

January 2005

## The Rise and Fall of American Legal Education

Richard A. Matasar  
*New York Law School*

Follow this and additional works at: [https://digitalcommons.nyls.edu/nyls\\_law\\_review](https://digitalcommons.nyls.edu/nyls_law_review)



Part of the [Legal Education Commons](#), and the [Legal Writing and Research Commons](#)

---

### Recommended Citation

Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y.L. SCH. L. REV. (2004-2005).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

## THE RISE AND FALL OF AMERICAN LEGAL EDUCATION

RICHARD A. MATASAR\*

About a year ago my fifteen-year-old nephew Alex took an extended holiday in New York. Alex, the son of a British father and an American mother, has grown up in London. His visits to the United States are a chance to get in touch with his American side — trips to amusement parks, ventures into mass culture and shopping, baseball games, non-stop commercial television, and a chance to watch the World Wrestling Federation.

He is a wonderful observer of culture, firmly committed to the old world and new. He admires the informality of the United States, the enormous diversity of our political system, the vibrancy of U.S. institutions, the willingness to engage in adventures, and the craving for change. But, he is also a Brit, who believes in the values of stability, the importance of tradition, the need to be part of a world that embraces other cultures (and has long given up British hegemony), and the knowledge that the elite have significant advantages that are maintained by traditional educational opportunities.

Alex attends Eton, the most ancient and prestigious boarding school in Britain. He assumes that upon his graduation, like most of his classmates, he will attend Oxford or Cambridge (like his Dad). He also assumes that after graduation from University, he will pursue a graduate degree in the United States at Harvard, Yale, or the University of Pennsylvania (like his mother, aunt, uncles, and grandparents). Alex knows that I am a law school dean and is always anxious to talk about higher education with me.

After chatting a bit about the differences in what is required in preparation for university studies — U.S. students need not know Latin and Greek, have no obligation to play rugby, are not required to learn to play a musical instrument, and do not go to school with members of the Royal Family — we settled into a serious discussion of the many differences between the United States and Great Brit-

---

\* Dean and President, New York Law School. J.D. 1977, B.A. 1974, University of Pennsylvania.

ain. He was most amazed at the substantial cost of an American education, the lack of governmental subsidies to our most influential schools, the extraordinary number of schools competing with each other, and the obsession with college athletics as a key-differentiating factor in students' choices of schools. On the other hand, he was also amazed at the richness of subject areas offered in American education and the openness of our admissions policies. We agreed that these differences did not make one system better than the other and that each had real virtues.

A few months later I visited Alex's family. We decided to make a pilgrimage to Eton, an extraordinarily beautiful school, with buildings hundreds of years old, with boys still wearing tails to class, studying with their tutors, and wandering the corridors of a school tracing back to the glory days of the British Empire. I was impressed, and even more so, to see the introduction of new technology in ancient dormitories and the school's commitment to growth. I learned about the requirement of every Etonian at the beginning of his career: to sign the roll book, list his name, address, and religion — a tradition dating back to the schools founding. Tradition and change, together, in one institution so valuable that the only doubts about its future concern how much more important it will become.

Before leaving the school we had a striking conversation that has haunted me ever since. We continued our dialogue about America and Great Britain, with some gentle kidding about accents, differences between our brands of football, war efforts, and mutual bewilderment with the French. It ended with Alex's final judgment about the relative merits of our cultures and schools, the ultimate zinger, the sure fire "I win; you lose" comment: "Uncle Rick, my school is older than your country!"

I have thought often about the wisdom of his observation because it implicitly raised all of the questions about law schools and American higher education that I have pondered over the last twenty-six years. What accounts for the stability, growth, and success of a school? Can newer upstart schools compete with birth-right schools whose brand name, tradition, and graduates ensure membership in the ruling elite? How long can Americans continue to raise the price of our education, without jeopardizing the exis-

tence of our institutions (or without changing them to increase their value)? Can we be like Eton and defy the law of educational gravity: what goes up must come down?

This essay explores these questions in some detail. Part I suggests that the success of American law schools is not sustainable under our current model of education and educational financing, except for a handful of prestigious Eton-like enterprises and another group of lower-cost providers. Part II discusses how law schools are evaluated by prospective students, faculty and the public-at-large; and that by engaging in the race for higher rankings, schools are dressing up their outward appearance while making no substantive moves towards improving the quality of future law school graduates. Part III challenges most law schools, especially high-cost, modest-prestige programs, to increase the value of what they offer, or risk institutional demise. Part IV lays out the process by which these schools can prosper in the new world to come.

#### I. THE PROBLEM OF VALUE

I often pose the following questions to audiences of non-lawyers: (1) “What is a legal education?” (2) “Why do people go to law school?” (3) “What do people study in law school?” (4) “What is the value of a legal education?”

To those who are not lawyers, faculty members, administrators or senior staff of a university, the answers to these questions seem obvious: (1) A legal education teaches people law. (2) People go to law school to become lawyers. (3) People study legal rules like cases, statutes, and administrative rules in law school. (4) Graduating from law school teaches people to become lawyers — people who can make a decent living representing others in their legal affairs.

Of course, to anyone involved in higher education or a law school, these answers are simpleminded. First, legal education does both more and less than teaching “law.” Second, students have myriad reasons to attend law school. Third, law schools venture far beyond basic legal materials and offer many subjects other than law. Fourth, law school itself often inadequately prepares students to be professionals; even when it provides an education that will permit graduates to pass the bar examination and become lawyers, many

students find it difficult to make a decent living. The mismatch between the perceptions of what a legal education provides and the actuality of that experience can create significant difficulties that will challenge the sustained viability of substantial numbers of schools. I explore these below.

A. *Legal Education Does Both More and Less Than Teaching Law*

Without being overly simple, many (perhaps most) people envision “law” to be a finite thing that can be learned. If one reads enough cases, statutes, administrative rules, executive orders, etc., one can learn *the* law. Some time in the first year of law school, however, students make a most disquieting discovery — law in this sense is rarely interesting and almost never the subject of their classes. Further, law is rarely bounded, is often ambiguous, and sometimes is practiced in great variance from how it is written.

Accordingly, faculty members are mostly uninterested in teaching “what law is.” Instead, they concentrate on researching and teaching “why” particular laws are created, the process by which they arise, and what laws ought to be. Scholarship and teaching rarely are descriptive; students are encouraged to think prescriptively and make normative judgments. In this model, law school is about how best to regulate the relationship of citizens to each other, their states, and their countries and how those countries can best relate to each other.

To a large extent, the actual content of any set of laws is rarely an important matter in law school. The prevailing thought is that any current law is contingent on time, place, and ideology and therefore not worth intense study except to understand how time, place, and ideology help to shape law. More important is to focus on change, which is almost never bounded by current law and is the result of politics, economics, and sociology. In short, the study of “law” fades into a background of intensive study of other matters that are seemingly more important.

Further muddying the purpose of law school is that students come to legal studies after they have entered adulthood. Law school is their transition from being a mere student to becoming a “professional.” Thus, many schools also focus on teaching values,

interpersonal relationship building, and ethics. Additionally, over the last twenty years, law schools have greatly increased their skills training in interviewing, counseling, negotiation, and mediation — subjects that are needed by lawyers, but can be used in multiple professions — to account for the diminished role of the legal profession in post-law school skills training and the substantial growth of law school skills clinics that have grown to fill the void. Whatever law school has become, it is only partially about studying law.<sup>1</sup>

*B. Students Have Myriad Reasons To Attend Law School*

Contrary to conventional wisdom, law students have many reasons to attend law school other than the obvious one of becoming a lawyer. Some may thirst to be lawyers, to represent clients, to go to court, to do deals — whatever they perceive lawyers do. Others, however, come to achieve wildly different goals.

Some see law school as a delaying tactic. They do not know what they want to do. They have graduated from undergraduate school with a major that has not led to employment. They have loans that are coming due (or parents that are ready to toss them out of their homes) and they find law school a relatively painless extension of their student days. Because law school has no prescribed undergraduate curriculum, they can qualify after completing almost any subject concentration (provided their grades and LSAT scores are high enough). Many schools give them generous financial aid and scholarships if they have high standardized test scores — even if they have no burning desire to become a lawyer. Law schools are located in cities or in terrific college towns — great places to live — and by borrowing the maximum amounts available, students can live a good life. They can go out. They can make their

---

1. Because law schools offer such a wide variety of subjects and fulfill so many objectives, they incur substantially greater costs than if they focused purely on teaching “law.” The result is to increase costs to those seeking merely to learn “law,” and simultaneously to offer inadequate depth in any other subject that they may be interested in studying. As discussed below, this choice reflects the commitment to serve students’ demands (which are unfocused), reinforces faculty members’ preferences to teach what they enjoy, and increases the distance between professional education and the profession. Yet, choosing to become a mere “trade” school would certainly undermine a school’s reputation, which is built on the scholarly reputation of the school and the quality of the student body it attracts. Thus, schools continue to build in areas that have little immediate pay off for their students seeking a quick path to becoming a lawyer.

car payments. And, they can defer making a final decision about what they want to do. After all, unlike other graduate education, at the end of law school, one can hang out a shingle and practice law (after passing that pesky bar exam!).

