

# RENAISSANCE OR RETRENCHMENT: LEGAL EDUCATION AT A CROSSROADS

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For the great enemy of truth is very often not the lie—deliberate, contrived, and dishonest—but the myth—persistent, persuasive, and unrealistic. Too often we hold fast to the clichés of our forebears. We subject all facts to a prefabricated set of interpretations. We enjoy the comfort of opinion without the discomfort of thought.

John F. Kennedy\*\*

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\*\* President John F. Kennedy, Address at Yale University Commencement (June 11, 1962), available at <http://www.jfklibrary.org/Research/Ready-Reference/Kennedy-Library-Miscellaneous-Information/Yale-University-Commencement-Address.aspx>.

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## INTRODUCTION

This is a time of unprecedented opportunity to undertake a comprehensive and unflinching evaluation of the deeply entrenched and inflexible system of legal education, a system that has utterly failed to adapt its pedagogy, culture, and economics to the current and devastating reality facing law students. A confluence of factors has created the current state of affairs, including the publication of two monographs—the MacCrate Report<sup>1</sup> and more recently, the Carnegie Report<sup>2</sup>—decrying the limitations of the dominant pedagogy of legal education and urging educators to reshape its reigning design; a collaborative effort to delineate the best practices in legal education in the Best Practices Report<sup>3</sup> that highlighted the shortcomings of legal education as currently structured; crushing student debt, rising tuition, and dismal employment prospects for law school graduates; vociferous student dissatisfaction with the value of their legal education; a continuing crisis in access to justice; the apparent end of “big law;” and alarming rates of student and lawyer distress. These factors contain

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1. AM. BAR ASS’N, LEGAL EDUCATION & PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

2. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

3. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) [hereinafter BEST PRACTICES], available at [http://law.sc.edu/faculty/stuckey/best\\_practices/best\\_practices-full.pdf](http://law.sc.edu/faculty/stuckey/best_practices/best_practices-full.pdf).

thematic cross-currents and send the unmistakable message that it is time to ignite a conversation within the academy and the broader legal community to reassess our mission, vision, and efficacy as legal educators. We must engage in unsparing self-reflection, step back from our entrenched positions and the attendant privilege we have as members of legal academia, and re-imagine a new vision for legal education that serves the interests of our students, the bench and bar, and society, with an overarching aspiration to bolster the bedrock principle of equal justice under law.

This Article synthesizes some of the literature criticizing the current state of legal education with some of the scholarship proposing solutions and argues that whatever review is undertaken must be expansive, with a careful and critical look at how each piece supports the endeavor. None of the ideas discussed below, taken alone, are novel, as scholarship abounds on all of the topics. Considered together, they propound a comprehensive and holistic approach to reform. In essence, my goal is to catalyze a wholesale reconsideration of the very foundation of legal education. Many of the seemingly disparate themes comprise a Gordian Knot and cannot be rectified in isolation. Accordingly, the whole enterprise must be deconstructed, from how we recruit and admit law students to how we license them, because the process supports a self-reinforcing and self-perpetuating system and culture that fails to serve our students and the society in which they will operate as professionals. I hope this engenders a conversation that is unfreighted by and decoupled from history and compels us to step back and critically assess how we can restructure legal education by focusing our sights on the best interests of our students instead of perpetuating the privilege and luxury of legal academia. Given the well-documented emotional and fiscal price that legal education is exacting from our students, it is unconscionable to maintain the status quo. After lamenting the current conditions that law students confront, one commentator noted that “[a]t some point, law professors can no longer disclaim responsibility for the harmful consequences of this enterprise.”<sup>4</sup>

This Article is comprised of three parts. Part I provides the historical backdrop for legal education, briefly critiques the current system, and discusses the impact of those shortcomings on law students. Part II considers a few of the solutions crafted in response to the current crisis facing legal educators. Part III suggests a wide array of reforms aimed at remediating these deficiencies and argues that any real reform must consider and integrate the seemingly disparate but interdependent factors. Piecemeal and incremental reforms will ultimately fail to fully remedy the shortcomings of our current system, although they may provide marginal relief. This section also illuminates the significant impediments to meaningful reform in legal education. Each section contains a truncated discussion of the topics because space constraints preclude a thorough discussion. My intention is not to provide persuasive evidence on each component, but rather to encourage a cumulative discussion that underscores the importance of an

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4. Brian Tamanaha, *Prospective Students Deserve Straightforward Law School Data*, NAT'L JURIST (Sept. 28, 2010, 11:02 AM), <http://www.nationaljurist.com/content/prospective-students-deserve-straightforward-law-school-data>.

ecumenical commitment to holistic and comprehensive reform. In conclusion, the Article argues that while the forces supporting the status quo are powerful and the barriers to change are substantial, the costs of ignoring these problems for law students, practicing lawyers, our venerated legal system, and the greater society are wholly unacceptable.

## I. CRITIQUE OF CONTEMPORARY LEGAL EDUCATION

### A. *Brief History*

The evolution of law school teaching methodology has been thoroughly discussed and dissected in other literature.<sup>5</sup> Although detailed coverage is not necessary here, a brief overview is warranted, precisely because legal education in the last century has been so tradition-bound and resistant to modernization. As initially structured, legal training relied on the apprentice model or classroom lectures.<sup>6</sup> At the end of the nineteenth century, Christopher Columbus Langdell, the dean at Harvard Law School, radically altered the teaching methodology by introducing and promoting the case method.<sup>7</sup> Designed to teach students “how to think like lawyers,”<sup>8</sup> the case method was premised on the notion of “law as science,” an assumption that fueled the notion that the primary skill students needed to master was the application of appellate decisions to the specific facts of individual cases.<sup>9</sup> The dominance of the case method rendered the apprenticeship model obsolete, and as a result, law students had little opportunity to acquire practical skills.<sup>10</sup>

By the 1930s, critics condemned the limitations of the case method on a number of grounds, including its inability to recognize the vagaries of real law practice and the lack of training in practical skills. The “legal realists,” among

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5. See, e.g., Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449 (1996).

6. *Id.* at 451-52.

7. See Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 5 n.7 (2000).

8. See Janeen Kerper, *Creative Problem Solving vs. the Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351, 358 (1998).

9. Critics rejected the notion that legal analysis could be reduced to “the collection, synthesis, and analytical comparison of common law cases . . . that could be consistently applied in predicting results and deciding future cases.” Bernard K. Freamon, *Action Research for Justice in Newark, New Jersey*, in EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION 167, 169-70 (Jeremy Cooper & Louise G. Trubek eds., 1997).

10. See Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 943-44 (1997).

them Jerome Frank<sup>11</sup> and Karl Llewellyn,<sup>12</sup> believed that the case method's reliance on the dry application of purportedly neutral legal principles, as if scientifically predictable, left students inadequately prepared to practice law in the messy "real world situations" in which actual lawyering unfolded. To remedy this deficiency, Frank was one of the first vocal proponents of clinical instruction.<sup>13</sup> Although others echoed his call for training in practical skills, there was initially little recognition of the value of this methodology in law schools.<sup>14</sup>

During the 1960s and 1970s, some changes on the periphery of legal education mirrored the zeitgeist in the wider culture.<sup>15</sup> Legal clinics, with a focus on justice and skills, began to solidify their place in the legal academy, albeit still on the edges of law school pedagogy. The 1980s ushered in an era in which some clinical faculty experienced heightened dissatisfaction with their marginal role within law school culture and the lack of legitimacy for skills training and argued for fuller integration into the legal academy.<sup>16</sup> Some friction ensued between those agitating for legitimacy and those who worried that the goal of integration subverted the central and compelling role of a justice mission in clinical education, tensions which remain unresolved today.<sup>17</sup> Whether skills should assume primacy over justice is an ongoing debate.<sup>18</sup> The late 1990s witnessed the

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11. See Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1315 (1947) [hereinafter Frank, *A Plea*] (proposing that law school be modified to more closely resemble the medical school model); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933).

12. Legal realists believed that "legal education should expose students to the dynamic relationship between theory and practice—that good theory is practical, and that good practice is informed by theory." Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1932 (2002).

13. See generally Frank, *A Plea*, *supra* note 11; see also Blaze, *supra* note 10, at 939-42, 952 (discussing the goal of clinics to provide comprehensive lawyering skills).

14. Barry and her colleagues ascribe four main reasons to the legal academy's resistance to a full embrace of clinical education. Barry et al., *supra* note 7, at 8-9. Specifically, law schools bristled at any similarity to a trade school and, as such, rejected the value of apprenticeships; clinics are resource-intensive and do not warrant a large share of hotly contested resources; no consensus supported the notion that any training aside from doctrinal analysis had any educational merit; and the American Bar Association initially did little to encourage the use of clinics. *Id.* These reasons continued to impede the integration of clinics until the late 1950s. See *id.* at 9-10.

15. See Wizner, *supra* note 12, at 1933.

16. Barry et al., *supra* note 7, at 16-17.

17. See generally *id.* (discussing the resistance to augmenting clinical training as part of the law school curriculum).

18. See, e.g., Praveen Kosuri, *Clinical Legal Education at a Generational Crossroads: X Marks the Spot*, 17 CLINICAL L. REV. 205, 218 (2010) (noting that millennials may not share the commitment to social justice that the founders of clinical education espoused and that clinical faculty must adapt their pedagogy to the needs and preferences of current students: "Today, all students are looking to the clinics to provide them with real-life, practical, and professional skills. There will inherently be more students in our presence who simply do not care about any

chorus of voices calling for meaningful reform growing more insistent and pervasive.<sup>19</sup> Among the arguments advanced was the argument that the responsibility for skills training should not be relegated to the clinics alone.<sup>20</sup>

Contemporary critiques of legal education are no less polemical and continue to condemn its anachronistic leanings. As one commentator noted, “[t]here is so much wrong with legal education today that it is hard to know where to begin.”<sup>21</sup> Other critics have concurred, noting that “the reality is that few law students graduate from law school ready to practice law.”<sup>22</sup> Any conversation and serious self-inventory must address the argument that “there is no way to reform legal education in any meaningful way without giving law students far more experience in the practice of law.”<sup>23</sup> Responses to the demands for greater practical training came in various forms, and three reports in particular carried enough gravitas to engender dialogue and scholarship—both in agreement and dissent—about the recurring critiques of the dominant and unyielding law school teaching orthodoxies: the MacCrate Report,<sup>24</sup> the Carnegie Report,<sup>25</sup> and the Best Practices Report.<sup>26</sup> Although some legal educators are committed to seriously evaluating the arguments and principles identified in these reports, many of the recurring themes still face stiff resistance. In essence, careful review and constructive critiques have engendered incremental advances, but legal education has not changed fundamentally in the last quarter century.

### B. Monographs

1. *The MacCrate Report*.—Responding to widespread reproach about the state of legal education, the ABA assembled a task force charged with investigating how to “narrow the gap” between law school and the practicing bar. The results, entitled the MacCrate Report and issued in 1992, endeavored to identify a taxonomy of the requisite skills and values necessary for the practice of law.<sup>27</sup> The report implored law schools to “narrow the gap” between law graduates and the practicing bar.<sup>28</sup> While emboldening beleaguered advocates of

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underlying social mission which the clinics employ. They want someone to show them what it means to be a lawyer, not just a public interest lawyer.”).

19. See Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 116 (2001).

20. See *id.* at 169 (concluding that the “teaching of fundamental lawyering skills and values to help prepare law graduates for practice” should be embraced throughout the law school curriculum, not isolated in clinics).

21. Morrison Torrey, *You Call That Education?*, 19 WIS. WOMEN’S L.J. 93, 93 (2004).

22. Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. C.R.-C.L. L. REV. 595, 595 (2008).

23. *Id.* at 597.

24. MACCRATE REPORT, *supra* note 1.

25. CARNEGIE REPORT, *supra* note 2.

26. BEST PRACTICES, *supra* note 3.

27. See MACCRATE REPORT, *supra* note 1, at 3-8.

28. See *id.* at 138-40 (identifying ten fundamental lawyering skills: problem solving, legal

skills training, the report triggered an avalanche of commentary, some laudatory and some dismissive.<sup>29</sup> The MacCrate Report inspired some incremental reforms and animated conversations that continued for the next fifteen years. Prominent critiques in the commentary included the short shrift paid to problem solving in context and the notable absence of inculcation about values in the curriculum.<sup>30</sup>

The criticisms contained in the report were not new, and they emanated from diverse constituencies: the bench, the bar, accrediting bodies, students, and the public. Owing at least in part to institutional resistance to comprehensive reform, prior curricular changes were ad hoc in nature and continued to generate considerable resistance.

2. *The Carnegie Report*.—Fifteen years later, in 2007, dissatisfied with the legal academy's intransigence, the Carnegie Foundation for the Advancement of Teaching (the "Carnegie Foundation") undertook its own critique, prompted by similar concerns. The Carnegie Foundation embarked on a comprehensive evaluation of the professional education offered to lawyers, compared this training to that provided in other professional training programs, and issued a

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analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas).

29. See, e.g., Engler, *supra* note 19; see also Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287 (1994). Criticisms include the report's failure to emphasize issues such as the human elements of lawyering and creative problem solving. See Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 595-96 (1994); see also Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319, 346-47 (1999) (noting that the MacCrate Report paid scant attention to "the more humanistic roles of values, interests, problem prevention, interdisciplinary analysis, creative thinking and self-reflection"). For the report's failure to account for the substantial resources necessary to alter the curriculum as suggested, see John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993), and for its failure to address the values underlying diversity, see Beverly Balos, *Conferring on the MacCrate Report: A Clinical Gaze*, 1 CLIN. L. REV. 349 (1994). For the Report's lack of emphasis on research and writing skills, see Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK L. REV. 245, 261 (1996), and for the Report's failure to incorporate professional values, see Russell G. Pearce, *MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values*, 23 PACE L. REV. 575 (2003).

30. See, e.g., Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 245 (1992) ("If our job is to train students to 'think like lawyers,' then we should train them to solve such a problem, because that is the kind of thinking that lawyers must actually do. But—you reply—law schools cannot spend their scarce academic resources teaching students every single skill they will need in law practice—how to bill clients, how to manage an office, how to find the courthouse. True, but problem-solving is not like any of those activities. Problem-solving is the single intellectual skill on which all law practice is based.").

fairly critical report.<sup>31</sup> The Carnegie Report characterized law schools as hybrid institutions of which one progenitor is “the historic community of practitioners, deeply immersed in the common law and carrying on traditions of craft, judgment, and public responsibility.”<sup>32</sup> Providing a countervailing influence is the culture of university research institutions that values scholarly productivity over skills often deemed insufficiently intellectual to warrant serious attention or the allocation of resources.<sup>33</sup> From the inception of modern law schools in the 1870s, legal education has tilted progressively toward its academic identity, relying on the notion that law and legal analysis are scientific undertakings, decipherable through formal knowledge.<sup>34</sup> Distancing themselves from a model pejoratively dismissed as a mere trade school, legal academics have focused increasingly on scholarship and research.<sup>35</sup> A byproduct of this orientation has been considerable contested discourse as to the legal academy’s role in preparing students for the practice of law.<sup>36</sup> Noting this tension, the Carnegie Report endeavored to advance a model that integrates formal knowledge and applied practice by suggesting curricular and pedagogical realignment.<sup>37</sup> Not satisfied with reforms aimed solely at inculcation in doctrine and skills, the report also directed much of its discussion to the development of professional identity as integral to the enterprise of legal education.<sup>38</sup>

While the Carnegie Report identified a number of areas in which legal education is lacking, it acknowledged the significant challenges attendant to the effort to reevaluate and revitalize legal education, making it more relevant to the preparation of practicing lawyers.<sup>39</sup> Past progress toward reform has been spotty and occasionally regressive.<sup>40</sup> For example, coinciding with greater integration

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31. CARNEGIE REPORT, *supra* note 2.

32. *Id.* at 4.

33. *See id.* at 4-5.

34. *See id.* at 5.

35. *See id.* at 7.

36. *See id.* at 8; *see also* Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 316 n.5 (1995) (“Law schools seem to be the only professional schools with faculties who see their central function as detached from the preparation of professionals for practice. Nor do professors in those other schools—medicine, engineering, business, architecture—generally view their scholarly work as both more important than, and essentially detached from, the work being performed by practitioners.”).

37. CARNEGIE REPORT, *supra* note 2, at 8-9.

38. *See id.* at 14. The authors explained that

[p]rofessional identity is, in essence, the individual’s answer to questions such as, Who am I as a member of this profession? What am I like, and what do I want to be like in my professional role? and What place do ethical-social values have in my core sense of professional identity?

*Id.* at 135.

39. *See generally id.* at 162-84.

40. *See, e.g.,* Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal*



for clinical faculty and the broad range of skills and experiences they provide to students was a movement toward hiring doctrinal faculty with less practice experience and more impressive academic credentials, further polarizing the debate over the allocation of resources between skills training and scholarly productivity.<sup>41</sup>

3. *The Best Practices Report*.—Contemporaneous with the publication of the Carnegie Report, members of the clinical community completed the Best Practices Project and issued a Best Practices Report, which endeavored to apply the best practices analysis applied widely in other disciplines to legal education.<sup>42</sup> The Best Practices Project methodically deconstructed the skills and professional ideals necessary for the competent practice of law.<sup>43</sup> This monumental effort set out guiding principles for the best practices in legal education, arguing that law schools must evolve to adapt to the changing legal landscape.<sup>44</sup> The Best Practices Report exhorted law schools to broaden their perspective of the skills necessary for the effective practice of law and lamented that this wide conception of skills is given scant attention in the law school curriculum.<sup>45</sup> The report echoed the recurring refrain that law schools fail to instill in their students a sense of professional commitment to ensure access to justice, both to the nation's poor and to its middle class.<sup>46</sup>

The Best Practices Report also decried a lack of professionalism that has fueled an erosion of public trust and an accompanying loss of lawyers' standing as moral leaders.<sup>47</sup> Not satisfied with limiting its purview to skills and values, the

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*Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 519 (2007) (“[H]istory is littered with failed reform efforts of this type. Many brilliant reforms do not take root because they overlook the crucial role of law school culture in determining their meaning and impact.”).

41. See Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 127-28 (2010) (noting that the recent decades have seen an influx of law professors with insufficient practical skills).

42. See BEST PRACTICES, *supra* note 3, at 1-3.

43. See *id.* at 2-4.

44. See *id.* at 13-14.

45. See *id.* at 15. According to the Best Practices Report, [t]he lawyer of the next century will need to be able to diagnose and analyze problems, to talk to and listen to people, to facilitate conversations, to negotiate effectively, to resolve disputes, to understand and present complex material, to use ever-changing technologies, to plan, to evaluate both economic and emotional components and consequences of human decision-making, and to be creative—to use tried and true methods when they are appropriate, but not to fear new and category-smashing ideas or solutions.

*Id.* (quoting Carrie Menkel-Meadow, *Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney General*, 49 J. LEGAL EDUC. 14, 14 (1999)).

46. *Id.* at 18-19.

47. *Id.* at 20.

report exhorted legal educators to attend to the emotional impact of law school,<sup>48</sup> noting that “too many law school classrooms, especially during the first year, are places where students feel isolated, embarrassed, and humiliated, and their values, opinions, and questions are not valued and may even be ridiculed.”<sup>49</sup> The Best Practices Report resolved that “[i]n order to improve the preparation of law students for practice, law schools should expand their educational goals, improve the competence and professionalism of their graduates, and attend to the well-being of their students.”<sup>50</sup> These debates are not merely academic—some analysts predict that the current recession will prompt prospective employers to place an even higher premium on competencies in skills related to the readiness to practice law upon graduation.<sup>51</sup> Citing increased pressure from law students and other constituencies, the Best Practices Report noted that change is inevitable and argued that effective reform is better enacted from within the academy than imposed externally.<sup>52</sup>

Although these three reports may differ in presentation, several common themes are evident. The reports support longstanding efforts of clinical faculty to “engage[] in a concerted shift to integrate legal practice with doctrinal learning in curricula of engaged clinical legal education.”<sup>53</sup> The reports are further consonant in their position that discussions about pedagogy and competing visions about the nature and structure of legal education must not obscure one critical element of law school mission and purpose—the obligation of lawyers to advance justice, particularly for the poor and dispossessed.<sup>54</sup> This theme is

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48. *See id.* at 21-26.

49. *Id.* at 22.

50. *Id.* at 13.

51. *E.g.*, Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 599 (2010) (concluding “that graduates with practical training will be best situated to succeed in the emerging job market”).

52. *See* BEST PRACTICES, *supra* note 3, at 26-27.

53. *See* Letter from Robert R. Kuehn, President, Clinical Legal Education Association, to Hulett H. Askew, Consultant on Legal Education & Admissions to the Bar, American Bar Association 3 (Oct. 15, 2010), *available at* <http://apps.americanbar.org/legaled/accreditation/Comments%20on%20Foreign%20Program%20Accreditation/CLEA.pdf> (regarding the accreditation of foreign law schools).

54. MACCRATE REPORT, *supra* note 1, at 213. Regarding the second normative goal, “striving to promote justice, fairness, and morality,” the MacCrate Report states that lawyer[s] should be committed to the values of:

2.1 Promoting Justice, Fairness, and Morality in One’s Own Daily Practice, including:

- (a) To the extent required or permitted by the ethical rules of the profession, acting in conformance with considerations of justice, fairness, and morality when making decisions or acting on behalf of a client;
- (b) To the extent required or permitted by the ethical rules of the profession, counseling clients to take considerations of justice, fairness, and morality into account when the client makes decisions or engages in conduct that may have an adverse effect on other individuals or on society;

widely echoed by other writers as well.<sup>55</sup>

### C. Student Vitriol

Students have responded to increasing tuition, staggering debt, and deteriorating job prospects with a firestorm of fury, becoming vocal and more sophisticated in disseminating their discontent.<sup>56</sup> This is facilitated in part by the students' unprecedented ability to communicate with each other in real time. The Internet is a popular forum for student jeremiads declaring that something is rotten in the state of legal education, evincing widespread student dissatisfaction.<sup>57</sup> Student blogs are replete with scathing entries expressing outrage at the law schools they accuse of engaging in unethical behavior through the recruitment and matriculation of law students without full disclosure as to the realistic prospects those students face.<sup>58</sup> While at times the language is so salty

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(c) Treating other people (including clients, other attorneys, and support personnel) with dignity and respect;

2.2 Contributing to the Profession's Fulfillment of Its Responsibility to Ensure That Adequate Legal Services Are Provided to Those Who Cannot Afford to Pay for Them;

2.3 Contributing to the Profession's Fulfillment of its Responsibility to Enhance the Capacity of Law and Legal Institutions to Do Justice.

*Id.* (citations omitted). The MacCrate Report further argued that "[l]aw school deans, professors, administrators and staff must not only promote these values [of justice, fairness and morality] by words, but must so conduct themselves as to convey to students that these values are essential ingredients of our profession." *Id.* at 236.

55. *E.g.*, Deborah L. Rhode, *Access to Justice: Again, Still*, 73 *FORDHAM L. REV.* 1013, 1021 (2004) ("[M]ost legal academics have done little to educate themselves, the profession, or the public about access to justice and the strategies necessary to increase it. . . . [W]e are not shouting from rooftops about unmet needs; we are not, for the most part, even murmuring in classrooms or muttering in law reviews."); *see also* John O. Calmore, *Social Justice Advocacy in the Third Dimension: Addressing the Problem of "Preservation-Through-Transformation"*, 16 *FLA. J. INT'L L.* 615, 632 (2004) (noting that "law school fails to produce public spirited and socially responsible lawyers") (quoting GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 971 (3d ed. 1999)).

56. *See* Leslie Kwoh, *Irate Law School Grads Say They Were Misled About Job Prospects*, *STAR-LEDGER*, Aug. 15, 2010, available at [http://www.nj.com/business/index/ssf/2010/08/irate\\_law\\_school\\_grads\\_say\\_the.html](http://www.nj.com/business/index/ssf/2010/08/irate_law_school_grads_say_the.html); *see also* Debra Cassens Weiss, *Angry Law Grads Beef, Blog and Move On; Tuition Makes \$15K Total in 80s Seem Paltry*, *ABA J.*, Aug. 16, 2010, available at [http://www.abajournal.com/weekly/article/angry\\_law\\_grads\\_beef\\_blog\\_and\\_move\\_on\\_big\\_tuition\\_pales\\_next\\_to\\_15k\\_total\\_i](http://www.abajournal.com/weekly/article/angry_law_grads_beef_blog_and_move_on_big_tuition_pales_next_to_15k_total_i).

57. Because student complaints are sometimes perceived by law school faculty and administrators as constant and unfounded, the sentiments expressed in melodramatic terms can make legitimate concerns easier to dismiss, thereby foreclosing serious attention to the underlying issues.

58. *See, e.g.*, BUT I DID EVERYTHING RIGHT!, <http://butidideverythingrightorsoithought.blogspot.com> (last visited June 9, 2011); FLUSTERCUCKED, <http://flustercucked.blogspot.com> (last

and accusatory as to be off-putting, the underlying sentiment reflects their desperation—they have endured three years of grueling academic demands, foregone income, and mounting debt, all undertaken with the belief that at the light at the end of the tunnel was a respectable profession and a reasonable salary. Instead, they face temporary employment, underemployment in areas such as low-wage contract work or even worse, complete unemployment. Whether these blogs and efforts exert any real pressure on law schools remains to be seen, but current and prospective students make up an important constituency that has seemed to be historically out of the mix of any national conversation about legal education.

Aside from vocalizing generalized lament, students are channeling their despair into other avenues. Several students in Tennessee have organized a non-profit group to demand concrete reforms, including more transparency in how law schools report and disseminate employment data.<sup>59</sup> Another student expressed his despondency about his job prospects by writing to his dean and offering to leave law school in his third year if the law school would refund his poorly invested tuition.<sup>60</sup> A third disgruntled student named his alma mater in his bankruptcy case and issued requests for admissions asking his law school to “[a]dmit that your business knew or should have known that [the p]laintiff would be in no position to repay those loans.”<sup>61</sup> Modern technology includes not just blogs, but other multimedia outlets such as YouTube videos, often evincing humorous but poignant discontent.<sup>62</sup> While the public expressions of outrage may only represent a minority view of the most disaffected students and are not always written diplomatically, legal educators would do well to heed the opinions

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visited June 9, 2011); LAWYERS AGAINST THE LAW SCHOOL SCAM, <http://lawschoolscam.blogspot.com> (last visited June 9, 2011); SCAMMED HARD!, <http://scammedhard.blogspot.com> (last visited June 9, 2011); TALES OF THE FOURTH-TIER NOTHING, <http://poetryforpants.blogspot.com> (last visited June 9, 2011); THIRD TIER REALITY, <http://thirddtierreality.blogspot.com> (last visited July 3, 2011).

59. See LAW SCHOOL TRANSPARENCY, <http://www.lawschooltransparency.com> (last visited June 9, 2011). Law School Transparency (LST) describes itself as “a Tennessee non-profit dedicated to encouraging and facilitating the transparent flow of law school employment information.” *Id.* Founded by two Vanderbilt University Law School students in 2009, LST and its administrators operate independently of any legal institutions, legal employers, or academic reports related to the legal market. *Id.*

60. *Open Letter to Interim Dean Brown*, EAGLEIONLINE (Oct. 15, 2010), <http://eagleionline.com/2010/10/15/open-letter-to-interim-dean-brown>.

61. Elie Mystal, *Student v. School: Charlotte School of Law Sued by Student Seeking Admissions for Bankruptcy Proceeding*, ABOVE THE LAW (July 22, 2010, 10:09 AM), <http://abovethelaw.com/2010/07/student-v-school-charlotte-school-of-law-sued-by-student-seeking-admissions-for-bankruptcy-proceeding>.

62. See, e.g., *Not Sure If This Is Funny or Sad: “So You Want to Go to Law School,”* IDEALAWG (Oct. 18, 2010, 8:36 PM), <http://westallen.typepad.com/idealawg/2010/10/not-sure-if-this-is-funny-or-sad.html>.

expressed. After all, many of these students paid upwards of \$120,000,<sup>63</sup> in addition to fees, books, living expenses, and foregone income, and they are understandably dismayed.

*D. Evidence of Law Student Distress and Professional Dissatisfaction*

Compounding complaints about the value of the skills imparted in law school and the dismal economic outlook for students is the evidence documenting the toll law school exacts from its students. The literature is rife with articles deploring the prevalence and severity of law student distress,<sup>64</sup> which manifests in a variety of maladaptive responses. Studies document elevated rates of depression, anxiety, alcoholism, suicide, and professional dissatisfaction among law school students.<sup>65</sup> These alarming statistics are compared to the indicia of well-being prior to starting law school, indexed against other graduate school students, and followed over the course of law school.<sup>66</sup> The reported distress does

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63. I note that this figure does not account for merit aid offered to some students, nor to the lower tuition typically associated with public law schools.

