

## Strategic Austerity: How Some Law School Affordability Initiatives Could Actually Improve Learning Outcomes

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### INTRODUCTION

The legal profession is facing profound and perhaps irreversible changes. Whether you view these striking demographics as a “crisis” likely depends on the location of your perch. If you are a tenured professor at a T14 law school or a senior partner at an NLJ 250 firm, you may view the trends we have been discussing today as cyclical corrections. If you are an unemployed graduate looking for work or an untenured professor at a lower-tier school that is struggling to stay afloat, you may be more likely to view these trends as permanent and paradigm shifting.

While applications to American law schools have been dropping markedly since 2005, the last three years have seen the most dramatic changes. Between 2010 and 2012, the total number of applicants to U.S. law schools decreased by twenty-four percent.<sup>1</sup> This year alone—2012–2013—the number of applicants dropped another thirteen percent.<sup>2</sup> By 2014, the legal academy may for the first time face an open enrollment situation where the total number of available seats exceeds the number of applicants.

Most law schools have responded to this sharp application decline in one of two ways. Many schools have dramatically reduced their class sizes, which entails foregoing tuition revenue. Lower gross revenue means schools must seek out opportunities to cut costs. Other schools have kept their class sizes relatively stable by offering more scholarship assistance to attract students (essentially increasing their discount rates). This approach too requires expenditure cuts, because absent additional non-tuition

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<sup>1</sup> *LSAC Volume Summary*, LAW SCHOOL ADMISSION COUNCIL, <http://www.lsac.org/lsacresources/data/lsac-volume-summary.asp> (last visited July 10, 2013).

<sup>2</sup> *Three-Year ABA Volume Comparison*, LAW SCHOOL ADMISSION COUNCIL, <http://www.lsac.org/lsacresources/data/three-year-volume.asp> (last visited July 10, 2013) (reflecting data as of June 28, 2013).

sources of funding (such as gifts or endowments) spending more money on scholarships means spending less money on something else.

Law schools cannot make up for this lost revenue by continuing to raise their tuition at rates that far outpace inflation. A continued upward spiral in tuition threatens to further exacerbate the downward spiral in applications. On average, law school tuition in the United States increased 375% at private law schools and 820% at public law schools between 1985 and 2009.<sup>3</sup> During this twenty-five-year period, law schools on average increased their tuition between 6–15% each year, while inflation averaged only 3%.<sup>4</sup> By way of comparison, tuition for MBA students at our nation's top management schools increased only 70% in the past decade, an average increase of 4–6% per year.<sup>5</sup> Reining in the law school tuition spiral is critical to restoring consumer confidence in the value of the product we are selling—especially in a climate where the job prospects for the graduates of some law schools are increasingly bleak.<sup>6</sup>

Legal educators are now engaged in some very difficult and painful conversations about the financial model of legal education. Schools that take an ostrich-like approach to this challenge risk becoming obsolete or irrelevant. What follows are seven proposed changes to the structure of legal education that could simultaneously reduce overall costs to law students,<sup>7</sup> and improve the quality of their education. Quality is not always synonymous with price. With vision and lots of hard work, it may be possible to do more with less.

Three of my proposals will require amendments to ABA accreditation standards. The political and institutional climate

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<sup>3</sup> BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 108 (2012).

<sup>4</sup> *Id.*

<sup>5</sup> *Overpriced or Priceless?*, THE ECONOMIST (Aug. 26, 2009), <http://www.economist.com/node/14297397> [hereinafter *Overpriced or Priceless?*].

<sup>6</sup> Law schools in the United States are now graduating approximately 44,000 students per year—roughly two graduates for every available job opening. Katherine Mangan, *Law Deans Confront a 'New Normal' as Schools Adjust to Job-Market Changes*, CHRON. HIGHER EDUC., Jan. 18, 2013, at A3; see also Karen Sloan, *Summer associate hiring declines amid anemic job market*, NAT'L L.J., (Feb. 11, 2013), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202587755601&Summer\\_associate\\_hiring\\_declines\\_amid\\_anemic\\_legal\\_market\\_&slreturn=20130611131009](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202587755601&Summer_associate_hiring_declines_amid_anemic_legal_market_&slreturn=20130611131009) (citing four-year decline in number of students obtaining summer associate positions); Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J., June 25, 2012, at A1 (finding 55% of 2011 graduates secured full-time jobs requiring a JD nine months after graduation).

