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THE WAY FORWARD: UNDERSERVED CLIENTS, UNDEREMPLOYED LAWYERS—WHAT CAN LAW SCHOOLS DO?

Brett G. Scharffs*

Abstract

Some lawyers are in the position where they would find it difficult to afford to hire themselves if they needed an attorney. The “twin crises” of underserved clients and underemployed lawyers might seem like a problem that would correct itself if we had a market that was working efficiently, but that does not appear to be the case.

This Article suggests that these are multifaceted problems, reflecting not just specific challenges facing law schools, such as declining applicants, declining minority enrollment, dramatic increases in law school tuition, falling salaries and too few jobs for graduates, and the high costs of clinical education, but also the “twin crises” are affected by a number of disquieting problems within the larger American economy and culture, including stubbornly high unemployment, falling median household income, the growing gap between the wealthy and poor in America, and trends with respect to marriage and family.

The Article focuses on what law schools can do to address these two problems. The Article’s recommendations reflect mainly what we already know about contemporary legal education: law schools should become more affordable, law schools should emphasize public service, law schools should admit more students who are likely to serve middle-class client, and law schools should focus on preparing students for today’s job markets.

The Article makes two modest proposals: eliminating the per student expenditure factor in law school rankings and facilitating market corrections rather than trying to engineer macro solutions. The Article concludes by expressing skepticism about some “big ideas” that currently seem quite popular: reducing law school to two years or implementing a third-year apprenticeship.

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I. INTRODUCTION

A. Lawyers Who Cannot Afford to Hire Themselves

Arthur Liman, who perhaps is remembered best as the spaghetti-haired chief counsel of the Iran-Contra hearings, confessed in his autobiography about his life as a high-profile, big-trouble lawyer that it always bothered him that his hourly rate was so high that if he were in need of his services, he would not be able to afford himself as an attorney.¹

For Liman, this led to an extraordinary commitment to public service. Liman noted,

Much of the work that has to be done . . . in the public-service sector is unglamorous, time-consuming, and underpublicized. . . . Public service also has its risks. It often brings criticism, sometimes from a lawyer's own clients. But if we care about society, we must be willing to take those risks. Public service, in my view, is a lawyer's privilege, one of the rewards of the profession. It is not an act of duty or charity. For a lawyer, public service is as natural as breathing. It is what we do when we're at our best.²

In the fifteen years since Liman wrote his book, lawyers providing public service has not become as natural as breathing. Indeed, if anything, the satisfactory provision of legal services, not just for those at the bottom, but also for those in the middle, may well have deteriorated. One criticism often leveled with justification against our legal system is that it works primarily for those at the very top and, to a lesser extent, the very bottom of the economic ladder.³ The indigent criminal defendant seeks assistance through public defenders and legal aid societies; the wealthy can afford a lawyer. But where does that leave the vast majority in the middle?

B. Understanding the Problem

Two cautionary comments warrant mentioning. First, the "twin crises" of underserved clients and underemployed lawyers might seem like a problem that would correct itself if we had a market that worked efficiently. If lawyers need jobs and clients need services, then in a well-operating market, we would expect each of these problems to help solve the other. To the extent they do not, it may be

¹ ARTHUR L. LIMAN, *LAWYER: A LIFE OF COUNSEL AND CONTROVERSY* 234 (1998).

² *Id.* at 174.

³ See, e.g., Peter G. Beeson, *Unbundled Legal Services: Help in Bridging the Gap Between Rich and Poor*, N.H. BAR ASSOC. (April 16, 2010), <http://www.nhbar.org/publications/display-news-issue.asp?id=5528>, archived at <http://perma.cc/YT56-X6UK> (noting the broadening divide between those who can afford an attorney and those who cannot).

because the legal services market is so heavily regulated—on the law school side by the Association of American Law Schools (“AALS”) and the American Bar Association (“ABA”) and on the practice side by state bar associations—that the problem is fundamentally not a market failure, but a regulatory failure. Second, as explained a bit further, some might express skepticism that these “twin crises” really exist.

1. Underserved Clients

Even though we have a general sense that there is a “twin crisis” of underserved clients and underemployed lawyers, it is harder than it might initially appear to really understand the problem. From my experience, thinking, and research on this topic, it is remarkably hard to get a sense of where the greatest deficiencies lie.

Much of the work once done by lawyers is being done by accountants, real estate agents, and help-yourself legal services available through state agencies, such as Utah Legal Services,⁴ the Utah Online Court Assistance Program (“OCAP”)—which is “the official State of Utah website for assistance in preparing court documents if you are not able to have an attorney draft them for you”⁵—as well as commercial providers, such as Legal Zoom, which specializes in basic business documents, personal services, wills and trusts, and even trademarks and other intellectual property.⁶

⁴ Utah Legal Services’ web site offers self-help materials on a wide range of matters, including domestic violence, family law, housing, consumers, public benefits, and estate planning. *Can ULS Help Me?*, UTAH LEGAL SERVS., http://www.utahlegalservices.org/public/public/get_help, archived at <http://perma.cc/5FDU-PTYW>.

⁵ *Online Court Assistance Program (OCAP)*, UTAH STATE COURTS, <http://www.utcourts.gov/ocap/>, archived at <http://perma.cc/8ENA-FR8X>. The program may be used for free, and you can file documents with the court through the service for a small charge (\$20.00), plus court filing fees. Topics are numerous and varied, including divorce custody, support, or paternity; child support calculator; enforcing domestic orders; landlord-tenant cases; protective orders; protective orders on behalf of a child; civil stalking; guardian/conservator exam; guardian/conservator inventory and annual reporting; guardian/conservator termination; guardianship of a minor; and employer’s answers to garnishment interrogatories. *Id.*; UTAH COURTS, OCAP PROGRAMS (2013), available at http://www.utcourts.gov/ocap/OCAP_Programs.pdf, archived at <http://perma.cc/6KZV-NNEG>.