64. See, e.g., Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425 (2005) [hereinafter Krieger, *Inseparability*]; Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (2002); Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*, 8 J. LEGAL WRITING INST. 229 (2002); Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883 (2007); see also Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 79 (2002) (“Unfortunately psychological distress, dissatisfaction, and substance abuse that begin in law school follow many graduates into practice.”); Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524, 538 (1998) (arguing that law students do not fare well when they are required to sacrifice personal values on the “altar of rationalism”); Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23, 36 (2000) (“Although the psychological profile of entering law school students matches that of the general public, an estimated twenty to forty percent leave with some psychological dysfunction including depression, substance abuse, and various stress related disorders.”); Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 283 (2004) (“[V]arious problems reported in the legal profession, such as depression, excessive commercialism and image-consciousness, and lack of ethical and moral behavior, may have significant roots in the law-school experience.”).

65. See Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL’Y L. & ETHICS 357, 358 (2009) (“In a country where the depression rate is ten times higher today than it was in 1960, lawyers sit at the unenviable zenith of depressed professionals.” (internal citation omitted)).

66. *Id.* at 366-67.

not drop off after the first year, when one might reasonably write off the statistics as reflecting the process of adjusting to law school.<sup>67</sup> In response to this troubling trend, law schools have taken limited steps to address the problem, primarily by referring students to on-campus counseling services.<sup>68</sup> However, most of these measures are aimed at students experiencing clinically significant, self-reported distress, and these programs are often not adequately resourced to provide sustained assistance to the majority of students. Perhaps most disturbing, these programs serve only to relieve distress *ex post facto* instead of identifying and ameliorating the underlying factors before they take their toll on students.

Student distress is attributed to a variety of factors ranging from the unrelenting workload and the constant academic pressure fostered by grading curves to the manner in which law school arrests students' moral development.<sup>69</sup> These explanations need not be mutually exclusive, and a synergy among the factors impacts each student differently.<sup>70</sup> The most frequently suspected contributors to student distress are outlined below.<sup>71</sup>

#### *E. Why All This Discontent?*

1. *The Socratic Method.*—One recurring theme proffered to explain law student distress is that disaffection is endemic to the nature of the first year curriculum. Socratic teaching, law school's "signature pedagogy," has been widely deconstructed. Some argue that it is by its very nature damaging,<sup>72</sup> while

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67. *Id.* at 367.

68. *Id.* at 361. Many, if not most, law student insurance programs have limited coverage outside of the institution, and if they do provide coverage, it likely requires a contribution from already overtaxed student financial resources. It is conceivable that some faculty do not take the data about law student distress seriously, as they survived law school without undue harm.

69. Steven Hartwell, *Moral Growth or Moral Angst? A Clinical Approach*, 11 CLINICAL L. REV. 115, 118-19 (2004).

70. Of particular concern is that the negative impact of law school seems to be exacerbated for students of color and women. See LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 76 (1997) ("If law school is 'boot camp' to train recruits for equally ruthless law firms, then the success of this institution is brilliant. Silence makes sense, difference has no place, and domination and alienation are the point. Alternatively, if law school is an attempt to engage and educate diverse students democratically and critically about the practices and possibilities of law for all people, then the failure of the institution is alarming. In the meantime, the price borne by women across colors is far too high and their critique far too powerful to dismiss."). See generally *infra* Part III.C.

71. One analyst attributes distress to "the overwhelming workload, intimidating classroom dynamics, excessive competition, astronomical debt, personal isolation, lack of feedback, and the nearly exclusive emphasis on linear, logical, doctrinal analysis." Lynn C. Herndon, *Help You, Help Me: Why Law Students Need Peer Teaching*, 78 UMKC L. REV. 809, 810 (2010) (quoting Hess, *supra* note 64, at 76).

72. Some commentators are particularly concerned about the impact of the Socratic method on women and students of color. E.g., Benjamin V. Madison, III, *The Elephant in Law School Classrooms: Overuse of the Socratic Method as an Obstacle to Teaching Modern Law Students*,

others posit that its utility and potential to inflict harm is dictated by the skill and temperament of the professor employing the method.<sup>73</sup> As noted earlier, the Carnegie Report opined that law schools are reasonably effective in this “first apprenticeship.”<sup>74</sup> Suggestions as to how to modify the methodology vary as widely as assessments of its efficacy. One school of thought favors keeping Socratic teaching intact as the best way to prepare law students for the rigors of practice.<sup>75</sup> Others suggest that this methodology should be modified after the first year, when repetition of the style in each subsequent doctrinal class can be mind-numbing and begins to generate diminishing returns.<sup>76</sup> Still others contend that irrespective of its suitability, allowing this one-dimensional methodology to dominate the entire first year eclipses other learning opportunities, as it is well-suited to only a narrow range of learning styles.<sup>77</sup> Proponents of a modified approach suggest that the first year is the prime time to integrate other competencies such as training in ethics, professionalism, and practical skills beyond the traditional first year writing curriculum.<sup>78</sup> Waiting until later may present a missed opportunity and even do irreversible damage. Despite the diversity of opinions regarding the Socratic method, it seems unlikely to be jettisoned in the foreseeable future. Within this framework, however, there is ample room to integrate strategies to minimize its negative impact<sup>79</sup> and

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85 U. DET. MERCY L. REV. 293, 301 (2008) (“If women and minorities do not benefit from the pure-Socratic approach, we ought to ask ourselves whether professors are ironically perpetuating a subtle form of discrimination by their insistence upon a purely Socratic classroom.”).

73. Ruth V. McGregor, *Response to Bang Goes the Theory—Debunking Traditional Legal Education*, 3 PHOENIX L. REV. 343, 344-45 (2010) (“There is no question in my mind that the effectiveness of the Socratic method does depend to a very considerable extent upon a particular teacher’s ability to help students make the necessary connections between what they are learning, the cases they read, and what they need to know to analyze actual problems in the real world.”).

74. CARNEGIE REPORT, *supra* note 2, at 21-24. This sentiment is echoed by some law students—even those who report dissatisfaction with or distress caused by the law school experience—who believe that the method effectively trains students to “think like a lawyer.”

75. Robert M. Lloyd, *Hard Law Firms and Soft Law Schools*, 83 N.C. L. REV. 667, 677 (2005) (“Unfortunately, today’s [s]oft law schools do not prepare their graduates for . . . reality. In most law schools, performance is optional. While the practice of law has been getting [h]arder, law schools have been getting [s]ofter.”).

76. *See id.* at 677-78.

77. Kristin B. Gerdy, *Making the Connection: Learning Style Theory and the Legal Research Curriculum*, 19 LEGAL REFERENCE SERVS. Q. 71, 78 (2001) (“The majority of legal instruction is oriented toward verbal learners.”).

78. *See generally* Madison, *supra* note 72.

79. *See, e.g.,* Marcia Canavan, *Using Literature to Teach Legal Writing*, 23 QUINNIPIAC L. REV. 1, 15-21 (2004) (discussing the use of storytelling techniques to teach legal writing); Deleso Alford Washington, *Critical Race Feminist Bioethics: Telling Stories in Law School and Medical School in Pursuit of “Cultural Competency,”* 72 ALB. L. REV. 961, 966 (2009) (advocating for “the use of storytelling and narrative analysis in legal and medical educational settings as a viable approach to enhance learning as well as benefit ultimate professional interactions”); *see generally*

complement the skills imparted. Given the intensity of opinion about the Socratic method and its centrality to law school pedagogy, a more detailed discussion of the varied schools of thought is warranted.

Arguably, the Socratic method exerts too much pressure on students, who are on the hook to answer a series of questions posed by an infinitely more skilled professor who is adept at “hiding the ball” and continues to press for answers when the student has long since exhausted his ability to argue. Closely related to the unrelenting pressure is the perceived humiliation of “getting it wrong” in front of a large classroom brimming with one’s peers.<sup>80</sup> This method is utilized even early on in the first year, when students cannot reasonably be expected to have mastered the cognitive dexterity necessary to engage in the rigors of Socratic banter.<sup>81</sup> Admittedly, lawyering may require thinking on one’s feet, under high-pressure situations, but it is not likely to demand the mastery of large quantities of new material each day, day after day, in class after class. Moreover, real life cases are animated by the authentic clients that provide sufficient details to impassion advocates (or at least their motivation for a paycheck), and the hours of preparation necessary for an appearance on behalf of a client are not analogous to the voluminous nightly reading assignments law students slog through, often exacting a considerable toll on family, friends, and a sense of healthy balance in their lives. I am not suggesting that law schools should infantilize or coddle students, that hard work is inherently bad, or that the workload should be reduced in a way that prevents rigorous preparation. Instead, educators ought to be selective and intentional about how they teach and what they assign and assure themselves through critical review that the methods employed are reasonably calculated to serve those ends.

The Socratic method is also impugned because as employed by some professors, it requires students to separate their morals from their professional identity as a lawyer.<sup>82</sup> Analysis of the cases requires students to focus on a sanitized and dispassionate presentation of facts (disembodied from the people who lived those conflicts and devoid of the social, historical and political context in which the issue arose) and apply purportedly neutral legal concepts to those facts. As a result of the forced impartiality and decontextualized facts, students must disassociate themselves from their moral reactions to answer with

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Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989) (arguing in favor of storytelling in law).

80. See Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?*, 43 CAL. W. L. REV. 267, 285 (2007) (noting that “there is ample evidence that a large number of students have found the Socratic method, at least in the way it was conducted in their classes, to be both humiliating and terrorizing”).

81. Presumably, it takes much repetition to impart these skills; thus, the same methodology is repeated in different substantive areas throughout three years of law school.

82. Jane Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J.L. & POL’Y 63, 73 (2003) (observing that law school embraces a “curriculum [that] is designed to neutralize . . . passion by imposing a rigor of thought that divorces law students from their feelings and morality.”).



imperturbable composure.<sup>83</sup> This antiseptic recitation of the facts, repeated ad nauseum in each case across substantive areas, can train the mind to disregard the rich tapestry of circumstances that makes each case compelling and unique. For some students, the divorce of their moral identity from the positions they must argue is profoundly alienating.<sup>84</sup> Related to the personal morality issue, the casebook method is also targeted for criticism because its decontextualized facts ignore the broader societal implications of individual cases.<sup>85</sup> Moreover, many law students entered law school with idealistic notions about advancing social and economic justice, yet our system of ethics instructs lawyers that the broader social implications of legal work are subverted by the goals of individual representation. The repeated focus on just one client rather than the lofty ideals of systemic change can be disappointing—especially when the outcome in a particular case is adverse to a larger group of disenfranchised people—since our system privileges the absolute right of clients to dictate the goals of representation, absent ethical conflicts. Despite the very real cost of this system, students are not often invited to participate in a broader social critique about society's preference for the glorification of individual autonomy over a collectivist ethos, or even taught that the system reflects those priorities.<sup>86</sup>

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83. CARNEGIE REPORT, *supra* note 2, at 139 (“[T]he curricular emphasis on analysis and technical competence at the expense of human connection, social context, and social consequences is reinforced by the broader culture in most law schools.”).

84. A brief discussion of the issue of morality may illuminate why the Socratic method alienates some students more than others. A gender-based critique of morality was articulated by Carol Gilligan, whose pioneering work on gender difference is both seminal and oft-criticized. *See generally* Erika Rackley, *From Arachne to Charlotte: An Imaginative Revisiting of Gilligan's in a Different Voice*, 13 WM. & MARY J. WOMEN & L. 751 (2007). Gilligan argued that women operate on a different moral paradigm than men. After her initial reception as a groundbreaking feminist, Gilligan came under attack. Critics chastised her for essentializing women's voices and argued that her approach privileged those who conform to the stereotype while marginalizing those outside it. Similarly, they argued that her analysis implicitly elevated the female voice as morally superior to the male voice and that her theory reduced morality to an overly simplistic, decontextualized duality. *See id.* at 752-53. Although Gilligan's work has been repudiated by some subsequent feminists as ultimately having a retrograde impact, certain threads of her analysis—namely, that people approach morality differently, between and within cultures—are compelling. *See id.* at 753-56. Removing the inflammatory gender labels, Gilligan has provided useful insights—that the amoral, analytical thinking required of law students is palatable to some and distressing to others. Critiques of Gilligan's gender theories aside, her identification of different moral compasses, and the inherent tension they create, can be instructive in looking at the law school paradigm. *See generally id.*

85. Karen H. Rothenberg, *Recalibrating the Moral Compass: Expanding “Thinking Like a Lawyer” into “Thinking Like a Leader,”* 40 U. TOL. L. REV. 411, 412 (2009) (“[L]aw schools focus too heavily on teaching skills for legal analysis while neglecting students' training regarding the ‘social consequences or ethical aspects’ of that legal analysis.” (citing CARNEGIE REPORT, *supra* note 2, at 187)).

86. Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60

Finally, presenting cases with predigested facts, devoid of the emotion that typically swirls around legal disputes, forces students to divert their attention from the emotional aspects of lawyering. While attorneys must be trained to analyze cases dispassionately, avoiding the emotional features of cases can be detrimental to students', lawyers', and clients' well-being.<sup>87</sup>

Not all educators agree that the casebook method has limitations, and some argue that the Socratic method has been unfairly maligned.<sup>88</sup> It is true that as applied currently, Socratic teaching bears little resemblance to the corrosive and imperious manner employed by Professor Kingsfield.<sup>89</sup> Proponents posit that further deviation from the already eviscerated application of this method leaves students woefully unprepared for the rigors of practice<sup>90</sup> and that the more humanistic application of the Socratic method has served only to increase the gap between legal education and the practice of law.<sup>91</sup> These concerns are

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VAND. L. REV. 609, 612-15 (2007).

87. See Rhonda V. Magee, *Legal Education and the Formation of Professional Identity: A Critical Spirituo-Humanistic—"Humanity Consciousness"—Perspective*, 31 N.Y.U. REV. L. & SOC. CHANGE 467, 476 (2007) ("We should talk about the spiritual and emotional implications of what we study, what we do, and how we interact with one another, so as to encourage and to model an approach to legal education and practice that brings the whole person into the room."); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119, 120 (2006) ("A core presumption underlying modern legality is that reason and emotion are different beasts entirely: they belong to separate spheres of human existence; the sphere of law admits only of reason; and vigilant policing is required to keep emotion from creeping in where it does not belong."); Grant H. Morris, *Teaching with Emotion: Enriching the Educational Experience of First-Year Law Students*, 47 SAN DIEGO L. REV. 465, 474 (2010) ("[E]motional issues confronting lawyers in 'real' practice should not be deferred until students' second or third year of law school. Those issues are an essential part of practical skills and professional identity development.").

88. See, e.g., Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955, 955-56 (2005); see also Lloyd, *supra* note 75, at 667 (arguing that "softening" of the law school curriculum and weakening academic rigor has resulted in law schools "doing a poor job" of training future lawyers). These arguments reinforce the assumption that lawyering is a zero-sum game and that zealous advocacy must somehow be premised on combative interactions. This group further argues that other reforms have "softened" law school, such as the "increasing reliance on student evaluations as part of the tenure process," which offers professors an incentive for easy grading and "spoon-feeding" information to increase student evaluations. See Christine Pedigo Bartholomew & Johanna Oreskovic, *Normalizing Trepidation and Anxiety*, 48 DUQ. L. REV. 349, 355-56 (2010).

89. Michael Vitiello, *Teaching Effective Oral Argument Skills: Forget About the Drama Coach*, 75 MISS. L.J. 869, 895 (2006) ("So anathema is the Socratic method that many law schools now distance themselves from the historical image of law school and advertise themselves as 'kinder and gentler,' than the traditional law school where Professor Kingsfield, the archetypal law professor in *The Paper Chase*, roams the halls.").

90. See Lloyd, *supra* note 75, at 677.

91. See Bartholomew & Oreskovic, *supra* note 88, at 355 ("The slow decline of the Socratic

undoubtedly genuine and well-intentioned, but as the Best Practices Report points out, “[l]aw professors not only have no incentive to change their teaching methods, they have no incentive to change’ at all.”<sup>92</sup>

2. *Competition/Grades.*—The grading system employed by the vast majority of law schools, and the inherent competition it engenders, is another frequently cited source of distress for students.<sup>93</sup> The first year’s reliance on high-stakes, end of semester exams typically provides only summative assessment, a system that is often in stark contrast to students’ experience in their undergraduate institutions. This grading system endures despite criticism from current students and practitioners.<sup>94</sup> Although some professors have implemented measures intended to address this pressure and provide some interim feedback, the fact remains that in most cases, the grade is premised almost entirely on one exam that typically requires and rewards a discrete skill set that comprises only a minute part of what lawyering requires.

Compounding the pressure exerted by high-stakes exams is the fact that they are neither designed nor intended to provide formative feedback. As Erwin Chemerinsky states with unapologetic candor, “[t]his is impossible to justify from a pedagogical perspective.”<sup>95</sup> If law schools truly exalt the skill of “thinking like a lawyer,” they cannot subscribe to the belief that this skill is fully imparted through classroom exercises and observations in the absence of corrective feedback that enables students to gauge their mastery of the material; individual feedback ought to be a high priority. A mere numerical grade and its placement within a mandatory curve provides little more guidance than allowing a student to see how she compares to her competitors, not whether she has mastered the material. Nor does it impart assistance in identifying areas of weakness (other than test-taking ability) and providing concrete, constructive suggestions as to strategies to improve performance.<sup>96</sup> Self-reflection and motivation are not

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method contributes to the gap between legal education and practice.”). *But see generally* Eric E. Johnson, *A Populist Manifesto for Learning the Law*, 60 J. LEGAL EDUC. 41 (2010) (arguing that law professors should endeavor to make the law easier to learn rather than engage in obfuscation; for example, by encouraging and adopting revamped casebooks that more closely resemble classic textbooks, intent on explaining the law, instead of rendering portraits of sometimes impenetrable concepts and presenting judicial opinions that were not written for an audience of novices).

92. BEST PRACTICES, *supra* note 3, at 211 (quoting Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 362 (2001)).

93. Peggy Cooper Davis, *Slay the Three-Headed Demon!*, 43 HARV. C.R.-C.L. L. REV. 619, 622 (2008) (“The fixed curve interferes with learning. It motivates students to work for grades rather than for comprehension or skill development.”); *see* Barbara Glesner Fines, *Competition and the Curve*, 65 UMKC L. REV. 879, 915 (1997) (acknowledging that law schools will continue to utilize mandatory grading curves despite compelling reasons not to).

94. BEST PRACTICES, *supra* note 3, at 176 (“The single exam tradition remains with us today, despite long-standing criticisms from academics, practitioners, and students.”).

95. Chemerinsky, *supra* note 22, at 597.

96. *See* Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111

encouraged by digits. Mandatory grading curves only exacerbate this pressure.<sup>97</sup> Moreover, mandatory curves can chill collaboration, as peers are perceived as competitors in a zero-sum game, deterring students from approaching learning as a mutually supportive and beneficial enterprise. The high stakes and isolation can cause profound stress and self-doubt.<sup>98</sup> Since this is often the only feedback students receive, other than the first year legal research and writing curriculum (LRW), which is often ungraded or not calculated in GPA,<sup>99</sup> summative assessment becomes the only indicia of success by which the students feel they can measure themselves. Students can come to believe that they are nothing more than the sum of their grades<sup>100</sup> and class rank,<sup>101</sup> disregarding a constellation of other skills they possess, including many that are integral to good lawyering but are neither formally recognized nor universally valued at the law school.<sup>102</sup>

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HARV. L. REV. 2027, 2036 (1998) (stating that “[t]he significance of grades thus becomes inflated because without more personalized feedback, grades provide students with the only indication of their performance”).

97. Lawrence S. Krieger, *Human Nature as a New Guiding Philosophy for Legal Education and the Profession*, 47 WASHBURN L.J. 247, 263-64 (2008) (criticizing curved grading).

98. See Grant H. Morris, *Preparing Law Students for Disappointing Exam Results: Lessons from Casey at the Bat*, 45 SAN DIEGO L. REV. 441, 452 (2008) (noting the negative impact of law school grading systems on student self-esteem).

99. Motivations may vary for schools that decline to grade LRW courses or to exclude those grades from a student’s GPA. The decision could be premised on a desire to decrease stress and foster learning, although that rationale is arguably applicable to all grades in the first year. Alternatively, excluding LRW work from grading or inclusion in GPA could be related to status and hierarchy concerns. Because legal writing is often taught by professors without full integration into the academy, some may believe that the grades in legal writing do not reflect sufficient academic rigor to compete with grades in doctrinal classes, or that the faculty is insufficiently qualified to assess student achievement.

100. Camille Lamar Campbell, *How to Use a Tube Top and a Dress Code to Demystify the Predictive Writing Process and Build a Framework of Hope During the First Weeks of Class*, 48 DUQ. L. REV. 273, 291 (2010) (arguing that students often perceive opportunities within the law school and future employment prospects as directly correlated with grades, which can cause distress that “typically manifests itself in isolation, detachment from the academic process, and a corresponding loss of self-confidence and motivation”).

101. Hess, *supra* note 64, at 78 (noting that concern with grades and class rank causes significant stress for law students and that “[t]he significance of grades becomes inflated because students get so little feedback during the semester that grades are the only indicator of their performance”).

102. Empathy, interpersonal skills, professionalism, creative problem solving, and a host of others skills are necessary to the competent representation of clients. See generally Stacy L. Brustin & David F. Chavkin, *Testing the Grades: Evaluating Grading Models in Clinical Legal Education*, 3 CLINICAL L. REV. 299 (1997). On a peripheral but relevant note, considerable debate has circulated among clinical faculty about the relative merits of grading, although no monolithic position has resulted. One position holds that if doctrinal classes are graded, clinics should follow suit to avoid sending a tacit message about the comparative worth of the endeavors and the skills

The emphasis on grades and the narrow skills they assess under the current regime does serve a purpose by sorting students for prospective employers, thereby streamlining the student selection process. Moreover, class rank dictates more than just job opportunities, as it is often the benchmark by which other learning opportunities in the law school are meted out.<sup>103</sup> The emphasis on grades as predictive of the quality of a student's future legal work is misplaced, as there is no definitive study correlating class rank with being an effective and professional attorney.<sup>104</sup> Presumably, this is in part because lawyers are rarely called upon to produce a three-hour written, issue-spotting, closed-book test, and the outcome of legal disputes is not determined by a high-stakes exam. Instead, effective advocacy requires interpersonal communication and problem-solving skills and adherence to ethical and professional norms, qualities that are rarely factored into a student's class rank.<sup>105</sup> Other criticisms impugn the accuracy and consistency of grading, arguing that the process is ultimately infused with an

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the clinics impart. *See id.* at 327-28. They further contend that for students who work incredibly hard, a grade of "pass" does not reflect the enormous efforts the students have expended and equates them with students who barely clear the hurdle of a passing grade, an outcome which is fundamentally unfair. In contrast, other clinicians suggest that dispensing with grading fosters a more collaborative learning environment; that sometimes grading clinics as other courses is like comparing apples to oranges depending on the vagaries of individual cases and the inherent difficulty of making quantitative and qualitative comparisons of intangible skills; and that students should rely on some intrinsic motivation to excel at the enterprise, not the external reward of a grade. *See id.* at 321 n.58. This debate among clinicians fleshes out additional concerns about grading. *See generally id.*

103. Glesner Fines, *supra* note 93, at 879 (arguing "that law schools rely too much on grading systems (as opposed to evaluation systems); that requiring norm-referenced grading undermines an effective learning environment; and that ranking is wholly counterproductive in a program designed to prepare individuals to serve justice"). Glesner Fines suggests that law schools delay ranking [students] until the second semester [of the first year], or even the second year of law school, could base first-year grades on a pass/fail system, or could weight the cumulative GPA to give greater emphasis to upper-level grades. Where grades are used to restrict access to law school programs, such as [l]aw [r]eview, seminars, or competitions, law schools should be especially wary that our academic reward systems do not aggravate inequality by providing richer, more effective learning opportunities for some students than others.

*Id.* at 910.

104. *See* James E. Coleman, Jr. & Mitu Gulati, *A Response to Professor Sander: Is It Really All About the Grades?*, 84 N.C. L. REV. 1823, 1828 (2006); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 58, 63-64 (1992); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1245-46, 1252 (1991); Daniel Keating, *Ten Myths About Law School Grading*, 76 WASH. U. L.Q. 171, 172 (1998).

105. *See generally* John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303 (2007) (proposing legal education reform and presenting various tables quantifying legal skills).

element of randomness, creating an outcome which is wholly unacceptable given the importance of class rank.<sup>106</sup>

The exclusive reliance on high-stakes testing has cemented its place in legal academia for several reasons. Among those is that it is far more labor-intensive to provide frequent and detailed feedback to students than summative assessments, and law school faculty seem reluctant to hire teaching assistants.<sup>107</sup> For many law school classes, large enrollment is the norm since “[i]t is also very cost-effective to have one teacher in front of a large number of students.”<sup>108</sup> To further justify end of semester, high-stakes summative feedback, some argue that students should be subjected to the type of testing they will need to excel at in order to pass the bar.<sup>109</sup> The focus on grades and the power they wield over a student’s sense of self and optimism for the future offer a compelling reason to encourage schools to invest heavily in their academic support programs.<sup>110</sup> The singular focus of the grading system creates intense pressure, and the high stakes associated with student performance can lead to depressed, disaffected students.<sup>111</sup>

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106. See generally Jeffrey Evans Stake, *Making the Grade: Some Principles of Comparative Grading*, 52 J. LEGAL EDUC. 583 (2002) (analyzing the technical intricacies of the law school grading system).

107. See Chemerinsky, *supra* note 22, at 597.

108. *Id.* at 595.

109. For further discussion of the bar exam, see *infra* Part III.E; see also AM. BAR ASS’N, 2010-2011 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 21, available at [http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/2010-2011\\_standards/2010-2011abastandards\\_pdf\\_files/chapter3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/2010-2011_standards/2010-2011abastandards_pdf_files/chapter3.authcheckdam.pdf) (“A law school shall not continue the enrollment of a student whose inability to do satisfactory work is sufficiently manifest so that the student’s continuation in school would inculcate false hopes, constitute economic exploitation, or detrimentally affect the education of other students.”). The corresponding obligation to weed out students who are statistically unlikely to pass the bar can cause some shortsighted and ultimately counterproductive results. For example, some students who pursue legal education as a powerful social and political tool and have no intention of practicing law could be edged out despite the irrelevance of bar passage potential. Also, the pressure to identify underperforming students could lead schools to ratchet up academic dismissal rates or ask students to aver that they will not take the bar exam, lest the results negatively impact the school’s reputation. Academic dismissal after “only” the first year may minimize the financial and emotional cost, but it can be devastating. This is not to suggest that schools should never academically dismiss students, but instead that schools should undertake this task judiciously and humanely and not be solely driven by statistics. The overarching goal should be first to support underperforming students.

110. Academic support programs should be carefully designed and structured to avoid singling out students and sending the message that they are destined to struggle, as such messages may create a self-fulfilling prophesy, undermine rather than bolster the acquisition of skills and confidence, and reinforce insidious stereotypes. See generally Louis N. Schulze, Jr., *Alternative Justifications for Law School Academic Support Programs: Self-Determination Theory, Autonomy Support, and Humanizing the Law School*, 5 CHARLESTON L. REV. 269 (2011).

111. Morris, *supra* note 98, at 442-43.

Most law students presumably excelled at their undergraduate institutions, and the adjustment to struggling with the academic rigors of law school can be difficult and disorienting.<sup>112</sup> Further intensifying the stress is that in some instances, the pressure to perform well can have an immediate and devastating financial impact.<sup>113</sup>

A final criticism is that the intensely competitive atmosphere fostered by jockeying for class rank may serve to reinforce the zero-sum game adversarial model that pervades lawyering,<sup>114</sup> causes discontent and distress, and generates negative public perceptions along with a host of other drawbacks. Recognizing the costs of a system that valorizes the combative nature of some lawyering is becoming more widespread, and alternative approaches to lawyering in general—specifically, conflict resolution—are gaining a foothold.<sup>115</sup> Despite evidence of the failings of the grading system employed almost universally by law schools, entrenched reasons cement their hold, some related to academic integrity and others related to less noble objectives.<sup>116</sup>

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112. *Id.* at 450-51 (noting that students internalize grades, and those who are “condemned with a grade of C” believe they “are marginal at best”).

