

2013

The Impact of Rankings and Rules on Legal Education Reform Essay

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CONNECTICUT LAW REVIEW

VOLUME 45

MAY 2013

NUMBER 4

Essay

The Impact of Rankings and Rules on Legal Education Reform

DAVID YELLEN

Legal education is experiencing intense pressures and is undergoing profound changes. Two important forces that help shape and limit the nature and scope of legal education reform are the U.S. News & World Report rankings and the American Bar Association's accreditation standards. The push and pull of these forces helps explain why law schools are embracing some changes and resisting others.

ESSAY CONTENTS

I. INTRODUCTION	1391
II. RANKINGS.....	1394
III. RULES	1402
IV. BUMPY LANDING OR DISRUPTIVE CHANGE?	1405
V. CONCLUSION	1407



The Impact of Rankings and Rules on Legal Education Reform

DAVID YELLEN*

I. INTRODUCTION

At the risk of belaboring the obvious, these are challenging times for legal education. The financial collapse and “Great Recession” of 2008–2009 led to a dramatic decrease in the hiring of law school graduates by private firms, government agencies, and other employers.¹ In fact, it was subsequently revealed that hiring was flat or declining even before then, as the forces of globalization and technology have impacted the provision of legal services.² It therefore seems unlikely that hiring of lawyers will rebound to prior levels any time soon.³ As the reality of the employment picture became clear, applications from prospective students began falling sharply; this year there are likely to be about 40% fewer applicants than three years ago.⁴ Meanwhile, students are graduating with record debt levels,⁵ the result of tuition increases well above inflation for many years.⁶

Many scholars and journalists have challenged the value of legal

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¹ See *The Job Market for Law Graduates*, WALL ST. J. (June 25, 2012), <http://online.wsj.com/article/SB10001424052702304782404577487242374826050.html> (reporting that 2011 graduates had slightly more than a 50% chance of being employed in full-time, permanent lawyer jobs nine months after graduation).

² William D. Henderson & Rachel M. Zahorsky, *Law Job Stagnation May Have Started Before the Recession—And It May Be a Sign of Lasting Change*, 97 A.B.A. J. 40, 44, 46–47 (2011).

³ *Id.* at 40, 44 (predicting that attorneys can anticipate slower rates of market growth, especially in firms, as they have reduced the number of entry-level attorneys hired out of law school and instead retained more senior associates).

⁴ *Three-Year ABA Volume Comparison*, LAW SCH. ADMISSIONS COUNCIL, <http://www.lsac.org/lscresources/data/three-year-volume.asp> (last visited Dec. 20, 2012).

⁵ Graduates now average over \$100,000 of law school debt, with some far exceeding that average. *Average Amount Borrowed for Law School 2001–2010*, A.B.A., http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/avg_amnt_brwd.authcheckdam.pdf (last visited Feb. 23, 2013).

⁶ *Law School Tuition 1985–2011*, A.B.A., http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/lstuition.authcheckdam.pdf (last visited Feb. 23, 2013); see also Karen Sloan, *Tuition Is Still Growing: Despite Lagging Law School Applications, It Vastly Exceeds Inflation*, NAT'L L.J. (Aug. 20, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202567898209&rss=nlj&slreturn=20120720115700> (reporting that in 2012, tuition and fees at private schools increased by about 4%, while in-state student rates at public schools increased by approximately 6%).

education.⁷ Calls for reform abound, both inside and outside law schools. Although there are, of course, a wide range of opinions about the path forward, the most common critiques suggest that: (1) there are too many law students given the available jobs; (2) most law schools are too expensive given the current economic reality; and (3) legal education should focus more on actually preparing students for the practice of law and fewer resources should be devoted to faculty scholarship. Unfortunately, many discussions about the origins of this situation and the adequacy of law schools' responses have a rather Manichean quality. For example, in his often insightful book, *Failing Law Schools*, Professor Brian Tamanaha charges that law schools "extract as much money as they can by hiking tuition and enrollment."⁸ "Scambloggers" like Professor Paul Campos are even more inflammatory.⁹ On the other side, some defenders of legal education often use lofty language to suggest that law professors suffer from little self-interest, being motivated principally by a higher calling.¹⁰

These caricatures do not capture the complex reality in which law schools exist. We are not selfless seekers of some Platonic ideal; nor are we profit maximizers indifferent to our students and to broader concerns. Instead, we struggle between two forces that are often at odds with one another: academic values and competitiveness. When we act in furtherance of academic values, we honor our highest ideals. When we pursue competitiveness and prestige, we act in a more businesslike fashion. There is no roadmap as to how to navigate these competing pressures. Sometimes we act from principle, sometimes from practicality. Collectively, we spend a great deal of time trying to improve the education our students receive, contributing to the development and dissemination of

⁷ See, e.g., BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* ix–xiii (2012) (discussing the downfall of legal education caused by multiple factors, including law schools seeking "prestige and revenue without attention to consequences"); Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES, Jul. 14, 2012, at SR10 (stating that law schools are "facing an existential crisis" requiring a difficult road towards a more "sustainable model"); Steven M. Davidoff, *The Economics of Law School*, N.Y. TIMES, Sept. 24, 2012, at F8 (examining the economics of a legal education across variously ranked schools); Clifford Winston, Op-Ed, *Are Law Schools and Bar Exams Necessary?*, N.Y. TIMES, Oct. 24, 2011 ("[T]he existing legal licensing system doesn't even do a great job at protecting clients from exploitation.").

⁸ TAMANAHA, *supra* note 7, at xii.

⁹ See generally INSIDE LAW SCH. SCAM BLOG, <http://insidethelawschoolscam.blogspot.com/> (last visited Feb. 12, 2013) (a blog dedicated to writings on "the law school scam").

