

## ESSAY

### **In This, the Winter of Our Discontent: Legal Practice, Legal Education, and the Culture of Distrust**

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*He at once went to his lawyer . . . . Now, Bold was not very fond of his attorney, but, as he said, he merely wanted a man who knew the forms of law, and who would do what he was told for his money. He had no idea of putting himself in the hands of a lawyer. He wanted law from a lawyer as he did a coat from a tailor . . . .*

—Anthony Trollope<sup>1</sup>

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1. ANTHONY TROLLOPE, *THE WARDEN* 24 (The Heritage Press 1955) (1855).

*and please forget  
about justice  
it doesn't exist  
about brotherhood it's deceit  
about love it has no right*

—Ingrid Jonker<sup>2</sup>

The sky is falling. Or so it seems. Perhaps it has fallen already. We can almost hear the shards crackle beneath our feet. In recent years, but particularly since the economic crisis of 2008, we have heard dire warnings of failing law schools and vanishing lawyers. Just a few years ago, American lawyers and legal educators were convinced that their institutions provided models for the world.<sup>3</sup> They were a bit too self-confident, perhaps, and a bit too certain of

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2. INGRID JONKER, *I Am With Those*, in *SELECTED POEMS* 50, 50 (Jack Cope & William Plomer trans., 1968).

3. Virtually from the beginning, American scholars have busied themselves in designing constitutions and laws for other nations. See GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776-1989: A GLOBAL PERSPECTIVE* 320-56 (2009); HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* 13-21 (2000). See generally Robert T. Brown, *Simon Greenleaf and the Liberian Constitution of 1847*, 9 *LIBERIAN STUD. J.* 51 (1980). In the past, our Supreme Court also has often influenced the evolving jurisprudence of other countries, but that influence has now waned. See David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 *N.Y.U. L. REV.* 762, 781 (2012). But see Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 *WM. & MARY L. REV.* 1473, 1495 (2008) (“Normative advice giving [by American academics] might occasionally have some beneficial effects, but in general the advice will be dominated by politics.”). American scholars and practitioners also worked to develop American-style legal infrastructures to support capitalism in the emerging democracies after 1989. See, e.g., Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 *U. PA. J. INT’L ECON. L.* 179, 188-89 (1999). Finally, the practices of American legal education have been broadly influential. See, e.g., Matthew S. Erie, *Legal Education Reform in China Through U.S.-Inspired Transplants*, 59 *J. LEGAL EDUC.* 60, 76-77 (2009) (examining American influence on reform of Chinese legal education); Takahiro Saito, *The Tragedy of Japanese Legal Education: Japanese “American” Law Schools*, 24 *WIS. INT’L L.J.* 197, 197 (2006) (examining American influence on reform of Japanese legal education).

their ability to “teach the world to sing.”<sup>4</sup> But their faith was sincere, and they were often encouraged in their efforts by colleagues in other countries, who recognized many things worth emulating in our institutions and practices. Indeed, we still hear songs of praise from abroad—where the rule of law sometimes seems fragile, judges often lack real independence, and lawyers frequently are less well trained.<sup>5</sup> At home, we hear a different melody. A steady drumbeat in the popular press, major newspapers, the blogosphere, and scholarly interventions seems to signal that the end days are upon us.<sup>6</sup>

We have a somewhat different view. We do not doubt that there has been much unjustified complacency in legal education and practice, and we do not underestimate the gravity of the challenges that beset us. Nor do we doubt the desirability or the inevitability of change, either in legal education or in legal practice. Certainly, we are not unmindful of the very real ways in which the world has changed, particularly because of developments in

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4. See *THE NEW SEEKERS, I'D LIKE TO TEACH THE WORLD TO SING (IN PERFECT HARMONY)* (Philips Records 1971).

5. See, e.g., David S. Clark, *American Legal Education: Yesterday and Today*, 10 *INT'L J. LEGAL PROF.* 93, 93 (2003) (“American legal education has never had a greater influence on the world scene than it has today.”); Carole Silver, Book Review, 61 *J. LEGAL EDUC.* 691, 691 (2012) (“U.S. legal education is under fire from all sides. . . . Travel outside of the U.S., however, and the analysis is completely different. There, the U.S. is a model for reform efforts, even the standard against which legal education programs in much of the rest of the world measure themselves.”).

6. See, e.g., Lincoln Caplan, *An Existential Crisis for Law Schools*, *N.Y. TIMES*, July 15, 2012, at SR10; Steven M. Davidoff, *The Economics of Law School*, *N.Y. TIMES*, Sept. 25, 2012, at F8; see also Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 *CREIGHTON L. REV.* 651, 697 (2012) (“Unless law schools reconfigure themselves, many will die on the vine, crushed by cost-structures incurred during good times and starved by an unwillingness of students to incur ever-increasing indebtedness to train for a much tighter job market.”); James Etienne Viator, *Legal Education's Perfect Storm: Law Students' Poor Writing and Legal Analysis Skills Collide with Dismal Employment Prospects, Creating the Urgent Need to Reconfigure the First-Year Curriculum*, 61 *CATH. U. L. REV.* 735, 754-72 (2012) (arguing for revamped research and writing programs); *Progress Report*, *INSIDE L. SCH. SCAM* (Dec. 18, 2013, 6:51 AM), <http://insidethelawschoolscam.blogspot.com>.

information technology,<sup>7</sup> to say nothing of globalization and the worldwide recession. Nor do we doubt the pressing need to find more effective ways of ensuring that justice is equally available to everyone in our society, and not just to those who can afford to hire the highest-priced lawyers. We do not doubt the seriousness of the financial challenges faced by law students and recent graduates because of the high cost of higher education, mounting debt burdens, and diminished employment prospects. We are concerned, too, that the lack of appropriate employment opportunities for educated young people is not just a problem for the legal profession, nor, indeed, just for the United States. This is a problem felt in much of the world, where thoughtful leaders are rightly concerned with the staggering social costs and consequences of a lost generation of talent.<sup>8</sup> Finally, we do not doubt the magnitude of the challenge confronting law schools, the profession, and society in general because of the current erosion of the law schools' applicant pool.<sup>9</sup>

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7. See generally RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* (2008).

8. See, e.g., Judith Crosbie, *Higgins Slates Narrow Focus on Currency*, IRISH TIMES (Jan. 12, 2013), [www.irishtimes.com/newspaper/ireland/2013/0112/1224328743121.html](http://www.irishtimes.com/newspaper/ireland/2013/0112/1224328743121.html) ("President Michael D. Higgins has criticised a focus in Europe 'on the security of the currency' while 'happy to leave aside' youth unemployment. He also criticized capitalism for 'turning universities into businesses' and citizens into clients."); see also Gwynn Guilford, *Ever-Growing Numbers of Spain's Lost Generation Are Paying the Price of Austerity*, QUARTZ, (Jan. 24, 2013), <http://qz.com/47153/spain-unemployment-lost-generation-are-paying-the-price-of-austerity> (detailing effects of employment on Spanish youth).

9. Concern about these issues is, of course, widespread within the legal profession and academy. Indeed, the American Bar Association (ABA) has taken the unusual step of empanelling a presidential task force on the future of legal education to report to the Council and the Accreditation Committee of the Section of Legal Education. See Am. Bar Ass'n, *Task Force on the Future of Legal Education* 1 (Aug. 1, 2013) (working paper), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/taskforcecomments/aba\\_task\\_force\\_working\\_paper\\_august\\_2013.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/aba_task_force_working_paper_august_2013.authcheckdam.pdf). The task force was charged with examining certain problems faced by the system of legal education, namely, the "considerable pressure prompted by rising tuition, large amounts of student debt, falling applications, and limited availability of jobs for law graduates." *Id.* It was "further charged to present recommendations for addressing these problems, which are workable and have a

What we do doubt is the wisdom of solutions that seem more based on panic or fear or opportunism, special pleading, and longstanding disaffection, than on sound and prudent reflection. We likewise doubt the wisdom of solutions based on the crudest and narrowest versions of economic analysis.

A reasonable starting point for thinking constructively about these issues would be to take stock of the aims and purposes of the legal profession, the ways in which legal education can shape and serve those aims and purposes, and the connectedness of both legal practice and legal education to human flourishing, justice, the public interest, and the well-being of a democratic society. We could then proceed to think specifically about the role that legal education and the legal profession have played in promoting social mobility for individual lawyers as well as clients, and the effect that such mobility has had on the health of the society-at-large. The promise of upward mobility has been an important feature of American history, and it remains one today, when our society is so marked by inequality, particularly with respect to meaningful access to educational opportunity. That inequality begins with the earliest years of life, and its effects may persist to the end.

Much of the current commentary on legal education takes a different tack, however, focusing on the most immediate and narrowly conceived needs and demands of what is now called the “legal industry.”<sup>10</sup> Many critics simply

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reasonable chance of acceptance.” *Id.* Although the task force has issued a preliminary report that includes specific recommendations, it observed that “this document had to be prepared and submitted quickly” because “[t]he urgency of the problems, and the serious threats to public confidence, demanded rapid action.” *Id.* “Thus, the Task Force accelerated its schedule and set a goal of approximately one year to complete all work,” which “necessarily constrained its ability to gather information, test hypotheses, and vet recommendations with interested parties.” *Id.*

10. See, e.g., Tonio D. DeSorrento & Geoffrey R. Thompson, *Something Short of Selling Out: Derivatives-Based Innovation in the Legal Profession and Capital Markets*, 21 *GEO. J. LEGAL ETHICS* 577, 597 (2008) (“Individual partners could invest in the legal industry. . . . A derivative product, then, can allow attorneys and other market participants to build wealth and hedge against years when their individual practices or firms underperform.”). Not so long ago, many lawyers complained that law practice was becoming nothing more than a

assume that the problems facing legal education and the legal profession are to be defined entirely in terms of the “market” (however vaguely defined), and that the solutions to those problems necessarily are to be found in the “market” as well.<sup>11</sup> “Realism” is required, we are told, lest the “legal industry” and its educational infrastructure collapse.<sup>12</sup>

The literature fairly bristles with distrust and resentment. Law schools, for example, are charged with benefitting professors at the expense of students. There is some truth to that. Indeed, while most law professors are handsomely compensated, some do not pull their weight and others are driven entirely by self-interest. But there are many such people in every walk of life, and they find shelter in other institutions as well. It is also true that law school graduates face large debt loads and dreary job prospects, but the same is also true of groups as disparate as business and veterinary school graduates.<sup>13</sup>

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“business,” but those voices seem to have fallen silent or are disregarded; many commentators now accept and embrace the idea that the practice of law is, can, and should be nothing more than a business. See Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51, 61 (Gerard W. Gawalt ed., 1984) (noting “the extraordinary outpouring of rhetoric, from all the public pulpits of the ideal—bar association and law school commencement addresses, memorial speeches on colleagues, articles and books—on the theme of the profession’s ‘decline from a profession to a business.’”). See generally JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* (1916); Conference, *The Law: Business or Profession? The Continuing Relevance of Julius Henry Cohen for the Practice of Law in the Twenty-First Century*, 40 *FORDHAM URB. L.J.* 1 (2012).

11. See, e.g., Daniel Martin Katz, *Quantitative Legal Prediction—or—How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 *EMORY L.J.* 909, 964 (2013) (“As the traditional market for professional services continues to experience significant disruption and permanent contraction, there will be corresponding employment opportunities for those with very particular forms of dual capacities.”).

12. See, e.g., *id.* at 966 (“The future [of the profession] belongs to those institutions and individuals who act as though their livelihoods depend upon it—because in many cases they do.”).

13. Deborah Jones Merritt, *The Job Gap, the Money Gap, and the Responsibility of Legal Educators*, 41 *WASH. U. J.L. & POL’Y* 1, 7 (2013); Melissa Korn, *What’s Wrong with Wharton?*, *WALL ST. J.*, Sept. 27, 2013, at B1; David Segal, *High Debt and Falling Demand Trap New Vets*, *N.Y. TIMES*, Feb. 24,

Thus, while some calls for reform are insightful, important, and long overdue, many suffer from a set of shared shortcomings: the critics' failure to frame their inquiries with an openness to wider questions of professional identity and education, their refusal to credit the idea that human beings might not be most accurately described as helpless actors in a world determined by so-called "market forces," and their failure to credit the public role of the legal profession—a role which, despite all its limitations, contradictions, and shortcomings, reflects a commitment to advancing and fortifying the public good.

Our purpose is not to defend the indefensible, still less to engage in sentimental calls for a return to some imagined golden age, when lawyers allegedly were indifferent to personal profit or well-being. American lawyers have always been interested in profit, but they also have been interested in more than that. Since the earliest days of the American legal profession, American lawyers have played a public role as well.

But the critics have largely ignored the public role of the profession and the purposes of education in defining and fulfilling that role. In doing so, they undermine the force of their appraisal of our current plight and the credibility of their assessments and prescriptions. What is important now is that the profession be fortified to maintain the essential public role that it has traditionally inhabited, at the same time that its members continue, as they have in the past, to navigate the shoals and rapids of the marketplace.

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2013, at BU1; Alison Damast, *At Top Business Schools, an MBA Application Drought*, BLOOMBERG BUSINESSWEEK (Sept. 07, 2012), <http://www.businessweek.com/articles/2012-09-07/at-top-business-schools-an-mba-application-drought>; Patty Khuly, *Declining Applications at Vet Schools: What . . . or Whom . . . Is To Blame?*, PET MD (July 18, 2007), <http://www.petmd.com/blogs/fullyvetted/2007/july/declining-applications-vet-schools-whator-whomis-blame-6333>; Edie Lau, *When Dental Schools Closed: Lessons for Veterinary Profession?*, VIN NEWS SERVICE (June 10, 2013), <http://news.vin.com/VINNews.aspx?articleId=27460>; Louis Lavelle, *B-School Application Growth Stalls*, BLOOMBERG BUSINESSWEEK (Sept. 12, 2013), <http://www.businessweek.com/articles/2013-09-12/b-school-application-growth-stalls>.

Our goal is not to endorse or deride any specific set of reforms. Our goal is simply to shift the focus of the discussion by attempting to situate the challenges we face within the broader context of professional culture—a context that seems to us to have been neglected in the sometimes feverish climate of the present debates. In a sense, as we will show, the “market reformers” have been swept up, consciously or not, in a wider movement that elevates markets over other forms of social analysis and therefore asserts and takes for granted what is in fact deeply contested. More specifically, they have pushed to the side the public-serving dimension of the lawyer’s role because it allegedly conflicts with the psychology of classical economic liberalism.

Our aim, then, is to restore the concept of the public domain to a discussion now dominated by mere considerations of costs and a belief in the inevitable triumph of a narrowed sense of professional culture. Before we can begin to reform professional systems and institutions and their educational infrastructures, we first need to identify the purposes to be served by the legal profession in a democratic society and the role that a legal education might play in preparing men and women for service in a profession so conceived. In other words, the question we raise is this: how can we determine whether a legal education is cost-effective before we identify the purposes that a legal education is meant to serve?

This Essay has three parts. In Part I, we discuss, in a general way, some of the changes that have occurred in society, the profession, and legal education in the past forty years or so. We are particularly interested in the growing tendency during this period to reconceptualize many social phenomena in market terms and the effects of this trend on legal education and the practice of law. In Part II, we continue our discussion of those themes, as they relate to the current debate over the future of legal education, by considering the analyses of Thomas D. Morgan and Brian Z. Tamanaha, both of whom approach the problem from the vantage point of economic analysis. Notwithstanding the similarities in their methodologies, their respective prescriptions point in somewhat different directions. We note the many useful insights in the work of both scholars,



but we also suggest that a broader view is necessary, and that the work of these commentators and others suffers from a failure to give sufficient attention to the public dimension and significance of the legal profession. In Part III, we again discuss the seriousness of the problems confronting legal education and the profession and endeavor to reframe the problem in a way that may be useful in developing a forward-looking approach to accomplishing the reforms that are necessary.

### I.

The challenges facing legal education and the profession have not developed in a vacuum. Nor can they be defined as simply confined to legal institutions. Many of the problems we face are not unique to law schools or the legal profession, and efforts to address them as if they were are bound to fail. The larger world also has changed dramatically, particularly because of globalization, digitalization, and the information explosion,<sup>14</sup> to say nothing of the Great Recession, the increasing gap between rich and poor,<sup>15</sup> and the extent of youth unemployment, particularly among minority groups.<sup>16</sup> Much of the current criticism fails to

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14. SUSSKIND, *supra* note 7, at 62-65.

15. See, e.g., JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 5-6, 93 (2012) (noting that the excessive emphasis placed on markets, deregulation, and commodification over the past thirty years has resulted in the highest levels of inequality since the Great Depression, the undermining of growth, a warping of the political system, and an underinvestment in public goods). One measure of the widening gap between rich and poor is the ratio of CEO pay to that of the average worker, which increased from 24 to 1 in 1950 to 380 to 1 in 2011. See LINDA HOLBECHE & GEOFFREY MATTHEWS, *ENGAGED: UNLEASHING YOUR ORGANIZATION'S POTENTIAL THROUGH EMPLOYEE ENGAGEMENT* 29 (2012); *CEO Pay, Low Tax Rates & Tax Evasion*, BUD MEYERS BLOG (Apr. 28, 2012, 7:19 AM), <http://bud-meyers.blogspot.com/2012/04/ceo-pay-low-tax-rates-tax-evasion.html>. For example, in 2011, the CEO of McDonald's made 580 times the compensation paid to a McDonald's average full-time, minimum-wage employee. See Leslie Patton, *McDonald's \$8.25 Man and \$8.75 Million CEO Shows Pay Gap*, BLOOMBERG NEWS (Dec. 12, 2012, 12:00 AM), <http://www.bloomberg.com/news/2012-12-12/mcdonald-s-8-25-man-and-8-75-million-ceo-shows-pay-gap.html>.

16. U.S. Bureau of Labor Statistics data demonstrate a persistent gap in the unemployment rate between whites (6.4%), Hispanics (9.3%), and blacks

situate the apparent turmoil in legal education in relation to these widespread social changes. For that reason, we first frame the inquiry in Part I.A. by considering the broader cultural forces and trends that have been in play. In Part I.B., we consider some of the ways in which some of these forces and trends have affected legal education and the profession.

### A.

Almost a decade ago, David Marquand, the English academic, public intellectual, and sometime parliamentarian, published *Decline of the Public: The Hollowing Out of Citizenship*, in which he lamented the ongoing decline in England of what he called “the public domain,” that is, “the domain of citizenship, equity and service whose integrity is essential to democratic governance and social well-being.”<sup>17</sup> For Marquand, the public domain is “the domain where the public interest is defined and public goods produced.”<sup>18</sup>

It is best understood [not as a sector, but] as a dimension of social life, with its own norms and decision rules, cutting across sectoral boundaries: as a set of activities which can be (and historically have been) carried out by private individuals, private charities and even private firms as well as public agencies. It is symbiotically linked to the notion of a public interest, in principle distinct from private interests; central to it are the values of citizenship, equity and service.<sup>19</sup>

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(13.0%). Press Release, Bureau of Labor Statistics, The Employment Situation—August 2013, at 1 (2013), available at [http://www.bls.gov/news.release/archives/empisit\\_09062013.pdf](http://www.bls.gov/news.release/archives/empisit_09062013.pdf). Similar gaps exist in Europe. See Leo Kaas & Christian Manger, *Ethnic Discrimination in Germany's Labour Market: A Field Experiment*, 13 GERMAN ECON. REV. 1, 2-3 (2011) (finding that job applicants with German-sounding names are more likely to receive interviews than applicants with Turkish-sounding names).

17. DAVID MARQUAND, *DECLINE OF THE PUBLIC: THE HOLLOWING OUT OF CITIZENSHIP* 1 (2004).

18. *Id.* at 26.

19. *Id.* at 27.

Marquand put forward “three interconnected propositions” concerning the essence of the public domain.<sup>20</sup> Those propositions, and what Marquand had to say about them, are worth recalling:

The first [of the three propositions] is that the public domain has its own distinctive culture and decision rules. In it citizenship rights trump both market power and the bonds of clan or kinship. Professional pride in a job well done or a sense of civic duty or a mixture of both replaces the hope of gain and the fear of loss (and, for that matter, loyalty to family, friends or dependants) as the spur to action. The second proposition is that the public domain is both priceless and precarious – a gift of history, which is always at risk. It can take shape only in a society in which the notion of a public interest, distinct from private interests, has taken root; and, historically speaking, such societies are rare breeds. Its values and practices do not come naturally, and have to be learned. . . . [T]he public domain depends on careful and continuing nurture. The third proposition is that, in Britain, the last twenty years have seen an aggressively interventionist state systematically enfeebling the institutions and practices that nurtured [the public domain], and that it is now in crisis.<sup>21</sup>

In an important sense, of course, the “decline of the public” that Marquand described in the England of that time was more the result of intended demolition than simple decline.

For those who held an alternative vision of social reality—one in which self-interest, competition, market rationality, unbridled market forces, and the efficiency that those forces allegedly produce as a matter of course—the public domain and its values signified nothing more than an obstacle to be overcome or, indeed, a cancer to be excised. The concept of a public interest distinct from private interests was the stuff of nursery rooms and fairy tales, as was the idea that human beings might be motivated by anything other than individual self-interest. For those espousing that social vision, it was necessary to anathematize the values of the public domain—deemed false values—as serving no purpose other than to exploit sentiment and camouflage privilege and rent-seeking. Even

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20. *Id.* at 1.

21. *Id.* at 1-2.

more important, the triumph of the market was billed as the inevitable product of historical forces beyond the influence, let alone the control, of any value system, individual, group, profession, or other institution of civil society.

Marquand argued that “[t]he single most important element of the [English] New Right program of the 1980s and 1990s was a relentless *kulturkampf* designed to root out the culture of service and citizenship which had become part of the social fabric.”<sup>22</sup> He continued:

Incessant marketization . . . has done even more damage to the public domain than low taxation and resource starvation. It has generated a culture of distrust, which is corroding the values of professionalism, citizenship, equity and service like acid in the water supply. For the marketizers, the professional, public-service ethic is a con. Professionals are self-interested rent-seekers, trying to force the price of their labour above its market value. The service ethic is a rhetorical device to legitimize a web of monopolistic cartels whose real purpose is to rip off the consumer. There is no point in appealing to the values of common citizenship. There are no citizens: there are only customers. Public servants cannot be trusted to give of their best. They are inherently untrustworthy. If they are allowed autonomy, they will abuse it. Like everyone else, they can be motivated only by sticks and carrots.<sup>23</sup>

England in the late twentieth century may provide the textbook case, but the decline of the public has not been an entirely English phenomenon. The decline of the public also resonates in the American experience of the past forty years.

