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## Renewing the "Social Contract" Between Law Schools, Lawyers, and Society

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# RENEWING THE “SOCIAL CONTRACT” BETWEEN LAW SCHOOLS, LAWYERS, AND SOCIETY

Robert W. Adler

## I. INTRODUCTION

In this inaugural symposium issue of the *Utah Law Review OnLaw*, and the associated day-long continuing legal education program co-sponsored by *Utah Law Review OnLaw* and the Utah State Bar Association,<sup>1</sup> the symposium editors, their faculty collaborator James Holbrook, and their colleagues in Utah’s legal community<sup>2</sup> synthesized a vision of the most important issues facing the legal profession from the perspective of both legal educators and legal practitioners. In so doing, the symposium and its component articles fill a critical gap in legal scholarship by engaging the Academy and the legal profession in a serious discussion of issues we face collectively as a legal community.

The “twin crises” identified in this conference and symposium issue—underemployed lawyers and underserved clients—should be of significant concern to law school deans, faculty, and administrators. The rapid decline in the legal job market over the past several years<sup>3</sup> means that many law students find it increasingly difficult to obtain satisfying and sufficiently lucrative jobs, particularly given the large amounts of cumulative educational debt many law students face on graduation.<sup>4</sup> Although Dean Scharffs<sup>5</sup> correctly notes that the

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\* © 2014 Robert W. Adler, Interim Dean, James I. Farr Chair and Distinguished Professor of Law, University of Utah, S.J. Quinney College of Law. I would like to thank Jonathan Hornok and his colleagues at the *Utah Law Review OnLaw* for having the foresight to plan this pathbreaking symposium and the associated Continuing Legal Education program in collaboration with the Utah Bar, and my colleague Professor James R. Holbrook for his guidance and help with this program.

<sup>1</sup> See *Twin Crises in the Law*, ULAW TODAY, <http://today.law.utah.edu/?events=twin-crises-in-the-law>, archived at <http://perma.cc/L46G-GYFV> (last visited Sept. 22, 2014).

<sup>2</sup> Participants in this planning process included former Utah Chief Justice Michael D. Zimmerman, my colleague Professor James R. Holbrook, Utah Law Review Executive Online Editor Jonathan R. Hornok, former judge William B. Bohling, Former Utah State Bar President (2013–2014) Curtis M. Jensen, and Palmer DePaulis.

<sup>3</sup> See GEORGETOWN UNIV. LAW CTR., 2013 REPORT ON THE STATE OF THE LEGAL MARKET 2–7 (James W. Jones et al. eds., 2013) [hereinafter GEORGETOWN], available at [http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1003&context=cslp\\_papers](http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1003&context=cslp_papers).

<sup>4</sup> See AM. BAR ASS’N, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION REPORT AND RECOMMENDATIONS 1, 11–12 (2014), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf), archived at <http://perma.cc/375R-CA9N> [hereinafter ABA REPORT AND RECOMMENDATIONS]; Jess Hofberger, *Law Graduate Employment in Utah by the Numbers*, 2014 UTAH L. REV. ONLAW 43, 47–51.

situation is somewhat better in Utah than it is nationally,<sup>6</sup> this is nevertheless of significant concern to the two law schools in Utah<sup>7</sup> and to the legal profession in the state. A rapidly declining pool of law school applicants makes it difficult for both institutions to admit as many qualified students as they have in the past. If the schools admit fewer students, they will experience declining tuition revenues and face financial problems, obviously an important issue for law schools. If they admit more students to fill their coffers, they risk exacerbating the imbalance between the supply of graduating law students and the demand for attorneys given the prevailing and longstanding economic model of the U.S. legal profession, which is equally obviously a problem for the practicing bar.

In this brief perspective essay, I survey some of the complex set of issues created by these twin crises. I begin by suggesting an overall conceptual vision of legal education as a *social contract between law schools, lawyers, and society*, which perhaps existed in the past but needs to be renewed and reinvigorated. Then, I explore some of the implications legal educators should consider in the next few years when we view our mission through the lens of that collective social contract, and lay out a nonexclusive list of action items that might begin to fulfill that vision.

## II. A CONCEPTUAL VISION OF THE FUTURE OF LEGAL EDUCATION, THE LEGAL PROFESSION, AND THEIR ROLES IN SOCIETY

The Report and Recommendations released by the American Bar Association's Task Force on the Future of Legal Education,<sup>8</sup> and described in more detail in this issue of *Utah Law Review OnLaw* by Professor James Holbrook,<sup>9</sup> focused on the purported tension between the training of lawyers as providing a "public value" and the training of lawyers as providing a "private value."<sup>10</sup> The "public value" perspective reflects the fact that society "has a deep interest in the competence of lawyers, in their availability to serve society and clients, in the broad public role they can play, and in their professional values."<sup>11</sup>

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<sup>5</sup> Brett Scharffs is the Associate Dean for Research and Academic Affairs, Francis R. Kirkham Professor of Law, Associate Director, International Center for Law and Religion Studies at the J. Reuben Clark Law School at Brigham Young University. See *Faculty Profiles*, BYU LAW, [http://www.law2.byu.edu/faculty/profile\\_fancy.php?id=29](http://www.law2.byu.edu/faculty/profile_fancy.php?id=29), archived at <http://perma.cc/XG5Q-YBTM> (last visited Sept. 22, 2014).

<sup>6</sup> See generally Brett G. Scharffs, *The Way Forward: Underserved Clients, Underemployed Lawyers—What Can Law Schools Do?*, 2014 UTAH L. REV. ONLAW 79 (describing market and demographic challenges affecting law schools and proposing solutions).

<sup>7</sup> Hofberger, *supra* note 4, at 47–51.

<sup>8</sup> ABA REPORT AND RECOMMENDATIONS, *supra* note 4, at 13–14.

<sup>9</sup> James R. Holbrook, *Reflections on the Future of Legal Education*, 2014 UTAH L. REV. ONLAW 53, 53–55.

<sup>10</sup> ABA REPORT AND RECOMMENDATIONS, *supra* note 4, at 6–7.

<sup>11</sup> *Id.* at 6.

