008 to 2012, while average tuition at 119 private schools the ABA surveyed over the same period rose 5.6% annually. ABA Section of Legal Education and Admission to the Bar, *Law School Tuition 1985-2012*, available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/lis_tuition.authcheckdam.pdf. In 2012, average tuition for an in-state resident at a public law school was \$23,214 while in the same year it was \$40,634 at a private law school. *Id.*

¹⁰ *ABA-Approved Law Schools by Year*, American Bar Association, Section of Legal Education and Admission to the Bar, available at http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html.

¹¹ Amanda Bronstad, *Recession Crimps Plans for New Law Schools*, NAT'L. L. J., (June 1, 2009), available at <http://www.nationallawjournal.com/id=1202431075010&rss=nlj>.

¹² Although the recession officially began in 2008, the legal industry is expected to continue an extended period of retrenchment to a degree that will spare not even top-ranked firms. See, e.g., Ashby Jones & Joe Palazolo, *Law-Firm Slowdown Fuels Cuts at Weil*, WALL ST. J., June 25, 2013, at A1, available at <http://online.wsj.com/article/SB10001424127887323683504578565383059487410.html>.

¹³ David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, available at http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all&_r=0 (noting that law school tuition has risen four times faster than college costs even in the depths of the recession and that law schools are sometimes required to contribute as much as 30% of their revenue to universities to subsidize less profitable fields).

impressive degree of insularity and unresponsiveness to the realities of an evolving legal profession. As schools consider ways to enhance their competitiveness, they would do well to engage in self-critical analysis to help bridge the culture of legal academia with the actual practice of law.

The downturn's effect on the broader legal community has been multifaceted and includes a sharp and sustained drop in demand for legal services, and increased resistance on the part of clients to pay for relatively inexperienced lawyers to handle their legal matters. It has also led to increasing demands for discounts and reliance on fixed fees for complex matters in place of hourly billing and slack demand among firms themselves for new lawyers due to outsourcing, offshoring and productivity gains wrought through emergent technology. These trends, some of which were well underway before the recession began in 2008, reflect long-term structural changes in the legal industry. They have placed some marginal schools at risk of extinction while forcing others to implement faculty buyouts, reduce class sizes and impose stringent austerity measures on contingent workers. Some law schools likely contributed to a surplus of law graduates by presenting placement data in ways that hindered meaningful assessments by prospective students of their career prospects following graduation. Instances of misleading statistical data, while helpful to law schools in boosting their rankings, have at the same time masked the struggles many graduates now encounter in locating full-time work requiring a law degree.¹⁴

Weaknesses in the law school business model are deeply ingrained in a pedagogical culture which values performance criteria that do not reflect critical core instructional competencies. The classic career path to a law school teaching position has traditionally entailed a degree from a top-ranked law school, an executive position on a law review and a federal clerkship. While these

¹⁴See, e.g., Karen Sloan, *Problems Persist with Law School Jobs Data, Watchdog Says*, NAT'L. L. J., March 4, 2013, available at [http://www.nationallawjournal.com/id=1202590850252/Problems-persist-with-law-school-jobs-data,-watchdog-says-\(stating-that-fewer-than-half-of-all-ABA-accredited-law-schools-have-met-the-expectations-set-by-the-ABA-in-its-reporting-requirements\)](http://www.nationallawjournal.com/id=1202590850252/Problems-persist-with-law-school-jobs-data,-watchdog-says-(stating-that-fewer-than-half-of-all-ABA-accredited-law-schools-have-met-the-expectations-set-by-the-ABA-in-its-reporting-requirements).). According to the non-profit Law School Transparency, during an initial assessment conducted December 18, 2012 and January 9, 2013, 78.4% of the 199 ABA-accredited schools failed to meet the standards set forth by ABA Standard 509, which governs presentation of consumer information, and 46.2% published data that were incomplete, inaccurate, or misleading in violation of the ABA standard. Winter 2013 Transparency Index Report, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227508 (last visited Feb. 10, 2014). At least one case brought by law students against their law school for fraud has advanced beyond a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6). The Federal District Court for the District of New Jersey rejected Widener School of Law's motion to dismiss plaintiffs' claims of statistical misrepresentation under the New Jersey and Delaware Consumer Fraud Acts. The court found a "thread of plausibility," albeit slight, to plaintiffs' argument that publishing an employment rate "upwards of 90 percent . . . gave false assurance to prospective students regarding their legal employment opportunities upon investment in and attainment of a Widener degree." *Harnish v. Widener Univ. Sch. of Law*, No. 2:12-cv-00608, slip op at 16 (D.N.J. March 20, 2013), <http://docs.justia.com/cases/federal/district-courts/new-jersey/njdce/2:2012cv00608/270000/33/0.pdf>.