⁶ See generally LEGALZOOM, <https://www.legalzoom.com/>, archived at <http://perma.cc/7V65-VSPB>. The range of services offered through online sites is quite broad. For example, the list of legal services for businesses on LegalZoom includes help forming a business (LLCs, S and C Corps, Nonprofits, Limited Partnerships, and Limited Liability Partnerships); tax licenses and permits (Federal Tax ID, State Tax ID, 501(c)(3) application, S-Corp election, business licenses, and seller’s permits); corporate changes and filings (corporate amendments, dissolution, foreign qualification, corporate name change, conversion, DBA/business name); real estate (leases, deed transfers); business compliance (annual reports, initial reports, corporate minutes, compliance calendar, registered agent

Other types of lawyers also help ameliorate this problem. Personal injury lawyers seem ready to help clients regardless of their ability to pay since their compensation is typically based upon a percentage of the recovery.⁷ Homeowners and auto insurance policies provide legal coverage for accidents that take place at home and on the road.⁸ Legal insurance to cover a broader range of legal services does not seem to have caught on,⁹ likely because most people do not buy legal insurance in the same way they buy medical insurance.¹⁰ Thus, aspects of the problem of underserved clients may be in the process of being solved in some measure by technology and outsourcing, while law schools and bar associations largely look on as bystanders. Meanwhile, the most important lawyerly skills—analytical reasoning and problem solving—are the aspects of legal education that seem to be under assault with all the rage being “skills training.”

Most movements for reform in the legal profession focus on large damage awards in medical malpractice and other tort cases, where justice sometimes seems to be meted out by a roulette wheel with a few big winners and a large number who receive no or poor compensation.¹¹ There is no clamor for ObamaLegalCare like there is for ObamaMedicalCare. This is not to say that there is not a problem of underserved clients, but these are issues that many people have been working on

services, operating agreements, bylaws, and resolutions); and miscellaneous additional services (including certificates of good standing, legal forms and agreements, business legal plans, and immigration). *Id.*

⁷ See, e.g., *When You Need a Lawyer, Legal Fees and Expenses: What Are Contingent Fees?*, ABA, http://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/lawyerfees_contingent.html, archived at <http://perma.cc/6CE-J3KT>.

⁸ See, e.g., *Home Insurance Coverage*, PROGRESSIVE.COM, <http://www.progressive.com/homeowners/home-owners-insurance-coverages/>, archived at <http://perma.cc/47YM-FU> U7 (listing several types of coverage, including coverage for dwelling, personal property, liability, medical payments, and loss of use).

⁹ There are businesses offering prepaid legal services, but some of these have been criticized as being pyramid schemes. Compare Judith L. Maute, *Pre-Paid and Group Legal Services: Thirty Years After the Storm*, 70 *FORDHAM L. REV.* 915, 943 (2001) (“[T]he bar should abandon its traditional resistance to group legal services, and willingly embrace innovative forms of practice that enhance middle-class access to affordable legal services”), with Fred C. Zacharias, *The Legal Profession in the Year 2050*, 15 *WIDENER L.J.* 253, 265–66 (2006) (comparing the negative side of prepaid legal services to that of HMOs).

¹⁰ Some online sites do offer monthly plans to cover basic personal and legal business advice. See, e.g., *Business Legal Plans*, LEGALZOOM, <https://www.legalzoom.com/attorneys-lawyers/legal-plans/business>, archived at <http://perma.cc/AA2D-83L8>.

¹¹ See, e.g., George N. Meros, Jr., *Toward a More Just and Predictable Civil Justice System*, 25 *FLA. ST. U. L. REV.* 141, 142 (1998) (arguing in favor of tort reform to create a “more just and predictable liability system”); Jeffery Young, *Trial Lawyers to Obama: Don’t Deal on Tort Reform in Healthcare Negotiations*, *THE HILL* (Feb. 14, 2010, 9:56PM), <http://thehill.com/homenews/administration/81055-trial-lawyers-to-obama-dont-deal-on-tort-reform>, archived at <http://perma.cc/AXV9-MMS5> (reporting trial lawyers’ opposition to tort reform).

for many years. There is a remarkably robust range of services and resources available, and in an online world, the level of accessibility to many basic legal services is probably higher than it has ever been.

One place where the problem of underserved clients is clearly evident is in the number of people who represent themselves *pro se* in both criminal and civil matters. As James Holbrook and Jonathan Hornok noted in a recent article in the *Utah Bar Journal*,¹² this is a problem that former Chief Justice Michael Zimmerman highlighted in his 1998 State of the Judiciary Address. Chief Justice Zimmerman said:

The presence of large numbers of *pro se* litigants is fundamentally inconsistent with [the current structure of Utah's court] system. Their lack of understanding of procedure and the law raises the prospect of the *pro se* litigant losing not on the merits of their case, but on technical grounds.¹³

2. Underemployed Lawyers

Lawyers better understand the problem of underemployed lawyers (especially recent graduates and current law students). As many as 44% of recent law graduates do not have full-time employment within nine months after graduation.¹⁴ In lower-ranked and unaccredited schools, especially schools in states with easy-entry rules for unaccredited and online law schools, the underemployment or unemployment number is even higher.¹⁵ This problem has compounded over the last five years or so, leading one commentator to estimate that in forty-seven of the fifty states, the number of law job openings is fewer than the number of lawyers

¹² James R. Holbrook & Jonathan R. Hornok, *Addressing Twin Crises in the Law: Underserved Clients and Underemployed Lawyers*, UTAH B.J., Sept./Oct. 2013, at 29.

¹³ Chief Justice Michael Zimmerman, State of the Judiciary Address (Jan. 19, 1998), available at <http://utah.ptfs.com/awweb/pdfopener?sid=B25003C2EC900D2866EF326B3918D7DC&smd=1&md=1&awdid=1>, archived at <http://perma.cc/4Y86-TKC5>. But notice, this problem was identified by Chief Justice Zimmerman in 1998, so this is not necessarily a new problem, and it is unclear whether it is a growing phenomenon.