Others see law school as a means to an end. They do not particularly know what lawyers do, but suspect that some lawyers make a lot of money. To them, law school is a hazing ritual — a painful step on the way to making a living. Their goal is simple: take the easiest course load that leads to the highest grades and the quickest exit from school to the work world.

Other students want to go into business, but think a law degree provides more value than a business degree (because the J.D. itself confers access to a legalized monopoly — the practice of law). Other students, especially in part-time programs, need the law school credential to advance in their current jobs in finance, education, business, or government. Some students want to teach and have heard that law teachers make a better living (or have an easier route to tenure) than do liberal arts teachers. Finally, there was my favorite student at the University of Florida Levin College of Law, who told me that he was in law school “in order to maintain his football ticket priority.”

Whatever the prevailing thought may be, students have myriad reasons to attend law school.<sup>2</sup>

### *C. Legal Studies are Varied*

As discussed above, law students and teachers study much more than legal materials. Reviewing the credentials of the faculty of most law schools underscores the enormous intellectual diversity of the legal academy. On the one hand are social scientists (who

---

2. Of course, with such varied reasons to go to school, it is not surprising that the law school experience is not fully satisfactory to many students. Some find it insufficiently practical. Others find it too practical. Some find the course offerings insufficient; others crave guidance. Almost all find the career services office insufficiently attentive to their personal needs (and fail to recognize that the market finds only a handful of graduates desirable). To a law dean there is no worse feeling than meeting with a third year student, soon to graduate, who asks the common question, “What do I do now?” As argued below, schools must adjust their thinking that students are one-size fits all, and need to give students multiple paths to and from law school. Failing to do so puts the school at risk that the high costs of a legal education will ill-serve students who are only marginally committed to becoming lawyers.

see law as a laboratory to study societies), economists (who view legal interactions as market transactions), psychologists (who try to understand social behavior as a product of the individual pathologies of people), scientists (who see law for its importance in promoting science), and artists (who see the law as promoting the arts). On the other hand are public policy analysts, who see the law as a form of political discourse that may be used instrumentally to achieve desirable social goals. And on either foot are social activists (who use the law for their political goals), technicians (who are neutral about outcomes, but love the craft of lawyering), and even lawyers (who want to teach students how to be an attorney).

Law school is now the product of the multiple (often conflicting) disciplines that drive law faculties. In short, they are mini-universities, in which law *qua* law plays only a part of the overall enterprise.

Consequently, the study of law is complex and varied. Cases, statutes, and administrative regulations are supplemented (and sometimes supplanted) by law review articles, books, empirical studies, experiments, and research projects. Students are expected to master (or at least become skilled dilettantes) of many disciplines and subjects. This fosters students' eclectic interests, but undermines the depth of their understanding of legal subjects; it sometimes alienates the school experience from lawyering jobs that will follow.<sup>3</sup>

*D. Law School May Inadequately Prepare People to Practice Law and Make A Decent Living*

Perhaps the most disturbing mismatch between public perceptions about law schools and reality is that three (or four) years of law school may not adequately prepare a student to be a lawyer. Worse yet, even if a graduate is prepared by law school to become a

---

3. As argued below, so long as law school does not impose unrecoverable costs to students, they will not balk at paying for an experience that leads to a rewarding career — even if it is one that is unrelated to the education provided by the school. But if the employment market will not support the debt that students accumulate to obtain the degree, students will demand closer connections between their education and their ultimate post-graduate career goals. Most law schools have not anticipated this problem and will have difficulty sustaining their infrastructure unless they are prepared to give educational value commensurate to its cost.



lawyer, he or she may not be able to find employment that will adequately support the debt he or she accumulates while in school.

As discussed above, law school education is only partially constructed to give students the skills, knowledge, and values they need to become a lawyer. First, very few law schools teach a specific body of law. They focus on national law and often ignore local idiosyncratic legal rules. Second, law schools are relatively uninterested in teaching rules at all. They primarily teach how to “*think* like a lawyer,” not “how to *be* a lawyer.” Third, because the practice of law is so much more varied and complex than what a law school can offer, very few students have the breadth of substantive learning that it takes to be a lawyer. Further, because students also must focus on many subjects other than substantive law, whatever breadth they gain in general knowledge or other disciplines comes at the expense of gaining in-depth knowledge of any legal topics. Fourth, even when law schools do a terrific job of teaching students to be lawyers, they sometimes sacrifice giving students the specific skills that enable them to pass the bar examination (which is only loosely connected to what is needed to practice law).

Although for some students, law school neither prepares them to be a lawyer nor prepares them to hurdle the entry barrier to joining the profession (or it merely gives them an entry pass, but not at a high competency level), for many years, these shortcomings were not problematic. Schools assumed that students would take bar review courses after graduation to fill their substantive knowledge gaps so that they could pass the bar examination. The schools also assumed that once students become lawyers, their employers would fill remaining knowledge gaps so that the graduates would become highly competent lawyers. As the old law school dean’s adage goes: “We have them for three years, the profession has them for five decades!”

So long as these assumptions were fulfilled, shortcomings in legal education have benefited law schools, allowing them to focus on larger questions of justice and the normative bases for law — topics that fit nicely with the research responsibilities expected of university-based colleges and are consistent with a reward system for faculty compensation skewed toward scholarly productivity. Further, because most law faculty members do not practice law and

only did so for short periods of time in their past, they are not compelled to teach outside of their current expertise. Law schools, therefore, function as academic institutions, not trade schools. Similarly, the law schools' avoidance of bar preparation (which often must concentrate on narrative descriptions of current law) forces students to rely on test preparation experts to do what they do best — loading knowledge of specific legal information and test-taking quickly into students' heads. These factors underscore lawyers' predisposition to believe that they are in the best position to train students to become actual lawyers. School simply does not teach wisdom and judgment, which come from working closely with a mentor in the real practice of law.

Unfortunately, in recent years, the division of responsibility between school, the profession, and bar preparation has broken down. Many students never gain a mentor in practice. Instead, they must be “practice ready” after graduation. In turn, this has driven law schools into much more specific skills training in lawyering disciplines, including legal writing and research, negotiation, mediation, counseling, trial skills, business planning, and the like. It has led to courses in law office management and the business of law. Similarly, with Boards of Law Examiners toughening the standards for admission to the bar,<sup>4</sup> the cost of failing the bar examination to students and law schools alike has risen so sharply that many schools now offer multiple “bar prep” courses during law school.

These changes have crammed more into legal education than ever before, thereby increasing educational costs by forcing schools to hire experts in non-traditional academic subjects. Coupled with other curricular expansions, improvements in facilities, and growth in other marketing activities, schools have inevitably raised their prices. This creates a deeper problem than failing to prepare stu-

---

4. Or at least, raising the “cut-score” expected on the multi-state portion of the exam. In recent years many states have raised their minimum bar pass scores. Whether driven by the desire to be above the national median on the standardized test scores or out of a fear that too many graduates are entering the profession or a sincere belief that the quality of young lawyers has been declining, the bar examination has been made more difficult to pass. No state has provided any data showing a correlation between higher test scores and the minimum competency to practice law — the supposed standard for the bar examination. However, this is a story for a different day and a different essay.

dents to be lawyers: even when they are prepared, many students simple cannot earn enough income after graduation to support the debt they incur in finishing their legal education.<sup>5</sup>

There are several tiers of law schools, stratified by price and prestige. Unlike many consumer goods, however, price and prestige do not run together. There are inexpensive schools that have high rankings and expensive schools that have low rankings, with the price difference often accounted for by state subsidies to higher education. For most students, the decision of where to matriculate is driven by a search for prestige (or location or some other intangible). Where price is important, students are driven from private to public education. Within markets, there is rarely much price differential between private schools. These market forces create little pressure on schools to restrain their price increases. And, because prestige drives enrollment decisions of schools, they continue to increase their expenditures on things that they believe will enhance their rankings (and thereby improve the quality of their students, which in turn will increase their rankings). The consequence is escalating costs.