<sup>7</sup> I purposefully label my proposals “affordability” initiatives rather than “cost containment” initiatives. Some of my ideas are directed at controlling expenditures, and thereby keeping the price of tuition down. Other ideas are directed at improving a law student's ability to afford his or her tuition, by increasing his or her earning capacity while in law school. Both forms of initiative reduce a student's overall cost of attendance.

now seems ripe to make these reforms. Many ABA accreditation standards are perceived to impede experimentation and innovation in legal education, and to primarily benefit academics (who largely have captured the accreditation process) over students and the practicing bar. The president of the American Bar Association has recently appointed a “Task Force on the Future of Legal Education” that is looking at the structural and economic models of legal education, and the impact of rising tuition and falling employment rates on crushing student debt.<sup>8</sup> The Task Force is soliciting comments and testimony from all sectors of the profession, and some of its members have predicted “bold” and perhaps even “radical” reform.<sup>9</sup> My hope is that several of the proposals presented at today’s symposium will be submitted for consideration by the Task Force in the critical months ahead.

#### SEVEN AFFORDABILITY INITIATIVES

##### A. Varying the Three-Year Model

In *Failing Law Schools*, Brian Tamanaha has argued for increased differentiation among law schools as to mission and focus. Some law schools should retain their focus on research and scholarship, while others should see themselves primarily as trade schools engaged in the professional preparation of lawyers.<sup>10</sup> I would encourage differentiation of another sort. More law schools should differentiate *internally*, and establish several paths available to their students for a JD degree. Rather than offering students a one-size-fits-all, three-year, full-time JD model, law schools should allow students to complete the JD degree in two years, three years, or four years (as described below) with alternate routes selected by students at the end of their first year primarily based on considerations of career interests and available finances.

A two-year JD would be designed primarily for students who intend to practice government or public interest law after graduation, and therefore are the most acutely sensitive to taking on substantial debt. The degree would be completed in

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<sup>8</sup> For 2010, the average combined undergraduate and law school debt for those new lawyers graduating with educational debt was \$124,000. TAMANAHA, *supra* note 3, at 110.

<sup>9</sup> Ethan Bronner, *A Call for Drastic Change in Educating New Lawyers*, N.Y. TIMES, Feb. 11, 2013, at A11. Another committee of the ABA—The Standards Review Committee of the Section of Legal Education and Admission to the Bar—is debating revisions to accreditation standards. Mark Hansen, *A Slightly Faster Track: Legal Section Takes Steps to Speed Up Review of Accreditation Standards*, A.B.A. J., Feb. 2013, at 60, 60. Exactly how the work of these two committees will be integrated and coordinated remains unclear. *See id.* at 61.

<sup>10</sup> TAMANAHA, *supra* note 3, at 172–74.

five semesters (two full academic years plus the summer in between).<sup>11</sup> The summer after the first year, the students in this program would take online courses that have been created by videotaping prior in-person class sessions, coupled by carefully crafted faculty review questions and online discussion threads. Prime courses that should be considered for such summer online instruction would be traditional second-year core courses such as Corporations, Evidence, Administrative Law, and Federal Taxation. The students would be charged on a per-credit basis for these online courses at a substantially reduced rate compared to taking the same course live during the regular academic year due to the lower cost to the law school in terms of delivery. Such an “online” summer program could save participating students twenty-five percent of their overall cost of JD tuition, by eliminating one semester and reducing the cost of a second semester by up to one-half.<sup>12</sup>

ABA accreditation standards could accommodate this “2 1/2-year” plan with two minor amendments.<sup>13</sup> First, the number of overall credit hours required for completion of the JD degree would have to be reduced from eighty-three to eighty.<sup>14</sup> Second, the maximum number of “distance education” credits the student could take toward a JD degree would need to be increased from twelve to fourteen credits.<sup>15</sup> Both changes are eminently reasonable, and indeed quite modest. A student would be able to complete the “2 1/2-year” program by taking sixteen credits each semester of his or her first year, fourteen online credits during the summer, and seventeen credits each semester during his or her second year. This model would provide a lower-cost gateway to the profession for students intending to

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<sup>11</sup> I take no position on whether the ABA should allow for completion of a JD degree in four semesters (roughly fifty-six credit hours). My gut instinct is that law schools in the United States are not sufficiently preparing our current students for practice in a global environment; compressing a JD program from six to four semesters would leave little room for addressing the present deficiency in international and comparative focus that exists at many law schools today.

<sup>12</sup> NYU is piloting a three-year medical school model not dissimilar to my proposal, eliminating some redundant science requirements and taking advantage of summer courses. See Anemona Hartocollis, *N.Y.U. and Other Medical Schools Offer Shorter Course in Training, for Less Tuition*, N.Y. TIMES, Dec. 24, 2012, at A16. My “2 1/2-year” model might not only save students twenty-five percent in tuition, but it would also reduce the amount of money they need to borrow for living expenses and reduce their opportunity costs of foregoing employment for an additional six months.