¹⁴ Karen Sloan, *Law Graduates' Jobs Rate—and Unemployment Rate—Increase Only Slightly*, NAT'L L.J., (Mar. 29, 2013), http://www.nationallawjournal.com/id=1202594092381&Law_graduates_jobs_rateand_unemployment_rateincrease_only_slightly, archived at <http://perma.cc/HQM3-TB6G> (noting that most recent numbers had an 82% employment rate but only a 56% rate of full-time, long-term work that requires bar passage).

¹⁵ Thomas Jefferson School of Law in San Diego, California, is one such school. In October 2012, 31.36% of 2011 graduates were unemployed or seeking employment in. A scant 27% held J.D.-required jobs. Dan Bauder, *Local Law School Has One of the Worst Employment Records*, SAN DIEGO READER (Oct. 16, 2012), <http://www.sandiegoreader.com/weblogs/news-ticker/2012/oct/16/local-law-school-has-one-of-worst-employment-rec-or/>, archived at <http://perma.cc/WKV2-KDGS>.

that graduate in that state in any given year.¹⁶ Students often graduate with heavy burdens of debt, compounding their problems when they do not find suitable employment.¹⁷

The economic realities for law students today can appear dismal, especially when viewed from the thirty-thousand-foot level of national employment statistics. Law school career services offices are facing challenges and pressures that are very large, and the range and variety of services they offer are much greater than they were even a few years ago. For example, Brigham Young University's ("BYU") law school's career services office provides not just introductory courses on different types of legal careers that students might consider, but also intensive counseling, externship programs, on-campus recruiting, mentoring programs, mock interviews, extensive networking, and many other resources. BYU's law school website also includes detailed employment data that breaks down employment outcomes for recent graduates; this includes all of the information submitted to the ABA, as well as additional information.¹⁸ For BYU's class of 2012 (the most recent class for which data is available), 9 months after graduation, 7 of 147 (about 5%) of graduates were still unemployed and seeking employment.¹⁹

II. THE CHALLENGES FACING LAW SCHOOLS

Law schools are facing a number of converging challenges, including a reduction in the quantity and quality of law school applicants, dramatic increases in tuition, the tremendous expense of clinical education, and an emphasis in law school rankings on expenditures per student that creates incentives for law schools to raise per-pupil spending, which often translates into increased tuition.

A. The Quantity and Quality of Law School Applicants Is Declining

After peaking at more than 100,000 in 2004, the number of applicants to ABA accredited schools declined to fewer than 70,000 in 2012, and the numbers in 2013 have fallen just below 60,000, nearly the smallest pool since the early 1980s.²⁰

¹⁶ Matt Leichter, *Law Graduate Overproduction*, LAW SCHOOL TUITION BUBBLE, <http://lawschooltuitionbubble.wordpress.com/original-research-updated/law-graduate-over-production/>, archived at <http://perma.cc/G896-QZFG>.

¹⁷ See *Which Law School Graduates Have the Most Debt?*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings>, archived at <http://perma.cc/BY66-VFU6>.

¹⁸ *Brigham Young University: Employment Summary for 2012 Graduates*, ABA, http://www.law2.byu.edu/page/categories/careers/documents/info_stats/ABA%20EmploymentSummary-2012b.pdf, archived at <http://perma.cc/5VKV-EANR>.

¹⁹ *Id.* See Generally, *BYU LAW SCHOOL*, <http://www.law2.byu.edu/site/home>, archived at <http://perma.cc/JNC3-AERM>.

²⁰ See Jacob Gershman, *Number of LSAT Test Takers Is Down 45% Since 2009*, WALL STREET J. LAW BLOG (Oct. 31, 2013, 11:32 AM), <http://blogs.wsj.com/law/2013/10/>

This decline is compounded by the fact that there has been a decline not just in the number of applicants, but also in their quality, as measured by the proportion and number of students scoring high on the LSAT.²¹

B. The Numbers and Proportions of Minority Law Students Is Declining

Both as an absolute number and as a percentage, fewer minorities are applying for, being admitted, and enrolling in law school, with many being denied admittance to every law school to which they apply.²² As law schools compete to maintain or improve their *U.S. News* rankings,²³ scholarship money is targeted increasingly at students with high GPAs and LSATs rather than students who need the money.²⁴

C. The Cost of Legal Education Is Increasing Dramatically

Tuition in law schools has gone up between two and a half and five times over the last twenty-five years, after adjusting for inflation.²⁵ For the 2012–2013 school

31/number-of-lsat-test-takers-is-down-45-since-2009/, archived at <http://perma.cc/5EFA-EY5L>.

²¹ See Jordan Weissman, *The Wrong People Have Stopped Applying to Law School*, THE ATLANTIC (Apr. 10, 2012, 10:37 AM), <http://www.theatlantic.com/business/archive/2012/04/the-wrong-people-have-stopped-applying-to-law-school/255685/>, archived at <http://perma.cc/3W65-GBFW>. The quality of law students' reasoning skills as tested by the LSAT is important to success at learning how to think like a lawyer. *About the LSAT*, LSAC.ORG, <http://www.lsac.org/jd/lSAT/about-the-lsat>, archived at <http://perma.cc/U98F-A4KY>. But see David A. Thomas, *Predicting Law School Academic Performance from Lsat Scores and Undergraduate Grade Point Averages: A Comprehensive Study*, 35 ARIZ. ST. L.J. 1007, 1021 (2003) (concluding, after analyzing twenty-seven years of admissions data from BYU's law school, that "[t]he common practice in law school admissions of attributing special weight to the LSAT score as a predictor of law school academic performance is without merit or validity.").

²² Tamar Lewin, *Law School Admissions Lag Among Minorities*, N.Y. TIMES, Jan. 6, 2010, at A7, available at <http://www.nytimes.com/2010/01/07/education/07law.html>, archived at <http://perma.cc/7UVJ-GT98> (noting "61 percent of black applicants and 46 percent of Mexican-American applicants were denied acceptance at all of the law schools to which they applied, compared with 34 percent of white applicants").

