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## Reflections on the Future of Legal Education

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## REFLECTIONS ON THE FUTURE OF LEGAL EDUCATION

James R. Holbrook\*

In 2012, the American Bar Association (“ABA”) created the Task Force on the Future of Legal Education (“Task Force”), which was charged with making recommendations to the ABA about how law schools, the ABA, state bar associations, and other groups and organizations can address the economics of legal education and its delivery to law students. The ABA determined that the Task Force was needed to respond to the rapid and substantial changes in the legal profession caused by the national and global economy.<sup>1</sup>

### I. THE TASK FORCE’S REPORT AND RECOMMENDATIONS

On January 23, 2014, the Task Force issued its Report and Recommendations,<sup>2</sup> which addresses the considerable pressure on legal education created by “the price many students pay for their education, the large amount of student debt, consecutive years of sharply falling applications,<sup>3</sup> and dramatic changes, possibly structural, in the market for jobs available to law graduates.<sup>4</sup>”<sup>5</sup> These problems are widely believed to threaten the effectiveness of legal education

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<sup>1</sup> *Task Force on the Future of Legal Education*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/taskforceonthefuturelegaleducation.html](http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html), archived at <http://perma.cc/P3TK-CTYN> (last visited Feb. 17, 2014).

<sup>2</sup> Paul L. Caron, *ABA Task Force on the Future of Legal Education Releases Final Report*, TAXPROF BLOG (Jan. 28, 2014), [http://taxprof.typepad.com/taxprof\\_blog/2014/01/aba-task-force.html](http://taxprof.typepad.com/taxprof_blog/2014/01/aba-task-force.html), archived at <http://perma.cc/99KY-MLVN>.

<sup>3</sup> “The number of people applying to U.S. law schools dropped nationwide for the third year in a row, prompting some law schools to slash the size of their entering classes. As of May 17, about 55,760 people had applied to American Bar Association-accredited law schools for the 2013–14 school year—down 13.4 percent from 2012, according to data compiled by the Law School Admission Council.” Catherine Ho, *Law School Applications Continue to Slide*, WASH. POST (June 2, 2013), [http://www.washingtonpost.com/business/capitalbusiness/law-school-applications-continue-to-slide/2013/06/02/db4929b0-c93f-11e2-9245-773c0123c027\\_story.html](http://www.washingtonpost.com/business/capitalbusiness/law-school-applications-continue-to-slide/2013/06/02/db4929b0-c93f-11e2-9245-773c0123c027_story.html), archived at <http://perma.cc/DB6P-AHBF>.

<sup>4</sup> “The drop in applications follows a period in which too many new lawyers chased too few jobs. The 2008 economic collapse forced many of the nation’s largest law firms to dramatically reduce the number of first-year lawyers they hired in 2009 and 2010.” *Id.*

<sup>5</sup> AM. BAR ASS’N, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS 1 (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/373L-FW83>.

and the public's confidence in it.<sup>6</sup> The Task Force acknowledges that prepared and released the Report and Recommendations quickly, which constrained the Task Force's ability to "gather information, test hypotheses, and vet recommendations with interested parties."<sup>7</sup>

*A. Legal Education as a Public Versus a Private Good*

The Task Force defines two key terms in the Report and Recommendations:

- (1) A "law services provider (or legal services provider) [is] a person who is skilled in knowledge and application of law."<sup>8</sup>
- (2) A "legal education program is a program of education in law or law-related fields that: (a) is designed to develop knowledge or skills in law or related fields; and (b) prepares individuals to be law services providers."<sup>9</sup>

The Task Force identifies a fundamental tension that underlies the current set of problems in legal education. For one, "*the training of lawyers provides public value*. 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>10</sup> However, "*the training [of lawyers] also provides private value*. Legal education provides those who pursue it with skills, knowledge, and credentials that will enable them to earn a livelihood."<sup>11</sup>

According to the Task Force, because training lawyers provides both public and private value, there is tension in legal education regarding how law students should be educated. Law schools must provide courses with certain content, irrespective of law students' preferences. For example, law schools must teach professional responsibility. From the private-value perspective, however, law schools must respond to market conditions and market forces when serving their students, irrespective of law professors' preferences. Conversely, from the public-value perspective, the current emphasis on faculty scholarship in legal education is justified by developing more intellectually competent lawyers and by improving law as a system of social ordering. Yet from the private-value perspective, law schools devote excessive resources to faculty scholarship, which unnecessarily increases the cost of legal education and the related amount of law student debt.<sup>12</sup>

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

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 6.