113. For some schools that award merit aid as a part of their financial aid package, the grant is accompanied by a requirement that the student must remain above a certain percentile/class rank, which is statistically impossible to achieve for all students receiving merit aid packages. *See, e.g.,* David Segal, *Law Students Lose the Grant Game as Schools Win*, N.Y. TIMES, Apr. 30, 2011, available at [http://www.nytimes.com/2011/05/01/business/law-school-grants.html?pagewanted=1&\\_r=1&sq=law%20school&st=cse&scp=2](http://www.nytimes.com/2011/05/01/business/law-school-grants.html?pagewanted=1&_r=1&sq=law%20school&st=cse&scp=2); *see also* Glesner Fines, *supra* note 93, at 886. This increases the pressure and stakes exponentially. Schools presumably disclose to students that they must maintain a certain class rank or standing in a certain percentile and that as a result of the amount of aid given out, some students will, as a statistical certainty, lose their aid. However, many students, unaccustomed to mandatory grading curves, may be unable to realistically assess their chances of losing their merit aid or to fully comprehend the pressure such a requirement will add to an already stressful transition. This system, intended to lure students to a less expensive option that inures primarily to the benefit of law school revenue and enrollment statistics, is unconscionable.

114. CARNEGIE REPORT, *supra* note 2, at 149 (quoting a student as saying, “The whole adversarial system is set up to produce winners and losers, just as the grading curve creates winners and losers.”).

115. *See infra* Part III.N. I do not mean to suggest that litigation or aggressive lawyering never has its place. Adversarial lawyering is clearly warranted in some circumstances, but in certain situations, adversarial lawyering can ultimately yields results that inflict enduring harm on all involved, even the parties who prevailed under conventional standards. This is particularly true in cases such as divorce and special education, when the parties are likely to have a vested interest in maintaining the ability to work cooperatively in the future. In such instances, a “scorched earth” approach can extinguish any residual goodwill. Even in less obvious scenarios, cooperative problem solving may lead to more buy-in from the parties. Less contested outcomes in cases involving a more cooperative approach may help illuminate the broader and long-term implications of adversarial dispute resolution processes.

116. Peterson & Peterson, *supra* note 65, at 381 n.154 (“In a discussion before a recent moot

3. *Professional Ideals/Professionalism.*—The system of legal education was initially premised on the exalted concept of citizen lawyers.<sup>117</sup> Over time, however, these ideals were sometimes eclipsed by the lure of high-salary, high-prestige jobs. As a result, the connection between lawyering and the greater social good became increasingly attenuated.<sup>118</sup> For students who embark on their legal education with lofty goals, the recalibrated focus dislocates the ideals that brought them to school, as they find little resemblance to the noble profession they aspired to join.<sup>119</sup>

Legal educators seem to shrink from discussions about their role in shaping professional ideals. Professors seem comfortable issuing definitive answers about doctrine but less so in advancing their beliefs about justice and professionalism. If there is no room to convey normative judgments, professors leave students with little guidance about how to develop their own professional values, other than what they surmise or absorb by osmosis. In hiding behind tenets of neutrality to cover the reluctance to weigh in on these matters, legal educators may tacitly and inadvertently send the message that matters of professionalism are wholly relegated to the realm of personal choice. Given the stakes, legal educators need to provide guidance and leadership on these issues by articulating aspirations for professional behavior.<sup>120</sup> Indeed, “instead of sending the positive message they are capable of, law faculty may inadvertently send a message of indifference and unimportance regarding the most important aspect of being a lawyer—being human.”<sup>121</sup> The absence of attention leaves students to develop their professional ideals in a vacuum.

4. *The Economics: Grim Job Prospects, Rising Tuition,<sup>122</sup> and Crushing*

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court final argument at George Washington University Law School, Justice Scalia and two distinguished circuit judges agreed that the abandonment of grades was not a realistic possibility for the vast majority of law schools.” (citation omitted)).

117. The visibility and importance of lawyers in our society started long before the big firm model made them very wealthy.

118. See CARNEGIE REPORT, *supra* note 2, at 150 (noting that law school can disconnect law practice from any social significance).

119. See Krieger, *Inseparability*, *supra* note 64, at 433-34.

120. Various bar committees have developed and distributed aspirational standards for professionalism. See BARBARA GLESNER FINES, RESEARCHING PROFESSIONAL RESPONSIBILITY, CH. 3, <http://law2.umkc.edu/faculty/profiles/glesnerfines/bgf-13.htm> (last visited June 9, 2011) (“Today, most states have adopted a version of the Model Rules of Professional Conduct, which provides regulatory standards for the most part. However, additional aspirational . . . [tenets] have been promulgated by specialized professional associations or state and local bar groups.”).

121. Amy Timmer & John Berry, *The ABA's Excellent and Inevitable Journey to Incorporating Professionalism in Law School Accreditation Standards*, 20PROF.LAW. 1, 15 (2010).

122. Bill Henderson, *Law School 4.0: Are Law Schools Relevant to the Future of Law?*, LEGALPROF.BLOG (July 2, 2009), [http://lawprofessors.typepad.com/legal\\_profession/2009/07/law-school-40-are-law-schools-relevant-to-the-future-of-law.html](http://lawprofessors.typepad.com/legal_profession/2009/07/law-school-40-are-law-schools-relevant-to-the-future-of-law.html) (“Over the last 30 years, the cost of a legal education has increased approximately three times faster than the average household incomes. Yet, it is difficult to identify a corresponding innovation within legal education that



*Debt.*—As a result of astronomical tuition increases, law students are saddled with withering debt that they have no guarantees of servicing, given the constricted job market.<sup>123</sup> The rapid escalation of tuition bills is justified neither by transformative reforms in legal education that would warrant the escalation of costs nor by being pegged to inflation. Nevertheless, ascending costs translate to crushing student debt.<sup>124</sup> The outgoing dean of Northwestern University opined that the break-even salary for law graduates is \$65,000.<sup>125</sup> Another study suggests that the figure is even higher than that.<sup>126</sup>

Despite the obvious importance of providing students with information necessary to gauge their job and salary prospects post-graduation, those interested in reviewing alumni employment and salary data face lamentable impediments to uncovering unvarnished statistics about individual institutions. Reported income and employment statistics for law schools can be inaccessible and ultimately misleading for a variety of reasons: a few high-paying jobs raise the average, skewing the real median income;<sup>127</sup> law schools dissemble behind fudged figures; unemployed or underemployed graduates are less likely to respond to inquiries; and some law schools have recently experimented with providing short-term research jobs to recent graduates to elevate employment rates that do not reflect jobs obtained in the real legal marketplace. Optimism expressed by law schools is belied by the real numbers. According to the National Association of Law Placement (NALP) website, the rate of student employment is at its lowest rate since the early 1990s.<sup>128</sup> The employment rate fell almost 4% over the prior

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justifies the higher cost.”); Elie Mystal, *Even U.S. News Suggests Law School Tuition Is Getting Ridiculous*, ABOVE THE LAW (July 15, 2010, 10:58 AM), <http://abovethelaw.com/2010/07/even-u-s-news-suggests-law-school-tuition-is-getting-ridiculous/#more-26942>.

123. The ABA has recently released a memo entitled “The Value Proposition of Attending Law School,” which advises prospective students to carefully consider the consequences of undertaking debt. AM. BAR ASS’N, THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL (2009), available at <http://www.abanet.org/lsl/legaled/value.pdf>.

124. Debt can dampen the goals and ideals that inspired them to attend law school in the first place. See EQUAL JUSTICE WORKS, FROM PAPER CHASE TO MONEY CHASE: LAW SCHOOL DEBT DIVERTS ROAD TO PUBLIC SERVICE 6 (2002), available at <http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lrapsurvey.authcheckdam.pdf> (“Faced with staggering law school debt, many law school graduates must forgo the call to public service despite their interest and commitment to such a career.”).

125. David Lat, *Changes in Legal Education: Some Thoughts from Dean David Van Zandt*, ABOVE THE LAW (Feb. 3, 2010, 8:23 PM), <http://abovethelaw.com/2010/02/changes-in-legal-education-some-thoughts-from-dean-david-van-zandt/>.

126. Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, COLUM. BUS. L. REV. (forthcoming 2011) (manuscript at 73), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1680624](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680624).

127. See Annie Lowrey, *A Case of Supply v. Demand*, SLATE (Oct. 27, 2010, 4:14 PM EST), <http://www.slate.com/id/2272621/pagnum/all/#p2>.

128. Press Release, Nat’l Ass’n of Legal Placement, Class of 2009 Faced New Challenges with Recession: Overall Employment Rate Masks Job Market Weakness (May 20, 2010), available at

two years; nearly 25% of jobs were classified as temporary, including judicial clerkships; 10% of jobs were part-time; and 70.8% were employed in positions that required a J.D., representing a decrease from previous years.<sup>129</sup> These figures include graduates employed by their alma maters.<sup>130</sup>

For students unable to command a salary sufficient to service their debt (or find employment at all, for that matter), the consequences can be financially catastrophic.<sup>131</sup> Yet it can be difficult for law students to grasp the harsh reality—that for many of them, law school is not a wise investment—until they have already matriculated.<sup>132</sup> *Forbes Magazine* characterized student debt as “an unfolding education hoax on the middle class that’s just as insidious, and nearly as sweeping, as the housing debacle.”<sup>133</sup> For those idealistic students fighting valiantly to dig out of a mountain of debt, the viability of working in public interest work will be even more remote.<sup>134</sup> One lawyer argued that the glut of law schools and the graduates they churn out at unsustainable rates is partially

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<http://www.nalp.org/2009selectedfindingsrelease>.

129. *Id.*

130. *Id.*

131. Burk & McGowan, *supra* note 126, at 74 (“[M]any graduates of less prestigious law schools, and many graduates with less distinguished academic records and similar credentials, are having a very hard time finding jobs remunerative enough to support the levels of student-loan debt common among recent graduates, let alone recoup the investment of time and money law school represents for them.”).

132. ABA Standard 509 requires law schools to provide “basic consumer information,” which could be expanded to more fully illuminate the economics for prospective students. AM. BAR ASS’N, *supra* note 109, at 38-39. Whether further information would be useful is questionable, however, if students do not fully comprehend that many law schools utilize mandatory grading curves and distinct pedagogical underpinnings that differ significantly from typical undergraduate teaching and assessment philosophies, a difference that may impede their ability to parallel undergraduate performance. If students unrealistically expect that they will be the exceptions to salary and employment statistics, additional information may be insufficient to spark a more realistic assessment.

133. Kathy Kristof, *The Great College Hoax*, FORBES, Feb. 2, 2009, available at <http://www.forbes.com/forbes/2009/0202/060.html>.

134. In my personal conversations with students who came to law school committed to public interest work, the stress about finding employment is often raw and palpable. My inability to offer reassurances leaves me feeling like I am complicit in their distress. The federal government has instituted a loan forgiveness program that includes lawyers working in public interest jobs (broadly defined), but this is only available for public loans. See *Public Service Loan Forgiveness*, FINAID, <http://www.finaid.org/loans/publicservice.phtml> (last visited June 9, 2011). Given the cost of education, many students are saddled with substantial private loans for which there is no relief. By limiting eligibility for loan forgiveness to those working for non-profits, the program excludes lawyers who may make low wages working to respond to underserved communities. This may serve to discourage people further from experimenting with innovative service delivery models—such as the private public interest law firm—because they are technically for-profit enterprises, rendering employees ineligible for loan forgiveness.

responsible for suppressed wages<sup>135</sup>—43,588 students received a J.D. degree in 2008, an increase of 11.5% since 2000.<sup>136</sup> Placing blame on the ABA for weak regulatory oversight, he invited the federal government to limit the accreditation of new law schools as a measure designed to stanch the flow of students lured to law school with unrealistic hopes of seeing a fair return on their investment.<sup>137</sup>

#### *F. Conclusion*

Theories abound as to why students are experiencing distress, and a combination of factors likely affects each student differently. Dangers attend any effort to generalize, and it is important to avoid essentializing students, as they do not present a monolithic group. Student resilience may differ based on race, gender, socioeconomic status, the presence and consistency of outside support networks, the level of financial stress, and whatever constellation of personal attributes and pressures accompany them to law school. Irrespective of the causes, the statistics documenting severe and pervasive distress paint a startling and foreboding picture. Indicators suggest that the stress of practicing law is not dissimilar from the pressure law students experience.<sup>138</sup> Law schools must explore these issues, develop palliative measures, and foster long-term resilience.

### II. RESPONSES

Suggestions for change come from diverse constituencies with disparate perspectives, motivations, and agendas. In some areas, allies for reform have made strange bedfellows. The level of responsiveness to the current conditions confronting law students varies widely within and among institutions. Some visionary, innovative, and intrepid schools have heeded the call to make real changes rather than superficial and piecemeal reforms. Others have been markedly intractable in their refusal to consider and enact meaningful reforms. The following is a sample, admittedly quite limited, of some relatively recent efforts to craft meaningful reforms.

#### *A. Humanizing/Balance in Legal Education*

Because law school and law practice are inordinately stressful for many participants, a small but passionate group of educators has been striving to make law school and lawyering more humane. Their mission is defined as “seeking to maximize the overall health, well being and career satisfaction of law students

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135. Mark Greenbaum, *No More Room at the Bench*, L.A. TIMES, Jan. 8, 2010, available at <http://articles.latimes.com/2010/jan/08/opinion/la-oe-greenbaum8-2010jan08>.

136. Lowrey, *supra* note 127.

137. See Greenbaum, *supra* note 135.

138. William E. Livingston, *De-Stressing the Profession*, 81 MICH. B.J. 25, 26 (2002) (“Work overload, competition, dealing with difficult people, and time pressures are stressors found in many professions. Unique to law, however, are legal role conflicts, an adversarial system of justice, and certain areas of practice with a more pronounced level of conflict.”).

and lawyers.”<sup>139</sup> In an earlier incarnation, the movement self-identified under the umbrella of “humanizing legal education,” and more recently, the group was accepted as an Association of American Law Schools (AALS) section entitled “Balance in Legal Education.”<sup>140</sup> This movement has spawned a number of articles theorizing about the problems and proposing solutions. Despite the severity and ubiquity of reported distress, neither the harsh statistics nor the heroic efforts of these educators appear to have ignited a national conversation aimed at getting to the root of the problem.<sup>141</sup> According to those committed to humanizing legal education, the goal of humanizing legal education will only be realized by wholesale reevaluation of the process by which we educate lawyers, as well as the culture of practice.<sup>142</sup> Despite the enormity of this task, it should be undertaken with a sense of urgency. The discussion must be inclusive and expansive, and “[t]o truly humanize legal education we must step out of the classroom and hallways and advocate on behalf of our students. We must step into the admissions and financial aid offices and take into account the values of investing in our students.”<sup>143</sup>

Reform must be holistic and comprehensive, and it cannot limit its focus to just curriculum or job prospects. As Barbara Glesner Fines observes, schools cannot just “[a]dd humanizing and stir.”<sup>144</sup> Glesner Fines defines three core principles of humanizing legal education.<sup>145</sup> The first, to “do no harm,”<sup>146</sup> requires professors to attend to the environment they create and to recognize and mitigate the stressors that make law school such a devastating experience for many students.<sup>147</sup> Second, professors are exhorted to understand their students

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139. *Humanizing Law School*, FLA. STATE UNIV. COLL. OF LAW, [http://www.law.fsu.edu/academic\\_programs/humanizing\\_lawschool/humanizing\\_lawschool.html](http://www.law.fsu.edu/academic_programs/humanizing_lawschool/humanizing_lawschool.html) (last visited June 9, 2011).

140. Bruce J. Winick, *Greetings from the Chair*, EQUIPOISE, Dec. 2009, at 1, available at [http://www.aals.org/documents/sections/balance/BalanceInLegalEdDec\\_09.pdf](http://www.aals.org/documents/sections/balance/BalanceInLegalEdDec_09.pdf). The Florida State University College of Law was recognized by the new section as making a significant contribution to the group’s mission by hosting a listserv devoted to the topic of balance in the legal education field and facilitating discussion therein. *Id.*; see also *Humanizing Ideas*, FLA. STATE UNIV. COLL. OF LAW, <http://humanizingideas.law.fsu.edu/default.asp> (last visited June 9, 2011).

141. Barbara Glesner Fines, *Fundamental Principles and Challenges of Humanizing Legal Education*, 47 WASHBURN L.J. 313, 321 (2008).

142. *Id.* at 317-18.

143. *Id.* at 325.

144. *Id.* at 318.

145. *Id.* at 313.

146. *Id.*

147. *Id.* at 315-18; see also Herndon, *supra* note 70, at 815-17 (observing that the best attribute of the class rank system is that it helps employers with selecting job candidates, but noting that this system is unreliable, primarily because it offers a limited assessment of a student’s full ability); Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1186 (2008) (“The class rank system has not changed substantively from its origins at Harvard in 1887. Class rank, based on grades received on law school examinations, continues to serve as the competitive selection process for

and interact with the same compassion that they expect students to cultivate toward their clients.<sup>148</sup> Finally, Glesner Fines provides a poignant reminder of the core values of humanism, which embraces working toward peace and justice and encourages professors to nurture these ideals in their students.<sup>149</sup> The critique of law and legal institutions is not enough—lawyering itself must also be scrutinized. Self-awareness is empowering, and “[s]tudents at least need to be made aware, not only of the various sorts of lawyer they might become but also of the various kinds of approaches they can take toward lawyering itself.”<sup>150</sup> Larry Krieger, a pioneering voice in the humanizing movement, excerpted several parts of his article for distribution to students, exhorting them to identify their core values, maintain perspective about what really matters, and strive for a healthy balance in their lives.<sup>151</sup>

Deviation in law school from the established norm of uniformity can be perceived as heretical, and the traditional curriculum and structure of interactions between professor and student is viewed by some as sacrosanct. Moreover, the assumptions that law schools should toughen students up, not attend to their inner lives, can be veiled behind objections about academic rigor. Given the entrenched ethos, institutional will is required to shake the traditional law school curriculum from its firmly planted roots.

### B. Outcome Measures

Another area that spawns acrimonious and suspicious debate is the topic of “outcome measures,”<sup>152</sup> which are widely employed by other accrediting

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membership on law review, law school honors, and as a gate-keeping mechanism for legal employers. Legal employers use a student’s class rank to determine who they will interview for positions, refusing to consider students who do not make the strict cut-off point. Moreover, even if a law firm elects to interview students from lower-tiered schools (and many will not), the class rank cut-off point for graduates at lower-tiered schools is significantly lower than where it is for graduates at more prestigious schools. Thus, similar to what occurs with the overall ranking of law schools, the economic value of a law degree will depend on the class rank of the student.” (footnotes omitted)); Judith Welch Wegner, *Reframing Legal Education’s “Wicked Problems,”* 61 RUTGERS L. REV. 867, 1006 (2009) (noting that employers may also benefit from access to a comprehensive portfolio outlining a law student’s accomplishments, “encouraging attention to more than class rank and grades,” thereby providing a better evaluation of a student’s overall legal capacity). I can state from experience that some of my most academically successful students were not necessarily those whom I expected would be the most effective advocates.

148. Glesner Fines, *supra* note 141, at 319.

149. *Id.* at 322-23.

150. CARNEGIE REPORT, *supra* note 2, at 132.

151. Lawrence S. Krieger, *What We’re Not Telling Law Students—and Lawyers—That They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from Its Roots*, 13 J.L. & HEALTH 1, 18 (1999) (exhorting students to maintain balance between career and family and to stay loyal to their ideals.).

152. In discussions regarding whether schools satisfy their learning objectives, the ABA is considering various changes to the current standards, including the implementation of outcome

agencies.<sup>153</sup> The movement to implement outcome measures emanates from dissatisfaction with the current system of reporting “input measures,” such as the number of volumes in a library, faculty-student ratios,<sup>154</sup> per pupil expenditures, and bar passage rates. Critics argue that the typical comparative input measures do little to truly illuminate the value of the educational experience for students and do not empower them to make meaningful comparisons to other law schools.<sup>155</sup> To remedy this problem, those advocating for the imposition and institutionalization of outcome measures argue that law students deserve transparency and the ability to make informed decisions about how they will be edified and enriched by the selection of a particular law school program.

Skeptics of outcome measures enumerate a number of objections. In a letter outlining concerns, the Society of American Law Teachers (SALT) reiterated the most frequently stated objections to the prospective change in standards: that the proposed “accreditation [s]tandards are overly prescriptive, will be a costly administrative endeavor, and will force law schools to reduce everything to a quantifiable measure and thus [spur] . . . a ‘race to the bottom.’”<sup>156</sup> Building

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assessments. According to the most recent draft:

The following methods, when properly applied and given proper weight, are among the acceptable methods to measure the degree to which students have attained competency in the school’s student learning outcomes: review of the records the law . . . [school] maintains to measure individual student achievement pursuant to Standard 304, evaluation of student learning portfolios, student evaluation of the sufficiency of their education, student performance in capstone courses or other courses that appropriately assess a variety of skills and knowledge, bar exam passage rates, placement rates, surveys of attorneys, judges, and alumni, and assessment of student performance by judges, attorneys or law professors from other schools. The methods to measure the degree of student achievement of learning outcomes are likely to be different from school to school and law schools are not required by this standard to use any particular methods.

AM. BAR ASS’N, REPORT OF SUBCOMMITTEE ON STUDENT LEARNING OUTCOMES 5 (2011), *available at* <http://apps.americanbar.org/legaled/committees/comstandards.html> (scroll down to “Meeting Date: January 8-9, 2011” and click “Report of Subcommittee on Student Learning Outcomes”).

153. These include business, architecture, pharmacy, and dental schools. Karen Sloan, *Holding Schools Accountable*, NAT’L L.J., Feb. 22, 2010, *available at* <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202443899383>.

154. Faculty-student ratios do not provide enough information for students to make knowledgeable assumptions about the accessibility of faculty, whether ratios translates to class size, and, if so, whether this is present across the board or solely in introductory lecture classes or seminars.

155. See Mary Crossley & Lu-in Wang, *Learning by Doing: An Experience with Outcomes Assessment*, 41 U. TOL. L. REV. 269, 269 (2010) (“An emphasis on assessment and outcomes measures is a drum beat that is growing louder in American legal education.”).

156. Letter from Raquel Aldana & Steven Bender, Co-Presidents of the Soc’y of Am. Law Teachers (SALT), to Donald Polden, Dean of Santa Clara Law Sch., and Steven C. Bahls, President of Augustana Coll. 1 (Mar. 8, 2010), *available at* <http://www.saltlaw.org/userfiles/file/3-5->

consensus on defining the requisite skills and the more thorny and elusive problem of measuring them are daunting tasks. Critics are concerned that a new standard would be too magisterial, requiring an inflexible, designated curriculum with little room for faculty to develop and pilot innovative programs tailored to their institutional mission.<sup>157</sup> They further worry about the potential cost of implementing such a system,<sup>158</sup> pointing out that because law schools lack the expertise to design and administer outcome assessments, they may be forced to seek outside consultants, driving up costs and intruding on law school autonomy.<sup>159</sup> Finally, commentators worry that schools could develop disparate standards and even allow schools to thwart even the most minimal alternations.<sup>160</sup> SALT proposed a middle ground by suggesting the mandate to provide instruction on a set of core lawyering skills that every law student should master irrespective of the area of practice, while allowing latitude to individual institutions to develop programs consistent with their specific programmatic goals.<sup>161</sup> Resistance also emanates from concern about the economics of implementing assessment measures, which coincide with calls to enhance and expand the labor intensive enterprise of skill building.

Further criticism of output measures is premised on the concern that they are part of a larger insidious effort to deregulate the legal academy, thereby devolving to law school administrators the “full discretion to determine their own mission and to inaugurate a curriculum to fulfill that mission.”<sup>162</sup> If the ABA adopts standards related to outcome measures, careful design will be critical to ensure that the priorities and values embedded in the current methodology do not inadvertently reinforce the outdated norms educators are hoping to revise.

Another risk is the difficulty of assessing the mastery of intangibles, such as internalized habits of self-reflection. Perhaps most alarming is the fear that outcome measures will be purely focused on bar passage without examining the inherent problems and shortcomings of the bar exam as the ultimate gatekeeper of the profession. Moreover, a focus on the relatively easy-to-measure bar passage results could compel schools to “teach to the test” to the exclusion of other worthy and important competencies. At a minimum, it would be useful to incorporate an expansive conception of the outcomes schools implicitly value by implementing measurements of success, writ large.

The significant risks of new standards have to be weighed against the right

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10SALTSuggested%20Modifications%20to%20Standard%20302.pdf.

157. *See id.* at 2, 4.

158. Katherine Mangan, *Law Schools Resist Proposal to Assess Them Based on What Students Learn*, CHRON. HIGHER EDUC., Jan. 10, 2010, available at <http://chronicle.com/article/Law-Schools-Resist-Proposal-to/63494/> (“Given the fragility of the legal profession and the fragility of law-school finances, it’s a tough time to think about taking on a major process of assessment.” (quoting Lauren K. Robel, Dean, Ind. Univ. Maurer Sch. of Law)).

159. Aldana & Bender, *supra* note 156, at 5-6.

160. *Id.* at 2, 4.

161. *Id.* at 2.

162. Kuehn, *supra* note 53, at 2.

of students to rely on the stated educational mission of a law school and the institution's ability to satisfy that mission by providing effective instruction in those areas. Despite the risks and challenges, the imposition of outcome measures is likely to prompt a vigorous debate about what should be measured and, presumably, why those skills are important, generating the possibility for a constructive dialogue.

*C. Procedural and Structural Changes to Accreditation Standards/Structural Changes to the Academy*

A variety of proposed changes to the current accreditation standards threaten to uproot the underlying structure of law school. The process and substance of the debate are provoking much consternation within the academy. For example, objecting to procedural changes, the Clinical Legal Educators Association (CLEA) recently expressed dismay that in the process of altering longstanding accreditation standards, the standards review committee failed to solicit opinions and invite the participation of various stakeholders impacted by reform efforts.<sup>163</sup> In particular, CLEA objected to procedural changes that signaled the unwillingness of the committee to seriously consider comments during the formative stage of developing reform.<sup>164</sup> CLEA expressed concern that the availability of subsequent opportunities to comment would be essentially illusory since proposed changes would already be cemented and therefore unchangeable.<sup>165</sup> Of particular concern is that the committee appeared to rely almost exclusively on the agenda advanced by the American Law Deans Association (ALDA), an organization proposing radical deregulation of the legal academy.<sup>166</sup> As outlined in the concerns expressed by CLEA, the flawed process creates the distinct possibility that legal education could be fundamentally altered while excluding many dissenting voices and eclipsing any meaningful effort at consensus-building.

The concerted effort to deregulate the law school accreditation process is inflamed by what can be reasonably perceived as the veiled goal of moving to an entrepreneurial model of legal education, with deans emboldened to function as autocratic business leaders. The obvious price of deregulation if taken to its extreme would be the end of "job security, academic freedom, and meaningful participation in law school governance."<sup>167</sup> Under an extreme version of this model, law schools would have little or no full-time faculty, allowing them to contain costs and be nimble to effectuate changes, untethered to the demands of

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163. Letter from Robert Kuehn, President, CLEA, to Hon. Christine Durham, Chair, Council on Legal Educ. & Admissions to the Bar and member, Utah Supreme Court; Hulett H. Askew, Consultant on Legal Educ.; and Donald J. Polden, Dean, Santa Clara Law Sch. 2 (Nov. 4, 2010), available at <http://cleaweb.org/CLEA%20Letter%20on%20Standards%20Review%20process%2011-04-10.pdf>.

164. *Id.*

165. *Id.*

166. *Id.* at 2-3.

167. See Kuehn, *supra* note 53, at 2.



faculty governance that can be notoriously contentious and obstructionist. One argument to justify a reduction in full-time faculty members is based on criticisms of the utility of increasingly esoteric faculty scholarship that is produced on the backs of law students, with no real attendant benefit to the students.<sup>168</sup> According to this argument, the money spent supporting law professors to produce scholarship could be better spent providing direct benefits to the students who finance those salaries. In a move that is less of a threat to the traditional law school faculty, ALDA is strongly pushing to eliminate security of position for clinical faculty.<sup>169</sup> Motivated, at least in part, to respond to the increasing cost of legal education, the member deans are demanding more freedom and power to tinker with faculty security, status, and salary.<sup>170</sup>

Although the underlying motivation of easing the financial burden of legal education is commendable and long overdue, the downsides of the ALDA proposal are considerable. Once launched, these modifications could lead down a slippery slope, ultimately signaling the reincarnation of the legal academy into mere technocratic enterprises. One school of thought touts the benefits of replacing at least some of the immovable and expensive full-time faculty with a more flexible, less demanding group of adjuncts,<sup>171</sup> a group without any vested stake in democratic law school governance. Under such a model, law students could be taught by less expensive, less organized, and transient adjuncts who work at the pleasure of the dean.<sup>172</sup> Undoubtedly, if the ABA authorizes the

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168. Thies, *supra* note 51, at 599 (“No longer can schools continue to subsidize academic research at the expense of teaching practical skills to their graduates.”); *see also* Newton, *supra* note 41, at 135-36 (“[M]any tenured professors continue to publish impractical law review articles in highly ranked reviews because such publications yield benefits even after tenure. Despite the extensive post-secondary education possessed by many law professors hired during the last decade, the quality of teaching by such faculty members (as a class) is deficient, particularly in preparing students to actually practice law (which should be the primary mission of a professional school for future attorneys).” (internal citations omitted)); Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 139, 161-62 (2008) (“[S]cholarship and teaching have increasingly diverged . . . . The scholarship that receives most attention these days, and that brings its authors most renown, is largely disconnected from the required first year curriculum and increasingly remote from all but the most specialized and sophisticated upper class courses.”).

169. Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183, 214 (2008).

170. *See* Scott Jaschik, *Law School Professors’ Tenure in Danger?*, USA TODAY, July 26, 2010, available at [http://www.usatoday.com/news/education/2010-07-26-ihe-law-tenure\\_N.htm](http://www.usatoday.com/news/education/2010-07-26-ihe-law-tenure_N.htm) (stating that the push for ABA’s removal of faculty tenureship language from the ABA standards was initiated by the dean of Northwestern University, David Van Zandt).

171. *See* Sonsteng et al., *supra* note 105, at 339-41.

172. *See* John Sonsteng & David Camarotto, *Minnesota Lawyers Evaluate Law Schools, Training and Job Satisfaction*©, 26 WM. MITCHELL L. REV. 327, 330 (2000) (“The use of non-tenured teachers, closely supervised adjuncts, non-lawyer professionals and the best distance-learning techniques will improve training and reduce costs.”); Judith Welch Wegner, *Response: More Complicated Than We Think*, 59 J. LEGAL EDUC. 623, 633 (2010) (noting that employing

increased use of adjuncts, such as judges and practitioners, they can provide practical skills training at decreased cost.<sup>173</sup> On the positive side, adjuncts would typically be drawn from the ranks of the practicing bar and would infuse the classroom with real life experience. However, in the absence of full-time faculty, or in the presence of one whose power has been essentially usurped, the dean would possess absolute authority to articulate and implement a law school's mission without any democratic checks and balances. Important issues that are already receiving short shrift, such as a school's commitment to justice and the inculcation of values, could become even more tangential in such a system. Although some professors rail against the contested discourse and infinite regressions that plague some faculty meetings and stifle reform efforts, there is value in the process of discussion and democratic voting, even in the face of very real power imbalances.

Despite the need to dislodge the faculty from their current comfort and complacency, I strenuously object to many of the assumptions embedded in ALDA's proposed reforms. In effect, some of the proposals could eviscerate academic freedom.<sup>174</sup> It is disheartening that hard-fought gains are facing renewed threats<sup>175</sup> such as security of position for clinicians, who at times can seem singularly vulnerable to political interference.<sup>176</sup> Retrograde as they are,

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adjunct faculty will be beneficial in two areas: teaching students practical skills and serving as a cost reduction measure). This is essentially outsourcing, as non full-time faculty, who presumably have a practice and are excluded from participation in law school governance, are unlikely to read articles about law school pedagogy in their unremunerated spare time. Although discussions at faculty meetings can at times border on the absurd, the discourse can provide cross-pollination of ideas. Law schools should not minimize the administrative burden of closely overseeing adjuncts. Moreover, the concentration of power in the hands of one omnipotent administrator certainly presents significant risks.

173. Thies, *supra* note 51, at 619-21 (proposing safeguards such as the publication of an adjunct handbook, smaller class sizes for adjuncts, attention to hiring and training, the development of a more rigorous interview process that includes the teaching presentation typically required of full-time faculty candidates, and careful evaluation and critique by full-time faculty members). Thies further notes that the current ABA accreditation process provides disincentives to the greater use of adjuncts, including their deflated percentage for purposes of faculty-student ratios and active discouragement for the integration of adjuncts in the first year curriculum. *See id.* at 621.

174. This loss of academic freedom would conceivably pose greater threats to clinical faculty than their doctrinal counterparts because of the former's tendency to use their voices in live controversies with real and often powerful adversaries rather than engage in disagreements in the relatively safe venue of scholarly publications.

175. *See infra* Part III.M.

176. *See* *Sussex Commons Assoc. v. Rutgers*, 6 A.3d 983, 990 (N.J. Super. Ct. App. Div. 2010) (holding that clinic was a public agency and, as such, subject to open access); Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y 33, 37 (2000); *Maryland Legislature Blunts Threat to Law Clinic Funding*, ABA NOW (Apr. 7, 2010), <http://www.abanow.org/2010/04/maryland-legislature-blunts-threat-to-law-clinic-funding/>; *see also* Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of*

however, the proposals deserve credit for sparking a national conversation—if not exactly soul-searching inquiry—about what we do in legal academia and why we do it. It is difficult to completely dismiss the notion that the current system may serve the interests of law professors, but it is not serving students. However, the academy should not categorically reject deregulation and experimentation out of fear of the ALDA agenda because the proposed changes may hold the key to some much needed reforms. Instead, despite the very valid concerns, educators should focus on establishing and safeguarding the floor of good educational practices and build in mechanisms to assuage fears about the end of a uniform program of legal education. In truth, even under the current system that strives to impose unified standards, legal education is not uniform. Adaptability is key—not in the regressive manner promoted by the ALDA, but in a manner that incorporates progressive values.

### III. SUGGESTIONS

As outlined above, the current state of legal education demands serious and sustained attention. Legal educators can hand-wring and cling desperately to the old traditions, or they can re-imagine legal education in ways that address its multiple shortcomings. The latter can be achieved by making the instructional process more humane and humanizing, providing better and more relevant training, reducing costs and their concomitant impact on student debt, turning the lasers on ourselves to examine our resistance, and constructing this enterprise as student-centered. A wide range of possibilities exist if faculty push themselves to think outside the box, and here I outline only a few. Professors need to consider options without retreating to the corners of their historically designated roles in the wrestling ring, and without underestimating the forces of resistance.<sup>177</sup>

#### *A. Allow Flexibility for Schools to Reevaluate Institutional Mission*<sup>178</sup>

Law schools could benefit from the latitude to individualize their programs instead of hewing to a uniform model that might be neither appropriate nor achievable for a particular institution. Some deans bristle at the “one size fits all” approach mandated by the current ABA accreditation standards.<sup>179</sup> Admittedly, there are risks associated with looser, more adaptive regulation of legal education, and some critics fear the unintended and potentially regressive consequences of

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*Interference in Law School Clinics*, 71 *FORDHAM L. REV.* 1971, 1975 (2003).

177. Sturm & Guinier, *supra* note 40, at 520 (warning that law school “culture is remarkably static, non-adaptive, and resistant to change, even in the face of strong pressure from significant constituents of legal education and evidence that law schools are not fulfilling core aspects of their mission”).

178. Sturm and Guinier note that this is “a time for systemic reflection and for reconstituting the framework and relationships shaping law schools.” *Id.* at 517.

179. Sherwood Ross, *7 Law School Deans Rip Accreditor American Bar Assn.*, *OPEDNEWS* (Dec. 3, 2008), [http://www.opednews.com/populum/print\\_friendly.php?p=7-Law-School-Deans-Rip-Acc-by-Sherwood-Ross-081203-512.html&c=a](http://www.opednews.com/populum/print_friendly.php?p=7-Law-School-Deans-Rip-Acc-by-Sherwood-Ross-081203-512.html&c=a).

experimentation. Deborah Rhode, hardly a voice associated with the reactionary ALDA, has argued in favor of specialized law schools that reflect the reality, needs, and mission of law schools and the communities served by their graduates, noting that different skills are necessary depending on the location and type of practice.<sup>180</sup> This represents another area where faculty should restrain the impulse to reflexively reject innovation simply because it parallels the ALDA position. Clearly, permitting experimentation and deviation from a standardized curriculum could further stratify law schools and legal practice. But if schools are not adequately preparing students to practice law in the venues in which they are most likely to practice, legal institutions are facing increasingly compressed resources, and students are facing increased debt, it is incumbent upon all of legal academia to direct energy and thought into figuring out how to educate students in a way that enables them to service their debt, support their families, and serve their communities, not fund faculty paychecks and research stipends.

Some undeniable logic attends the argument that law schools focused on nuts and bolts practice could reallocate resources to ensure that students obtain the type of skills necessary to flourish in the professional areas commonly represented in the demographics of their graduates. If one concedes the validity of the argument that some scholarship provides little practical benefit to students despite its cost, individual schools could repurpose salary and stipends to those who provide instruction in skills rather than research. Stratification is risky, but perhaps such a model would make law school more broadly accessible, and consequently make lawyers available to a wider swath of the population. This is a worthy goal in light of the prevalence of people dispossessed from the legal system. Although it is easy to see why a bifurcated system is objectionable, the concept deserves discussion, as there may be ways to mitigate those very valid concerns.

Law schools must engage in the careful and perhaps painful process of self-reflection about institutional mission and vision. Not every school can possess a coveted spot in the top tier, and educational programs at lower-tiered institutions should not reflexively try to mimic the programs at those schools and aspire to a standard many schools will never achieve. A reasonable query is why the academy should not allow law schools to recognize and respond to the distinctions that already exist—notably, graduates of prestigious law schools are more likely to work at big firms and enter legal academia; local law schools will more likely produce lawyers who represent individuals within their communities. Law schools should be able to individualize the training to provide the skills

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180. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE* 190 (2000) (“It makes little sense to require the same training for the Wall Street securities specialist and the small town matrimonial lawyer. While some students may want a generalist degree, others could benefit from a more specialized advanced curriculum or from shorter, more affordable programs that would prepare graduates for limited practice areas.”). *But see* Michael A. Olivas, “Majors” in Law?: *A Dissenting View*, 43 HARV. C.R.-C.L. L. REV. 625, 627 (2008) (arguing that Rhode’s proposal would result in further stratification among law schools).

necessary to succeed in a small firm or solo practice.<sup>181</sup> Perhaps some schools should set their sights on serving their communities rather than covet a higher ranking.<sup>182</sup> Schools could be encouraged to follow the example cited by the Carnegie Report, detailing the distinct programs at CUNY and NYU.<sup>183</sup> The Carnegie Report lauds the schools for their ability to “form communities of learning in which the form of curriculum and pedagogy follows, or anticipates, their students’ future professional functions.”<sup>184</sup>

*B. Increase Diversity of Faculty, Students, and the Profession*

Exhortations to increase diversity within law schools and the legal profession elicit little conceptual opposition.<sup>185</sup> However, merely acknowledging the importance of diversity within law schools is insufficient to combat the existing disparities with the intention, determination, and rigor necessary to overcome the barriers to fuller participation. Legal education and the legal profession have witnessed significant progress in eliminating homogeneity, and they are far more representative of the general population than before.<sup>186</sup> Despite very real progress in enhancing the diversity of law schools however, significant obstacles endure.<sup>187</sup> Current minority enrollment in law school is at approximately 20%;<sup>188</sup> African-

181. Redirecting resources away from scholarly pursuits may ultimately reinforce further stratification because faculty interested in research and writing might migrate to schools that value scholarly output.

182. See Randolph N. Jonakait, *The Two Hemispheres of Legal Education and the Rise and Fall of Local Law Schools*, 51 N.Y.L. SCH. L. REV. 863, 887 (2006-07) (“Local law schools, however, must do more than this to justify their continued existence. The schools need to focus more on training their students to practice and compete better in the small-firm, personal-client sphere where the majority of their graduates will practice.”).

183. CARNEGIE REPORT, *supra* note 2, at 34-45.

184. See *id.* at 43.

185. But see Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2258-59 (2000) (citing studies suggesting that increasing racial diversity within law schools comes with risks, including the increasing balkanization of students of color, which must be weighed against the risks of minority “tokenism”).

186. Whites comprise 90.3% of lawyers, and 69% of lawyers are men. AM. BAR ASS’N, GOAL IX REPORT 2006-2007: THE STATUS OF RACIAL AND ETHNIC DIVERSITY IN THE AMERICAN BAR ASSOCIATION 5 (2007) [hereinafter GOAL IX REPORT], available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/racial\\_ethnic\\_diversity/credp\\_goal9\\_2007\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/racial_ethnic_diversity/credp_goal9_2007_2011.authcheckdam.pdf); COMM’N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 2009, at 1 (2009), available at <http://www.americanbar.org/content/dam/aba/migrated/women/reports/CurrentGlanceStatistics2009.authcheckdam.pdf>.

187. Ryan D. King et al., *Demography of the Legal Profession and Racial Disparities in Sentencing*, 44 LAW & SOC’Y REV. 1, 1 (2010) (observing that “the legal profession [is] now more racially and ethnically diverse than at any point in U.S. history”).

188. See LAW SCH. ADMISSION COUNCIL & AM. BAR ASS’N, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 2009 EDITION 858-62 (2008). The composition of law school student bodies is not expected to be reflective of the general population any time soon. See ABA

Americans constitute 4.2% of the legal profession (but 12.9% of the population), and Latinos comprise 3.7% of the legal profession (but 12.5% of the population).<sup>189</sup> Women are now well-represented among law students, but they are still underrepresented in the academy and the profession, most notably at the highest levels of practice.<sup>190</sup> Inattention to remediating the factors that obstruct realization of egalitarian and diversity ideals serves to perpetuate the present state of affairs.

This section recognizes an expansive definition of diversity, including not just race and gender, but a host “of social, political, and cultural variations in individuals/groups, including those related to class, national origin, sexual orientation, geographic region, political affiliation, religion, ability/disability and age.”<sup>191</sup> Heterogeneity in law school classes and the profession contributes immeasurably to enriched understanding of the myriad experiences and perspectives that combine and overlap to form the human condition. Because of the historical foundation of race and gender disparities, and because much of the scholarship focuses on these two areas,<sup>192</sup> they will be the primary focus of this section. This decision should not be taken to suggest that these two are the only categories worthy of attention, but instead should be taken as symbolic of a much more inclusive and expansive conception of diversity.

Given the changing demographics of this country<sup>193</sup> and of the legal profession, the cultural changes engendered by globalization require law schools

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*Leadership: Office of Diversity Initiatives*, AM. BAR ASS’N, <http://www.americanbar.org/groups/leadership/diversity.html> (last visited June 9, 2011).

189. GOAL IX REPORT, *supra* note 186, at 5.

190. Deborah Jones Merritt & Barbara F. Reskin, *New Directions for Women in the Legal Academy*, 53 J. LEGAL EDUC. 489, 490-91 (2003) (reporting that a study of hired tenure track and non-tenure track faculty from 1986 to 1991 revealed that “[a]ggressive action . . . was needed just to assure that faculties identified and hired women who were equal to the white men they so readily hired”); Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2245-46 (2010); see generally Deborah Jones Merritt, *Are Women Stuck on the Academic Ladder? An Empirical Perspective*, 10 UCLA WOMEN’S L.J. 249, 251 (2000) (demonstrating through empirical research that women in general, and particularly those of color, were disadvantaged in the job market in legal academia).

191. Meera E. Deo et al., *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 CHICANA/O-LATINA/O L. REV. 1, 3 (2010) (citation omitted). Given the current financial conditions, attention to issues of socioeconomic diversity and its impact on the accessibility of legal education class seems a worthy topic.

192. See *id.* at 4.

193. Barry et al., *supra* note 7, at 62 (citing projections by the U.S. Census Bureau that by 2050 in the United States, the percentages of Caucasians and persons of color will be equal); David Hall, *Giving Birth to a Racially Just Society in the 21st Century*, 21 U. ARK. LITTLE ROCK L. REV. 927, 935 (1999) (suggesting that “by the year 2030, the number of people of color will exceed the number of whites in this country”).

to provide instruction on multicultural competencies.<sup>194</sup> Even the Supreme Court has recognized the importance of diversity in legal education,<sup>195</sup> noting that a diverse class contributes to cross-cultural understanding, preparing students to function in a diverse workforce, and deconstructing stereotypes.<sup>196</sup>

The significance of these issues extends far beyond the confines of legal education to the practice of law as members of an increasingly globalized community. Lawyers will have no choice but to develop multicultural competencies, even if they expect to practice in a narrowly local field or homogenous community.<sup>197</sup> Aside from the intrinsic value of a more diverse bench and bar, diversity within the profession appears to support a more impartial administration of justice,<sup>198</sup> greater perceived legitimacy of our democracy,<sup>199</sup> and

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194. Sue Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 34-35 (2001); see also BEST PRACTICES, *supra* note 3, at 66 (identifying “[s]ensitivity and effectiveness with diverse clients and colleagues” as one of five professional values).

195. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (“Our conclusion that the [l]aw [s]chool has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the [l]aw [s]chool’s proper institutional mission, and that ‘good faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary.’” (citation omitted)).

196. *Id.* at 330-31.

197. Deo et al., *supra* note 191, at 7 (“[A] meaningful presence of faculty of color, female faculty, and students of color in the classroom is critical not only for students who find diversity discussions personally significant, but also for every student who wishes to understand how the law develops in a society that is becoming progressively multicultural.”); see also Charles R. Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 LA RAZA L.J. 140, 142 (1995) (“[S]ome law students may expect to practice law in a field in which race, gender, sexual orientation, age, religion, physical and mental ability, economic class, and other significant personal characteristics simply do not matter. Thus, a graduate may try to define a narrow legal niche in which he or she can maintain at least the illusion that sensitivity to diverse perspectives is unnecessary for a successful practice of law. However, even those who do not seek to challenge the legal system’s claims of objectivity will find it difficult to deny or escape the cultural pluralism of our national identity . . . .” (internal citation omitted)).

198. See King et al., *supra* note 187, at 26 (noting that after studying the impact of a more diverse bar to the sentencing practices of non-white convicts, the authors concluded “that more racial diversity in the bar results in less racial disparity in criminal sentencing”); see generally Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997) (lamenting the dearth of minority judges and positing that a diverse bench and varied perspectives enhance impartiality and public perceptions of fairness); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000) (arguing that homogeneity undermines the perceived and real legitimacy of the judiciary).

199. Carla D. Pratt, *Taking Diversity Seriously: Affirmative Action and the Democratic Role of Law Schools: A Response to Professor Brown*, 43 HOUS. L. REV. 55, 77 (2006) (“The visual presence of lawyers of color serving in leadership positions in our democracy assures people of color that they belong to the political community and that their group interests are being represented

the training of lawyers more likely to provide services to underserved communities.<sup>200</sup> The intersection between a heterogeneous student body and advancing justice is critically important. As Anderson notes, if legal education reform directs its attention only to “the curriculum but fail[s] to address who law schools teach and who our graduates serve, we will have missed an opportunity to diversify the profession and renew its commitment to making justice a reality for all.”<sup>201</sup>

Realizing the goal of assembling a diverse student body requires law schools to increase the heterogeneity of the applicant pool. Instead of merely articulating disappointment about the lack of qualified candidates and relying on minimal efforts such as sending out ever-increasing quantities of glossy admissions literature, schools need to dig deeper into the roots of the problem. Some critics argue that one of the most intractable impediments to a diverse student body is a failure to invest in the pipeline process, and law schools are well-situated to make a meaningful contribution to these initiatives.<sup>202</sup> Providing meaningful and sustained support for the pipeline process is a substantial commitment, but most profound problems are not solved without holistic and sustained efforts. Other studies have suggested that initiatives are necessary to enhance diversity within law school and the profession. For example, one report on the disproportionately low representation of Latinas outlined several suggestions, including the implementation of a mentoring program, increasing the visibility of Latina role models, conducting outreach to various community members to fortify the pipeline process, and developing support networks.<sup>203</sup> Additional initiatives included eliminating glass ceilings that penalize women for endeavoring to strike a balance between family and career, as well as drawing attention to the underrepresentation of Latinas in law school and the profession.<sup>204</sup> Little empirical evidence has been gathered to elucidate all the barriers to a diverse academy and profession, heightening the importance of engaging in a systematic study. In the interim, law schools can begin to act on common sense suggestions, gather, share, and analyze data, and expand beyond the nominal efforts that have failed to achieve the objectives of diversifying law school and the legal practice.

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in governmental debates and decisionmaking.”).

200. Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011, 1025 (2009) (“For justice and legitimacy, however, broad access to the profession must be a central concern. The overwhelming whiteness of the profession contributes to a disparity in justice for the poor and disempowered.”).

201. *Id.*

202. Sarah E. Redfield, *The Educational Pipeline to Law School—Too Broken and Too Narrow to Provide Diversity*, 8 PIERCE L. REV. 347, 381 (2010) (“Law schools and the law community, with their institutional infrastructure and systemic connections, have the capacity to craft, support, and sustain successful pipeline interventions before the law school gates, should they have and commit the will.”).

203. HISPANIC NAT’L BAR ASS’N, *FEW AND FAR BETWEEN: THE REALTY OF LATINA LAWYERS* (2009).

204. *See id.* at 7.



Once assembled in school, commentators have suggested various methods of making the entire process of legal education more inclusive and relevant to a diverse student body.<sup>205</sup> Ensuring a diverse faculty is indisputably important—an ideal that is far from the current reality, despite the ABA’s objectives of “[p]romot[ing] full and equal participation in the association, our profession, and the justice system by all persons” and “[e]liminat[ing] bias in the legal profession and the justice system.”<sup>206</sup> The notion that diversity is important merely because it provides role models has drawn fire<sup>207</sup> as critics point out the myriad benefits of a diversified faculty. Despite the value of a heterogeneous faculty, statistics about the presence of women<sup>208</sup> and people of color<sup>209</sup> in the academy are telling. Increasing faculty diversity must be a priority, not merely paying lip service to it. This requires a wide array of initiatives such as paying close attention to how teaching loads are assigned.<sup>210</sup> Further examples include expanding conceptions of valued scholarship to include critical and interdisciplinary theories, analyzing whether women and minority faculty fare worse in teaching evaluations than their

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205. One professor suggests the following methods: “[m]ake classrooms welcoming”; “[a]ssign minority and white women faculty to teach in the first year”; “[r]equire a pedagogy that does not have a demonstrated bias”; “[e]liminate letter grades, relying upon a pass/fail system”; and “[e]ncourage faculty to utilize take-home exams.” Morrison Torrey, *Actually Begin to Satisfy ABA Standards 211(a) and 212(a): Eliminate Race and Sex Bias in Legal Education*, 43 HARV. C.R.-C.L. L. REV. 615, 616-17 (2008).

206. *Diversity*, AM. BAR ASS’N, <http://www.americanbar.org/portals/diversity.html> (last visited June 10, 2011).

207. Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN’S L.J. 93, 98-99 (1990).

208. One report found that 36.9% of all law faculty are women. *2007-2008 Association of American Law Schools Statistical Report on Law Faculty*, ASS’N OF AM. LAW SCH., <http://www.aals.org/statistics/2008dlt/gender.html> (click “Gender and Age” hyperlink) (last visited June 10, 2011). That number drops when calculating the percent of tenure track or tenured women, which falls to 30.4% women. *Id.* (click “Job Security” hyperlink); see also ASS’N OF AM. L. SCH., ON LAW SCHOOL FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS 4-5 (2005-06), available at <http://www.aals.org/documents/statistics/20052006statisticsonlawfaculty.pdf> (showing that 81.2% of deans, 63.6% of associate deans with professor title, 74.1% of professors, 55.2% of associate professors, and 54.9% of assistant professors are male).

209. Only 15.2% of faculty were identified as non-white. *2007-2008 Association of American Law Schools Statistical Report on Law School Faculty*, *supra* note 209 (click “Race and Ethnicity” hyperlink).

210. Faculty candidates and those under review who are not of the dominant culture may face challenges. For example, evidence suggests that women and faculty of color fare worse in teaching evaluations than their white male counterparts, and progressive and critical scholarship agendas may not be as well-received. Moreover, women may be assigned to teach classes considered “soft.” See, e.g., Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293, 305, 314 (2004) (arguing that “[g]enerally, female law professors disproportionately teach courses that can be described as more ‘feminine,’ softer, less hard core, and often perceived as less prestigious”).

white male counterparts, and exploring and dismantling other impediments to a full representation in the academy. In addition to a representative faculty, other suggestions exhort professors to attend to the classroom dynamics that alienate students hailing from diverse backgrounds.<sup>211</sup>

Despite the discomfort associated with raising issues of race, gender, and diversity more generally, professors should be encouraged to confront and address these issues, as they are often central to a complete discussion of the context of cases.<sup>212</sup> One critic concluded that “white males tend to exclude and avoid discussions regarding race and gender, while female faculty and faculty of color tended to engage in diversity discussions. As a whole, students prefer classroom discussions that include race and gender issues as means of illuminating how the law affects people differently.”<sup>213</sup> Compounding the

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211. See Sari Bashi & Maryana Iskander, *Why Legal Education Is Failing Women*, 18 YALE J.L. & FEMINISM 389, 389 (2006); Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 AM. U.J. GENDER SOC. POL’Y & L. 511, 572 (2005) (arguing that eliminating “the Socratic method or hiring more female faculty will not alone end gender differences or address likely underlying causes. Rather, the problems with the current legal education that cause gender differences are likely far more nuanced—part curricular, part pedagogical, part cultural, and part social—and their effect on gender is only one of many harmful manifestations. . . . This search for underlying causes will require that the law school community discuss and grapple with the missions and methods of legal education more generally.”); see also Felice Batlan et al., *Not Our Mother’s Law School?: A Third-Wave Feminist Study of Women’s Experiences in Law School*, 39 U. BALT. L.F. 124, 128, 147 (2009) (noting that a review of the literature over the last twenty-five years generally “conclude[s] that women are much less satisfied with their law school experience than men and often experience deep feelings of alienation while in law school” and recommending that law schools “provide more female mentors for the student body”). The authors do, however, laud the end of the discrepancy in achievement between men and women, noting that in some instances, women have begun to outperform men. *Id.* at 128-29. But see Claire G. Schwab, *A Shifting Gender Divide: The Impact of Gender on Education at Columbia Law School in the New Millennium*, 36 COLUM. J.L. & SOC. PROBS. 299, 301, 327 (2003) (arguing that gender is not dispositive in dictating student experience, but rather that the problem is attributable to “the persistence of an underlyingly male approach to legal education,” and concluding that there has been “a shift from a law school experience that is entirely gendered to one characterized by a combination of both a gendered and a ‘standard’—that is to say, traditionally male—law school experience”).

212. See generally Johanna K.P. Dennis, *Ensuring a Multicultural Educational Experience in Legal Education: Start with the Legal Writing Classroom*, 16 TEX. WESLEYAN L. REV. 613 (2010) (exhorting legal educators to integrate multicultural educational experiences throughout the curriculum).

213. Deo et al., *supra* note 191, at 37; see also Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1234 (2010) (stating that contrary to what anti-affirmative action advocates argue, students of “underrepresented minority students in ‘meritocracy’ states must endure silencing, imposition, and performing in white spaces at a far greater rate than their counterparts in race-based admissions states”).

tendency of some faculty to skirt difficult topics is that specific language choices can be alienating for those not in the cultural majority. For example, one theory suggests that the neutral language of law affects students differently based on their race and gender.<sup>214</sup> Failure to interrogate these issues risks the continued alienation of women and those in the cultural minority and misses an important opportunity to broaden the students' understanding of the real and perceived biases embedded in the law and legal institutions.<sup>215</sup> Attention to these issues benefits not only those who are alienated by a more circumscribed and decontextualized conversation, but the entire law school population.<sup>216</sup> The above suggestions can be expanded to apply to issues of race, class, and diversity more generally.<sup>217</sup> The best intentions of diversifying law school and the legal

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214. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 6 (2007) ("[L]earning the apparently neutral language of the law appears to have different effects on students of different races, genders, and class backgrounds.").

215. Discord exists among feminist thinkers about gender-based reforms to legal education. Caitlin Howell outlines the arguments aimed at combating the marginalization of women in law school and has enumerated various feminist proposals to counteract the inherent bias. See Caitlin Howell, *Combating Gender Inequities in Law School: Time for a New Feminist Rhetoric That Encourages Practical Change*, 4 MOD. AM. 36 (2008). These include "inserting gender and feminist perspectives into first year classes, such as torts and contract law," employing feminized teaching methodologies, "[h]umanizing law school . . . [by] fostering an ethic of care in the classroom," and examining "the concept of gender as the consequence of the power structure of law school." *Id.* at 36-37. Howell argues that this focus on gender is misplaced and encourages legal reform that does not rely on gender stereotypes. See *id.* Others have outlined the risk of focusing on the impact of law school on women. See, e.g., Jennifer L. Rosato, *The Socratic Method and Women Law Students: Humanize, Don't Feminize*, 7 S. CAL. REV. L. & WOMEN'S STUD. 37, 39 (1997) (cautioning against a "women-friendly" approach, concerned that the implicit message is that women are unsuited to the demands of the law school experience). Other critics note that female professors are assigned less respected course loads. See, e.g., Kornhauser, *supra* note 210, at 314.