The “private value” counterpoint suggests that “[l]egal education provides those who pursue it with skills, knowledge, and credentials that will enable them to earn a livelihood.”<sup>12</sup>

Although the suggested distinction between legal education as providing public versus private value has some appeal, I believe that it is a false dichotomy and is plagued by flawed assumptions about the degree to which legal education can or should be characterized in purely market terms. A more appropriate way to view the nature of legal education—and the law itself—is as a social contract between legal educators, lawyers, and society. In *The Social Contract*,<sup>13</sup> eighteenth century French political philosopher Jean-Jacques Rousseau suggested that all participants in a society must surrender an equal amount of rights and impose the same degree of duties in return for the privileges and benefits of freedom and a free society.<sup>14</sup> Likewise, because of the critical role it plays in the governance of a free society, the legal profession has established a form of “social contract” in which, in return for the substantial privileges attorneys enjoy, we must surrender a proportionate amount of rights and assume a proportionate degree of duties to society.

Most lawyers are privileged in many ways. On average, they earn quite a good living.<sup>15</sup> Despite a recent decline in the public image of lawyers,<sup>16</sup> historically attorneys have been a respected profession.<sup>17</sup> And attorneys have the opportunity to attain leadership roles in society as judges, legislators, and chief executives. In return for those opportunities and privileges, lawyers have a proportionate responsibility to use their skills to serve society. That includes not only ethical and professional conduct, but also an obligation to help meet the needs of those who cannot afford or otherwise have access to legal service. As we revisit legal education in response to the “twin crises” and other challenges, we have both

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<sup>12</sup> *Id.* at 7.

<sup>13</sup> JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT OR THE PRINCIPLES OF POLITICAL RIGHTS* (G.P. Putnam’s Sons ed., Rose M. Harrington trans., 1893) (1762).

<sup>14</sup> *See id.* at 19–26.

<sup>15</sup> *See Salary Distribution Curve: Class of 2012*, NALP, <http://www.nalp.org/salarydistribution>, archived at <http://perma.cc/E2GW-U7U4> (last visited Sept. 22, 2014) (showing mean salary for the graduating class of 2012 as \$80,798). Note, however, the highly bi-modal nature of the distribution curve, with one peak centering around \$40,000–\$50,000 and another sharp peak, reflecting large law firm salaries, around \$160,000. *Id.*

<sup>16</sup> *See, e.g.*, Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1, 1–3 (1994) (discussing a decline in lawyer professionalism); Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 808–11 (1998) (documenting a decline in lawyers’ public image); Nancy B. Rapoport, *Dressed for Excess: How Hollywood Affects the Professional Behavior of Lawyers*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 49, 50 n.5 (2000).

<sup>17</sup> *See Galanter, supra* note 16, at 808–11; *cf.* Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1344 n.15, 1345–46 (noting that professionalism of attorneys declined “dramatically in the last twenty-five years” implying a higher level of professionalism historically).

an opportunity and a responsibility to renew and reinvigorate this traditional social contract.

### III. LAW SCHOOL RESPONSES TO THE “TWIN CRISES”

The issues highlighted by this symposium relate most directly to the “back end” of the work of law schools, that is, to the legal employment markets and the efforts of law school placement offices. Given the depth and severity of these crises, however, it is incumbent upon law schools around the country to consider responses at all stages of their operations, from the very “front end” (admissions), through curricular planning and delivery, to professional development, career counseling and placement efforts. At the University of Utah’s S.J. Quinney College of Law (Utah), we have taken considerable steps to address these issues in recent years, but continue to search for newer and better responses. Moreover, although every law school faces important differences in circumstances<sup>18</sup> that suggest variations in these initiatives, commonalities also suggest that all law school faculty and administrators can learn from solutions being tested around the country.

#### *A. Admissions: The Search for Students and Attorneys Who Will Honor the Social Contract*

A combination of motivations internal to the legal academy and external forces—most notably the rankings produced by U.S. News and World Report<sup>19</sup>—have created an admissions process that focuses most heavily on an applicant’s Law School Admissions Test (LSAT) score and undergraduate grade point average (UGPA). There are several compelling reasons to question this focus independent of the “twin crises” and other recent developments. A predominant focus on those numeric indicators impedes efforts to increase diversity in law schools and in the legal community at large.<sup>20</sup> It also exalts some kinds of skills and abilities over others in ways that do not necessarily reflect the full range of qualities that are desirable for successful attorneys, such as empathy, compassion, and effective

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<sup>18</sup> These include size, location, history, faculty and student body composition, the legal and broader economies in the regions they serve, and many other variables.

<sup>19</sup> *Top Law Schools*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools>, archived at <http://perma.cc/M9YA-CVX9> (last visited Sept. 22, 2014).

<sup>20</sup> See MAJORIE M. SHULTZ & SHELDON ZEDECK, IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING 14, 44, 86–88 (2008), available at <http://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf>, archived at <http://perma.cc/ZU4D-9SBF> (“Heavy emphasis on LSAT scores in admission decisions substantially reduces the presence of African-American and Latino students in law school and the profession, as well as diminishing the prospects of inclusion for those from most non-elite families.” (citations omitted)).

negotiating, problem solving, and advocacy skills in addition to the more traditional focus on analytical reasoning ability.<sup>21</sup>

Given the shifting nature of legal employment markets and declining law school applications, however, it is now even more important for law schools to rethink their admissions strategies to reflect the range of abilities and inclinations that will be valuable for the wider range of employment options that law school graduates will be wise to explore in the near-term and probably for the foreseeable future. Those may include greater opportunities in business, finance, government, and public policy—all choices that some law school graduates have always pursued and in which they have found rewarding careers, but that have been and continue to be undervalued in formal assessments of a law school’s job placement success. Existing ranking systems unfortunately “discount” jobs that do not require or formally prefer a J.D. relative to equally legitimate career choices for which law school training nevertheless is extremely valuable.<sup>22</sup>

At Utah, as is undoubtedly true at many other institutions, we have been making concerted efforts to go “beyond the numbers” in our admissions process. Before readers become too skeptical of this claim, let me acknowledge that Utah, like every other law school, does consider those indicators very carefully as one of many aspects of our admissions process. We must do so to maintain the quality of our educational experience, and to ensure that we admit applicants who are most likely to succeed in law school, in the bar examination, and in practice. In addition, no law school in the current competitive environment can afford to be blind to the rankings.