¹⁰ See, e.g., Jay Sterling Silver, *The Case Against Tamanaha's Motel 6 Model of Legal Education*, 60 UCLA L. REV. DISC. 50, 55 (2012), available at <http://www.uclalawreview.org/?p=4036> (stating that the important role of law professors is "to reflect on and identify abuses of power and solutions to perplexing social problems from the Archimedean point of the academy"); Letter from Michael A. Olivas, President, Ass'n of Am. Law Schs., to Hulett H. Askew, Consultant on Legal Educ., Am. Bar Ass'n (Mar. 28, 2011), available at <http://www.aals.org/advocacy/Olivas.pdf> (referring to the modeling of "public service" and "selflessness" by law professors).

knowledge about law, and improving the justice system. But we also aggressively pursue our individual and institutional interests, which is the main reason tuition has increased so much in recent decades.¹¹ The decisions we make about values and competition reveal a lot about who we are. It is fair to judge us on the totality of our actions. It is simplistic, though, to suggest that only one set of these forces matters.

There can be little doubt that the balance has tipped towards the pursuit of competitiveness, at the expense of academic values, in recent years.¹² Market forces, once unleashed, are very difficult to control. Most of the current calls for reform are, in effect, calls to reverse that trend. Any effort to understand how, and how well, law schools are responding to the current crisis should take into account our goals, incentives, and obligations. What motivates us and constrains us? Many factors have contributed to the shape legal education has taken,¹³ and many factors affect how we respond to the current situation.

Change is occurring in legal education, sometimes even where there is no clear payoff for the schools embracing such change. But change is slowed by differences of opinions or priorities, inertia, external forces, and institutional and individual self-interest. In this Essay, I attempt to explore current legal education reforms through the prism of two of the major forces that influence and constrain us: *rankings* and *rules*. By rankings, I refer specifically to the annual ranking of law schools by *U.S. News & World Reports* (“*USNWR*”), but I really mean the broader set of competitive forces that have come to have such great influence on legal education. By rules, I focus mostly on the *Standards and Rules of Procedure for Approval of Law Schools* (“*ABA Standards*” or “*Standards*”) of the American Bar Association’s Section of Legal Education and Admission to the Bar, which is the nationally recognized accreditor of law schools. There are, however, many other rules that affect how law schools are organized and how they operate. I discuss how rankings and rules have helped shape the form that legal education has taken and, more importantly, how they support or inhibit the reforms that schools are, or are likely to, consider in the coming years.

¹¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-20, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COSTS AND ACCESS 24–25 (2009), available at <http://www.gao.gov/new.items/d1020.pdf>.

¹² See, e.g., TAMANHA, *supra* note 7, at 72 (stating that law school administrators and faculty defend the inflation of reported employment statistics by rationalizing that “since most law schools were doing it, it wasn’t wrong, and any school that did not boost numbers would suffer next to competitor schools that engaged in the practice”).

¹³ For an excellent overview, see generally A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949 (2012) (reviewing the historical development of legal education in the United States).

II. RANKINGS

Rankings have become influential throughout higher education, but they appear to have particular importance in legal education. This is probably because the legal profession and law schools are more hierarchical and prestige-oriented than most segments of the economy and higher education. As a result, it is hard to overstate the impact of *USNWR* on legal education. Although *USNWR* was not the first entity to rank law schools,¹⁴ it rapidly became dominant. The rankings have driven behavior in a number of significant, often troubling, ways. The annual release of its rankings creates a wave of excitement and anxiety throughout legal education. Some law school deans have ridden into office promising to improve a school's rankings; some have been driven from office by falling rankings.

That said, *USNWR* is the most visible example of the competitive forces that have become so powerful in higher education in general, and legal education in particular, over the past few decades. If *USNWR* had never started ranking law schools, or if they stopped today, some behaviors would be different. But it seems certain that law schools would still be much more market-oriented than in the past. The information age, America's love for lists and rankings, and myriad other factors have all pushed in the same direction. So while I discuss the impact of *USNWR* in particular here, I am really referring to the constellation of competitiveness factors that influence our environment.

The major impact of *USNWR* has been to incentivize schools to expend great resources pursuing prestige and highly credentialed students, resulting in enormous upward pressure on tuition.¹⁵ Of course, obtaining prestige and the best students were goals of law schools long before the rankings. But because of the *USNWR* methodology, these pursuits took on greater urgency in the rankings era. Two of the most heavily weighted factors in *USNWR* methodology are a pair of opinion surveys: one of four faculty members from each school, and the other of one thousand or so judges and lawyers.¹⁶ Although it has been demonstrated that reputation survey results change very little over time, schools devote a great deal of

¹⁴ Some rankings can be almost comical. For a time, there was something known as "The Gourman Report." It purported to rank law schools in a variety of categories. Upon inspection, however, it became apparent that schools were ranked in the same order in each and every category. It certainly appeared that the author of this ranking simply fabricated numbers to justify the rankings. See Jeffrey Selingo, *A Self-Published College Guide Goes Big-Time, and Educators Cry Foul*, CHRON. HIGHER EDUC. (Nov. 7, 1997), http://www.broh.com/images/D2-1997-11-07_CHE_-_Guide_books.pdf (reporting on the sham rankings).

¹⁵ David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1.