216. See Morrison Torrey, *Yet Another Gender Study? A Critique of the Harvard Study and a Proposal for Change*, 13 WM. & MARY J. WOMEN & L. 795, 797 (2007) ("After writing several articles addressing gender and legal education, I have come to the realization that even though female students were subjected to a greater quantity (and sometimes different quality) of negative law school experiences, substantial numbers of men are also being deprived of a quality legal education. Apparently law school is a positive learning experience for hardly anyone!" (internal citation omitted)).

217. For a discussion of how the current admissions practices, while facially neutral, impede the diversification of law schools, see Leonard M. Baynes, *Introduction: The LSAT*, U.S. News & World Report, and *Minority Admissions*, 80 ST. JOHN'S L. REV. 1 (2006) (providing an overview of the articles outlining the adverse impact of LSAT scores on admissions); Pamela Edwards, *The Shell Game: Who Is Responsible for the Overuse of the LSAT in Law School Admissions?*, 80 ST. JOHN'S L. REV. 153 (2006); Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN'S L. REV. 41 (2006). There is a documented racial disparity in LSAT performance. See LAW SCH.

profession will be circumvented unless the existing structural impediments to full participation are identified and eliminated. This cannot be a passive endeavor; it demands attention, energy, and resources.

*C. Encourage Student Well-Being Through Self-Awareness  
and Self-Reflection*

Law students are expected to assimilate seamlessly into a culture that privileges and rewards a discrete set of skills and a particular temperament that tolerates conflict and stress. The attributes valued and validated in law school tend to focus on the analytical and linear while subverting creativity and communitarian ideals.<sup>218</sup> Law schools make little effort to cultivate awareness of each student's strengths and preferences. Instead, law school tends to value and reinforce the set of skills that allowed law professors to rise to the top of their fields. Rather than force students to conform their constellation of strengths and values to those reflected in the dominant paradigm, law schools should structure opportunities for students to explore self-knowledge and instill habits of self-reflection. This habit should begin when students first arrive during orientation<sup>219</sup> and then be revisited repeatedly throughout law school.<sup>220</sup> Many clinics enhance discussions and self-awareness by utilizing testing such as Myers-Briggs<sup>221</sup> to help students identify personality types, motivated by the assumption that students will experience more professional satisfaction if they make informed

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ADMISSION COUNCIL, MINORITY DATABOOK 14 tbl.IV-1 (2002) (noting that the average LSAT score for African-American students over a seven-year period was 141 to 142; for Native Americans, 147 to 148; for Asian-Americans, 150 to 151; for Caucasians, 151 to 152; for Hispanics, 146 to 147; for Mexican-Americans, 146 to 147; and for Puerto Ricans, 137 to 138). For a discussion of the staggering cost of legal education, which necessarily reduces opportunities based on class, see *infra* Part III.K. See, e.g., Osamudia R. James, *Dog Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education*, 85 IND. L.J. 851, 853 (2010) (arguing that schools may constitutionally employ race-conscious and race-exclusive aid as methods of diversifying student body).

218. David R. Culp, *Law School: A Mortuary for Poets and Moral Reason*, 16 CAMPBELL L. REV. 61, 98 (1994) ("Legal instruction teaches students to exercise rational, critical judgment and exalt logic over other values, such as emotional sensitivity.").

219. See generally Paula Lustbader, *You Are Not in Kansas Anymore: Orientation Programs Can Help Students Fly over the Rainbow*, 47 WASHBURN L.J. 327 (2008).

220. See Allison D. Martin & Kevin L. Rand, *The Future's So Bright, I Gotta Wear Shades: Law School Through the Lens of Hope*, 48 DUQ. L. REV. 203, 218 (2010) ("[L]egal educators can play an important role in maintaining and creating hope in law students by enhancing the components of hope: goals, pathways thinking, and agentic thinking. Based on these components, we have created five principles of engendering hope in law students: (A) help them formulate or reframe goals; (B) increase their autonomy; (C) model the learning process; (D) help them understand grading as feedback rather than as pure evaluation; and (E) model and encourage agentic thinking.").

221. *MBTI Basics*, MYERS & BRIGGS FOUND., <http://www.myersbriggs.org/my-mbti-personality-type/mbti-basics/> (last visited June 10, 2011).

choices about practice based on self-awareness. Recognizing different areas of strength and personality types, even if they are not those rewarded in the traditional classroom teaching methodologies, may serve to anchor students to their value and sense of self-worth even in the face of less than stellar performance in other areas.

To ameliorate student distress, law schools should integrate sound psychological principles into their pedagogical practices. As with most disciplines, the study of psychology has evolved, providing new insights. A development that holds particular promise in palliating law school distress is the field of positive psychology, based on the notion that “to understand the human condition, we should study not only mental illness and distress but also the conditions that lead to optimal functioning.”<sup>222</sup> Recent proponents of positive psychology include Todd and Elizabeth Peterson, who argue that past proposals for curricular reform aimed at addressing student distress are likely to generate controversy within the academy, as they are perceived by some faculty as requiring deviation from the traditional law school educational mission.<sup>223</sup> Instead, they suggest strategies derived from the precepts of positive psychology and note that these might be more palatable than some proposals for radical reform, as they would “not require a complete overhaul of the law school curriculum.”<sup>224</sup>

Another example of engendering positive health is one professor’s efforts to integrate hope theory, a subset of positive psychology, in the first year writing curriculum.<sup>225</sup> Hope theory holds that students fare better when they are: focused on learning objectives rather than fixated on specific performance goals, the latter of which are imposed externally; urged to formulate concrete rather than abstract goals; and encouraged to work towards rather than avoiding a particular outcome.<sup>226</sup>

Even if legal education refuses to budge, sound psychological practices can be incorporated into the existing structure to counteract the disempowering dynamics of law school. Schools should make a commitment to consciously focus on empowering and enlightening students and promoting self-awareness to inoculate students against stress, depression, and alienation.

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222. Peterson & Peterson, *supra* note 65, at 362.

223. *See id.* at 361.

224. *Id.*

225. *See generally* Jamie R. Abrams, *A Synergistic Pedagogical Approach to First-Year Teaching*, 48 DUQ. L. REV. 423 (2010).

226. *See* Martin & Rand, *supra* note 220, at 218.

*D. Rethink Summative Assessment, Mandatory Grading Curves,  
and Class Rank*<sup>227</sup>

Given the stakes for students, law schools should eschew the reliance on summative assessments, mandatory grading curves, and class rank. Employers would surely object to a system that required them to expend more energy to sort students, but if all law schools adopted a system that presented a more holistic review of student competencies, employers might come to believe that this system ultimately enabled them to make better hiring decisions.<sup>228</sup> Law school seems to foster a belief by some students that good jobs<sup>229</sup> are only available to those in the top 10% of the class, yet hard reality dictates that 90% of the students will not realize that goal, and the ensuing pressure can be demoralizing.<sup>230</sup>

Mandatory grading curves foster an inherently competitive environment. Arguably, the competition imposed by mandatory grading curves mirrors pressures in the “real” world. Perhaps that is precisely the reason to modify or jettison the reliance on competition. Students could instead be encouraged and rewarded for collaborating, allowing them all to achieve good grades rather than doling out grades based on a comparison to their cohort, premised on the theory that objective rather than comparative mastery of the material is paramount.<sup>231</sup> Promoting the acquisition of collaboration skills as a byproduct would also be a welcome development that reflects the realities of practice. Perhaps if the ethos of collaboration were nurtured instead of extinguished in law school, it would be more prevalent and visible in practice. Law school lags far behind the practice of law in cultivating an awareness of the importance of collaboration and instruction in that and other skills necessary to solve problems.

A few schools have eliminated numerical grading and class rank, although

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227. This type of reform will require lower-tier law schools to become less risk-averse, but with that risk comes opportunity. Instead of genuflecting to the *U.S. News and World Report* rankings, schools can set their sights on a better system of assessment. Law schools themselves could model introspection and an honest assessment of their strengths and gear their educational program to the needs of their student body. This could include producing lawyers who primarily practice in small or solo practices and acknowledging that they are not training future law professors if that is not the likely career trajectory of their graduates.

228. Some schools have eliminated numerical grading and class rank, although some of these tend to be the types of schools in which employment is not ever really in question. See *infra* note 232.

229. This is another instance wherein the groupthink mentality for some students can distort their own priorities and lead them to believe that the “good jobs” are those defined by high status and salaries, rather than a determination of the best fit for each student based on circumstances, preferences, values, and skills.

230. Daisy Hurst Floyd, *We Can Do More*, 60 J. LEGAL EDUC. 129, 130 (2010) (“Unfortunately, legal education defines the prizes as goals that cannot be achieved by most of our students. If winning is defined by being in the top 10 percent of the class, then 90 percent of our students are set up for failure from the beginning.”).

231. See Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 781 (2004).

many of these tend to be the types of schools in which employment is not ever really in question.<sup>232</sup> The use of narrative evaluations rather than numerical grades answers many concerns: they provide formative feedback (even in end of semester, high-stakes tests, students are given the tools to understand retrospectively what they did well and what they did not); eliminate the need for, and mechanism supporting, mandatory curves and class rank; and provide employers with a far more comprehensive and holistic view of a student's abilities.<sup>233</sup> Alternative schemes are already in place in select institutions. With the explicit goal of encouraging cooperative learning, for example, Northeastern University School of Law utilizes written evaluations that provide meaningful feedback about test performance but do not pit students against each other with mandatory curves.<sup>234</sup> This system necessarily dispenses with class rank because it is impractical to make comparisons of narrative assessments.<sup>235</sup>

Short of radical reform, professors can implement adjustments that blunt the deleterious impact of high-stakes testing. One suggestion is to require professors to give midterm exams in the first year courses and provide students with individualized narrative feedback, even if the interim results are not included in the final grade.<sup>236</sup> Similarly, practice multiple choice quizzes may help prepare students for the bar, even if they are not calculated into the students' GPAs. Professors have created ways to overcome the deterrents to providing corrective feedback in large classes,<sup>237</sup> including assigning students to at least one small

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232. See *Degree Requirements*, NE. UNIV. SCH. OF LAW, <http://www.northeastern.edu/law/academics/curriculum/degree-requirements.html> (last visited June 10, 2011) (using narrative evaluations instead of numerical grades); *Grades*, YALE LAW SCH., <http://www.law.yale.edu/academics/jdgrades.htm> (last visited June 10, 2011) (using modified pass/fail grading system); *Grading Policy*, BERKELEY LAW, [http://www.law.berkeley.edu/students/career\\_services/foremployers/grading.html](http://www.law.berkeley.edu/students/career_services/foremployers/grading.html) (last visited June 10, 2011) (same); *Policies*, U. OF CHI. LAW SCH., <http://www.law.uchicago.edu/employers/policies> (last visited June 10, 2011) (using a scaled grading system instead of GPA system and not ranking students); *Requirements for Graduation and Good Academic Standing for the J.D. Program*, U. OF NOTRE DAME LAW SCH., <http://law.nd.edu/current-students/bulletin-of-information/requirements-for-graduation-and-good-academic-standing-for-the-j-d-program/> (last visited June 10, 2011) (using the regular grading system, but not ranking students); *Requirements for the J.D. Degree*, HARVARD LAW SCH., <http://www.law.harvard.edu/academics/handbook/rules-relating-to-law-school-studies/2010-2011-requirements-for-the-j.d.-degree-.html#J.GradesforJ.D.Students> (last visited June 10, 2011) (using a pass/fail system); *Stanford Law School Grading System*, STANFORD LAW SCH., [http://www.law.stanford.edu/experience/careers/ocs/students/resources/pdf/Grading\\_System\\_Explanation.pdf](http://www.law.stanford.edu/experience/careers/ocs/students/resources/pdf/Grading_System_Explanation.pdf) (last visited June 10, 2011) (same).

233. Implementing such a system would require a reallocation of faculty resources and a reorientation of priorities, as well as rethinking the curriculum to make it more amenable to narrative and frequent assessments.

234. *Degree Requirements*, *supra* note 232.

235. *Id.*

236. Schuwerk, *supra* note 231, at 782.

237. See Schwartz, *supra* note 84, at 370 (suggesting that law schools adopt "computer

section and eliminating grades in the first semester.<sup>238</sup> Finally, schools could develop systems of recognizing excellence in areas outside of grade point average, such as intramural competitions, seminars, and pro bono activities. This would serve to emphasize and reinforce other important measures of participation in law school culture and the value of alternative methods of preparing to practice law. Further, schools could work to limit the primacy of grades in the distribution of other resources within the school, such as law review and interscholastic competitions.<sup>239</sup>

#### *E. Restructure the Bar Exam*

A frequently cited argument in favor of high-stakes exams is that they are similar to the conditions presented by the bar exam. This argument is an instance of the tail wagging the dog, since the bar exam has been excoriated by critics for its near complete irrelevance to the actual practice of law,<sup>240</sup> and few believe that this test adequately measures the competencies necessary to practice.<sup>241</sup> Instead

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programs [to] allow faculty to administer short answer and multiple-choice assessments to their students on-line” and encouraging professors to “use self-, peer-, and small group-grading”). Even if these measures are not implemented across the board, schools could assign students to at least one small course in the first year, which would be conducive to more individualized feedback. *See, e.g.,* Bruce R. Jacob, *Developing Lawyering Skills and the Nurturing of Inherent Traits and Abilities*, 29 STETSON L. REV. 1057, 1071 (2000) (“In some law schools, each first-year student is placed in at least one small enrollment section of a basic course, e.g., Contracts, Torts, or Real Property. In a section with twenty-five or fewer students, writing assignments periodically can be given.”).

238. *See* Emily Zimmerman, *An Interdisciplinary Framework for Understanding and Cultivating Law Student Enthusiasm*, 58 DEPAUL L. REV. 851, 897-99 (2009) (arguing that grading curves and summative assessments dampen enthusiasm for law school, which negatively impacts the quality and effectiveness of legal education, and suggesting alternatives such as dispensing with grading for the first semester of law school).

239. Schuwerk, *supra* note 231, at 789-90.

240. *See, e.g.,* Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Should Change*, 81 NEB. L. REV. 363, 364 (2002) (“[T]he entire process used to select lawyers—from the Law School Admission Test (LSAT), through law school, and up to the bar exam—overemphasizes some skills and completely disregards others.”); Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 433 (2003); Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1193 (1995).

241. Keating, *supra* note 104, at 172 (“While law school tests attempt to measure issue-spotting and legal analysis—two skills that are certainly important to the practice of law—real law practice generally allows a lawyer the luxury to ruminate on a client’s problem for more than just three hours.”); Adam G. Todd, *Exam Writing as Legal Writing: Teaching and Critiquing Law School Examination Discourse*, 76 TEMP. L. REV. 69, 72 (2003) (“There is a multiplicity of skills not assessed on a blue book exam that can be found in outstanding lawyers in practice. Key skills such as the ability to counsel troubled clients, negotiate favorable settlements, and be persuasive



of working backwards from a flawed licensing system, those in the profession should instead advocate for a reformation of the bar exam under a methodology that reflects and assesses the skills commonly employed by competent and ethical attorneys. The current system parallels concerns articulated about “teaching the test” that some educators feel has eviscerated creativity in public school curricula.<sup>242</sup> As a result of this pressure, the focus of the curriculum and teaching methodologies is often directed to passage rates rather than critical legal education and instruction in a broad array of skills and competencies. I am not suggesting that schools or their accrediting agencies should unleash all students who have earned a J.D. to practice law without demonstrating proficiency in an enumerated list of competencies, but instead that the existing paradigm of legal education and licensing assessment does not serve those ends.<sup>243</sup>

Law schools do have an affirmative duty to prepare students to pass the bar examination, and concerns about bar passage rates are legitimate. However, allowing bar passage concerns to drive the curriculum, grading methodologies, and academic standards is shortsighted and counterproductive to the goal of producing competent practitioners. This is particularly true when some of the conventional wisdom about bar passage is belied by the facts. For example, an empirical study demonstrated that taking substantive bar courses in the upper-level curriculum did not correlate with a higher bar passage rate for the lowest quartile of the class, those considered at highest risk for failing the bar.<sup>244</sup> This conclusion does not support the frequent admonitions that lower-performing students should be channeled into substantive bar courses.<sup>245</sup> For schools in lower tiers with serious concerns about bar passage rates, a low passage rate can prompt faculties to enact reactionary (and potentially punitive) measures instead of engaging in comprehensive self-assessment and reform. Harsher grading systems aimed at identifying underperforming students and directing them to supportive services is justifiable if the remedy is to actually guide students to adequately resourced and easily accessible academic success programs with a proven record of success. However, if the unspoken but real goal is to weed out students who may lower a school’s already problematic bar passage rate, perhaps the schools should be encouraged to develop a better mechanism for identifying students who are likely to succeed—instead of accepting students whose future success they may question—to fill seat with tuition-paying students.<sup>246</sup> Instead of

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to a jury are not assessed.”).

242. Janice Gross Stein, *Law and Education: The Practice of Accountability*, 14 EDUC. & L.J. 1, 4 (2004).

243. See Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 69-70 (2007).

244. See Douglas K. Rush & Hisako Matsuo, *Does Law School Curriculum Affect Bar Examination Passage? An Empirical Analysis of Factors Affecting Bar Examination Passage During the Years 2001 Through 2006 at a Midwestern Law School*, 57 J. LEGAL EDUC. 224, 225 (2007).

245. *Id.* at 225-26.

246. Sober lessons are presented by an ominous trend at high schools concerned about their

externalizing blame by bemoaning student performance, work ethic, and study habits, schools should closely analyze their teaching methodologies. Fairly mild adjustments may usher in measurable improvements such as incorporating frequent practice essays with prompt and detailed feedback and providing free bar preparation courses as a short-term fix. Unfortunately, in the absence of other reforms, imposing more rigidly enforced academic standards is likely to negatively impact diversity within the student body and, ultimately, the profession.

Various proposals set forth alternatives to the bar exam that are more closely calculated to assess skills that are necessary in lawyering.<sup>247</sup> One widely discussed option is a post-graduate apprenticeship, or at least a “mandatory period of supervised practice before full admission to the legal profession.”<sup>248</sup> The demands of requiring a structured apprenticeship could present seemingly insurmountable logistical and quality control concerns, and the costs associated with such a model would only serve to exacerbate student debt if they are not offset in some way. However, the idea should not be dismissed without a careful consideration of creative ways to construct such a program in a cost-effective manner.

Another proposal envisions a tripartite evaluation process: the first step involves an evaluation of common law knowledge; the second phase requires application of this knowledge to more complicated problems; and the third component consists of an assessment of the integration of skills and professional values.<sup>249</sup> This process would be completed two years after graduation from law school and would result in full licensure.<sup>250</sup> Alternatively, graduates could be required to pass a bifurcated bar exam, with the first part testing analytical thinking and traditional doctrinal subjects after the completion of the first year of law school and the second part taken after the third year, assessing a broader range of skills.<sup>251</sup> An alternative method of ensuring that students develop competencies in lawyering tasks beyond those tested by the bar is mandatory

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testing outcomes, particularly when they are tied to funding. Some schools have been accused of increasing expulsion rates and discouraging attendance for students expected to underperform in order to report more favorable test results. See generally William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 585 (2006); Madeline E. McNeeley, *Title IX and Equal Educational Access for Pregnant and Parenting Girls*, 22 WIS. WOMEN’S L.J. 267 (2007); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004). While these heavy-handed but shortsighted and dishonest tactics may assist test results in the short term, they exact a considerable long-term price, particularly to those students deemed unworthy or incapable of redemption.

247. See BEST PRACTICES, *supra* note 3, at 9 n.21.

248. *Id.* at 9.

249. *Id.* at 10.

250. *Id.*

251. Wegner, *supra* note 172, at 640-41.

clinical education.<sup>252</sup> These proposals can be summarily rejected as impractical, costly, radical, and irrelevant, but the arguments seem primarily based on antiquated custom and logistical challenges that should not justify refusing to reconsider the current, deeply flawed system. In the end, the structural barriers erected by the current system reverberate backward to the admissions process, its reliance on the LSAT,<sup>253</sup> and its presumed value in predicting bar passage. These factors render legal education inaccessible to many potentially talented, ethical, empathic, and zealous students who are edged out only by the narrow focus of our licensing system, not based on their potential to contribute to the legal marketplace specifically (and justice, more expansively).

*F. Encourage Curricular/Teaching Innovation*

Professors should be encouraged to experiment with curricular innovation designed to meet any number of goals not typically addressed under the “signature pedagogy.” Because most law professors model their teaching on the instructional methodologies they experienced in law school, they have little exposure to pedagogical advances. In replicating the same teaching methodology without critical reflection, legal educators fail to consider and incorporate important pedagogical breakthroughs, including but not limited to those identified by John Dewey and experiential learning,<sup>254</sup> Donald Schön’s insights about the reflective practitioner,<sup>255</sup> and Howard Gardner’s recognition of multiple intelligences.<sup>256</sup> A group of forward-thinking educators is collaborating on a project designed to overcome some of the barriers to pedagogical reform. Legal Education Analysis and Reform Network (LEARN) is comprised of “ten law schools [that] have come together to work with the Carnegie Foundation to promote thoughtful innovation in law school curriculum, pedagogy and assessment.”<sup>257</sup> Recognizing that doctrinal law professors do not spend much

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252. See Stephen Ellmann, *The Clinical Year*, 53 N.Y.L. SCH. L. REV. 877, 891 (2008-09) (“The clinical year speaks to all elements of the legal education apprenticeship, but does so in a way that may seem surprisingly obvious—namely, by making the third year something quite close to explicit apprenticeship.”).

253. See *About the LSAT*, LSAC, <http://www.lsac.org/JD/LSAT/about-the-LSAT.asp> (last visited June 10, 2011).

254. See, e.g., JOHN DEWEY, *DEMOCRACY AND EDUCATION* (1916); JOHN DEWEY, *HOW WE THINK* (1910); JOHN DEWEY, *HUMAN NATURE AND CONDUCT* (1922); JOHN DEWEY, *MY PEDAGOGIC CREED* (1897); JOHN DEWEY & EVELYN DEWEY, *SCHOOLS OF TOMORROW* (1915).

255. See, e.g., DONALD A. SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER* (1987); DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983).

256. See, e.g., HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* (1983); HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE* (1993).

257. LEGAL EDUC. ANALYSIS & REFORM NETWORK (LEARN), *GENERAL DESCRIPTION OF PLANNED PROJECTS 10* (2009-10), available at [http://www.law.stanford.edu/display/images/dynamic/events\\_media/LEARN\\_030509\\_lr.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/LEARN_030509_lr.pdf).

time discussing, ruminating, or writing about pedagogy, LEARN aspires to create an accessible platform to advance pedagogical developments within the academy.<sup>258</sup> Among LEARN's goals are promoting the teaching innovations that are often unacclaimed and disseminating information about these creative approaches to other law schools and professors.<sup>259</sup> In so doing, LEARN hopes to discredit the notion that an innovative curriculum is less rigorous than its Socratic predecessor or inherently anti-intellectual; to share ideas so that schools are not compelled to reinvent the wheel when considering changes; and to engage in methodical reflection and mutual assessment about the efficacy of these new teaching tools.<sup>260</sup> LEARN's approach is to encourage collaboration and create alliances among the great minds and talented teachers from across the curriculum to integrate the best of legal pedagogy and to bolster the legitimacy and momentum of reform by demonstrating all the ways it is currently happening.<sup>261</sup> The project initially started in small working groups but intends to expand its reach, ultimately creating an inclusive network of educators and law schools determined to identify the best way to train future lawyers, not cling uncritically to tradition.<sup>262</sup> This effort typifies the attitudes espoused by many clinical educators, who eschew proprietary approaches to innovation and foster generous and collaborative endeavors whose shared objective is to bring everyone forward together.<sup>263</sup>

Multiple avenues are available to develop creative curricula that help to engage the students' hearts and minds and to cultivate empathy, an essential ingredient for compassionate and effective problem solving and other important but intangible competencies. A few examples illuminate the range of creative possibilities. Herb Eastman asks students to draft a social justice complaint—one that refuses to delimit a complaint to the legally salient, emotionally detached and decontextualized facts, but rather is written passionately, integrating broad social justice themes and narrative.<sup>264</sup> His unconventional approach forces students to situate their clients' legal issues in their social, political, historic, and economic context, and to craft narrative that speaks not just the sophisticated players in the legal system, but to the clients as well.<sup>265</sup> Recognizing the numbing impact of Socratic dialogue and exhibiting concern about the its effect on students' commitment to public interest work, Nisha Agarwal and Jocelyn Simonson

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258. *Id.* at 16.

259. *Id.* at 14.

260. *See id.* at 22.

261. *See id.* at 13.

262. *See id.* at 20.

263. Although unstated, a secondary benefit is decreasing the risk associated with innovation, as there is safety in numbers.

264. *See generally* Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 769 (1995).

265. Derek W. Black, *Turning Stones of Hope into Boulders of Resistance: The First and Last Task of Social Justice Curriculum, Scholarship, and Practice*, 86 N.C. L. REV. 673, 693-95 (2008); *see also* Eastman, *supra* note 264, at 788 (example of a "thick pleading").

describe a summer program at Harvard designed to immerse students in the theories underlying public interest work by coupling an internship experience with a seminar devoted to identifying and interrogating the work they do on-site at public interest organizations.<sup>266</sup>

Laurie Moran and Susan Waysdorf describe the development of a new type of hybrid course that seamlessly integrates a doctrinal class with a compelling service learning component.<sup>267</sup> In this course, the students were exposed to the structural underpinnings of the geography of poverty in post-Katrina New Orleans and then traveled there to provide hands-on service grounded in a deep understanding of history and context.<sup>268</sup> Other professors are humanizing teaching in large classroom settings,<sup>269</sup> expounding on the methods and benefits of the problem method,<sup>270</sup> heeding the importance of classroom architecture and atmospherics,<sup>271</sup> and ameliorating the pressure of first year classes by organizing students into small law firms in which they can navigate the process of answering questions with reduced stress.<sup>272</sup>

In order to encourage faculty experimentation, schools can reduce any perceived risks associated with deviating from the norm, so long as the efforts are reasonably calculated to achieve certain outcomes. For example, schools could minimize the importance of course evaluations in the initial phases of piloting new methodologies, develop evaluation instruments that are better designed to

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266. See generally Nisha Agarwal & Jocelyn Simonson, *Thinking Like a Public Interest Lawyer: Theory, Practice, and Pedagogy*, 34 N.Y.U. REV. L. & SOC. CHANGE 455 (2010).

267. Laurie Moran & Susan Waysdorf, *The Service-Learning Model in the Law School Curriculum: Expanding Opportunities for the Ethical-Social Apprenticeship* (unpublished manuscript), available at [http://www.nyls.edu/user\\_files/1/3/4/15/1009/THE\\_SERVICE\\_LEARNING\\_MODEL\\_IN\\_THE\\_LAW\\_SCHOOL\\_CURRICULUM0901101.pdf](http://www.nyls.edu/user_files/1/3/4/15/1009/THE_SERVICE_LEARNING_MODEL_IN_THE_LAW_SCHOOL_CURRICULUM0901101.pdf) (last visited June 10, 2011).

268. *Id.* at 2-3. Similarly, I have developed some independent studies that are partnerships with non-governmental organizations to combine student research with the needs of under-resourced organizations. Students were very engaged in the legal issues and derived a sense of satisfaction about the real-life impact of their work.

269. See generally Justine A. Dunlap, "I'd Just As Soon Flunk You As Look at You?" *The Evolution to Humanizing in a Large Classroom*, 47 WASHBURN L.J. 389 (2008) (describing various techniques to humanize large classroom teaching); Paula Lustbader, *Walk the Talk: Creating Learning Communities to Promote a Pedagogy of Justice*, 4 SEATTLE J. SOC. JUST. 613 (2006) (promoting a learning environment that encourages justice).

270. See generally Keith H. Hirokawa, *Critical Enculturation: Using Problems to Teach Law*, 2 DREXEL L. REV. 1 (2009) (arguing that problem-based learning allows doctrinal professors to integrate critical pedagogies).

271. Sturm & Guinier, *supra* note 40, at 531. The architecture of the traditional classroom focuses on the front of the room, which funnels authority to the professor facing the class, a design that affects the classroom dynamics. *Id.* In contrast, clinic seminars are often structured so that students are all seated at the same height in a circle, creating a more collaborative learning environment.

