# Two Questions for Law Schools about the Future Boundaries of the Legal Profession

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It is a tough time to be teaching Professional Responsibility in U.S. law schools, at least insofar as one focuses on the economics of the current market. Law jobs are down, student debt loads are up, and students caught in the (seemingly) sudden downturn are angry and apprehensive.

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<sup>1.</sup> Between November 2008 and December 2009, the legal services industry lost 42,000 jobs. News Release, Bureau of Labor Statistics, The Employment Situation at 24, tbl. B1 (Dec. 4, 2009), http://www.bls.gov/news.release/archives/ empsit\_01082010. pdf. The overall employment rate for new law school graduates was 87.6% in 2011, the lowest since 1996. Press Release, Class of 2010 Graduates Faced Worse Job Market Since Mid 1990s: Longstanding Employment Patterns Interrupted, National Association of Law Placement (Jun. 1, 2011), http://www.nalp.org/2010selectedfindingsrelease. Although fall, 2011 law firm recruiting was up slightly from 2009 levels, the legal sector continued to lose jobs through the end of 2011. Press Release, Law Firm Recruiting Volumes Inch Up, Making Modent Gains After Recession-Era Declines, National Association Of Law Placement (Mar. 7, 2012), available at http://www.nalp.org/march12\_perspectives\_pr.

Debra Cassens Weiss, GAO Puts Blame on US News Rankings for High Law School Tuition, (Oct. 2009), available A.B.A. 27, http://www.abajournal.com/news/article/why you can blame us news instead of the aba for high law school tuition/ (reporting that the average debt for private law school graduates rose from around \$75,000 in 2001-2002 to \$91,506 in 2007-2008, and the average debt for public law graduates schools rose from around \$50,000 to \$71,436 in 2007 dollars); see also Debra Cassens Weiss, Average Debt of Private Law School Grads is \$125K; It's Highest at these Five Schools, A.B.A. J. (Mar. 28, 2012), http://www.abajournal.com/news/article/average\_debt\_load\_of\_private\_law\_grads\_is\_125k\_these\_five schools lead to m (reporting that the average educational debt for private law school graduates was nearly \$125,000 in 2011-12); ABA Urges Help for Students Repaying Educational Debts, ABA Student Div.), July 10, 2010, (ABA Law http://www.americanbar.org/newsletter/publications/monthly e newsletter home/july10.html former ABA president Carolyn B. Lamm's letter to Congress supporting the "dischargeability of private

It is especially hard to be teaching third-year students in a third-tier law school in New York City. For years, New York has been the economic epicenter of the U.S. legal profession, home to the oldest, richest, and biggest private law firms in the country. Until recently, a cartoon map of the U.S. legal profession would have had a super-sized midtown Manhattan at the center, with the Harvard crest to the upper right and the scales of justice, for D.C., below. If the map had been drawn in the late 1990s, it also would have an icon for Silicon Valley.

Today's cartoon map would have a big red downward arrow over Manhattan and bolded black and white chomp marks framing the map on all sides. China, India, e-discovery, legal process outsourcing: U.S. law firms are being besieged by foreign and non-legal competitors<sup>5</sup> and (seemingly) suddenly, thousands of U.S. law graduates have nowhere to go.<sup>6</sup> New York has been especially hard hit: a 2009 state-by-state comparison of new lawyers to new job openings found that New York had a surplus of 7,687 lawyers, accounting for 28 percent of the national surplus.<sup>7</sup> No other state even came close.<sup>8</sup>

What does one say to students who are about to enter this market?

One strategy is to downplay the numbers, although this is getting more difficult to do. In the early days of the acute downturn and law firm layoffs of 2008 and 2009, professional opinion was split as to whether the industry—specifically, corporate legal services—was going through a short-term correction or a more radical and permanent restructuring. A 2009 industry survey reported that only 53% of corporate counsel and 52%

student loans for those who have made good faith efforts to repay educational debts yet have had to declare bankruptcy").