¹⁶ Robert J. Morse & Samuel Flanigan, *Methodology: Law School Rankings*, U.S. NEWS & WORLD REP., Mar. 12, 2012, at B4.

energy towards enhancing their reputations.¹⁷ This has probably been the greatest factor in the large increase in the number of faculty employed at many schools, the reduction in teaching loads and the greater emphasis on the production of scholarship. The production of glossy promotional material has skyrocketed in the rankings era.¹⁸

The admissions credentials of first-year students also count very much in the *USNWR* rankings.¹⁹ This has affected schools in a variety of ways. In an effort to appeal to the most desirable students, schools have expanded specialized academic programs and spent a great deal of money enhancing physical facilities.²⁰ Schools pay more attention to students' LSAT scores and undergraduate grade point averages ("UGPAs") in the admissions process and less attention to other intangible factors.²¹ The use of merit scholarships to attract students with high LSAT scores and UGPAs has exploded in the *USNWR* era, leaving far less money available for need-based aid.²² Because transfer students do not count in the *USNWR* methodology,²³ some schools keep their first year classes relatively small and add many transfer students in the second year.²⁴ Several schools have succumbed to the temptation to misreport the credentials of enrolled students.²⁵

Another area that has been impacted considerably by the focus on

¹⁷ See, e.g., Patrick G. Lee, *Law Schools Get Practical; With the Tight Job Market, Course Emphasis Shifts from Textbooks to Skill Sets*, WALL ST. J. (July 10, 2011, 7:02 PM), <http://online.wsj.com/article/SB10001424052702304793504576434074172649718.html> (describing recent efforts at some law schools to enhance their reputations in differing ways).

¹⁸ Sam Favate, *Law School Promotional Materials Not Worth the Expense—Study*, WALL ST. J. (Aug. 24, 2012, 1:00 PM), <http://blogs.wsj.com/law/2012/08/24/law-school-promotional-materials-not-worth-the-expense-study/>.

¹⁹ See Morse & Flanigan, *supra* note 16 (noting that selectivity is weighted by 0.25 in calculating a school's overall ranking).

²⁰ See Segal, *Law School Economics: Ka-Ching!*, *supra* note 15 (identifying a "construction boom" as the latest nationwide trend for law schools).

²¹ See Shawn P. O'Connor, *Learn the 5 Deciding Factors in Law School Admissions*, U.S. NEWS & WORLD REP. (Nov. 12, 2012), <http://www.usnews.com/education/blogs/law-admissions-lowdown/2012/11/12/learn-the-5-deciding-factors-in-law-school-admissions> (naming the top two deciding factors in law school admissions as LSAT score and undergraduate GPA).

²² *The Law School Merit Scholarship Game*, SBM BLOG (May 11, 2011, 5:43 AM), <http://sbmblog.typepad.com/sbm-blog/2011/05/the-law-school-merit-scholarship-game.html>.

²³ Morse & Flanigan, *supra* note 16.

²⁴ Kashmir Hill, *Poaching 1Ls: A New Perspective on Transfer Students*, ABOVE THE LAW (Dec. 29, 2008 11:31 AM), <http://abovethelaw.com/2008/12/poaching-1ls-a-new-perspective-on-transfer-students/>.

²⁵ Both Villanova Law School and the University of Illinois College of Law have been sanctioned for misstating the admissions credentials of their students over a period of years. Jodi S. Cohen, *U. of I. Law School Fined \$250,000 for False Admissions Data*, CHI. TRIB. (July 24, 2012), http://articles.chicagotribune.com/2012-07-24/news/chi-20120724u-of-i-law-school-fined_1_false-admissions-data-lsat-scores-paul-pless; Martha Neil, ABA Raps Villanova re Inaccurate Admission Data, Says Law School Must Post Censure Online, A.B.A. J. (Aug. 15, 2011), http://www.abajournal.com/news/article/abas_legal_ed_section_sanctions_villanova/.

rankings and competitiveness is graduate employment. Schools have always tried to assist their students in finding employment, of course. But *USNWR* helped shift the playing field by making graduates' employment rates another significant factor in their rankings.²⁶ The positive side of this is that many schools began to take the job searches of their students more seriously. At many schools, more resources have been dedicated to career services offices.²⁷ On the less positive side, too many schools have been less than candid and complete about their graduates' employment results and starting salaries.²⁸ In addition, as the job market weakened dramatically after 2008, some law schools went to great lengths to keep employment numbers high, including hiring their own graduates in short-term positions.²⁹

USNWR has another direct role in the tuition increases that have taken place. By rewarding schools for spending more per student on instructional related activities, *USNWR* provides a powerful incentive towards growth. This is perhaps the magazine's pseudoscience at its worst. The rankings include no real attempt to measure educational quality. Instead, at this crude level, it equates more spending with better quality.

Apart from these specifics, the broader impact of the rankings era has been to reduce the self-restraint of law schools. Many of the steps schools have taken to influence *USNWR* are quite rational. But many of them conflict with academic values. A dean who, in the 1980s, suggested pursuing many of the tactics that have since become commonplace, would have been seen as not "getting" what legal education was about. Our ambitions, institutional and personal, are always balanced against a sense of obligation to our students. But once competitive, market-oriented forces began to take hold, they were hard to resist.

Merit scholarships provide a good example. Why did merit

²⁶ Robert J. Morse, *Making Sense of Law Schools' Jobs Data*, U.S. NEWS & WORLD REP. (Mar. 13, 2012), <http://www.usnews.com/education/blogs/college-rankings-blog/2012/03/13/making-sense-of-law-schools-jobs-data>.

²⁷ See, e.g., LAWPROF, *Law School Creates First Year Course on How to Get a Job*, INSIDE LAW SCH. SCAM BLOG (July 16, 2012 5:47 AM), <http://insidethelawschoolscam.blogspot.com/2012/07/law-school-creates-first-year-course-on.html>.

²⁸ Fortunately, the ABA now requires a level of disclosure that makes it the leader among accrediting agencies. See AM. BAR ASS'N, ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 2012–2013 39 (2012), [hereinafter STANDARDS FOR CONSUMER INFORMATION], available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/chapter_5_2012_2013_aba_standards_and_rules.authcheckdam.pdf (discussing standards for consumer information).