272. See Schuwerk, *supra* note 231, at 790-95.

assess efficacy in teaching that integrates non-traditional goals, and otherwise encourage innovation. This would be especially important for faculty in the pre-tenure years. Schools can send the clear message that diverging from standard practice and reflecting on the results, based on sound pedagogy, is welcome, encouraged, and even rewarded. Another option is to assign lighter course loads and committee work to professors who are teaching classes that incorporate more labor-intensive, skills-oriented methods, thereby offering an incentive. Creative approaches would only serve to enhance instruction in a broad range of skills.

*G. Provide Mentoring*<sup>273</sup>

Faculty obligations to students should entail more than just shepherding them through the mastery of substantive and procedural law and techniques of argument. More expansively, professors can guide students' entry into the world of legal professionals, a concept characterized by Robert Schuwerk as "stewardship of the *practice* of law."<sup>274</sup> The nature of the relationship between law students and faculty is inherently hierarchical, partly because of the real knowledge and experience gap that separates them, and partly due to the unequal dynamic that attends the student-professor dyad.<sup>275</sup> Despite this intrinsic and unavoidable power imbalance, students benefit from personal connections with professors, and they often relish opportunities to interact in a less formal manner than the classroom typically allows.<sup>276</sup> To be blunt, especially because tuition dollars pay faculty salaries, our obligation to nurture students should not end at the office door. Professors should be accessible for more than just a study question posed during office hours and limited to the substantive topic that arose in the classroom. Instead, faculty should immerse themselves in a vibrant learning community<sup>277</sup> and seek out opportunities to engage in meaningful

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273. Women mentors help students normalize their responses to law school stress and feelings of alienation. See Batlan et al., *supra* note 211, at 148 (arguing that women mentors would "allow[] women to shape a space in which to recognize that their feelings of distress are neither isolated nor unusual").

274. Schuwerk, *supra* note 231, at 754 (emphasis added).

275. *Id.* at 758-61.

276. Many schools have developed mentoring programs that partner with attorneys from the local bar, but these programs have to be thoughtfully administered and consist of more than just a hands-off approach to matching up students. Instead, programs should involve structure, guidelines, and monitoring to ensure the best experience for students and the ongoing participation of the local bar. See Neil Hamilton & Lisa Montpetit Brabbit, *Fostering Professionalism Through Mentoring*, 57 J. LEGAL EDUC. 102, 128 (2007) ("A well designed formal mentor program that successfully combines the talents and skills of a mentor with a strong seminar component can foster . . . principles [of professionalism] for the newest generation as well as older ones."); see generally Melissa H. Weresh, *I'll Start Walking Your Way, You Start Walking Mine: Sociological Perspectives on Professional Identity Development and Influence of Generational Differences*, 61 S.C. L. REV. 337, 337 n.1 (2009) (encouraging new and experienced lawyers to work together to "enhance professionalism in the legal community").

277. Faculty members will understandably have different sensibilities, comfort levels, and

interactions outside the classroom<sup>278</sup> in ways that foster the modeling and transmission of professional values. The level of commitment and structure of interaction can vary from fairly low-demand advising programs to more sustained and structured interactions.<sup>279</sup> Unfortunately, professors do not typically conceive of mentoring as within their job description.<sup>280</sup> Some faculty members who entered the academy with complete comfort about the hierarchy or rigid boundaries may feel unsettled by exchanging more than superficial pleasantries with their students, or they may feel constrained by other considerations to limit the time they spend with students. However, establishing relationships also enables faculty to serve as a resource to identify and support struggling students. While that may arguably fall under the bailiwick of a dean of students, the comfort of a compassionate and familiar professor can be extremely meaningful. Given the reported rates of distress, the legal academy should marshal any available resources to humanize legal education and attend to student well-being.<sup>281</sup>

Law schools should also broaden the notion of career counseling as well to include more than advice about job acquisition, resume reviews, and practice interviews. Students would be better served by learning about the benefits and disadvantages of various practice areas, including non-legal career options, and be encouraged to reflect about their career goals, temperaments, and options. Introspection allows students to make deliberate and informed choices about what aspects of practice they will find challenging and fulfilling, what they cannot tolerate, and areas in which they can compromise. Faculty can supplement their career services offices by serving as ad hoc advisors who are willing to engage students in discussions calculated to dig below the surface of stated career goals and be available to discuss issues of values, professionalism, job satisfaction, and

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boundaries. However, schools could adopt formal advising programs that are designed and resourced to provide informal contact, such as brown bag lunches, to allow for free-flowing discourse. See, e.g., Ann Juergens, *Practicing What We Teach: The Importance of Emotion and Community Connection in Law Work and Law Teaching*, 11 CLINICAL L. REV. 413 (2005).

278. See William J. Rich, *Balance in Legal Education: Pervasive Principles*, 60 J. LEGAL EDUC. 122, 123 (2010) ("Engaged faculty also care about their students outside of the classroom, make themselves available for individual conferences, and respond to expressions of need or interest.").

279. For example, after Hurricane Katrina, an outpouring of student interest coalesced into a large contingent dedicated to providing on the ground and immediate assistance, and the newly minted Student Hurricane Network planned and promptly executed service trips. After my school's first trip to post-Katrina Mississippi, I accompanied students on the next two trips, first to New Orleans, and then to Texas to work with Texas RioGrande Legal Aid. Working, staying, and recreating with students provided ample opportunities to interact. The nature and intensity of trip served an equalizing function, fostered enduring social connections, and facilitated broad-ranging discussions about law, justice, and lawyering that are often lost under the structure and pressures of law school.

280. See Sturm & Guinier, *supra* note 40, at 535.

281. See *supra* Part II.A.

how to cultivate a balance between work and family. These conversations can be guided by the precepts of client-centered counseling, encouraging students to contemplate their goals expansively and consider all the ramifications of each choice based on their individual priorities, goals, and experiences. In the current economy, it is fair to question whether students have the luxury of thinking in those terms, and it is virtually impossible for career services offices, under enormous pressure to elevate employment statistics, to counsel desperate students to make carefully calculated choices. However, the temporary unattainability of some goals should not thwart efforts to foster reflection, even if students must temper their short-term expectations and behavior in light of the present economic circumstances.

Law schools can redouble their efforts to set up programming to facilitate interactions among faculty, practitioners, and students. The Inns of Court is an exemplary organization, providing both engaging programming and informal social interactions centered on themes related to lawyering and professionalism.<sup>282</sup> Collegiality can also be fostered with members of the local bar, who are often more than willing to mentor students. Less formal meetings would also be useful, such as brown bag lunches with no particular agenda, allowing issues to arise organically from unstructured conversations. With competing demands on faculty time, this intangible mandate is likely to fall by the wayside unless we explicitly value the ability to serve as an important force in the lives of students.

#### *H. Clinics/Externships/Experiential Education*

Law schools should strive to expand offerings that immerse students in real life lawyering. The multidimensional and potentially transformative value of clinics is undisputed. Clinical education serves multiple purposes by providing hands-on skills training, inculcating values, advancing justice, exposing students to problem solving, introducing ethics and professionalism as applied to real situations, and beginning the lengthy process of acculturation to legal practice.<sup>283</sup> With the luxury of smaller classes comes the opportunity to engage with students about critical issues that are merely abstract principles in the absence of authentic (rather than simulated) clients and the myriad pressures that accompany real

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282. *General Information*, AM. INNS OF COURT, <http://www.innsforcourt.org/Content/Default.aspx?Id=2> (last visited June 25, 2011). Local chapters of the Inns of Court set up engaging programs intended to provide connections between lawyers and the judiciary, with interactive programming to address emerging issues. *Id.*

283. Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 58 (2009) (discussing RONIT DINOVIETZ ET AL., NALP FOUND. FOR LAW CAREER RESEARCH & EDUC. & AM. BAR FOUND., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 81 (2004) [hereinafter *After the JD*]). *After the JD* is a careful analysis of the impact of participating in clinics during law school. Recent law graduates consistently rated their clinic experience highly in terms of preparation of practice. *Id.* at 81 fig.11.1. To the surprise of many, participation in the clinic did not appear to inculcate an enduring commitment to public interest work, although the study did find that those predisposed to public interest work seemed to have had that inclination ossified by participation in a clinic.



practice. Clinical faculty strive to instill habits of self-reflection so that even after the experience, law students are motivated to remain vigilant and committed to ongoing professional growth. Clinical experiences are so instrumental in preparing students for the practice of law that some commentators argue persuasively that clinics should be universally required.<sup>284</sup>

Clinics offer experiences that cannot be manufactured in a classroom and can be profoundly meaningful for students. Clinics are uniquely positioned to facilitate “transformative experiential opportunities for exploring the meaning of justice and developing a personal sense of justice, through exposure to the impact of the legal system on subordinated persons and groups and through the deconstruction of power and privilege in the law.”<sup>285</sup> Exposure to real life situations and genuine clients also exposes students to the “disorienting moment”<sup>286</sup> that has been widely touted as integral to the development of sensitivity and an internal moral compass, as well as passion for the law and for justice.<sup>287</sup>

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284. See Karen Tokarz et al., *Toward Universal Clinical Education: Why the Time Is Ripe for Requiring Clinical Courses for All Law Graduates 1* (unpublished manuscript), available at [http://www.nyls.edu/user\\_files/1/3/4/15/1009/Mandatory%20Clinical%20Legal%20Education%20draft%20Sept%2021%202010-1.pdf](http://www.nyls.edu/user_files/1/3/4/15/1009/Mandatory%20Clinical%20Legal%20Education%20draft%20Sept%2021%202010-1.pdf) (last visited June 10, 2011).

285. Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1477 (1998) (internal citations omitted).

286. See Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 38-39 (1995) (arguing that lessons of social justice are a necessary part of legal education generally, and clinical education in particular).

287. E.g., Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51 (2001); see generally ASS’N OF AM. LAW SCH., PURSUING EQUAL JUSTICE: LAW SCHOOLS AND THE PROVISION OF LEGAL SERVICES 4 (2002), available at [http://www.aals.org/equaljustice/final\\_report.pdf](http://www.aals.org/equaljustice/final_report.pdf) [hereinafter EQUAL JUSTICE PROJECT]; David Barnhizer, *The Justice Mission of American Law Schools*, 40 CLEV. ST. L. REV. 285 (1992); Barry et al., *supra* note 7; John O. Calmore, “Chasing the Wind”: Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization, 37 LOY. L.A. L. REV. 1167 (2004); Lauren Carasik, *Justice in the Balance: An Evaluation of One Clinic’s Ability to Harmonize Teaching Practical Skills, Ethics and Professionalism with a Social Justice Mission*, 16 S. CAL. REV. L. & SOC. JUST. 23, 78 (2006); Dubin, *supra* note 285; Freamon, *supra* note 9, at 167; Hess, *supra* note 64, at 79 (lamenting the “psychological distress, dissatisfaction, and substance abuse” some attribute to the casebook method and opining that the impact of this teaching methodology could be ameliorated by experiences that confront students with issues of morality and social justice); Henry Rose, *Law Schools Should Be About Justice Too*, 40 CLEV. ST. L. REV. 443 (1992); Wizner, *supra* note 12; Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 1011 (2004). Although a recent study found mixed results as to whether participation in clinics inspired students’ interest in social justice, it did conclude that participation in clinics likely nurtured and solidified those inclinations for students already predisposed to work in this area. See Sandefur & Selbin, *supra* note 283, at 99. There has been much hand-wringing about the erosion of public

Among the benefits offered clinics is instruction on professionalism<sup>288</sup> and exposure to moral issues, as “practice-oriented courses can provide important motivation for engaging with the moral dimensions of professional life—a motivation that is rarely accorded status or emphasis in the present curriculum.”<sup>289</sup> Clinical experiences further provide space for professors to inculcate values regarding the public service ethos of the profession.<sup>290</sup> Additional opportunities for experiential learning are available through externships<sup>291</sup> and other practice-oriented projects that can be integrated into the existing curriculum. In any of these opportunities, escaping the sterile classroom environment can be enormously gratifying, inspiring, and edifying.<sup>292</sup> Although these opportunities are resource-intensive to structure with appropriate pedagogical goals and oversight, there are creative ways to offer them. Unfortunately, even if the institutional resistance to a reoriented emphasis on skills training is surmounted, the ensuing discussion is often derailed by the perceived financial cost of low faculty-to-student ratios and labor intensive pedagogy, thrusting this debate squarely into the constant battle over the allocation of scarce resources. However, as David Chavkin demonstrates through his analysis of the relative costs of clinical training at his institution, some of this conventional wisdom may be illusory.<sup>293</sup>

Admittedly, advocates of expanded opportunities for experiential learning face a haunting conundrum. It is hard to reconcile demands for more labor-intensive, and therefore costly, experiential learning with a commitment to contain spiraling tuition costs. One solution discussed previously, the increased

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interest commitment among students as they progress through their legal education, so this finding should not be minimized. See Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 BUFF. L. REV. 1355, 1412 (2007); Deborah L. Rhode, *Pro Bono in Principal [sic] and in Practice*, 26 HAMLINE J. PUB. L. & POL’Y 315, 320-23 (2005).

288. See Melissa L. Breger et al., *Teaching Professionalism in Context: Insights from Students, Clients, Adversaries, and Judges*, 55 S.C. L. REV. 303, 308-09 (2003) (“[C]linical legal education, with its convergence of theory and real-world practice, provides an ideal opportunity for teaching professionalism and ethics to students in meaningful ways.”).

289. CARNEGIE REPORT, *supra* note 2, at 88.

290. Robert R. Kuehn, *A Normative Analysis of the Rights and Duties of Law Professors to Speak Out*, 55 S.C. L. REV. 253, 293 (2003) (“[T]he issue is not whether law schools should seek to instill the legal profession’s public service norms, but rather, how this should best be done.”).

291. This Article does not wade into the debate as to whether clinics or externships are more valuable, but it is worth noting concern expressed by some that because externships are infinitely cheaper to run, educators must be wary of the risk that most experiential instruction will be outsourced as a cost-saving measure rather than a reasoned pedagogical decision.

292. This is not meant to suggest that the learning imparted in classrooms is without value, but simply that it cannot prepare students to practice alone without complementary training that situates students in the real world.

293. David F. Chavkin, *Experiential Learning: A Critical Element of Legal Education in China (and Elsewhere)*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 3, 13-14 (2009).

use of adjuncts, provides a partial response to the cost issue but implicates serious concerns related to the historically fraught status of clinical faculty. Shifting teaching to those with either a circumscribed or nonexistent role in faculty governance hearkens back to a time when clinical faculty were completely marginalized in the academy. Outsourcing supervision is risky and likely sacrifices some quality of interaction when an attorney is balancing supervision with the competing demands of his or her own practice. Moreover, those attorneys do not have the luxury of contemplating the nuances of pedagogy. Organized faculty mentoring is essential in any program that expands the use of adjuncts. On balance, the risks of the increased use of adjuncts to facilitate increased experiential learning opportunities must be carefully considered. This analysis should extend beyond the quality of the classroom experience to issues related to the structure of the academy.

### *I. Professionalism, Ethics, and Morals*

The Carnegie Report defines the third apprenticeship as one of “identity and purpose,”<sup>294</sup> an introduction to canons of ethical and social behavior through which students can begin to explore and develop their professional integrity, mission, and character.<sup>295</sup> This is partly achieved through explicit discussion, and partly through the “‘hidden’ curriculum,” which is comprised of the myriad subtle and unspoken ways that values are transmitted between and among faculty and students.<sup>296</sup> The ABA has recently exhorted lawyers to strive for higher ideals,<sup>297</sup> principles that should be unequivocally telegraphed to students during the first year.<sup>298</sup> In furtherance of these goals, the ABA is currently contemplating mandatory instruction in professionalism.<sup>299</sup> One commentator has suggested that if instruction and guidance about professionalism is incorporated into standards, there must be output measures to ensure that law schools take this relatively intangible commitment seriously.<sup>300</sup> To safeguard against a hollow and illusory

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294. CARNEGIE REPORT, *supra* note 2, at 28.

295. *Id.*

296. *Id.* at 29.

297. See AM. BAR ASS'N, “... IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 16-19 (1986) [hereinafter ABA BLUEPRINT], available at [http://www.abanet.org/cpr/professionalism/Stanley\\_Commission\\_Report.pdf](http://www.abanet.org/cpr/professionalism/Stanley_Commission_Report.pdf); AM. BAR ASS'N, TEACHING AND LEARNING PROFESSIONALISM 13-25 (1996).

298. See generally Patrick E. Longan, *Teaching Professionalism*, 60 MERCER L. REV. 659 (2009) (describing Mercer's efforts to provide explicit instruction in professional ideals, starting with a credit-bearing class in the first year, and recognizing the importance of introducing these values at the outset of education).

299. Timmer & Berry, *supra* note 121, at 1 (noting that the American Bar Association's Accreditation Standards Review Committee is considering inserting the word “ethical” into its description of participation in the legal profession).

300. See *id.* at 20 (“Because law schools have a significant opportunity for impacting the professional identity of lawyers, the schools must be accredited in a way that their commitment to professional identity development is encouraged, required, and measurable.”).

commitment to these ideals, schools need to develop thoughtful, integrated, and pervasive instructional plans. Mandatory instruction does not require schools to thrust values down the students' throats, but rather recognizes that institutional and personal reluctance to tread into areas characterized as values does a disservice to students and the profession.<sup>301</sup> The attitude that certain "soft" topics should be deliberately sidestepped has deep historical roots, as "Llewellyn and his followers so thoroughly purged most discussion of genuine ethics from the initial curriculum that law students and lawyers are now taught a process and not a purpose for the law."<sup>302</sup> However, leaving it to students to absorb professional ideals in a vacuum is fraught with peril. If schools fail to raise issues of the professional role, they run the risk that in the absence of guidance and modeling, some students will consciously or unconsciously imprint on the first lawyers with whom they interact and assume that such conduct represents acceptable professional behavior. These issues are too important to leave to chance. A much better practice is to raise issues of professional identity proactively so that within the expansive range of behavior that is not explicitly proscribed,<sup>303</sup> students can think through their own values and priorities and develop a philosophy of lawyering that is consistent with those ideals.<sup>304</sup> Even if they parse cases and statutes based on neutral principles of legal analysis, "[l]aw professors cannot be value-neutral on matters of value."<sup>305</sup> As members of a self-regulating profession that is central to reinforcing our nation's democratic ideals, law professors have an obligation to inculcate some universal minimum standards, the absence of which can impede both procedural and substantive justice.

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301. The supposition that we can be completely neutral with respect to values is faulty. It is better to acknowledge our assumptions and perspectives and point out various alternatives to our views than to falsely suggest that one can be truly be a blank slate, disassociated from all the aspects of one's identity, ideals, and lifetime of experiences.

302. Steve Sheppard, *Teach Justice*, 43 HARV. C.R.-C.L. L. REV. 599, 599-600 (2008).

303. See Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75, 75 (2000) ("Almost all significant ethical decisions that lawyers face in the practice of law involve discretion. For some of these decisions, no rules or standards guide lawyers.").

304. Timmer & Berry, *supra* note 121, at 15 ("[T]hen there are the rest—the future lawyers wandering through law school becoming soulless automatons as they master the case method and learn to be passionate about the perspective of the party who hired them, losing themselves in the process. These are the students whose souls might be released and liberated to carry their values along with them into practice. Rather than leave their souls behind, they can learn when, where, and how to incorporate their personal beliefs, morals, and ethics into the practice of law, thereby ensuring a career that they can live with and be proud of.").

305. RHODE, *supra* note 180, at 203; see also Stephen Wizner, *Is Learning to "Think Like a Lawyer" Enough?*, 17 YALE L. & POL'Y REV. 583, 583, 591 (1998) (suggesting that "law schools [are] educating students for technical proficiency, but failing to inculcate in them a proper sense of their social and public responsibilities as members of the legal profession" and contending that "[l]aw schools, and particularly law teachers, have a 'moral responsibility' to democratize our legal culture.").

Law schools typically do not address the ethical, moral, and professional choices students will necessarily face. To inoculate students against the surprise and confusion when these issues arise, and to enhance the process of thoughtful and principled resolution of these issues, students should be introduced to the vexing ethical and moral questions they will confront in practice early and often, throughout the curriculum. Frequent exposure to these formative issues will sensitize students and help prepare them in advance of encountering these scenarios in practice, when they are presumably under more pressure and potentially more myopic as a result.<sup>306</sup> Reflection will not necessarily minimize or eliminate exposure to difficult issues, but students will be better prepared to formulate a system for resolving them, or they will select an area or type of practice where they can exercise some greater control about the issues that are likely to arise.<sup>307</sup> Because morality is deemed personal, discussion of morality is typically relegated to the periphery of education, if it happens at all. This is a mistake, as “[i]t is incumbent on the national law school faculty to give law students tools to argue about moral duty, to recognize a compelling moral argument, and to prepare students to engage in the moral practice of law.”<sup>308</sup> Avoiding these topics sends a tacit and undesirable message: “[w]hen faculty routinely ignore—or even explicitly rule out-of-bounds—the ethical-social issues embedded in the cases under discussion, whether they mean to or not, they are teaching students that ethical-social issues are not important to the way one ought to think about legal practice.”<sup>309</sup> Some articles that deconstruct the elusive concept of professionalism exalt lawyering as a learned profession and note that all but the most sophisticated clients cannot truly assess the services they retain. The nature of our self-regulating profession and our monopoly of legal representation elevates the collective obligation to seek and advance justice.

As part of the critique of law, legal institutions, and lawyering that comprise a well-rounded legal education, students should be exposed to the underlying philosophy of our system. This understanding should extend beyond an ability to parrot back the nature of our esteemed adversarial system and its obligation to adhere to the tenets of zealous representation for individual clients.<sup>310</sup> Students

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306. See Beth D. Cohen, *Helping Students Develop a More Humanistic Philosophy of Lawyering*, 12 J. LEGAL WRITING INST. 141, 152-58 (2006).

307. Even if lawyers expect to assume heroic postures in all cases and for all clients, they will invariably be confronted with difficult clients and ethical conundrums, and they will at some point inevitably and unavoidably grapple with issues of paternalism and other dilemmas.

308. Sheppard, *supra* note 302, at 601.

309. CARNEGIE REPORT, *supra* note 2, at 140.

310. For some students, the process of disengaging their moral compass and following the dictates of client prerogative can be deeply disconcerting. Much has been written of the personal cost of the “hired gun” approach, in which the lawyer is merely executing a function in an adversarial system, irrespective of her moral reaction to the objectives of representation in a particular case. See, e.g., Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9, 13 (1995) (explaining moral activism, which “in its broadest sense demands accountability from lawyers for their actions, and tends not to permit the mere fact of occupational role expectations

should be encouraged to explore the obvious and hidden costs and benefits of this system that requires subversion of the greater good to the interests of individual clients, both for those who interact with our legal institutions and for lawyers individually, who will invariably be forced to advocate for positions they would not personally choose. Exposing students to the spectrum of alternative constructs that exist in other legal systems empowers them to engage in a comparative critique of the axioms upon which each system is based and to understand the implicit values and tradeoffs. Being prepared for these contingencies, acknowledging the potential toll our system exacts, and understanding why these compromises are foundational in our system may minimize the impact for those who don the mantle of zealous advocacy with some ambivalence.

Professors can insert opportunities to discuss ethics, morals, and professional ideals by making an effort to recontextualize the cases under discussion, indentifying personal and humanizing details about the clients, and examining the broader social, political, historical, and economic context that the conflict inhabits.<sup>311</sup> Attention to the issues deemed essential to the formation of a responsible, integrated, and professional identity cannot wait until the second or third year of study, when students may have effectively, but not necessarily auspiciously, internalized the disconnection between their morals and their mastery of dispassionate and analytical reasoning.<sup>312</sup> Additionally, these issues should be taught pervasively, not just in a course focused on ethics that is relegated to the margins of the curriculum. The tacit message is that the mastery of technical ethical guidelines is sufficient instruction. An effort to integrate these topics into other courses would situate them within the overarching framework that requires some lawyers to subvert their personal morality to their lawyering persona, sometimes at considerable cost to their sense of integrity and well-being. Providing pervasive instruction permits an exploration beyond our rule-bound, proscriptive approach to ethics as a rich opportunity to nurture their sense of personal ethics and morality. Expansive discussions can be supplemented by concrete teaching tools, such as movie clips, role plays, small group discussions, reflective essays, guest speakers, and other exercises designed

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to justify lawyer conduct"). Some ethicists suggest that we adopt a more flexible model in which lawyers are permitted, but not required, to include political considerations of the choices faced in the process of representing clients. *See generally* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994); Beverly Balos, *The Bounds of Professionalism: Challenging Our Students; Challenging Ourselves*, 4 CLINICAL L. REV. 129 (1997). This permits the lawyer some flexibility to allow her personal moral and professional spheres to coexist. Encouraging students to explore various reactions to the role they will play in our adversarial model should be done frequently.

311. In the first year, "students are told repeatedly to focus on the procedural and formal aspects of legal reasoning, its 'hard' edge, with the 'soft' sides of law, especially moral concerns or compassion for clients and concerns for substantive justice either tacitly or explicitly pushed to sidelines." CARNEGIE REPORT, *supra* note 2, at 141.

312. *See id.* at 142.

to engender real dialogue. An approach that carefully circumvents or studiously ignores discussion of the intersection of ethics, morals, and professionalism does nothing to inculcate a heightened sense of responsibility in all areas.<sup>313</sup> Ethics and professionalism should be considered a broad, idealistic, and aspirational construct that extends beyond regulatory dictates.<sup>314</sup>

*J. Public Interest Work*<sup>315</sup>/*Access to Justice*<sup>316</sup>/*Pro Bono*<sup>317</sup>

Our vaunted democratic ideals are premised on the notion of equal access to justice. The concept of “equality before the law is at the core of the social contract just as peacefully resolving disputes between citizens, including between citizens of different economic and social classes is . . . the ‘chief reason,’ but

313. *Id.* at 149; see also Jeremy Cooper & Louise G. Trubek, *Social Values from Law School to Practice: An Introductory Essay*, in EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION, *supra* note 9, at 1, 14 (“A law school . . . can too easily destroy the potential desire of law students to commit themselves passionately and wholeheartedly to social justice, by its obsession with the acontextual, the dispassionate, and the analytical.”).

314. It is critical to emphasize professionalism and ethics beyond examination of the rules, as they are largely proscriptive and fail to articulate lofty standards. See Daniel S. Kleinberger, *Wanted: An Ethos of Personal Responsibility—Why Codes of Ethics and Schools of Law Don’t Make for Ethical Lawyers*, 21 CONN. L. REV. 365, 370 (1989) (“[T]he rules are seen primarily as a set of *malum prohibitum* commands to be parsed, analyzed, interpreted, and distinguished—just like any set of regulations applicable to any other trade or business.”).

315. See Russell Engler, *From the Margins to the Core: Integrating Public Service Legal Work into the Mainstream of Legal Education*, 40 NEW ENG. L. REV. 479, 485 (2006) (“Numerous studies reveal the extent to which the values of law students are shaped by their law school experiences and those experiences typically push students away from, rather than toward, public interest work.”); see also Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 288 (2001) (“A provocateur for justice actively imbues . . . students with a lifelong learning about justice, prompts them to name injustice, to recognize the role they may play in the perpetuation of injustice and to work toward a legal solution to that injustice.”).

316. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1, 28 (2009), [http://www.lsc.gov/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf) [hereinafter DOCUMENTING THE JUSTICE GAP] (noting that under 20% of low-income persons get the legal assistance they need and that “to fund these needs, the federal share must grow to be five times greater than it is now, or \$1.6 billion”); Engler, *supra* note 315, at 484 (“Legal needs studies have consistently shown that anywhere from seventy to ninety percent of legal needs of the poor go unaddressed in America.”); Robert Robinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 104 (2005) (“Everyone—lawyers, judges, academics, the public—knows that the ‘rich’ get more justice than everyone else.”).