For years, the law school market has been protected from fears that they are pricing their product out of reach for most students. Several factors account for this: (1) educational cost is highly leveraged, with students borrowing most of the cost of their education; (2) lenders have been willing to lend to any credit-worthy student; (3) lenders have not been risk averse because substantial portions

---

5. Without laying out the complicated financial data, recent years have seen law school debt rise substantially. For many years law schools have increased tuition at a faster rate than inflation and at a faster rate than salaries have increased. Together with the cyclical nature of demand for new lawyers, there is a real crunch on new lawyers: they have difficulty finding jobs; when they find them, the pay is not adequate to support their debt. If the gap continues to increase — as it has for the last several years — many students simply will not be able to manage high student debt and at the same time pay their rising consumer borrowing, prior educational expenses, housing costs, automobile payments, insurance coverage, and the basic professional lifestyle they believe a lawyer should be able to afford. While these issues have always confronted law school graduates, the economy has managed to provide long-term returns on the investment in a legal education that makes it a worthwhile investment. This essay posits that many trends — expected interest rate increases, demographic changes, high numbers of new lawyers, lower retirement and death rates among experienced lawyers, outsourcing of legal jobs, de- and re-regulation of the legal profession, and the like — make the future returns on a legal education investment much more risky.

of students' loans are federally guaranteed; (4) lawyer salaries have been ample to support the debt service that students accumulate in law school; and (5) students have been able to rely on family resources to support them where loans fall short.

In recent years, this financial model has come under some stress. The prices at law schools have grown faster than the rate of inflation; this merely compounds the earlier debt that students have accumulated for their undergraduate education. As general consumers, students also borrow for cars, entertainment, living expenses, and lifestyle; and this creates additional real pressures on students when they graduate. Most importantly, for many students, the legal employment market is too soft to support debt. Some (perhaps as many as 20%–25%) have problems finding any legal job within nine months of graduation. Those who fail the bar examination are especially hard hit, but are joined by many other colleagues who have not done well in school. Others may find jobs, but at modest salaries. Even those making the highest salaries find that the debt that they have accumulated while in school may tax them for years, make it difficult to afford housing and other essentials for a high quality of life. Students report that servicing their debt drives them into less satisfying careers than they would otherwise choose.

These financial pressures may soon challenge the capacity of law schools to continue to raise their prices. If so, it may undermine the current model for American legal education in non-prestigious, private, expensive law schools. Even many public law schools are only a few years from facing the same pressures; as their state support erodes, their students seek comfortable life styles while in school, and they engage in costly expansions of faculty, physical plant, or other services. In essence, we may be reaching the end of the golden era for law schools, beginning a period of decline, and putting many schools' survival at risk.

The remainder of this essay explores this possibility and proposes ways for schools to stave off their inevitable decline. Here is the issue: most law schools venture far beyond their expected mission of "training people to be lawyers." They offer themselves as micro-universities (but without explicitly embracing this mission). They deal with students who do not know why they are in school.

They owe duties to the legal profession, to law reform, to advancing human knowledge, to civil and human rights, and to universities whose missions are sometimes at odds with professional training. And, they are very expensive. Together, these multiple trends confuse the purpose of legal education. They raise the question of whether the legal education enterprise is worth its expense — the question of value. The further legal education wanders from a simple affordable mission to produce lawyers, the more questionable its intrinsic value will become and the more each school will be forced to justify its existence.

## II. ASSESSING VALUE IN THE LAW SCHOOL MARKET

Common sense suggests that law schools would be evaluated on how well their graduates perform as lawyers — a clear corollary to the widely held belief that law schools train lawyers. The schools whose graduates are the “best” lawyers would be the “best” law schools. Even if one broadened the understanding of what law schools actually do to encompass the variations on mission that have crept into legal education, the best metric for assessing the quality of a school would still seem to be “outputs” — the quality of a school’s graduates in whatever pursuits they engage.

Common sense aside, it is clear that neither students, faculty, employers, nor the public (represented through rankings) look to the actual performance of a school’s graduates in assessing that school’s quality:

- Students sometimes ask about who has attended a school and how well they have done, but more often look only to a school’s reputation (or LSAT scores or other input measures). When they look at employment rates, they usually look at gross statistics and do not focus on the substantial differences in outcomes dependent on law school performance.

- Faculty rarely look to the quality of a school’s graduates (but are deeply concerned about the LSAT scores and undergraduate grades of its students). They also want to know about the rank of the school, its prestige in the academy, and the opportunities they will have at the school to teach what they want.

- Although employers sometimes rely on the success of a given school’s graduates within their organization in deciding who

to hire, they often rely instead on short hand formulae in deciding which students to interview — a function of the rank of the school attended and class rank of the student.

- Ranking systems and reputation surveys do not acquire information about the success of a law school's graduates, except for their initial jobs, which may or may not measure lawyering skills. Sometimes they look to a school's first-time bar passage, which may say more about the quality of failing students' multiple choice standardized test-taking ability than the skills and values they need to practice law or the quality of the graduates who pass the bar.

It may not be a complete surprise that those outside of the law school community need stand-in measures like reputation to assess a school, but even current law students and faculty rarely focus on the actual outcomes for a school's graduates (at least after initial jobs and the bar examination). They often obsess about the prestige of their schools. They search for a brand name, whose value rests primarily in reputation. Even if the education is inferior to what might exist at a lower-ranked school, the market value of a more prestigious education seems to outweigh a superior educational product. It is a rare law school that does not lose a top student through transfer to a higher-ranked law school that provides a lower (or no) scholarship to the student and no opportunity for membership on its law review (or other honor societies). While transfer students sometimes report regretfully that they find the "quality" of teaching lower at their new schools, few seem to regret their choice because of the perceived value of the new brand name education they have acquired.<sup>6</sup>

Simply put: the law school market rarely asks whether the careers that graduates obtain bear a relationship to what they learn in school. It does not pose the question of whether the benefits law

---

6. Of course, like all markets, reputation (like price) does bear a relationship to actual quality and performance. Like other markets, once information becomes available on the actual quality of a lawyer — like their work for clients, at trials, in deals, etc., performed in other settings — higher valuations can be achieved. But, as argued below, these are often attributed to the quality of the individual, not his or her training. Similarly, the failures to perform by graduates of highly valued schools are frequently attributed to the individuals, not to those who trained them. In the law market, given the vast supply of new graduates, it is simply the safest choice to go with a brand name and wait and see. Reputations gained are not easily lost, and improving a reputation is at best, a long-term goal.

school graduates obtain are worth the cost of the education their school has provided. Instead, the market values law schools most highly for their inputs — the quality of the student body, the physical facilities, the endowment. While these may be accurate standards for the quality of a school's graduates when they become professionals, this is not always the case. Rather, a school's reputation becomes an end in itself, with value beyond either inputs or outputs. Accordingly, schools engage in a quest for enhanced reputation as a means to improving their apparent quality. The theory then goes that if reputation rises, the quality of the school's inputs will rise. This in turn will help to further increase reputation and in turn will lead to yet better inputs. Ultimately, the critical quality level will be reached and the reputation will be high enough that the market will value a school's outputs sufficiently to make the degree worth obtaining.

The consequence of this theory, however, is to drive schools to expend ever higher amounts to generate resources to enhance their reputations — better facilities, higher scholarships to buy better students, higher-priced faculty who bring fame to the school, more esoteric, but visible programs, famous speakers — whatever might gain an edge in reputation. Unfortunately, these expenses may only slightly affect the ultimate quality of a school's graduates. Making the expenditures may nonetheless be sensible if reputation is enhanced. It can enhance the quality of inputs and help the school gain slightly in reputation against close competitors. But, over time, the competitors will respond and the battle will continue without ever really affecting the overall relative reputation of a school. Ultimately, costs have gone up without real quality improvements and with little reputational gain. So long as the market absorbs the school's graduates, it merely means that costs are higher and students' debt service is higher. The issue this essay poses is: what happens when costs exceed returns in the market? Will increasing prices and expenditures continue to sustain the vast majority of schools whose reputation never rises? What happens to such schools if their graduates never experience the increased opportunities that come to those who attend high-prestige schools? Can the model be sustained?

Evaluating these questions is a complicated matter, since the value of a legal education has to be assessed in the several markets in which law schools operate — admissions, recruitment of faculty, placement, and philanthropy. An analysis of these markets reinforces the current valuation system that looks to reputation, confirms that a school's value currently has little to do with the actual educational activity of the school, but suggests that this market is in jeopardy. It further suggests that if American law schools continue to search for value primarily in reputation enhancement (without also substantially improving the actual quality of what they offer), they will fail. In the sections that follow, the essay suggests a different approach that is cost sensitive and seeks to look for value in the actual training that a school provides.

*A. Students Look for Prestige During the Admissions Process*

In evaluating law schools, many students obsess about prestige and rankings. Although there may be little direct relationship between a school's prestige or ranking and the quality of the education it offers, the preoccupation with rankings is rational at the extremes because the market does confer advantages on students at the most prestigious schools and imposes disadvantages for those at the bottom of the hierarchy.

First, by traditional quality measures (LSAT, undergraduate GPA, etc.) the students at top-tier schools are much stronger than lower-ranked schools. Whatever one might think of these quality measures, they provide a good prediction of who will succeed in law school (and the bar examination) and often are a guide to past performance, future ambition, socio-economic status, and social connections — all of which are excellent proxies for a path to later economic or career success.