<sup>3.</sup> See MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 21 (1991) (discussing the historic centrality of New York City in the corporate legal services industry).

<sup>4.</sup> See Saul Steinberg, View of the World from Ninth Avenue, THE NEW YORKER, Mar. 29, 1976 (cover) (depicting a map of the world as seen by self-absorbed New Yorkers).

See William D. Henderson & Rachel M. Zahorsky, Law Job Stagnation May Have Started Before the Recession-And It May Be A Sign of Lasting Change, A.B.A. J. (July. 1, 2011), available at http://www.abajournal.com/magazine/article/paradigm\_shift; Aric Press, A Chasm With Consequences, LAW. (ONLINE) 1, (June 2011), available http://amlawdaily.typepad.com/amlawdaily/2011/06/chasm.html; John Markoff, Armies of Expensive Replaced Cheaper Software, N.Y. TIMES. Mar. http://www.nytimes.com/2011/03/05/science/05legal.html?pagewanted=all; Joel Stashenko, Lawyers Face New Challenges From Global Competition, N.Y. L.J. (ONLINE) (Feb. 4, 2011), available at http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202480255104.

<sup>6.</sup> See Hilary Potkewitz, Law School Grads: The Lost Generation, CRAIN'S NEW YORK BUSINESS, Aug. 29, 2010, available at http://www.crainsnewyork.com/article/20100829/SUB/308299989.

<sup>7.</sup> Catherine Rampell, *The Lawyer Surplus, State by State*, N.Y. TIMES (Jun. 27, 2011, 11:00 a.m.), http://economix.blogs.nytimes.com/2011/06/27/the-lawyer-surplus-state-by-state/. The analysis compared the number of people who passed the state bar exam to the estimated number of legal job openings in the state in 2009. The estimated national surplus was 27,269 lawyers.

<sup>8.</sup> Rampell, supra note 7. California came in second with an estimated surplus of 2,951 lawyers.

of private practice attorneys believed the recession would permanently change the way business is done in the legal industry. These days, most analysts acknowledge "enormous structural change," with causes that predate the recession and are likely to have lasting impact. <sup>10</sup>

Of course, even the short-term correction theory is cold comfort for students unlucky enough to be entering the market while the correction occurs. Short-term or not, it is bad for them. Research suggests they will never catch up. 11 The short-term correction theory is better suited as a justification for down-playing the numbers—or skirting the subject of the job market for new lawyers altogether.

Another strategy is to blame the law schools—either individually, for misleading marketing, <sup>12</sup> large class sizes, and high tuition, or collectively, for all of the above plus being wedded to an increasingly outdated curriculum and/or regulatory system. <sup>13</sup> Blaming the law schools is by far the dominant angle within the blawgosphere and the popular press, <sup>14</sup> and includes cheap shots among competitors as well as more systematic and fair-minded analysis.

But even a systematic, fair-minded analysis of the failings of U.S. law schools is, by itself, a difficult message to deliver face-to-face to one's students. The punch line for many of them is still bad: you are screwed. There really is no way to dress this up, other than simply pandering to the most cynical views. (For instance: you are screwed, but everyone with

<sup>9.</sup> LEXIS NEXIS, STATE OF THE LEGAL INDUSTRY SURVEY 7 (Dec. 2009), available at http://www.lexisnexis.com/document/State\_of\_the\_Legal\_Indsutry\_Survey\_Findings.pdf.

<sup>10.</sup> Henderson & Zahorsky, supra note 5 (quoting Ray Bayley, president and chief executive of Novus Law). One consultant predicts that over 25% of the 65,000 non-partner positions at the nation's largest law firms will be cut or re-categorized over the next five to seven years. Lisa Smith, Chipping Away at the Traditional Model, HBR Consulting, Sep. 23, 2010, http://info.hbrconsulting.com/blog/archive/2010/09/23/chipping-away-at-the-traditional-model.aspx.