<sup>11</sup> *Id.* at 7.

<sup>12</sup> *Id.* at 6–7.

Additionally, from the public-value perspective, law schools traditionally have emphasized that their purpose is to teach students to think like a lawyer. From the private-value perspective, however, law schools now find that they have to reposition themselves to provide law students with education that leads to a job or career. This requires rethinking the curriculum, student services, and the business of legal education.<sup>13</sup>

### *B. Pricing a Legal Education*

Training lawyers for public value is adversely affected by the cost of legal education. The pricing of J.D. programs is generally cost-based, which is determined by the total cost of delivering legal education, less revenue from other sources (such as endowment income or state subsidies). Cost-based pricing is very different from market-based pricing, which takes market price as a given and then reduces costs so as to deliver a service at a profit. Whereas market-based pricing creates strong incentives to lower costs, cost-based pricing provides little such incentive.<sup>14</sup>

The Task Force notes that the current power of rankings by U.S. News & World Report drives all sorts of decisions by applicants, law schools, and prospective employers.<sup>15</sup> For example, J.D. program pricing is discriminatory in the microeconomic sense because students with higher LSAT scores are given price discounts, called “merit scholarships,” in order to attract them to law schools. High LSAT students affect law school status by contributing directly and indirectly to higher law school rankings. Other students with lower LSAT scores pay the full, or very near it, “sticker” price of legal education. This means students who pay the most for their legal education tend to be ones whose income potential may be the lowest and whose student debt may be the highest.<sup>16</sup>

Another pricing factor identified by the Task Force is the significant cost of faculty scholarship and related activities that are not part of core instructional services. This results in part from status competition among schools and from the way law schools are ranked nationally. It also results from the prevailing faculty culture, which views scholarship as a defining characteristic of being a law professor and as central to professional identity.<sup>17</sup>

Yet another pricing factor is the inclusion of practice-related education opportunities in J.D. programs. Law schools have steadily increased their offerings of clinical education (generally more expensive than classroom education), career

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<sup>13</sup> *Id.* at 9–10.

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Id.* at 10.

<sup>16</sup> *Id.* at 11.

<sup>17</sup> *Id.*

services, academic support, and bar preparation support; and they have increased writing and inter-school competitive activities.<sup>18</sup>

### *C. Financing a Legal Education*

The Task Force contends student-loan repayment obligations affect job or career choices and therefore affect the distribution of legal services throughout society. For example, loan repayment obligations decrease the ability of law school graduates to enter lower-paying public service jobs, or decrease their ability to enter practice in communities or geographic areas where income potential is not sufficient for them to repay their student loans.<sup>19</sup>

### *D. Accrediting Legal Education*

The Task Force contends the ABA Standards for Approval of Law Schools do not encourage innovation, experimentation, and cost reduction on the part of law schools.<sup>20</sup> Since the early twentieth century, the standard curriculum of a law school has been academically oriented and taught mainly by full-time, tenured or tenure-track professional educators.<sup>21</sup> Law schools have not adopted their programs or practices to student demands or to market considerations. For example, curricular elements devoted specifically to bar passage are only recent additions and only exist in a few law schools. Similarly, little space in the curriculum is typically devoted specifically to preparing students to pursue and compete for jobs, which is a responsibility generally delegated to a nonacademic unit of the law school.<sup>22</sup>

### *E. The Historical Arc of Legal Education*

The Task Force emphasizes the “economy of law and related services and the associated employment market have changed sharply in recent years. This has affected traditional legal services, where hiring decreased, particularly for new lawyers in large firms and lawyers in government practice.”<sup>23</sup> This change in employment for lawyers is likely not just a passing phenomenon caused by the Great Recession that will self-correct, but a structural change in the practice of law. Consequently, the supply of lawyers appears to exceed demand in some

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 11–12.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 14–15.

<sup>22</sup> *Id.* at 14.