²³ *Top Law Schools*, U.S. NEWS & WORLD REPORT (Mar. 2013), <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools>, archived at <http://perma.cc/GD9P-Y3FT>.

²⁴ Finding statistical evidence of this is difficult as law schools are loathe to admit this, but anecdotal evidence is strong, and common sense confirms, that this is happening, perhaps dramatically.

²⁵ See Paul Campos, *The Crisis of the American Law School* 1–3 (Jan. 2012) (unpublished manuscript), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=paul_campos, archived at <http://perma.cc/5KRQ-LASF> (demonstrating that inflation-adjusted tuition at Harvard has gone from \$12,386 in 1971 to \$50,880 in 2012; private law schools from \$15,438 in 1985 to \$39,915 in 2011; public law schools

year, the median full-time tuition, assuming residency, for all ABA accredited law schools is \$36,134.²⁶ For private universities, the median full-time tuition is approximately \$40,732; for public universities, it is \$21,532.²⁷

Government loans, which are virtually unlimited and carry below-market interest rates, have enabled law schools to charge more. When virtually unlimited low-interest student loans are available, it is not surprising that law schools, as well as universities more broadly, have responded by increasing tuition.²⁸

D. Clinical Legal Education and Skills Training Is Expensive

Increasing “skills training” is all the rage in legal education.²⁹ But clinical education is extremely expensive on a per-credit basis.³⁰

E. Starting Salaries and Rates of Employment Are Down

Meanwhile, the 2012 law school class had a national median salary of \$61,245 for full-time jobs immediately following graduation, significantly lower than the high of \$72,000 in 2008.³¹ Moreover, salaries for recent law school graduates are distributed bimodally—resembling a two-humped camel—so the

from \$3,746 in 1985 to \$20,076 in 2011); Matt Leichter, *It's the Rent, Not the Regulations*, LAW SCHOOL TUITION BUBBLE (Dec. 18, 2012), <http://lawschooltuitionbubble.wordpress.com/2011/12/18/its-the-rent-not-the-regulations/>, archived at <http://perma.cc/NL4R-VXF6> (providing statistical analysis of law school tuition increases).

²⁶ See LAW SCH. ADMISSION COUNCIL, 2014 ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, https://officialguide.lsac.org/Release/OfficialGuide_Default.aspx, archived at <http://perma.cc/AC2Z-QR8P> (follow “View All Schools” hyperlink; then click “Finances” hyperlink; the information was sorted and analyzed by hand).

²⁷ *Law School Tuition 1985–2012*, ABA, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_tuition.authcheckdam.pdf, archived at <http://perma.cc/JH6E-ABU3>.

²⁸ See Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501, 506–08, 512 (2000).

²⁹ Amy Yarbrough, *Task Force Explores Need for Practical Skills Training*, CAL. ST. B.J. (June 2012), <http://www.calbarjournal.com/June2012/TopHeadlines/TH1.aspx>, archived at <http://perma.cc/3FW-7PRV>.

³⁰ Skills training classes frequently have a lower student-faculty ratio, which often increases cost. See *id.* (“The group will also weigh the potential benefits versus the costs of a training requirement, and if it makes sense to first test out the program with a pilot phase.”).

³¹ See Press Release, Nat’l Ass’n for Law Placement, Law School Class of 2012 Finds More Jobs, Starting Salaries Rise—But Large Class Size Hurts Overall Employment Rate (June, 20, 2013), available at http://www.nalp.org/classof2012_selected_pr, archived at <http://perma.cc/HX93-NX9K>.

median salary information is misleading.³² For students at the high-salary camel's hump, existing average debt loads may be manageable, but for students whose starting salaries cluster at the low-salary camel's hump, existing average debt loads are too high. Almost no one earns an amount near the median.

F. Disquieting Macro Trends

In thinking about the “twin crises” of underserved clients and underemployed lawyers, it is important to situate these problems within larger economic and cultural shifts taking place in the United States. Four important background factors are (1) employment, (2) median household income, (3) the growing gap between the wealthy and poor in America, and (4) trends with respect to marriage and family. Thus, the problem is deeper than just insufficient legal services for middle class clients.

1. The Employment Landscape

Unemployment has remained above 7% for over four and a half years and is currently 6.7%.³³ Even as the unemployment rate has fallen in 2013 from 7.9% to 7.3%, many of the jobs that have been created have been part-time, rather than full-time, jobs.³⁴ The percent of people either in a job or looking for a job has fallen by 3% since the great recession started in 2007.³⁵ The labor participation

³² *Class of 2012 Salary Distribution Curve*, NAT'L ASS'N FOR LAW PLACEMENT (Sept. 2013), http://www.nalp.org/class_of_2012_salary_distribution_curve, archived at <http://perma.cc/9C23-9DWG>.

³³ *Civilian Unemployment Rate (UNRATE)*, FED. RES. BANK ST. LOUIS, <http://research.stlouisfed.org/fred2/series/UNRATE/>, archived at <http://perma.cc/CX92-G5FQ>.

³⁴ Rick Ungar, Op-Ed., *Is Obamacare Destroying the Job Market and, If So, Does It Really Have To Be This Way?* FORBES (Aug. 6, 2013), <http://www.forbes.com/sites/rickungar/2013/08/06/is-obamacare-destroying-the-job-market-and-if-so-does-it-really-have-to-be-this-way/>, archived at <http://perma.cc/8ZTR-K7DZ>. For a nonopinion piece, see Paul Davidson, *Many New Jobs Are Part Time and Low-Paying*, USA TODAY (Aug. 4, 2013, 5:55 PM), <http://www.usatoday.com/story/money/business/2013/08/04/part-time-low-wage-jobs/2613483/>, archived at <http://perma.cc/H4DB-KM9A> (noting that newly created jobs after the great recession have largely been low-wage and part-time).