<sup>11.</sup> See Peter Coy, The Lost Generation, BLOOMBURG BUSINESS WEEK, Oct. 19, 2009, available at http://www.businessweek.com/magazine/content/09\_42/b4151032038302. htm; Vivia Chen; Lost Generation is Now a Forgotten Generation, The CAREERIST (June 8, 2011), http://thecareerist.typepad.com/thecareerist/2011/06/lostgen.html (reporting that most 2009 law graduates who were laid off in the initial downturn continue to be shunned by large law firms).

<sup>12.</sup> See Karen Sloan, Plaintiffs' Firms Target Another 20 Law Schools, Alleging Fraud, NAT'L L.J. (Mar. 14, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202545575181&Plaintiffs\_firms\_target\_another\_l aw\_schools\_alleging\_fraud (discussing the growing number of law suits alleging fraudulent marketing by law schools).

<sup>13.</sup> See generally BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (forthcoming 2012).

<sup>14.</sup> See David Segal, Is Law School a Losing Game?, N.Y. TIMES, Jan. 8, 2011, at BU1, available at http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all; David Segal, Law School Economics: Ka-Ching!, N.Y. TIMES, Jul. 16, 2011, available at http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all; Debra Cassens Weiss, Which Law Schools' Grads Make \$160K Median Pay? None, According to Website's Data, A.B.A. J. (May 24, 2011, 10:40 a.m.), http://www.abajournal.com/news/article/which\_law\_schools grads make 160k median pay none according to websites dat.

those high-paying big law jobs was miserable anyway. Or: you are screwed, and this never would have happened if I had been dean. Or, even more cynically: you are screwed, and what were you thinking anyway? The job market for non-elite law graduates has been bad for years. Did you think you were "God's special little snowflake"?<sup>15</sup>)

Whatever truths lie in these various lines of analysis, they are not especially helpful to students already enrolled in law school on either a personal, pragmatic or professional, educational level. Law students need a strategic vision—for themselves, primarily (in the short term, most urgently), but also for the profession. They need to know where the profession is heading and how they will fit in. And law schools have an institutional duty to communicate—and indeed, to create—such a vision.

Yet U.S. law schools are notably lacking in collective strategic vision. At the institutional level, most law schools are focused on marketing and the short-term (summer and immediate post-graduate) placement of students in order to improve their U.S. News law school ranking. Although a number of law schools have made institutional investments in research on the profession, such programs focus disproportionately on the top of the existing market—large law firms and their global, corporate clients. Most law faculty research on the profession likewise focuses on the large firm market or on legal ethics. There is virtually no effort at the institutional level (and only a little at the scholarly level) to rethink the functional and regulatory boundaries of the profession—much less to shape the future of the legal services market.

<sup>15.</sup> Elie Mystal, The Times "Unearths" the Law School Scam But Still Can't Explain It, Above the Law (July 18, 2011, 10:34 a.m.), http://abovethelaw.com/2011/07/the-times-unearths-the-law-school-scam-but-still-cant-explain-it/ (arguing that "kids will go to law school regardless of facts"). See also Karen Sloan, Law School Hopefuls Undaunted by Dim Prospects, NAT'L L.J. (Online) (Oct. 21, 2010), http://www.law.com/jsp/nlj/Pub ArticleNLJ.jsp?id=12-2473715517 (survey of prospective law applicants found 81% would still apply even if "a significant number of law school graduates were unable to find jobs in their desired fields").

<sup>16.</sup> See Segal, Losing Game, supra note 14 (stating that it is an "open secret" that law schools finesse placement data in a variety of ways to improve their annual ranking in U.S. News); Kyle P. McEntee & Patrick J. Lynch, A Way Forward: Improving Transparency in Employment Reporting at American Law Schools, PACE L. REV. (forthcoming), available at http://papers.ssm.com/sol3/papers.cfm?abstract\_id=1528862 (calling for increased transparency in law school reporting of graduate placement rates); Karen Sloan, A Fight Breaks Out Between ABA, NALP Over Jobs Data, NAT'L L.J. (ONLINE) (Aug. 9, 2011), http://www.law.com/jsp/law/article.jsp?id=12-251038470&A\_Fight\_Breaks\_Out\_Between\_ABA\_NALP\_Over\_Jobs\_Data (discussing the ongoing controversy over "what entity should oversee the collection and analysis of law graduates' jobs data").