Second, as discussed below, highly ranked law schools also succeed in the faculty recruitment and philanthropy markets. As is often the case, the rich *do* get richer.

Third, the reputations of highly ranked law schools are often national. Because employers come to the schools from around the nation, students may have significantly more options in choosing their first job or in choosing its location. More importantly, many legal employers choose to interview students at top schools almost



without regard to their class rank (if they have one, given that many top-ranked schools, with sufficient market power, avoid ranking altogether). Even when firms have cut-offs as to which students they will consider, the cut line may be at the 25th or the 50th percentile, far in excess of the cut-offs at lower-tier law schools.

Seeing these advantages, many students choose schools based primarily on their ranking. However rational this preference might be for choosing an elite school over any other, the preference often is irrational within the middle range of law schools. Outside of the very top of the rankings, the market seems to have little preference for students at one mid-tier school or another, regardless of the relative ranking the schools. Students at the schools may be little different from each other in their "quality" measures. Firms do not come from around the country to recruit at such schools. Students are cut-off from interviewing unless they are at the top of their classes. Although students may rely on rankings to sort between such schools, the market may not care.

Where students are somewhat more sophisticated and understand that only the elite law school brands have substantial market value, they nonetheless still may look to factors other than the quality of the training offered at a school in making their admission decisions. Some students look to the quality or appearance of a school's facilities (with the consequence that schools often engage in escalating battles to build bigger and better buildings at high costs that students must absorb through increased tuition). Some students may be persuaded by glossy recruitment brochures or advertising of schools, which also contribute to higher costs. Others may be drawn to schools that offer extraordinary levels of service, great cafeterias, strong advising systems, many clubs and organizations, etc. — other factors that contribute to warmer feelings about the school, but which also lead to higher costs. Relying on common sense, some students choose schools based on their location, reasoning that if they are not at a prestigious school, they should be closer to where jobs may be located. This may account for the very large numbers of students seeking admission to lower-ranked law schools in major metropolitan areas. Yet, many (perhaps most) urban schools are private and very expensive and the competition for jobs in their cities — not only from all local schools, higher and

lower ranked, but also from schools across the nation — may give students a false impression that they are greatly advantaged by location.

These factors all draw students into higher-priced education, where little of the price has anything to do with the intrinsic nature of the education that is offered. In a job market in which students can find fulfilling jobs that pay well, these costs are relatively unimportant. A robust market justifies the educational costs, whatever they might be. The ultimate value (and continued viability) of such high-priced, mid-tier schools, however, is wholly dependent on an outside market. And, as discussed below, that market may no longer be sufficient to make the investment by students sensible.

Although this analysis suggests that few students choose education because of particular advantages in the programs of law schools, several schools have recently tried to distinguish their (rather generic) programs from each other. They create specialty and certificate programs, offer overseas study, create dual degrees, etc. Although these initiatives often raise costs, few schools undertake an analysis to see if they are valued in the market as superior training of students to become lawyers, as opposed to another marketing tool to take advantage of law school applicants' lack of sophistication in measuring value.

In this environment, in which students invest in brand names, near-brand names, and wanna-be brand names, there are some students who take a different approach; they engage in cost-benefit analysis. They reason (correctly) that unless they are accepted by a law school at the top of the first tier, the market value of the "brand" may not have sufficient power alone to allow them to recoup their investment in getting their law degree. These students then search for the best scholarship packages. They choose rural schools with lower costs than expensive urban schools. They choose state supported schools whose subsidies lower tuition substantially. Yet, even these decisions rarely focus primarily on the education offered at the school; they look at the lowest cost (and highest rank within similarly priced schools) as the best way of measuring the school's value. Legal education is merely a commodity where one school's program is fungible with any other school's program. Because the goods are indistinguishable from one producer

to another, cost is the only rational basis to choose. The lower the cost, the greater the future returns. Under this analysis students only choose the higher price school in cases where the value of the brand name (or some idiosyncratic reason) provides the student with a sense that the initial investment will be recouped over time.

Whatever the merits of this analysis, over time currently advantaged schools may suffer the same fate that is likely for higher-priced schools. They are in the same labor market as more expensive schools. Their faculty members are often evaluated by the same standards as those at higher-priced schools. Salaries are often compared. Students expect that whatever price they pay, they are entitled to the same service level as they would receive at a higher-priced school. Universities come to appreciate that many law students will pay without regard to price; they urge (and even may require) prices to rise. Schools still seek better students and spend scholarship dollars to get them. They want a state-of-the art facility. State support erodes because K-12 is a higher priority or undergraduate education is more critical or tax receipts are down. Even at schools with a current price advantage, tuition is likely to continue to rise until it reaches the level at which students will question the value of their purchase. It is only a matter of time.

#### *B. Faculty are Rankings-Driven*

Law schools have broad-based faculties with multiple degrees, in many related disciplines. Only some faculty members define themselves primarily as lawyers rather than legal academics. With few exceptions, the faculty often has practiced law for a short period of time (on occasion, they have never practiced law). Even faculty members with distinguished practice careers do not continue to practice law. They teach (but only a limited number of courses). The most important part of their job is to produce scholarship, most of which is only tangentially related to teaching others how to practice law. Sometimes the scholarship is not even related to core legal problems. It can be theoretical. It can be about judging. It can be about law reform. It can be about societal reform. Rarely is it about lawyering.

These forces contribute to how law schools are valued — especially in the rankings. A significant part of the rankings methodol-

ogy relies on reputation surveys, on the assessment of deans, associate deans, hiring committee chairs, and recently tenured faculty members — all members of law school faculties. As discussed above, many faculty members do not focus on the teaching of law. Rather, they look to more scholarly ways of assessing schools, like the productivity of a school's faculty or the visibility of a school's faculty in law reform work or other public activities.

This focus is yet another incentive for a law school to expend resources to influence its reputation. In this case it leads to: reducing teaching loads to free time for scholars to write (and thereby requiring larger faculties or more adjunct hiring); hiring faculty who have interests that may be provocative, press-worthy, or attractive to university press and law review editors (and paying them premium salaries or giving them reduced teaching loads); encouraging faculty to travel (and supporting it generously); and promoting faculty to appear on television, write editorials, participate in national law reform or other social movements (with appropriate support and staff assistance). These activities are worth subsidizing when they bolster the substantive mission of a law school. Usually they have only a tangential relationship to the core education of law students — the ostensible reason that the students come to law school in the first place. They are, however, essential in the arms battle for reputation.

Even in the absence of some institutional preference to build reputation at the expense of focusing on the school's program, there are important market forces that skew faculty behavior. Being a faculty member is a job; and, as with most jobs, faculty members are interested in the pay and perks associated with their jobs. Such benefits are generally distributed on the basis of the contribution that the faculty member makes to the school and to the profession. The least visible (and unevaluated) part of a faculty member's job is the influence he or she has on the career development of a school's graduates. Such influence may not even be measurable until the graduate has practiced for years (and is long beyond the power of the school to monitor). Instead, faculty members' scholarship and professional activities are easy to calculate, count, and survey. Fame is the coin of the faculty realm and fame is determined by what others say about the faculty member's work. Not surprisingly, this

leads most faculty members to prefer work that will be rewarded, work that sometimes does much less for the school's product than for the school's (and faculty member's) reputation.

As with a preference for inputs over outputs in student recruitment, this focus on faculty development has been a means to the end of reputation. For some schools it has been the shortest path to an increased ranking. And, while this may improve the quality of those applying to the law school, the increased ranking has not necessarily translated into greater long-term opportunities for a school's graduates. Until recently, the "feel good" of improved reputation has warranted the expenditures because students have been no worse off (and perhaps even a bit better off) than before; their opportunities have kept pace with the increased educational cost. But, in the years to come, it is unlikely that students' opportunities will grow at the same rate that costs will rise. When that happens, schools will face the real question of how best to prioritize the activities of their faculties.<sup>7</sup>

### *C. Educational Quality is a Distant Second for Employers*

Of all stakeholders in American legal education, one would assume that legal employers would be most interested in the actual training that takes place at a student's law school. One would assume that the employers would seek to hire those from schools providing the best "lawyering" education, whose students can hit the ground running as a lawyer. The experience of most law school graduates, however, suggests that this is simply not the case. Like other segments of the market, legal employers are interested in a variety of other factors that are only marginally related to what law schools actually do with their students — relying on students'

---

7. This issue has the potential to become the most divisive matter for schools to address. With tenure and little incentive to change many faculty members can ride out their service at a school long before it will be in crisis. Like most issues of intergenerational equity, the real costs will be borne by future faculty members and students. It is critical, therefore, in the immediate years to come that law schools address faculty workloads and priorities. I frequently have argued that no non-profit institution should stay in business primarily to pay its salaries. For law schools to rise above this purpose they must focus their energies on providing real value to their students beyond the good will generated by reputation alone. I discuss this quest for value in the final sections of this paper.

grades and the prestige of their schools as proxies for what they have learned.