317. Comment 1 to Rule 6.1 of the American Bar Association Model Rules of Professional Conduct states that “[e]very lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.” MODEL R. PROF’L CONDUCT 6.1 cmt. 1 (2004).

obviously not the only purpose, for government itself.”<sup>318</sup> Despite its foundational underpinnings, “[i]t is astonishing that the principle of equal justice—a principle enshrined in virtually every articulation and embodiment of civic virtue and pride in our democracy, from courthouse facades, to the Pledge of Allegiance, to the iconography of ‘blind justice’—remains so obviously and utterly hollow and illusory.”<sup>319</sup> A panoply of fundamental rights are rendered inconsequential if people lack the resources and access to vindicate them. Yet in a system that lauds its adherence to the rule of law, the inattention to equal access to justice is shameful. The statistics are undeniably stark—for every 6415 people who are eligible for free legal services, there is one attorney, while the corresponding ratio for attorneys providing private legal services is 429 to one.<sup>320</sup> The federal funding of legal services through the Legal Services Corporation, which originated in 1981, has been appreciably diminished in real dollars.<sup>321</sup> Securing increased funding for the poor is a tough sell when economic suffering is omnipresent, but woefully unequal access to the justice system predated our current economic crisis and will endure long past its recovery. Even in better times, the United States has still lagged far beyond other developed and democratic societies. Studies demonstrate a lamentable comparison between expenditures for access to justice in the United States and other countries, pointing out that one would expect that in a purely adversarial system, financial investment would be proportionally higher than in systems that are premised on an inquisitorial style, where judges are active participants in the fact-finding mission.<sup>322</sup> The two largest sources of funding for legal services providers are the Legal Services Corporation<sup>323</sup> and money generated through the Interest on Lawyers Trust Accounts program (IOLTA).<sup>324</sup> Decreases in IOLTA coffers, due in part to a lack of the economic activity that generates the funds<sup>325</sup> and

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318. Earl Johnson, Jr., *Equality Before the Law and the Social Contract: When Will the United States Finally Guarantee Its People the Equality Before the Law the Social Contract Demands?*, 37 FORDHAM URB. L.J. 157, 215 (2010) (citation omitted); *see also* Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691, 691 (2006) (“A society based on the rule of law fails in one of its central premises if substantial parts of the population lack access to law enforcement institutions.”).

319. Robinson, *supra* note 316, at 156.

320. DOCUMENTING THE JUSTICE GAP, *supra* note 316, at 19.

321. Johnson, *supra* note 318, at 210-11.

322. *See id.* at 200; *see also* Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 979 (2009) (suggesting that certain aspects of civil law systems, in which judges play an inquisitorial role, may be suitably adopted by our system to advance access to justice).

323. Helaine M. Barnett, *Justice for All: Are We Fulfilling the Pledge?*, 41 IDAHO L. REV. 403, 409-10 (2005).

324. *What Is IOLTA?*, IOLTA.ORG, <http://www.iolta.org/grants/> (last visited June 11, 2011).

325. *See* Luz E. Herrera, *Rethinking Private Attorney Involvement Through a “Low Bono” Lens*, 43 LOY. L.A. L. REV. 1, 29 (2009) (“Moreover, funds earned through the Interest on Lawyers Trust Accounts (IOLTA) program have reached dismal lows with the lowering of interest rates.”);



compounded by dramatic state budget cuts, have further eroded the ability of legal services offices to provide representation to those in need.<sup>326</sup>

The current statistics evince an unprecedented crisis, and law schools, as the point of entry into the legal profession, have an obligation to inculcate in students a sense of responsibility to respond.<sup>327</sup> This commitment must be more than just hollow admonitions or aspirational exhortations to undertake this work as a worthy charity; it must be a fundamental component of their professional identity. By raising the importance of these ideals to the very foundation of our system, professors can work to dislodge complacency. Justice for all should not be a contested, controversial, or illusory concept.<sup>328</sup> Since lawyers have constructed a state-sanctioned system that confers a complete monopoly in the provision of legal services, law schools must instill the ethos that this privilege is accompanied by the solemn obligation to ensure that equal justice is a reality. This extends beyond mere access to the courtroom door to the obligation to work toward eliminating the barriers to structural equality.<sup>329</sup> Raising these issues in class

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Erik Eckholm, *Interest Rate Drop Has Dire Results for Legal Aid*, N.Y. TIMES, Jan. 19, 2009, at A12 (“[A]s the federal funds rate declined along with the number of real estate transactions, the payout has fallen precipitously.”).

326. Kathleen A. McKee, *The Impact of the Current Economy on Access to Justice*, 62 ME. L. REV. 613, 627 (2010) (“In light of the reduction in IOLTA funding, some legal aid programs face program budget cuts of up to 50 percent. Projected shortfalls in 2008 IOLTA revenue ranged from a low of \$2.3 million in Illinois to a high of \$15 million in New Jersey and Massachusetts. In practical terms, the president of Legal Services of New Jersey estimated that ‘for every million dollars New Jersey loses in money for legal services, it must lay off 20 staffers and serve 900 fewer clients.’” (internal citations omitted)); Neeta Pal, *The Economy and Civil Legal Services*, BRENNAN CTR. FOR JUSTICE, Apr. 22, 2011, [http://www.brennancenter.org/content/resource/the\\_economy\\_and\\_civil\\_legal\\_services1/](http://www.brennancenter.org/content/resource/the_economy_and_civil_legal_services1/) (“IOLTA revenue has plummeted due to declining interest rates.”).

327. The current state of affairs surfaces discussions about whether pro bono work should be mandatory for lawyers, who enjoy an absolute, state-sanctioned monopoly on the provision of legal services and arguably should be subjected to a heightened duty to advance access to justice. While relevant and important, that debate is beyond the scope of this Article.

328. Rhode, *supra* note 55, at 1021 (“[M]ost legal academics have done little to educate themselves, the profession, or the public about access to justice and the strategies necessary to increase it. . . . [W]e are not shouting from rooftops about unmet needs; we are not, for the most part, even murmuring in classrooms or muttering in law reviews.”). See DEBORAH L. RHODE, ACCESS TO JUSTICE 191-93 (2004), for a discussion about the responsibility of legal educators to instill professional values. “Legal education plays an important role in socializing the next generation of lawyers, judges, and public policymakers. As gatekeepers to the profession, law schools have a unique opportunity and obligation to make access to justice a more central social priority.” *Id.* at 193; see also Barnhizer, *supra* note 287, at 337; Calmore, *supra* note 287, at 1169.

329. See EQUAL JUSTICE PROJECT, *supra* note 287, at 3 (“The Project eschewed the term ‘access to justice’ in its planning literature in the belief that access to the legal system, though critical to many when meaningful, did not capture the full range of legal inequality that affects people and communities . . .”).

should augment student awareness,<sup>330</sup> and it may serve to sustain a passion for justice that initially draws some idealistic students to the practice of law but becomes attenuated under the pressure and rigors of school and legal practice.<sup>331</sup>

Schools can inculcate a commitment to equal access to justice and professional obligation by nurturing these ideals in law school.<sup>332</sup> One way to do so is by investing in a vibrant pro bono culture within the school<sup>333</sup> under the guiding principle that “free legal work for clients who cannot afford legal services is a vivid enactment of the law’s professional identity.”<sup>334</sup> Law schools should demonstrate a tangible commitment to pro bono work not merely by empty encouragement, but by providing opportunities, an institutional framework, and administrative attention that communicates implicit values.<sup>335</sup> A powerful message from law schools and concrete actions that support those ideals can create a culture of service and pro bono work that endures after graduation.<sup>336</sup>

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330. Dwight Aarons, *A Nuts and Bolts Approach to Teaching for Social Change: A Blueprint and a Plan of Action*, 76 TENN. L. REV. 405, 407 (2009) (“Raising social justice issues in the law school classroom should raise the social consciousness of all students.”).

331. *Id.* (noting that justice-related themes “may encourage students who came to law school intent on serving the public interest not only to retain their idealism and values, but to consider how they might put that idealism and those values into action”).

332. See Tigran W. Eldred & Thomas Schoenherr, *The Lawyer’s Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 400 (1994) (asserting that “‘law schools . . . constitute the greatest opportunity’ to instill an ethic of public service in young lawyers” (citation omitted)); Kuehn, *supra* note 290, at 293 (“[T]he issue is not whether law schools should seek to instill the legal profession’s public service norms, but rather, how this should best be done.”); EQUAL JUSTICE PROJECT, *supra* note 287, at 3 (“[L]aw schools have a vital role to play in explicating the nature of the problems and generating approaches for their resolution.”).

333. *E.g.*, Leslie Boyle, *Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 GEO. J. LEGAL ETHICS 415, 415-16 (2007); Steven B. Scudder, *Justice Will Prevail (with a Little Help from Her Friends): Pro Bono in Utah*, 2006 UTAH L. REV. 1081, 1082 (analyzing the pro bono culture in Utah, “explor[ing] strategies for changing the culture of pro bono nationally,” and asserting that America’s law schools can play a vital role in establishing and expanding pro bono services).

334. CARNEGIE REPORT, *supra* note 2, at 138.

335. See Engler, *supra* note 315, at 493 (addressing the importance of instilling a commitment to provide legal services to the poor and advocating for more coherence in law school programs aimed at equal justice).

336. *E.g.*, DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS (2005); see also Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2431 (1999) (suggesting that thoughtful strategies employed by law schools to involve law students in pro bono projects while in the developmental stage of their professional identity can significantly affect their commitment to pro bono activities); Larry R. Spain, *The Unfinished Agenda for Law Schools in Nurturing a Commitment to Pro Bono Legal Services by Law Students*, 72 UMKC L. REV. 477, 492 (2003) (asserting that “[a]ccess to justice and a commitment to pro bono service should become an institutional priority at every law school,” and to that end, every law school should develop an

One study demonstrated that a school's success in inculcating an ethos of pro bono work depends in large part on "how supportive the school's overall culture is of such experience and how well integrated it is into the students' developing understanding of what it is to be a lawyer."<sup>337</sup> Admittedly, resistance to these ideals may emanate from those who see a license to practice law as a ticket to wealth and status. Other options include collaborative partnerships between law schools, private firms, and non-profit organizations<sup>338</sup> and other alliances that serve the dual goals of conveying an institutional commitment to pro bono work and providing much-needed services to the community.<sup>339</sup> These initiatives can also enhance opportunities for mentoring, networking, and practical lawyering.

Pro bono efforts and experiential learning opportunities can be supplemented by incorporating justice work into existing courses. For example, in a class that includes a research and writing component, professors can encourage students to select topics that serve the dual goals of inspiring and engaging them individually while providing much needed labor for under-resourced agencies, instead of having students focus on topics that represent purely academic inquiries.<sup>340</sup> Structures already exist for non-profits to identify areas of research that would be useful to them. Students could also be assigned other projects with practical utility.<sup>341</sup> Debates as to whether participation in pro bono efforts should be mandatory in law school are beyond the scope of this Article, but it is worth heeding the caution that obligatory programs may ultimately emphasize the acquisition of skills over justice-related goals.<sup>342</sup>

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agenda for the provision of pro bono services).

337. CARNEGIE REPORT, *supra* note 2, at 139.

338. See generally Laurie Barron et al., *Don't Do It Alone: A Community-Based, Collaborative Approach to Pro Bono*, 23 GEO. J. LEGAL ETHICS 323 (2010) (affirming the need for pro bono services and suggesting a tripartite model—involving faculty and students, law firms, and community organizations—that responds to the need for legal services for low income clients and communities).

339. E.g., Dale Margolin et al., *Empowerment, Innovation, and Service: Law School Programs Provide Access to Justice and Instill a Commitment to Serve*, 48 FAM. CT. REV. 672, 672 (2010) (describing five pro bono programs "where law students, under the supervision of [faculty] . . . or community professionals, provide assistance or legal representation to underserved . . . populations").

340. For example, the American Constitution Society compiles a list of public interest research topics. *About ResearchLink*, AM. CONST. SOC'Y L. & POL'Y, <http://researchlink.acslaw.org/> (last visited June 11, 2011) ("ACS ResearchLink collects legal research topics submitted by practitioners for law students to explore in faculty-supervised writing projects for academic credit."). Additional outreach could generate an expanded list of topics.

341. For example, at Western New England College, Judge Dina Fein teaches a course entitled "Access to Justice." Students in that course select projects intended to assist local organizations and can include developing pro se training manuals, websites, policy suggestions, and other work with practical applications.

342. But see Granfield, *supra* note 287, at 1404-05 ("[I]n mandatory [pro bono] programs, the emphasis on skills training may usurp the question of professional commitment to serving

The legitimacy of the entire system is undermined when so few of the nation's poor and middle class cannot proceed past the courthouse steps,<sup>343</sup> a reality that communicates an intolerable indifference to those at the bottom of the socioeconomic ladder.<sup>344</sup> The harsh economic realities of practice can throw cold water on idealism and a commitment to advance access to justice, and the economic downturn makes advocacy for increased funding for legal services a seemingly futile goal. To raise awareness of this reality, lawyers and law professors must disabuse the public of the notion that our system, as currently structured, comes even remotely close to satisfying our venerated ideal of equal access to the law, to justice, and to lawyers.

*K. Challenge the Primacy of U.S. News*<sup>345</sup>

The *U.S. News and World Report* ranking system exerts a hegemonic and ultimately destructive influence in law school culture, indirectly dictating institutional responses at every level of administration, from admission to bar

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underrepresented populations. . . . One potential drawback of mandatory pro bono programs and their tendency to focus on skill-based benefits might be that they unintentionally dilute the meaning and purpose of pro bono.”).

343. A push for a “Civil Gideon” has been recently reinvigorated. *See, e.g.*, Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 1988 (1999) (advocating pro se court reform); Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 *TEMP. POL. & CIV. RTS. L. REV.* 697, 697 (2006) (advocating for a Civil Gideon). Even if such a system were implemented, we still must safeguard against failures within the system—ineffective assistance of counsel, an unlevel playing field, overworked attorneys, bias, and other impediments to equal access to justice.

344. *But see* Rhode, *supra* note 55, at 1016 (noting that many people labor under a misperception about the availability to legal counsel to the poor: “Four-fifths of Americans believe, incorrectly, that the poor are entitled to counsel in civil cases; only a third think that low-income individuals would have difficulty finding legal assistance, a perception wildly out of touch with reality.”).

345. *See* Alfred L. Brophy, *The Emerging Importance of Law Review Rankings for Law School Rankings, 2003-2007*, 78 *U. COLO. L. REV.* 35, 37 (2007) (“There is increasing evidence that law schools have bent their practices of admission, expenditures, hiring, and even their modes of reporting to the ABA in response to the *U.S. News* rankings.”); Francine Cullari, *Law School Rankings Fail to Account for All Factors*, 81 *MICH. B.J.* 52, 52 (2002) (pointing out that “applicants, administration, trustees to a certain extent, faculty, and employers pay attention to the [*U.S. News*] rankings.”); MICHAEL SAUDER & WENDY ESPELAND, *LAW SCH. ADMISSION COUNCIL, FEAR OF FALLING: THE EFFECTS OF U.S. NEWS & WORLD REPORT RANKINGS ON U.S. LAW SCHOOLS* 1 (2007), available at <http://www.lsac.org/LSACResources/Research/GR/GR-07-02.asp> (“One general effect of the . . . [*U.S. News*] rankings on law schools is that it has created pressure on law school administrators to redistribute resources in ways that maximize their scores on the criteria used by . . . [*U.S. News*] to create the rankings, even if they are skeptical that this is a productive use of these resources.”).

passage to employment statistics.<sup>346</sup> The literature analyzing the impact of *U.S. News* is predominantly negative. Scathing criticism for the damage caused by the *U.S. News* ranking system is multifaceted. Commentators argue, among other things, that the system decreases incentives for innovation,<sup>347</sup> measures the wrong things,<sup>348</sup> has a deleterious impact on admissions decisions<sup>349</sup> and diversity,<sup>350</sup> is unreliable,<sup>351</sup> contributes to the escalation of law school costs,<sup>352</sup> is unrelated to

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346. See Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, at A1 (“Students entering law school have little way of knowing how tight a job market they might face. The only employment data that many prospective students see comes from school-promoted surveys that provide a far-from-complete portrait of graduate experiences.”). Reporting is not always constructive. See Michael Sauder & Wendy Nelson Espeland, *Strength in Numbers? The Advantages of Multiple Rankings*, 81 IND. L.J. 205, 211 (2006) (“Pressure to boost placement statistics has encouraged schools to broaden their definition of employment to include non-legal jobs and to invest heavily in tracking students who do not respond to their employment surveys.”); see also Kyle P. McEntee & Patrick J. Lynch, *A Way Forward: Improving Transparency in Employment Reporting at American Law Schools* (Apr. 8, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1528862> (describing efforts to launch a website aimed at providing unvarnished employment statistics about law school graduates).

347. See Rachel F. Moran, *Of Rankings and Regulation: Are the U.S. News & World Report Rankings Really a Subversive Force in Legal Education?*, 81 IND. L.J. 383, 383 (2006) (noting that “norms of uniformity and standardization have dominated the world of legal education, substantially limiting law schools’ ability to compete against one another” and that accordingly, law schools are reluctant to innovate lest they risk their accreditation, reputation, and future).

348. See, e.g., Brian Leiter, *How to Rank Law Schools*, 81 IND. L.J. 47, 52 (2006) (“We should produce more rankings that unleash academic talent and ambition, not rankings that reward decanal connivance at manipulating ranking schemes cooked up by journalists.”).

349. See Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admission Process of Law Schools*, 40 LAW & SOC’Y REV. 105, 105 (2006) (finding that the *U.S. News & World Report* rankings “have significant [negative] effects on both the decisions of prospective students and the decisions schools make in the admissions process”).

350. Wendy Espeland & Michael Sauder, *Rankings and Diversity*, 18 S. CAL. REV. L. & SOC. JUST. 587, 589 (2009) (highlighting “concerns about the impact of rankings on diversity, and rais[ing] questions about how to think about professional diversity”); Laura Rothstein, *The LSAT, U.S. News & World Report, and Minority Admissions: Special Challenges and Special Opportunities for Law School Deans*, 80 ST. JOHN’S L. REV. 257, 258 (2006) (arguing that the *U.S. News* “purported measure of quality” ignores the importance of diversity).

351. See generally Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493 (2007) (demonstrating the unreliability of *U.S. News* rankings of law schools through a comprehensive analysis).

352. Emily A. Spieler, *Making Legal Education More Practical*, NAT’L L.J., Feb. 22, 2010, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202443868634&slreturn=1&hbxlogin=1> (“A recent U.S. Government Accountability Office report indicates that rising tuition levels are, at least in part, a reflection of law schools’ response to the ‘rankings game.’”) (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-20, HIGHER EDUCATION: ISSUES RELATED

the quality of education provided by the institution,<sup>353</sup> and is not individualized for the needs of each student and offerings of a particular school.<sup>354</sup> Perhaps most damning, the dominance of the ranking system creates immense pressure, and “schools frequently manipulate the rankings by reporting false data.”<sup>355</sup>

The ABA’s Section of Legal Education and Admissions to the Bar’s report on the *U.S. News and World Report* rankings examined the impact of the ranking system and outlined three primary concerns.<sup>356</sup> Citing a U.S. Government Accountability Office report, the ABA’s report concluded that because the ranking system considers per pupil expenditure, schools that endeavored to keep costs down would face the perverse result of faring worse in the ranking than those who made no effort to contain costs.<sup>357</sup> As a result, the ranking system

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TO LAW SCHOOL COST AND ACCESS (2009)).

353. See M.H. Sam Jacobson, *The Curse of Tradition in the Law School Classroom: What Casebook Professors Can Learn from Those Professors Who Teach Legal Writing*, 61 MERCER L. REV. 899, 903 (2010) (“The *U.S. News & World Report* rankings are the tail that wags the dog. The rankings are based on statistical measures that have little to do with the quality of the education, yet they are widely used by prospective students and faculty, as well as prospective and existing donors and employers, for that very purpose”).

354. See Joanna Grossman, *U.S. News & World Report’s 2005 Law School Rankings: Why They May Not Be Trustworthy, and How the Alternative Ranking Systems Compare*, FINDLAW (Apr. 6, 2004), <http://writ.news.findlaw.com/grossman/20040406.html> (asserting that legal education has fallen hostage to the *U.S. News* rankings and students would be better served by “more subjective assessment of the fit between a student’s needs and a school’s offerings”).

355. Thies, *supra* note 51, at 617. Instead of obfuscating the real figures, schools should provide useful and transparent information on short-term and long-term job prospects. Thies recommends that the ABA “require law schools to provide more information to prospective students about the career prospects of their graduates.” *Id.* at 599. Also, there should be methods to safeguard against suspicious statistics or at least illuminate the methodology. For example, schools have been using post-graduate programs to elevate employment statistics. In response, schools argue that if everyone else is employing sketchy reporting methodologies, they will be disadvantaged by more candid reporting. This phenomenon reinforces the need for more transparency in the process. Students would also benefit from some sort of pre-counseling to see if law school is the right fit for them. Some students may end up at law school by default, because they were not interested in business or medicine, and they may not feel a genuine calling to the profession. Giving students full information would help them make informed decisions. Also, a recent study concluded that grades, rather than the elite status of the school, are a better predictor of salary. See Ashby Jones, *New Study: Forget the Rankings, Just Bring Home Straight A’s*, WALL ST. J. L. BLOG (July 30, 2010, 2:24 PM EST), <http://blogs.wsj.com/law/2010/07/30/new-study-forget-the-rankings-just-bring-home-straight-as/>.

356. MARTHA DAUGHTREY ET AL., AM. BAR ASS’N, REPORT OF THE SPECIAL COMMITTEE ON THE *U.S. NEWS AND WORLD REPORT* RANKINGS 3-4 (2010) [hereinafter ABA REPORT], available at <http://amlawdaily.typepad.com/files/f.usnewsfinal-report.pdf>.

357. *Id.* at 3 (citing U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 352). On an anecdotal note, one school worried that if it charged less in tuition than its competitors, students would perceive that the school offered a less valuable commodity, putting it at a competitive disadvantage.

encourages tuition increases.<sup>358</sup> Second, the report concluded that the rankings system incentivizes admissions offices to gear financial aid toward students with high LSATs and GPAs rather than students with greater financial need, requiring the neediest students to borrow more money.<sup>359</sup> Finally, the report concluded that the *U.S. News* rankings have an adverse impact on the goal of increasing diversity in law school, as “the overriding importance of the *U.S. News* metric has tended to drive other measures of quality and mission to be down-played, and that racial diversity has been one of the casualties.”<sup>360</sup> The report discussed various efforts to minimize the deleterious effect of the ranking system—including attempts to convince *U.S. News* to modify its system, proposals to educate the public about the system’s shortcomings and thereby decrease its power, and initiatives to coalesce resistance from law schools in cooperating with *U.S. News*.<sup>361</sup> With little results accruing from these efforts, the report concluded that the system is unlikely to undergo significant transformation, yet it did not want to discourage a continued campaign advocating for a system designed to honor the differences in law school missions and discourage the disincentives to innovation or resistance to the hegemony of considered factors.<sup>362</sup>

Not everyone is critical of the rankings system. Some analysts, while conceding the system’s shortcomings, argue that the tool has some utility for students<sup>363</sup> and that the rankings match students with employers.<sup>364</sup> Further, there may be some benefits, such as requiring schools to report pro bono efforts. Various proposals suggest alternatives designed to redress the pitfalls of the *U.S. News* methodology,<sup>365</sup> such as a proposal for a two-tiered ranking system<sup>366</sup> and

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358. “[T]he move to a more hands-on, resource-intensive approach to legal education and competition among schools for higher rankings appear to be the main factors driving the cost of law school.” U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 352, at 2.

359. As Paula Lustbader points out, reliance on the LSAT perpetuates distributive injustice, since students with fewer economic resources are less likely to take a LSAT preparation course, with a corresponding decrease in chances for admission and merit based financial aid. Lustbader, *supra* note 269, at 617.

360. ABA REPORT, *supra* note 335, at 3-4.

361. *Id.* at 4.

362. *Id.*

363. See, e.g., Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 407-08 (1998). Professor Korobkin notes that students read and value rankings because they know that attending a highly-ranked school signals their quality to desirable employers, who also study the rankings in order to interpret these indicators. *Id.* at 407-09. This coordination function is served whether or not the rankings accurately measure the quality of law schools, however defined. *Id.* at 410.

364. *Id.* at 409-10.

365. See, e.g., Jon M. Garon, *Take Back the Night: Why an Association of Regional Law Schools Will Return Core Values to Legal Education and Provide an Alternative to Tiered Rankings*, 38 U. TOL. L. REV. 517 (2007) (suggesting regional alliances aimed at combating the dominance of *U.S. News*); Andrew P. Morriss & William D. Henderson, *Measuring Outcomes: Post-Graduation Measures of Success in the U.S. News & World Report Law School Rankings*, 83

the use of SSRN as a more accurate indicator of scholarly impact, but none are likely to pose any real challenge to its dominance any time soon.<sup>367</sup>

To limit the primacy of and damage inflicted by the ranking system, some commentators have exhorted law schools to engage in collective and concerted action to refuse to participate, recourse that does not seem to have gained much traction. Other options include the development of an alternative ranking mechanism that gives students transparent and useful information about law schools that is relevant to their professional goals, at least as much as they are able to identify before they start school.<sup>368</sup> Such a system might actually promote innovation and differentiation among law schools that currently believe they have no choice but to strive to emulate the model of the elite law schools against which they will be measured.<sup>369</sup> Alternatively, survey instruments need to be modified, perhaps through independent verification, to prevent schools from manipulating data.<sup>370</sup> In addition to the foregoing advantages of systemic reform, the rejection

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IND. L.J. 791 (2008) (arguing that law schools or governing organizations should compile meaningful information for prospective students); Patrick T. O'Day & George D. Kuh, *Assessing What Matters in Law School: The Law School Survey of Student Engagement*, 81 IND. L.J. 401 (2006) (arguing that indicia of student engagement are a better measure of the value of a law school program than *U.S. News*); Richard A. Posner, *Law School Rankings*, 81 IND. L.J. 13 (2006) (comparing *U.S. News* ranking with alternative methodologies); Cass R. Sunstein, *Ranking Law Schools: A Market Test?*, 81 IND. L.J. 25 (2006) (arguing for a market test relying on students' choices); David A. Thomas, *The Law School Rankings Are Harmful Deceptions: A Response to Those Who Praise the Rankings and Suggestions for a Better Approach to Evaluating Law Schools*, 40 HOUS. L. REV. 419 (2003) (examining the flaws of the ranking systems).

366. See generally Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 IND. L.J. 83, 95 (2006) (identifying the disadvantages of *U.S. News* and exploring advantages and disadvantages of the Social Science Research Network (SSRN) measures and proposing using them to supplement existing measures of law schools' performance); Laurel Terry, *Taking Kronman and Glendon One Step Further: In Celebration of "Professional Schools,"* 100 DICK. L. REV. 647, 667-75 (1996) (arguing that legal institutions should be ranked on two different models—research institutions and teaching institutions).

367. But see Sam Kamin, *How the Blogs Saved Law School: Why a Diversity of Voices Will Undermine the U.S. News & World Report Rankings*, 81 IND. L.J. 375, 381 (2006) (noting that information is increasingly available to prospective students through the Internet).

368. This will presumably be a fluid dynamic once they are immersed in school.

369. However, the elite law schools can sometimes take risks that the lower schools cannot—for example, not providing class rank, with little risk that employers will decline to interview students who have not been pre-sorted by grades (although there are still ways to distinguish oneself with the standard indicators of law school achievement, such as participation in law reviews and stellar faculty recommendations).

370. Andrew Morriss and William Henderson propose the following:

Law schools, acting through their accrediting agency, the ABA, could authorize NALP to compile and publish school-level salary and employment information. Providing information on the distribution of salaries of recent graduates would, for example, allow students a realistic method of comparing their expected debt levels to their ability to pay



of *U.S. News* as a driving force likely would have a positive impact on diversity in law schools.<sup>371</sup>

*L. Revisit the Elevation of Scholarship and Broaden Its Focus/Reward*<sup>372</sup>

Theoretically, law school academics are expected to excel in three areas—teaching, scholarship, and service. In reality, scholarly productivity is the coin of the realm, and within the “publish or perish culture,” at least until tenure, teaching is a distant second at many institutions.<sup>373</sup> “[M]any American law schools continue to privilege theory over practice in teaching, scholarship, and institutional mission.”<sup>374</sup> While many scholars aver that engaging in scholarly inquiry and writing inures to the benefit of students, studies are more equivocal about a clear and demonstrable link between scholarship and the quality of teaching.<sup>375</sup> Legal scholars relish the time to contemplate legal issues and argue

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off student loans after graduation. Salaries have the potential to exert a large anchoring effect on law student expectations; furthermore, average salaries can be substantially affected by a small fraction of students obtaining lucrative large firm employment. Therefore, a more useful and accurate summary of information would provide a detailed breakdown of employment type by law schools.

Morriss & Henderson, *supra* note 365, at 831 (internal citations omitted).

371. See Espeland & Sauder, *supra* note 350, at 589 (highlighting “the actual and potential consequences of the rankings for diversity at three levels of analysis: 1) the *individual* decision-making of law school applicants; 2) the *organizational* decision-making of law schools in the admissions practices that create classes and distribute students across schools and programs; 3) and the heterogeneity of law schools as kinds of organizations with distinctive missions and niches in the *field of legal education*” (emphases added)); Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309 (2006) (looking at the impact of rankings on achieving a diverse student body). For a discussion of the overreliance on LSAT scores and its impact on diversity, see *supra* Part III.E.