CENTER FOR THE STUDY OF THE LEGAL http://www.law.georgetown.edu/legalprofession/; PROGRAM ON THE LEGAL PROFESSION, http://www.law.harvard.edu/programs/plp/pages/research.php; CENTER ON THE GLOBAL LEGAL PROFESSION, http://law.indiana.edu/centers/global-profession.shtml; BUILDING BETTER LAWYERS, SOUTHERN CALIFORNIA INNOVATION PROJECT, http://weblaw.usc.edu/centers/scip/. Stanford Center on the Legal Profession, which focuses on public interest law and access to justice, is an exception. See STANFORD CENTER ON THE LEGAL PROFESSION, http://www.law.stanford.edu/program/centers/clp/.

One might argue that it is unrealistic to expect law deans and faculty to engage in plotting their own demise. One implication of the recent downturn is the need to reduce the number of law schools, <sup>18</sup> or at least the number of law graduates competing in the current market. <sup>19</sup> Why should law schools "invest" in downsizing or trumpet messages about the contraction of the legal services market? Most law schools embrace downsizing only after their enrollments shrink.

But downsizing is not the only institutional strategy available. The market downturn and resulting pressure on the traditional law school business model create a strategic opportunity for law schools, especially mid-market and lower-ranked schools with little to gain by continuing to compete with Harvard. The downturn also creates an opportunity for critical scholarship on the profession, which traditionally has been marginalized within law schools. Indeed, not since the last Great Depression and the New Deal has there been a better opportunity to rethink the mission of legal education and, by implication, the future of the legal profession.

This essay identifies two fundamental strategic issues confronting law schools and suggests how critical theory and research might contribute to institutional change. The first issue is the increasing segmentation of the profession—not just between corporate and personal legal services, <sup>22</sup> but also between commodity and "bespoke" or "high-margin" <sup>24</sup> work in both

<sup>18.</sup> See Karen Sloan, Delaware Delays Plans to Launch Law School – and It's Not Alone, NAT'L L.J. (ONLINE) (May 9, 2011), http://www.law.com/jsp/nlj/legaltimes/PubArticle FriendlyLT.jsp?id=1202493440036 (discussing "a string of colleges that have backed away from plans to [start] new law schools").

<sup>19.</sup> See Kevin Kiley, Objecting to More Lawyers, INSIDE HIGHER ED (June 21, 2011, 3:00 a.m.), http://www.insidehighered.com/news/2011/06/21/law\_schools\_shrink\_enrollments\_in\_face\_of\_poor\_job\_market\_fewer\_applications.

<sup>20.</sup> See Elizabeth Chambliss, Organizational Alliances by U.S. Law Schools, 80 FORDHAM L. REV. (forthcoming 2012) (analyzing recent strategic initiatives by law schools and predicting industry change from below).

<sup>21.</sup> See Elizabeth Chambliss, When Do Facts Persuade? Some Thoughts on the Market For "Empirical Legal Studies," 71 LAW & CONTEMP. PROBS. 17, 37-38 (2008) (discussing the relative popularity of "Empirical Legal Studies" within law schools, compared to more critical socio-legal traditions); Elizabeth Mertz & Marc Suchman, A New Legal Empiricism: Assessing Empirical Legal Studies and New Legal Realism, 6 ANN. REV. L. & SOC. SCI. 555 (2010) (noting the unwillingness of the legal academy to embrace socio-legal scholarship on its own terms).