experiences are no doubt useful indicia of intelligence, they are by no means necessarily reliable indicators of actual teaching ability or effectiveness in the classroom. By focusing on the conventional pedigree as its exemplar, the legal academy has very possibly screened out many candidates who might have been among its most effective educators.

The unusual nature of the legal teaching profession is partly exemplified by the fact that no consensus has yet coalesced around the critical practice skills doctrinal legal educators should possess. The ABA requires accredited institutions to hire faculty who have “a high degree of competence, as demonstrated by its education, experience in teaching or practice, teaching effectiveness, and scholarly research and writing.”¹⁵ These standards are striking for their vagueness but accommodate the various niches that specific schools may choose to occupy in an effort to gain a competitive advantage in the market for educational services. These specialities range from an emphasis on legal theory to classes that embrace the quotidian aspects of legal practice.

For those who aspire to teach law, law schools would do well to establish discrete concentrations within their curricula and should look for inspiration to the rigorous programs that exist for doctoral students in the liberal arts. These programs almost universally require understanding of a variety of required methods deemed essential to academic literacy, including empirical tools and methods to ensure that students are conversant in their chosen fields. While law schools increasingly view a doctoral degree in another field as an asset, doctrinal legal educators have historically never been expected to develop skills common to doctoral candidates in other fields. Indeed, there *may* be undue suspicion that a candidate with a degree in another field is not truly committed to a career in legal scholarship - much as employers once viewed with skepticism candidates with joint degrees in law and non-legal subjects such as MBA's.

Nor are aspiring instructors required or expected to exhibit critical skills common to the practice of many lawyers, such as case evaluation, describing complex concepts to clients, negotiation, developing litigation strategy, understanding insurance coverage issues, dispute resolution, brief writing and motions drafting. To the contrary, the trend among faculty search committees is to prioritize candidates based on their track record of producing scholarly publications or their likely ability to do so in the near future. Only as a secondary criterion – perhaps a distant second - do schools closely examine a prospective hire's proficiency in communicating ideas to

¹⁵ABA Standards and Procedure for Approval of Law Schools, Standard 401.

students and fostering critical thinking skills that should be regarded as core attributes of any effective legal educator.

A pervasive bias towards instructors with extensive scholarship rather than teaching ability reflects not only a strong desire among law faculty to legitimize their work as contributing to a *bona fide* academic discipline but also constitutes an effort to shape the perceptions of other law faculty and, in turn, boost a school's overall ranking in comparison with peer institutions.¹⁶ Non-tenured faculty or those starting out in academia quickly understand that failure to generate publications on a consistent basis will jeopardize their career prospects and so direct their energies accordingly. Regrettably absent among these institutional considerations are the professional needs of students themselves, whose debts subsidize the aspirations of faculty and administrators.

The evolution of the academic legal system in the United States has also given rise to other curious practices which are so widespread as to seem unremarkable and which further indirectly reflect the academy's disengagement from the concerns of actual practice. Among these is the dearth of peer-reviewed journals in comparison with other academic fields. Instead, publication decisions are usually made by law review editors who are almost entirely drawn from the ranks of second and third-year law students. The proliferation of law journals has also given rise to a vast genre that is largely intended not as a research source for scholars but as ends in themselves.