On this side of the Atlantic, a few years before Marquand began his summing up of the situation in England, Robert Kuttner, a prominent journalist and occasional university lecturer, made some of the same points about the United States. According to Kuttner:

By agreeing to a sterilized idiom of market failures, externalities, and the like, one can back into an acceptance of an overly mechanical view of economic man, in which narrow conclusions

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22. *Id.* at 2.

23. *Id.* at 3.

necessarily follow from narrow premises, realities of political and market power are excluded, and entire debates about the nature of the good society are foreclosed by tacit definition.<sup>24</sup>

In Kuttner's view, that is precisely what had happened in the United States. As Kuttner observed, "enthusiasts of markets have claimed that most of human activity can and should be understood as nothing but a series of markets, and that outcomes would be improved if constraints on market behavior were removed."<sup>25</sup>

Kuttner continued:

In the past quarter-century, a good deal of economic theory has become less the study of "the allocation of scarce resources," and more the simple celebration of markets. A more complex model of human behavior, reflecting twentieth-century insights about psychology, has reverted to a simplified nineteenth-century conception of rationality. A more complex view of society has given way to the claim that most issues boil down to material incentives, and most social problems are best resolved by constructing or enhancing markets. And, indeed, fewer people today enjoy protections against the uglier face of the market, or social income as a right of citizenship. More aspects of human life are on the auction block. Champions of market society insist that all of this makes us better off.<sup>26</sup>

"For two centuries," Kuttner noted, "critics, left and right, have observed that a functioning society requires more than a series of markets; that civic life requires people

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24. ROBERT KUTTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS* 230-31 (1996). Kuttner likewise observed that "[i]n a stylized taxonomy of why and when to regulate, it is all too easy to ignore . . . that failure to regulate would not have yielded efficient laissez-faire markets but would merely have entrenched a different set of inequities and inefficiencies." *Id.* at 230.

25. *Id.* at 39. More recently, Michael J. Sandel has drawn a distinction between what he terms market economies and market societies: "A market economy is a tool—a valuable and effective tool—for organizing productive activity. A market society is a way of life in which market values seep into every aspect of human endeavor. It's a place where social relations are made over in the image of the market." MICHAEL J. SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* 10-11 (2012).

26. KUTTNER, *supra* note 24, at 39.

to be more than self-interested maximizers of their own utility.<sup>27</sup>

Suddenly, the wisdom of left and right was left behind. Now, it was thought that societies could, should, and, indeed, must be built on an understanding of human beings as only “self-interested maximizers of their own utility.”<sup>28</sup> The new marketization meant “that market *institutions* [would] drive out extra-market institutions,” and “market *norms* [would] drive out” extra-market norms.<sup>29</sup> Firms thought to be undervalued became the target of takeovers and increasingly were operated, not by people who knew the industry, let alone the community, but by investment bankers who presumably knew how to maximize value before selling out and moving on.<sup>30</sup>

The outsourcing of jobs and other market-oriented strategies aimed at maximizing value (usually measured in terms of short-term gains that could be easily liquidated and reinvested) spread from manufacturing and commerce to professional service firms and universities.<sup>31</sup> They also spread from lower-wage, lower-skilled jobs to what had been

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27. *Id.* at 48; see also DANIEL T. RODGERS, *AGE OF FRACTURE* (2011) (criticizing the overzealous application to other social sciences of market principles that gained popularity in the 1960s and 70s); see generally ANGUS BURGIN, *THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION* (2012); DANIEL STEDMAN JONES, *MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS* (2012).

28. KUTTNER, *supra* note 24, at 48. Fortunately, other economists have taken a more nuanced view of human motivation. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1473 (1998) (“Our goal . . . is to advance an approach to the economic analysis of law that is informed by a more accurate conception of choice, one that reflects a better understanding of human behavior and its wellsprings.”); see also DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 378-85 (2011) (demonstrating that individuals do not act solely to maximize their own utility).

29. KUTTNER, *supra* note 24, at 48.

30. According to Kuttner, “[m]any of the takeovers . . . turned out to be bad deals. This is hardly surprising, since, as Michael Lewis put it in *Liar’s Poker*, they were often the result of a twenty-six-year-old apprentice investment banker playing with his computer rather than a move by someone who knew something about the industry.” *Id.* at 184.

31. See *id.* at 73-75.

higher-wage, higher-skilled jobs.<sup>32</sup> “These strategies allow[ed] employers to escape all the implicit contracts and reciprocal obligations that characterized the labor-management regime of a generation ago. If an employee is not permanently attached to the payroll, you don’t really owe her anything beyond a day’s pay for a day’s work.”<sup>33</sup> In other words, the alienation of labor was complete; work was understood purely in market terms. The social and moral character of work was no longer acknowledged. Nor were the moral and social dimensions of the relationship between employer and employee.<sup>34</sup> Not insignificantly, the size of the gap between executive and worker compensation increased geometrically.<sup>35</sup>

A profound sense of transience and insecurity came to permeate most, if not all, levels of management and labor. With no assurance of what tomorrow might bring, many came to focus on maximizing gain for the short term, while perhaps-fleeting opportunities for profit still lay before them. Even the nature of human relationships changed; human beings were encouraged to see the world—and each other—in a different light. In this view, no one can be trusted; all act only from self-interest and estimates of personal profit and loss; all are natural shirkers. As Kuttner noted:

When everything is for sale, the person who volunteers time, who helps a stranger, who agrees to work for a modest wage out of commitment to the public good, who desists from littering even

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32. *See id.* at 73-74.

33. *Id.* at 75.

34. *See id.* at 69, 73.

35. The average total compensation for chief executive officers of S&P 500 companies rose 13.9% from the year before, to \$12.94 million in 2011. *CEO Pay, Low Tax Rates & Tax Evasion*, *supra* note 15. In 2010, total compensation had increased 22.8% from its 2009 level. *Id.* In 2012, total CEO compensation was 354 times that of the average worker. *See Executive Paywatch: CEO Pay and You*, AFL-CIO, <http://www.aflcio.org/Corporate-Watch/CEO-Pay-and-You> (last visited Feb. 15, 2014). In 1982, CEO compensation was forty-two times that of the average worker. *Id.*

when no one is looking, who foregoes an opportunity to free-ride, begins to feel like a sucker.<sup>36</sup>

There is no possibility of appeals to honesty or integrity, to a proper concern for the well-being of one's fellow man, to the public good, or to one's sense of pride in a job well-done. All is self-interest; all is carrots; all is sticks. In this view, the market even trumps democratic politics and government. Indeed, some have argued that voting is itself irrational: "[A] rational individual will choose not to expend effort on legislative or civic life, since the 'cost' (in information gathered and time expended) will invariably outweigh the scant individual benefit."<sup>37</sup>

In the United States, as Joseph Stiglitz has noted, the emphasis placed on markets, deregulation, and commodification during the last thirty years not only has resulted in the highest levels of inequality since the Great Depression, but has undermined growth and efficiency and warped the political system.<sup>38</sup> "Part of the reason for this is that much of America's inequality is the result of market distortions, with incentives directed not at creating new wealth but at taking it from others," particularly from the "poor and uninformed," as was the case with the financial sector, which "made enormous amounts of money by preying upon these groups with predatory lending and abusive credit card practices."<sup>39</sup> (Of course, the financial sector did not act alone; it was aided by the good work of talented lawyers at every step of the way.) At the same time, the United States has underinvested in public goods—"in infrastructure, basic research, and education at all levels."<sup>40</sup> As Stiglitz has observed, "[t]he more divided a society

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36. KUTTNER, *supra* note 24, at 62-63.

37. *Id.* at 336.

38. *See* STIGLITZ, *supra* note 15, at 5-6 (noting, not endorsing, this view).

39. *Id.* at 6, 37; *see also* STEVEN A. RAMIREZ, LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW 3 (2013) ("[T]hose possessing excessive economic resources will rationally seek to subvert the rule of law in order to entrench their privileged position and insulate themselves from competition, at the expense of an optimal legal infrastructure to support macroeconomic growth.").

40. STIGLITZ, *supra* note 15, at 93.



becomes in terms of wealth, the more reluctant the wealthy are to spend money on common needs.”<sup>41</sup> But that is shortsighted as well as selfish: “The success of . . . firms, and indeed the viability of our entire economy, depends heavily on a well-performing public sector.”<sup>42</sup>

Just as the decline of the public was deemed to be inevitable by many in England, so we are told in the United States that market forces will continue to produce dramatic changes in the way we live, that those forces are irresistible, that those changes are inevitable, and that no value system, individual, group, profession, or other institution of civil society can possibly prevail against them. We are told that there is but one value on which we can all agree, which is the desirability of a robust and unbridled market that allows for the unfettered accumulation of individual wealth.

That is true, we are told, even if honoring that value results in a greater and greater concentration of wealth in fewer and fewer hands. Indeed, we are told that increasingly great concentrations of wealth are both empirically inevitable and normatively desirable. The idea of the public interest is myth. However, the useful myth of upward mobility is no myth at all.<sup>43</sup> Nor is the myth that formal equality is the same as equal opportunity. On this view, unfettered competition is not only good in its place, but good in itself; competition should be maximized every day, in every way, and in every venue. Somehow, that is the recipe for success, both for individuals and for nations, in a global community.

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41. *Id.*

42. *Id.* at 92; see also TONY JUDT, *ILL FARES THE LAND 2* (2010) (“Much of what appears ‘natural’ today dates from the 1980s: . . . uncritical admiration for unfettered markets, disdain for the public sector, the delusion of endless growth. We cannot go on living like this.”).

43. See LINDA LEVINE, CONG. RESEARCH SERV., R42400, *THE U.S. INCOME DISTRIBUTION AND MOBILITY: TRENDS AND INTERNATIONAL COMPARISONS 1* (2012) (“Research raises questions about whether Americans’ perceptions of their likelihood of upward mobility are exaggerated. Empirical analyses estimate that the United States is a comparatively immobile society . . . .”); see also Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 599-602 (2000).

This is crude economics. Indeed, as more behaviorally oriented scholars have demonstrated, it rests on an incomplete view of human nature and an inadequate theory of human motivation.<sup>44</sup> Yet it remains a formidable part of the prevailing ideology, which set in motion a great new transformation, spurring a reconsideration of the role of the professions and education, including the practice of law and the education of lawyers.

### B.

To be sure, there has been much complacency in American legal education and practice, and the challenges that beset us now are serious indeed. They are not all due, however, to the failure of the legal academy and profession to respond to market realities. Many of our fellow citizens lack confidence in our justice system. Despite an apparent surplus of lawyers, the middle class and the poor frequently lack access to legal services.<sup>45</sup> The outcome of disputes often seems to depend not on principle but on the relative financial resources of the parties.<sup>46</sup>

The practice of law has changed dramatically in recent years, but relatively few academic lawyers have explored the causes or consequences, let alone the desirability, of those changes.<sup>47</sup> The price of legal education is excessive,

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44. See KAHNEMAN, *supra* note 28, at 13-14.

45. See Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1785 (2001) ("An estimated four-fifths of the civil legal needs of the poor, and the needs of an estimated two- to three-fifths of middle-income individuals, remain unmet.").

46. See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974).

47. Generally speaking, the academic study of the profession has not garnered broad interest within the legal academy. See William H. Rehnquist, *The Legal Profession Today*, 62 *IND. L.J.* 151, 152 (1987) ("But . . . law school faculties . . . very rarely . . . evince any interest in the sort of empirical studies that might shed light on [fundamental changes in the legal profession]. Law school faculties have preferred to devote themselves . . . to criticism and analysis of legal doctrine . . ."). However, the exceptions are notable. See generally RICHARD L. ABEL, *AMERICAN LAWYERS* (1989); JEROME E. CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* (1962); MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF*

but there is little consensus, if any, as to what constitutes a sound legal education.

Lawyers in the public sector face many of the same problems that other public employees face at present—when public sector austerity is the prescribed remedy for a weak economy, the very need for government is questioned, and public employees are scapegoated. Budget cuts have left many government lawyers—from those who enforce the securities and banking laws to those who prosecute drug trafficking and street crime—hopelessly overworked. Public defenders often lack sufficient resources to provide effective representation.<sup>48</sup> There are fewer jobs for new graduates and little time for mentoring those who are hired.

In the private sector, competition is king. The economics of law practice are tough. In relatively prosperous firms, the controlling partners have come to expect their own compensation to increase every year, regardless of economic conditions.<sup>49</sup> That has become increasingly difficult to sustain, especially in the years following 2008.<sup>50</sup> Information

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THE BIG LAW FIRM (1991); JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982); JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005); LYNN MATHER ET AL., DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE (2001); ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988); ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? (1964); Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008).

48. See, e.g., Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 689 (2010) (“[P]ublic defenders will have no alternative except to resign if they are forced to take on more cases than they can competently and ethically handle.”).

49. See generally NELSON, *supra* note 47, at 227 (“In the law firm the power of the dominant colleagues derives from their relationships with clients.”); Michael D. Freeborn, *Reining the Rainmaker*, 85 ILL. B.J. 231, 231 (1997) (noting the deification of rainmakers); Robert W. Hillman, *Professional Partnerships, Competition, and the Evolution of Firm Culture: The Case of Law Firms*, 26 J. CORP. L. 1061, 1067 (2001) (noting reallocation of firm income and management responsibility to rainmakers).

50. The world of large law firms had changed dramatically by end of the 1990s, but the pace of change accelerated during the recession that followed the bombing of the World Trade Center in September 2001 and once again during the Great Recession. See Linda Sorenson Ewald, *Agreements Restricting the*

about the profitability of law firms (measured in terms of “profits-per-partner”) is widely available, and partners in one firm can measure the size of their success against their peers in other firms.<sup>51</sup> Likewise, information about the compensation paid to in-house counsel is often a matter of public record. Those lawyers, once disdained by many large firm lawyers,<sup>52</sup> frequently provide the compensation

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*Practice of Law: A New Look at an Old Paradox*, 26 J. LEGAL PROF. 1, 31-32 (2002) (“[A] revolution in the practice of law has occurred requiring economic interests of the law firm to be protected as they are in other business enterprises.” (quoting *Howard v. Babcock*, 863 P.2d 150, 156 (Cal. 1993))); Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 599 (2010) (“The economic recession of 2008-2009 has placed unprecedented stress on the legal profession. Although smaller downturns in 1990-1992 and 2000-2001 created similar problems, the current recession likely will outstrip them in duration and intensity.”); Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2051-52 (2010) (noting the devastating effect of the economic meltdown on the legal profession). According to one source, by the end of 2009, the top 250 law firms had shed 5259 lawyers. Joyce S. Sterling & Nancy Reichman, *So, You Want to Be a Lawyer? The Quest for Professional Status in a Changing Legal World*, 78 FORDHAM L. REV. 2289, 2297 n.43 (2009) (citing Karen Sloan, *Where Have All the Flowers Gone?*, NAT’L L.J., Dec. 21, 2009, at 12).

51. The American Lawyer published its first annual Am Law 50 list of the nation’s largest firms in 1985. The rankings rely heavily on profits-per-partner—a rigid criterion that some observers credit with undermining lawyer satisfaction. See Steven Harper, *Harper on Rankings*, 10 PARTNER’S REPORT 10 (2010) (“Most firm leaders now adhere to the *Am Law* measures, annually seeking to maximize revenues and average profits per equity partner. The resulting culture of billings, billable hours, and associate/partner leverage ratios begins to explain why large-firm lawyers lead the profession in career dissatisfaction. Without a metric to measure it, attorney well-being drops out of the equation.”). Profits-per-partner at large law firms grew from a range of \$200,000-\$500,000 in 1986 to up to \$4,460,000 in 2012. See *Rising and Falling on the Am Law 100 Across 25 Years*, THE AMERICAN LAWYER (Mar. 1, 2012), available at <http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202548923245>; *The Am Law 100 2012*, THE AMERICAN LAWYER (May 1, 2012), available at <http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202597273265>.

52. See Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1057-58 (1997) (identifying two of the most significant changes over the past thirty years as “the growth in number, prestige and power of in-house counsel and the globalization of the business and capital markets”) (footnote omitted).

benchmarks now, with large salaries, bonuses, stock options, and other benefits.<sup>53</sup> They also control the important flow of legal work to particular firms, and, not insignificantly, to particular partners in those firms.<sup>54</sup>

Because of their structure, many large law firms are not especially well managed,<sup>55</sup> and it is often difficult to determine for whose benefit firm decisions are made.<sup>56</sup> As firms grew over the past several decades,<sup>57</sup> they continued to

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53. According to the 2012 Corporate Counsel Compensation Survey, the average compensation for the top fifty general counsels of Fortune 500 companies ranged from \$14,611,037 (CBS) down to \$2,596,297 (Fluor). Shannon Green, *The 2012 GC Compensation Survey*, CORPORATE COUNSEL (Aug. 1, 2012), <http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1341783741529&slreturn=20130017104428>.

54. See Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 294-98 (1985) (characterizing general counsel's tendency to "shop around" when seeking legal advice as the result of a "more professionalized" business management approach fostered by a bureaucratized corporate hierarchy); Andrew Schaeffer et al., *The Modern Beauty Contest*, LITIG., Spring 2009, at 29, 33 ("One general counsel reports that when she sees lavish buffet lunches, limos to the airport at the firm's beck and call, silver tea and coffee services, and the like, she knows who is ultimately paying for it. She is more impressed by an office piled with papers, a week's supply of coffee cups on the windowsill, and an administrative assistant who is busy and only has time to point to the coat closet. She then knows that she has a hardworking firm that is probably hungry for business.").

55. LAURA EMPSON, *MANAGING THE MODERN LAW FIRM: NEW CHALLENGES* xviii (2007) ("Has the law firm become . . . an anachronistic model that is creaking and groaning at the seams? Critics argue that the classic law firm organization is no longer able to deal with the sheer size and complexity that many large firms have attained."). Large law firms receive the greatest amount of scholarly attention, but account for a relatively small percentage of lawyers in private practice. Of the 75% of American lawyers in private practice in 2005, 49% were solo practitioners, 18% worked in firms with six to fifty lawyers, and 20% worked in firms of more than fifty lawyers. See AM. BAR ASS'N, *LAWYER DEMOGRAPHICS* (2012), available at [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer\\_demographics\\_2012\\_revised.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf).

56. See Elizabeth Chambliss, *New Sources of Managerial Authority in Large Law Firms*, 22 GEO. J. LEGAL ETHICS 63, 79 (2009) ("[T]op partners have individual economic incentives to protect the status quo and will use the threat of departure to maintain it. Thus, top partners will block management changes that would benefit the firm.").

57. Between 1975 and 1985, large firms grew at an annual rate of 8%. GALANTER & PALAY, *supra* note 47, at 46, app. A at 143-44. The number of law

be organized as partnerships, but “partnership” became a thinner concept.<sup>58</sup> Except for those in the control group of a firm, partners began to resemble employees more than owners.<sup>59</sup>

Firms that wished to compete for the biggest cases and transactions found that they needed large standing armies that required regular rations, even when there was no

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firms with more than 250 partners rose from five in 1991 to forty-eight in 2005. See *The NLJ 250: Annual Survey of the Nation's Largest Law Firms* (Nov. 14, 2005). Many firms are so large that even partners can have little more than a nodding acquaintance with each other. Twenty-two American firms now have more than 1000 attorneys. Baker & McKenzie, which tops the NLJ 350 list, touts more than 4000 lawyers working in seventy-two offices in forty-five countries. *The NLJ 350: By the Numbers*, AM. LAW (Apr. 16, 2012), <http://www.americanlawyer.com/PubArticleALD.jsp?id=1202548783905>.

58. Few law partnerships were equal partnerships in the sense of compensating all partners equally, although some reportedly compensated members of certain seniority cohorts equally. See Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 341 (1985) (describing the cohort compensation system). But many firms, in keeping with principles of partnership democracy, permitted everyone to have an equal voice in firm affairs, even if it remained possible to call for a “points vote,” which favors those with a larger ownership interest. See Robert W. Hillman, *Law, Culture, and the Lore of Partnership: Of Entrepreneurs, Accountability, and the Evolving Status of Partners*, 40 WAKE FOREST L. REV. 793, 796, 809-10 (2005) (“Equality has long been a norm of partnership law. . . . An emphasis on the relationship among partners rather than the relationship between the firm (an artificial entity) and its partners is consistent with the classic egalitarian model of the partnership as a collaborative effort among individuals joined through a contractual bond in a common enterprise.”); Janice Mucalov, *What to Look for in a Partnership Agreement*, CBA PRACTICELINK, <http://www.cba.org/cba/practicelink/wwp/agreement.aspx> (last visited Mar. 17, 2014) (“Day-to-day decisions usually require a simple majority. Fundamental changes and important matters often need a two-thirds or three-quarters majority vote of partners. Note that not all votes may be equal. In firms where partners are allocated points or partnership units, the firm may have weighted votes – so if a partner has 100 partnership points, they will have double your voting power if you come in with 50 points.”). In many firms, such votes were viewed as divisive and undesirable and were generally avoided. See Hillman, *supra*, at 810.

59. Hillman, *supra* note 58, at 820 (“If a partner’s claim to income largely is in the form of a salary, the partner bears no responsibility for claims against the firm, and the partner does not participate meaningfully in firm governance, then the label ‘partner’ has no substantive meaning whatsoever and the individual so described is an employee rather than a partner.”).

battle immediately to be fought. One solution was to try and keep a steady stream of such work by using promises of handsome compensation to recruit (or keep) proven “rainmakers.”<sup>60</sup> Another was to acquire whole firms or practice groups with enviable “books of business.”<sup>61</sup> Yet another solution was to “outsource” the firm’s more routine work<sup>62</sup> or hire a cohort of lower-status, lower-paid lawyers to do it.<sup>63</sup>

Firms also sought to arrange matters so that they looked particularly profitable, because profitable businesses like to be represented by profitable law firms.<sup>64</sup> They

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60. GALANTER & PALAY, *supra* note 47, at 54-57; *see also* MILTON C. REGAN, JR., EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER 37-38 (2004) (discussing the division in firms between “service partners” (work-horses) and “rainmakers” (business generators)); William D. Henderson & Leonard Bierman, *An Empirical Analysis of Lateral Lawyer Trends from 2000 to 2007: The Emerging Equilibrium for Corporate Law Firms*, 22 GEO. J. LEGAL ETHICS 1395, 1399 (2009) (“Wanting to attract and retain lawyers with the largest books for price-insensitive work, law firm managers increasingly focus on the profits per partner as reported to *The American Lawyer* rather than a long-term business strategy that delivers a highly valued and cost-effective service to clients.”).