372. One recent analysis estimated that the cost of producing a law review article by a tenured professor at a highly ranked school is in the range of \$100,000 and noted that 43% of law review articles are never cited by other academics, judges, or practicing lawyers. Karen Sloan, *Legal Scholarship Carries a High Price Tag*, NAT’LL.J., Apr. 20, 2011, available at [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=120249088822&Legal\\_scholarship\\_carries\\_a\\_high\\_price\\_tag&slreturn=1&hbxlogin=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=120249088822&Legal_scholarship_carries_a_high_price_tag&slreturn=1&hbxlogin=1).

373. Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 56 n.281 (2002) (noting that “*U.S. News & World Report* [s] rankings . . . do not consider quality of teaching as a factor worth evaluation”); Schuwerk, *supra* note 231, at 763 (“Once they are hired, law professors are rewarded primarily for scholarship.”).

374. Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073, 1073 (2009).

375. See David L. Gregory, *The Assault on Scholarship*, 32 WM. & MARY L. REV. 993, 999 (1991) (“If professors do not engage in scholarship, they cannot fully foster critical analytical skills in their students because their own skills will atrophy. Squandering these intellectual professional resources is inexcusable.”); Korobkin, *supra* note 363, at 423-24; James Lindgren & Allison Nagelberg, *Are Scholars Better Teachers?*, 73 CHI.-KENT L. REV. 823, 827-29 (1998); Deborah

that their distance from the actual practice of law empowers them to engage in more objective critiques than would be possible while fully immersed in the enterprise of practicing law. In contrast, critics argue that academics ensconced in the ivory tower, wholly isolated from the vagaries of legal practice on the ground, have created a body of esoteric legal scholarship that is of little utility to the bench, the bar, and the students taught by these scholars.

Statistics support the claim that scholarship produced in the legal academy is cited with decreasing frequency by the judiciary, lending credence to the assertion that many scholars are essentially writing to the increasingly narrow and exclusive audience of other law school academics.<sup>376</sup> Moreover, the student-driven process of selecting law review articles and its attendant impact on a professor's career trajectory has been widely criticized.<sup>377</sup> One answer is to expand the definition of countable scholarship and de-privilege the identification of recondite topics as infinitely preferable to practical scholarship that is selected for its relevance to the world of practicing lawyers instead of the rarified ranks of academics.

Many suggestions aimed at addressing the inadequacy of legal education as currently conceptualized require intangible efforts and attention, unlike the quantifiable production of scholarly articles and presentation of these ideas to other academics. This is compounded by the lack of incentives for faculty to engage with students or adapt their pedagogy. Because efforts unrelated to scholarly output often go unnoticed and unrewarded, both financially and in terms of recognition, it sends a tacit message that these contributions to the life of the law school are devalued.<sup>378</sup> A reconstructed system that rewards both productive scholars and engaged and innovative teachers could redirect some energy into enhancing law school pedagogy over lengthening a list of scholarly output.<sup>379</sup> Tenure standards could be revised to incorporate the recognition of dedication and service to the law school. Another option is to lobby the omnipotent *U.S. News* to include in its indicia the quality and quantity of faculty contributions to the life of the law school, even though they may be more difficult to objectively

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Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 807 (1998); Fred R. Shapiro, *They Published, Not Perished, but Were They Good Teachers?*, 73 CHI.-KENT L. REV. 835, 840 (1998).

376. See generally David Hricik & Victoria S. Salzmann, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761 (2005).

377. Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results from a National Study*, 71 ALB. L. REV. 565, 584 (2008) (noting "that editors use author credentials extensively to determine which articles to publish").

378. See Newton, *supra* note 41, at 136.

379. This will be a hard sell for institutions when a large portion of the *U.S. News* reporting system is reputational and presumably based in large part on perceived scholarly quality. However, as discussed throughout the Article, the entire system must be reformed, given the interconnection between the component parts.

assess.<sup>380</sup>

*M. Equalize Status of Clinical, LRW, and Tenure Track Faculty*

The demand for expanded instruction in practical skills will be vindicated when all faculty members share equal status, salary, and voting rights in hiring, promotion, and tenure, as well as full participation in all curricular and institutional decisions.<sup>381</sup> Some schools have equalized and integrated their faculties, but in many schools, the balkanization of faculty continues to engender a destructive dynamic within the academy, and deep divisions persist among doctrinal, clinical, and LRW faculty. It is easy to retreat behind old narratives and perceived entrenched interests, wary and resentful of each other. The continued relegation of “skills faculty” to the margins of power within the academy stunts the conversation about educational reform since full participation in law school governance is critical.<sup>382</sup> This stratified structure sends an unmistakable message to students about what is valuable in the curriculum. Moreover, it is hard to measure the true cost of relegating clinical and writing faculty to a lower status, but demoralization certainly takes a toll. Eliminating the current hierarchy could instead transcend the divisions and redirect attention to the big picture that should be driving the conversation about law school reform—how to prepare our students to be competent, ethical, and satisfied lawyers. With a fully inclusive representation of legal educators at the table, faculty could work toward finding common ground. A collaborative reform effort wrought from multiple and occasionally tense and fragmented conversations might engender conditions in which the stakeholders truly listen, eschew defensiveness, contemplate, and perceive critiques about how educators function individually or institutionally not as personal attacks, but instead advanced in the spirit of truly open-minded dialogue in pursuit of meaningful reform. Skills and doctrinal faculty all bring important perspectives to this

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380. The temptation to fudge subjective data could threaten to render reporting completely unreliable, given the likelihood that law schools may feel they have no choice but to gin more objective data if they perceive that their competitors are engaging in similar dissembling. However, instruments such as student evaluations of faculty engagement may be possible. Some commentators have suggested that law schools should not strive to teach everything to all students, but instead to provide general training and then tailor curricula to particular focuses by creating niche law schools.

381. See Deborah Maranville et al., *Re-vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering* 50 (NYLS Clinical Research Inst., Working Paper No. 10/11-6), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1626568](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626568) (“At the same time, decisions made at the local level on status, job security, and voting rights in turn affect who will be in a position to participate in the national discussions on both personnel issues and curriculum.”).

382. It strikes me as ironic that doctrinal faculty do not question their ability to evaluate clinical teaching and scholarship despite the rich world of clinical pedagogy and a distinct body of clinical scholarship, yet in many institutions, clinical faculty cannot vote on hiring and retention of doctrinal faculty, an inequality that further skews and reinforces the power imbalance.

enterprise, but as currently structured, some voices are more equal than others.

Stiff resistance to equalization is due in part to ingrained assumptions about the relative value of the different work, and it is attributable in part to the relative expense of clinical education.<sup>383</sup> The intrinsic hierarchy of values can only be dismantled when faculty are forced to honestly examine deep-rooted assumptions, and it will be perhaps encouraged by a review of legal education. One response to the cost is reflected in the current threats to the hard-fought victory giving clinical faculty security of position,<sup>384</sup> which should serve as the miner's canary for doctrinal faculty. Schools should strenuously resist, mindful that the proposals may be genuinely motivated by an interest in ameliorating the financial burden that law students face, but the impact is far-reaching. If security of position provisions are repealed, whether with the demise of tenure for all professors or clinical faculty alone, the pressure will be to add experiential learning opportunities on the cheap, at the expense of the current educators in the trenches with the students.<sup>385</sup> Greater flexibility may be desirable, but concerns persist about consistent pedagogy and the long-term demoralization of clinical faculty who reside in those institutions.

Opposition to placing a premium on skills training includes: objections to the perceived costs; parrying from tenured faculty who are wedded to their research agendas; faculty resistance to learning new teaching methodologies when they have long ago mastered the old ones; disinterest in the labor-intensive demands of skills teaching; a lack of support for, or even overt hostility to, focusing on skills because they are derided as too pedestrian; the difficulty of developing assessment instruments designed to measure competencies that are not tested by standard examinations; pressure from *U.S. News* to attend to concrete inputs that are more readily and objectively measured; and the drive to increase institutional visibility and prestige through scholarly productivity.<sup>386</sup> Schools have enjoyed some increased funding for skills training, but this increase is typically accompanied by a parallel increase for research as well, which fails to address the underlying disparities or offset concerns about disproportionate resource allocation.<sup>387</sup>

#### *N. Respond to the Changing Nature of Practice*

Law schools are educating lawyers who will hone their skills in a world that may bear little resemblance to the one in which many faculty cut their teeth as practitioners, if they practiced at all. That our system of education has hardly

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383. *But see* Chavkin, *supra* note 293, at 13-14 (arguing that clinical education is not as expensive as is widely believed, particularly when compared to the relative cost of small seminars).

384. AM. BAR ASS'N, *supra* note 109, at 32 ("A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure.").

385. This discussion of security of position provisions is not intended to argue against tools for ensuring ongoing post-tenure productivity, but to raise concern about academic freedom and parity among faculty.

386. *See* Thies, *supra* note 51, at 612.

387. *Id.* at 612-13.

evolved to mirror the changes in practice over the past century is telling. It is incumbent on schools to carefully consider how legal education ought to be modified to reflect the needs of our students and a more contemporary legal marketplace.

Of particular relevance to the changing face of law school is the “death of big law.”<sup>388</sup> Law schools were historically driven in part to produce associates whose labor enriches law firms. Under the “big law” model, law firm partners generate significant profits by leveraging the labor of associates,<sup>389</sup> driving up costs for the consumers of high-price legal services. Because the tasks assigned to associates typically did not require sophisticated legal skills, law schools did not experience pressure to graduate students with a wide range of lawyering skills,<sup>390</sup> and “[l]aw schools shaped their curricula to respond to the needs of the corporate practice of large law firms.”<sup>391</sup> Changing times and the economic downturn have produced sophisticated and thrifty clients who are no longer willing to subsidize the legal training of associates<sup>392</sup> and who impose pressure for new associates to generate money in a way that adds value for the clients, not the firm partners.<sup>393</sup> As a result, some analysts contend that employers will prefer law school graduates who possess a range of practical skills.<sup>394</sup> The reconstructed model in big law may trickle down to other employers, who will follow suit in demanding practical skills, given the high price of training lawyers in-house. This trend may exert additional pressure on law schools to focus on the provision of skills training.

Another area that must be considered is generational learning preferences.<sup>395</sup> Millennials, the generational group from which the vast majority of current law students are drawn, have grown up in a world saturated with almost unimaginable and ever-advancing technological innovation. As a result, their style of learning and engagement has developed differently than those who came of age in a different era.<sup>396</sup> Legal educators must resist the temptation to duck their heads in

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388. Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 813-14 (“Law schools will have to find education models that are more cost-effective and that address employer demands in the new market for law graduates.”).

389. Thies, *supra* note 51, at 600.

390. *Id.* at 602.

391. MACCRATE REPORT, *supra* note 1, at 87.

392. Burk & McGowan, *supra* note 126, at 78 (“As increasing numbers of sophisticated clients refuse to pay high rates for inexperienced lawyers, the debate about new lawyers’ practical preparation and who should be providing it has gotten louder and more pointed, though no clearer.”).

393. See Lat, *supra* note 125 (“Clients are balking at paying for junior associates, which raises a question: If clients will no longer pay for the training of junior associates, who will?”); see generally Thies, *supra* note 51 (outlining the reasons the traditional structure of law firms is not economically sustainable).

394. See Thies, *supra* note 51, at 600-02.

395. See, e.g., Campbell, *supra* note 100, at 282-83.

396. See Susan K. McClellan, *Externships for Millennial Generation Law Students: Bridging the Generation Gap*, 15 CLINICAL L. REV. 255, 255 (2009); see also Leslie Larkin Cooney, *Giving*

the sand when it is challenging to keep pace with technological advancements and force themselves to adapt to student learning styles and the modernization of legal practice (e.g., electronic discovery, technology in the courtroom, depositions conducted remotely, and confidentiality issues associated with the use of this technology).

In an increasingly globalized world, schools must adapt their curriculum, pedagogy, and worldview to incorporate this reality. Strategies include the increased integration of issues related to the internationalization of law practice, the importance of providing instruction on cultural competence,<sup>397</sup> and the installation of awareness of the legal, economic, cultural, and political world beyond our borders. Even if schools do not expect the graduates of individual institutions to acquire jobs with obvious international connections, the influence of increased global interconnectedness will inevitably seep into almost all areas of practice.<sup>398</sup>

As professionals, law professors must address the widespread dissatisfaction among the public about the hostile way law is practiced, including the incalculable costs to perceptions of justice and fair play engendered by the current system. The concept that all disputes are litigable and all injuries compensable fuels a caustic cycle and often serves to perpetuate harm rather than foster the peaceable and enduring resolution of disputes. Introducing students to alternative dispute resolution and other problem-solving competencies early and often is critical before students have fully internalized the message sent throughout the first year—that conflicts should be resolved in zero-sum game litigation posture. Faculty must counter the first year curriculum's

overwhelming message . . . that real law and real lawyers maintain the status quo by resolving disputes between private parties. This message is built into the very fabric of the torts, contracts, property, and civil procedure courses, as they were designed by Langdell and his immediate successors, and as they continue to be taught at the present time.<sup>399</sup>

The students' educational experiences should fully embrace and incorporate exposure to the expanding range of alternative perspectives on law practice,<sup>400</sup>

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*Millennials a Leg-Up: How to Avoid the "If I Knew Then What I Know Now" Syndrome*, 96 KY. L.J. 505, 505 (2008) ("Millennial students are those born after 1981 and they are quite different from the Gen X students with whom legal educators are familiar.").

397. See Arturo J. Carrillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527, 586 (2004) ("[M]ore law schools are realizing that the clinical training of transnational lawyers is an essential component of legal education in the age of globalization.").

398. See, e.g., Lauren Carasik, *"Think Glocal, Act Glocal": The Praxis of Social Justice Lawyering in the Global Era*, 15 CLINICAL L. REV. 55 (2008).

399. Edward Rubin, *Curricular Stress*, 60 J. LEGAL EDUC. 110, 111 (2010).

400. Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429, 433 (2005).

including multidisciplinary problem solving,<sup>401</sup> holistic lawyering,<sup>402</sup> collaborative lawyering,<sup>403</sup> therapeutic jurisprudence,<sup>404</sup> creative problem solving,<sup>405</sup> preventive law,<sup>406</sup> transformative mediation,<sup>407</sup> and restorative justice.<sup>408</sup>

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401. See V. Pualani Enos & Lois H. Kanter, *Who's Listening? Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting*, 9 CLINICAL L. REV. 83, 84 (2002) (arguing that “[c]lients dealing with complex and multidimensional problems need service providers who approach problem-solving in a way that is client-centered, client-empowering, and incorporates multidisciplinary and community-based solutions and resources”).

402. Holistic lawyering is defined as

“[a]n orientation toward law practice that shuns the rancor and bloodletting of litigation whenever possible; seeks to identify the roots of conflict without assigning blame; encourages clients to accept responsibility for their problems and to recognize their opponents’ humanity; and sees in every conflict an opportunity for both client and lawyer to let go of judgment, anger, and bias and to grow as human beings.”

Ingrid N. Tollefson, *Enlightened Advocacy: A Philosophical Shift with a Public Policy Impact*, 25 HAMLINE J. PUB. L. & POL’Y 481, 504-05 (2004) (citation omitted).

403. Collaborative lawyering is explained as follows:

The mission of collaborative law is “[t]o promote the non-adversarial practice of law. To promote collaborative law, which resolves legal conflicts with cooperative, rather than confrontational, techniques, and in which lawyers do not litigate—thereby encouraging parties to reach agreements in a creative and respectful manner. To educate the public and the legal community about the process and value of collaborative law.”

Cohen, *supra* note 306, at 156 n.73 (citation omitted).

404. Therapeutic jurisprudence

“[c]oncentrates on the law’s impact on emotional life and psychological wellbeing. It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic and anti-therapeutic consequences. It does not suggest that therapeutic concerns are more important than other consequences or factors, but it does suggest that the law’s role as a therapeutic agent should be recognized and systematically studied.”

*Id.* (citation omitted).

405. The Center for Creative Problem Solving, which is based at California Western School of Law, “develops curriculum, research, and projects to educate students and lawyers in methods for preventing problems where possible, and creatively solving those problems that do exist.” *Center for Creative Problem Solving*, CAL. W. SCH. OF LAW, [http://www.cwsl.edu/main/default.asp?nav=creative\\_problem\\_solving.asp&body=creative\\_problem\\_solving/home.asp](http://www.cwsl.edu/main/default.asp?nav=creative_problem_solving.asp&body=creative_problem_solving/home.asp) (last visited June 11, 2011).

406. “The National Center for Preventive Law (NCPL) is dedicated to preventing legal risks from becoming legal problems.” *National Center for Preventive Law*, CAL. W. SCH. OF LAW., <http://www.preventivelawyer.org/main/default.asp> (last visited June 11, 2011). The NCPL is also based at California Western School of Law and provides materials and information to those interested in the theories and practice of preventive law. *Id.*

407. In the transformative view, conflict is more about interactions than violations or conflicts

### *O. Impediments*

1. *Faculty Resistance.*—Some faculty members react defensively to the admonition to make legal education more relevant. Discussing the importance of integrating practical skills or other creative curricular reforms to their teaching repertoire can leave professors feeling irrelevant and antiquated, fueling resistance to reorienting their teaching so far into their careers—that is, “[r]eluctance to support curricular reform may in fact reveal some discomfort with curricular modifications that may make certain faculty members feel a lack of confidence in their ability to take part in new, more modern visions of law teaching.”<sup>409</sup> Moreover, faculty “may resist change because they prefer to replicate the environment in which they achieved success.”<sup>410</sup> Those arguing for an overhaul of the system should be mindful of the reasons for resistance and frame their arguments with an understanding of factors which may undergird the opposition. Overt criticisms of faculty who have not practiced law may be counterproductive in encouraging them to innovate their teaching to include methods more often used by those who teach the skills. Instead, disparate groups of faculty can stop trading recriminations, share the best teaching methodologies, demystify the various techniques and goals, and recognize that law students must merge doctrinal insights with practical knowledge and skills. Somehow, faculty need to foster a belief that the participants are all operating in good faith to advance legal education and engender dialogue that rejects old, ossified assumptions. Faculty members who are disengaged with the current crisis are not likely to be reading law review articles on pedagogy and legal education. Those concerned with reform need to reach out to their colleagues and create space for these conversations to take place in a non-accusatory, constructive, and collegial way, such as faculty colloquia. These suggestions may sound hopelessly naïve. Let me be clear, however, that I prefer a process of civil discourse, but I do not suggest that those agitating for reform temper the substance of our critique. Admittedly, these conversations will be threatening to some whose gravitational pull toward tradition is powerful.<sup>411</sup>

2. *Financial Issues.*—Even if law school administrations and faculties embrace reforms, the thorny issue of fiscal pressure can dampen or extinguish even the best of intentions. Competition for law students may increase in the near

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of interest. See *Institute for the Study of Conflict Transformation*, HOFSTRA LAW, [http://law.hofstra.edu/academics/institutesandcenters/ISCT/isct\\_resources.html](http://law.hofstra.edu/academics/institutesandcenters/ISCT/isct_resources.html) (last visited June 11, 2011).

408. As Beth Cohen notes, other approaches include restorative justice, “[a] systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders, and communities caused or revealed by the criminal behavior.” Cohen, *supra* note 306, at 156 n.73 (citation omitted).

409. Toni M. Fine, *Reflections on U.S. Law Curricular Reform*, 10 GERMAN L.J. 717, 729-30 (2009).

410. Sonsteng et al., *supra* note 105, at 352.

411. A less nefarious cousin to refractory individual faculty is institutional inertia, which will only change when the affected constituencies persevere in challenging the status quo.



future. Assuming that undergraduate college applications peaked in the 2009 application cycle, four or six years down the road, law school applications will likely drop, perhaps precipitously. Compounding the demographic shifts are both the economic downturn and the publicity surrounding the questionable financial wisdom of attending law school. Some schools may be forced to shut their doors.<sup>412</sup> Although this may be appealing to prospective law students, fewer attorneys may exacerbate the inadequacy of legal resources for the poor and middle class. Moreover, because escalating pressures to prepare students to practice law through a reoriented focus on skills are often dismissed on account of fiscal constraints, any real dialogue about the mission of legal education is eclipsed by the bottom line.

Despite the barriers to forward progress, law school must evolve because legal practice has changed. In the face of opposition, some successful prior reform efforts have altered legal education in meaningful ways. For example, because of the vanishing trial, schools pay increased attention to alternative dispute resolution. The academy has absorbed other changes as well; critical pedagogies have contributed incalculably to our understanding of difference and the importance of developing cross-cultural competencies,<sup>413</sup> and the introduction of clinics into the law school curriculum (and their progress, albeit uneven, from the margins of the school to more established place) has been widely hailed as a critical advance. Schools have witnessed the introduction of more interdisciplinary approaches, and classes on interviewing, counseling, and negotiation are more readily available, although they are by no means ubiquitous. Some initiatives have prevailed over the initial resistance, but there is a long way to go. Reform may feel like a Sisyphean task, but doing nothing represents an abdication of our duty as legal educators.

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412. One possibility is that in this environment, some law schools will simply not be able to survive. The closure of some law schools would yield both positive and negative results. Closure would limit the number of graduates vying for the same jobs, perhaps making it easier for those who make the cut to secure employment, perhaps with an attendant salary increase associated with fewer candidates for jobs. In all likelihood, however, those denied entrance would come from the groups already underrepresented in law school, the bar, and the bench. Another downside is that fewer lawyers would be available to the public in an era when the poor and middle class have few legal resources at their disposal. Top law schools would not be at risk, so it would likely be independent law schools unconnected to a university capable of absorbing some of the financial burden that face closure. The losers would likely include schools that serve a predominantly local market and provide community-oriented lawyers. A further potential downside is that the decreased competition for students fostered by fewer slots might lessen the pressure on law schools to mold the education to student demands for relevancy of their education.

413. See Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education*, 13 AM. U. J. GENDER SOC. POL'Y & L. 161, 162 (2005); Kathryn M. Stanchi, *Step Away from the Case Book: A Call for Balance and Integration in Law School Pedagogy*, 43 HARV. C.R.-C.L. L. REV. 611, 612 (2008) (arguing that law school professors should "increase the number of courses that integrate doctrine, theory and skills so that students learn to use both doctrine and legal theory, including critical theory, in a practice context").

*P. The Gordian Knot*

The above suggestions are inextricably intertwined, sometimes obviously and at times more subtly. For example, the rising tuition and student debt cannot be remediated without considering the factors that make legal education so expensive and the emerging proposals to contain costs, a conversation that cannot take place outside the context of current efforts to implement potentially regressive regulatory reform, which in turn must be viewed in terms of their retrograde impact on the entire enterprise of legal education and the exacerbation of already significant structural inequities.<sup>414</sup> Access to justice cannot be advanced in isolation from institutional indifference to instilling a sense of professional commitment to public interest ideals. Further, it is related to efforts to increase diversity in law school and the attendant increase in lawyers committed to working in underrepresented communities that a diversified profession would bring—an effort that loops back again to crushing debt loads, which often foreclose the possibility of low-remuneration justice work. Student distress cannot be ameliorated without considering changes to our signature pedagogy, which must be evaluated for its efficacy in preparing students to practice law, especially when it is elevated over skills training and experiential learning, priorities that are representative of curricular and institutional policies that are influenced by the precarious status of skills faculty within the academy. The narrow and repetitive attention to sanitized, de-contextualized facts and analytical thinking is exacerbated by faculty reluctance to transmit ideals on issues of professionalism, ethics, and morals that are often obfuscated by the focus on value-neutral Socratic instruction. Grading methodologies both contribute to student distress and fail to provide meaningful and formative assessment, but they must be viewed in the context of bar preparation, itself a questionable goal given the test's inability to identify and measure the competencies necessary for lawyering. All of these factors are refracted through the prism of the *U.S. News* rankings, a singularly destructive tool when assessed in light of its impact on legal education. In essence, the seemingly disparate factors cannot be easily disaggregated, since they are entangled as part and parcel of the whole enterprise of legal education. Nothing short of a radical reorientation will remediate the complex set of factors that work synergistically to create the current crisis.<sup>415</sup>

Perhaps the biggest impediment to meaningful reform is the potentially insurmountable challenge of motivating academics to act against their own

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414. *See supra* Part I.E.

415. I reluctantly acknowledge that change may be incremental rather than radical, given the conservative nature of our institutions. That reality should not deter us from articulating the ideal reforms, because if we concede and internalize the futility of real change, the vision we embrace will already be compromised. We should delay pragmatic considerations for later. If we adopt even some of these suggestions, they may help to generate institutional change. Even small changes can create a meaningful and measurable difference for individual law students and their future clients.

perceived self-interest in maintaining the status quo. It is not my intent to assert a blanket indictment of law professors and their underlying intentions—they reflect in large part the institutions to which they belong. While I repeatedly and emphatically question our motivations and conclusions, I believe that some of the individual and institutional tendencies toward self-preservation are not conscious and deliberate, but rather uncritical. That said, we must challenge the blind adherence to the dogma of current legal pedagogy without demonizing those who subscribe to its tenets. The prevailing confidence in the fundamental wisdom of our current system must be evaluated by something other than the vigor of the beliefs underlying it. Although there is a difference in intent between actively obstructing change and passively hindering reform with inertia, the end result is the same. If we stand by and do nothing, we are complicit in this deteriorating system. If we just cobble together piecemeal reforms that cohere only in their unwillingness to challenge the status quo, meaningful reform will be effectively obstructed. I am not alone in feeling increasingly agitated about this enterprise and my role in it, and I would welcome an open, engaged, expansive, and inclusive conversation in which we genuinely step outside our personal and institutional interests to figure out what is best for the students,<sup>416</sup> the profession, and the society in which the law operates.<sup>417</sup>

#### CONCLUSION

Legal education is at a critical crossroads.<sup>418</sup> Most commentators, even those who argue that the time is ripe to transform legal education, are not sanguine about the prospects of meaningful change. Given legal education's history of successfully thwarting reforms, observers are justifiably cynical about generating any groundswell of support for reorienting our institutions. Admittedly, the barriers are enormous and perhaps insurmountable, especially if legal educators continue to resist engaging in unflinching introspection about our mission and methods. While this Article proposes sweeping changes that are likely to be dismissed as quixotic, we must make an effort to engender these conversations not just on a national level among the most vociferous interested parties, but also at the level of institutional discourse, and even through individual conversations in the hallways. Law professors can be impassioned, resolute, and outspoken, but they often fail to leaven their opinions with humility and introspection. We must question our own assumptions and open our minds to think charitably about the positions espoused by others instead of silencing or marginalizing dissenters.

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416. As one of the largest stakeholders in this enterprise, students should also be invited to participate in this dialogue.

417. I concede discomfort with threads of my discussion. Some ideas, proposed with the best intentions of reform aimed at the students, could easily be hijacked and backfire. For others, I merely identify something that needs to be examined and changed, without suggesting a particular solution, in part because the considerations are complex and the answers opaque.

418. For many schools, the current crisis will not represent an existential threat. For other schools, the risk is real, and those schools face a stark choice: they can either sit at the helm and navigate through necessary reforms, or they can focus on rearranging deck chairs.

We must articulate with brutal honesty the depth and breadth of the problems and acknowledge that our own self-interest colors our perceptions. We can resort to unproductive and antagonistic finger-pointing, demand incontrovertible empirical evidence and an appealing bottom line before we take reform seriously, and cling tenaciously to a tradition which serves us, but no longer serves our students. Alternatively, we can work diligently to overcome faculty resistance to venturing out beyond our comfort zones.

For those determined to widen the lens through which we view reform, it would be a shame if we ceded our demands for meaningful reform at the outset and settled out of the box for less contested change instead of mobilizing attention and resistance to the current crisis. Only after we are able to shake the foundation of legal education should we seek common ground to rebuild legal education from its roots. Consensus is a messy, frustrating, and at times alienating process, but the underlying principle suggests that the process builds alliances among former adversaries, opens minds, and ultimately yields a more sustainable result with broader buy-in from the diverse constituencies. Law professors, known to be a combative bunch, will never unanimously subscribe to a revamped, uniform pedagogy, however elegantly articulated, but refusal to participate in good faith makes those resisting change unwitting accomplices in maintaining the much maligned status quo. In order to embark on this process, we must be willing to examine the entire enterprise. The inextricable interconnection among many of the malfunctioning components demands nothing less than a wholesale reevaluation of our current system. Integrity compels us to speak truth to power, even if it is not for the faint of heart. Perhaps this is the perfect storm to motivate long overdue, enduring change that inures to the benefit of our students, the legal system, and the bedrock principle of equal justice under law.