Faculty search committees, in an apparent tendency to validate their own experiences, may also display bias in selecting colleagues with backgrounds similar to their own. That pattern translates into disproportionate representation on faculties by graduates of a select few highly ranked law schools but it also favors those with limited practice experience, thereby giving rise to a cadre of professional educators with a self-perpetuating ethos that discounts the experiences acquired in the actual practice of law. Limited client exposure among academics is particularly ironic in view of the flourishing use of the case study method of instruction.

¹⁶ Peer reviews constitute one-fourth of a school's overall score in the widely followed U.S. News and World Reports annual ranking of law schools. During fall 2012, the magazine asked law school deans, deans of academic affairs, chairs of faculty appointments and the most recently tenured faculty members to rate programs on a scale from marginal (1) to outstanding (5). Sam Flanigan & Robert R. Morse, "Methodology: Best Law Schools Rankings," U.S. NEWS & WORLD REPORTS, March 11, 2013, <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2013/03/11/methodology-best-law-schools-rankings>. This inherently subjective category is further flawed insofar as only approximately 63% of those selected for the survey actually submitted responses. *Id.*

Yet, it is a common and counter-intuitive practice among law schools to devalue practitioners with more than a few years of practice experience, perhaps under the implicit and untested assumption that the demands of an academic role would be too unfamiliar to a practicing attorney. As an ABA draft report on the future of legal education observed in 2013, the natural propensity to avoid risk that exists in most organizations is particularly acute in a law school where “a substantial part of the organization consists of people who have sought out their positions because those posts reside largely outside market- and change-driven environments.”¹⁷

While there are many possible strengths or specialities that a law school may use to promote its appeal to prospective law students, it is difficult to find fault with the conclusion of the ABA’s draft report that “[t]he principal purpose of law school is to prepare individuals to provide law-related services” and that oddly enough this “elementary fact is often minimized.”¹⁸ Law firms and corporations, the arenas in which the majority of law graduates have gained core competencies over the past century, are increasingly looking to universities to assume the responsibility for training. This shift in expectations undoubtedly reflects in part the dominance of the billable hour system that reduces the incentive among senior attorneys to mentor or train inexperienced associates. Despite increasing openness to alternative approaches such as flat fee billing, the majority of law firms still rely upon billable hour arrangements with their clients to gauge associate and partner productivity and minimize the risk of lost profits in undertaking legal representation.

Compounding the constraints on the ability of law schools to meet the expectation to train students how to deliver legal services effectively and creatively is the consistent under-utilization of practicing attorneys. Over the past decade, the contract or temporary employment model has spread through academia generally, and there is no reason to believe that the trend will spare law schools. Cost pressures will almost certainly drive law school administrators to rely increasingly on contract or adjunct instructors. While these positions are untenured and admittedly pose troubling implications for academic independence (not to mention job security), adjuncts clearly can give law

¹⁷ Draft Report and Recommendations, American Bar Association Task Force on the Future of Legal Education, September 20, 2013, Sec. I, “Culture and Conservatism,” p. 15, *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCsQFjAB&url=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fadministrative%2Fprofessional_responsibility%2Ftaskforcecomments%2Ftask_force_on_legealeducation_draft_report_september2013.authcheckdam.pdf&ei=bm8ZU_jqOMiSkQeMiIDACQ&usg=AFQjCNHupg2uW0t9g9TR_ABukgSc-LhySA.

¹⁸ *Id.*, “Key Conclusions,” at p. 2. The task force received feedback from recent graduates that their training had fallen short in fostering their “development of core competencies, particularly those relating to representation and service to clients, that make one an effective lawyer.” *Id.* at p. 24.

students a deeper insight into the profession than full-time academics alone can provide. Yet, current guidelines of the American Bar Association limit their use by prohibiting adjuncts in accredited law schools from teaching most core curriculum classes. In fact, the ABA's model rules, in a nod to the primacy of tenure, permit only full-time faculty to teach the majority of a school's curriculum, including required first-year core courses.¹⁹