<sup>22.</sup> See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319 (1982) (survey of 800 lawyers finding that most lawyers practiced exclusively either for corporations and other large organizational clients or for individuals and small businesses); JOHN P. HEINZ, ROBERT L. NELSON, REBECCA SANDEFUR & EDWARD O. LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 7 (2005) (follow-up study finding that the division between corporate and personal legal services endures).

<sup>23.</sup> RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES 29 (2008) (arguing that legal services tend to evolve from "bespoke" to "commoditized" services through the use of information technology).

sectors. Law schools have three options for responding to segmentation: to ignore it, as most schools have done for decades (and continue to do, despite evidence that segmentation will only increase); to exploit it, as most top-tier law schools attempt to do, for instance by forming preferred-provider relationships with large law firms and other corporate-sector employers; or to combat it, as arguably it is in most law schools' interest to do, for instance by repurposing law schools to provide training that applies across sectors and promoting a collective commitment to access to justice. 26

Access to justice initiatives, however, lead directly to the second issue, which is the pressure for deregulation.<sup>27</sup> Why should anyone pay monopoly rates for services that non-lawyers (such as information technologists) can competently and more efficiently provide? And what should be the role of law schools in training people and designing systems for the delivery of "law-related" (that is, unregulated) services? Deregulation presents a particular challenge for law school reformers because it threatens the professional identity and status of legal academics. Moreover, the regulation of law schools is highly centralized and beyond any one school's control. Yet the pressure to rethink the boundaries of monopoly regulation will only grow stronger in light of access to justice initiatives and deregulation in other markets, such as the U.K.<sup>28</sup> Law schools either can be proactive and start a collective conversation about the future of the profession—or simply continue to react competitively to external shocks.

This essay aims to contribute to a collective conversation by proposing a direction and framework for institutional innovation. It argues, specifically, for shrinking the boundaries of the unified J.D. degree, to focus primarily on legal doctrine, method, and professional ethics; while expanding the development of specialized pre- and post-J.D. training. In other words, rather than further segmenting law schools according to the

<sup>24.</sup> Susan Shallcross, Marketing Your Practice Today: A Business-Minded Approach to Business Development Targeting the Superstar Clients, 36 LAW PRACTICE 46 (May/June 2010) (distinguishing between "high-margin" and "low-margin" work).

<sup>25.</sup> See Chambliss, supra note 20 (discussing alliances between elite law schools and corporate law firms and clients); Gemma Charles, A Revolution in Legal Education, THE LAWYER, Mar. 22, 2004 (discussing the trend toward firm-tailored legal practice courses for London's "magic circle" firms); Julia Berris, Cleary Teams Up with the College of Law for the LPC, THE LAWYER, Sep. 3, 2008 (discussing the move toward exclusive deals between law firms and training providers); William Henderson, Milbank's Big Bet, AM. LAW., May 5, 2011 (describing Milbank's new midlevel associate training program at Harvard).

<sup>26.</sup> See U.S. Dept. of Justice, Access to Justice Initiative, http://www.justice.gov/atj/index.html.

<sup>27.</sup> See Clifford Winston & Robert W. Crandall, Time to Deregulate the Practice of Law, WALL ST. J., Aug. 22, 2011; Unlocking the Law: Deregulating the Legal Profession, http://truthonthemarket.com/unlocking-the-law-symposium/, Sep. 20-21, 2011 (online symposium debating various proposals for deregulation).

<sup>28.</sup> See Legal Services Act, 2007, c. 29 (Gr. Brit.), available at http://www.legislation.gov.uk/ukpga/2007/29/contents.

characteristics of employers, the essay argues for rethinking the *sequencing* of U.S. legal education, to create more flexible entry and exit points at various stages of specialization.