²⁹ See, e.g., Joel F. Murray, *Professional Dishonesty: Do U.S. Law Schools that Report False or Misleading Employment Statistics Violate Consumer Protection Laws?*, 15 J. CONSUMER & COM. L. 97, 101–04 (2012) (discussing the manipulation of employment statistics).

scholarships barely exist before *USNWR* began ranking law schools?³⁰ Schools have always sought bright, talented students, and grades and LSAT scores have always mattered. But before the rankings began, merit scholarships were not seen as an appropriate tactic, at least not on a widespread basis.³¹ Reportedly, it was New York University, with growing resources and ambition to match, that first began to pursue higher rankings through “buying” the best students. Soon, however, any school that wished to compete with NYU had to answer in kind, and shortly thereafter, merit scholarships had become widespread throughout legal education. There is nothing inherently wrong with merit scholarships, at least at the outset.³² But as they became endemic, they had two very negative effects. First, they contributed to excessive increases in tuition. As schools began to receive less tuition from their “top” students, they made up the difference by charging everyone else more.³³ Because incoming credentials tend to correlate with first-year grades,³⁴ this had the truly perverse effect of placing more of the financial burden on the students likely, on average, to have fewer employment options after graduation. And as merit scholarships rose, need-based financial aid became tighter, leading to an environment in which the pursuit of rankings has led to an increase in tuition and a relative decline in need-based financial aid.³⁵ This

³⁰ See David Segal, *Behind the Curve*, N.Y. TIMES, May 1, 2011, at BU1 (“The difference between the early ‘80s and today . . . can be summed up in one name: U.S. News, which began ranking law schools in 1987.”).

³¹ See *id.* (“[I]n the days before the Internet . . . just a handful [of law schools] offered merit scholarships.”).

³² On the other hand, the practice by some schools of requiring students to maintain a certain GPA in order to retain their scholarships after the first year, while often refusing to disclose the rate at which prior students have retained their scholarships, has been very troubling. See Segal, *Law School Economics: Ka-Ching!*, *supra* note 15 (“[T]he phrase ‘bait and switch’ came up a lot. Several assumed that they were given what is essentially a discount to get them in the door.”). The ABA now requires schools to disclose their scholarship retention policies and rates under Standard 509. STANDARDS FOR CONSUMER INFORMATION, *supra* note 28, at 39.

³³ See Segal, *Law School Economics: Ka-Ching!*, *supra* note 15 (“Of course, there is nothing inherently wrong with incentives that ask students to earn strong grades in exchange for a break on tuition. But given that students are often shocked when their scholarships disappear, there are some basic questions about good faith and full disclosure here—an irony, given that those topics are covered in law school.”).

³⁴ See LISA A. STILWELL ET AL., LAW SCH. ADMISSIONS COUNCIL, LSAT TECHNICAL REPORT 11-02: PREDICTIVE VALIDITY OF THE LSAT—A NATIONAL SUMMARY OF THE 2009 AND 2010 LSAT CORRELATION STUDIES 1 (2011), available at <http://www.lsac.org/lsacresources/research/tr/pdf/tr-11-02.pdf> (“The combination of LSAT scores and [undergraduate GPA] . . . continues to be superior to either predictor alone for predicting [first year average].”); see also *LSAT Scores as Predictors of Law School Performance*, LAW SCH. ADMISSIONS COUNCIL, <http://www.lsac.org/jd/pdfs/lsat-score-predictors-of-performance.pdf> (last visited Feb. 18, 2013) (“The studies show that LSAT scores help to predict which students will do well in law school.”).

³⁵ See Isaac Bowers, *Rising Law School Tuition Examined in New Book*, U.S. NEWS & WORLD REP. (Aug. 22, 2012), <http://www.usnews.com/education/blogs/student-loan-ranger/2012/08/22/rising-law-school-tuition-examined-in-new-book> (“[L]aw school tuition and fees will increase 4 percent at

happened in a rational way that was next to impossible for any school to resist, yet has resulted in a system at odds with some of our important values.

The rapid rise in tuition is probably the most troubling aspect of the rankings era. Often law schools increase tuition is an inadequate explanation. It is no coincidence that the rapid rise in tuition has occurred since schools have begun to feel the full impact of competitive forces.³⁶ It is probably the case that legal education was, prior to the advent of rankings, underpriced in a purely economic sense. In other words, when tuition was \$5,000, students probably would have willingly paid considerably more. Self-restraint, though, led schools to hold tuition down. Why did tuition increase so much after around 1990 when it had not before? Did university and law school leaders simply become greedier? Although salaries have certainly gone up, much of the revenue generated by increased tuition has gone to pay for more faculty and administrators and merit scholarships. In essence, it was in response to *USNWR*-type competitive forces.

An important part of the problem is that just as schools have been obsessed with prestige, so too have students. *USNWR* attained its position of importance not just because legal educators pay attention to the rankings, but because students do as well.³⁷ Students have been willing to pay for prestige. Until recently, students were willing to absorb rapidly-rising tuition. Not only were applications at all-time highs, but most students were not very price sensitive. Because of the way the merit scholarship market works, most students could go to a lower-ranked institution at a lower effective tuition rate (or go to one of the handful of public law schools that charge significantly lower tuition).³⁸ Yet, relatively few students did so, probably out of the not unrealistic view that going to

private law schools (to approximately \$40,585) and 6 percent at public law schools (to approximately \$23,590) at a time when inflation is about 1.7 percent and law school applications have declined by 25 percent over the past two years.”); see also Segal, *Law School Economics: Ka-Ching!*, *supra* note 15 (“The number of need-based scholarships has actually shrunk in the last five years, according to A.B.A. figures, to 18,000 from 20,000 five years ago.”).