³⁵ See *Labor Force Statistics from the Current Population Survey*, BUREAU LABOR STAT., <http://data.bls.gov/timeseries/LNS11300000>, archived at <http://perma.cc/3UFA-C9S7> (data extracted Feb 19, 2014). Part of this may be due to demographic changes, but the proportion of civilians from twenty-five to fifty-four that are working has dropped by 2% as well. See also *Graph: Civilian Labor Force Participation Rate—25 to 54 Years (LNU01300060)*, FED. RES. BANK ST. LOUIS, [http://research.stlouisfed.org/fred2/graph/?chart_type=line&s\[1\]\[id\]=LNU01300060&s\[1\]\[range\]=5yrs](http://research.stlouisfed.org/fred2/graph/?chart_type=line&s[1][id]=LNU01300060&s[1][range]=5yrs), archived at <http://perma.cc/CK42-CW56>.

rate, including the rate of employment for working-age men, is at its lowest in thirty-five years.³⁶

2. Median Household Income

Since the great recession of 2008, the median household income in the United States has fallen 8.1% from \$54,489 to \$50,054 in 2011.³⁷ Utah's median income has likewise dropped.³⁸

3. Growing Gap Between the Wealthy and Poor

Another worrisome economic trend is the growing gap between the rich and the poor. Today, over 24% of the nation's income is earned by the top 1%; 45% of the income in America is earned by the top 10%.³⁹ The gap between the rich and the poor in America is the greatest it has been at any time since the Great Depression.⁴⁰ Meanwhile, the number of households receiving some form of government assistance is at an all-time high.⁴¹

³⁶ Steve Hargreaves, *Labor Participation Lowest Since 1978*, CNNMONEY (Sept. 6, 2013), <http://money.cnn.com/2013/09/06/news/economy/labor-force-participation/index.html>, archived at <http://perma.cc/KX4W-NG7G>.

³⁷ CARMEN DENAVAS-WALT, ET. AL., U.S. CENSUS BUREAU, *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011*, at 7 (2012), available at <http://www.census.gov/prod/2012pubs/p60-243.pdf>, archived at <http://perma.cc/YBW8-TYFN> (noting the income peak in 1999 was at \$54,932 in 2011 dollars).

³⁸ Lee Davidson, *Is the Average Utahn Better off Financially Than Four Years Ago? Census Says No*, SALT LAKE TRIB. (Sept. 13, 2012, 9:29 AM), <http://www.sltrib.com/sltrib/politics/54882599-90/2011-ago-census-data.html.csp>, archived at <http://perma.cc/63KN-U36B>.

³⁹ Timothy Noah, *The Great Divergence*, SLATE, http://img.slate.com/media/3/100914_NoahT_GreatDivergence.pdf, archived at <http://perma.cc/83L2-9P3K>.

⁴⁰ See Connie Stewart, *Income Gap Between Rich and Poor is Biggest in a Century*, L.A. TIMES (Sept. 11, 2013), <http://articles.latimes.com/2013/sep/11/nation/la-na-nn-income-inequality-20130910>, archived at <http://perma.cc/7E9M-2B3R>.

⁴¹ Depending on whether assistance is measured at the present time or over one's lifetime, the number ranges from 33% to 55%. Annalyn Kurtz, *Majority of Americans Have Received Government Aid*, CNNMONEY (Dec. 18, 2012, 3:11 PM), <http://money.cnn.com/2012/12/18/news/economy/government-entitlement-aid/index.html>, archived at <http://perma.cc/9NYA-BP4M> (noting that 55% of Americans have received some form of Government aid); Tami Luhby, *Government Assistance Expands*, CNNMONEY (Feb. 7, 2012, 6:50 PM), http://money.cnn.com/2012/02/07/news/economy/government_assistance/, archived at <http://perma.cc/3VLM-CEMG> (noting that one-third of Americas are currently on some form of government aid, excluding social security).

4. Marriage and Family

In the United States today, more than 40% of children are born to single mothers.⁴² Among some social and demographic groups, the numbers are even more alarming: 72% of African American children are born to single mothers,⁴³ more than 53% of Hispanic children are born to single mothers,⁴⁴ and over 50% of all children born to mothers under the age of thirty are born to single mothers.⁴⁵ These trends may not be quite as dire in Utah as other states, but the trends are similar.⁴⁶ While social scientists and others disagree on the causes, as well as the effects, of these numbers,⁴⁷ average social indicators for children of single mothers are consistently worse than for those of children from two parent homes.⁴⁸

5. The Disappearing Middle Class

The problem is not simply that the middle class is underserved by the legal profession. The problem is much deeper and structurally problematic: the middle class is shrinking, if not disappearing.⁴⁹

⁴² Joyce A. Martin et al., *Births: Final Data for 2010*, NAT'L VITAL STATISTICS REP., Aug. 2012, at 1, 8, available at http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf, archived at <http://perma.cc/TU9V-A7V6>.

⁴³ *Id.* at 45.

⁴⁴ *Id.*

⁴⁵ Jason Deparle & Sabrina Tavernise, *Unwed Mothers Now a Majority Before Age of 30*, N. Y. TIMES, Feb. 18, 2012, at A1, available at <http://www.nytimes.com/2012/02/18/us/for-women-under-30-most-births-occur-outside-marriage.html>, archived at <http://perma.cc/3C9S-W3CM>.

⁴⁶ Wendy Leonard, *Report: Utah Families Are Strong, But They Could Be Stronger*, DESERET NEWS (Jan. 5, 2013, 5:15 PM), <http://www.deseretnews.com/article/865570027/Report-Utah-families-are-strong-but-they-could-be-stronger.html>, archived at <http://perma.cc/G4CF-LUNA> (“Approximately 1.3 percent of total households in the state contain cohabitating couples, whereas 2.4 percent of homes are made up that way nationally. Utah’s percentage is the lowest in the country.”).