<sup>13</sup> See Larry E. Ribstein, *Practicing Theory: Legal Education for the 21<sup>st</sup> Century*, 96 IOWA L. REV. 1649, 1675 (2011) (advocating for more flexible accreditation standards).

<sup>14</sup> See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 304(b) (2012–13) (Interpretation 304-4).

<sup>15</sup> See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 306(d) (2012–13). The standard, which prohibits taking more than four distance education credits in a single semester, would also need to be eliminated.

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serve low-income clients, at a time when the availability of legal services for the poor and middle class in the United States is being seriously threatened by rapidly declining law school enrollments. Law schools might consider limiting admission to this program to students committed to public interest or government service.

My “four-year” model would essentially take the traditional three-year JD program and add a paid apprenticeship between the second and third year, during which participating students would spend a year away from the law school in gainful law-related employment. One way to think of this is an optional “gap year” for law students. The economic advantage of this model would be that students would be able to earn money to help pay for the third year of law school.<sup>16</sup> They should also be allowed to lock in their third year tuition at the rate applicable upon their departure. The pedagogical advantages are twofold: (1) it would provide them with hands-on experience applying the concepts and skills they learned in their first two years of law school, and (2) it would help them better assess their strengths and interests, so that they could come back to law school with a renewed sense of purpose and a greater focus on what final courses might be essential for their intended career path. This “four-year” model might be particularly attractive for students who finish the second year of law school without any firm direction about their vocation, and are uncertain about the advisability of undertaking an expensive third year of study until they gain more focus.

Of course, one prerequisite to the viability of such a “four-year” model is the availability of apprenticeships to fill the “gap year.” By “apprenticeship,” I envision a salaried position at a small to mid-size law firm or a corporate general counsel’s office, performing functions somewhere between the level of paralegal and entry-level associate at a salary of roughly \$45,000 per year.<sup>17</sup> In an economy where close to forty-five percent of law

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<sup>16</sup> Apprentices would need to apply for a deferment of their student loans during this gap year, because typically federal loans enter repayment after a six-month grace period upon disenrollment. See *When You Graduate or Leave School*, DIRECT.ED.GOV, <http://www.direct.ed.gov/leaving.html> (last visited July 2, 2013). Forbearance is common for students who take a leave of absence from law school for personal or medical reasons, and there is no reason to suspect that loan servicers under the federal direct student-lending program would react to a shift away from a standard three-year JD model by not routinely granting forbearance or deferment requests. See *Deferment and Forbearance*, DIRECT.ED.GOV, <http://www.direct.ed.gov/postpone.html> (last visited July 2, 2013).

<sup>17</sup> My apprenticeship model bears many similarities to the “articling” system in Canada, but students would complete the apprenticeship during rather than following law school. See John Law, *Articling in Canada*, 43 S. TEX. L. REV. 449, 456–70 (2002).

school graduates nationwide are presently unable to find full-time legal work nine months after graduation,<sup>18</sup> one might reasonably question why employers would hire a current student at \$45,000 per year when they could hire an unemployed but already licensed attorney for \$60,000<sup>19</sup> to do similar work? In addition to the possible \$15,000 cost savings, I think there are two other incentives for law firms to hire apprentices. The first is flexibility. Small to mid-size firms with fewer resources and no formal hiring or training programs may be willing to take on an apprentice to help with a complex litigation matter or a large but short-term transactional project, when they would be reluctant to commit to hiring a full-time employee due to uncertainty about future business. The second reason is loyalty to the law school. Prominent alumni in small to mid-size law firms may be willing to mentor apprentices as a way to give back to the law school, and to help their alma mater experiment with a new and exciting model of legal education. If career services and externship directors cultivated relationships with appropriate alumni, it is possible that each year they could identify ten to twenty employers willing to participate. If the initial experiment is successful, that number may grow over time.

Notwithstanding the availability of these new “2 1/2-year” and “four-year” paths to a JD, perhaps the majority of law students will continue to select a traditional three-year course of study. Students in this category might include those students who are elected to law review, those who are successful in securing remunerative summer employment after their second year that leads to a full-time job offer, and students who are receiving substantial assistance from others in financing their legal education. The availability and perhaps continued prominence of the three-year model would not diminish our responsibility to curtail tuition costs even for traditional students, in some of the manners I will describe below in proposals two through seven. Moreover, law schools must redouble their efforts to make the third-year experience pedagogically *valuable* for traditional JD candidates, by offering a “competency-based” curriculum with carefully crafted simulation, practical skills, and capstone courses.<sup>20</sup>

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<sup>18</sup> See Palazzolo, *supra* note 6, at A1.