³⁶ See Segal, *Law School Economics: Ka-Ching!*, *supra* note 15 (“If it sounds absurd that America’s legal education system could be whipsawed by, of all things, U.S. News, you have yet to grasp the law school fixation with rankings.”).

³⁷ According to a recent survey by Kaplan Test Prep, when asked for the most important factor in deciding which law schools to apply for admission, students answered as follows: ranking—32%, geographic location—22%, academic programming—20%, affordability/tuition—13%, and placement statistics—8%. Press Release, Kaplan Test Prep, *Despite an Uncertain Employment Landscape, Law School Applicants Still Consider School Rankings far More Important than Job Placement Rates When Deciding Where to Apply* (June 19, 2012), <http://press.kaptest.com/press-releases/kaplan-test-prep-survey-despite-an-uncertain-employment-landscape-law-school-applicants-still-consider-school-rankings-far-more-important-than-job-placement-rates-when-deciding-where-to-apply>.

³⁸ See Segal, *Behind the Curve*, *supra* note 30 (“Every fall . . . [a]spir[ing] 1L’s shop for the best combination of money and prestige, and schools dangle acceptance letters and dollars.”).

the “best” possible school, even at a higher cost, would pay off in the long run.³⁹

In summary, the effect of *USNWR* and other competitive forces has been to encourage law schools to get bigger and more expensive, and to devote more resources to faculty scholarship and merit-based financial aid.⁴⁰ How do these forces now operate, as law schools confront a rapidly changing environment? In other words, how do these forces relate to the assertion that law schools are too big, too expensive, and inadequately focused on the training of students?

Let us begin with enrollment. Law school enrollment has declined for two years,⁴¹ with further declines likely.⁴² That is a good thing, as fewer prospective students will go deeply into debt without the likelihood of good legal jobs awaiting them. But why are schools reducing their class sizes? Reducing the total number of law students makes a lot of sense from a societal standpoint, but for an individual school that is probably not enough of an incentive to get smaller. Consider the financial and human consequences of downsizing. If a school enrolls 250 students per year, cutting the class size by 10% is a major, painful, disruption. It would, over a few years, require a budget cut of approximately \$2.7 million per year.⁴³ Because most of a law school’s expenditures are in personnel costs, this would entail firing many people or making major pay cuts.⁴⁴

Aside from the self-inflicted financial pain of downsizing, a school could not even be sure that it would be doing much good by shrinking. Twenty-five fewer students is a mere drop in the bucket of the larger

³⁹ See *id.* (“As common as G.P.A. requirements are, they often barely register in applicants’ deliberations. The very human tendency to overestimate one’s talents is part of the problem.”).

⁴⁰ The impact of *USNWR* has been largely negative, but not entirely. The past few decades have seen tremendous growth in the student-centeredness of law schools in some important ways. When I began teaching in 1988, many schools disdained paying any attention to bar exam preparation, much to the detriment of our students. Now, most schools identify at-risk students and provide a variety of means of assistance. This change was driven at least partly by the role bar passage rates play in rankings and the annual publication of bar passage rates by school. Other student services have improved, as well, in an effort to attract students and influence rankings. Career-services offices, for example, are better staffed and resourced.

⁴¹ Erin Geiger Smith, *Law School Enrollment Drops Significantly*, THOMSON REUTERS (Nov. 28, 2012), http://newsandinsight.thomsonreuters.com/Legal/News/2012/11_-_November/Law_school_enrollment_drops_significantly (“Just under 45,000 first-year students enrolled in law school this fall, 9 percent fewer than 2011 and approximately 15 percent fewer than 2010 . . .”).

⁴² See Ethan Bronner, *Law Schools’ Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 31, 2013, at A1 (“Law school applications are headed for a 30-year low, reflecting increased concern over soaring tuition, crushing student debt and diminishing prospects of lucrative employment upon graduation.”).

⁴³ This calculation is assuming a tuition level of \$40,000, with an average discount rate of 10%.

⁴⁴ See *The Absurdity of UC-Irvine*, INSIDE LAW SCH. SCAM BLOG (July 24, 2012, 7:02 AM), <http://insidethelawchoolscam.blogspot.com/2012/07/the-absurdity-of-uc-irvine.html> (“[F]aculty salary and benefits make up 50% to 60% of the typical law school’s expenditures.”).

national employment problem. Most or all of those twenty-five prospective students would probably enroll at another law school. Even if the school cut twenty-five students from the bottom end of its students' credentials, the school could not even be sure that this step would result in twenty-five fewer of its own graduates being unemployed or underemployed after graduation.

But schools are reducing their class size, with more reductions likely to come. I believe that this is happening principally because of the discipline imposed by the market and, yes, by rankings. Some schools, particularly the least selective ones, may be worried about whether the students they would have to enroll to maintain class sizes from a few years ago would be capable of succeeding in law school and passing the bar. All schools are concerned with declines in their median LSAT and GPA scores, which is certain to happen if a school remains the same size as applications drop. This is an instance where competitive forces have pushed schools in a positive direction.