Legal employers use screening devices to arrive at the pool of graduates they consider for employment. For example, they interview only at selected law schools. Not surprisingly, the most highly rated law schools — especially those in big cities — have the most employers who will interview on campus. This reflects confidence that the students at these schools have already been sorted by the academy; they have the highest LSAT scores and the highest undergraduate grades. In short hand: they are the “smartest.” Next, employers sort by performance in law school. Most prefer to hire students at the top of their class. Many will not even look at the credentials of a student outside of the top percentiles in the class. However, at elite schools, the cut-off at which an employer will not look seriously at a candidate is significantly deeper into the class than at a lower-ranked school. It is only after this sorting that employers look to *what* students do in law school (as opposed to *how* they do) as a screen of who to hire.

This approach is fully consistent with the hierarchical approach to learning that begins quite early in American education. Students are often tracked in grade school and middle school. Even fewer students can take advanced placement courses. Only those with high SAT, ACT, and achievement scores are admitted to prestigious schools. Later, only those with high GPAs, LSATs, MCATs, GMATs, and GREs are admitted to prestigious graduate programs. And then, only the best of the best gain their initial employment in the higher paying (or higher prestige, but lower paying public interest) jobs.

In many instances, what has been learned in school is only a distant second credential to how well one has done. Grades and test scores are a proxy for actual skills and knowledge. Employers justify this approach by making a long-term bet on “talent” over training. An experience from my days at Chicago-Kent illustrates the point. As part of our career services outreach, I met with hiring partners at the major Chicago law firms. They were delighted for the chance to get to know us better and always offered deep respect for the program that we had developed. They acknowledged the leadership of Chicago-Kent in training students in legal writing and

research. They praised the law school's superior training in technology. They lauded the specialty programs and graduate degrees offered by the law school; as one partner put it, "You do more with less, than any other school in town." But, in response to our question why they did not hire more of our students (or reach deeper into the class), the answer was always the same, "We can always train smart people to get better, but we cannot train intelligence" — sort of like the National Basketball Association's preference for height, which simply can't be taught.

Even if these stand-in measures fail, by giving both false positives and false negatives, firms have little incentive to search more deeply into the actual knowledge and skills of those they hire. False positives are disposed of simply. New attorneys often do work that is supervised by others (or do low stakes work for clients). Their poor performance can be evaluated, warnings can be given, and ultimately, they can be dismissed. Yet, no one would fault the hiring partner for reaching out to students from the best schools with the highest grades. Nor, would the school be faulted for its failure to train. Rather, the poor performance can be attributed to the "character" of the new lawyer. Similarly, failing to identify the diamond in the rough, the new lawyer with superior skills (but weak grades or a low-prestige law school pedigree) can be remedied by hiring laterally, after the lawyer has already proven his or her worth. Neither the partner who failed to identify this prospect can be faulted, since there was no objective evidence of their talent, nor will the school be praised, because both the graduate and the firm are likely to attribute success to the individual talent of the lawyer.

In the face of this strong preference for input credentials, many employers look to what a student has learned only as a "tie-breaker." Some employers look to what students have learned as a primary driver in making a decision as to who will be hired: for example many government agencies look for a particular expertise; public interest firms may look to desire, dedication, and commitment to principles (that either may or may not be demonstrated by what a student does in school). Some organizations may look for specific knowledge in order to fulfill client responsibilities. However, in most of these cases, the employment is often at a salary much less than what top-line law firms are paying and therefore

provide less resources to new employees to cover the cost of their education. This in turn may lead graduates to jobs they might otherwise not seek in order to cover their debt.

The end result of this employment market is to reinforce many of the perceptions that students carry. Grades are the most important credential in gaining employment — high grades from a highly prestigious school is the best course to follow. Perversely, this may lead students to avoid classes that may challenge them because their grades might be at risk. Further, it may lead students to stay in their comfort zone. We often hear from graduates many years after they leave the law school that they wish they had taken some course or program that they avoided while in school. In focusing on obtaining work, they lost sight of the more important longer-term need to learn to work well.

As perverse as this system might appear, it works rationally to sort new employees and does not undermine significantly the ability of law schools to attract new students and charge them a market-rate price. So long as employers continue to be willing to pay high salaries to train new lawyers on the job, so long as most students perceive themselves as eligible for the highest paying of those jobs, and so long as the salaries pay for students' debt, the system holds together. The real issue that American legal education will face is when the vast majority of students no longer have a realistic possibility of obtaining work that is sufficiently remunerative to justify the costs of their education. Unless we are willing to assume that law students are really playing the lottery, or buying education primarily as a luxury good for its esthetic value, the future bodes poorly for our current model of expensive legal education.

*D. A Quick Take on Philanthropy: The Rich Get Richer*

Before becoming the dean of a law school, I had a quaint notion that fundraising would work something like this: a school would identify its needs (scholarships, professorships, funding for new programs, etc.); it would go to those with resources and make a case for the need; it would appeal to businesses (law firms and the like) and ask them to give to make better lawyers; it would go to graduates to ask them to support *alma mater*; and in the end, good programs and ideas would be supported.



It doesn't work that way. While some gifts (usually moderate in size) may come from appeals to loyalty, an appeal based on a school's need is rarely effective. Philanthropy also reflects the market. Those with money did not get their assets by ignoring basic economic analyses. Investing with stronger organizations (or those with a product that will gain cache in the market) yields stronger returns than investing in weaker organizations in which the capital helps merely with survival. The need to see that the investment will pay off is even greater in requests for funds from those who have no pre-existing loyalty or relationship with the organization. For them, the gift is often a form of *quid pro quo*; the critical question is not what is the need, but what is the return.

Not surprisingly, those with the most resources get the most resources. They can rely on their larger endowments to gain greater returns on investments for which they can take greater risk because they have less reliance on the investments to cover basic necessities on their operations. They can attract new gifts from loyal graduates whose generosity is made more likely by the greater opportunities they received as students at a school whose reputation ensured those opportunities. In short, this market tracks others — prestige is rewarded, sometimes without relation to the current status of the program. It reinforces the strength of the strong in the market and underscores the precariousness of the position of lower-ranked institutions. Fundraising cannot solve the value dilemma schools will face.<sup>8</sup>

---

8. Fundraising poses difficult prioritization questions for schools. First, they must trade-off between annual, expendable gifts that can be used to manage current budget shortfalls. This has the benefit of reducing the burdens on students and the school. However, this strategy cannot help over the long run unless similar funds can be raised annually. Thus, schools seek endowment gifts whose returns can be expected in perpetuity. However, such gifts generally return only a small percentage annually and require ever-larger endowments to manage current budgetary problems. Few non-elite schools can raise enough to reduce their dependence on tuition. Accordingly, their fundraising is directed to supplement budgets, to account for investments in "excellence," which usually means something that will enhance the school's reputation. Ultimately, these steps forestall the inevitable — the need to work at improving the core value of the education at the school.

### III. DECLINING VALUE WILL LEAD TO THE FALL OF AMERICAN LEGAL EDUCATION

#### A. *American Legal Education is Currently a Great Success*

The system of American legal education has been a great success. Large numbers of students attend schools throughout the country. They have a wide array of choices of schools: between rural and urban, private and public, expensive and moderately-priced, and high-prestige and low-prestige. Students have generally found that a legal education (no matter where in the hierarchy and regardless of cost) has been valuable.

In making their value assessments, students have assumed that whatever leveraging they do in the short-run — borrowing their funds or bearing the opportunity costs of delaying entry into the work world — has been worthwhile. In analyzing their decisions, however, recent trends have suggested that the model is fraying. First, the market seems to value brand name more highly than the actual education that is purchased. Perhaps this reflects the real lack of differentiation between education at one school and education at another. As a mere commodity, education's value can then be found only in the value of the brand or in acquiring the education at a low price.

Thus, recently, schools having neither brand name power nor cheap prices have had to search for value in other ways. They create the appearance of product differentiation with specialty programs, niche marketing, high-end facilities, and famous faculty. They engage in providing high levels of customer service — personal attention to students, commitments to technology, and special services. Because there is so little reliance on the actual value of the education that students receive, these “quality of life” issues are important markers that help to motivate applicants to consider one school over another. Students, as any other consumer of a luxury good, find value in the experience they have as consumers.

Eventually, high-end shopping experiences cannot alone sustain a business. While shopping for a Mercedes Benz may be enjoyable — with coffee, soda, and cookies, wonderful test drives, and low pressure sales forces — the car ultimately must be perceived as being worth its price. At one time Cadillac was the premier brand, but when its quality deteriorated, so did its sales (and ultimately so

did its brand value). Mercedes strives to keep its quality at the point where its reputation imparts additional returns to its owners because the quality of the product actually warrants its reputation.