<sup>19</sup> According to the National Association of Law Placement, the median salary for Class of 2011 graduates employed in a legal job full-time was \$60,000. See *Salaries for New Lawyers: An Update on Where We Are and How We Got Here*, NAT'L ASS'N L. PLACEMENT (Aug. 2012), <http://www.nalp.org/august2012research>.

<sup>20</sup> For a description of the innovative new third-year curriculum at Washington and Lee School of Law, see *Washington and Lee's New Third Year Reform: Leading the Way in Legal Education Reform*, WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW,

### B. Allow for Paid Externships

The ABA prohibits a law student from receiving both pay and credit for the same externship.<sup>21</sup> This “no pay” rule, implemented in 1979 and retained after further study in 1983, is unique in professional education. Among professional schools, only law, pharmacy, and nutrition schools enforce such a limitation.<sup>22</sup> Allowing law students—like business, accounting, and engineering students—to “earn while they learn” would help them keep down the net costs of their legal education and thereby reduce debt.

The concerns that prompted the ABA to retain the “no pay” rule in 1983 no longer seem very persuasive. Professor James Backman at Brigham Young University has summarized these concerns as follows: fear of drawing student interest and financial resources away from in-house clinics serving the poor; worries about faculty being able to control the learning objectives in a paid externship, where there may be a stronger conflict of allegiance between the employer and the educator; and a concern that employers will not allow students to participate in important formational experiences that cannot be billed to a client (shadowing meetings, court appearances, depositions, etc.).<sup>23</sup> Professor Backman makes a powerful case that the concerns that prompted the ABA to retain the “no pay” rule in 1983 no longer exist: in-house clinics are on surer financial footing at most law schools, and their faculty have greater job security; standards for awarding credit for study outside the classroom are far more detailed and comprehensive in terms of quality assurance;<sup>24</sup> and faculty can still control the learning objectives in paid externships by setting up a detailed commitment letter with the supervisor, specifying the types of work and opportunities the students will be provided.<sup>25</sup>

Moreover, the “no pay” rule disadvantages students from lower socioeconomic backgrounds. If law students are forced to

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<http://law.wlu.edu/thirdyear/> (last visited July 1, 2013). For a description of what a “competency-based” law school curriculum might entail, see William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 495–501 (2013).

<sup>21</sup> ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 305 (2012–13) (Interpretation 305-3).

<sup>22</sup> James H. Backman, *Where Do Externships Fit? A New Paradigm is Needed: Marshaling Law School Resources to Provide an Externship for Every Student*, 56 J. LEGAL EDUC. 615, 640 (2006).

<sup>23</sup> James H. Backman, *Law School Externships: Reevaluating Compensation Policies to Permit Paid Externships*, 17 CLINICAL L. REV. 21, 26, 40–41, 48 (2010).

<sup>24</sup> See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 305(e) (2012–13) (detailing explicit prerequisites for awarding credit for field placement programs).

<sup>25</sup> Backman, *supra* note 23, at 53.

choose between a part-time paying job outside the legal profession (such as working as a barista at a coffee shop) or a legal externship, some will be forced to choose the former in order to pay their living expenses. This may lead students from more modest means to forego valuable externship opportunities that will give them the necessary experience, credentials, and contacts to obtain a full-time legal job following graduation.

If employers have a choice to pay externs or not to pay externs, one might argue that they will reflexively choose the “no pay” option, and therefore little benefit will inure to law students by making a change to Standard 305. But many legal employers have been reluctant to take on unpaid externs due to fear of violating the minimum wage provisions of the Fair Labor Standards Act. The Wage and Hour Division of the Department of Labor has issued detailed guidelines setting forth six criteria for determining when educational internships may be hosted by for-profit organizations without providing compensation. The fourth criterion specifies that the activities of the intern must provide “no immediate advantage” to the employer.<sup>26</sup> Some law firms are reluctant to take on unpaid externs for fear of violating this provision.<sup>27</sup> Allowing for paid legal externships—say, up to 200% of the prevailing minimum wage—might thus end up *increasing* the pool of available opportunities for law students. Moreover, a 2009 survey by the organization Intern Bridge found that both employers and students derived greater satisfaction from paid internships than unpaid internships; the students found the assignments more meaningful, and the employers found performance on the assignments to be of higher quality.<sup>28</sup>

### C. Vary Teaching Loads

Some commentators have predicted that many law schools will be forced to contain costs by increasing the teaching loads of full-time faculty members.<sup>29</sup> For example, professors at many top-tier law schools presently teach three courses per year (roughly ten credits). If those same professors were required to teach four courses per year (roughly twelve credits), certain faculty slots could go unfilled upon retirement over the next decade, and some stipends currently paid to adjunct professors could be eliminated.