It seems fair to say that today's law schools are too expensive.⁴⁵ However, to the best of my knowledge, no schools have reduced tuition.⁴⁶ The most that has happened is that the rate of increase has been cut to around the level of inflation. This is probably because while there are competitive advantages to schools in enrolling fewer students, there are no similar advantages to cutting prices. Schools do, of course, cut prices for selected students through merit scholarships, but charging less from the students willing to pay full tuition is simply foregoing revenue. I speak from experience here. My school, Loyola University Chicago School of Law, has held the line on tuition increases a bit more in recent years than our closest competitors. As a result, our tuition is around \$3,000 per year less than those competitors. From a market standpoint, this gets us nothing. The students we most want to attract are receiving scholarship offers from us and other schools. Their net tuition cost is what matters to them, not the "sticker price." The number of students willing to pay full price may shrink to zero, but even then, schools may be more likely to provide scholarships to every student than to reduce the stated price. Schools are much more likely to continue to downsize, which has market advantages, than to cut tuition, which does not.

Curriculum reform is another area where there are few, if any, market

⁴⁵ *E.g.*, *Judging the Pros and Cons of Law School*, TIMES DISPATCH (Feb. 6, 2011, 12:00 AM), http://www.timesdispatch.com/news/judging-the-pros-and-cons-of-law-school/article_c9b05c53-14b0-5280-940e-030e51744626.html ("[T]here is no question that law school is expensive. Too expensive. There are far too many people who . . . graduate from law school owing more than \$200,000 in federally guaranteed loans that they might never be able to repay.").

⁴⁶ Schools may be decreasing net tuition by increasing scholarships, but I am not aware of any schools that have reduced the stated tuition applicable to all students.

or rankings-based incentives for change. Nothing in *USNWR* attempts to capture the quality of a school's educational program. It is hard to imagine that innovations in teaching are reflected in the opinion surveys, given how little most voters actually know about the 200 law schools captured by *USNWR*. Employers show very little interest in what actually goes on in the classroom, despite frequent suggestions to the contrary. Large firms routinely hire from the same small number of schools. Although there was enormous expansion before the Great Recession, and firms were hiring from schools they had previously ignored, once hiring shrunk, most firms returned to old habits. There is simply no evidence that employers have the inclination or ability to discern among law schools based on the quality of instruction.

This does not mean, of course, that law schools have been ignoring their educational programs. In fact, I would argue that the past few years have been one of the most fertile ever in terms of curriculum innovation and development. Experiential learning, in particular, has been expanded at many schools.⁴⁷ Clinical programs have not really grown because of the expense involved, but more schools are offering externships and expanding simulations.⁴⁸ A greater number of schools are also offering more transactional-based courses.⁴⁹ Because so many more graduates are opening their own practices, schools (and bar groups) are developing incubator programs to assist them.

There are many other curriculum innovations taking place as well. Schools are banding together through groups like Educating Tomorrow's Lawyers to develop and share best practices.⁵⁰ The ABA is likely to require schools to begin assessing student-learning outcomes in a more systematic way. Although legal education remains far behind medical education in producing "practice-ready" graduates, there has been great progress. And this has been happening in difficult times despite the absence of external incentives for change. This trend is a positive example of schools ignoring market incentives and pursuing an intrinsic value.

We cannot and should not give in completely to competitive pressures.

⁴⁷ *E.g.*, News Release, Univ. of Conn. Sch. of Law, UConn School of Law Adopts 'Practice-Based Learning' Requirement for Students (Nov. 29, 2012), available at <http://www.law.uconn.edu/content/practice-based-learning>.

⁴⁸ *See* AM. BAR ASS'N, A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010 77 (Catherine L. Carpenter ed., 2012) (noting an increase in the number of law schools offering externship opportunities across eight practice areas).

⁴⁹ *See id.* at 78 (noting an increase in the number of law schools offering drafting courses across four of seven practice types).

⁵⁰ *E.g.*, *About ETL*, EDUCATING TOMORROWS LAWS., <http://educatingtomorrowlawyers.du.edu/about-etl/> (last visited Feb. 9, 2013) (purporting to use "the work of law schools and professors committed to legal education reform to align legal education with the needs of an evolving profession by providing a supported platform for shared learning, experimentation, ongoing measurement and collective implementation").

It is fair to hold law schools to a different standard from a for-profit business. We frequently announce to the world that we seek to serve society, not just our own interests. As lawyers, we have a particular responsibility to contribute to improving justice in society. And the investment of public funds, mostly through federal student loans, calls for a broader responsibility. I wish that we leaders in legal education had been wise enough, or strong enough, to resist the forces discussed above. As we go forward, however, it is important to recognize the power of these forces, which have impacted not just law schools, but all of higher education.⁵¹ Unfortunately, the impact of rankings will not be reduced unless we figure out a way to be less motivated by the quest for prestige. No one has proposed a credible solution.

III. RULES

Law schools operate within the framework of multiple sets of rules. State and regional accreditors, the U.S. Department of Education, and state bar admission authorities all regulate aspects of legal education. The rules that most directly and comprehensively affect law schools are the ABA Standards.⁵² In order for its graduates to be able to take the bar exam around the country, law schools must be accredited by the ABA.⁵³ In order to receive or maintain ABA accreditation, a law school must be in compliance with every ABA Standard.⁵⁴

The accreditation work of the ABA Section of Legal Education is done principally through the governing Council and several major committees, including the Accreditation Committee and the Standards Review Committee.⁵⁵ This is a largely self-regulatory process, with the result that the Standards reflect a rather law professor-centric view. Although only one-half of the members of the Section's Council and major committees may be legal educators,⁵⁶ the views of legal educators dominate. Some of

⁵¹ *E.g.*, Julie Margetta Morgan, *What Can We Learn from Law School? Legal Education Reflects Issues Found in All of Higher Education*, CTR. FOR AM. PROGRESS (Dec. 21, 2011), <http://www.americanprogress.org/issues/higher-education/report/2011/12/21/10775/what-can-we-learn-from-law-school>.

⁵² 2012–2013 *ABA Standards and Rules of Procedure for Approval of Law Schools*, 2012 A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, [hereinafter *ABA Standards*], available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf.