61. GALANTER & PALAY, *supra* note 47, at 54-55; Henderson & Bierman, *supra* note 60, at 1421.

62. *See generally* Jose A. Arambulo, Comment, *O Where, O Where Has My Legal Job Gone?: Examining the Realities of “Offshoring” Legal Work and Why States Can Regulate the Practice Despite Congress’ Broad Power Under the Foreign Commerce Clause*, 38 SW. L. REV. 195 (2008) (discussing outsourcing to gain a competitive advantage).

63. *See, e.g.*, BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 169 (2012); Catherine Rampell, *At Well-Paying Law Firms, a Low-Paid Corner*, N.Y. TIMES, May 24, 2011, at A1; Sara Randazzo, *Calling All Unemployed Law Grads: Greenberg Is Hiring*, AM LAW DAILY (Oct. 21, 2013), <http://www.americanlawyer.com/id=1202624550961> (describing how Greenberg Traurig is hiring new associate classes, but pay for “[t]hose who sign on will be . . . considerably less than the typical starting associate,” and they “will bill at a much lower hourly rate—and may wind up only sticking with the firm for a year”).

64. *Cf.* Russell G. Pearce & Eli Wald, *The Relational Infrastructure of Law Firm Culture and Regulation: The Exaggerated Death of Big Law*, 42 HOFSTRA L. REV. 109, 141 (2013) (noting that Big Law has responded to the rise in in-house counsel positions by cutting costs to retain clients and remain profitable). *See generally* Barry Sullivan, *Professions of Law*, 9 GEO. J. LEGAL ETHICS 1235 (1996) (book review); Barry Sullivan, Book Review, 5 LEGAL ETHICS 179 (2002).

competed for the most prestigious addresses, the most opulent offices, and the most highly credentialed associates.<sup>65</sup> Above all, they attempted to report the most impressive profits-per-partner numbers.<sup>66</sup> To that end, they terminated—or “de-equitized”<sup>67</sup>—long-time partners who practiced in a less-lucrative specialty or were perceived as “underperforming” in one way or another. In that way, they

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65. They recruited the “best” students from the “best” schools, with lavish dinners and other demonstrations of firm prosperity, summer programs in which the recreation-to-work ratio was high, and starting salaries that were unrelated to the value that new associates were capable of producing. See NELSON, *supra* note 47, at 66 (“The leading position of large firms is historically linked to their ability to recruit the best graduates from the best law schools.”); Tom Ginsburg & Jeffrey A. Wolf, *The Market for Elite Law Firm Associates*, 31 FLA. ST. U. L. REV. 909, 927 (2004); Chris Mondics, *Many Law Firms Are Cutting Back on Summer Internships*, L.A. TIMES, July 19, 2010, available at <http://articles.latimes.com/2010/jul/19/business/la-fi-law-interns-20100719>; Lisa van der Pool, *Law Firms Launch Leaner Summer Associate Classes*, BOS. BUS. J., May 11, 2009, available at [http://www.bizjournals.com/boston/stories/2009/05/11/newscolumn1.html?surround=etf&ana=e\\_article](http://www.bizjournals.com/boston/stories/2009/05/11/newscolumn1.html?surround=etf&ana=e_article). The median base starting salary for new law school graduates was \$18,000 in 1977; by 2000 it stood at \$85,000. See Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 HOFSTRA L. REV. 879, 883 (2002). By 2007, base starting salaries in elite New York law firms reached \$160,000. Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 21. Those that could afford to do so competed for the highest status symbols: Supreme Court clerks. See Brent Kendall, *High-Court Clerks Attract a Frenzy*, WALL ST. J., Sept. 18, 2012, at B1 (observing that large corporate firms typically offer Supreme Court clerks a signing bonus of \$280,000, which is more than the annual salaries earned by the Justices).

66. See Lerman, *supra* note 65, at 883-84.

67. “De-equitization,” the demotion of a partner from owner to employee status, is a “contentious, upsetting, and stigmatizing process.” Douglas R. Richmond, *The Partnership Paradigm and Law Firm Non-equity Partners*, 58 U. KAN. L. REV. 507, 511-12 (2010); see also Hillman, *supra* note 58, at 816-17 (discussing partner “demotions” through de-equitization). While only 44% of NLJ 250 firms had a two-tiered partnership structure in 1994, *Non-Equity Partners*, 94-11 PARTNER’S REPORT 14 (Nov. 1994), 70% of firms with more than seventy-five attorneys had a two-tiered partnership structure in 2007, *Partnership Structures*, 04-6 PARTNER’S REPORT 8 (June 2004). If those who control the firm wish to shed a partner, they can usually do so easily by decreasing his or her compensation.



were able to reduce the denominator.<sup>68</sup> Another strategy focused on cutting costs by hiring fewer associates, particularly at the entry level, and paying them less,<sup>69</sup> requiring longer hours of those who were hired,<sup>70</sup> and periodically replacing experienced associates with those who could do the same work at less cost (and greater profit) to the firm.<sup>71</sup> They also extended the partnership track.<sup>72</sup> Firms that previously took pride in inculcating firm-specific customs and practices now found the opportunity costs too great and increasingly insisted that law schools produce “practice-ready” associates.<sup>73</sup> Pressures were put on associates to become profitable from the beginning, while

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68. Nat Slavin, *Secrets, Lies and Law Firm Profits*, CORP. LEGAL TIMES, May 1, 2002, available at 2002 WLNR 15011633 (suggesting that the “profits-per-partner game,” which allows firms to recruit top lateral hires, is “a vicious circle” that allows firms to get better clients and charge those clients higher fees).

69. See Joe Palazolo, *Law Grads Face Brutal Job Market*, WALL ST. J., June 25, 2012 (“Members of the law-school class of 2011 had little better than a 50-50 shot of landing a job as a lawyer within nine months of receiving a degree . . . .”); see also Maulik Shah, *The Legal Education Bubble: How Law Schools Should Respond to Changes in the Legal Market*, 23 GEO. J. LEGAL ETHICS 843, 850 (2010) (“A small number of firms are . . . instituting an apprenticeship system for new associates . . . . [T]he basic idea is that . . . associates will get basic training, lower salary, and billed to clients at lower rates.”).

70. Galanter & Henderson, *supra* note 47, at 1877.

71. See David Lat, *A Peek Inside the Winston & Strawn Black Box and Additional Info on Stealth Layoffs*, ABOVE THE LAW (Apr. 23, 2010, 3:42 PM), <http://abovethelaw.com/2010/04/a-peek-inside-the-winston-strawn-black-box-and-additional-info-on-stealth-layoffs> (former associate describing “stealth layoffs” at one large firm).

72. Among 500 recently promoted partners at sixty Am Law firms, the average time to partner was ten-and-a-half years. See Sara Randazzo, *For This Year’s New Partners, Perseverance Pays*, AM LAW DAILY (Jan. 13, 2012, 6:53PM), <http://amlawdaily.typepad.com/amlawdaily/2012/01/for-this-years-new-partners-perseverance-pays-off.html>.

73. See David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1 (“So, for decades, clients have essentially underwritten the training of new lawyers, paying as much as \$300 an hour for the time of associates learning on the job. But the downturn in the economy, and long-running efforts to rethink legal fees, have prompted more and more of those clients to send a simple message to law firms: Teach new hires on your own dime.”).

lateral hiring also became more attractive. In these circumstances, the sharpness of competition within firms often came to equal that which existed between firms. Loyalty is a luxury for employees and firms alike.<sup>74</sup>

In the current environment, partnerships are simply markets in microcosm. Often the relationship among partners is largely competitive and adversarial; the only common goal is to maximize this year's profits. Some partners will succeed in the competition; others will not; some will believe that they have succeeded, but will feel insufficiently rewarded. Partners will come and go, some more quickly than others.<sup>75</sup> That is an essential part of the reimagining of the firm. Indeed, even as the parties repeat the wedding vows, both may already be surveying the field. The cost incurred in shedding partners is simply a cost of doing business. Partnership is a transient status.

For the most part, these changes went unnoted in the law schools, which were mainly interested in law firms as sources of funding for themselves and of employment opportunities for their students.<sup>76</sup> Indeed, many law schools

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74. See Jonathan Lindsey et al., *Lateral Partners: Compensation Is Key to Attracting and Retaining Rainmakers*, 8 LAW FIRM PARTNERSHIP & BENEFITS REP. 1, 1 (2002) (“[A]ny lingering stigma associated with switching firms has long since vanished.”); Rehnquist, *supra* note 47, at 152 (noting a decline in loyalty among large-firm partners); Saundra Torrey & B.H. Lawrence, *Star Lawyers Become ‘Free Agents’; Traditional Loyalty Gives Way to Bidding War Mentality*, WASH. POST, Feb. 27, 1989, at A1 (“[T]he best and brightest are all too eager to make a switch.”).

75. See Henderson & Bierman, *supra* note 60, at 1403 (“The ‘churn’ of partners . . . varies by metropolitan area.”). There is always the possibility that today's ally will become tomorrow's rival. See Robert W. Hillman, *The Impact of Partnership Law on the Legal Profession*, 67 FORDHAM L. REV. 393, 398 (1998) (“For many firms, present partners represent significant future competitors.”).

76. Many law professors were not particularly interested in the profession. Some had never practiced law, while others had practiced only for token amounts of time. See Segal, *supra* note 73 (“One 2010 study of hiring at top-tier law schools since 2000 found that the median amount of practical experience was one year, and that nearly half of faculty members had never practiced law for a single day.”). Among other things, a dismal academic job market beginning in the late 1960s caused many recent PhDs to go to law school with the objective of becoming law professors. See Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 167 (2006) (“First, American universities produced a glut of Ph.D's in the 1960s and

hoped to share in the law firms' prosperity in two ways: rising associate salaries were thought to justify higher tuition, while increased partnership income could translate into increasingly robust donations. Thus, while law schools seemed to sleep, the legal profession became the legal industry. Just as surely, law schools became the legal education industry.

Competition is king in legal education, too. Success or failure may turn on the slightest change in the rankings, and efforts to influence the rankings have sometimes involved levels of deceit that would make most boiler room operators blush.<sup>77</sup> The pressures placed on deans are

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1970s, and some of these students gravitated to law schools, and eventually to the legal academy, bringing their training and interdisciplinary perspectives with them.”). The entry of such dual-trained scholars proved a boon for interdisciplinary legal scholarship, but it also increased the distance between the legal academy and the practicing bar. See Alex M. Johnson, Jr., *Think Like A Lawyer, Work Like A Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1238 (1991) (arguing that law professors have “resolved their dichotomous mission—their role as both teachers of academics and trainers of lawyers—by identifying themselves as academicians first and foremost”); see also Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 645 (1968) (“By compelling true academics, or those who have the potential for serious scholarship, to play out a Hessian-trainer role, and by compelling highly skilled Hessian-trainers to make believe they are legal scholars, the disease dilutes both scholarship and Hessian training to the advantage of neither.”). See generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (arguing for more “practical” scholarship, with a healthy balance of theory and doctrine).

77. See, e.g., Chris Mondics, *Villanova on 2 Year Probation for Grade-Inflation Scandal*, PITT. POST-GAZETTE, Dec. 11, 2012 (describing an Association of American Law Schools-imposed probation for knowingly reporting inaccurate student qualifications); Julie Wurth, *Admissions-Scandal Effects Muted So Far*, NEWS-GAZETTE (Illinois), Aug. 26, 2012, at A1 (noting that the law school at The University of Illinois was fined and censured by ABA for extensive misreporting of student qualifications); *Breaking: Ex-CSO Assistant Director from Thomas Jefferson Admits to Fraud, Alleges Deliberate Scheme by Law School*, LAW SCH. TRANSPARENCY (Oct. 23, 2012, 10:00AM), <http://www.lawschooltransparency.com/2012/10/ex-cso-assistant-director-from-tjls-admits-to-fraud> (highlighting Thomas Jefferson Law School's misreporting of graduates' employment data); see also Christopher Polchin, *Raising the “Bar” on Law School Data Reporting: Solutions to the Transparency Problem*, 117 PENN ST. L. REV. 201, 221 (2012) (“Students are embarking upon six-digit mounds of debt based on [representations of] sunny job prospects that are, in reality, just the opposite.”).

intense. Universities have always depended on law schools to underwrite less profitable programs. That may have made sense when legal education was mainly delivered in gigantic lecture halls, with little expensive equipment and few auxiliary student services. It also may have made sense because law graduates seemed destined to make larger salaries than others. But neither condition now holds. Law graduates cannot count on dramatically higher-paying jobs, and legal education is not the profit center it was.

Legal education now depends heavily on small-group learning, whether in seminars or clinics,<sup>78</sup> and it requires state-of-the-art information technology.<sup>79</sup> Students also demand state-of-the-art facilities and expect an array of student services that was unheard of a generation ago.<sup>80</sup> But universities still look to law schools for their “tax.”<sup>81</sup> The price of a legal education has increased dramatically; law student debt is high; current employment prospects are

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78. See, e.g., Suzanne Valdez Carey, *An Essay on the Evolution of Clinical Legal Education and Its Impact on Student Trial Practice*, 51 U. KAN. L. REV. 509, 540-41 (2003) (“Clinical legal education has . . . established itself as a critical component of legal education . . .”). See generally Laura G. Holland, *Invading the Ivory Tower: The History of Clinical Education at Yale Law School*, 49 J. LEGAL EDUC. 504 (1999) (chronicling the rise of clinical education at Yale). The status of clinical faculty has long been a divisive issue. See generally Peter Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008) (detailing historical development of relevant accreditation standards).

79. See John A. Seibert, *The Cost and Financing of Legal Education*, 52 J. LEGAL EDUC. 516, 524 (2002) (noting that technology, including that necessary for administrative functions, has been a major contributor to cost increases).

80. See generally Brian Jacob et al., *College as Country Club: Do Colleges Cater to Students’ Preferences for Consumption?*, Nat’l Bureau of Econ. Research, Working Paper No. 18,745; Sarah Ferris, *As Students Become More Like Customers, GW Faced with Swelling Demands*, GW HATCHET (Aug. 21, 2013), <http://www.gwhatchet.com/2013/08/21/welcome-to-gw-where-students-come-first>.

81. According to Frank Read, some universities regularly take up to 30% of their law schools’ tuition revenue to support other programs. See Frank T. Read, *Law School Debt Blues, The Crushing Burden of Debt Dictates Students’ Life Choices*, 13 TEX. LAW. 19 (1997); see also Childs Walker, *University of Baltimore President Responds to Ousted Law Dean*, BALT. SUN, Aug. 1, 2011 (resigning Baltimore Law School dean claimed that the university seized 45% of the law school’s revenues).

bleak.<sup>82</sup> Differential pricing frequently places the greatest financial burden on those considered to be the least well-qualified students.<sup>83</sup>

All are rightly concerned about the high cost of legal education and the debt burden that students take on to pay that cost. But price seems to have little to do with student choice; many students are willing to go deeply into debt to acquire a degree from the most highly ranked school to which they can secure admission. What matters to students is the perceived market value of a particular degree, and they depend on the rankings to measure it.<sup>84</sup>

Law schools know how to capitalize on that fact. For example, they turn down well-qualified entry-level students whose credentials would jeopardize their rankings, but accept many of them as transfers, when their credentials do not matter.<sup>85</sup> Nonetheless, there is diminished demand for legal education. Many law schools must choose between lower standards and unfilled seats. Some law schools will close. But the declining interest in legal careers will also challenge the broader society, which has depended on lawyers to fill an array of offices of public trust, from local hospital boards to the presidency of the nation.<sup>86</sup>

Clearly, American legal education is ripe for change, but the direction of change is far from certain. Will it be change designed to ease the pain associated with the inevitable death of the profession as we have known it, or will it be

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82. See Merritt, *supra* note 13, at 7 (“NALP’s nine-month employment reports are bleak. Even the class of 2007, which enjoyed the strongest placement success in recent times, faced a significant job gap.”).

83. See TAMANAHA, *supra* note 63, at 98-102.

84. See Bourne, *supra* note 6, 664 (“The rankings play directly into the psychological needs of students and teachers across the board, because they feed directly into the almost unconscious worship of hierarchy, however illegitimate, that afflicts law students, law teachers, and the legal services industry.”).

85. See Hannah R. Arterian, *The Hidden Curriculum*, 40 U. TOL. L. REV. 279, 289 (2009).

86. See generally John E. Cribbet, *The Changeless, Ever-Changing University: The Role of the Law School*, 26 ARIZ. L. REV. 241, 256-57 (1984) (arguing that law schools should equip their graduates to serve a democratic society).

change aimed at ensuring once more the persistence of core professional values amidst changed circumstances? In any event, one might assume that the starting point should be to take stock of the aims and purposes of the legal profession and the justice system; the ways in which the legal profession currently serves or disserves those aims and purposes; the ways in which legal education can shape and serve those aims and purposes; and, more broadly, the relationship of both legal practice and legal education to human flourishing, the requirements of justice, and the well-being of a democratic society. One might begin by also trying to give a full account of the lawyer's role, both as a representative of clients in circumstances too numerous to catalogue and as a "public citizen having a special responsibility for the quality of justice."<sup>87</sup> By demonstrating such openness to wider questions of professional identity and education, one could begin to consider how best to educate lawyers.<sup>88</sup>

A good starting point for thinking about the purposes to be served by legal education is to focus on the purpose of education itself. Philip Jackson, a long-time scholar of educational theory and practice, has taken up John Dewey's 1938 challenge to educators to "find[] out just what education is."<sup>89</sup> In a short but thoughtful book, Jackson seeks to build up a theory of education for contemporary purposes. At the most basic level, Jackson notes, "education was and is and perhaps always will be a socially facilitated

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87. MODEL RULES OF PROF'L CONDUCT Preamble & Scope ¶ 1 (2013).

88. Some, indeed, have taken that approach. *See, e.g.*, WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 12, 146 (2007) [hereinafter CARNEGIE REPORT] (advocating for an integrated approach to legal education that would "combine conceptual knowledge, skill and moral discernment" with "the capacity to recognize the ethical questions [that] are obscured by other issues" and the ability to exercise "wise judgment when values conflict"); *see also* AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 330-34 (1992) [hereinafter MACCRATE REPORT]; AM. BAR ASS'N, TEACHING AND LEARNING PROFESSIONALISM 13-25 (1996).

89. PHILIP W. JACKSON, WHAT IS EDUCATION? 4-5 (2012).

process of cultural transmission.”<sup>90</sup> Education “involves transmitting something that is considered valuable by those in charge of the operation.”<sup>91</sup> Jackson sees education as “trafficking in truth,” and he affirms that “education is fundamentally a moral enterprise.”<sup>92</sup> Accordingly, Jackson posits that the goal of education

is to effect beneficial changes in humans, not just in what they know and can do but, more important, in their character and personality, in the kind of persons they become. Moreover, the beneficiaries of that process are not just the individuals being served but also the society at large. Ultimately, the world in general stands to benefit from such an effort.<sup>93</sup>

Some might regard this description as more appropriate to preprofessional education, seeing students as already fully formed adults by the time they embark on postgraduate studies such as law. Yet, while students may increasingly become partners in their own education as they become older and more mature, men and women beginning the study of law do not usually have a fully formed idea of what it means to be a lawyer, and it is up to the law schools to see to it that students receive the grounding necessary for that development.<sup>94</sup> In a sense, that has become more difficult in recent years, as fewer full-time law professors have had any substantial amount of experience in the practice of law.<sup>95</sup>

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90. *Id.* at 10.

91. *Id.* at 94.

92. *Id.* at 20, 94.

93. *Id.* at 94.

94. See Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 117, 119 (2001) (arguing that law schools must strive to cultivate “a sense of professional self-consciousness and constructive introspection, and an attitude of respect and responsibility towards others”).

95. See Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 107-08 (2010) (“The gulf between the main faculty and these second and third class members of the legal academy in terms of practical experience and

The situation is exacerbated by changes in law practice. In earlier times, even relatively brief periods spent in practice might have permitted a junior lawyer to gain valuable real-world experience in a large firm. That is less likely to be the case now, when associates are more likely to spend their time assembling documents or reviewing them for privilege than closely observing their elders try cases, argue appeals, or negotiate transactions, let alone participating in those activities themselves. If difficult ethical issues arise, and are seriously dealt with, the process is not likely to involve the most junior associates. On the other hand, of course, law schools have made large commitments to clinical education, and many have become more open to having courses taught by adjuncts.<sup>96</sup> But clinics are costly and typically serve relatively few students, and adjuncts are necessarily focused on their primary employment.

As Jackson has observed, education is at least in part a process whereby the community transmits its values to those who wish to join it. When lawyers and law schools accept the proposition that the legal profession is really the legal industry, that professional values are illusory and simply a form of deception that masks self-interest and facilitates the exaction of monopoly profits, and that clients and students are simply customers, it is difficult to imagine what kind of “cultural transmission” is meant to be effected through legal education, formal or informal. It is equally difficult, given those assumptions, to imagine how legal education can fulfill its role of effecting beneficial changes in individual characters, the society at large, or the world in general. If there is no such thing as the legal profession, no substance or truth to professional values, and no relationship with clients and students other than that

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inclination is widening at the very time when it needs to be shrinking.”); *see also* Edwards, *supra* note 76, at 34 (“While [law] schools are moving toward pure theory, the firms are moving toward pure commerce, and the middle ground—ethical practice—has been deserted by both.”).

96. *See* Holland, *supra* note 78, at 504; David A. Lander, *Are Adjuncts a Benefit or a Detriment?*, 33 U. DAYTON L. REV. 285, 285 (2008) (commenting on increasing role of adjuncts in legal education, and asserting that one-quarter of all courses are now taught by adjuncts).



defined by market values,<sup>97</sup> it is no wonder that law schools have come to see themselves as being in crisis.

But much of the current commentary takes a different tack: legal education is not “a moral enterprise,” but simply the training component of “the legal industry.”<sup>98</sup> Neither lawyers nor law schools have any identity except as market actors; the only goal is to make both more profitable and efficient. Thus, one can talk about training lawyers in the same way that one talks about building particular machines to perform particular functions in other industries. Both the articulation of the problem and its analysis reflect the crudest versions of economic analysis. Some of the discussion involves more than that, of course, but even then it is likely to be based on something other than sound and prudent reflection.