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<sup>26</sup> U.S. DEPT OF LABOR WAGE AND HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010), *available at* <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>.

<sup>27</sup> Backman, *supra* note 23, at 55.

<sup>28</sup> *Id.* at 44.

<sup>29</sup> TAMANAHA, *supra* note 3, at 182.



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Rather than increase teaching loads across the board, my proposal would be to differentiate among faculty in their annual course assignments depending on their productivity in other academic endeavors (most notably scholarship). Course loads have been reduced at many law schools over the past two decades in order to give faculty more time for research and writing.<sup>30</sup> Yet, even after this across-the-board course relief, not all faculty members at all law schools have become productive scholars. Faculty play many roles, and not all of them equally well. At many law schools there are highly effective teachers who do not engage in substantial research. Those faculty members should be utilized more effectively by being assigned an additional course per year. It makes little sense, from either a cost-efficiency or utility perspective, to treat all faculty members equally, regardless of their strengths, interests, and contributions.

Unfortunately, many schools have preferred a facially egalitarian approach to teaching assignments as a way to avoid the political difficulties (and wounded egos) that would result from differentiation. But this only results in inequalities being forced underground—they still exist. Some faculty members are both productive scholars *and* productive teachers; under a facially egalitarian teaching assignment model, they end up doing a disproportionate share of the work in terms of combined student contact hours and scholarly contribution. If law schools react to the current affordability crisis by increasing the teaching loads of *all* full-time faculty members across the board, they run two risks: (1) jeopardizing the scholarly output of their most productive researchers, and (2) burning out their most effective classroom instructors who already teach heavy student loads.

A more sensible approach to teaching assignments is to raise the presumptive teaching load for all full-time faculty, but then to allow individual faculty members to petition for a reduced course load in a particular year, depending on (1) their scholarly agenda and the likely success of their projects (as demonstrated by prior significant scholarly contributions), or (2) unusually high student contact hours. By thus making faculty members “earn” a reduced teaching load, law schools could begin the difficult but critical task of varying teaching assignments to suit individual faculty productivity.<sup>31</sup> Allocation of teaching responsibilities

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<sup>30</sup> *Id.* at 42–44.

<sup>31</sup> If implemented, my proposal might also serve as a retirement incentive for senior faculty members reaching the end of their careers, who do not anticipate that they would be eligible for a reduced teaching load under a new course assignment model. All retirement incentives (broadly conceived) are important for schools to consider as part of an overall cost containment strategy.

would then begin to more optimally reflect the different interests, talents, and capabilities of faculty members at various points in their careers.<sup>32</sup>

#### D. Short-Term Contracts: Creating a “Third Track” for Full-Time Faculty

The traditional model of legal education is to hire, recruit, and promote two categories of full-time faculty: (1) clinical/legal research and writing faculty (so-called “skills” or “experiential learning” faculty), and (2) tenured/tenure-track faculty (so-called “podium” faculty). While many schools have eliminated the contractual distinction between these two types of faculty members by offering tenure to clinicians, at most schools the primary teaching responsibilities and research expectations for these two groups of professors continue to be different.<sup>33</sup> What each group has in common, however, is longevity; both skills and podium faculty typically view law teaching as a career that will span the remainder of their working lives. In other words, these faculty members are wedded to us for as long as they want to be here.

This two-track model of faculty hiring ignores an important and far more flexible source of legal talent. Lawyers are living longer and retiring earlier. Many partners at major law firms work under partnership agreements that require them to retire at or around sixty-two years of age. Similarly, many government attorneys and judges are eligible for a public pension, depending on their years of service, in their early sixties. Lots of these accomplished, talented, and still energetic lawyers would relish the opportunity to continue working in a law school environment as visiting faculty. These retiring lawyers and judges still have lots left to offer our students, and it is a missed opportunity not to utilize them.

I am not urging law schools to hire seasoned old trial lawyers to come in and tell war stories to our students. Some of the accomplished attorneys I am envisioning have taught at our law schools with distinction as adjunct faculty while they were practicing law or serving on the bench (with exemplary course

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<sup>32</sup> Deans who increase teaching loads in response to the present financial crisis might also consider allowing faculty members to “bank” credits from year to year. This would allow faculty who wish to devote substantial energies to research to teach an extra course in one year in order to obtain a course reduction in the next.