<sup>23</sup> *Id.* at 13.

sectors of the economy.<sup>24</sup> However, poor and lower-income populations remain underserved because the cost of legal services is too expensive.<sup>25</sup>

The model of legal education that developed in the early twentieth century involved a rough division of responsibility. Law schools took on the private-value responsibility of providing basic “general education of lawyers, largely in an academic environment” through an academic approach.<sup>26</sup> The practical public-value and business-related aspects of legal education were to be learned on the job after graduation from those already in law practice.<sup>27</sup>

Over time, this rough allocation of responsibility for legal education has broken down. The legal profession increasingly shifted more responsibility to law schools for the practical and business aspects of the education of lawyers, mainly because clients were unwilling to subsidize the practical education of new lawyers.<sup>28</sup> The result has been expanded law school curricula, increasing costs of instruction, and continually increasing tuition as law schools took on these additional expensive forms of education no longer provided by private law firms.<sup>29</sup>

Law school education is funded through a system of tuition, scholarships, and loans. Standard tuition rates often are discounted with financial aid to attract applicants with high LSAT scores and GPAs.<sup>30</sup> Other law students must rely extensively on borrowing to finance their legal education. These loans are readily available as part of the federal loan programs for students in higher education.<sup>31</sup>

#### *F. The Legal Education of the Future*

The Task Force recommends that the stakeholders in the legal education system—law schools, universities, the ABA Section of Legal Education, the Association of American Law Schools, state bar admission authorities, state supreme courts, and other regulators of lawyers and legal services—collaboratively develop plans and initiatives to address the current challenges in legal education.<sup>32</sup>

The Task Force emphasizes that “law schools are in the business of delivering legal education services” and that “no business can succeed in the long run unless it pays close attention to the value” of the services it provides.<sup>33</sup> In this regard, the Task Force recommends that law school educational programs should be

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 16.

<sup>27</sup> *Id.*

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

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 22.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 25.

<sup>33</sup> *Id.* (emphasis omitted).

redesigned so that graduates will be competent in the practical delivery of some legal services.<sup>34</sup> Doing so will promote both the public and private good.<sup>35</sup>

The Task Force recommends that “law faculties move to reconfigure the faculty role and promote change in faculty culture . . . .”<sup>36</sup> These proposed changes may affect “accountability for outcomes; scope of decision-making authority; responsibilities for teaching, internal service, external service, and scholarly work; career expectations; modes of compensation; interdependence;” and reclassifications of individuals who are deemed “faculty.”<sup>37</sup>

## II. A TRADITIONALIST’S CRITIQUE OF THE TASK FORCE’S WORKING PAPER

Joseph P. Tomain, Emeritus Dean of the University of Cincinnati College of Law, has written a traditionalist critique<sup>38</sup> of an earlier Working Paper (“WP”) prepared by the ABA Task Force. Dean Tomain disagrees with the WP that today’s law schools do not do enough “*training of lawyers*” and he doubts that law schools need to do more skills training.<sup>39</sup> More importantly, however, he disagrees with the WP’s “aligned (and largely implicit) argument that legal scholarship is of so little value that it should be deemphasized in favor of more market responsive approaches by more law schools.”<sup>40</sup>

Dean Tomain contends that skills training will not empower law students to distinguish unjust laws or understand the policies and conditions that create and change laws.<sup>41</sup> In this regard he says, as an example,

Let me make a quick and rough distinction between education and training. I can train a reasonably intelligent eighth-grader to draft a non-compete clause in 10 or 15 minutes. I cannot, however, educate them about market definition, information asymmetries, or public policies regarding employment in different sectors of the economy.<sup>42</sup>

Dean Tomain agrees that law schools are facing significant economic challenges, as pointed out by the Task Force. However, he defends the standard

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<sup>34</sup> *Id.* at 25–26.

<sup>35</sup> *Id.* at 29.

<sup>36</sup> *Id.* at 28.

<sup>37</sup> *Id.*

<sup>38</sup> Joseph P. Tomain, *ABA Task Force on the Future of Legal Education, Working Paper* (Aug. 1, 2013) (unpublished manuscript), available at <http://leiterlawschool.typepad.com/leiter/2013/08/more-thoughts-on-the-aba-task-forces-working-paper-on-the-future-of-legal-education.html>, archived at <http://perma.cc/J6J5-YU3U>.

<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Id.*

<sup>41</sup> *See id.* at 3.

<sup>42</sup> *Id.*

model of legal education that produces graduates who are “intelligent, well-educated, have the ability to learn quickly and think critically.”<sup>43</sup> He says,

[t]he graduates of standard model regional law schools go into the region’s most prestigious public and private sector positions. These graduates become respected business leaders as well as leaders of the bar and the bench; serve the communities in which they live; and, more than occasionally, reach national prominence. . . . The standard model, long based on Langdell’s Harvard or Wayland’s Yale, serves the legal profession and the communities in which their graduates practice by concentrating on academic and scholarly rigor.<sup>44</sup>

Dean Tomain challenges the Task Force’s assumption that law schools can effectively respond to changes in the legal profession or that those changes have any degree of permanence. He also imagines that, as the economy continues to improve, the demand for legal services will return to its old level.<sup>45</sup>