To be sure, lawyers are market actors. American lawyers have never been indifferent to personal profit or well-being; no false sense of propriety ever required that American clients slip “honoraria” into the back of a barrister’s gown. But American lawyers have always viewed themselves as something more than simply market actors. What is at stake in the current debate is whether they will continue to do so, and, if they do, whether that stance can be justified.

## II.

Two law professors, Thomas D. Morgan and Brian Z. Tamanaha, have been particularly influential in setting the current terms of the debate. Morgan has written a book addressing the challenges presented by globalization; Tamanaha has written a book about legal education and its current plight.<sup>99</sup> Morgan is an expert on professional responsibility and a former law school dean. Tamanaha is a scholar of jurisprudence who had the unusual experience of

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97. See THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 21 (2010) (“[L]awyers in American [sic] are not now a profession and—over most of their history—they have never been one.”).

98. See, e.g., DeSorrento & Thompson, *supra* note 10, at 577.

99. See generally MORGAN, *supra* note 97; TAMANAHA, *supra* note 63.

serving as an interim dean before receiving tenure. Both have been government lawyers; neither, apparently, has ever been engaged in the full-time private practice of law.

The starting point for each book is the proposition that legal education and legal practice are activities to be defined mainly in market terms; they are creatures of the marketplace and neither can persist unless its values reflect market realities.<sup>100</sup> That, according to both writers, is the hard truth; there is not much more to say.

Neither book spends much time on the virtues or values (let alone the demands) of a profession charged with occupying a public space in a democratic society;<sup>101</sup> the profession presumably rises or falls along with a cluster of factors drawn from market theory and neoliberal attitudes about the forces that allegedly motivate human behavior.<sup>102</sup> Nor is there much discussion about many of the most significant roles that lawyers play: effectively and peacefully resolving disputes and conflicts, providing effective representation to individuals in a diverse and complex society, and protecting individuals and groups against the state and powerful private interests.<sup>103</sup> Likewise, there is little said about the lawyer's role in educating clients; in crafting, planning, negotiating, and

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100. MORGAN, *supra* note 97, at 3; TAMANAHA, *supra* note 63, at x-xi.

101. See, e.g., Martin Bohmer, *Equalizers and Translators: Lawyers' Ethics in a Constitutional Democracy*, 77 FORDHAM L. REV. 1363, 1375 (2009) (emphasizing lawyers' roles as "rhetorical equalizers" and "translators from the language of private interests to the language of the public interest"); Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO. J. LEGAL ETHICS 155, 155 (2006) (arguing that law schools must emphasize "democracy duty"). See generally Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy*, 77 FORDHAM L. REV. 1591 (2009) (examining various perspectives on lawyers in a democracy).

102. See Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1387 (2009) (arguing that democratic lawyering challenges neoliberalism and its agenda).

103. See Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159-62 (1958) (finding that the lawyer delivers "special services," and that "the lawyer must keep his obligations of public service distinct from the involvements of his private practice").

memorializing transactions; or in problem-solving for families, businesses, agencies, and bureaucracies. But grand plans are unveiled for training “legal workers” in ways that reflect the authors’ views of new developments in the profession and society and the desirability or need for a more stratified profession.<sup>104</sup>

What these books tell us, albeit in different ways, is that an appropriate legal education for most lawyers is one that can be completed in the shortest time and at the lowest cost. This is true, the books tell us, even though practicing lawyers face an increasingly complex world. In addition, the legal profession that deserves our attention seems pared down to those who serve the interests of the biggest businesses; scant attention is paid to that part of the profession that does not. The latter can make do with a lesser legal education and look forward to less success in the marketplace. Where judges or criminal defense lawyers will come from, and how lawyers who serve the middle class and the poor will fit into this vision, is not clear. How bright students from underprivileged backgrounds or those with other deficits of social capital will fare in this new regime also remains unclear. Nor is it clear how the public’s business will be done. All that matters is that the market will have taken a full measure of everyone’s worth—by whatever criteria the market finds compelling at the moment.

#### A.

In *The Vanishing American Lawyer*, Thomas D. Morgan takes stock of the challenges that lawyers face; he provides many insightful observations about changes that already have occurred in the market for legal services and about further changes that he deems necessary. Indeed, the great strength of Morgan’s work is his enthusiasm for the future and his willingness to imagine precisely what the future may hold. One of Morgan’s central points is that “lawyers are facing fundamental changes in both what they will be

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104. See MORGAN, *supra* note 97, at 167-82; TAMANAHA, *supra* note 63, at 207-16.

asked to do and whether the work they once did will continue to be done by lawyers at all.”<sup>105</sup> Morgan has less enthusiasm for giving the past its due. He notes, for example, that we should no longer look to experience for wisdom because the world changes too quickly for even our own experiences to provide useful guidance: “As we grow older, we expect that experience will allow us to know more and to do familiar things better. In an era of change such as ours, however, experience can become a burden.”<sup>106</sup>

Morgan argues that “the concept of a lawyer we have known will become a part of history, along with the knights and mercenaries who were hired to fight the battles of others in earlier times.”<sup>107</sup> He believes the term “lawyer,” if it is used at all, “will increasingly be seen as imprecise and obsolete,” and it “will come to describe a very different kind of occupation.”<sup>108</sup> Society may need law, Morgan suggests, but “it does not follow that a system based on law requires lawyers, as we now know them, to run effectively.”<sup>109</sup> “For better or worse, most of tomorrow’s lawyers will resemble what we today call business consultants more than they will call to mind Clarence Darrow and Atticus Finch.”<sup>110</sup>

Even more fundamental, perhaps, is Morgan’s argument that there is no such thing as the “legal profession,” at least in the traditional sense of a group having a common identity and culture.<sup>111</sup> For Morgan, the so-called “legal profession” is simply a collection of individuals who share a common training, but use it for diverse purposes and in ways that are more different than

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105. MORGAN, *supra* note 97, at 3.

106. *Id.* at 72.

107. *Id.* at 16. One might be forgiven for wondering about the basis for Morgan’s assertion that the age of mercenaries is over, whether the term is taken literally or figuratively.

108. *Id.* at 25.

109. *Id.* at 26. This sentiment seems somewhat analogous to the idea that society needs “spirituality” but not organized religion.

110. *Id.* at 25.

111. *Id.* at 21.

alike.<sup>112</sup> In addition, lawyers can no longer be seen primarily as advocates or legal counselors; they are simply “business consultants” with special training in law.<sup>113</sup> For that reason, recent developments in legal education, which seek to improve the competence of all students in certain skills, do not comport with contemporary legal practice.<sup>114</sup> Indeed, Morgan believes that much of what law students are required to learn in law school will not be of any practical use to them.<sup>115</sup> According to Morgan, legal education is headed in exactly the wrong direction.<sup>116</sup>

In Morgan’s view, the “fact” that there is no such thing as a legal profession must be understood if legal work is to be liberated from its professional pretensions and put on a sound business basis: “[U]se of the idea of a ‘profession’ to understand the world of lawyers [simply] obstructs clear thinking about what lawyers actually do and how they are likely to have to respond to the world they face.”<sup>117</sup> Morgan concedes that professionalism might have been a meaningful concept in prior ages, when lay people could not understand law or independently evaluate the work of lawyers, although the term is meaningless today, when

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112. *Id.* at 25-26. This is an argument that has been made frequently in recent years to support an exemption from certain rules of professional responsibility for multinational firms and others that deal with “sophisticated” clients. For example, it has been argued that such firms must be allowed to engage in multidisciplinary practices, raise capital through the selling of shares to nonlawyer investors, and be relieved from such ethical restraints as the so-called “hot potato” doctrine. See Daniel J. Bussel, *No Conflict*, 25 *GEO. J. LEGAL ETHICS* 207, 222-23 (2012); Sara J. Lewis, Note, *Charting the “Middle” Way: Liberalizing Multijurisdictional Practice Rules for Lawyers Representing Sophisticated Clients*, 22 *GEO. J. LEGAL ETHICS* 631, 659-60 (2009); *The Case Against Clones*, *ECONOMIST*, Feb. 2, 2013, at 51, 51. Otherwise, it has been argued, such firms will be disadvantaged in the marketplace, both with respect to other professional services firms that provide some form of legal counsel and foreign law firms, many of which operate free from such constraints. See Lewis, *supra*, at 639.

113. MORGAN, *supra* note 97, at 25.

114. See *id.* at 15.

115. See *id.* at 15-16.

116. See *id.* at 200-04.

117. *Id.* at 20.

“many clients . . . are able to—and do—evaluate and direct their lawyers.”<sup>118</sup>

Although there is much to be said for Morgan’s detailed analysis and insights, his area of genuine concern seems curiously limited to the lawyers who practice in firms that serve big business, particularly international business. Indeed, what seems to concern him most is creating the necessary conditions for such firms to “achieve . . . “dominan[ce].”<sup>119</sup> He seems far less concerned about other aspects and concerns of the legal sphere, such as the quality and effectiveness of the courts, the successful prosecution of crimes, the peaceful and satisfactory resolution of disputes, or the ability of ordinary people to enforce their rights. Amidst the package of educational reforms that he offers, he seems scarcely to have considered, for example, how judges will be prepared for the work that they must do in the new environment that he envisions. He admits that the smaller and more specialized bar he envisions might give “reason for concern that it will be harder to find judges who are qualified to manage the work of a court of general jurisdiction,”<sup>120</sup> but he points out that the problem is not

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118. *Id.* at 25. That is true, but only with respect to the most sophisticated clients represented by the large firms, and the extent that it is true even of them is open to question. Certainly, some corporate counsel will overrule the litigation decisions of outside counsel, but often they do so on questionable grounds. For example, it is not uncommon for corporate counsel to insist that particular arguments be made to a court because they think that their corporate superiors would wish to have those arguments made, even though litigation counsel rightly believes that the arguments will adversely affect the client’s case. Morgan is admirably clear in telling us that that legal practice cannot, in his view, be categorized as a “profession.” *Id.* at 21. He is less clear, however, in telling us whether any activity should be so denominated. At one point, he seems to concede that medicine properly can be considered a unitary profession, but he also seems to suggest that the word itself is suspect, unless it is given the thinnest possible meaning: that is, expert work for which people are willing to pay money. *See id.* at 15-17. Morgan perceptively notes that contemporary society has come to use the word “profession” almost “promiscuously.” *Id.* at 21. This is an interesting point because, just as the word “profession” has been applied to every conceivable line of work, the word “industry” also has become ubiquitous.

119. *Id.* at 166.

120. *Id.* at 229.

really a difficult one because most courts are specialized or require more by way of “empathy and common sense” than of legal knowledge.<sup>121</sup> Presumably, those with much at stake would simply opt out of the public justice system and have their disputes settled by highly paid private adjudicators. But Morgan also speculates that judicial candidates who require broader knowledge would probably be willing to go back to school.<sup>122</sup> Morgan does not explore the consequences that might flow from such a radically different approach to staffing the judicial branch, let alone how such changes might affect the role or status of judges in society.<sup>123</sup>

Likewise, Morgan gives little attention to the importance of educating criminal defense lawyers and prosecutors who can provide effective representation;<sup>124</sup> he does not address the challenges presented by living in a nation that is both beset by crime and hobbled by a criminal justice system that comes perilously close to not working at all. No one seriously believes that most persons accused of a crime receive the kind of representation to which they are

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121. *Id.* Not everyone possesses common sense or empathy. Having mentioned the importance of these qualities in staffing his inferior tribunals, Morgan does not explain how persons with these qualities will be recruited. In addition, such qualities, while desirable in adjudicators at all levels, should not be seen as a substitute for legal knowledge. Decisions based entirely on common sense or empathy do not conform to the minimum requirements of the rule of law.

122. *Id.* at 230.

123. In common law countries, the appointing authorities have tended to choose experienced practitioners and senior academic lawyers as judges. *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 34 (3d ed. 2007). This fact has contributed to the relatively high prestige of the bench in those countries. *Id.* In civil law countries, by contrast, judges traditionally have been career civil servants and enjoy varying degrees of independence, public confidence, and professional respect. *See id.* at 35. Studies of the post-Communist judiciary in Russia suggest that the maintenance of a high-quality, respected, and independent judiciary is not something that can be taken for granted. *See* INT’L COMM’N OF JURISTS, *THE STATE OF THE JUDICIARY IN RUSSIA: REPORT OF THE ICJ RESEARCH MISSION ON JUDICIAL REFORM TO THE RUSSIAN FEDERATION* 14 (2010), available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/Russia-indepjudiciary-report-2010.pdf> (noting that court clerks, researchers, police officers, and prosecutors are appointed as judges, but lawyers are not).

124. *See* MORGAN, *supra* note 97, at 218-20.

entitled under the Constitution, and the pressures placed on defendants to engage in plea bargaining, rather than avail themselves of their constitutional right to a jury trial, are intense. Clearly, the system could not work if the rights of criminal defendants were treated as something more than “paper rights.”<sup>125</sup> It is as if Morgan thinks such matters, which have long been considered core concerns of any legal system, will somehow take care of themselves.

Of course, Morgan is not particularly interested in the full spectrum of lawyers and lawyers’ work. He is mainly concerned with “elite lawyers”—those who can afford an elite education and will spend their careers working for elite clients, either in elite law firms or at corporate headquarters.<sup>126</sup> Although they are now to be viewed, in Morgan’s terms, as a specialized cohort of “business consultants,” rather than as traditional “lawyers,” they represent the part of the world of “legal work” that is of principal interest to him. Those lawyers who cannot afford an elite education and do not make their careers working for elite clients are not “real” lawyers, or, at least, not the real focus of Morgan’s concern. They may be judges, government regulatory lawyers, criminal defense lawyers, prosecutors, or advocates and counselors for small businesses, the middle class, or the poor, but the work that they do is, by definition, “routine.”<sup>127</sup>

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125. For example, Justice Jackson spoke eloquently on the indispensability of the lawyer’s role in giving value to the “paper ‘rights’” of citizenship. See Robert H. Jackson, *Tribute to Country Lawyers: A Review*, 30 A.B.A. J. 136, 138 (1944).

126. See MORGAN, *supra* note 97, at 128-75.

127. See *id.* at 132-33. An important part of the story of private practice will be missed if one overlooks the sector of midsized firms. Midsized firms may be able to provide their juniors with more meaningful professional experiences than large firms, freeing them to engage in public service activities of their own choosing, rather than being assigned to represent the pet cause of a powerful partner in another office. See Burk & McGowan, *supra* note 65, at 70 (“[D]iseconomies of scale—such as multiplying conflicts of interest and the friction inherent in management, coordination, and splitting the pie according to each individual’s marginal contribution among increasingly unfamiliar colleagues—should make growth beyond a certain scale affirmatively unprofitable.”); see also Jeff Coburn, *Making it Without Merging: Who Says Midsized Firms Can’t Surge Ahead While Staying Independent?*, OF COUNSEL, June 2006, at 5, 7 (describing how the midsized firm Patterson, Belknap, Webb



Morgan apparently considers the difficulty and interest of most legal work to be proportional to the amount of money at stake, but he recognizes that there are exceptions to that generalization, as where an individual finds himself enmeshed in litigation.<sup>128</sup> Of course, much of the most difficult legal work does involve large sums of money, as we know from the derivatives fiasco.<sup>129</sup> Indeed, much complicated legal work was involved in creating investment vehicles that even the creators did not fully understand.<sup>130</sup> However, when one contemplates the complexity of ordinary modern life—or attempts to work through invoices from a health care provider or cell phone company—one must wonder whether the generalization is correct. In any event, according to Morgan, non-elite lawyers constitute a separate work force that does not need the kind of education required of the elite “business consultants,” and they should not aspire to the same professional, social, or economic rewards as the “business consultants.”<sup>131</sup>

As Morgan sees it, the elite sector is destined to become only more elite and more globally oriented, whereas the non-elite sector will be transformed or will wither away, with its members eventually being replaced simply by standardized legal forms and narrowly specialized, less well-educated, less well-paid, and lower-status workers trained to fill out the forms.<sup>132</sup> But disputes are not always

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& Tyler experienced 100% attorney participation in pro bono activities within a two-year span).

128. MORGAN, *supra* note 97, at 133.

129. See generally SATYAJIT DAS, *TRADERS, GUNS & MONEY: KNOWN AND UNKNOWN IN THE DAZZLING WORLD OF DERIVATIVES* (rev. ed. 2010) (exposing the culture of greed surrounding derivatives trading); NICHOLAS DUNBAR, *THE DEVIL'S DERIVATIVES: THE UNTOLD STORY OF THE SLICK TRADERS AND HAPLESS REGULATORS WHO ALMOST BLEW UP WALL STREET . . . AND ARE READY TO DO IT AGAIN* (2011) (describing the rise of derivatives trading and the personalities of its wealthiest champions).

130. See Timothy E. Lynch, *Derivatives: A Twenty-First Century Understanding*, 43 *LOY. U. CHI. L.J.* 1, 15-30 (2011) (defining derivatives and their characteristics and presenting a modern framework for understanding them).

131. See MORGAN, *supra* note 97, at 25, 213-26.

132. See *id.* at 95, 130.

between non-elite clients or between elite clients. Sometimes disputes occur when the interests of a non-elite client collide with those of an elite client, and there is not much doubt about whose interest will prevail in such a case.<sup>133</sup> The narrowly specialized and less well-educated lawyer often will prove no match for the high-priced lawyer representing the credit card company.

To be sure, the Great Recession and the downturn in demand for higher-end legal services that preceded it do seem to have been particularly hard on the elite sector.<sup>134</sup> Even those who were not part of the control groups that governed or managed their firms had become accustomed to lavish lifestyles fueled by robust levels of compensation.<sup>135</sup> The downturn in firm profits resulting from the decline in demand for legal services saw various responses, beginning with the large-scale cutting loose of relatively lower-paid employees.<sup>136</sup> Ultimately, however, many highly compensated partners had to be turned out so that the compensation levels of those who stayed could remain at a level commensurate with their expectations.<sup>137</sup> Those who were deemed expendable certainly were worse off than their forebears of the so-called “golden age,” when large-firm lawyers not only thought of themselves as the “conscience” of their clients but also had a sense of belonging to a common enterprise that included the assurance that “nobody starves,”<sup>138</sup> meaning that lawyers were not made

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133. See Galanter, *supra* note 46, at 103-04.

134. See Wald, *supra* note 50, at 2061 (examining “the changing professional landscape of large law firms” in light of the great recession).

135. *How Much Do Law Firms Pay New Associates? A 14-Year Retrospective as Reported by Firms*, NAT’L ASS’N FOR LEGAL CAREER PROFS. (Sept. 2009), <http://www.nalp.org/2009septnewassocssalaries> (showing that in 2009 the median starting salary for first-year associates at law firms with more than 251 attorneys was \$145,000).

136. See Debra Cassens Weiss, *Law Firm Layoffs Hit 10K Mark; Thursdays Most Often Bring Bad News*, A.B.A. J. L. NEWS NOW (Apr. 13, 2009, 11:45 AM), [http://www.abajournal.com/news/article/law\\_firm\\_layoffs\\_hit\\_10k\\_mark\\_thursdays\\_most\\_often\\_bring\\_bad\\_news](http://www.abajournal.com/news/article/law_firm_layoffs_hit_10k_mark_thursdays_most_often_bring_bad_news).

137. MORGAN, *supra* note 97, at 107.

138. *Id.* at 14 (citing REGAN, *supra* note 60, at 26 (quoting PAUL C. HOFFMAN, *LIONS IN THE STREET 2* (1973))).

redundant when business in their specialty areas suffered a downturn and their particular skills were not currently in high demand.<sup>139</sup>

Those who stayed also found life hard. There was less demand for the incomprehensible investment vehicles and credit agreements that lawyers had made so much money designing, lobbying for, and defending in litigation. There was little money to be made on litigation when plaintiffs lacked the resources to fund it and defendants lacked the funds to satisfy any sizeable judgment. There was little corporate reorganization work to be done because reorganizations require risk capital, and risk capital was in short supply. And there are limits to how many hours a team of lawyers can work—especially when the work force is being reduced—even if the work is available.

Without any apparent sense of irony, Morgan reports that “[l]aw firm partners have tried to keep their own earnings steady, but as the chair of one firm put it, We can’t beat the donkeys any harder.”<sup>140</sup> The donkeys to be beaten, of course, are the firm’s employees: the equity partners who are not part of the control group, the so-called nonequity partners, counsel, the permanent associates, the traditional associates, the paralegals, and the support staff.<sup>141</sup> If only

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139. See *id.* As Morgan correctly points out, the so-called “golden age” was hardly a golden age for everyone. *Id.* at 12. Whereas large-firm employment provided much more security than it does today, there was a great deal of racial, religious, ethnic, and gender discrimination in the hiring practices of large law firms. *Id.* Social connections and nepotism also provided the basis for affirmative discrimination. See generally Eli Wald, *The Rise and Fall of the Wasp and Jewish Law Firm*, 60 STAN. L. REV. 1803 (2008). Clients suffered a lack of competition as bar associations set and enforced standard, mandatory fees for routine services. MORGAN, *supra* note 97, at 13.

140. Morgan, *supra* note 97, at 3 (quoting David Bario, *Fog Advisory: Managing Partners Are Nervous About What 2008 Will Bring*, AM. LAW., Dec. 2007, at 112, 114) (internal quotation marks omitted).

141. Morgan briefly discusses the issue of leverage, *see id.* at 107, but there is more to be said on the subject. First, leverage is not purely a matter of partner-to-associate ratio, with all partners sharing equally in the profits that leverage brings to the firm. Some partners have a greater share in the firm than others and therefore benefit from leverage disproportionately. Second, there may be partners in a firm, including equity partners, who are valued largely for their skills, rather than their business-getting abilities, and who may in fact receive

the donkeys could each find a few more hours to bill, life would be much more pleasant for everyone, but especially for those at the top of the pyramid. Morgan notes that large-firm lawyers, despite their generally high levels of compensation, appear to be less satisfied with their careers than other lawyers,<sup>142</sup> but he does not stop to reflect on the possible connection between job satisfaction and the attitude expressed by the firm chair he quoted. Nor does he stop to reflect on what kind of an organization it is whose leaders think of their partners and other colleagues as donkeys.<sup>143</sup>

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less compensation than even the dollar value of their own work would warrant. They may sometimes be equity partners, rather than nonequity partners, for various reasons. For example, it may be important to the firm that such partners contribute capital, which would not be the case if they were nonequity partners. That is why some firms initially de-equitized a number of partners and later re-equitized them. Finally, de-equitization is often a political matter, rather than a financial one. While firms have become less democratic in recent years, there are still some political rights that individual partners have. De-equitization may be used to silence dissenters when other means, such as cutting compensation, have failed. On the other side of the ledger, of course, is the market for lateral partners who are valued for their "books of business," which sometimes travel, but sometimes do not. Morgan is certainly correct in noting that the most "relevant tournament for many lawyers [is the tournament which results in the lawyer's becoming] a partner at a firm that pays more than [his] own." *Id.* at 110. Of course, the tournament does not end there. At the very least, the new partner must strive to ensure that he continues to receive the compensation level that brought him there. Moreover, in many cases, the partner wandering in search of higher compensation may not be satisfied with one upward move. For some partners able to do so, the search for higher compensation may resemble the perpetual news cycle or the perpetual election cycle. No sooner is he ensconced in his new firm but that the itinerant partner begins his search for a potentially more lucrative affiliation. This is not a practice limited to large firm lawyers, of course, but one shared by those who are restless "stars" in all lines of work.