Nevertheless, in addition to considering traditional diversity considerations such as race, ethnicity, gender, sexual orientation, and similar factors that are likely to increase the breadth of the educational experience for all of our students, we also pay attention to qualities such as prior advanced degrees, breadth of educational background, and prior professional experience.<sup>23</sup> A focus on those factors, in addition to LSATs and UGPAs, can help to address the “underemployed lawyers” crisis for our graduates for two reasons. First, cross-trained students, so

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<sup>21</sup> See *id.* at 24–36 (reporting several tests, alternative to the LSAT and UGPA, used to measure effective lawyering skills).

<sup>22</sup> Robert Morse, *How to Evaluate Law Schools’ Jobs Data*, U.S. NEWS & WORLD REPORT (Mar. 12, 2013), <http://www.usnews.com/education/blogs/college-rankings-blog/2013/03/12/how-to-evaluate-law-schools-jobs-data>, archived at <http://perma.cc/7H95-CS TL>.

<sup>23</sup> See, e.g., *Admissions FAQs*, S.J. QUINNEY COLL. OF LAW, <http://www.law.utah.edu/admissions/admission-faqs/>, archived at <http://perma.cc/43UJ-5QGN> (last visited Aug. 1, 2014) (“While there is an emphasis on a candidate’s academic record, the College of Law employs a holistic review of all applicant files, evaluating a multitude of factors beyond the LSAT and undergraduate GPA.”); S.J. QUINNEY COLL. OF LAW, *FACTS AT A GLANCE* (2014) available at <http://www.law.utah.edu/wp-content/uploads/2013-2014-Facts-at-a-Glance.pdf>, archived at <http://perma.cc/A6BT-W3S2> (last visited Sept. 22, 2014); *Law School Profile*, S.J. QUINNEY COLL. OF LAW, <http://www.law.utah.edu/admissions/law-school-profile/>, archived at <http://perma.cc/GMZ-533Z> (last visited Sept. 22, 2014).

long as they are otherwise well qualified, are likely to be more competitive for even traditional legal jobs. For example, employers reviewing candidates to practice banking and finance law may value students with an advanced degree in economics; intellectual property firms will similarly prefer students with advanced degrees in science and engineering; and medical malpractice firms may look for cross-training in biology or the medical sciences. Second, students with interdisciplinary backgrounds are more likely to be interested in less “traditional” careers in business, government and public policy than are students whose sole aspiration has always been to study and to practice law.

Moreover, to address the “second crisis” of underserved clients, and viewed from the social contract perspective outlined above, Utah has a history of pursuing law school candidates with a demonstrated interest in service as part of their career aspirations, whether through full-time public interest or other service-oriented legal employment, or through a dedicated commitment to *pro bono* service as a significant part of a traditional law practice.<sup>24</sup> This pursuit often relies on somewhat more subjective analysis of which of the many law school applicants who profess those aspirations “really mean it.” However, evidence of a significant prior history of service work rather than simple asserted aspirations can help law schools to identify those students who are most likely to continue those practices during and after law school. Our success in admitting a large percentage of students with a prior history of service may be partially responsible for the remarkable amount of service work our students perform during law school through the Pro Bono Initiative<sup>25</sup> and through our extensive clinical and externship programs.<sup>26</sup> Hopefully, it will also produce new generations of attorneys who

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<sup>24</sup> See S.J. QUINNEY COLL. OF LAW, STUDENT BULLETIN 2013/2015, available at <http://www.law.utah.edu/wp-content/uploads/2013-2015-Student-Bulletin.pdf>, archived at <http://perma.cc/Y7QM-XMAF> (last visited Sept. 22, 2014).

<sup>25</sup> See *Pro Bono Initiative*, S.J. QUINNEY COLL. OF LAW, <http://www.law.utah.edu/probono/>, archived at <http://perma.cc/F9VJ-66BB> (last visited Sept. 22, 2014). In Academic Year 2012–2013, the Pro Bono Initiative had 437 placements for a total student body with fewer than 400 students. *Compare Participation*, S.J. QUINNEY COLL. OF LAW, <http://www.law.utah.edu/probono/participation/>, archived at <http://perma.cc/B2A9-WSZB> (last visited Aug. 1, 2014), with *Law School Profile*, S.J. QUINNEY COLL. OF LAW, <http://www.law.utah.edu/admissions/law-school-profile/>, archived at <http://perma.cc/X346-EZ2U> (last visited Aug. 1, 2014) (listing total enrollment for the 2013–2014 student body at 364).

<sup>26</sup> See *Clinical Program Home*, S.J. QUINNEY COLL. OF LAW, <http://www.law.utah.edu/clinic/>, archived at <http://perma.cc/S46F-UYNA> (last visited Sept. 22, 2014). In Academic Year 2012–2013, Utah law students devoted more than 43,000 hours to community service through either Pro Bono Initiative or clinical placements, with a student body of fewer than 400 students—an average of more than 100 hours per year per student. E-mail from Kay Shelton, Assoc. Dir., Clinical Program, S.J. Quinney College of Law to Sean Brian, Executive Online Editor, Utah Law Review (May 19, 2014, 11:43 AM) (on file with Utah Law Review) [hereinafter Clinical Program E-mail] (reporting 40,750 hours of work in the clinical program from summer 2012 through spring 2013); E-mail from JoLynn Spruance, Dir., Pro Bono Initiative, S.J. Quinney College of Law to Sean Brian, Executive Online Editor, Utah Law Review (May 16, 2014, 4:19 PM) (on file with Utah Law

remain committed to helping underserved clients throughout their professional careers.

A second and related practice adopted by Utah and many other law schools has been to admit somewhat fewer entering students.<sup>27</sup> Admittedly, this response is driven in part by precipitous recent declines both in the law school applicant pool,<sup>28</sup> and the related desire to maintain the traditional numeric indicators that are so critical to a law school’s ranking. While most law school deans and admissions directors may be reluctant to admit openly how much admissions decisions are driven by rankings, the simple fact is that law schools operate in an environment that focuses increasingly on consumer information.<sup>29</sup> Lower rankings make a school less desirable to future applicants. That reputational decline can cause smaller applicant pools, less qualified classes, declining revenues, and then even lower rankings.