The ABA's position appears increasingly archaic and indefensible during a period marked by an inexorable shift away from tenured faculty positions in favor of fixed-term or contract positions with no definite employment guarantees. In 1993, for all academic institutions in the United States, part-time faculty constituted 38% of faculty appointments.²⁰ Based on data from 1988 compiled by the American Association of University Professors, tenure and tenure-track jobs accounted for only 24% of the academic workforce.²¹

In January 2014, the House Committee on Education and the Workforce released a report which provided more recent statistics on adjunct faculty in higher education.²² The report found that "national trends indicate that schools are increasingly relying on adjuncts and other contingent faculty members, rather than full-time, tenure-track professors, to do the bulk of the work of educating students."²³ It further observed that there had been a significant increase in the hiring of contingent professors in all types of institutions of higher learning. In 1969, the number of professors working part time was just 18.5% but between 1975 and 2011 the number of part-time faculty grew strikingly by more than 300%.²⁴ Citing data from the U.S. Department of Education,

¹⁹The ABA requires that an accredited school reserve the "major portion of the law school's curriculum" for full-time faculty, who must also teach "substantially all of the first one-third of each student's coursework." Standards and Procedure for Approval of Law Schools, Standard 403(a).

²⁰AMERICAN ASS'N OF UNIV. PROFESSORS, COMMITTEE ON PART-TIME AND NON-TENURED-TRACK APPOINTMENTS, *The Status of Non-Tenure Track Faculty*, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (June 1993), available at <http://www.aaup.org/report/status-non-tenure-track-faculty>. The American Association of University Professors ("AAUP") drew its data from a survey of institutions in a 1988 National Survey of Postsecondary Faculty (NSOPF) conducted by the National Center for Education Statistics of the Department of Education.

²¹ The remainder of the academic workforce, based on data from the AAUP, consists of "adjuncts, part-timers, graduate students and full-time professors not on the tenure track." Tamar Lewin, "Gap Widens for Faculty at Colleges, Report Finds," N.Y. TIMES, April 8, 2013, p. A15.

²²"The Just-in-Time Professor, A Staff Report Summarizing eForum Responses on the Working Conditions of Contingent Faculty in Higher Education," Democratic Staff, January 2014, available at <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/1.24.14-AdjunctEforumReport.pdf>.

²³*Id.* at p. 1.

²⁴ *Id.* at p. 3 (citing John W. Curtis & Saranna Thornton, *The Annual Report on the Economic Status of the Profession 2012-13*, AAUP (2013), available at: <http://www.aaup.org/file/2012-13Economic-Status-Report.pdf>).

the report noted that the number of contingent faculty (including part-time or adjunct faculty members, full-time non-tenure-track faculty members or graduate student assistants) in degree-granting two and four year institutions of higher learning is more than 1.3 million people, constituting over three-quarters of the country's instructional workforce.²⁵ Thus the employment trend in academia mirrors those of the private sector generally in its increasing reliance on a contingent workforce that requires no long-term commitments to pay salaries or benefits. The Patient Protection and Affordable Care Act's requirement that employers offer health insurance coverage to workers with over 30 hours per week creates an unintended incentive to hire fewer permanent, full-time employees and will likely reinforce the allure of a contingent workforce composed of independent contractors.²⁶

Limitations on adjuncts also cut against the ABA's guideline encouraging schools to draw upon experienced practicing lawyers and judges as teaching resources to enrich their educational programs.²⁷ The ABA's stance is particularly insupportable given its requirement of safeguards that, if faithfully implemented, ensure quality control of even non-tenured instructors.²⁸ The availability of instructors with significant practice experience infuses a healthy dose of reality into law school curricula and will remain an attractive labor pool to budget-strapped administrators. Yet institutions that violate the ABA's restrictions place their accredited status at risk, an important factor in law school rankings,²⁹ as well as a strong marketing tool in attracting students which enhances their competitiveness for legal positions following graduation.