142. *Id.* at 11 n.36.

143. Morgan's recounting of this story is particularly ironic, given his assertions that "firm culture is [more] likely to affect individual lawyer behavior" than any ethical prescriptions by bar associations, and that "differing firm cultures can constructively compete for the kind of reputation to which they will aspire." *Id.* at 68. Among large firms, however, there seems to be much less variation in "firm culture" in any deep or meaningful sense today than there was a generation ago. To the extent that differences are trumpeted, they seem to reflect very small differences of emphasis and may be more the product of law firms' marketing departments than reality. At bottom, large firms are all

Morgan's critique cuts quite deep. In his view, the contemporary notion of the "legal profession" is simply a product of ideas that surfaced in the 1950s and gained renewed currency in the 1980s.<sup>144</sup> Since then, Morgan argues, the notion has been perpetuated by lawyers "in an effort to achieve political influence and economic advancement."<sup>145</sup> In other words, the notion of legal professionalism is a tin horn. While Morgan concedes that "many elements of professionalism represent personal qualities or styles of behavior that appropriately appeal to lawyers' aspirations to live good lives and act in ways that serve the public interest," he believes that "lawyers have no unique claim to these values" and should not be viewed as "a special class of service providers."<sup>146</sup> In Morgan's view, the idea that a lawyer is "an officer of the legal system and a public citizen having special responsibility for the quality of justice"<sup>147</sup> is little more than self-serving rhetoric. Nor is

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subject to the same market pressures (or understand themselves to be), as Morgan notes, and, by and large, they have responded to those pressures in substantially the same ways. *See id.* at 87. Nor is it clear what Morgan means when he speaks of reputation as a vehicle of competition. *See id.* at 68. Is it competition for lawyers or competition for clients? The two arenas are quite different. Morgan seems to suggest elsewhere that firms can attract the lawyers they want by differentiating themselves through firm culture, that is, by showing a receptivity to part-time work, and so forth, *see id.* at 150 n.52, but current market conditions make it unlikely that law firms will do much that they otherwise do not find in their economic interest to do, simply to attract new lawyers, when the supply so exceeds the demand. Moreover, the reality of what firms deliver is often quite different from what they promise. Women regularly find that their careers are indeed compromised by taking advantage of maternity policies, whatever they are told, and they often find that part-time work translates into part-time pay for virtually full-time work. *See* Joan Williams and Cynthia Thomas Calvert, *Balanced Hours: Effective Part-Time Policies for Washington Law Firms: The Project for Attorney Retention*, 8 WM. & MARY J. WOMEN & L. 357, 378 (2002).

144. MORGAN, *supra* note 97, at 51, 55.

145. *Id.* at 55.

146. *Id.* at 56.

147. MODEL RULES OF PROF'L CONDUCT Preamble & Scope ¶ 1 (2013). The idea that professional ethics is a superfluous category, and that lawyers simply need to follow ordinary ethical rules, is a powerful one. Moreover, lawyers have often acted in ways that are morally reprehensible by any standard, and the substance of some rules is certainly open to question. But the events of recent

there anything to be said, apparently, for the idea that affirming these values in a collective and definitive way may be valuable in itself, let alone serve to influence the affairs of real life in a positive way that transcends merely individual “aspirations to live good lives.” “[T]he overarching reality today is that lawyers are not set apart and special,” Morgan asserts, but simply “economic actors, specially trained, but driven by all the vices—and virtues—of a capitalist economic system.”<sup>148</sup> And that, presumably, is how it should—and must—be.<sup>149</sup>

Morgan believes that legal practice is a highly differentiated world in which various practitioners who might be called “law workers” do very different kinds of work and have very little in common. Perhaps the only thing they have in common is their helplessness in the face of market forces. As with pharmacists and physicians, whose working conditions also are less pleasant, and whose work is also less intellectually interesting than a generation ago,<sup>150</sup> “[d]evelopments in the world of lawyers will . . . be driven by the world lawyers and their clients face, not the world lawyers wish they could create.”<sup>151</sup> Moreover, “[t]he reality of the differences among lawyers is only increasing

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years suggest that reliance on individual interpretation of the general moral standards of the community may not be sufficient to promote the public values that warrant protection and encouragement.

148. MORGAN, *supra* note 97, at 25.

149. Morgan notes that the “tournament of lawyers” has become the “tournament of professionals,” at least insofar as lawyers now compete with other vocational groups with overlapping specialized knowledge, such as accountants, and with lawyers from other countries. *See id.* at 59-60, 108; *see also* Tanina Rostain, *The Emergence of “Law Consultants,”* 75 *FORDHAM L. REV.* 1397, 1398 (2006) (noting the various forms of consulting by lawyers and nonlawyers).

150. Morgan correctly notes that many pharmacists, once trusted professionals who ran their own pharmacies and dispensed professional advice personally to customers, are now “reduced to dispensing pills from the corner of a local Walmart and advising customers only by handing out printed warnings about the side-effects of prescription drugs.” MORGAN, *supra* note 97, at 15. A similar narrative may be told about physicians, who “seem to deal with insurance companies as much as with patients, and opportunities for independent professional judgment are much too rare.” *Id.* at 16.

151. *Id.*

today, and . . . the idea of an identity that lawyers have in common [is] vanishing rapidly.”<sup>152</sup> Morgan also predicts that this differentiation will become more acute in the future: “[L]awyers are facing fundamental changes in both what they will be asked to do and whether the work they once did will continue to be done by lawyers at all.”<sup>153</sup> Clients seek advice from lawyers to help them accomplish an objective; they do not generally consult a lawyer simply for confirmation that their objective cannot legally be accomplished.<sup>154</sup> Indeed, most clients, according to Morgan, have little interest in whether the transaction conforms to law or not; they have no interest in the rule of law; all that interests them is getting the result they want in the short term.<sup>155</sup> And lawyers are less helpful to them than they might otherwise be, not only because they take law more seriously than their clients do, but because they are trained, according to Morgan, to see difficulties rather than

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152. *Id.* at 5-6.

153. *Id.* at 3.

154. *Id.* at 61. The implication of much discussion on this point is that lawyers are trained to see legal difficulties—rather than possibilities—in any scheme presented to them. That may be true to some extent, but market forces certainly provide a strong corrective. In the current climate, the more serious danger, for both clients and society at large, seems to come from the opposite direction, namely, the tendency, in Marshall Field’s immortal words, to “[g]ive the lady what she wants[.]” See LLOYD WENDT & HERMAN KOGAN, *GIVE THE LADY WHAT SHE WANTS! THE STORY OF MARSHALL FIELD & COMPANY* 223 (1952). What may be effective merchandising is not necessarily ethical, socially responsible, or even effective lawyering. It is difficult to imagine that anyone who has witnessed the events of the past decade in America would think that the problems we face are due to lawyers not being sufficiently responsive to their clients’ interests. Whether one focuses on the Department of Justice lawyers who drafted the torture memos or the lawyers who helped bring down the economy by designing exotic investment vehicles or facilitating the granting of mortgages to those who could not afford them, the problem does not seem to have been the unresponsiveness of lawyers to their masters. It seems utopian to believe, in this environment, that “[a] lawyer’s and law firm’s reputation increasingly will be the guarantors of professional quality assistance clients hope to receive, and private actions against lawyers who fail to meet the promised standard are likely to replace formal discipline as the principal regulator of lawyer activity.” Morgan, *supra* note 97, at 231.

155. Morgan, *supra* note 97, at 61.

opportunities.<sup>156</sup> Presumably, the world belongs to experts whose judgment is not clouded by a fastidiousness about following the law.

Much of Morgan's book correctly emphasizes the necessity and inevitability of change. But Morgan's arguments sometimes seem to reflect an odd view of the work that lawyers do and have always done. For example, Morgan seems to assume that practitioners in the past made their living by giving legal advice *in vitro*, that is, that the advice they gave was abstract and rendered without any deep appreciation of context, let alone an understanding that the client's goal was to solve a real-life problem, rather than some purely legal puzzle or proof. In the future, Morgan predicts, "the interaction of law with increasingly complex economic and social issues will make distinctively legal questions less common and [will] make many of the skills honed in law schools less relevant."<sup>157</sup> "Rather than needing professionals whose understanding of law dwarfs their understanding of the substantive issues faced by clients, the world will require legally-trained persons to be more fully integrated into the substantive challenges today's clients face."<sup>158</sup> What Morgan says is clearly correct, but most experienced practitioners would not find it new.<sup>159</sup>

If by a "distinctively" legal problem Morgan means to describe a "purely" legal problem, it is difficult to imagine that such questions ever existed, at least outside the four walls of a law school classroom. What Morgan describes as the world of the future is what the successful practice of law has always entailed. The trusted business lawyer was one who had a strong understanding of law, but he was trusted mainly because he also understood the real world. He understood the context of his client's business and the particular challenges that his client faced; his advice was valuable because it was practical and rooted in his

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156. *See id.* at 59-61.

157. *Id.* at 15.

158. *Id.*

159. In this sense, "experience" may not be quite the burden that Morgan thinks it to be. *See id.* at 72.



understanding of business as well as law. The trusted admiralty lawyer knew about the sea and ships and often had been to sea himself. The trusted securities lawyer knew as much about the folkways and byways of the securities markets as she did about the relevant law. The trusted intellectual property lawyer understood science and engineering. The trusted university lawyer was trusted because she understood the ways of her university client in particular as well as those of universities in general. The trusted family lawyer was one who could call on an understanding of psychology and accounting, and, sometimes, the art of persuading the police and the judiciary to take emergency actions they might be reluctant to take, but which were necessary to preserve the interests, and even the life or physical safety of her client.

Wise counselors were never prized simply because they had the kind of intellectual ability that translates into membership on the law review; their advice was prized because they were wise men and women who knew the relevant law, but mostly because they understood the nature of their clients' businesses and experiences. As Morgan says, lawyers who cannot provide nonlegal insights will find that their phone stops ringing,<sup>160</sup> but that has always been the case. Karl Llewellyn made the point many years ago, as Morgan notes: the successful lawyer must "know[] . . . the life of the community, the needs and practices of his client[,] . . . the *working situation* which he is called upon to shape *as well as* the law with reference to which he is called upon to shape it."<sup>161</sup>

Of course the world changes, and there may be new areas of expertise that will be necessary for the successful practice of law in the future. The American business lawyer working in Japan undoubtedly will provide more effective representation to her American client if she has as good a grasp of the Japanese language as she has of Japanese commercial and competition law. She will be more effective

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160. *See id.* at 134.

161. *Id.* at 184 (quoting KARL E. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 16 (1960)).

still if she has a good knowledge of Japanese culture and business practice in addition to a sound knowledge of U.S. law and the realities of her client's business. To provide that kind of representation, she will probably need the assistance of others, but she certainly must know enough to act appropriately and in accordance with local commercial and social practice, to ask the right questions, and to listen to the answers in an informed way. Perhaps even more important, the small-town lawyer in western Virginia or western Ohio may face the same challenges. She may well have a client who needs to do business in China. She cannot hope to know enough to represent the client by herself, but she risks losing the client altogether if she does not know enough to guide him, with help from others, through the maze of problems he faces. She is not likely to be effective in representing her small-town manufacturer client who trades in China if she has only the "routine" "small-town lawyer" education that Morgan seemingly thinks adequate for her.

The so-called "hemispheres"<sup>162</sup> of legal practice do not work in quite the way that Morgan's model suggests. Small-town lawyers sometimes need to know something about foreign law, and at least one graduate of the William Mitchell College of Law has become Chief Justice of the United States.<sup>163</sup> Neither of those facts is to be regretted. Both should be applauded as emblematic of the kind of dynamic and egalitarian profession that is one important mark of a democratic society.

What particularly interests Morgan, however, is large-scale, transnational lawyering, whether done in-house or at a large law firm. Indeed, the bulk of the book is devoted to that part of the legal sector, its particular problems, and the steps it must take to "achieve . . . dominan[ce]" in the new global environment.<sup>164</sup> For Morgan, that is where the action (and the money) is; it is also the area that he regards as

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162. *Id.* at 110-11.

163. See Donn McLellan, *In Memoriam: A Tribute to Chief Justice Warren E. Burger: Biographical Profile*, 22 WM. MITCHELL L. REV. 3, 3-4 (1996).

164. MORGAN, *supra* note 97, at 166.

least congenial to the traditional values of lawyering and professionalism.

Morgan's view of legal education builds upon his view of practice. There are several objections to it. First, Morgan's view of legal education is convincing only if one truly believes that lawyers have no special obligations to the public. In a society built on the rule of law, but often ignorant of the most basic principles of democratic government, denying that lawyers have a special responsibility seems an extravagance. Second, Morgan's view assumes that a narrowly specialized education best serves the student's—and the client's—interest, but, as Morgan also recognizes, lawyers with a broader perspective are likely to be more successful.<sup>165</sup> Among other things, lawyers regularly draw on analogies from other areas of law. The fewer areas of law one knows anything about, the less one has to draw on. Third, a narrowly specialized legal education might make sense if students went to law school knowing that they wanted to specialize in a particular area and could be assured that jobs in that area would exist both when they entered the legal workforce and for the longer term.<sup>166</sup> Unfortunately, most students do not go to law school with a firm intention to follow a particular subspecialty, and those who do are very likely to change their minds, either before graduation or after they have had some taste of that subspecialty in practice.<sup>167</sup> Furthermore,

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165. *See id.* at 208-10.

166. *See Career Center: Practice Area Survey Results*, ABOVE THE LAW (Apr. 7, 2010, 12:02 PM), <http://abovethelaw.com/2010104/career-center-practice-area-survey-results> (“Almost half of law student respondents [to a survey asking about how the economy has affected practice area choices] indicated that their practice area choices have been affected by market conditions, with litigation the new top choice among law students.”).

167. *See* Richard L. Abel, *Choosing, Nurturing, Training and Placing Public Interest Law Students*, 70 *FORDHAM L. REV.* 1563, 1567 (2002) (noting that many who enter law school hoping to serve the public interest end up switching to more lucrative specialties); *see also Changing Practice Areas*, *FINDLAW*, [http://www.infirmation.com/articles/one-article.tcl?article\\_id=2506](http://www.infirmation.com/articles/one-article.tcl?article_id=2506) (last visited Mar. 18, 2014) (“In a lot of respects, the path attorneys take to joining a particular practice area is nothing short of insane. Most attorneys interview for summer associate jobs, take the best summer job they can get, and join a particular firm without much thought to what practice area they will be in.”).

it is extremely difficult to predict that jobs in a particular subspecialty will be available.<sup>168</sup>

Perhaps most important, however, are the advantages that such a system creates for those who are already advantaged, together with the disadvantages that it perpetuates for those who come from more modest circumstances. Students who lack social capital are not likely to begin their studies with the kind of backgrounds that will ensure them a fast start in legal study, let alone with a knowledge of the world of law and business that allows them to come to legal study knowing what kind of legal work they want to do when they have secured their education. If there are such students who know precisely what they want to do when they complete their studies, they probably are the children of lawyers and business people and others who, because of their backgrounds, have already seen a fair slice of the world of business and commerce. In the past, however, many successful business lawyers have come from modest beginnings and have known very little of the world of business when they began their studies.<sup>169</sup> It was the breadth of the law school curriculum and the opportunity to learn about many different subjects from many different professors that put them on paths that they would not otherwise have known to exist.<sup>170</sup>

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168. “[The] original practice area interest of [selected law school respondents] was 46% corporate, 23% litigation, 18% real estate, 4% bankruptcy, 3% employment, 3% tax, [and] 2% trusts and estates.” *Career Center: Practice Area Survey Results*, *supra* note 166. Due to shifts in market conditions, however, those same law school respondents later expressed the following practice area interests: “67% litigation, 47% corporate, 40% bankruptcy, 29% employment, 27% real estate, 22% trusts and estates, [and] 19% tax.” *Id.* The “percentages add up to more than 100% because respondents” were permitted to express interest in more than one practice area. *Id.*

169. *The Undergraduate Education for a Corporate Law Career*, VAULTBLOGS (Mar. 10, 2009), <http://www.vault.com/blog/vaults-law-blog-legal-careers-and-industry-news/the-undergraduate-education-for-a-corporate-law-career> (“Certainly, many successful lawyers enter law school with little to no prior study of business, finance or law.”).

170. For that reason, students may be advantaged in general by a shorter curriculum in the sense that a legal education will cost less. On the other hand, those who are likely to benefit the most are not the students with the greatest need, but those who come from the most privileged backgrounds and come to

Morgan recognizes that law schools supplanted apprenticeships because law schools were able to teach law in a more systematic way, not being dependent on the vagaries of an individual lawyer's caseload or pedagogical inclination.<sup>171</sup> According to Morgan, what law schools are good at doing is teaching of that kind.<sup>172</sup> Morgan has little interest in the kinds of skills training championed by the MacCrate and Carnegie reports.<sup>173</sup> Law schools are not particularly good at that kind of teaching, Morgan argues, and can provide it only at great cost.<sup>174</sup> Moreover, even purporting to draw up a list of skills that all lawyers should have is a fool's errand because such lists are premised on the false assumption that there is a unitary legal profession that students will join when they graduate. In Morgan's view, the skills championed by the MacCrate Report will be useless to many—perhaps most—law graduates.<sup>175</sup> Most of his “business consultants” would better spend their time studying comparative law or learning languages or taking business school classes. Indeed, many will have profited more from what they learned in their preprofessional training than from what law school has to offer.<sup>176</sup> Thus, the

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legal study with a leg up, though they sometimes lose that advantage over the three-year course, assuming that the law school is doing its job. Soia Mentschikoff was fond of saying that the true test of a law school was not the competence of its best students, but the competence of those at the bottom of the class. Today we might put it differently, that is, that the test of a law school is not what it does to educate those who come with the greatest advantages, but those who come with the least. We do not necessarily argue here in favor of a three-year curriculum, but simply suggest that the choice may be more complicated than some proponents of a shorter curriculum have suggested.

171. See MORGAN, *supra* note 97, at 187-88.

172. Morgan suggests a number of things that all legally trained persons should know; the list is wise, if somewhat conventional. See *id.* at 178-84. However, Morgan also suggests that the knowledge represented by this list can be imparted in a brief period of time. See *id.* at 214 (advocating that law school be shortened to two years).

173. For a description of these reports, see MACCRATE REPORT, *supra* note 88; CARNEGIE REPORT, *supra* note 88.

174. See MORGAN, *supra* note 97, at 210.

175. See *id.* at 182-84.

176. See *id.* at 185.

changes urged by the MacCrate and Carnegie reports “point legal education in substantially the wrong directions and have seemingly ignored what is happening to the legal profession itself.”<sup>177</sup>

To be effective, as Morgan suggests, lawyers need to have skills and knowledge beyond what is taught in law school, whether that be science or engineering for intellectual property lawyers, foreign language proficiency and cultural knowledge in the case of international lawyers, or navigation in the case of admiralty lawyers.<sup>178</sup> Yet legal employers today do regularly complain about the skills levels of current law graduates, and the list of skills found wanting usually correlates with those contained in the MacCrate and Carnegie reports.<sup>179</sup>

How will students acquire the skills that employers believe they need if law schools are not the proper venue for learning them? Only a limited amount of mentoring occurs in the large firms because it is so expensive.<sup>180</sup> When one combines the billing rates of the potential mentors with those of the neophyte lawyers to be mentored, the

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177. *Id.* at 200.

178. *Id.* at 211-12.

179. *See, e.g.*, Tom Hentoff, *The Secrets of Superstar Associates*, LITIG., Spring 2006, at 24, 24 (noting that young associates with the ability to succeed at important assignments are in “agonizingly short supply”); Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 338 (2011) (survey of judges finding that “law schools should provide more course work oriented to instilling practice-oriented skills”); Viator, *supra* note 6, at 741 (noting that judges and firms’ hiring partners “criticize the lamentable writing of modern law students”).

180. *See, e.g.*, Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 281 (2000) (examining how short-term metrics contribute to the decline of mentoring, adversely affecting junior attorneys, as well as their clients); David E. Van Zandt, *Client-Ready Law Graduates*, LITIG., Fall 2009, at 11, 11 (“[I]ncreased leverage pressures . . . necessitate that their newer associates do, in fact, work with clients and lead teams from the beginning of their tenures. . . . As a result, the traditional training method of associate-partner mentoring gets sacrificed.”).

opportunity costs of mentoring are substantial.<sup>181</sup> It is not surprising that law firms wince at the idea of teaching recent graduates to draft interrogatories or write a brief at a combined cost of what may amount to more than \$1000 an hour. Indeed, the cost of the partner's time is often dispositive in itself. In other practice venues, the chief impediment to mentoring is not the value of time, but time itself. Quite simply, senior-level government and public interest lawyers in resource-stretched offices often do not have the time to mentor younger lawyers.

According to Morgan, the answer to this problem may well rest with the very law firms that have thus far shunned mentoring.<sup>182</sup> Morgan imagines a modified apprenticeship system in which recent graduates accept lower salaries in exchange for more mentoring.<sup>183</sup> Few debt-saddled law graduates have indicated an interest in such a model. Nor have many firms. Howrey, which Morgan holds up as a model in this respect, vanished shortly after the book was published.<sup>184</sup> It is the value of the mentor's time that makes mentoring undesirable for employers.<sup>185</sup> Furthermore, law firms do not work with the kind of regularity with which law schools function. Circumstances continually change in the practice of law; meetings are postponed; emergencies intervene.<sup>186</sup> Despite the best of intentions, the reduced-wage associate may well receive

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181. Big law partners may charge as much as \$1250 per hour. See Vanessa O'Connell, *Big Law's \$1,000-Plus an Hour Club*, WALL ST. J., Feb. 23, 2011, at B1.