In part, however, Utah has also chosen to admit smaller classes because of the weak job market for law school graduates in the past several years. We do not want to admit candidates who face a high risk of failing the bar exam,<sup>30</sup> and a high risk of not securing professionally rewarding employment with an income sufficient to repay student debt, or a reasonable means of doing so. Based on discussions I have had recently with deans and faculty from other law schools, I surmise that many other schools are making similar admissions decisions.

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Review) [hereinafter Pro Bono Initiative E-mail] (reporting 4,507 hours worked in the pro bono program during the 2012 academic year); E-mail from Susan Baca, Operations Manager for Admissions and Fin. Aid to Sean Brian, Executive Online Editor, Utah Law Review (May 14, 2014, 11:45 AM) (on file with Utah Law Review) [hereinafter Admissions E-mail] (reporting admitted class sizes between 97 students and 128 students for classes admitted since 2010).

<sup>27</sup> Over the past six years, the first-year class matriculated to S.J. Quinney College of Law has moved from a range of 115–130 per year to 97 for the class of 2015 and 107 for the class of 2016. Admissions E-mail, *supra* note 26. At a recent American Bar Association accreditation-training workshop, the ABA’s Deputy Consultant for Legal Education reported that some law schools have experienced a 40 percent decline in matriculating students, and many others are down between 20–40 percent. Scott Norberg, Deputy Consultant on Legal Education for the American Bar Association Section of Legal Education and Admissions to the Bar, Presentation at Site Evaluation Workshop for Law School Representatives and New Site Evaluators (Oct. 5, 2013).

<sup>28</sup> The number of law school applicants declined from a high of 100,000 in 2004 to approximately 70,000 in 2012, and it is predicted to decline further to roughly 60,000 in 2013, the smallest applicant pool since the later 1970s and early 1980s. Scharffs, *supra* note 6, at 85.

<sup>29</sup> See ABA REPORT AND RECOMMENDATIONS, *supra* note 4, at 9–10; SHULTZ & ZEDECK, *supra* note 20, at 12.

<sup>30</sup> See generally Nicholas L. Georgakopoulos, *Bar Passage: GPA and LSAT, not Bar Reviews* (Robert H. McKinney Sch. of Law Legal Studies, Research Paper No. 2013-30, 2013) (finding that law school GPA was strongly correlated to bar passage rate and also finding a weaker but existent correlation between LSAT and bar passage).



One positive irony that may be associated with the declining law school applicant pool, although my “evidence” for this is admittedly impressionistic, is that a very high percentage of students in the past few Utah entering classes have chosen to go to law school for the “right” reasons, meaning that they believe that lawyers owe a special duty to society in addition to their individual interest in making a decent living. Those students are more likely to seek public service positions or to serve the public through *pro bono* work. This makes sense because, given the decline in legal employment markets, students are less likely to seek a law degree solely because they view it as a ticket to wealth.

*Action Item 1: Broaden the focus of the admissions process.* In light of the above factors, one key action that can be taken by the legal academy collectively would be to reduce the relative emphasis placed on numeric quality indicators (LSAT and UGPA) in the admissions process, to increase the emphasis on qualitative factors such as breadth of interests and backgrounds and both expressed and demonstrated inclination to engage in public or *pro bono* service during and after law school. Individual law schools cannot realistically make that change alone, however, given the pressure imposed by the U.S. News and other rankings, which incorporate those numeric indicators so heavily in their systems. A comprehensive approach requires law school deans to continue to work with U.S. News and other rankings entities to reduce the focus on numeric indicators in ranking law schools or to develop independent sources of information on which law school applicants can make intelligent decisions based on the full range opportunities provided by different law schools around the country.

*B. Matriculation: Instilling Respect for the Social Contract from the Outset*

The matriculation process, including law school orientation or “Introduction to Law” programs, is a small but critical component of law school in terms of the values we communicate to our students. At Utah, we make a special effort to communicate a strong sense of public service during our Orientation—and we continue to emphasize the value of service through our Pro Bono Initiative, clinics, and other service-oriented programs throughout the three-year law school program. The Introduction to Law week closes with a swearing in ceremony in which the incoming class takes an oath promising to abide by standards of ethics, professionalism, and civility both during and after law school. To further underscore the point, a respected jurist administers the oath to the students and gives a short address emphasizing the importance of these values to the legal profession. We also spend a significant amount of time this week promoting the educational and public service value of our clinical and pro bono programs, and close the week with a class service project.

*C. The Cost of Law School: Enabling Lawyers to Fulfill the Social Contract*

There is an obvious connection between law school tuition, financial aid resources and policies, and the “twin crises.” When students graduate from law

school with significant amounts of debt—regardless of the source of that debt—they are likely to have a narrower range of feasible employment options absent workable debt forgiveness programs or other means of spreading out or reducing their student loan payments and other debt obligations.

For some students, and some who purport to rank the relative value of law schools, salary on graduation or long-term earning capacity is a critical measure of the value of a law school degree, or of the relative value of degrees received from different institutions. From the perspective of the social contract between law schools, lawyers, and society, that view devalues employment in the public service and public interest sectors, or practice in law firms that pay lower salaries or earn smaller profits because they devote a significant amount of time to *pro bono* practice.<sup>31</sup>

The good news for young lawyers in Utah is that both Utah law schools have below average tuition and significantly below average debt.<sup>32</sup> As Dean Scharffs notes in his article, the J. Reuben Clark Law School at BYU has an unusually low tuition profile, even for those who are not members of the Church of Jesus Christ of Latter-day Saints (LDS Church), but particularly for those who are.<sup>33</sup> That demonstrates that the LDS Church has a very commendable view that educators provide public as well as private value. In this sense, the LDS Church endorses the idea of a social contract between its law school and society, recognizing that its investment in lower-cost legal education will be repaid through the services that BYU-trained attorneys provide to society.