This is especially important when the consumer borrows the funds for the purchase. They keep purchasing as long as the price is justified in the market or by the prestige associated with the ownership. But, one would have to wonder how long the Mercedes brand would retain its value if every year the customer borrowed 100% of the price of the car, pushed it off of a cliff, repeated the process for three years, and had nothing to show for it at the end.

Yet, that is the dilemma soon to face a wide range of American law schools (of middle-prestige, but luxury price), the majority of whose students borrow 100% of the cost and may not have a job at the end that will pay for the debt that has been accumulated to purchase the education. In the real world, you keep the Mercedes (which is itself useful). In the world of law schools, where many students are merely buying the degree without regard to its intrinsic value, may not pass the bar examination at the conclusion of their program, and may not find a legal job (or one with a decent salary), there may be nothing to show for their education but the flames as it goes off the cliff. This world portends the end of legal education as we know it. Students will no longer see law school as a good investment if they accumulate high debt, but cannot find income commensurate with paying the debt. What might be left are students with either an independent means to pay for school (who are too few to make up a large percentage of every law school); or, students who are willing to play a lottery (with much better odds than most, since by definition, 10% of every law school class will be in the top 10%, but whose odds are terrible nonetheless); or, perhaps students who will come for the esthetic value of their education. Like a beautiful piece of art, students will come for the mere joy of owning the piece!

By any calculation, if cost exceeds return, legal education is in for rocky times.<sup>9</sup>

---

9. It might be argued that law schools can survive by continuing to rely on students to act irrationally; inertia, parental pressure, ignorance of facts, and naiveté will keep them coming. This might sustain the survival of a school for some additional period of time, but it is unlikely to last long. Inertia ridden, parentally pushed, ignorant, naïve students need hard cash to support their irrational choices. Nothing sup-

Given this analysis, why hasn't legal education already declined? In fact, in recent years, with a weak economy, it has prospered as never before.<sup>10</sup>

First, it is funded primarily by debt (or the generosity of parents and employers). Law students borrow most of the cost of their education. The federal government guarantees payment of the largest portion of their debt. Private lenders are willing to lend the remainder of the funds. They use sophisticated financial instruments to grade the credit risks of the students to whom they make loans, and seek guarantors for loans to those with the weakest credit ratings. The lenders also are sensitive to the prestige of the schools of their borrowers, with favorable rates sometimes available to students at the higher prestige schools.

In the absence of loans, many students receive support from their parents who pay for their education (or co-sign their loans). In some instances, especially for part-time students, employers pay for their workers' education. Legal education is supported by mountains of OPM (other people's money) and sometimes by large amounts of personal debt that cannot be discharged in bankruptcy. So long as lenders continue to lend, parents continue to support, and employers continue to invest, law schools can meet their financial obligations and fund the expansion of their operations by raising prices (for which more loan money is available).

The unprecedented low interest climate of the last several years has accelerated this trend and reduced the risk associated with taking on more debt. Not only is the cost of educational debt at its lowest point in recent memory, the government has permitted extensive loan consolidations of all government guaranteed loans and thereby reduced past debt as well. Moreover, the interest rates have allowed borrowers to afford ever-larger amounts of other debt

---

ports the idea that banks and other lenders will support such choices without a confidence level that they will be repaid. Of course predicting future market trends is always risky business — legal employment may continue to expand in perpetuity, salaries may grow to out pace debt, foreign competition may go away. But hoping for a bright future that may (or may not come) cannot protect schools if they guess wrong. Simply put: schools must plan for the worst to ensure survival and then just be better situated if the worst never comes.

10. The obvious reason is that currently the long-term return on the investment is still in excess of alternatives. This may continue to be the case for the many years, but as discussed below several trends in the legal employment market make this suspect.

as well — for housing, cars, and consumer credit. The result is to insulate student borrowers from the worst effects of high leveraging. However, as the economy rebounds in the years to come, interest rates will once again rise. If they increase, but there is not a similar rise in income, students will be worse off — not only for their law school borrowing, but for all debt as well.<sup>11</sup>

Second, even when students are nervous about taking on law school debt, they often think that they have few alternatives other than to go to law school (or some other similar school). In a robust economy, businesses hire students directly from undergraduate school and are willing to bear training costs for the graduates. However, in less frothy economies, recent college graduates do not have such options.

The post *dot-com* bust illustrates this point. With the economy in recession, many students who once might have found remunerative employment after graduation faced the prospect of unemployment (and the obligation to pay back their undergraduate debt). Because much of undergraduate education is non-vocational, many recent graduates did not have particularly valuable skills or any technical knowledge. Rather than taking low paying jobs (or begging for relief from parents), such students perceived another choice: to borrow even more money, continue their education, and roll the dice for better future employment prospects.

For those with no burning desire to become an intellectual, with no technical knowledge, with no discernable passion for science, and with an aversion to blood, the choices seem simple: law school or business school. Many choose law school over business school, reasoning that although law school might cost 1/3 more (three years versus two years), the law degree would be more flexible — in the worst case, they might be able to practice law on their own.

---

11. If rates increase, students will be at risk. They depend on freely available, cheap credit to pay their bills. In the years to come, the cost of education will continue to rise, not only because tuition rates will go up, but so too will other costs of attendance, like housing, books, health insurance, and the like. Students therefore will borrow more money and will have to deal with higher interest rates. Each borrowed dollar (of which there will be more and more) will cost more. Without a similar rise in income, educational cost will reach the point of being too expensive to warrant investment by either the student or the lenders.

Third, this has been a sensible strategy over the last several decades. Even though students have accumulated debt, they have leveraged their loans into higher paying jobs than they might have received without an advanced degree. Moreover, becoming a lawyer (or other professional) has given them more prestige within society and a well-respected role in the economy. High debt makes sense when long-term returns on borrowing put the graduate into a position that is superior to what they could have achieved without borrowing. The issue that remains is whether the model is sustainable after debt rises to a high enough level.<sup>12</sup>

Fourth, even when students understand the risk associated with high levels of borrowing in a modest job market, they tend to think that they will be the exception to the rule. In countless conversations with entering law students, I have concluded that most think they will be in the upper-third of their class (or at worst will be average). They see their chances of being a top student as no worse than one in three to one in five. Many believe that they will be in the top of their classes because they have always been at the top of their classes. Thus, they tend to deeply discount the risk that they will end up in jeopardy of incurring high cost and have a low paying job. But it is a fact that 90% of all students will be in the bottom 90% of their class!

Finally, for most of the last twenty years, the economy has heated up sufficiently to validate the investment in a legal education. While salaries may remain stable for short periods of time, they have tended to skyrocket and rise sufficiently to sustain the debt that students accumulate. This environment reflects the boundless optimism in the American economy and the triumph of our economic model during the last years of the twentieth century. In such an environment, students, like others, gladly accept risk and have been rewarded by real returns (even if they are sometimes

---

12. There are several trends that make borrowing increasing amounts for education a questionable long-term investment. First, it depends on jobs expanding at the same or faster rate than the number of new graduates entering the workforce (or that more jobs are needed). As life expectancies increase and retirement rates decline, this may not be the case. Second, the numbers of new graduates are increasing relative to the numbers of lawyers they are replacing. There are just more lawyers now than ever before. Third, as discussed below, trends in the legal profession may slow the growth of new legal jobs.

delayed). But, like other investments, the higher the risk, the greater the fall unless the borrower engages in hedging strategies. In law schools, students sometimes hedge by seeking joint degrees (or specialties that have market value independent of being a lawyer). As discussed below, these hedges will become increasingly important in the years to come.

*B. The Good Times are Coming to an End*

The great success of American legal education has been buoyed by cheap money, a perception that there are not many viable alternatives, a sense that a legal education is an excellent long-term investment, students' belief that they are the exception to any negative trends, and the historically accurate belief that the legal profession is so robust that it will always outrun the debt that students take to become lawyers. In the years to come, each of these trends will change substantially and jeopardize the legal academy.

First, cheap money will remain available only as long as the Federal Government is willing to maintain guarantees for loans and to subsidize low interest rates when loans consolidate and private lenders are willing to loan to law students. Unfortunately, the future of the legal profession does not sustain a belief that loans made to law students will continue to be secure. If lenders come to this conclusion, loans will be more expensive and less available. If so, the edifice of legal education will crumble as its sales decline.

Both private employers and law school career specialists share a growing unease about legal salaries. Firms have felt pressure to raise salaries in their recruitment of new lawyers. Doing so has freed law schools to continue to raise their prices, knowing that students have been able to manage their debts. But, unlike the past, in which firms have easily passed on their labor costs to clients, competition in the provision of legal services has become increasingly price sensitive. Clients see legal costs as one variable cost that can be controlled. They have been less willing to let their fees provide the training for young lawyers whose salaries cannot be justified by the work that they are capable of doing. In short, law firms are finding that their high labor costs are a problem.