The essay draws heavily on the thinking of my colleagues Richard Matasar and David Johnson, who have been promoting innovation and experimentation within my own third-tier, independent law school as well as within the institutions that regulate legal education. Trying to reform law schools from within is largely a thankless task, as now former Dean Matasar might have noticed.<sup>29</sup> Moreover, law deans and faculty have no monopoly over thinking about the legal profession. But, as Matasar and others have argued, legal academics have a special duty to think about the future of the profession and the value of formal legal education<sup>30</sup>—a duty that comes to mind most forcefully in classroom and other interaction with students.

Part I examines the sources of segmentation in the legal profession and criticizes calls for further segmentation of law schools according to the size and wealth of law firms and other traditional employers. Part II examines the increasing pressure for the deregulation of law practice and the challenges it poses for the existing (costly, three-year) J.D. degree. Part III examines the strategic and regulatory implications for law schools and explains how critical theory and research can contribute to institutional innovation.

### I. SEGMENTATION

The legal profession historically has been segmented primarily by the type of client served. John P. Heinz and Edward O. Laumann famously distinguished between the "two hemispheres" of the profession, one

<sup>29.</sup> Due in part to Matasar's activism and visibility in reform efforts, New York Law School became a poster child for complaints about legal education, including a \$200 million class action law suit alleging that the law school reported misleading employment data. See Karen Sloan, "Poster Child" Shares Frustration About Pace of Law School Reform, NAT'L L.J., Jul. 26, 2011; Scott Jaschik, Suing Over Jobs, INSIDE HIGHER ED, Aug. 11, 2011. In January, 2012, Matasar left his position as Dean and President of New York Law School to become Vice President for University Enterprise Initiatives at New York University. Rick Matasar from Dean of New York Law to NYU, FAC. LOUNGE (Jan. 9, 2012), http://www.thefacultylounge.org/2012/01/rick-matasar-from-dean-of-new-york-law-to-nyu.html. The suit against New York Law School was dismissed in March, 2012, marking the first ruling in more than a dozen ongoing suits. See Alexandra Gomez-Jimenez, et al. vs. New York Law School, et al. (NYSCEF Index No. 65226/11), available at https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=tirVQewp3WubLLAB61Zy/A=&system=prod.

<sup>30.</sup> See Richard A. Matasar, Defining Our Responsibilities: Being an Academic Fiduciary, 17 J. CONTEMP. LEGAL ISSUES 67 (2008) (arguing that law deans and faculty have a fiduciary duty to prioritize the interests of students and other stakeholders over their own); David B. Wilkins, The Professional Responsibility of Professional Schools to Study and Teach About the Profession, 49 J. LEGAL EDUC. 76 (1999) (arguing that law schools have an ethical duty to study and teach about the profession).

serving primarily corporate and other large organizational clients and the other serving individuals.<sup>31</sup> In the 1960s and 1970s, most lawyers spent their careers exclusively within one hemisphere or the other, with law school attended being the most important criterion for entry into corporate practice.<sup>32</sup> In 1962, more than 70% of the lawyers in New York's leading law firms had graduated from Columbia, Harvard, or Yale.<sup>33</sup>

Since the 1970s, the corporate sector has expanded from roughly half of the U.S. legal services market to two-thirds or more, suggesting that "hemisphere" may no longer be an accurate label. In addition, lawyer mobility between practice settings has increased. Still, the type of client served—large organizations versus individuals—remains an important source of segmentation among lawyers, and law school rank remains a significant predictor of which sector graduates enter. In 2005, most top ten law schools sent more than 50 percent of their graduates to the nation's largest 250 law firms, whereas law schools ranked 26 or lower sent fewer than 20 percent. Moreover, large law firm recruiters use different grade point average cutoffs at different law schools. Thus, while—so far—there are no formal (regulatory) divisions between the corporate and personal legal services sectors, law school stratification has become increasingly rigid over the past several decades, to the point that some argue law schools should be organized around the corporate-individual divide.

For instance, Randolph Jonakait argues that there is a "sharp and unbridgeable chasm" between "[g]raduates of high-prestige law schools [who] primarily work on the corporate side," and the graduates of "local law schools" who primarily represent individuals.<sup>40</sup> He argues that "[l]ocal

<sup>31.</sup> Heinz & Laumann, supra note 22, at 319.