Tuition at Utah remains lower than the national average,<sup>34</sup> and from the perspective of the “twin crises” it would be most desirable to keep it that way.

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<sup>31</sup> Former Utah Supreme Court Chief Justice Michael D. Zimmerman, who delivered the keynote address at the Twin Crises symposium, is cofounder of a law firm that has been recognized nationally for devoting a significant percentage of its total billable time to *pro bono* work, and markets itself as a firm in which its attorneys earn somewhat less but enjoy more rewarding and balanced careers. See *Beacon of Justice Award Winners Announced Today*, NAT’L LEGAL AID & DEFENDER ASS’N (Aug. 30, 2013), <http://www.nlada100years.org/2013-beacon-justice-award-winners-announced-today>, archived at <http://perma.cc/D85F-MWVJ>; *Zimmerman Jones Booher Receives Prestigious Beacon of Justice Award*, ULAW TODAY (Aug. 31, 2013), <http://today.law.utah.edu/2013/08/zimmerman-booher-jones-receives-beacon-of-justice-award/>, archived at <http://perma.cc/6N27-U N8H>.

<sup>32</sup> Scharffs, *supra* note 6, at 85–86, 90 n.50; compare Hofberger, *supra* note 4, at 48 & n.16 (noting that average law school debt at graduation for S.J. Quinney graduates in 2012 was \$80,608 and \$54,766 for BYU law graduates in 2011, the most recent data), with Adam Cohen, *Just How Bad Off Are Law School Graduates*, TIME (Mar. 11, 2013), <http://ideas.time.com/2013/03/11/just-how-bad-off-are-law-school-graduates/>, archived at <http://perma.cc/DR45-DGZ6> (noting average debt load for law school graduates as over \$100,000).

<sup>33</sup> See Scharffs, *supra* note 6, at 90 n.50.

<sup>34</sup> Compare Hofberger, *supra* note 4, at 48 (noting that tuition for the S.J. Quinney College of Law is \$23,489 for residents), with Scharffs, *supra* note 6, at 85–86 (noting that “median full-time tuition, assuming residency, for all ABA accredited law schools is \$36,134”).

Unfortunately, the law school and even the university administration are not entirely in control of tuition, which is ultimately set by the Board of Regents.<sup>35</sup> For example, the Regents increased tuition across the University of Utah by five percent for the 2013–2014 academic year, including tuition for law students.<sup>36</sup> The Regents need to increase tuition revenues in part because the state legislature cut public funding for higher education significantly in the wake of the financial crisis, and has not restored that funding since that time.<sup>37</sup>

*Action item 2: Increase public funding of legal education.* A second action item, then, this one for the Utah public,<sup>38</sup> is to persuade the state legislature that higher education, including stable and sufficient funding for the state’s public law school, provides significant public value. In particular, the Utah State Bar and its members should take the position that a strong public legal education through the University of Utah’s law school supports the social contract between lawyers and society by making legal education more affordable, and thereby enabling Utah’s lawyers to engage in government, pro bono and public interest practice, or even to charge more moderate fees for middle income clients.

This aspect of the social contract, of course, requires equal consideration on the part of Utah’s legal community. The legislature and the public will naturally and understandably lose faith in the social contract between lawyers and Utah society if the legal community fails to fulfill its contractual obligations, that is, if a high percentage of attorneys engage in neither public service nor *pro bono* practice. The contractual *quid pro quo* for higher levels of public (or private philanthropic) funding, which can help to keep the cost of legal education more affordable for more students, is the responsibility on the part of Utah’s lawyers—particularly those whose legal education is supported by public funding—to help increase access to justice.

In addition to lower tuition, the second way to reduce the amount of debt law students bear on graduation, or to reduce the impact of that debt, is to provide students with more assistance in the form of scholarships or loan forgiveness programs. Scholarships reduce student debt directly by reducing the cost of law school tuition. At Utah, graduate fellowships provide additional, leveraged tuition waivers in return for service provided by fellowship recipients to the law school,

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<sup>35</sup> See UTAH CODE ANN. § 53B-7-101(7) (2013).

<sup>36</sup> Marjorie Clark, *Utah Campus’ Tuition to Increase by 5 Percent*, THE DAILY UTAH CHRON. (Apr. 3, 2013, 12:12 AM), <http://www.dailyutahchronicle.com/?p=2586845>, archived at <http://perma.cc/W49L-VTAA>. In the interest of full disclosure, for budgetary reasons the law school increased its differential tuition, which reflects the difference between undergraduate and law school tuition, by a proportionate five percent.

<sup>37</sup> Lindsey Whitehurst, *Utah Regents Approve Tuition Increases for Next School Year*, THE SALT LAKE TRIB. (Mar. 29, 2013, 10:05 PM), <http://www.sltrib.com/sltrib/news/56079647-78/percent-tuition-colleges-utah.html.csp>, archived at <http://perma.cc/VLZ5-ZSZ3> (“Tuition at Utah colleges and universities has risen sharply in recent years as state funding was cut by 13.4 percent during the recession.”).

<sup>38</sup> The same argument is true, of course, for public higher education in all states.

their fellow students, or to the community.<sup>39</sup> Those opportunities are valuable not only because they reduce law school costs, but because they provide recipients with valuable practical training in addition to their other law school activities, and additional credentials to help them in their employment search. Moreover, they further reinforce the idea of a social contract in which attorneys should discover the intrinsic rewards inherent in providing service to others in addition to the more tangible professional benefits that might accompany that service.

A related issue that was highlighted in the ABA Task Force Report is the trend for law schools to increase the percentage of scholarship funding devoted to merit rather than need-based scholarships.<sup>40</sup> The perverse result, as noted by the Task Force, is that students with better credentials and the higher income earning potential graduate from law school with the lowest debt, whereas students with the highest debt burdens are less likely to secure employment with an income sufficient to pay off their relatively higher student debt.<sup>41</sup> This problem, in turn, relates to the pressure discussed above for law schools to maintain or improve their rankings by attracting students with the highest LSATs and UGPAs. That provides a strong incentive to use available scholarship funding to induce the best-qualified applicants—rather than those with the greatest financial need—to attend law school.