For the last several years, firms have utilized several strategies in dealing with their labor costs: (1) demanded higher billable

hours from their new lawyers; (2) fired lawyers who are not immediately able to perform at a high level; and (3) eschewed entry level hiring in favor of hiring more experienced lawyers. All three of these trends bode poorly for the current model of legal education in which the prospect of a high-paying initial legal job provides an incentive to students to come to school. Working greater hours, with the risk that bad performance will not be tolerated, in an environment where more experienced workers can be brought in at a similar salary suggests that the job lottery odds are getting worse. In this environment, lenders may be unwilling to fund what may become a worse investment.

A less obvious risk to the highly leveraged law school business is the risk that families will be less able to support their children's educational cost. In recent years, in a soft job market, financial aid officers report that law school graduates have relied on family resources to cushion the transition from law school to the legal profession. A look forward at the demographics of American society suggests that the students of tomorrow may have fewer family resources to rely upon. There is a wide disparity in birth rates between wealthier American families (with relatively low birth rates) and families of more modest means (who have higher birth rates) — especially in minority communities. The students of tomorrow may increasingly come from families with more children who have fewer assets to cushion slow job markets.

Second, changes are likely within the legal profession that may undermine continued optimism that it will always expand to create new opportunities for law school graduates. State and federal government regulation (and deregulation) of the legal profession may profoundly affect the need for a vast supply of highly paid new lawyers. Tort reform is quite likely, with the effect of depressing returns for personal injury lawyers. The very complex tax system (and much of the work associated with estate planning) may be simplified. New forms of competition from online providers of legal advice to computerized forms to breaking the monopoly of lawyers to dispense advice may undercut the meat and potatoes of small firm practice. Legal work (like other services in the economy) can be outsourced to English speaking workers in other countries with lower wages than currently provided to American lawyers. The



partnership track in firms will be constricted; lawyers may be members of corporations, with limited chances to share in profits and firm growth. Non-U.S. competition will siphon off international business from American firms.<sup>13</sup>

Adding to these pressures, law schools are graduating increasing numbers of students who will expand the number of potential new members of the legal profession. More laborers mean lower wages throughout as they compete for the limited number of jobs (or so the classical labor theory might guess). Adding to this are the increasing numbers of foreign lawyers gaining one-year law degrees in the United States who work at multi-national firms that compete for business in the United States and can pay their U.S.-trained workers lower wages because these workers have had lower educational costs. I have no doubt that the high-end of the legal profession will continue to expand and demand new lawyers. The only question is whether this sector, from which students derive their salary expectations, but which employs only a small percentage of all lawyers, will sustain those expectations. It does not seem likely.

The golden era of American legal education is drawing to a close. Loans will be more closely monitored. Family resources will be tested. Fewer opportunities will be available. Salaries will be depressed. Greater numbers of graduates will compete for fewer slots in the market. The outcome seems inevitable — high-priced schools, with moderate prestige, will not survive, unless they change.

#### IV. SURVIVAL OF THE FITTEST: AMERICAN LEGAL EDUCATION WILL RISE AGAIN

This analysis suggests that expensive schools with modest reputations will be in jeopardy. Such schools offer very little to sustain student demand. Most of their graduates cannot command large salaries after graduation, with higher paying employers seeking only

---

13. Law schools have contributed to this trend. By educating lawyers from around the world in LL.M. programs, they have passed on important skills that will be used by non-U.S. firms to compete for business. The legal profession is a worldwide market and non-U.S. firms can underprice the market because their lower salaries and lower educational costs. If so, business may shift to them at the expense of U.S. firms and their highly paid workers.

those with high grades. Their degrees do not have national brand name recognition. More importantly, these schools have for years escalated costs in an effort to raise prestige, established new programs to create “distinctiveness” in the market, and have hired expensive, permanent faculty, who cannot be shed without modifying tenure — a very costly venture. Such schools have high infrastructure costs that must be maintained. If they face a depressed applicant pool, they must reach deeper into the applicant pool and accept less well-qualified students. This in turn will diminish the reputations that the schools have been seeking, which will lower the quality of their applicant pool further, and ultimately unravel the accomplishments of the school.

In this environment, only a handful of schools will survive: the old-line, high-prestige, law schools; the inexpensive publicly funded schools; and new, lower-priced competitors that will accept students without regard to quality.

Because the admissions, faculty, employment, and philanthropy markets value brand names most highly, high-prestige schools have a much greater chance of prospering in a declining market. Students there have the strongest skills coming in. Graduates of the schools have a disproportionate share of the highest paying jobs. They have the greatest cushion provided through philanthropy (past, present, and future). Employers are willing to hire graduates from throughout their class ranks. Thus, for the short run, such schools will prosper and survive (or at least stave off as long as possible the pressures that mid-tier schools will face).

Similarly, lower-priced schools can prosper. State supported schools have the advantage of subsidies that can cushion the borrowing of students. Graduates of such schools will have less need for the high salaries that must be achieved to pay the debt service on very expensive schools. Essentially students at these schools will graduate with less debt and the schools can survive without the same immediate economic pressures that will face middle-tier private schools.

It is also likely that new schools will begin to compete for law students. Schools using new technologies — teleconferencing, the Internet, and the like — can offer lower-priced education than older schools. They also might use less expensive labor (adjuncts,

un-tenured, non-tenure-track), utilize more modest physical facilities, and offer education at hours more consistent with allowing students to work while in school.

However much these schools might escape the immediate consequence of a declining market for law school graduates, eventually they too may face a point at which price begins to exceed return. For the high-prestige schools, it may come in the form of fewer of the graduates having a wide-array of options. For state schools, it may be the refusal of legislatures to deeply subsidize graduate students — especially lawyers. And, for new competitors it may be the forces of the labor market or the demands of students for better services that will drive costs upward. Eventually, all of legal education will face the question of survival — will they provide sufficient value to warrant the good life?

I have written as if decline is inevitable, inexorable, and unavoidable. If I believed that this was the case, I would advocate that we declare victory, shutter our doors, and cash in our assets. But, decline is inevitable only if we act as if we are not subject to market forces and if we refuse to take the drastic steps necessary to retool our business. Law schools that refuse to change should shut down now, while they can gloriously exit. But, for those seeking to survive and prosper in the years to come, the task is clear: create real value for your students and the school might climb out of its predicament and rise.

The future will require schools to provide value that comes from its education, not merely from its price or its brand name. In time, that education can produce a brand of its own — based on outputs, not inputs. But, the battle is to create something special in the meantime. These are some of the steps that will be taken.

#### *A. Reducing the Cycle Time to Adulthood*

Where is it written that it takes four years of undergraduate education and a minimum of three years before a citizen can take on professional responsibilities? Unlike legal education in most of the world, in which students may study law in undergraduate school, American legal education is a graduate discipline. The consequence is to significantly raise the cost of becoming a lawyer. As the value of a law degree declines in a tight job market in which

income does not cover debt, the pressure will mount to reduce the time it takes to become a lawyer.<sup>14</sup>

The first steps will be taken directly in the law schools, which will offer accelerated degrees combining semesters and summers or which allow substantial overloads of courses.<sup>15</sup> At the least this will reduce students' opportunity costs by getting them to legal jobs more quickly. But because this approach does not immediately reduce the out-of-pocket expenses of students, since schools can still charge full price, there will be a continued push to reduce students' overall costs. Some schools might seek a market advantage by lowering their price for accelerating students, but ultimately will be forced to make up for lost income. They might respond by accepting more students — a policy that would further flood the labor market. In the end, they will begin to encroach on undergraduate education — giving students the option of entering law school before finishing college or even instead of college — thereby reducing students' overall educational costs.

Within the university, this may lead to shifting resources from undergraduate majors that students will no longer study because they perceive them without market value. This reallocation will cause major turmoil, but may also create incentives to better utilize overall faculty resources by having faculty members teach across departments and disciplines. For other law schools, however, their students will come at the expense of small colleges, community colleges, and mediocre undergraduate schools whose graduates do not fare well in the employment market.

There may be some market resistance to younger law graduates being permitted to practice law without supervision. It almost goes

---

14. This is especially true given the international competition to provide legal services. With non-U.S. lawyers having significantly lower costs to become a lawyer (and lower salaries as well), American schools will have to lower overall educational costs to permit our firms to compete. American labor costs cannot continue to outpace salaries of foreign firms unless our productivity and quality justify a price differential. The success of non-U.S. firms in recent years suggests that whatever quality differences currently exist, may be lessening.