With budget pressures weighing heavily upon schools (especially those that are publicly supported) and diminishing revenues from declining enrollment, those institutions without access to generous endowments, tolerant taxpayers or larger university systems willing to impart supplemental resources are far from insulated from the economic stresses that buffet every law firm. Faced with

²⁵*Id.* (citing "A Portrait of Part-Time Faculty Members, Coalition on Academic Workforce", June 2012, *available at*: http://www.academicworkforce.org/CAW_portrait_2012.pdf).

²⁶ *See, e.*, "Colleges are Slashing Adjuncts' Hours to Skirt New Rules on Health-Insurance Eligibility," *The Chronicle of Higher Education*, (Apr. 22, 2013), *available at* <http://chronicle.com/article/Colleges-Curb-Adjuncts-Hours/138653/>. Many colleges and universities are already reducing adjuncts' hours or capping their maximum course loads as well as hiring more adjuncts to distribute workloads in order to avoid triggering the Affordable Care Act's penalties for breaching the 30-hour rule. *Adjuncts and Affordable Care*, *INSIDE HIGHER EE*, January 29, 2014, *available at* <http://www.insidehighered.com/quicktakes/2014/01/29/adjuncts-and-affordable-care-act>.

²⁷ ABA Standards and Procedure for Approval of Law Schools, Standard 403(c).

²⁸ The ABA requires that instructors who are not full-time faculty must be provided orientation, guidance, monitoring, and evaluation. ABA Standards and Procedure for Approval of Law Schools, Standard 403(a).

²⁹ For example, law schools that are not ABA-accredited are excluded entirely from the widely viewed "Best Law Schools Ranking" published by U.S. News and World Reports. Sam Flanigan & Robert R. Morse, *supra*, note 16.

diminishing returns from traditional sources, law schools are now exploring other means of raising revenue. These include appeals to mid-career professionals in heavily regulated fields such as medicine, urban planning and environmental consulting to enroll in one-year programs to enhance their understanding of the law.³⁰ They are also intensifying their marketing campaigns to foreign lawyers seeking to understand American legal practices and domestic lawyers who want to improve their marketability with L.L.M.'s in tax, intellectual property and a few select additional areas.³¹ Some are reducing the sizes of their incoming classes even though they will lose some revenue as a consequence.³²

Yet these efforts, while rational responses to a shrinking pool of traditional applicants, are unlikely to compensate adequately for the drop in demand from corporate clients for legal services that is driving the decline in enrollment in traditional three-year programs. At the same time, tuition and student debt are rising at alarming rates.³³ The law school business model will be subjected to even greater stresses if rising rates of loan defaults among law graduates eventually prompt stricter eligibility requirements for federally subsidized educational loans than presently exist. Rather than merely delaying the crisis by seeking students abroad or at later stages in their careers, law schools will eventually have to respond to the legal employment crisis by viewing their curricula through the prism of legal practice itself and assisting their students in attaining the skills they are likely to need to represent clients.

An important step in addressing the problems that now afflict schools is to change the mindset of legal instructors themselves. Most students invest significant amounts of their time and money to train as legal practitioners and only a minuscule fraction aspire to be scholars or teachers. An apprenticeship was the generally accepted method of legal skills acquisition in the United States

³⁰Jennifer Smith & Ashby Jones, *More Often, Nonlawyers Try Taste of Law School*, WALL ST. J., May 20, 2013.

³¹*Id.*

³²Joe Palazzolo and Chelsea Phipps, *With Profession Under Stress, Law Schools Cut Admissions*, WALL ST. J. (June 11, 2012), available at <http://online.wsj.com/news/articles/SB10001424052702303444204577458411514818378>. In fact, a survey conducted by Kaplan Test Prep in 2012 found that 51% of U.S. law schools had reduced the size of their entering classes. Ashby Jones, *Top Law School Cuts Admissions*, WALL ST. J. (March 11, 2013), available at <http://online.wsj.com/news/articles/SB10001424127887324281004578354490114584144>. Restricting admissions may be an attractive option because it has the beneficial consequence of reducing the extent of a law school's drop in its ranking. See Ashby Jones, *Shakeout Hits Law Schools*, WALL ST. J. (March 11, 2013).