⁴⁷ Compare Noah, *supra* note 39 at 7 (arguing that the income gap between single parents and two-parent households was closed by mothers entering the workforce because the one trend canceled the effects of the other in the aggregate), with KAY HYMOWITZ ET AL., *KNOT YET: THE BENEFITS AND COSTS OF DELAYED MARRIAGE IN AMERICA* 19 (2013), available at <http://nationalmarriageproject.org/wp-content/uploads/2013/04/KnotYet-FinalForWeb-041413.pdf>, archived at <http://perma.cc/7Q8-J3D6> (showing that the rise in out-of-wedlock pregnancy rates primarily happens among women who have not finished college).

⁴⁸ See HYMOWITZ ET AL., *supra* note 47, at 32 (“Most researchers agree that on average, whether because of instability or absent fathers or both, children of unmarried mothers have poorer outcomes than children growing up with their married parents.”).

⁴⁹ Jan Diehm & Katy Hall, *Middle Class Jobs, Income Quickly Disappearing* (INFOGRAPHIC), HUFFINGTON POST, http://www.huffingtonpost.com/2013/06/06/middle-class-jobs-income-_n_3386157.html, archived at <http://perma.cc/935X-NN62>.

III. WHAT LAW SCHOOLS CAN DO

In the face of these large societal trends, as well as the long list of problematic realities facing law schools, it would be easy to despair. But there are a number of relatively straightforward—though not particularly glamorous or headline-grabbing—things that law schools can and should do.

A. Law Schools Should Become More Affordable

The most important service law schools can provide students in today's job market is to help them graduate law school with less debt. This involves addressing several interrelated factors, such as (1) tuition, (2) student aid, (3) loan forgiveness, and (4) lowering operating costs.

1. Tuition

The most straightforward way for law schools to reduce the debt of graduating students is to reduce their tuition. A few law schools have decreased their tuition, but the recent trend has been for schools to increase tuition, even as the number of applicants has fallen.⁵⁰

⁵⁰ For example, for the 2013–2014 academic year, the University of Utah S.J. Quinney College of Law's web site says tuition and fees for on-campus resident students is \$23,489, and the total estimated annual cost is \$43,791. *Cost of Attendance*, S.J. QUINNEY COLLEGE OF LAW, UNIVERSITY OF UTAH, <http://www.law.utah.edu/admissions/financial-information/tuition-schedule/>, archived at <http://perma.cc/QD2P-G7MR>. For nonresident on-campus students, tuition and fees are \$44,635, and total estimated expenses are \$65,657. *Id.* The average debt of the Class of 2012 was \$80,608. *Id.* In contrast, in-state tuition at the school for the 1999–2000 academic year was \$4,913. Denis Binder, *The Changing Paradigm in Public Legal Education* 33 (2005) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=836744, archived at <http://perma.cc/S224-8KRU>. Tuition at BYU's law school has also increased. For the 2013–2014 school year, tuition for LDS students was \$11,280 per year, and total expenses are estimated at \$31,352. *Tuition & Financial Aid*, BYU LAW, <http://www.law2.byu.edu/site/admissions/tuition-financial-aid>, archived at <http://perma.cc/3ZL4-FF7T>. For non-LDS students, tuition was \$22,560, and total expenses are estimated at \$42,632. *Id.* This is up from \$2,665 for LDS Students in 1999–2000. *Undergraduate Catalog 1999–2000: Tuition and Fees*, BYU, <http://saas.byu.edu/catalog/archive/1999/info/tuition.html>, archived at <http://perma.cc/9MNP-HCYL>. Average debt of a 2012 BYU law graduate was \$56,112. *Which Law School Graduates Have the Most Debt?*, US NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings/page+8>, archived at <http://perma.cc/CQ5D-NMQK>.

2. *Student Aid*

Another approach is to provide greater student aid.⁵¹

3. *Loan Forgiveness*

A number of law schools provide loan forgiveness programs for graduates who engage in public service or lower paying jobs. One idea is to focus loan forgiveness on the service of pro-bono or low-bono legal services, not income limits. For example, a program could allow lawyers to bill time against their law school loans at deeply discounted rates (\$25–50 per hour) only if a client pays some share of the service (like 25–50%).

4. *Lower Costs*

The paths to lower costs are painfully obvious—both obvious and painful: lower faculty salaries, smaller administrative staffs, higher teaching loads, reduced emphasis on scholarship (allowing for more credits taught per teacher), fewer skills labs, shrinking libraries, and higher student-faculty ratios. None of these courses of action are particularly palatable, and not all schools will need to resort to all of them.

B. Emphasize Public Service

Law schools must give more than lip service to public service and the need to provide not just pro bono, but also low bono. Law schools, such as BYU, with a self-proclaimed mission that emphasizes service, should be leaders.⁵² Public service should be understood broadly to include providing affordable legal services to underserved populations.

C. Admit Students Who are Likely to Serve Middle Class Clients

There is no way to predict with exactitude which students are likely to become lawyers who will provide legal services to middle-income or low-income clients, but it is reasonable to expect that students who come to law school from

⁵¹ The average estimated total amount of scholarship money at the University of Utah, S.J. Quinney College of Law, for 2013–2014 is \$1,866,100. This amount estimates that 52% of enrolled students will receive merit or need-based scholarship money with an average award amount of \$2,017. *Law School Profile*, S.J. QUINNEY COLLEGE OF LAW, UNIVERSITY OF UTAH, http://www.law.utah.edu/admissions/college_information/law-school-profile/, archived at <http://perma.cc/JB4K-KABT>.

⁵² See Marion G. Romney, Opening Remarks, Becoming J. Reuben Clark's Law School (Aug. 27, 1973) available at http://www.law2.byu.edu/law_school/foundingdocumentsnew/pdf%20documents/romneybecomingclarksschool.pdf, archived at <http://perma.cc/RA22-FFSR> (reciting desirable leadership properties for BYU law school graduates).

middle- and lower-economic situations will in some large measure return to serve their communities. We have already noted the decline in minority enrollment in law school. In addition to other types of diversity, law schools will need to focus on valuing economic diversity in the background of their students.