15. Accelerating the time to graduation still permits law schools to extract the same price as a three-year education by charging by the credit hour or for overloads, etc. However, even if the out-of-pocket-cost of an accelerated education is the same as the normal three-year track, students may still have a substantial savings by accelerating. They can reduce their opportunity costs incurred by delaying entry to the profession.

without saying that wisdom and judgment come with experience. Nonetheless, the profession may find a significant advantage in hiring new lawyers who have lower debt. First, they can be paid much less, not only because their debt is lower, but also because they have incurred much lower opportunity costs in becoming lawyers. If so, employers might once again better afford to train their new lawyers. Second, the profession might stiffen post-graduate testing and continuing legal education training without imposing undue burdens on new lawyers. Finally, the quality of the work place might improve with lower billable hours necessary for employers to recover their investment in new lawyers.

*B. Diversifying the Law School's Customer Base: Law School as Mini-University*

Law schools derive their income from students studying to become lawyers. If they are to survive in the future, they must reconceive their missions. Law schools already have deep expertise in the relationship of law to multiple disciplines, have invested heavily in faculty with multiple disciplinary knowledge, and can impart knowledge that is valuable to people who are not lawyers. Thus, the law school might serve a different role within the university. Students can come to become lawyers (a lengthy process) or they can come to receive portions of a legal education — certificates in subject areas, specialties that are useful to students from other disciplines (medicine, business, engineering, the arts), and continued professional training for those in business who need to know law, but who do not need to become a lawyer.

Law schools will become mini-universities with multiple entry and exit points. Students will be able to take the whole program or parts of the program. They will be able to enter and return throughout the course of their adult lives. The law school will forge alliances with other professions, seek out employees of those professions, and offer them advanced training in legal issues that will be useful to them in their professional lives.

Conceived in this way, schools will become less reliant of “law students” and more reliant on “students of law.”<sup>16</sup> By diversifying

---

16. I contemplate not only that students will be attracted to law school from other disciplines for some legal training, but also that law students may choose to leave law

their customer base, law schools can cushion the impact of a lawyer employment market that does not justify accumulation of high debt. Rather than teaching students interested in “union cards” (or mere brand name degrees), they will teach students interested learning law. In short, the degree will become less valuable than the actual skills, values, and knowledge being taught.

*C. Membership in International Consortia: Partnerships and Distance Learning*

Law schools try to be all things to all students. They hire faculties to teach in all areas. They build law library collections that cover all subject areas. They try to give students an appreciation of international law, jurisprudence, technology, trial law, private law, etc. This leads to serious duplication of resources. Schools located within blocks of each other spend to build boutique specialties in an effort to compete for handfuls of students to improve their rankings. Even states that support more than one law school, rarely share resources between the schools, choosing to let the Gators compete with Seminoles in the classrooms as well as the football field!

This is wasteful. If schools cooperated with each other and shared their resources, costs could be reduced, schools could build real expertise, and students could be exposed to experts from many locations. Accordingly, it is likely that schools will begin to share their resources. Using combinations of in-person teaching, in which expert faculties may ride the circuit between schools (which hire local adjuncts to manage the courses in the absence of the ex-

---

school early to go to other disciplines as well or to receive something other than a law degree. Law school currently contemplates a straight path from first-year to graduation, with an expectation of a bar exam at the end. Some law students may decide that this is not a sensible option. Currently, they must either drop out or fulfill an unnecessary degree. I expect that schools will provide other exit strategies — specific, terminal masters degrees which add one semester of courses to the first year, send out “law masters” — folks who have one and a half years of law school and some special disciplinary training, the equivalent of ABD (all but dissertation) Ph.D. students with terminal masters. These “law masters” could then go into the market place with less debt, real legal training, some special knowledge in a field, and a choice to gain more education in that field or go into the profession associated with the field. Such “masters” might include: real estate, trusts and estates, financial planning, dispute resolution, etc. These hedges might prove very attractive to students with lower grades who want to cushion the impact of their borrowing, but not lose the value of their sunk legal educational costs.

perts) and distance learning, in which the experts deliver the core materials (which are discussed locally by lower-priced adjuncts), several schools are likely to band together to improve their education.

Issues such as brand confusion, income distribution, and cost sharing may arise. This will force cooperating schools to think of themselves differently, not just as individual schools, but also as collectives. Private businesses, especially moderate sized enterprises have acted similarly in forming buying groups or joint ventures. For law schools, it will be the creation of consortia that will begin to brand themselves to compete with upper-tier brands. Depending on their course mix, these consortia can offer real value to their students.

There is no reason to believe that these consortia will only involve domestic law schools. The United States is not the only place with law, lawyers, and law schools (nor the only place in which schools compete and face a difficult economic future). Nonetheless, American law schools are envied throughout the world and are attractive places for international students. In the years to come, law schools will survive by better tapping into the international market and providing their students with broader education. Doing so will not merely provide a marketing distinction (as is the present course of international study), but will be driven to create real substantive advantages. Tomorrow's lawyer will need to understand the advanced economies of the world to be an effective lawyer. This will drive some schools into alliances with foreign law schools, creating the ability to offer American law students broader experiences than they currently receive. Using the same techniques suggested above, international consortia will give the partner schools significant marketing advantages and cost savings. To survive, every middle-tier private school will have international and domestic partners, or be sure to fail.

#### *D. Mergers, Acquisitions, and Going Out of Business Sales*

Scale matters. Some schools will decide that joint ventures or consortia simply do not offer sufficient branding or efficiency to warrant the activity necessary to carry them on. Moreover, the difficulty of melding different cultures makes alliances of separate and independent institutions difficult. Thus, some schools will decide

to merge with others or acquire others in their quest for greater expertise and distinctiveness. And, given the likelihood that some schools will not be able to compete in this environment, the survivors will also look for asset sales of failing schools. Like other industries, law schools will consolidate.

This conclusion should not be surprising to observers of the legal profession. For the last two decades, law firms have been consolidating through mergers, acquisitions, and picking up assets of failed firms. The reasons are similar to those that will impel law schools to act: firms (as do schools) need broad-based businesses, with geographic diversity, a wide array of expertise, and the flexibility to offer employees multiple locations and career options.

Like law firms, not only will schools consolidate, they will experiment with different organizational forms. As firms have moved away from partnerships, there is every reason to believe that schools will move away from their current form as non-profit organizations. For-profit firms, corporations, or even law firms might move into the law school business. There are intriguing possibilities of firms seeking to provide their own future employees by providing them cradle to grave training — Law Kibbutz, as I sometime call it! Other organizations like legal publishers or adult-learning, for-profit schools, might see law schools as excellent cross-training facilities that round out their product lines — especially as the cycle time to adulthood decreases and law schools begin to function like mini-universities. In the future, law schools that prosper may need the deep pockets of parent companies that can place law into broader educational facilities that may supplant traditional universities (and which can offer faculty profit sharing, flexible work options, and the chance to change departments in which demand for their services may be greater).

## V. ESTABLISHING REAL MISSIONS TO BUILD BETTER PROFESSIONALS

When my nephew Alex pointed to Eton as the exemplar of excellence in education, he reminded me that only a handful of schools prosper by birthright. They have survived for centuries. Their graduates are the leaders of industry, government, and the arts. They have built facilities that are the envy of small countries (and have retained assets that rival the largest organizations in the



world). But even these schools adapt and change — they bring Internet and morning coats together to make sure that tradition continues in a modern world.

For more lately arriving institutions, success has been contingent on other factors. It has never hurt to start well capitalized and to build greatness upon a strong base or to have the home state invest the school with deep subsidies and strong loyalty. American legal education has its Etons — like Harvard and Yale. It has its late arrivals that have been built on early excellence and strong investment — like Stanford and Chicago. It has public schools supported by strong initial investments and incredible loyalty of its graduates — like Michigan, Virginia, and Texas. But for most American law schools, prosperity has been the by-product of good market conditions, the ability to expand by increasing tuition and passing the costs to students who will pay almost any price with cheap, readily available loans. It seems that law schools are striving for prestige alone, but not worrying about their intrinsic quality (or the possibility that they are in any jeopardy at all).

This era is coming to an end. Price will matter in the future as credit constricts, the job market becomes less remunerative, and the legal profession changes. This world will have its survivors whose brands or prices separate them from the pack. But the only other survivors will be those that will radically change — in form, in product, or in mission.

Perhaps the future outlined above is overly pessimistic and apocalyptic. But, whether one believes the end of the world is imminent or not, it is clear that legal education must look inward in the years to come, if it is to survive. Too much of legal education is currently devoted to faculty preferences at the expense of what is best for the school and its students. Too many law schools try to become attractive to students without the hard work of improving the substance of their education. Too many activities are hollow, directed to improving ranking, but not focused on the actual education of students. The place to begin is straightforward: schools must establish their missions and must fulfill their missions. If they are to avoid a decline, they must stand for something worthwhile. They must create a better product.