⁵³ *Id.* at 3. Every jurisdiction in the country allows graduates of ABA accredited schools to take the bar examination. In many states, being a graduate of an ABA accredited school is either the only, or predominant, way of achieving eligibility for admission to the bar. *Id.*

⁵⁴ *Id.*

⁵⁵ *See id.* at 125–26 (describing the major committees involved in the accreditation process). I served as a member of the Standards Review Committee from 2006 through 2012.

⁵⁶ *Id.* at 119, 125.

the “public” members are former law professors, and the truly non-legal educators involved are understandably reluctant to suggest they know more than those with more experience in law schools.

The Standards form the “architecture” for legal education.⁵⁷ The stated goal of the Standards is to establish the minimum requirements necessary to ensure a quality legal education capable of preparing students for entry into the profession and admission to the bar.⁵⁸ The Standards impose requirements on law schools in a wide range of areas, including governing structure, the program of legal education, faculty, library and facilities.⁵⁹ Most of the Standards are quite reasonable. However, compared to the accreditation standards governing other professional schools, the ABA Standards are highly specific and sometimes intrusive. The Standards specify that the minimum number of minutes of instruction a student must receive to graduate is 58,000 minutes.⁶⁰ Schools must require that applicants take the Law School Admission Test or another “valid and reliable” admission test.⁶¹ Full-time faculty (many of whom must have tenure or long-term contracts) must teach “substantially all” of the first-year curriculum and the “major portion” of the rest.⁶² Full-time students are forbidden from working in jobs more than twenty hours per week.⁶³ Schools are required to monitor the regular and punctual attendance of students.⁶⁴

All accreditation rules impose costs, so cost alone is not an adequate basis for challenging the impact of the Standards. Some of the ABA Standards are highly questionable, though, because they seem less concerned with ensuring minimum standards of quality than with preserving a preferred place within universities for law schools and a preferred place within law schools for full time faculty. The requirements of security of position for faculty, restrictions on the use of adjuncts and limitations on out of classroom learning are all unlike any that exist in other major accreditor’s rules.

On the other hand, the ABA Standards leave substantial room for flexibility. And importantly for the discussion here, they do not really explain the changes that have occurred in law schools during the rankings era. The ABA Standards have not changed in fundamental ways since the advent of the competitive forces discussed above, and thus cannot fairly be credited or blamed for the ways in which legal education has changed. No

⁵⁷ Jay Conison, *The Architecture of Accreditation*, 96 IOWA L. REV. 1515, 1517, 1525 (2011).

⁵⁸ *ABA Standards*, *supra* note 52, at ix.

⁵⁹ *Id.* at 9–10, 17, 29, 43, 47.

⁶⁰ *Id.* at 22.

⁶¹ *Id.* at 36.

⁶² *Id.* at 31.

⁶³ *Id.* at 157.

⁶⁴ *Id.*

new or amended ABA Standards forced schools to drive up tuition, establish so many new programs, hire large numbers of faculty, reduce teaching loads, increase support for faculty scholarship, or rely heavily on merit scholarships or transfer students. The primary responsibility for these changes rests with legal educators ourselves, and how we have responded to competitive pressures.

Yet, as law schools consider an uncertain and changing future, the ABA Standards shape and limit the debate. A number of curricular steps schools might consider, either to reduce costs or to enhance students' preparation for the practice of law, are currently prohibited by the ABA Standards. For example, a school could not eliminate the third year of law school or even make it completely externship-based.⁶⁵ A school could not forego any commitment to scholarship and focus all of its resources on teaching. Nor could it maintain a curriculum staffed equally by full-time faculty and adjuncts.⁶⁶ The major cost savings that could be obtained by eliminating most of a library's physical collection are also forbidden.⁶⁷

I am not suggesting that all law schools should adopt any or all of these proposals. For example, I believe in the value of legal scholarship and find many of the criticisms of it wrong or overstated.⁶⁸ But in this crisis environment, there should be great room for experimentation. The Standards too often reflect an overly faculty-centric view of an ideal law school. It bears repeating that the ABA Standards are intended to reflect minimum requirements. In essence, the question is whether the graduates of a school can be "trusted" to take the bar examination, and if successful in that, be admitted to the bar.⁶⁹ The ABA Section of Legal Education

⁶⁵ Schools that offer two-year programs do so by cramming three years of credit into two years. Schools, like Northeastern University School of Law, that have students spend substantial amounts of time in externships generally require students to be enrolled year-round, and still have to satisfy the 45,000 minutes requirement. See *Cooperative Legal Education Program*, NORTHEASTERN UNIV. SCH. OF LAW, <http://www.northeastern.edu/law/co-op/index.html> (last visited Dec. 26, 2012) (describing the year-round program at Northeastern University School of Law where students switch between externships and class time); *ABA Standards*, *supra* note 52, at 22 (requiring 45,000 minutes of class time).

⁶⁶ See David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, at A1 (noting that half of law schools' expenses are typically spent on faculty, and how this expenditure is necessary to maintain rankings).

⁶⁷ See Taylor Fitchett et al., *Law Library Budgets in Hard Times*, 103 LAW LIBR. J. 91, 94 (2001) (discussing how ABA standards once required core collections along with faculty status and tenure for the library director, while also noting that many libraries no longer build their print collections).

⁶⁸ See, e.g., Segal, *What They Don't Teach Law Students: Lawyering*, *supra* note 66 (describing the lack of practical training offered by most law schools); see also *Annual Fourth Circuit Court of Appeals Conference: Remarks by Chief Justice of the Supreme Court John Roberts* at 28:50–32:05 (C-SPAN television broadcast June 25, 2011), available at <http://www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476-1/> (discussing the disconnect between what is offered in a legal education and the realities of the practicing bar).