<sup>32.</sup> Id. at 182.

<sup>33.</sup> ERWIN SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATIONAL MAN? 39 (1969).

<sup>34.</sup> See Heinz et al., supra note 22, at 42, Table 2.1 (showing that 64% of Chicago lawyers' time was devoted to corporate clients in 1995, up from 53% in 1975). Given the growth of corporate law firms between 1995 and 2008, that percentage is likely even higher now.

<sup>35.</sup> Id. at 142-146.

<sup>36.</sup> Id. at 58-59 (reporting the effects of law school status on lawyers' careers).

<sup>37.</sup> William D. Henderson & Andrew P. Morriss, What Law School Rankings Don't Say About Costly Choices, NAT'L L.J., Apr.16, 2008 (reporting employment outcomes for 2005 graduates of the top-ranked 100 law schools); Employment Trends for Law School Grads, http://www.law.com/pdf/nlj/20080414employment trends.pdf/.

<sup>38.</sup> See Law Schools Grades and Your Career, http://www.infirmation.com/articles/one-article.tcl?article id=3713.

<sup>39.</sup> See Michael Sauder & Wendy Espeland, The Discipline of Rankings: Tight Coupling and Organizational Change, 74 Am. Soc. Rev. 63 (2009); Michael Sauder & Ryon Lancaster, Do Rankings Matter? The Effects of the U.S. News & World Report Rankings on the Admissions Process of Law Schools, 40 LAW & SOC'Y REV. 105 (2006).

<sup>40.</sup> Randolph N. Jonakait, The Two Hemispheres of Legal Education and the Rise and Fall of Local Law Schools, 51 N.Y.L. SCH. L. REV. 862, 864 (2006/2007).

law schools must recognize that they are not training attorneys primarily for the same segment of the bar as elite [law] schools, but rather for the personal-client sphere." According to Jonakait, personal services lawyering requires different skills than corporate lawyering, in that "[p]ersonal-client attorneys seldom face legally complex matters, and seldom write briefs or memoranda, but, unlike corporate attorneys, they must be able to deal with difficult human problems and relations." Jonakait therefore urges local law schools to focus on skills and training for the personal-client sphere, specifically: technology training, social skills, office management, marketing, and taking responsibility for decisions. <sup>43</sup>

Likewise, Brian Tamanaha argues that given corporate law firms' preference for elite law school graduates, non-elite law schools "ought to develop a different model of education that better matches the jobs and careers of their graduates," such as decreasing investment in scholarship and limiting the number of students admitted. According to Tamanaha, writing in 2007, law school "is still a good investment for graduates of elite law schools, who are in line for lucrative (albeit life-draining) corporate law jobs. The same cannot be said for graduates of non-elite law schools."

There are a number of problems with Jonakait and Tamanaha's proposals, not the least of which is their uncritical channeling of all the best-credentialed law applicants into corporate law practice. Have law schools grown so stratified and competitive that they have lost all independence from corporate clients? Do law schools have no responsibility to shape the allocation of legal services? I return to this issue in Part III, below.

Further, even if we imagine a profession that is neatly divided between private practice for corporate versus individual clients—that is, not counting criminal practice, government service, public interest practice, academia, consulting, or the myriad other settings in which modern lawyers

<sup>41.</sup> Jonakait, Two Hemispheres of Legal Education, supra note 40, at 864.

<sup>42.</sup> Id.

<sup>43.</sup> Id. at 887-896.

<sup>44.</sup> Brian Tamanaha, A Slice of Information About Corporate Law Firms and Legal Academia, BALKINIZATION (Jan. 31, 2007), available at http://balkin.blogspot.com/2007/01/slice-of-information-about-corporate.html.