³³Average tuition annually has risen to more than \$40,000, up from \$23,000 in 2001, and average debt following graduation has increased from \$70,000 in 2001 to \$125,000 in 2011. Richard A. Epstein, *The Rule of Lawyers*, WALL ST. J. (May 6, 2013), at A13. According to another estimate, the average cost of law school – including living expenses, now runs between \$150,000 and \$250,000, of which a significant amount is debt-fueled. Rick Schmitt, *Is Law School Worth It?*, WASHINGTON LAWYER (March 2013), at 24. The average debt of a student who graduated from a private law school in 2011 was estimated to be \$142,565. *Id.*

until the 1890's, when the American Bar Association began to require law schools to provide several years of post-graduate education as a condition of their accreditation.³⁴ Given the shrinking opportunities for experiential skill development in the post-recessionary environment, law schools can perform a valuable societal service by taking steps to fill the vacuum. The new imperative does not by any means require faculty to abandon the traditional mission to cultivate the ability to structure and articulate ideas, identify issues and conjure creative legal solutions. While cultivating analytical rigor is undoubtedly an essential lawyering skill that schools should seek to inculcate, it is difficult to imagine an education that could be considered truly effective without exposing prospective lawyers to individuals informed by advocacy on behalf of actual clients, which requires greater use of adjuncts and other part-time instructors. Loosening staffing restrictions, particularly for core courses, would undoubtedly generate resistance from tenured staff seeking to protect the privileges to which they have been accustomed, but it would promote better integration of the two cultures that have arisen between doctrinal pedagogues and practitioners.

Keenly aware that the percentage of their graduates in full-time legal jobs following graduation is a critical factor in their rankings, some schools are responding, albeit belatedly, to the need to inject a practical component into their curricula. One positive step has been the proliferation or expansion of legal clinics and internships to enable students to gain practical experience which employers maintain they value. Even in the clinical area, however, ABA standards reflect a subtle bias in favor of doctrinal instruction. While schools must provide clinical faculty members with job security “reasonably similar” to those they provide their tenured full-time faculty members, they may satisfy the requirement either through establishment of a tenure track program or “a program of renewable long-term contracts.”³⁵ Under ABA guidance which is merely interpretive, a “long-term contract” means at least a presumptively renewable five-year contract or “other arrangement sufficient to ensure academic freedom.”³⁶ In place of tenured clinical faculty or a reasonable facsimile of tenure, the ABA alternatively permits “a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.”³⁷ These standards, which permit schools to decide what protections are sufficient to ensure academic independence and poorly circumscribe their

³⁴ Albert J. Harno, *Legal Education in the United States: A Report Prepared for the Survey of the Legal Profession* (1953), pp. 19–20.

³⁵ ABA Standards and Procedure for Approval of Law Schools, Standard 405, Interpretation 405-6.

³⁶ *Id.*

³⁷ ABA Standards and Procedure for Approval of Law Schools, Standard 405(c).

discretion to appoint clinical instructors for relatively short periods, cast some doubt on whether the ABA is truly committed to full participation of clinical instructors in law school governance.

Despite an increase in the use of in-house clinics or externships, the majority of ABA-approved schools still display a disturbing inability to integrate them fully into their curricula. The ABA pays superficial deference to the concept of integrating practice skills into curricula by requiring that a law school “shall offer substantial opportunities . . . for live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experience and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence.”³⁸ Yet while the ABA standards contemplate student exposure to live-client or real-life experiences through clinics or field placements, they do not require law schools to “offer these experiences to every student nor must a law school accommodate every student requesting enrollment in any particular live-client or other real-life practice experience.”³⁹ By one commentator’s estimate, only 14 of all ABA-accredited law schools require credit-bearing in-house clinics or externships as a prerequisite to graduation and some of those that do require only two or three course credits.⁴⁰ In addition to these concerns, many schools remain unwilling to examine or challenge the presumption – widely shared among the most elite schools – that a quality legal education is possible only through live interaction in the classroom. That approach overlooks the opportunities presented by technology, such as Skype, to leverage resources and incorporate a distance learning component into their curricula.