⁶⁹ A membership organization like the Association of American Law Schools can very legitimately have more rigorous standards for membership. Its core values, including scholarship and a

should be examining its standards critically, with an eye towards eliminating any restrictions on law school flexibility not clearly justified by educational necessity. At one point, I had high hopes that the current comprehensive review of the ABA Standards might lead to substantial reform of this sort.⁷⁰ Now, however, as that process grinds along in its fifth year, that seems very unlikely.

IV. BUMPY LANDING OR DISRUPTIVE CHANGE?

I have omitted the prospect of a soft landing from the current crisis. Perhaps the Department of Education's new Pay as You Earn student loan repayment program⁷¹ will lead to an increase in law school applicants. Or perhaps predictions of long term weakness in the legal job market will be proven wrong and hiring will recover. In either case, a soft landing may be possible, but it seems much more likely that legal education is moving to a permanently altered terrain.

A likely path is the one we seem to be on now. Schools are painfully adjusting to fewer applicants and jobs by downsizing moderately and scaling back ambitions. Large tuition increases are a thing of the past and with increasing competition for students, net tuition may actually be declining. Faculty and staff lines may shrink through attrition or buy-outs. The law school curriculum continues to evolve in the direction of experiential learning. Of course, some law schools are being hit harder by recent trends and perhaps the predictions that a number of schools will close will come to pass.

This is not a radical agenda. Although I give legal educators higher marks on reform than do the most vociferous critics, human nature and past experience suggest that, left to its own devices, legal education will almost certainly not embrace radical change. Competitive forces will continue to shape the environment. *USNWR* is in the business of selling its publication, not improving legal education, so it is not realistic to look to them to move things in any particular direction. They will continue to adjust their methodology, in order to be seen as a "serious" player. But any policy changes they encourage are incidental, not purposeful.

The ABA Section of Legal Education does embrace a broader

self-governing, largely full-time faculty, reflect an important vision of the academy. My point here is that not every lawyer needs to have attended a school of this model, such that the ABA Standards should be more focused on appropriate minimum requirements.

⁷⁰ See *Standards Review Committee*, A.B.A., http://www.americanbar.org/groups/legal_education/committees/standards_review.html (last visited Feb. 10, 2013) (describing the Review Committee's policies for amending the ABA Standards).

⁷¹ See *Education Department Launches 'Pay as You Earn' Student Loan Repayment Plan*, U.S. DEP'T OF EDUC. (Dec. 21, 2012), <http://www.ed.gov/news/press-releases/education-department-launches-pay-you-earn-student-loan-repayment-plan> (describing a new repayment pay that could lower monthly bills for recent graduates).

responsibility for reform, but because of caution and interest group politics, it is likely to pursue slow, incremental change. This kind of caution is probably inherent in self-regulation. As disappointed as I am with the Section's stodginess regarding the ABA Standards, I am not prepared to conclude that a different entity would be a better accreditor. Perhaps over time, the Section will become more reform-minded.

If the "disruptive change" that is frequently predicted is to come to pass, it will be because of external forces. Certainly changes in the profession and the practice of law have this potential.⁷² Another major change may come from the states. As influential as the ABA Standards are, it is important to remember that it is the states that determine eligibility for bar admissions. Changes to state rules can have an enormous impact on legal education. Recently, for example, New York has imposed a *pro bono* requirement in addition to the ABA Standards.⁷³ Schools wishing for their graduates to be able to take the New York bar examination have no choice but to comply with these rules.

In the long run, the greater impact the states may have is in reducing, not increasing, barriers to entry into law practice. Recently, the Supreme Court of Washington approved the concept of Limited License Legal Technicians.⁷⁴ Although many of the details remain to be worked out, in essence, the state will license people without a law degree to perform some of the functions that lawyers currently do. It is analogous to physician's assistants, a profession that has grown tremendously in recent years.⁷⁵ It seems likely that over time, many more states will create a similar category of legal paraprofessional. With lawyers financially out of reach for many low- and moderate-income people, this may be a way to enhance access to the legal system. It is fairly easy to imagine someone with less than a J.D. degree providing such services as house closings, simple wills and uncontested divorces, for example. If this idea becomes widespread, it will be truly disruptive for many law schools, although the more nimble schools will find a vigorous market educating this new category of practitioner.

⁷² See, e.g., Elizabeth Chambliss, *Two Questions for Law Schools About the Future Boundaries of the Legal Profession*, 36 J. LEGAL PROF. 329, 331 (2012) (discussing enormous structural change); Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1872–73 (2008) (discussing potentially disruptive changes coming from large law firms).

⁷³ *New York State Bar Admission: Pro Bono Requirement FAQs*, N.Y. STATE UNIFIED CT. SYS., 4 (Oct. 1, 2012), <http://www.nycourts.gov/attorneys/probono/FAQsBarAdmission.pdf>.

⁷⁴ *Supreme Court Adopts Limited License Legal Technician Rule*, WASH. STATE BAR ASS'N, <http://www.wsba.org/News-and-Events/News/Supreme-Court-Adopts-Limited-License-Legal-Technician-Rule> (last visited Feb. 13, 2013).

⁷⁵ See *Physician Assistants: Job Outlook*, U.S. BUREAU OF LABOR STATISTICS (Mar. 29, 2012), <http://www.bls.gov/ooh/healthcare/physician-assistants.htm#tab-6>.

V. CONCLUSION

The story of legal education is neither heroic nor sinister. We have a great deal to be proud of, but are also capable of acting in shortsighted and selfish ways. With candid, level-headed discussion, we can find a way forward that preserves much of what we have accomplished in recent decades, while adapting to the painful new reality.