182. MORGAN, *supra* note 97, at 163-64.

183. *Id.* at 164.

184. *Id.* Michael J. De La Merced, *Howrey Law Firm Dissolves After Slow Bleed of Partners*, N.Y. TIMES DEALBOOK (Mar. 10, 2011, 4:26 PM), <http://dealbook.nytimes.com/2011/03/10/howrey-law-firm-dissolves-after-slow-bleed-of-partners>.

185. See Fortney, *supra* note 180, at 281.

186. See, e.g., Edward M. Slaughter & K.C. Ashmore, *Can I Bill For This? A Call for Mentoring in the Modern Law Firm, Defense Ethics and Professionalism*, FOR DEFENSE, Dec. 2008, at 74, 81 ("The pressures of modern practice make it difficult for law firms to foster the kind of mentoring relationships that ensure these needs are met.").

very little additional mentoring in exchange for her reduced wages, and the mentoring she receives will likely come from underutilized lawyers, rather than from the firm's most talented practitioners or most effective mentors.<sup>187</sup> That would be consistent with the experience of many law firm associates who have opted for reduced hours at reduced pay, only to learn that they had effectively signed on for virtually full-time scut work at part-time pay.<sup>188</sup>

Morgan acknowledges that lawyers did much good work for the public while operating under the mistaken idea that it was part of their collective identity or "professional" responsibility, and he sees no reason why that should not continue in the future, even when the "professionalism" scales have fallen from their eyes.<sup>189</sup> Looking back at past efforts to foster professionalism, one must acknowledge that more was involved than hollow phrases. Efforts to improve the law's rationality and fairness, to eliminate invidious discrimination, to improve the efficient administration of justice, and to enhance opportunities for all of our citizens have occupied the public careers of many of the nation's finest lawyers, often at real personal cost to themselves.<sup>190</sup>

But there is no reason to believe that such work, in all its variety and diversity, necessarily will continue, let alone that it will continue to be done in the same spirit of the public interest.<sup>191</sup> Many of the lawyers who did the work

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187. See Paul H. Burton, *What Money Can't Buy: Organic Mentoring in Law Firms*, ARIZ. ATT'Y, Mar. 2007, at 13, 13 ("Organic, mano a mano mentoring is all but extinct in today's frenetic legal environment.").

188. See William D. Henderson & David Zaring, *Young Associates in Trouble*, 105 MICH. L. REV. 1087, 1106 (2007) ("Firms may persuade associates to stay longer by requiring shorter hours, being family friendly, and increasing opportunities to obtain partnerships. But it is unclear that profit-maximizing firms—or, more accurately, firms seeking to retain rainmaking partners—would be likely to do so.").

189. MORGAN, *supra* note 97, at 69.

190. See generally KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012).

191. That such work will be done in the public interest, rather than for the benefit of lawyers and their clients, is a demanding ideal to put into practice. See, e.g., Alex Elson & Michael Shakman, *The ALI Principles of Corporate Governance: A Tainted Process and a Flawed Product*, 49 BUS. LAW. 1761, 1765



Morgan admires were formed and educated, in Philip Jackson's sense, by the values of a profession that understood itself to be so defined and obligated.<sup>192</sup> It is possible that some part (but certainly not all) of this work will appeal to Morgan's "business consultants." But one wonders what, if anything, will anchor the admittedly demanding requirement that this work should be done, not for private advantage, but for the public interest. Clearly, it is not enough to say that "all citizens have a moral obligation to devote their best efforts to using their skills in ways that contribute to the public interest."<sup>193</sup>

## B.

Brian Z. Tamanaha's book, *Failing Law Schools*, addresses the current "costs" and financial pay-offs of a legal education.<sup>194</sup> As Tamanaha explains, "[t]his book challenges fundamental economic aspects of the operation of law schools, although I do not go deeply into pedagogical issues. What got us into this position is our hunger for revenue and chase for prestige."<sup>195</sup> For most people,

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(1994) (measuring the American Law Institute's principles of corporate governance project against the Institute's traditional view that client interests must be "[l]eft . . . at the door") (quoting Rita Henley Jensen, *Navigating Turbulent Waters at ALI: The American Law Institute Brings Its Corporate Governance Principles to Harbor*, NAT'L L.J., Aug. 9, 1993, at 1)). Once the spirit of professionalism is exorcised, however, there is no reason to believe that even the motivation for acting in the public interest will persist.

192. See JACKSON, *supra* note 89, at 94; see also Harry T. Edwards, *Renewing Our Commitment to the Highest Ideals of the Legal Profession*, 84 N.C. L. REV. 1421, 1422, 1429 (2006) (arguing that "global, economic, technological, and demographic changes should neither determine nor even affect the fundamental values of the legal profession," and that "when students graduate from law schools, they should have more than a good understanding of the ethical [and pro bono] standards of [the] profession").

193. MORGAN, *supra* note 97, at 69.

194. See generally TAMANAHA, *supra* note 63.

195. *Id.* at xii. Tamanaha views the law schools' "hunger for revenue" as a recent phenomenon fueled by faculty self-interest, which presumably is manifested in higher salaries, useless research, and a decrease in teaching loads, all of which are responsible for the need for additional faculty. See *id.* at xii, 62-68. Almost fifty years ago, however, Dean John Ritchie of the Northwestern Law School hazarded a series of predictions about the future

according to Tamanaha, legal education is simply a bad investment.<sup>196</sup> His goal, then, is to “expos[e] the disconnect between the cost of a legal education and the economic return it brings and find[] ways to fix it.”<sup>197</sup> In Tamanaha’s view, the high cost of a legal education is attributable to “the costs and consequences of [law professors’] academic pursuits”<sup>198</sup> and the fact that “two generations of law students have been *willing* and *able* to plunk down whatever law schools charged.”<sup>199</sup> The lesson is clear: “The economic model of law school is broken,”<sup>200</sup> and until the current models of legal education are altered, there is no

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shape of legal education, not based on faculty self-interest, but on what he took to be the requirements of a sound legal education for the practice of law. John Ritchie, *Legal Education in the United States*, 21 WASH. & LEE L. REV. 177, 181-87 (1964). Ritchie predicted “a substantial increase” in faculty-to-student ratios, resulting from a pedagogically justified and “insistent demand for relatively small classes.” *Id.* at 184-85. “Reducing the size of classes,” he observed, “will, of course, require an increase in the size of the faculty.” *Id.* at 185. He also predicted “a substantial increase in the funds allotted . . . for legal research,” as well as a greater emphasis on interdisciplinary and empirical work. *Id.* And Ritchie focused on a theme briefly touched on by Tamanaha, namely, the tension between theory and practice. See TAMANAHA, *supra* note 63, at 54-55; Ritchie, *supra*, at 186. As his “last guess,” Ritchie predicted

that the divergent views on the relative importance of training in practical skills and in legal theory that have characterized legal education . . . since colonial times, will continue . . . . But the Jeffersonian view of the relevance of social science materials in training students . . . seems to be steadily gaining support and . . . will attain ascendancy over the Story-Langdell insistence that law students’ attention should be focused exclusively on “Legal materials.”

Ritchie *supra*, at 186. Ritchie’s observations suggest that the explanations for law faculty expansion, reduced teaching loads, increased emphasis on scholarship, and the inherent tensions between theory and practice, are more complex than Tamanaha’s economic analysis would suggest, perhaps even originating in the roots of the profession and in honest efforts to grapple with the demands of providing a quality professional education.

196. See TAMANAHA, *supra* note 63, at x-xi.

197. *Id.* at xi.

198. *Id.* at 54.

199. *Id.* at 132.

200. *Id.* at x, 105.

hope to “rectify the warped economic arrangement that law schools have created.”<sup>201</sup> In other words, the problem is cost.

Tamanaha is obviously correct, not in the sense that cost is the only problem (let alone the simple one that he describes), but in the sense that the cost of legal education, like that of all higher education, is indeed a serious problem.<sup>202</sup> There are many reasons for the high cost of higher education. The declining public support for public universities is part of the problem;<sup>203</sup> so, too, is the decline in endowment income that accompanied the onset of the Great Recession. The general inadequacy of education at all levels and the unequal distribution of educational opportunity also come into play.<sup>204</sup> Tamanaha’s book is ultimately

201. *Id.* at 182.

202. As Tamanaha explains, the problem begins with undergraduate education. “From 1985 to 2009, tuition increased by 327 percent at private undergraduate institutions and by 375 percent at private law schools. . . . Total student debt[] [accounting for both undergraduate and postgraduate education] has increased 511 percent since 1999.” *Id.* at 129. The problem is not limited to law students, but to students in many fields that require postgraduate education, such as social workers, clergy, English teachers, veterinarians, and scholars in the humanities. Many fields require expensive postgraduate education but provide uncertain employment prospects and afford modest compensation even to those who can find employment. See *Graduate School in the Humanities: Just Don’t Go*, CHRON. HIGHER EDUC. (Jan. 30, 2009), <http://chronicle.com/article/Graduate-School-in-the/44846>.

203. Declining taxpayer support for public higher education, which reflects a lack of social consensus about public higher education as a public good, is at least partially responsible for higher tuition. See Gary Fethke, *Why Does Tuition Go Up? Because Taxpayer Support Goes Down*, CHRON. HIGHER EDUC., Apr. 6, 2012, at A28; see also Sandy Baum & Michael McPherson, *Is Education a Public Good or a Private Good?*, CHRON. HIGHER EDUC. (Jan. 18, 2011), <http://chronicle.com/blogs/innovations/is-education-a-public-good-or-a-private-good/28329> (“Higher education is not a pure public good. It is clearly possible to exclude people who do not pay. What people who call education a public good mean is that there are positive externalities—not all of the benefits accrue to the students.”).

204. See, e.g., Meredith Phillips & Tiffani Chin, *School Inequality: What Do We Know?*, in SOCIAL INEQUALITY 467, 510 (Kathryn M. Neckerman ed., 2004) (“[A]t the beginning of the twenty-first century disparities in teachers’ education, credentials, experience, subject matter knowledge, and cognitive skills continue to favor white and nonpoor schools.”); Adam Gamoran, *What Will Decrease Educational Inequality?* WIS. CENTER FOR EDUC. RESEARCH, [http://www.wcer.wisc.edu/news/coverStories/decrease\\_ed\\_inequity.php](http://www.wcer.wisc.edu/news/coverStories/decrease_ed_inequity.php) (last visited Jan. 29, 2011) (assessing socioeconomic bases for the educational inequality between

disappointing, not because it is about costs, but because it is only about costs. As noted, it is not part of Tamanaha's plan to "go deeply" into the pedagogical concerns or imperatives of legal education. He seems to think that the discussion can proceed without considering what law schools are—or should be—trying to accomplish pedagogically.<sup>205</sup> He also seems to think that we need not consider the work that lawyers do, the role that they play in society, or how they can be prepared most effectively for what they do.<sup>206</sup> But cost is not an independent variable, and cost cutting is not an exercise that can be undertaken without considering the necessary qualities of the product one wishes to produce or the conditions under which it must be produced.

Tamanaha's book may suffer from the critical assumption that the value of a legal education can be measured only in terms of an individual consumer's anticipated financial return, but the book has much value nonetheless, as a consumer's guide to legal education.<sup>207</sup> Tamanaha has gathered a wealth of useful and valuable

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whites and minorities). *See generally* JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* (2005); JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* (2010).

205. *See, e.g.*, Sullivan & Podgor, *supra* note 94, at 151 ("The teaching of professionalism is critical to the health of the legal profession and the society it serves."); *see also* Patrick E. Longan, *Teaching Professionalism*, 60 *MERCER L. REV.* 659, 699 (2008) ("Teaching first-year law students about professionalism is important. In the end, of course, this instruction must have a central purpose: to make it more likely that the next generation of lawyers will practice with professionalism.").

206. The extent of Tamanaha's emphasis on costs is somewhat reminiscent of the literature on "cost disease," often applied to aspects of civil society that traditionally fall in the public domain, and for a long time were considered immune from market pressures. For recent examples of this form of analysis, *see generally* ROBERT J. FLANAGAN, *THE PERILOUS LIFE OF SYMPHONY ORCHESTRAS: ARTISTIC TRIUMPHS AND ECONOMIC CHALLENGES* (2012) (following in the footsteps of the classic study in the field, WILLIAM J. BAUMOL & WILLIAM G. BOWEN, *PERFORMING ARTS: THE ECONOMIC DILEMMA* (1966)); as well as the study of the neoliberal transformation of basic scientific research in PHILIP MIROWSKI, *SCIENCE-MART: PRIVATIZING AMERICAN SCIENCE* (2011)). Needless to say, American universities have come under similar scrutiny and pressures.

207. *See* TAMANAHA, *supra* note 63, at 145-59.

data, statistics, and information on law schools, from admissions to tuition to employment prospects and debt burdens.<sup>208</sup> He explains how the schools assemble the metrics and is appropriately critical of the lack of transparency with which law schools shape and disseminate information, to say nothing of the brazen distortions and misrepresentations that some of them have sometimes employed.<sup>209</sup> Anyone seeking to understand the factors contributing to the costs of legal education or the processes by which law schools gather and present their numbers will find this study useful. Moreover, Tamanaha is right about the effects of cascading student debt: the luckier students may feel compelled to accept an otherwise undesirable position simply because it will facilitate loan repayment, while the least fortunate may not find any job that will allow them to do that.<sup>210</sup>

On the other hand, Tamanaha's analysis is largely untethered from any vision of what an optimal legal education might entail, let alone the relationship of such an education to the demands placed on the legal profession in a democracy. There is little in this book about the public role of lawyers. Tamanaha is dismissive of Michael Olivas's 2011 description, as president of the Association of American Law Schools (AALS), of law as a "public profession," and ridicules the idea that law professors somehow engage in "public service"; educating lawyers could not possibly make a net contribution to society.<sup>211</sup> Tamanaha largely ignores the historical literature on the profession (including the debates over whether law is a public or purely private calling), overlooking how both pressure for change and actual change have regularly occurred in legal education and the profession.<sup>212</sup>

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208. *See id.* at 107-18, 161.

209. *See id.* at 72-78.

210. *See id.* at 77.

211. *Id.* at 29-31; Letter from Michael A. Olivas, President, Ass'n Am. Law Sch., to Hulett H. "Bucky" Askew, Consultant on Legal Educ., Am. Bar Ass'n 3 (Mar. 28, 2011), *available at* <http://www.aals.org/advocacy/Olivas.pdf>.

212. For overviews of the trajectory of historical change in American legal education, see William W. Fisher III, *Legal Theory and Legal Education, 1920-*

In the morality tale that Tamanaha tells, the principal victims are the students: most are incurring great debt for no purpose.<sup>213</sup> The villains are many: the ABA, the AALS, the *U.S. News* law school rankings,<sup>214</sup> elite law schools, the federal loan policies that facilitate law school attendance, pampered law professors (and their unproductive scholarly habits), and law school administrators who are the law professors' enablers or fellow travelers.<sup>215</sup> All allegedly have contributed to an environment in which law schools are not simply failing, but sowing the seeds of their own destruction.

According to Tamanaha, the alarming rise in law school tuition is mainly the product of a self-serving system of

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2000, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 34 (Michael Grossberg & Christopher Tomlins eds., 2008); Hugh C. Macgill & R. Kent Newmyer, *Legal Education and Legal Thought, 1790-1920*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 36 (Michael Grossberg & Christopher Tomlins eds., 2008). For views and analysis of changes over the history of the American legal profession, see ABEL, *supra* note 47; JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950); Robert W. Gordon, *The American Legal Profession, 1870-2000*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 73 (Michael Grossberg & Christopher Tomlins eds., 2008); Alfred S. Konefsky, *The Legal Profession: From the Revolution to the Civil War*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 68 (Michael Grossberg & Christopher Tomlins eds., 2008).

213. See TAMANAHA, *supra* note 63, at 108-25. Tamanaha also expresses concern about the impact that the economics of legal education has on the availability of legal representation, but it is far from clear that his solutions will improve the situation. *See id.* at 170-71.

214. As Tamanaha notes, *U.S. News* is "the surviving rump of a defunct magazine," which now busies itself with ranking educational institutions. *Id.* at 79. It is ironic that the rankings emanate from a company that was apparently unable to succeed in its own core business. While Tamanaha is correct in suggesting that the rankings have caused many law schools to act corruptly, with respect to the reporting of data and so forth, *see id.* at 78-84, it is unlikely that many important decisions would be made differently if law schools were simply competing against each other, rather than competing in the shadow of the rankings. For example, Tamanaha questions the emphasis on merit scholarships as opposed to need-based scholarships, *see id.* at 97-98, but most law schools are likely to use their resources to secure the best-qualified students they can even if *U.S. News* is not looking over their shoulders. While they might be somewhat more creative in evaluating candidates for admission if they did not have to make their LSAT scores a matter of public record, that possibility seems remote, to say the least.

215. *See generally id.* at 7, 107-66.

“self-regulation.”<sup>216</sup> The root of the problem is the law school accreditation standards, which are promulgated and enforced by the ABA (and abetted by the AALS). They require all law schools to meet the same minimum standards, regardless of a school’s individual vision or mission. As a result, “students must pay a premium that attaches to accreditation.”<sup>217</sup> The standards require that law schools operate on a tenure model and “preclude[] law schools from relying more heavily on cheaper adjuncts.”<sup>218</sup>

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216. *See id.* at 8-21.

217. *Id.* at 19.

218. *Id.* at 126. For many years, the accreditation standards promulgated by the ABA Section of Legal Education and Admission to the Bar have included certain provisions relating to security of position for various categories of faculty members. *See* ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2013-2014 Standards 402-04 (2013). In recent years, there has been much discussion, both within the Section of Legal Education and in the broader community, about the desirability of having such provisions included within the standards, what classes of faculty (if any) should be covered by them, and how their language should be interpreted. Currently, Standard 405(a) and (b) provide in general terms that “[a] law school shall establish and maintain conditions adequate to attract and maintain a competent faculty” and that it “shall have an established and announced policy with respect to academic freedom and tenure . . . .” More specifically, Standard 405(c) provides that “[a] law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and noncompensatory perquisites reasonably similar to those provided other full-time faculty members.” The ABA’s official interpretation of Standard 405(c) provides that “[a] form of security of position reasonably similar to tenure includes a separate tenure track or a program of renewable long-term contracts,” meaning a contract of at least five years’ duration that is “presumptively renewable or other arrangement sufficient to ensure academic freedom,” and that “[d]uring the initial long-term contract or any renewal period, the contract may be terminated for good cause, including termination or material modification of the entire clinical program.” *Id.* at Interpretation 405-6. Standard 405(c) also makes clear that it “does not preclude 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.”

In the past, much controversy surrounded the definition and implementation of the “reasonably similar to tenure” language. For example, prior to the adoption of the current interpretation, the Accreditation Committee (which is responsible for determining a law school’s compliance with the standards) took the position that a one-year contract provided security of employment “reasonably similar to tenure.” AALS EXECUTIVE COMMITTEE AND ABA ACCREDITATION POLICY TASK FORCE OPEN FORUM 32-33 (2007), *available at* <http://apps.americanbar.org/>

The problem is exacerbated because academic lawyers (like other university teachers) value the creation of new knowledge. Indeed, universities reinforce that focus by giving substantial weight to scholarly production in decisions concerning promotion, tenure, and

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legaled/AC%20Task%20Force/AC%20Task%20Force%202007%20Open%20Hearing.txt (remarks of Paulette Williams) (“At Northwestern there are 31 full-time clinicians who are on one-year contracts and Northwestern has been found to be in compliance with 405(c).”). Most disinterested observers have found absurd the proposition that a one-year contract provides security of employment “reasonably similar to tenure.” Several other provisions also relate to security of position. Standard 206 provides that “[e]xcept in extraordinary circumstances, a dean shall also hold appointment as a member of the faculty with tenure,” and Standard 603 provides that “[e]xcept in extraordinary circumstances, a law library director shall hold a law faculty appointment with security of faculty position.” Standard 405(d) provides that “[a] law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well-qualified to provide legal writing instruction . . . .” But most universities have tenure systems in place that would cover some of these categories of law school faculty, without regard to the ABA’s standards. Thus, the most immediate practical effects of the ABA requirement have been (a) to require law schools that are not part of a university to adopt systems “reasonably similar to tenure,” and (b) in the case of other law schools, to specify which categories of faculty are entitled to which sorts of protection.

The wisdom of these provisions is open to debate, both in themselves and as accreditation standards, and there is much ongoing discussion about them. Certainly, there is an argument to be made in favor of granting more autonomy to law schools. On the other hand, it may be argued that some of the requirements are so central to minimum quality concerns and the nature of the academic enterprise that uniformity is desirable. It is frequently argued that these requirements add significantly to the cost of a legal education. But that proposition remains contested. To be sure, these requirements occasionally protect faculty who, for one reason or another, are underperforming. Economic analysis, however, would suggest that it would cost more to hire top-flight faculty without offering them some form of job security than it would be to hire them with it. Tamanaha is correct in noting that the accreditation standards for other professional schools do not impose such requirements. *Cf.* TAMANAHA, *supra* note 63, at 31. Those who support the requirement would doubtless suggest that the analogy is flawed because most other professional education takes place in schools that are part of a university and that the nature of law makes the protection of academic freedom a more real concern for law teachers than for some others. *See* Brian Leiter, *Should the ABA Require Faculty Tenure for Accreditation?*, BRIAN LEITER’S LAW SCHOOL REPORTS (Aug. 12, 2013), <http://leiterlawschool.typepad.com/leiter/2013/08/should-the-aba-require-faculty-tenure-for-accreditation.html>.



compensation.<sup>219</sup> Scholarly production is also the way to be noticed (and recruited) by higher-ranked institutions. Unlike some other fields, however, legal scholarship seldom finds outside support. Law schools therefore typically subsidize faculty research through endowment income and tuition.<sup>220</sup> Moreover, many law schools have reduced teaching loads to permit greater scholarly production.<sup>221</sup> That creates the need for more faculty members, thereby adding to the costs of legal education.<sup>222</sup> To meet those costs, law schools must increase endowment, increase tuition, increase enrollments,<sup>223</sup> or, most likely, do all three.