<sup>33</sup> While the ABA does not require law schools to afford clinical faculty the right to earn tenure, it does require at a minimum that they be afforded “a form of security of position reasonably similar to tenure” following a probationary period, such as a presumptively renewable five-year contract. See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 405(c) (2012–13) (Interpretation 405-6).

evaluations to prove it). With careful screening and vetting, some of these former adjuncts could bring extraordinary skill sets to our communities as “full-time but short-term” visitors, at exceptionally low cost.

Tenure might not be as “dead” as many pundits like to proclaim,<sup>34</sup> but in an era of heightened attention to costs, it naturally will be limited to a smaller and smaller percentage of faculty. Law schools should thus expand their pool of potential teaching resources to create a third category of full-time faculty member—the distinguished visitor from practice. Especially in an era where fewer and fewer tenure track faculty are being hired with significant practice experience, ignoring this highly talented sector of the labor market makes little sense—either in terms of cost or in terms of maximizing the professional preparation of our students. Without the need for sabbaticals, summer research support, or research assistants, these professors could teach a course load of three to four courses per year for one-fourth to one-half the cost of tenure-track faculty, and no long-term commitment. Visitors could be awarded a series of short-term contracts (e.g., two years) and be retained only so long as the relationship continues to meet institutional needs.

Many law schools have shied away from such a layered faculty hiring strategy due to concern about its impact on *U.S. News & World Report* rankings. Full-time tenured or tenure-track faculty improve the school’s student-faculty ratio, and arguably have the greatest capacity to influence the academic reputation of the school.<sup>35</sup> But schools need to take a bold step in reducing faculty costs for the benefit of their students, irrespective of its incidental effect on the rankings. In other words, they should have the courage to lead the rankings indicators, rather than simply follow them. And even if one views rankings as a legitimate concern, the ABA could certainly help here by changing the way it calculates student-faculty ratio.<sup>36</sup> The ABA currently treats “visitors” (even those teaching a full course load) as 0.7 faculty resources rather than one full faculty resource, unless the visitor is covering for a regular full-time

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<sup>34</sup> Robin Wilson, *Tenure, RIP: What the Vanishing Status Means for the Future of Education*, CHRON. HIGHER EDUC. (July 4, 2010), <http://chronicle.com/article/Tenure-RIP/66114/>.

<sup>35</sup> TAMANAHA, *supra* note 3, at 62.

<sup>36</sup> In their rankings instrument, *U.S. News & World Report* uses the student-faculty ratio reported annually by law schools to the ABA. See Sam Flanigan & Robert Morse, *Methodology: Best Law School Rankings*, U.S. NEWS & WORLD REP. (Mar. 11, 2013), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2013/03/11/methodology-best-law-schools-rankings>.

faculty member on leave.<sup>37</sup> More significantly, visitors are included in the ABA's category of "additional teaching resources" (along with administrators who teach and adjuncts), which is capped at 20% of the school's full-time skills and podium faculty.<sup>38</sup> Because many schools are already at their 20% cap in additional teaching resources, hiring more distinguished visitors from practice will do nothing to improve their student-faculty ratio, and may actually hurt that figure if visitor hiring is done in lieu of regular full-time appointments.<sup>39</sup> The ABA should consider raising the "cap" on additional teaching resources in Standard 402 to 30% or 40% in order to encourage schools to take more creative and less costly approaches to faculty recruitment.

#### E. Maximize Course Enrollments

Another trend that drives up the cost of legal education is running low-enrollment courses. I am not referring to clinics or certain simulation courses such as Trial Practice or Negotiation, which may need to be small in order to achieve valid pedagogical objectives. I am referring to very narrow seminars that primarily advance the research interests of the instructor, or doctrinal "podium" courses that are being taught primarily in a lecture style to an unusually small audience. It is very uncommon for deans or associate deans to cancel scheduled courses due to limited enrollments, for fear of embarrassing the professor or upsetting the expectations of enrolled students. But here, law schools need to learn a lesson from the airline industry. Just as it is not cost-efficient to run planes with half-empty seats, it is not cost-efficient to run classes with half-empty desks. Airlines have closely scrutinized consumer travel patterns over time and reorganized their routes and schedules to optimize efficiency; law schools must do the same sort of rigorous analysis with regard to course preferences and enrollments.

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<sup>37</sup> See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 402 (2012-13) (Interpretation 402-1(1)(a)(ii)).

<sup>38</sup> See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 402 (2012-13) (Interpretation 402-1(1)).