D. Prepare Students for Today's Job Markets

In the current law school environment, there is likely to be a further stratification of law schools into those who are preparing students for elite legal careers and those preparing students for smaller market and lower-end legal careers. Law schools must do a better job of matching their curricular and career services support to the employment prospects of their graduates. For schools where most students practice in small markets or small firms, those schools must do a better job of preparing their students for the job prospects they are likely to have.

1. Curriculum That Prepares Students for Underserved Clients' Needs

Law schools should continue to think creatively about their curricular offerings to make them more relevant. There have been a number of exciting curricular developments at BYU's law school in the past few years, including adding several new clinics,⁵³ promoting clinical alliances,⁵⁴ and creating skills labs as add-ons to traditional doctrinal courses.⁵⁵ Further thinking in this area is warranted.

2. Expand Practical Learning Opportunities

Both BYU's and the University of Utah's law schools have been leaders and innovators in the use of externship and other experiential learning opportunities for students.⁵⁶ In order to be effective, these types of programs need strong faculty

⁵³ Memorandum from Gordon Smith, Assoc. Dean of BYU Law School, on How to Choose Your Courses 2013–14, to 2L & 3L Students 5–6 (July 12, 2013), *available at* http://www.law2.byu.edu/page/categories/student_resources/course_materials/How%20to%20Choose%20Your%20Courses%202013-14_2.pdf, *archived at* <http://perma.cc/TAS5-WVRB> (noting the Negotiation and Conflict Resolution Clinic and the Law and Entrepreneurship Clinic).

⁵⁴ *Id.* at 6–7 (noting the Community and Economic Development Clinical Alliance and the Government and Legislative Clinical Alliance).

⁵⁵ *Id.* at 7 (noting the Family Law Skills Lab).

⁵⁶ In one recent ranking, the University of Utah placed third (89.5%) and BYU's law school ranked fifth (76.7%) in the percentage of students who participated in an externship experience. Michelle Weyenberg, *Top Schools for Externships*, PRELAW, 2013, at 12, *available at* http://www.nxtbook.com/nxtbooks/cypress/prelaw_2013backtoschool/index.php?startid=12, *archived at* <http://perma.cc/Y7FG-ND5V>.

oversight, but such programs are an important way of providing students with opportunities to get first-hand experience in a variety of different practice areas.⁵⁷

3. *Small Business Clients*

When we think of serving middle- or low-income clients, we often think in terms of personal legal services, such as criminal defense, wills and estates, and family law. But one of the most fertile areas for legal reform and improved service is for small business clients.

Small businesses are and will be the engine of economic growth in the United States. Regulatory compliance for small businesses has become much more complex and expensive over our lifetimes. For example, the securities laws regulating raising capital by small businesses have become so complex and expensive that it imposes a severe restraint.⁵⁸

Laws must accommodate innovative ways of financing small businesses, such as crowd sourcing and private lending and investing in small businesses. Securities fraud and other abuses will remain a significant problem, and Utah has special problems with affinity fraud.⁵⁹ But we must not make it inadvertently too difficult for legitimate small businesses to comply with securities, employment, health and safety, and other laws.⁶⁰ Addressing this problem will involve a combination of better training of law students and simplification of regulations affecting businesses, including securities laws.

⁵⁷ James H. Backman & Cory S. Clements, *Significant But Unheralded Growth of Large Externship Programs*, 28 *BYU J. PUB. L.* 145, 150.

⁵⁸ See *Small Business and the SEC: A Guide for Small Business on Raising Capital and Complying with the Federal Securities Laws*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/info/smallbus/qasbsec.htm>, archived at <http://perma.cc/46K4-G3FV> (“If a small business is offering and selling securities, even if to just one person, the offer and sale of the securities must either be registered with the SEC or conducted in accordance with one of the many registration exemptions under the Securities Act.”).

⁵⁹ Saule T. Omarova, *Wall Street As Community of Fate: Toward Financial Industry Self-Regulation*, 159 *U. PA. L. REV.* 411, 416 (2011) (“Given the complexity and global nature of the modern financial market, any government’s attempt to regulate it in a purely unilateral command-and-control manner will inevitably encounter the fundamental problem of regulatory arbitrage, whereby financial institutions find new ways to get around government rules, thus creating a never-ending spiral of rulemaking and rule evading.”); Steven L. Schwarcz, *Regulating Complexity in Financial Markets*, 87 *WASH. U. L. REV.* 211, 214 (2009) (“[C]omplexities of the investment securities themselves can lead to a failure of investing standards and financial-market practices.”); see also *Investor Education: Affinity Fraud*, UTAH DEP’T COMMERCE, DIV. SEC., http://securities.utah.gov/investors/edu_affinityfraud.html, archived at <http://perma.cc/EKZ8-YYFA>.

⁶⁰ This recommendation obviously goes beyond what law schools can do directly themselves and will require legislative and regulatory changes.

4. *Alternative Dispute Resolution and Mediation*

Dispute resolution mechanisms other than formal courtroom measures are often viewed as a way of providing more cost-effective legal services, both for high and low ends of the legal services.

5. *Post-graduation Clinics*

One idea that is receiving significant attention recently is having post-graduation clinics that employ recent graduates who have not found employment and are preparing themselves for solo or small-firm practice. One challenge facing these models is that it is difficult to generate income sufficient to cover the costs. Medical services clinics rely heavily upon Medicare, Medicaid, and private insurance revenue streams, and there are no clear analogies of these sources of funding for legal services. Some of these programs seem to have been created as bridge employment mechanisms that are designed primarily to facilitate nine month after graduation employment statistics.⁶¹

IV. SOME MODEST PROPOSALS

A. *Eliminate the Student Expenditure Factor in Law School Rankings*

One of the important but little understood factors used in determining the *U.S. News and World Report* rankings is expenditures per student.⁶² This has the insidious effect of incentivizing law schools to increase their expenditures per student. This is usually done by raising tuition—making lavish capital expenditures that can be reflected in higher per-student spending that will be paid by future generations of law students—or by reducing class size.