Dean Tomain also wonders how law schools can afford to provide more skills training and what part of the curriculum will be deleted to make room for it: “What courses or programs will be eliminated from a school’s curriculum as skills training expands? And, at what cost? Skills training doesn’t come cheap.”<sup>46</sup>

Dean Tomain concludes that the standard model of legal education works well in educating lawyers and need not be changed in traditional law schools:

The standard model’s concentration on legal methodology and analysis; critical thinking and problem solving; *introductions* to skills and experiential learning; and, the commitment to scholarship and law reform are sound and valuable. More to the point, a faculty culture that is free to engage in traditional academic activities has real value that cannot, and will not, be reproduced in practice or skills settings. The standard model projects to students that law is academically rigorous, has a relationship with justice, and requires a deep sense of professionalism in order to succeed [at] the bar, in business, in politics or any other profession. The standard model should not be devalued even as we experiment with, innovate, and advocate for a wider variety of law schools.<sup>47</sup>

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<sup>43</sup> *Id.* at 4.

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

<sup>45</sup> *Id.* at 5.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*



### III. RECOMMENDATIONS FOR THE FUTURE

The factors affecting the future of legal education are not a temporary blip that will self-correct as the economy improves, but rather are permanent structural changes affecting legal education and law practice. We are living the “new normal.” Below are three recommendations for law schools to address these changes.

#### A. *Law Schools Should Do More Research*

The Task Force’s Recommendations are not based on research. They are *ad hoc* responses to dramatic declines in law school applications and admissions, substantially increased law student debt, and fewer jobs available in traditional law firms. More research should be conducted involving a broader range of participants, including state bars, local lawyers and law firms, corporate and institutional general counsels, current students, alumni, and the courts. Input from diverse stakeholders will allow law schools to prepare students to better meet local market demands and opportunities. Further, law schools may choose to focus on areas of the law that particularly are experiencing growth in the local market. In particular, stakeholders should be asked: What do you look for in a law school graduate? What are you not seeing in recent law school graduates? What do you see as coming underrepresented areas of law practice? What specific practice related training should be added to the curriculum?

#### B. *Leverage Existing Practice-Oriented Programs*

Many law schools already provide law students with significant opportunities for law-practice-related education, skills training, and experiential learning. This is a too well-kept secret that should be explained to prospective applicants, current students, alumni, and employers. Further, these existing programs can be refined to better prepare students for real-world practice. For example, the S.J. Quinney College of Law offers students dozens of skills courses, simulations, competitions, and other opportunities for practical training, which include the following:

*Client Interaction:* interviewing, counseling, law practice management, and client crisis management;

*Transactions:* negotiation; decision-making; and drafting courses in business planning, community justice, conservation easements, contracts, elder law, estate planning, technology commercialization, intellectual property licensing, patent prosecution, and real estate transactions and finance;

*Litigation:* legal methods and research, pretrial practice, taking and defending depositions, cross-examination, trial advocacy, appellate practice, Supreme Court practice, and innocence investigation and post-conviction process;

*Pro Bono Initiative:* law students working with real people facing real legal problems;

*Dispute Resolution:* mediation, arbitration, and comparative dispute resolution;

*Internships and Clinics:* civil, criminal, disability law, environmental law, family law, health law, judicial, mediation, new ventures, nonprofits, and small business;

*Competitions:* Traynor Moot Court, mediation, negotiation, environmental law, international law, intellectual property, and national moot court;

*Law School Centers:* the Global Justice Think Tank and Center, the Stegner Center, and the Law and Biomedical Science Center; and

*Simulations:* the counterterrorism simulation and corporate transaction negotiation.

### *C. Convey to Students the Importance of Practice-Related Education*

First- and second-year law students often do not recognize that they should take advantage of practice-related educational opportunities until they face the prospect of graduating without a job with a traditional law firm, at which time they realize they need more practice-related education. Perhaps, practice-related educational opportunities should be added to first-year doctrinal courses. Additionally, current clinical externships could be supplemented with in-house clinics or with third-year apprenticeships. Students should not be caught off guard at graduation without a job, having missed the opportunity to develop practical skills during law school.

## CONCLUSION

Legal education must adapt to address the changing demands on law school graduates. The ABA Task Force's Report and Recommendations addresses some of these concerns. However, there are some valid criticisms of the Task Force's approach. Law schools should address these issues for themselves by doing their own research, leveraging existing practice-oriented programs, and informing students of the importance of practice-related education before they graduate.