Loan forgiveness is another way to help law school graduates to expand their employment options. Utah offers the Fordham Loan Forgiveness Program for students who choose public interest careers on graduation.<sup>42</sup> Federal and other loan forgiveness programs<sup>43</sup> can also be useful in helping young attorneys to manage their debt. From the perspective of the social contract concept, the key benefit of such programs is that they can enable those who wish to pursue lower paying public sector or public interest positions to do so while still being able to meet their loan obligations responsibly. Society is recognizing the public good inherent in

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<sup>39</sup> When a student qualifies for a graduate fellowship, which requires the student to serve as a teaching assistant, academic support tutor, or research fellow, the University’s Graduate School provides a tuition benefit waiver that increases the economic value of the fellowship. See *Tuition Benefit Program Guidelines*, UNIV. OF UTAH GRADUATE SCH., <http://gradschool.utah.edu/tbp/tuition-benefit-program-guidelines/>, archived at <http://perma.cc/K2PQ-UZ7R> (last visited Sept. 22, 2014).

<sup>40</sup> ABA REPORT AND RECOMMENDATIONS, *supra* note 4, at 1–2, 11, 22–23.

<sup>41</sup> *Id.* at 1–2.

<sup>42</sup> See *Awards, Scholarships, and Fellowships Home*, S.J. QUINNEY COLL. OF LAW, <http://www.law.utah.edu/awards/#fordham>, archived at <http://perma.cc/7Q4V-XUBN> (last visited Sept. 22, 2014). The Jefferson B. and Rita E. Fordham Loan Forgiveness Program is named for former University of Utah Law Professor (and later University of Pennsylvania Law School Dean) Jefferson Fordham and his widow Rita Fordham, with generous funding from the Fordham family.

<sup>43</sup> See CONSUMER FIN. PROT. BUREAU, PUBLIC SERVICE & STUDENT DEBT: ANALYSIS OF EXISTING BENEFITS AND OPTIONS FOR PUBLIC SERVICE ORGANIZATIONS 5–7 (2013), available at [http://files.consumerfinance.gov/f/201308\\_cfpb\\_public-service-and-student-debt.pdf](http://files.consumerfinance.gov/f/201308_cfpb_public-service-and-student-debt.pdf), archived at <http://perma.cc/A46H-VD49>.

legal education in return for the commitment that a significant percentage of the bar devotes to the public welfare.

*Action item 3: Reduce student debt.* In addition to decreasing the cost of law school, there are several obvious but not necessarily easy ways to help reduce actual accrued student debt given that most students will continue to rely on loans even if law school tuition is stabilized or reduced. First, especially in the current fiscal climate, it is important for law schools to keep tuition and other costs as low as possible. Second, increased scholarship assistance, loan forgiveness programs, and other financial aid can help students to bear the necessary costs more easily. Third, the more law schools can free themselves from the incentives to focus so heavily on numeric indicators in both their admissions and financial aid processes, the more they can redirect a higher percentage of available scholarship funding to need-based rather than merit-based assistance. Alternatively, scholarship funding can be directed more specifically to students whose admissions file demonstrates a strong commitment to the social contract and associated public service work. All of those strategies, however, require increased funding from a variety of external sources.

#### *D. What We Teach: Preparing Students to Fulfill the Social Contract*

The substance of the legal education program is at the heart of the legal academy's end of the social contract bargain. Our core responsibility is to prepare students for the practice of law, and one aspect of the current debate over legal education is the extent to which law schools actually prepare students to practice law.<sup>44</sup> That suggests more attention to teaching practical skills in addition to legal doctrine, and many critics question whether U.S. law schools devote enough attention to teaching skills.<sup>45</sup> But if we take seriously the related obligation that lawyers serve society as part of their social contract, we need to teach our students much more than skills, and much more than skills plus doctrine. Thus, the appropriate question is not whether we teach enough skills, but what is the appropriate *balance* between teaching skills, substance, ethics, and traditional "thinking like a lawyer."

Law schools do have an obligation to teach the basic skills necessary for new attorneys to practice law, such as legal analysis, legal writing, interviewing, counseling, negotiation and other dispute prevention and resolution methods, and litigation skills. Although we are not alone among our peers, Utah has a particularly strong focus both on teaching practical skills and on providing both simulation-based and live client opportunities for practical learning.<sup>46</sup> In addition

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<sup>44</sup> See ABA REPORT AND RECOMMENDATIONS, *supra* note 4 at 14.

<sup>45</sup> See *id.*, at 14, 26–27.

<sup>46</sup> Michelle Weyenberg, *Top Schools for Clinics*, PRELAW, Winter 2014, at 22–23, available at [http://www.nxtbook.com/nxtbooks/cypress/prelaw\\_2014winter/#/22](http://www.nxtbook.com/nxtbooks/cypress/prelaw_2014winter/#/22), archived at <http://perma.cc/5Y2Y-BQ6U> (reporting the National Jurist rankings that place the University of Utah as number two for clinic opportunities, with 40,000 hours a year devoted to clinics).

to our strong first-year legal methods program, which provides experience and instruction in far more than the traditional skills of legal research and drafting of legal memoranda and briefs, we require students to complete a portfolio of legal writing before graduation.<sup>47</sup> That includes the traditional research paper, which ensures that students have at least one very rigorous legal analysis project in the second or third year, but also requires three other significant writing projects such as a significant transactional document, a significant litigation document, and an appellate brief from a moot court or other experience, or a document produced as part of clinical work.<sup>48</sup> Moreover, we have added to our curriculum a number of focused upper-level legal drafting courses such as contract drafting, estate planning (in which students draft wills, trusts, and other estate planning documents), real estate drafting, patent drafting, and intellectual property licensing.

Similarly, we have increased the number of focused skills courses we offer. In addition to our broadly focused but practice-oriented lawyering skills class, students can learn a full range of litigation skills through a triad of courses addressing pretrial practice, trial advocacy, and appellate practice. Students interested in particular practice areas can take more specialized courses such as environmental practice, Supreme Court practice, and real estate transactions and finance. During our summer session, we offer specialized litigation skills classes in topics such as taking and defending depositions and preparing, examining, and cross-examining witnesses. Students interested in alternative dispute resolution can take mediation and advanced negotiation, arbitration, environmental conflict resolution, and the ADR clinic.