The ABA recently announced that it has eliminated the reporting of per student expenditures, which has led to speculation that *U.S. News* will follow suit.⁶³ This would be a very positive development, as the per-student-expenditure number creates incentives for law schools to raise tuition (in order to increase per-

⁶¹ See Bernie Burk, *Employment Outcomes II: What We Know about School-Funded Temporary “Bridge” Positions at First-Tier Law Schools*, FACULTY LOUNGE (Mar. 28, 2012, 2:37 PM), <http://www.thefacultyounge.org/2012/03/employment-outcomes-ii-what-we-know-about-school-funded-temporary-bridge-positions-at-first-tier-law.html>, archived at <http://perma.cc/3NH-ERM7>.

⁶² Sam Flanigan & Robert Morse, *Methodology: Best Law School Rankings* U.S. NEWS & WORLD REPORT (Mar. 11, 2013), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2014/03/10/methodology-2015-best-law-schools-rankings>, archived at <http://perma.cc/N3VH-3JET> (stating that approximately 10% of the ranking score is derived from money spent on students, including financial aid).

⁶³ Mat Bodie, *Expenditure, Tuition and U.S. News*, PRAWFSBLAWG (July 9, 2013, 10:52 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2013/07/expenditures-tuition-and-us-news.html>, archived at <http://perma.cc/F6AC-7UL6>.

student spending), a significant portion of which likely goes toward improving faculty and administrative salaries.

B. Facilitate Market Correction, Rather than Try to Engineer Macro Solutions

If the legal services market operated efficiently, the combination of underserved clients and underworked lawyers should lead to lawyers providing more services at lower costs. Further thought needs to be given as to whether there are structural barriers preventing underemployed lawyers from providing lower-cost services.

I am doubtful of large statewide or national responses that seek to engineer solutions to the problem of too many lawyers or underserved clients. We should be seeking to remove impediments to market solutions and to correct market failures,⁶⁴ rather than seeking to circumvent the market or engineer large-scale solutions. At law schools, we should focus primarily on what we can do to improve the career prospects and service mindedness of our students.

V. THE CURRENT BIG-IDEAS: REDUCING LAW SCHOOL TO TWO YEARS OR IMPLEMENTING THIRD YEAR APPRENTICESHIP

Some popular ideas percolating around legal education is to reduce law school to two years or to replace the third year with an apprenticeship where students practice law without paying tuition or at a significantly reduced cost under supervision of a skilled practitioner with law school oversight.⁶⁵ President Barack Obama recently endorsed this idea in a speech on the future of education in the United States.⁶⁶

⁶⁴ It may be a mistake to think about these problems as being the result of a market failure since the legal services market (both entry through AALS and ABA accreditation rules) and the legal profession (through Bar Admission and regulation) is such a heavily regulated industry.

⁶⁵ Examples of this call come from a variety of sources. See *How to Fix Law School: Six Experts Tell Us What They'd Change*, NEW REPUBLIC (July 23, 2013), <http://www.newrepublic.com/article/113983/how-fix-law-school-symposium>, archived at <http://perma.cc/4GFY-7SL5>. Vocal advocates of the two-year model include Brian Tamanaha of Washington University in St. Louis and Samuel Estreicher of New York University Law School. See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 20–28 (John M. Conley & Lynn Mather eds., 2012); Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y, 599, 599 (2012).

⁶⁶ Dylan Matthews, *Obama Thinks Law School Should Be Two Years. The British Think It Should Be One*, WASH. POST WONKBLOG (Aug. 27, 2013, 2:00 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/27/obama-thinks-law-school-should-be-two-years-the-british-think-it-should-be-one/>, archived at <http://perma.cc/A5N3-XBSP> (quoting President Obama, “This is probably controversial to say, but what the heck, I’m in my second term so I can say it. (Laughter.) I believe, for example, that law schools would probably be wise to think about being two years instead of three years—because by the

This may make sense for a law school that is seeking to prepare its students for nonelite legal practice, but it is likely counterproductive for preparing law students for complex and high-level practice providing more than basic routine legal services. But if bar rules were changed to allow students to sit for the bar after two years of law school, this would have wide-ranging implications for the legal profession. It would be difficult for schools to maintain a three-year model, and the implications for legal education would be significant. Law schools would likely admit more students to make up for lost tuition from the loss of third year students, and the problems of lawyers being well-prepared for legal practice would be exacerbated. The oversupply of lawyers would increase.

Although the idea is sometimes disparaged,⁶⁷ the most important service law schools provide law students is training in analytical, thinking, and problem solving skills that are primarily taught through the Socratic method. Unskillful Socratic teaching is probably less than valueless, but skillful Socratic teaching is the most important service law schools can provide to law students.

Students who have experienced both legal and business graduate education tend to identify the skill of working in groups as the most distinctive characteristic of business education. However, the skill of analytical reasoning and problem solving is the distinctive feature of legal education.

VI. CONCLUSION

Winston Churchill once said that the definition of success is going from failure to failure without losing enthusiasm. For law schools, times are tough. But legal education remains an important and valuable endeavor. We may have to make adjustments; we may have to rethink some old ways of doing things. But we should not give up on our belief that, when done well, legal education is one of the best preparations for service and leadership in the world. Law schools will provide a high-value legal education for their students when they enable their students to live their values—by preparing them to practice law competently and ethically at the highest levels and by enabling students to choose for themselves what kinds of lives they would like to live while practicing law.

third year—in the first two years young people are learning in the classroom. The third year they'd be better off clerking or practicing in a firm, even if they weren't getting paid that much. But that step alone would reduce the cost for the student.”).

⁶⁷ See *How to Fix Law School*, *supra* note 65 (“The Socratic method, in which a lecture hall full of students is supposed to sit politely while the professor plays a game of ‘guess what I’m thinking’ with one or two of them, should go. So should the hallowed tradition of using appeals court rulings as the primary teaching materials. It’s an incredibly inefficient way to convey information, when the point they want you to absorb is two sentences at the end of 40 apparently irrelevant pages.”).