<sup>39</sup> Adjuncts and administrators without faculty rank who teach count as 0.2 faculty resources; administrators with faculty rank who teach count as 0.5 faculty resources; and visitors on short-term contract count for 0.7 faculty resources, all subject to the 20% cap. By way of illustration, a school with fifty full-time faculty members on tenure track, or its equivalent, is capped at ten additional teaching resources to be computed toward its student-faculty ratio. If the school already employs forty adjunct faculty members per year and employs four deans/associate deans who have teaching responsibilities, they have reached their cap of ten additional teaching resources. Hiring a visitor might be beneficial for the students and the curriculum, but it would have absolutely zero effect on the student-faculty ratio at my hypothetical school as presently computed by the ABA.

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My proposal here is threefold. First, law schools must have the courage to cancel seminars and doctrinal courses that are undersubscribed (e.g., under eight students), forcing the professor to offer an alternative course either in that semester or in the following semester. Second, law schools should offer certain doctrinal courses that typically enroll between nine to fifteen students (for example, a Conflicts of Law or Admiralty course) on an every-other-year schedule. If this matrix were planned in advance and adequately published to students, they would know that if they wished to take a certain course they must do so in their second year, or it would not be offered again before they graduate. Finally, law schools in urban environments with other law schools nearby should develop “target” enrollments for each class, and work out a consortium agreement with partner law schools whereby students outside the host law school would be allowed to register for open classes after the internal registration period had closed if the target enrollment had not been reached. Such a consortium agreement could operate on a balance of payments model, where the outside students would not pay any additional tuition, but the consortium members would work out a per-credit exchange at the end of each year depending on how many outside students took courses at each school. Such an exchange, over time, would encourage law schools to play to their subject matter strengths in making curricular decisions, rather than trying to satisfy the full panoply of student interests.

#### F. Expand Seats in Clinical Programs through Use of Teaching Fellowships

Law schools face pressure to cut costs at the same time that they face pressure to expand their practical skills offerings. Yet one of the prime drivers of the tuition spiral (in addition to reduced teaching loads and higher administrative costs) has been the increase in both number and diversity of clinical offerings at many law schools. Clinical programs are extremely expensive to operate on a cost-per-credit basis, due to the extremely low student-faculty ratio necessary to accomplish clinical pedagogical objectives (typically around 8:1).<sup>40</sup> Many law schools that would like to “require” all students to participate in a clinic, or at a minimum guarantee a clinic seat to every student who desires one, might find it prohibitively expensive to do so.

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<sup>40</sup> Peter A. Joy, *The Cost of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 309, 309 n.1 (2012).

One low-cost method of expanding the number of available seats in clinics is to hire recent law school graduates (preferably graduates who have excelled in that particular clinic) as “teaching fellows” for six to twelve months after their graduation. This fellowship would serve as a form of apprenticeship for the recent graduate as he or she searches for full-time employment. But because the fellow is also a licensed attorney, he or she would be available to help the faculty member supervise students on assigned cases. Such assistance would allow the faculty member to increase enrollments in the clinic by perhaps two to four additional students per semester. Clearly fellows are not substitutes for experienced clinicians, because they do not have the legal practice experience, the judgment, or the teaching skills to serve as a student’s primary case supervisor. But they could assist the faculty member in managing and directing a student’s caseload, including providing research direction and document review. Viewing some recent graduates as perhaps an additional teaching resource in the clinics might be a low-cost way to increase the student-faculty ratio from 8:1 to 11:1. In return for their services, law schools might offer such fellows a modest housing stipend, or free courses in the school’s LLM program. This is another example of how law schools can be more creative in expanding their pie of available teaching resources in a way that does not add substantially to the tuition burden of students.

#### G. Cut Back on Law Reviews

There are presently 201 accredited law schools in the United States and over 650 student edited law journals—on average, over three journals per school. Many schools host specialty journals in such areas as environmental law, cyber law, maritime law, etc. At many law schools, students are paying tuition to serve on a specialty law journal, where they receive up to three credits per year for writing a note and engaging in editorial work such as source and cite checking. While students undoubtedly receive some educational benefit from journal experience, the primary beneficiaries are the well-paid faculty members at *other* law schools who are finding a home for their scholarship. This clearly represents a cross-subsidy.<sup>41</sup> Flagship journals at many lower-ranked law schools, and even specialty journals at mid- to top-tier law schools, are reaching to fill their books, and sometimes publishing “scholarship” of dubious value that does not significantly benefit the student editors, the host school, or the profession. One study has suggested that up to forty-three

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<sup>41</sup> TAMANAHA, *supra* note 3, at 61.

percent of law review articles published in the United States are never cited after publication by a *single court or other scholar*.<sup>42</sup>

It is time for law schools to seriously reconsider whether all of their currently sponsored law journals are wise investments of valuable tuition dollars. Are the students receiving a rigorous academic experience that will better prepare them for the practice of law? Are the journals publishing articles that are likely to have any influence in the legal profession? Even if the answer to both of these questions is *yes*, might the same benefits flow from online rather than print publication?<sup>43</sup> Might many law schools—particularly lower ranked law schools that are struggling with enrollments—be better off publishing only one flagship journal?