Tamanaha claims that faculty scholarship does not merit such support because little of it is useful to the bench and bar or even cited by other scholars.<sup>224</sup> In addition, he suggests that law schools act from impure motives: they support scholarship because it adds to the law school's "reputation"—an important but illusive factor in the rankings.<sup>225</sup> Others have also questioned the value of legal

219. See TAMANAHA, *supra* note 63, at 42-44.

220. See, e.g., Bourne, *supra* note 6, at 692-93 (arguing that "forty percent of faculty salaries go into [faculty scholarship]," and these salaries are funded by student tuition); Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 139, 145 (2008) ("The cross-subsidy from student tuition to faculty research remains substantial.").

221. See TAMANAHA, *supra* note 63, at 40-44.

222. See *id.* at 44.

223. Of course, increased enrollments result in the production of more law graduates competing for a smaller number of jobs. See LAW SCH. ADMISSION COUNCIL & AM. BAR ASS'N, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 866 (2013); available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_official\\_guide\\_aba\\_approved\\_schools.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_official_guide_aba_approved_schools.authcheckdam.pdf) (stating overall JD enrollment has increased from 119,847 in 1984-1985 to 144,288 in 2011-2012); Hannah D'Apice, *June Jobs Report: Legal Industry Continues to Shrink*, AM LAW DAILY (July 8, 2011, 6:34 PM), <http://amlawdaily.typepad.com/amlawdaily/2011/07/junejobsrepor.html> (noting simultaneous increase in lawyers and decrease in lawyer jobs).

224. See TAMANAHA, *supra* note 63, at 55-60.

225. See *id.* at 85; Judith Welch Wegner, *Reframing Legal Education's "Wicked Problems,"* 61 RUTGERS L. REV. 867, 949 (2009) (suggesting that law schools are constantly striving "to improve how they are regarded within . . . the hierarc[hyl]"); Sam Flanigan & Robert Morse, *Methodology: Best Law Schools Rankings*, U.S. NEWS & WORLD REPORT (March 11, 2013), <http://www.>

scholarship, usually on the ground that much (or most) of it is too abstract and too far removed from the problems that judges and lawyers are required to solve.<sup>226</sup>

But perceptive observers have argued that such views are based on too narrow an understanding of usefulness.<sup>227</sup> Moreover, much scholarly work does concern problems actually faced by lawyers and judges and contributes directly to law reform.<sup>228</sup> Indeed, such contributions are particularly critical now, when many practitioner

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usnews.com/education/best-graduate-schools/top-law-schools/articles/2013/03/11/methodology-best-law-schools-rankings (explaining that so-called peer assessment (25%) and assessment by lawyers and judges (15%) account for 40% of a law school's weighted average). While Tamanaha complains that tuition dollars are being invested in efforts to increase the reputation of the school, students and alumni clearly benefit if such a strategy is actually successful. See TAMANAHA, *supra* note 63, at 126. *But see* David C. Yamada, *Same Old, Same Old: Law School Rankings and the Affirmation of Hierarchy*, 31 SUFFOLK U. L. REV. 249, 262 (1997) (explaining that rankings simply confirm long understood hierarchy of institutional prestige).

226. Tamanaha notes that Judge Harry Edwards and Chief Justice John Roberts have taken the same position. TAMANAHA, *supra* note 63, at 55-56. There is also empirical support for proposition that the current Justices cite legal scholarship less frequently than their predecessors. *See, e.g.*, Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399, 408-09 tbl. 1 (2012) (giving an empirical analysis that shows that the current Justices cite law review articles less frequently than their predecessors).

227. *See, e.g.*, Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1928 (1993) (arguing that Judge Edwards's criteria for worthwhile scholarship are excessively narrow); *see also* Anthony T. Kronman, *Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 969 (1981) (arguing that legal scholarship helps law professors meet their responsibility as moral educators, as it assists the professor in "achiev[ing] a better understanding of his own vocation and its meaning"); Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1330 (2002) (arguing that for scholars in a professional school, "at least part of the mission is to advance understanding and promote improvement of their profession and its institutions," which "includes all of the contexts in which law is developed, enforced, interpreted, and practiced").

228. *See, e.g.*, Carol S. Steiker, *Promoting Criminal Justice Reform Through Legal Scholarship: Toward A Taxonomy*, 12 BERKELEY J. CRIM. L. 161, 176 (2007) (setting forward a nonexhaustive sketch of how "legal scholarship can—and does—contribute to the reform of criminal justice."); *see generally* WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

interventions may reflect their clients' self-interest, rather than any independent assessment of the public interest.<sup>229</sup> It may be, of course, that much of the most immediately useful work is not being done at the most prestigious schools or being published in their journals.

Tamanaha also takes aim at the effect of increased faculty salaries on tuition.<sup>230</sup> Tamanaha's concern is justified, but his is a peculiar complaint for a believer in markets. To be sure, increases in faculty salaries must be paid for—by increased endowment income or by increased tuition revenues. But increases in faculty salaries are the product of the market for human capital. Here, the elite law schools act as the ultimate salary pacesetters, vying with one another for the best-known scholars.<sup>231</sup> However, the competition goes down as far as law schools can afford it, and law school salaries reflect the impact of competition virtually throughout the system.<sup>232</sup>

But much of the higher cost of law school is also attributable to improvements in legal education, on the one hand, and to consumer choice, on the other. The need for significant improvements in legal education was obvious as early as 1964, when Dean John Ritchie of Northwestern

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229. See, e.g., Elson & Shakman, *supra* note 191, at 1765-66 (suggesting the ALI's principles of corporate governance depart from its traditional view that members "leave their clients' interests at the door"); Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 54 (2004) (reporting the attention paid by an overwhelming majority of Supreme Court clerks to an "academically oriented" amicus brief filed by "a prominent academic [who] takes a disinterested view.").

230. TAMANAHA, *supra* note 63, at 52.

231. See, e.g., Clayton P. Gillette, *Law Faculty as Free Agents*, 17 J. CONTEMP. LEGAL ISSUES 213, 218-19 (2008).

232. Many law schools apparently follow a practice of meeting offers that individual faculty members receive from other schools. Thus, the more aggressive faculty regularly negotiate with other schools, not with a view toward moving, but simply for the purpose of making more money where they are. That practice may result in substantial non-merit-based differentials within the faculty. Because conscientious deans shrink from having to administer salary schedules that are grossly unfair, they must decide whether to require everyone to prove his or her auction value or depend on their own judgments, which may include having to raise the salaries of professors who, for one reason or another, are not prone to make a constant test of their value.

Law School offered a number of suggestions for improving legal pedagogy.<sup>233</sup> Prominent among them was the need for smaller classes, higher student-faculty ratios, and more interdisciplinary courses.<sup>234</sup> Shortly thereafter, legal educators began to see the need for clinical and simulation opportunities. In addition, much fundamental rethinking of legal education took place as a result of the pathbreaking contributions of Donald Schön and others to the theory of education for the professions.<sup>235</sup> In combination, these trends and concerns radically changed the nature of legal education in the United States, producing a pedagogical model relying much more heavily on the interaction of small groups of students with professors. Those innovations have been costly, but they have been driven by real pedagogical concerns, not faculty self-interest.

But consumer demand also has been influential in raising the cost of legal education. Law schools do not build law school facilities to meet minimum ABA standards, but to satisfy the high expectations of prospective students. In addition, law students expect—and need—far more extensive student services than in the past.<sup>236</sup> Today's law students are much more diverse.<sup>237</sup> They also need and expect expert assistance in identifying employment opportunities.<sup>238</sup> Many of these changes are good; they

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233. See Ritchie, *supra* note 195, at 181-87.

234. See *id.*

235. See generally DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983).

236. See, e.g., Jennifer Jolly-Ryan, *Bridging the Law School Learning Gap Through Universal Design*, 28 *TOURO L. REV.* 1393, 1418-30 (2012) (arguing that law schools must provide students good counseling, mentoring, support, and a host of other services).

237. See Aaron N. Taylor, *As Law Schools Struggle, Diversity Offers Opportunities*, *CHRON. HIGH. EDUC.* (Feb. 10, 2014), <http://chronicle.com/article/As-Law-Schools-Struggle/144631> ("Today, students of color account for 26 percent of all law students. Ten years ago, the proportion was 21 percent; 40 years ago, it was 10 percent.").

238. Menachem Wecker, *Students Must Take More Active Role in Job Hunt, Law Schools Say*, *U.S. NEWS & WORLD REPORT* (Nov. 30, 2011), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2011/11/30/students-must-take-more-active-role-in-job-hunt-law-schools-say> ("[A] third-year

signify that students who would not have been admitted to law school a generation ago are now being given the opportunity to pursue a career that would have been closed to them. But they also put an additional strain on resources.

For Tamanaha, the economic lesson is clear. Unless you graduate from an elite law school (and the more elite the better), with very little (or at least manageable) student loan debt burden, and are headed to a large firm that pays high salaries right from the start (though those salaries may now be on the decline), law school is probably not worth the investment.<sup>239</sup> The run of law schools are too expensive and force students to accumulate too much debt.<sup>240</sup> Particularly for the graduates of lower- and middle-ranked schools (now conveniently evaluated—or stigmatized—by *U.S. News*), the likelihood of breaking into the elite job market is slim, and the job opportunities and salaries available elsewhere will make it difficult to pay off one's debt and still lead a reasonably comfortable life. With a few exceptions—namely, elites and some public law schools that are still relatively less expensive and deliver quality legal education—the law schools are engaged in a race to the bottom.<sup>241</sup>

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law student . . . admits that his impression upon entering law school was that the school's Career Development Office ought to find him a job.”).

239. See TAMANAHA, *supra* note 63, at x-xi. Recently Tamanaha's assertions about the lack of economic value of a law degree have been placed in considerable doubt across the spectrum of law schools. See Michael Simkovic & Frank McIntyre, *Populist Outrage, Reckless Empirics: A Review of Failing Law Schools*, 108 NW. U. L. REV. ONLINE 176 (2014), <http://www.law.northwestern.edu/lawreview/online/2014/1/Simkovic&McIntyre.pdf>. Simkovic explains the methodology and findings of the study and responds to Tamanaha's reactions on Brian Leiter's blog. See, e.g., Michael Simkovic, *Brian Tamanaha's Straw Men (Part 1): Why We Used SIPP Data from 1996 to 2011*, BRIAN LEITER'S L. SCH. REP. (July 24, 2013, 5:17 AM), <http://leiterlawschool.typepad.com/leiter/2013/07/brian-tamanahas-straw-men-part-1-why-we-used-sipp-data-from-1996-to-2011.html> (the first of numerous guest posts); see also Brian Leiter, *Reflections on "The Economic Value of a Law Degree" and the Response to It*, BRIAN LEITER'S LAW SCH. REP. (July 30, 2013, 4:54 AM), <http://leiterlawschool.typepad.com/leiter/2013/07/the-economic-value-of-a-law-degree-redux-1-1.html>.

240. TAMANAHA, *supra* note 63, at 109-12.

241. *Id.* at 184-85.

It is difficult to know from Tamanaha's account how to assign relative responsibility to the various villains of the piece. After all, even if the ABA regulations were repealed entirely, law schools would still continue to engage in many of the same cost-inflating activities, which are really the product of the rankings rather than regulation.<sup>242</sup> Moreover, even if the rankings vanished, the law schools would still continue to engage in many of these activities because law schools will always compete with one another unless the market becomes so thoroughly oligopolistic as to drive most law schools from the field.

What are Tamanaha's proposed solutions? They focus primarily on ways to reduce costs, and, when possible, stimulate productivity. Perhaps the most important, from Tamanaha's perspective, is to tighten loan eligibility requirements and cap the total federal loan dollars made available to the students of individual law schools.<sup>243</sup> Tamanaha professes agreement with the propositions that "[p]roviding access to legal careers is essential" and that "[t]he legal system will suffer if only the wealthy can attend law school,"<sup>244</sup> but he views the loan programs as a market distortion—an incentive for law schools to continue to ramp up prices, with the results that fewer and fewer students can really afford a legal education and the legal needs of the poor and the middle class will go unmet.<sup>245</sup>

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242. See Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359, 368 (2006) (attributing the "publications war" to the rankings' "academic reputation score"); Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 LAW & SOC'Y REV. 105, 122-25 & tbl. 2 (2006) (showing correlations between changes in rankings, volume of law school applications, and school selectivity ranking). *But see* Rachel F. Moran, *Of Rankings and Regulation: Are the U.S. News & World Report Rankings Really A Subversive Force in Legal Education?*, 81 IND. L.J. 383, 383-99 (2006) (asserting that "any discussion of the market in legal education [is] . . . lopsided when it focuses on the impact of rankings and ignores . . . barriers to innovation" engendered by the ABA accreditation process itself).

243. TAMANAHA, *supra* note 63, at 180.

244. *Id.* at 179.

245. See *id.* at 178-79. But for a thorough criticism of Tamanaha's understanding of "student loan repayment methods," see generally Philip G.

A thoroughgoing public policy analysis of government loan policies would be an interesting exercise. Presumably, the analysis would focus on whether the interest of society is served by subsidizing the opportunity to obtain and acquire the skills necessary for entering a profession, skills that can be put in service of the public, even though the opportunity might come at a substantial cost to the individual. Tamanaha chides “liberal law professors,” who propose social justice agendas in law schools, for participating in an enterprise that rewards them (with high salaries, low teaching loads, and very little supervision), but hinders their students from choosing to assist the poor and the middle class.<sup>246</sup>

Nonetheless, according to Tamanaha, the root of the problem lies in the accreditation standards, which mandate a one-size-fits-all model.

Accredited law schools today have a three-year curriculum taught by law professors who are scholars more than lawyers, while the bar incessantly complains that graduates are inadequately prepared for the practice of law. . . . The proposition that students could be trained for practice solely in law school was wrongheaded from the outset. The best way to learn how to practice law is to actually do it.<sup>247</sup>

To reduce the high cost of legal education, Tamanaha argues, the ABA standards should be adjusted to allow for multiple varieties of legal education.<sup>248</sup> “Academic” law schools emphasizing scholarly pursuits should be allowed to continue their mission. But other law schools should be freed up to educate lawyers in a less costly fashion, perhaps

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Schrag, *Failing Law Schools—Brian Tamanaha’s Misguided Missile*, 26 *GEO. J. LEGAL ETHICS* 387 (2013).

246. TAMANAHA, *supra* note 63, at 35. According to Tamanaha, the practices tolerated in law schools would never be tolerated in the idealized private firms that he imagines operating in a perfect market. Market discipline apparently would prevent such things from happening. But we know all too well that perfect markets do not exist in the real world, that private firms are notorious for rent-seeking, and that they often succeed in passing on the costs of their inefficiencies to consumers.

247. TAMANAHA, *supra* note 63, at 172.

248. *See id.* at 172-73.

by reducing the core term of study to two years or allowing graduates of nonaccredited law schools to take the bar examination.<sup>249</sup>

Tamanaha envisions a world in which legal education is delivered by schools comparable “in program and pricing” to “vocational colleges and community colleges.”<sup>250</sup> A solution that analogizes a subclass of law schools to community colleges obviously envisions a legal profession quite different from that which currently exists in the United States or in most other capitalist democracies. Moreover, a world in which scholarship and proposals for law reform emanate only from a narrow range of elite law schools should also be cause for concern in a large and diverse democracy.

For Tamanaha, it is time to acknowledge what *U.S. News* has already signified and validated, and what everyone has known for a very long time. We have a segmented and stratified law school market from top to bottom, training lawyers to do different legal tasks in different legal markets. Why force all students to be educated under one expensive umbrella, focused on scholarship and costly library and research infrastructures? There should be “[r]esearch-oriented law schools” and “practice-oriented” schools, “staffed by experienced lawyers teaching full time or as adjuncts.”<sup>251</sup> For those institutions continuing on a three-year track, a third year devoted to practice-readiness (with a change in the standards) would revive a version of the long-abandoned apprenticeship method.<sup>252</sup>

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249. *See id.* at 173-76.

250. *Id.* at 174. For a critique of Tamanaha’s proposal, see Jay Sterling Silver, *The Case Against Tamanaha’s Motel 6 Model of Legal Education*, 60 *UCLA L. REV. DISCOURSE* 50, 50 (2012), <http://www.uclalawreview.org/pdf/discourse/60-4.pdf> (concluding that a two-year course of law study would not succeed because of “the pedagogical needs of law students, the interests of the clients of fledgling attorneys, and the role law professors have traditionally played in championing legal reform and the rights of the disenfranchised through enlightened scholarship”).

251. TAMANAHA, *supra* note 63, at 174.

252. *See id.* at 175-76.



One suggestion is that practice-readiness could be accomplished through placements with practitioners,<sup>253</sup> but it is not clear why such an arrangement would suit practitioners or students. Practitioners might be willing to pay a meager wage to students while they learn to practice, but they are unlikely to do so. Like recent graduates, students may prove to be a net drag on operations and they may well leave to work for a competitor. More likely, the firms willing to devote substantial resources to teaching and mentoring students would require payments from either the law schools or the students. In addition, it not clear what kind and amount of mentoring would occur in busy law offices, let alone what uniformity of educational experience could be achieved in quite distinct, idiosyncratic placements.<sup>254</sup>

Another possibility is that law schools will provide more of this training themselves, but that possibility also presents difficulties.<sup>255</sup> The point of requiring law schools to provide more practical training is to shift training costs from employers to the law schools. Each sector of the profession is likely to argue that the skills most needed by

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253. *See id.* at 175.

254. There are approximately 45,000 third-year law students in the United States each year. *See* Jennifer Smith, *Crop of New Law Schools Open Amid a Lawyer Glut*, WALL ST. J., Feb. 1, 2013, at B1. Even if that number were to decrease substantially in coming years, it is difficult to imagine how the requisite number of third-year placements, properly supervised, could be found, given the fact that there are only about 760,000 law “jobs” in the United States. *Occupational Outlook Handbook, Lawyers*, BUREAU LAB. STATISTICS (Jan. 8, 2014), <http://www.bls.gov/ooh/legal/lawyers.htm> (“Number of jobs, 2012: 759,800”). In addition, many of those lawyers practice in geographical locations, practice settings, or professional specialties that might make them unlikely candidates for third-year practice placements. Finally, an even smaller number might be qualified and willing to provide the kind of supervision that is essential to meaningful experiential learning. Unless placements are carefully supervised, students may be exploited or neglected. In order to control the quality of education for practice-readiness, law schools may be faced with very costly and time-consuming responsibilities. *See also* Karl N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV 651, 668 (1935) (“Why worry in the schools about apprenticeship? The men [sic] get it? But how many get it? And with whom? And under what conditions favorable to learning? Do you know? Does anybody?”).

255. *See* TAMANAHA, *supra* note 63, at 174.

neophyte lawyers in that sector are those that should receive the greatest investment by law schools. Otherwise, the costs of doing business in that sector will increase because training costs will not be externalized. It is not necessarily a foregone conclusion, however, that those are the skills that law schools should teach, even to those desiring to work in that sector. What is essential to a student's long-term employment interests is not necessarily the same as the set of skills with which an employer would like to see an entry-level employee equipped prior to his or her start date.

Tamanaha is refreshingly candid about his goal: the creation of "a differentiated legal education system" (really a market) to match or mirror the legal job or career market.<sup>256</sup> He seems to suggest that we actually need two legal professions (or maybe more) trained differently to do different things (perhaps with different values or with different ethical norms and perhaps even defined differently professionally).<sup>257</sup> While the elite bar, the ABA, and law schools succeeded a century ago in creating a set of rules aimed at excluding from the profession people they considered to be socially unworthy, and, failing that, to relegate them to the periphery of the profession,<sup>258</sup> those efforts largely failed. Many of those who had been deemed unworthy eventually came to occupy the top ranks of the profession, and some became champions of a different vision of America, one in which merit mattered more than gender, race, religion, or social class, and one in which graduates of the lowest-ranked schools could ultimately achieve the highest success. Tamanaha would redefine both legal education and the profession to put back in place the social checkpoints that once were so powerful. Indeed, he would make them virtually insurmountable. Ironically, he would do that in the name of increasing access to legal education and to legal services.

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256. *See id.* at 172-76.

257. *See id.* at 174.

258. *See* JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL JUSTICE IN MODERN AMERICA* 40-53 (1976).

The formal segmentation of the profession championed by Tamanaha is profoundly undemocratic; it is certainly contrary to deeply ingrained American values of equality and equal opportunity; and it will certainly restrict social mobility by closing one of the avenues that has been most successful in fostering such mobility. To prescribe that certain kinds of people should be the clients of lawyers who are certain kinds of people also goes a long way toward stigmatizing both clients and lawyers. Over this layer of social and economic “realism,” Tamanaha superimposes a dystopian vision of the creative destruction of some of the traditional roles and functions of the bar, shifting and changing, responding to short-term economic crisis, long-term structural changes, globalization, technology, competition, and so forth. Those who are not called to participate in elite markets will become robotic scribes, mass processing simple and ordinary transactions for people previously deprived of legal services, and receiving low levels of compensation to match their lower tuitions, lower debt burdens, and inescapably lower social status.

In some sense at least, Tamanaha’s argument takes for granted that the elite law schools are doing a great job, presumably because their graduates do well in securing very remunerative entry-level positions.<sup>259</sup> But law schools with the greatest name recognition, the largest alumni networks, and so forth, are destined to have the best job placement and starting salary data. They will also attract the best students, regardless of price. Competition among law schools seems to be driven by the perceived value of the degree rather than by price. Unless their educational programs are demonstrably worse than everyone else’s, they will continue to attract the best students and reward them accordingly.

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259. See Karen Sloan, *The Go-To Law Schools: A Special Report*, NAT’L L.J., Feb. 27, 2012, at 11. But some studies suggest that the graduates of some lower-ranked schools, although employed in smaller numbers by the large firms, actually do as well or better at those firms over the long term. See, e.g., Debra Cassens Weiss, *Do Elite Law Grads Disdain Longtime BigLaw Work? Stats Suggest Lower-Tier ‘Strivers’ Stick Around*, A.B.A. J. (Mar. 12, 2012, 4:30 AM), [http://www.abajournal.com/news/article/do\\_elite\\_law\\_grads\\_disdain\\_longtime\\_biglaw\\_work\\_stats\\_suggest\\_lower-tier](http://www.abajournal.com/news/article/do_elite_law_grads_disdain_longtime_biglaw_work_stats_suggest_lower-tier).