Utah is also particularly strong in providing live client experiences to our students. The vast majority of our students participate in one or more clinical placements, our Pro Bono Initiative, or both, racking up over 45,000 hours of public service in each of the last two academic years, with a relatively small student body of approximately 370 students in all three classes.<sup>49</sup> *PreLaw* magazine ranked Utah third in the country in 2013 for externships and second in the country in 2014 for clinical opportunities overall,<sup>50</sup> and the fact that it was the only public school and lowest cost school in the top tier (according to the U.S. News rankings) belies the idea that skills training must be too expensive for law

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<sup>47</sup> *Graduation Requirements*, S.J. QUINNEY COLL. OF LAW, <http://www.law.utah.edu/student-handbook/graduation-requirements/#writing>, archived at <http://per.ma.cc/J5KN-3722> (last visited Sept. 22, 2014).

<sup>48</sup> *Id.*

<sup>49</sup> Clinical Program E-mail, *supra* note 26, (reporting 41,850 hours of work in the clinical program from summer 2011 through spring 2012 and 40,750 hours from summer 2012 through spring 2013); Pro Bono Initiative E-mail, *supra* note 26, (reporting 3,555.25 hours of volunteer work in the pro bono program for the 2011 academic year and 4,507 for the 2012 academic year); Admissions E-mail, *supra* note 26 (reporting admitted class sizes of under 130 students for all classes since 2010).

<sup>50</sup> Michelle Weyenberg, *Top Schools for Externships*, PRELAW, Back to School 2013, at 12 available at [http://www.nxtbook.com/nxtbooks/cypress/prelaw\\_2013backtoschool/#/12](http://www.nxtbook.com/nxtbooks/cypress/prelaw_2013backtoschool/#/12), archived at <http://perma.cc/SK4H-6K4H>; Weyenberg, *supra* note 46, at 22–23.

schools to achieve.<sup>51</sup> Utah offers clinical opportunities in a wide range of practice areas—both litigation and transaction-focused—including criminal law, elder law, family law, health law, environmental law, new-venture and other business transactions, and many others. The Pro Bono Initiative allows students to begin live practice experience beginning in the second semester of their first year, and to continue throughout law school.

In response to the ABA Task Force Report and other factors, the Utah law faculty continues to explore more and better ways to integrate practice skills into our curriculum, including our first-year program. Our Center for Innovation in Legal Education<sup>52</sup> is experimenting with “blended learning” methods in which more of the basic doctrinal information can be conveyed through online modules, thus freeing up class time for more discussion and practical application of the material. And we are soliciting input from our alumni and others in the practicing bar on how we can do a better job of preparing our students to practice.

Preparing students to practice, however, fulfills only one component of our responsibility to “train” law students. Law schools are not trade schools, and we do a tremendous disservice if all we teach is how, as opposed to what, and even more importantly, why we practice law. What do we want to achieve through law and the legal system? How will it make society and the world better? Who should we serve to ensure fair access to justice? If we stop teaching those things, we will be breaching our social contract to ensure that our students are prepared to practice ethically, professionally, and with a commitment to the public welfare as well as their own.

In this respect, the ABA Task Force Report disturbingly misses the real point of legal education in fulfilling the social contract between law schools, lawyers and society. The August version of the report noted that law schools only recently began to offer courses designed specifically to help students pass the bar exam,<sup>53</sup> but that statement was wisely removed from the final version. Needless to say, we want our students to pass the bar, and our bar passage rate remains consistently high. But our job is to teach students to become lawyers, not just to pass the bar

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<sup>51</sup> See *Forbes: College of Law Among Top 25 Law Schools for High-Earning Grads*, ULAW TODAY (Mar. 20, 2013), <http://today.law.utah.edu/2013/03/forbes-college-of-law-a-mong-top-20-law-schools-for-top-earning-grads/>, archived at <http://perma.cc/6PNF-D9ST>.

<sup>52</sup> See *Center for Innovation in Education*, S.J. QUINNEY COLL. OF LAW, <http://www.law.utah.edu/center/innovation/>, archived at <http://perma.cc/Z222-SH4N> (last visited Sept. 22, 2014).

<sup>53</sup> *Compare* AM. BAR ASS’N, TASK FORCE ON THE FUTURE OF LEGAL EDUC., WORKING PAPER 13 (2013), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/taskforcecomments/aba\\_task\\_force\\_working\\_paper\\_august\\_2013.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/aba_task_force_working_paper_august_2013.authcheckdam.pdf), archived at <http://perma.cc/99LA-TCHC> (“For example, as important as bar passage is to the success of graduates and thus the success of a school, curricular elements devoted specifically to bar passage are only recent additions, and they still generally remain limited.”), with ABA REPORT AND RECOMMENDATIONS, *supra* note 4, at 14 (omitting the quoted sentence from the “Mismatch Between Curriculum and Goals” paragraph).

exam. An excessive focus on teaching to the bar exam may be to the detriment of more skills instruction, and equally detrimental to efforts to instill a broader sense of social responsibility in a new generation of attorneys. On the other hand, no student wants to spend three difficult years only to learn that they cannot practice their chosen profession because of an inability to pass the professional qualifying exam. Perhaps the real question, then, is whether the bar exam tests the right things.

*Action item 4: Rethink the bar exam.* It remains important to ensure that all attorneys admitted to practice have the requisite level of knowledge and competence necessary to represent their clients and to serve the interests of justice. Whether the multistate bar exam and individual bar exams do so, however, is open to question. The sheer volume of “law” is now so massive that expecting any individual to master even a portion of it is increasingly unreasonable. Defining a specific subset of that law for students to “master” in the month before the bar exam, and likely to forget a month later, does little to explore fitness to practice, much less a deeper sense of why they are doing so. The practicum elements of many bar exams go part of the way to testing competence rather than memorization. Whether other aspects of the typical bar exam test anything meaningful is a question that the bar as a whole should continue to explore.