It may cost a law school up to \$25,000 annually to publish a specialty journal, including printing costs of multiple volumes per year and the apportioned salary and benefits of a professional staff member hired to manage business affairs. For less than half that figure, law schools could open thirty seats in two new practical skills courses taught by experienced adjunct professors (such as advanced legal research or advanced legal writing) that might serve similar pedagogical objectives. The students in such courses might receive an equal or even more formative educational experience, and the law school would save money.

My recommendation for close scrutiny of expenditures is not confined to law reviews. It is always difficult to raise questions about the value of existing programs. Sacred cows are scattered across the legal academy. Many programs have well-entrenched advocates and their own unique institutional histories. Yet these are exactly the sorts of difficult conversations that a wise steward of financial resources must undertake. Law school deans who are serious about curtailing the rising cost of tuition must scrutinize all aspects of their programs—from library subscriptions to administrative personnel to travel and catering—in order to identify those expenditures that have the least significant impact on our two primary educational

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<sup>42</sup> Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 118 (2010).

<sup>43</sup> In 2009, a group of twelve law library directors at some of the nation's leading law schools issued the "Durham Statement on Open Access to Legal Scholarship." Call to Action from Richard Danner et al. (Feb. 11, 2009), *available at* <http://cyber.law.harvard.edu/publications/durhamstatement>. The Durham Statement encourages law schools to make their print law journals available in electronic format via open access on the web. In addition, the Durham Statement encourages the end of print publications and the move to an exclusively electronic platform for law reviews. While many law schools in the United States have accomplished the first objective, very few have accomplished the second.

missions: the advancement of legal knowledge and the professional preparation of our students. All operational and salary expenditures must be evaluated against these two critical benchmarks.

#### CONCLUSION

The economic fuel that has sustained law schools for the past several decades has been the willingness of students to finance the high cost of their legal education through student loans, on the hope that they will obtain a six-figure legal job upon graduation. This bubble—much like the subprime mortgage bubble—is beginning to burst.<sup>44</sup> As the percentage of graduates nationwide who obtained full-time legal jobs requiring a JD shrunk last year to fifty-five percent,<sup>45</sup> the application pool has plummeted. College graduates increasingly see law school as a very risky proposition.

We are now facing a perfect storm of overcapacity of seats, shrinking demand for legal services in several sectors of the legal profession,<sup>46</sup> and a flawed economic model of the professoriate. Some have likened this crisis to the automotive industry in Detroit in the 1970s and to the steel industry in Pittsburgh in the 1980s.<sup>47</sup> We ignore these challenges at our peril, and risk walking backwards over a precipice while pointing blindly to the responsibility of others in the system. The law schools that are able to react nimbly and decisively to these changing demographics might state the most convincing case for attracting the precious tuition dollars of aspiring lawyers.

I hope that nothing I have said in this essay will deter recent college graduates from pursuing a law degree. Being a lawyer is an intellectually challenging and professionally satisfying career. And the diverse legal needs of this nation's citizens are certainly very compelling. But the trends I have identified are real, and cannot be ignored. If we are attentive to market indicators and the needs of our students, we may emerge from this economic downturn leaner, stronger, and more focused on what matters

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<sup>44</sup> Henderson, *supra* note 20, at 494; *see also* Robert J. Rhee, A Market Correction in Legal Education: What's Happening? What Now?, Address at the Chapman University School of Law Symposium: The Future of Law, Business, and Legal Education: How to Prepare Students to Meet Corporate Needs (Jan. 31, 2012).

<sup>45</sup> *See Overpriced or Priceless?*, *supra* note 5.

<sup>46</sup> *See* Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 757–63 (2010); THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 1–3 (2010).

<sup>47</sup> Lincoln Caplan, Editorial, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 15, 2012, at 10(L) (quoting Hastings College of Law Dean Frank Wu); Michael Madison, *Legal Education and the End of the Beginning*, THE FACULTY LOUNGE (Oct. 25, 2012, 10:10 PM), <http://www.thefacultyounge.org/2012/10/legal-education-and-the-end-of-the-beginning.html>.



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