In a world of this construction, they will be deemed the “best” law schools. That may be the way of the world, but it is no reason to say, as Tamanaha seems to do, that there is no point in having upstart schools nipping at the heels of their elite sisters, that we should freeze the frame where we are, declare the competition concluded, and award the prizes and the riches—institutional and individual—to those who have already succeeded.<sup>260</sup>

As Tamanaha would have it, those who do not gain admission to an elite law school, but make the foolhardy choice to go to law school nonetheless, are destined for second-class citizenship in the legal profession.<sup>261</sup> Whether the criteria used in those admissions decisions are really the criteria that should be used to select the most promising future lawyers is one question.<sup>262</sup> A more serious one, perhaps, stems from the fact that the top ranks of the legal profession in America, including many of the elite law firms and some of the highest benches, have not insubstantial numbers of graduates of non-elite law schools.<sup>263</sup> That

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260. Ironically, Tamanaha seems to believe that competition between segments of the law school “industry” is unwise and can be avoided as long as everyone understands and accepts their place. TAMANAHA, *supra* note 63, at 172-76. And he seems to think that the competition between law schools will wither away if only the accreditation standards or the *U.S. News* rankings would disappear. *See id.* If one were to take those factors out of the equation, however, there is no reason to suspect that schools will not continue to compete, but instead will continue to seek ways to differentiate themselves from each other on other grounds such as strength of program, specialization, and geographical advantages. Students may pay a premium because of accreditation requirements, but they are likely to continue to pay a premium based on other elements schools use to separate themselves from the competition.

261. *See id.*

262. *See, e.g.,* Pamela Edwards, *The Shell Game: Who Is Responsible for the Overuse of the LSAT in Law School Admissions?*, 80 ST. JOHN’S L. REV. 153, 165 (2006) (“A strong first step [in deemphasizing use of the LSAT in law school admission decisions] would be to encourage *U.S. News & World Report* to reflect the values of the academy when determining the factors it uses to calculate law school rankings.”); Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN’S L. REV. 41, 91 (2006) (arguing that law school admissions committees over-rely on the LSAT).

263. Theodore P. Seto, *Where Do Partners Come from?*, 62 J. LEGAL EDUC. 242, 244-45 tbl. 1 (2012) (listing the top fifty feeder schools for partners in the NLJ

diversity is not only healthy but essential to a democratic society.<sup>264</sup> Does anyone really believe that a Supreme Court staffed entirely by graduates of Harvard and Yale is a good thing? But that is the world that Tamanaha would have us validate.<sup>265</sup>

Whether law schools should be two years or three;<sup>266</sup> whether they should admit students with two or three years

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100 and demonstrating that thousands of partners hail from non-elite schools). For a critique of Seto's methodology, see Robert Anderson, *Bloated Is Better for Law School Rankings*, WITNESSETH: LAW, DEALS, & DATA (Dec. 14, 2012, 1:23 AM), <http://witnesseth.typepad.com/blog/2012/12/bloated-is-better-for-law-school-rankings.html>.

264. See William D. Henderson & Rachel M. Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession?*, A.B.A. J., July 2012, at 36, 37 ("This near obsession with pedigree is not only paralyzing to the career prospects of individual lawyers; it is damaging to the entire profession.").

265. Paradoxically, as employment opportunities have decreased, the number of law schools has increased. The number of ABA-accredited law schools has increased from 135 in 1964 to 201 in 2011. AM. BAR ASS'N, ENROLLMENT AND DEGREES AWARDED: 1963-2012 ACADEMIC YEARS 1 (2012), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf). To most observers, this development seems like lunacy. See, e.g., Elie Mystal, *Someone at the ABA Is Aware That New Law Schools Make No Sense*, ABOVE THE LAW (Oct. 5, 2012, 4:12PM), <http://abovethelaw.com/2010/10/at-least-one-person-at-the-aba-is-aware-that-new-law-schools-make-no-sense>. Perhaps some of the new schools will succeed, while some existing schools will vanish. That has happened in the past. According to Ritchie, there were more law students enrolled in 1930 than in the 1950s (although the 1930s enrollment figures doubled those of the 1920s), and while there were 190 "degree conferring" law schools in 1940, there were only 159 in 1964. Ritchie, *supra* note 195, at 177-78. Those numbers have fluctuated over time for various economic, political, and professional reasons. Indeed, as Bryant Garth has perceptively reminded us, much of today's crisis rhetoric about legal education and "too many lawyers" bears striking similarities to that of the 1930s and the Great Depression. Bryant G. Garth, *Crises, Crisis Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, 24 STAN. L. & POL'Y REV. 503, 509 (2013).

266. See, e.g., Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599, 599 (2012) (arguing "for a revision of the rules of the New York Court of Appeals to allow students to sit for the bar after two years of law school classes whether or not the law school requires three years to obtain a degree"); see also Adam J. T.W. White, *Upholding the Oath of Competency While Filling the Indigent Void: Why the Law School Curriculum Should Be Extended to A Fourth*

of preprofessional education without requiring all to have an undergraduate degree;<sup>267</sup> whether they should offer legal studies and the study of other disciplines simultaneously or sequentially; whether they should accept only students who have a substantial amount of work experience (as many business schools do);<sup>268</sup> whether they currently allocate too

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*Year*, 11 FLA. COASTAL L. REV. 425, 450-57 (2010). Presumably, a two-year law degree would not be considered a doctoral degree but a professional master's degree akin to an MBA. Such a change might have implications for a variety of practices and norms in legal education, including the qualifications for law school faculty hiring, judicial clerkship applications, and the continued existence of student-edited law reviews.

267. A number of law schools permit qualified undergraduates to enroll after three years of undergraduate study; some schools restrict this option to its university's own undergraduate students, while others have agreements with other undergraduate institutions which allow their students the same opportunity. *See, e.g.*, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, *supra* note 218, at Standard 502(a); Elie Mystal, *Are '3+3' Programs a Good Idea?*, ABOVE THE LAW (Nov. 21, 2013), <http://abovethelaw.com/2013/11/are-3-3-programs-a-good-idea>. Some law schools have also allowed its university's undergraduates to enroll without taking the LSAT. *See, e.g.*, *Doctor of Jurisprudence: How to Apply*, MAURER SCH. L., <http://law.indiana.edu/admissions/jd/apply/index.shtml> (last visited Mar. 22, 2014); *Early Assurance Program*, GEO. L., <http://law.georgetown.edu/admissions-financial-aid/jd-admissions/early-assurance-program> (last visited Mar. 22, 2014); Adele Shapiro, *Breaking News! Applications Are Down! Law School Without the LSAT*, KAPLAN LSAT BLOG (Feb. 1, 2013), <http://blog.kaplanlsat.com/2013/02/01/breaking-news-applications-are-down-law-school-without-the-lsat>.

268. In recent years, Northwestern Law School places more weight on work experience in its admission decision than most schools. In the class entering in September and May of 2013, 91% of students have had one or more years of full-time work. *See Class Profile*, NW. L. SCH., <http://www.law.northwestern.edu/admissions/profile> (last visited Mar. 24, 2014). Reflecting the emphasis on work experience in admission decisions, the average age at matriculation for the traditional entering class was twenty-five. *Traditional 3-Year JD Class Profile*, NW. L. SCH., <http://www.law.northwestern.edu/admissions/profile/jdprofile.html> (last visited Mar. 24, 2014). In addition, the median years of work experience for the accelerated JD class was six, *Accelerated JD Class Profile*, NW. L. SCH., <http://www.law.northwestern.edu/admissions/profile/AJDprofile.html> (last visited Mar. 24, 2014), and for the joint JD/MBA entering class, the average years of full-time experience was 4.75. *JD-MBA Class Profile*, NW. L. SCH., <http://www.law.northwestern.edu/admissions/profile/jdmbaprofile.html> (last visited Mar. 24, 2014).

many resources to scholarship and law reform activities;<sup>269</sup> whether they pay too much or too little attention to “skills” training;<sup>270</sup> whether they currently teach the skills that today’s and tomorrow’s lawyers will need to have mastered;<sup>271</sup> whether they should be skeptical of the self-interested demands of legal employers for “practice-ready” entry-level lawyers; whether they should train students for their long-term professional needs; whether they can make legal education more affordable; and whether they can successfully educate lawyers to provide efficient and cost-effective professional services to those who otherwise could not afford representation are all important questions.<sup>272</sup> If we do not know, however, what specific role we expect lawyers to play in a democratic society and a market economy; if we do not know what lawyers really need to know to fulfill their necessary roles and live a good life too—

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269. See, e.g., Maimon Schwarzschild, *The Ethics and Economics of American Legal Education Today*, 17 J. CONTEMP. LEGAL ISSUES 3, 10 (2008) (arguing that law schools place too much emphasis on scholarship, leading to an institutional breakdown that has “lowered academic morale dramatically”).

270. See generally David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191, 219 (2003) (concluding “that the case-centered approach to clinical education . . . does not adequately foster” the lawyering skills students need); Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 SANTA CLARA L. REV. 93, 135-36 (2005) (discussing how legal research and writing should be taught); Richard A. Matasar, *Skills and Values Education: Debate About the Continuum Continues*, 46 N.Y.L. SCH. L. REV. 395, 428 (2003) (“[T]he commitment to skills and values education advocated over the last ten years has had a measurable impact on legal education.”).

271. See Margolis & DeJarnatt, *supra* note 270, at 135-36.

272. The possible consequences of the answers to these questions are not obvious, particularly for disadvantaged or less well-educated students. For instance, it may take longer under certain circumstances to acquire basic skills and experiences necessary for the successful practice of law in any environment, and it is not easy to measure the tradeoff between incurring cost and debt, on the one hand, and the opportunity to acquire useful skills, on the other hand. If the educational process takes longer, it may pay off in better long term prospects and opportunities that turn out to be cost-effective for some students as they take the full measure of professional culture. See generally Bryant Garth & Joyce Sterling, *Exploring Inequality in the Corporate Law Firm Apprenticeship: Doing the Time, Finding the Love*, 22 GEO. J. LEGAL ETHICS 1361 (2009).

it seems obvious that law schools have much work to do before they can begin to tackle those programmatic questions.

### III.

We are told that we have entered an increasingly integrated and interrelated world—a dynamic, complex, and intensely challenging world that stresses interdisciplinary and multidisciplinary problem-solving. Indeed, one can hardly imagine the world that will exist when the lawyers now entering the profession reach senior status. Yet we are also told that less formal legal education will suffice for most of the practicing bar. Presumably, they will pick up whatever else they need as they go along. Such an education will suffice, of course, only if most students and most of the bar are content to lower their sights, leaving to those who are fortunate enough to overcome the obstacle of securing admission to a highly ranked law school all of the influence, prestige, and financial rewards to which all could at least aspire in the past. This dynamic world of challenges and opportunities is to be placed out of reach of most law graduates. For law schools, as for individual lawyers, one's place in the great chain of being, the hierarchy of worth, is to be entrenched. There are no second chances. Where one begins will determine where one will end up.

For hundreds of years now, American lawyers have talked about what the profession should be, how it should be defined, what role it should play in a democratic society, and how those who aspire to membership in the profession should be educated to prepare them for their life's work. The best American lawyers have also thought hard about the ambiguity of their cultural and moral position; they have long recognized that their tools can be used for good or ill; and they have known that the credibility and ultimate vitality of their profession depends on the recognition that they owe real duties to the public as well as to their clients and themselves. The public, too, have long recognized that a society built on law cannot flourish without the work of professionally trained men and women who are committed to advancing the public's interest as well as their own and that of their clients. The public, no less than the lawyers



themselves, have recognized the inherent difficulty of that position and the many opportunities that exist for the ideal to be compromised in practice. But the public have expected the profession to discharge that complex and sometimes ambiguous set of responsibilities to the best of its abilities. In his essay on liberal education, William Cronon wrote that “[i]n the end, it turns out that liberty is not about thinking or saying or doing whatever we want. It is about exercising our freedom in such a way as to make a difference in the world and make a difference for more than just ourselves.”<sup>273</sup> That also is an apt description of the moral purpose, as well as the moral challenges, that are inherent in the lawyer’s role.

Early in the nineteenth century, law professors (who often were also well-respected practitioners or jurists) were wont to wax poetic on celebratory occasions about the inherently public nature of the legal profession. Even discounting for the self-serving nature and congratulatory tones of these professional self-justifications, the vision underlying the rhetoric is both obvious and striking. According to these orators, lawyers were “public sentinel[s]” providing a “public service,”<sup>274</sup> protecting against the invasion of rights, whether through the actions of other individuals or by the state. Indeed, they were perceived to be “the ministering officers in the temple of justice,” to whom

the injured resort, for redress of their wrongs; the doubting and perplexed, for the solution of their difficulties; the oppressed, for relief; the dying, for the final arrangements of their worldly wealth; the widow and the orphan, for their violated rights; and

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273. William Cronon, “*Only Connect . . .*”: *The Goals of A Liberal Education*, *AM. SCHOLAR*, Autumn 1998, at 73, 79.

274. JOSEPH STORY, A DISCOURSE PRONOUNCED UPON THE INAUGURATION OF THE AUTHOR, AS DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY, ON THE TWENTY-FIFTH DAY OF AUGUST, 1829, at 25 (1829). It should be noted that casting lawyers as clothed in public responsibilities also had a distinct political message and content in its age that has evolved or shifted over time, situating the legal profession in the early nineteenth century as guardians against the excesses of democracy.

all for the preservation and security of whatever is valuable in life, or its modes of enjoyment . . . .<sup>275</sup>

These addresses emphasize nothing so much as the notion of service in the administration of justice, broadly construed. In their variety of roles, lawyers were portrayed as responsible for ensuring that a robust set of rights were protected and valid obligations enforced, so that a vital civil society would be bound together and its work accomplished. Through the professional representation of private interests, lawyers were thought to fulfill a public purpose.

The practice of law has always been embedded in commerce, and the organization and market for legal services has changed often over time. The key question remains how lawyers should be trained and what values they should hold if they are to flourish in a profession that is embedded in commerce and charged with protecting the interests of clients, but charged as well with advancing the public interest and treating the public's business as its own. If we are to view Morgan's book as an expression of acute cultural anxiety, the lament seems to rise up from elite practitioners (the traditional winners), who are fearful of losing their current status and prestige as they face competition in a global marketplace. That is a legitimate concern, and one that legal education must address, but it is not clear that that is the only concern—or even the principal one—with which law schools should be occupied.

Surely, law schools must be interested in providing the best education they reasonably can provide to all who would serve the legal needs of the public, without regard to how “important” or “unimportant” their clients might be, and without regard to how much money their clients' problems might involve. Indeed, the tumultuous events of the past decade demonstrate, if anything, the importance of ensuring that the best possible legal education is provided, not only to those who are committed to representing big business, but also to those who will hold big business to account—by

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275. SIMON GREENLEAF, A DISCOURSE PRONOUNCED AT THE INAUGURATION OF THE AUTHOR AS ROYALL PROFESSOR OF LAW IN HARVARD UNIVERSITY, AUGUST 26, 1834, at 11 (1834).

prosecuting criminal conduct, designing effective regulatory practices, and representing the victims of big business's well-lawyered schemes to take advantage of the poor and the middle class.

If those ends are to be achieved, the lawyers who represent the public and the victims of fraud and deceit must be every bit as well educated and every bit as sophisticated as those who represent big business. It also behooves law schools to find the means for providing a first-class education for all of its students, and it behooves law schools to lead the way in developing the mechanisms and systems necessary for lawyers to represent clients, especially the poor and the middle class, in a cost-effective way. In this regard, one would hope that the wise use of technology and personnel management skills could lead to the more efficient and effective practice of law, rather than to the lawyer obsolescence that Morgan predicts. Law schools should be forward-looking and in the forefront of such efforts.

There is no doubt, as Tamanaha asserts, that law schools, which "have long held themselves out as the conscience of the legal profession, . . . have been engaging in disreputable practices."<sup>276</sup> Indeed, there are so many known instances of fraud that one suspects that we have only seen the tip of the iceberg. At the very least, this fact ought to raise questions about leadership: about the kinds of people central administrations and law faculties choose to lead law schools, what their real qualifications for handling these positions are, what pressures they operate under, and what should be expected of them.

Tamanaha draws on his own experience as the interim dean of a law school in deep crisis. The picture he paints of his former colleagues is unremittingly negative: the senior faculty are described as nonproductive, intellectually uninteresting people, committed neither to teaching nor to scholarship, coasting toward a retirement that is better taken at full-pay in the classroom than on a pension.<sup>277</sup> They

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276. TAMANAHA, *supra* note 63, at x.

277. *See id.* at 4-8.

are not only shirkers, but proud of it.<sup>278</sup> Tamanaha's solution was to do something akin to declaring martial law.<sup>279</sup> That might well have been the right course for that law school at that time, but that is not the essence of leadership in legal education or anywhere else.

Tamanaha clearly overestimates the efficacy of top-down management, whether in law schools or in business. Leaders do not generally lead effectively, or accomplish anything lasting, by means of coercion, rather than persuasion, or through the authority of office, rather than the manifestation of admirable personal qualities. Leadership is particularly difficult when the group to be led is not only highly educated, but professionally trained to see all sides of an issue, value reasoned opinion, and distrust fiat in all its forms. Leadership in such circumstances requires hard work: encouraging the development of a genuine sense of community built around a common vision, persuading the community that the vision is the right one for the time and place, and convincing the community to work toward the achievement of that vision for the common good.<sup>280</sup> Leadership does not consist, in the words of Professor Morgan's law firm chair, of learning how to "beat the donkeys" harder.<sup>281</sup>

In response to Tamanaha, let us be clear: the fact that we conceive of the legal profession and legal education as parts of the public domain, which must ultimately be evaluated in terms more enduring and comprehensive than short-term costs and benefits, should not be taken by anyone as an excuse for overlooking, let alone accepting, inflated or excessive costs in legal education. We take that

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278. *But see* Jeffrey L. Harrison, *Faculty Ethics in Law School: Shirking, Capture, and "The Matrix,"* 82 U. DET. MERCY L. REV. 397, 408 (2005) (arguing that just because law schools are vulnerable to shirking by professors does not mean it actually occurs).

279. *See* TAMANAHA, *supra* note 63, at 7.

280. *See generally* Ronald A. Heifetz & Riley A. Sinder, *Political Leadership: Managing the Public's Problem-Solving,* in *THE POWER OF PUBLIC IDEAS* 179 (Robert B. Reich ed., 1990).

281. MORGAN, *supra* note 97, at 3 (quoting Bario, *supra* note 140, at 114) (internal quotation marks omitted).

problem as seriously as anyone, and we believe that it is imperative that a solution to rising costs, not only in law school but throughout higher education, be found. Higher education, and particularly professional legal education, cannot become the preserve of only those who are very rich or otherwise advantaged without threatening the very foundations of our democratic society. Nor can we be anything but deeply concerned about the employment prospects of our students. It is certainly the responsibility of law schools to be candid with students about past placement success and current prospects, and the decision to pursue legal studies should be a fully informed one. That all should go without saying.

What we do mean to say—and think worthy of special emphasis—is that cost is not an independent variable. In addressing the question of cost, we need first to take thought on what we expect of the legal profession, and on the consequences for legal education that flow from those expectations. We need especially to take thought on the possible adverse consequences for our democratic society of suggested solutions such as the imposition of formal segmentation in legal education and the profession. In other words, we cannot decide on how to deliver the most cost-effective legal education unless we first decide what an appropriate legal education entails. Thinking about how to produce the cheapest “legal education” without also thinking about what an appropriate legal education entails, as some would have us do, is as wrong-headed as refusing to think about cost at all.

These are complex questions. But there is yet another inquiry to be made; it is at least as important and no less difficult, but it has largely escaped the critics’ notice. It is disconcerting that so little of the current conversation has addressed the subject of legal education from the perspective of the role that lawyers have played, and must continue to play, as citizens and leaders in our constitutional democracy, both locally and nationally, but also, increasingly, on a global stage. As Philip Jackson has observed, education is at least in part a process whereby a community transmits its values to those who wish to join

it.<sup>282</sup> But it is difficult to imagine what kind of “cultural transmission” is meant to be effected through legal education when lawyers and law schools accept the proposition that the legal profession is simply an “industry”; that professional values are illusory and a form of deception that facilitates the exaction of monopoly profits; and that clients and students are simply customers. It is equally difficult, given those assumptions, to imagine how legal education can fulfill its role of effecting beneficial changes in individual characters, the society at large, or the world in general. If there is no such thing as the legal profession, no substance or truth to professional values, and no relationship with clients and students other than that defined by market values,<sup>283</sup> it is no wonder that law schools are in crisis.

In *Grutter v. Bollinger*, Justice O’Connor observed that “universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders.”<sup>284</sup> Justice O’Connor focused on leadership in its most immediately public meaning and manifestation, namely political leadership. But the type of leadership she described goes well beyond the examples she gave. Lawyers serve their communities in all sorts of ways. Representing people in the peaceful resolution of disputes, helping them achieve their goals by memorializing their intentions in documents that protect their rights and interests, guiding clients through the intricacies of commercial transactions or the regulatory requirements of the bureaucratic state—all of these are forms of leadership for the public writ large. It is such tasks, and society’s continuing need for them to be done, and done well, that may ultimately be at issue in these debates.

In 1877, John Randolph Tucker gave the commencement address at the University of Maryland School of Law. Tucker had an illustrious career: Attorney

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282. See JACKSON, *supra* note 89, at 94.

283. See MORGAN, *supra* note 97, at 21 (“Lawyers . . . are not now a profession and—over most of their history—they have never been one.”).

284. 539 U.S. 306, 332 (2003).

General of Virginia under the Confederacy, General Counsel of the Baltimore & Ohio Railroad, Dean of Washington and Lee University School of Law, postwar Congressman from Virginia, an accomplished advocate who defended the Haymarket Anarchists, President of the ABA, and author of one of the leading treatises on American constitutional law.<sup>285</sup> He lived in a period of extraordinary change, which he personally navigated with considerable dexterity. His words to the Maryland graduates of 1877 provide a fitting coda to this essay. He said: “Many think every thing good because old, and everything evil because new; others directly reverse these propositions. Neither is right; both are in error. Change is not reform; nor is a blind conservation of the established order of things, wisdom.”<sup>286</sup> We, too, live in a period of extraordinary change, which poses substantial challenges for legal education and the practice of law. We cannot stand on “the established order of things.” Still less can we go back. But it behooves us to reflect on the likely consequences of one possible change or another, and to take thought on what needs to be changed and what needs to be retained, as we engage the great projects of renewal and reconstruction that surely await us.

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285. For details of Tucker’s career, see John W. Davis, *John Randolph Tucker: The Man and His Work*, 6 WASH. & LEE L. REV. 139 (1949).

286. John Randolph Tucker, Address to the Graduating Law Class of the University of Maryland 22 (June 1, 1877), available at <http://www.law.umaryland.edu/marshall/schoolarchives/documents/CommencementAddress1877.pdf>.