Creative thinking on content delivery may well be necessary in view of the availability of internet-based applications, which are already encroaching upon the traditional classroom learning model.⁴¹ Schools without part-time programs should discard the prejudice that part-time study is

³⁸ ABA Standards and Procedure for Approval of Law Schools, Standard 302(b)(1).

³⁹ ABA Standards and Procedure for Approval of Law Schools, Standard 302, Interpretation 302-5.

⁴⁰ Peter A. Joy, *Considering the Cost of Clinical Legal Education*, NEW YORK STATE BAR ASS’N. J. (Sept. 2013), at 21. As the author also points out, the ABA standard requiring schools to ensure students “receive substantial instruction other professional skills generally regarded as necessary for effective and responsible participation in the legal profession” under ABA Standard 302(a)(4) is largely rendered meaningless by an ABA consultative memorandum concluding that “substantial instruction” in professional skills can be satisfied with as little as one credit hour of skills training so long as instruction in professional skills engages each student in skills performance that are assessed by an instructor. *Id.*

⁴¹ The ABA currently permits distance learning for credit “only if the academic content, the method of course delivery, and the method of evaluating student performance are approved as part of the school’s regular curriculum approval process.” ABA Standards and Procedure for Approval of Law Schools, Standard 306(a). In order to create a simulacrum of the classroom environment, the ABA further requires (1) “ample interaction with the instructor and other students both inside and outside the formal structure of the course throughout its duration; and (2) “ample monitoring of student effort and accomplishment as the course progress.” ABA Standards and Procedure for Approval of Law

emblematic of a sub-standard legal education. Quite the contrary, such programs - by allowing students to continue working while in school - are effective ways to combat the escalating costs of a legal education while at the same time creating an enriching dialogue between mature workers and recent college graduates.

It will be impossible for the academic legal establishment to resist the transformative consequences of market forces indefinitely regardless of whether it fully acknowledges the problems that now exist. Chronic unemployment afflicting new attorneys, the perception that law is no longer an assured path to a stable career and the desire to avoid crippling debt undoubtedly diminish the incentive to pursue a law degree. The decision of many students to abjure law school altogether combined with constraints on the ability of schools to raise tuition adequately to make up for the shortfall in revenue will continue to force institutions to eliminate faculty and prompt introspection into their roles as incubators of legal talent. The Obama administration's recent proposal to link the availability of federal educational funding to school affordability and improving students' return on their investments may also indirectly place further restrictions on revenue available to schools subject to Title IX.⁴² Given the long-term domestic economic and political trends, the legal academy would repay itself and the profession generally by examining its own outmoded approaches to educating both students and those who teach them.

Schools Standard 306(c)(1)&(2). A school cannot grant a student more than four credit hours in any term nor more than an overall total of 12 credit hours toward the J.D. degree through distance learning. ABA Standards and Procedure for Approval of Law Schools, Standard 306(d). Under the ABA's requirements, a class taught remotely ironically necessitates more active monitoring of student progress than is the case in most doctrinal courses, where an instructor is only able to gauge whether students have assimilated the course material through a final examination.

⁴²FISCAL YEAR 2013 BUDGET SUMMARY & BACKGROUND INFORMATION FOR U.S. DEPARTMENT OF EDUCATION, <http://www.languagepolicy.org/documents/FY13%20USED%20summary%20request.pdf>. Under its proposed "Race to the Top" program, the Obama administration seeks to channel \$1 billion for states with strong records of increasing college affordability and quality which states may demonstrated through, e.g., "operating institutions that reasonably stabilize or contain the growth in what students pay for college" and "measure and publicize institutional value in terms of financial returns and other outcomes . . ." *Id.* at 59. See also Jennifer Smith, *Legal Education on Trial: Is the Third Year Necessary?*, WALL ST. J. (Aug. 25, 2013), <http://online.wsj.com/article/SB10001424127887324906304579035040993030928.html>.