#### *E. Professional Development: Career-Long Fulfillment of the Contract*

Perhaps the most significant critique that law schools face today is the “unemployed lawyers” half of the “twin crises.” The National Association for Law Placement (NALP) reports that nearly half of all law school graduates nationally in 2012 had not obtained employment requiring a J.D. nine months following graduation.<sup>54</sup> Fortunately, both of Utah’s law schools have significantly better placement records than reflected in this national average, even given the downturn in the general and legal economies. For Utah’s 2012 graduating class, for example, over 87 percent reported full-time employment nine months after graduation, of which 84 percent required or preferred law degrees and 73 percentage of which required bar passage.<sup>55</sup> The likely explanation for this significant difference between national and Utah statistics is that Utah has the benefit of having only two law schools, both of which are high quality and highly ranked, and according to

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<sup>54</sup> See NALP, LAW SCHOOL CLASS OF 2012 FINDS MORE JOBS, STARTING SALARIES RISE—BUT LARGE CLASS SIZE HURTS OVERALL EMPLOYMENT RATE 1 (2013) available at <http://www.nalp.org/uploads/Classof2012SelectedFindings.pdf>, archived at <http://perma.cc/CT97-WF5C> (reporting that only 64.4 percent of the Class of 2012, nationally, had a job that required a J.D. nine months after graduating).

<sup>55</sup> UNIV. OF UTAH, EMPLOYMENT SUMMARY FOR 2012 GRADUATES, AS REPORTED TO THE AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR (2013), available at <https://dl.dropboxusercontent.com/u/1724754/ABA%20Employment%20Summary%202012.pdf>, archived at <http://perma.cc/6WSK-4BR7>.



one source, Utah ranks among the best in the nation in its ratio of law graduates to available jobs.<sup>56</sup>

Helping our students to find “a job,” as in “any job,” however, cannot be our only goal in fulfilling our commitments under the social contract. Surely any current law student, or a recent graduate who has not yet found a satisfying job, is justified in arguing that they cannot afford to be too selective, that is, to accept only those jobs that maximize their opportunities to serve society. Fortunately, however, in several respects the goals of helping all of our students find rewarding jobs and ensuring that we maintain our end of the social contract are not necessarily inconsistent. Indeed, in some respects considering the social contract can help the goal of enhancing employment opportunities for our students and alumni far more than it hurts.

First, at the most basic level, we do our best to encourage and to facilitate opportunities for our students to engage in *pro bono* and other public service work during law school, particularly through our Pro Bono Initiative and extensive service-oriented clinical programs. In addition to providing valuable opportunities for live client training, our hope is that students will find those service activities to be so rewarding that they continue them throughout their careers, regardless of the type of job they choose after graduation. As many participants in the Twin Crises program emphasized, every lawyer can engage in some form of *pro bono* or other public service work, and there are ample opportunities to do so through the Utah Bar’s Pro Bono and Modest Means programs and otherwise. There is simply no reason that lawyers have to choose between an economically sufficient position and public service work.

Second, a law degree can help people serve society in many ways other than the practice of law. Many students enter law school with the intent of using their legal training for other careers. Among many other things, a good law school education can enhance analytical, organizational, leadership, and other key skills for many professions. Thus, law schools and law school graduates can fulfill the social contract through careers in government or other public service, business, nongovernmental organizations, philanthropy, and a wide range of cross-disciplinary pursuits (such as law and public health, or law and medicine, or law and social work). For students interested in those pursuits, a temporary downturn in the market for practicing lawyers does not necessarily impair their careers or their ability to fulfill their obligation to society as trained attorneys.

Third, the single most important message of this program is the irony inherent in the fact that so many law students have trouble finding legal employment when such a high percentage of the American public lacks access to basic legal services. Currently, the people and institutions most likely to have access to justice are the

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<sup>56</sup> See, *The Absolute Worst State for Job-Hunting Law-School Grads*, THE ATL. (June 3, 2013 2:24 PM), <http://www.theatlantic.com/business/archive/2013/06/the-absolute-worst-states-for-job-hunting-law-school-grads/276463/>, archived at <http://perma.cc/BLK2-W63X> (referencing Matt Leichter’s ranking, which places Utah 43rd out of 51 in the “glut” of attorneys analysis if Tennessee is included).

very rich, who can afford hefty legal fees, and the very poor, which receive court-appointed or other government-subsidized legal aid.<sup>57</sup> It is as if the automobile industry manufactured nothing but expensive luxury cars that only a small percentage of the public can afford, and cheap scooters provided to poor people by the government, rather than designing a wide range of vehicles for people in a range of income levels.

*Action item 5: Serve the middle class.* The action item that is most clearly common to both of the “twin crises” is to find new markets for middle class legal services and ways to provide them. At the University of Utah, we have experimented over the past several years to address issue of middle class legal services through the University Law Group, an incubator program in which an extremely experienced attorney (Dennis Gladwell) mentored a group of recent Quinney law graduates seeking to develop solo or small law firm practices to serve the needs of middle class clients. The legal profession clearly is missing a huge market, and needs to develop business models that allow attorneys to earn a reasonable income while meeting the needs of this predominant segment of society. We continue to search for ways to help our graduates to strike this balance, which is at the heart of the “twin crises” highlighted by this program.

#### IV. CONCLUSION

In this essay, I suggested five “action items” that can help law schools and the legal profession renew their implicit “social contract” with the general public. The root cause of the “twin crises” may be that both law schools and the legal profession have lost track of their obligation to provide justice to all segments of society in return for the privileges society confers on the legal profession. Although these actions alone may not suffice to restore the social contract fully and to solve all of the problems inherent in the “twin crises,” we can move a long way in the right direction if we admit students with a commitment to serving the public as well as their own interests, to instill in those students a career-long sense of public service, to keep student debt low enough that law school graduates can seek a rewarding range of careers, to teach students the skills and substance necessary to perform as professionals, and to help develop a wider range of career options to provide legal services to everyone in society.

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<sup>57</sup> See ABA REPORT AND RECOMMENDATIONS, *supra* note 4, at 13; James R. Holbrook & Jonathan R. Hornok, *Addressing Twin Crises in the Law: Underserved Clients and Unemployed Lawyers*, UTAH B. J., Sept./Oct. 2013, at 29.