<sup>45.</sup> Brian Tamanaha, Why the Interdisciplinary Movement in Legal Academia Might be a Bad Idea (For Most Law Schools), BALKINIZATION (Jan. 16, 2008), available at http://balkin.blogspot.com/2008/01/why-interdisciplinary-movement-in-legal.html (stating that knowledge of the social sciences, in particular, "is irrelevant to the practice of law").

<sup>46.</sup> Brian Tamanaha, Wake Up, Fellow Law Professors, to the Casualties of Our Enterprise, BALKINIZATION (June 13, 2010), available at http://balkin.blogspot.com/2010/06/wake-up-fellow-law-professors-to.html (stating that "law schools must shrink the number of graduates," especially "students with the worst prospects" in the corporate client sector).

<sup>47.</sup> Tamanaha, Why the Interdisciplinary Movement, supra note 45.

practice (or might soon practice)—it is debatable whether these two "hemispheres" require functionally different skills. Is it true that lawyers for individuals "seldom face legally complex matters"?<sup>48</sup> Or, is it simply that individual clients are less likely to be able pay for such services? Is it true that corporate practice does not involve "human problems and relations"?<sup>49</sup> Certainly most corporate lawyers would debate this. In fact, elite law schools are scrambling to develop J.D. and executive education courses on emotional intelligence, problem solving, and law office management <sup>50</sup>—some of the very skills that Jonakait identifies as necessary for solo and small firm practice.

Finally, even if we embrace the narrow perspective of corporate legal employers, and simply strive to tailor legal education to their interests—which arguably is what most U.S. law schools currently are competing to do—it is not obvious what large law firms and their clients will want from new law graduates in the coming years. Many "complex legal matters" that large law firm associates traditionally have performed in fact have turned out to be subject to automation and commoditization, leading to increased competition from foreign lawyers<sup>51</sup> and non-legal service providers,<sup>52</sup> and a drop in large law firms' demand for new graduates.<sup>53</sup> Corporate clients, likewise, have loudly declared that they do not want to pay for services

<sup>48.</sup> Jonakait, supra note 40, at 864.

<sup>49.</sup> *Id.* 

<sup>50.</sup> See, e.g., Harvard Law School Announces New Professional Development Program With Milbank, Feb. 9, 2011, http://www.law.harvard.edu/news/2011/02/09\_milbank-at-harvard.html (covering topics such as management skills and client relations); Harvard Law School Problem Solving Workshop, http://www.law.harvard.edu/academics/registrar/winter-term/problem-solving-workshop.html (teaching students to "respond with immediacy to particular client problems"); Gillian Hadfield & Anthony Kearns, Executive Summary, Building Better Lawyers Workshop, available at http://lawweb.usc.edu/assets/docs/contribute/BuildingBetterLawyersOutputFinal\_001.pdf (describing a USC Law School initiative focusing on "problem-solving, business integration and judgment"); Patrick G. Lee, Law Schools Brush Up on Practical Skills, WSJ LAW BLOG, July. 11, 2011, http://blogs.wsj.com/law/2011/07/11/law-schools-go-practical/ (describing courses on emotional intelligence and project management at Indiana University Maurer School of Law).

<sup>51.</sup> See Stashenko, supra note 5 (reporting the findings of a New York State Bar Association committee on challenges facing the New York legal profession).

<sup>52.</sup> See Jordan Furlong, The Stratified Legal Market and its Implications (Mar. 25, 2011), available at http://www.law21.ca/pag4/ (discussing increasing industry competition for what used to be large firm work); Markoff, supra note 5; Interview with Mark Ross, Industry Opinion: Legal Process Outsourcing (May 10, 2010), available at http://www.integreon.com/phpapp/wordpress/wp-content/uploads/2010/09/io4\_may10\_integreon.pdf.

<sup>53.</sup> See Henderson & Zahorsky, supra note 5.

from first- and second-year lawyers,<sup>54</sup> and some corporate clients have begun to side-step large law firms altogether for much of their work.<sup>55</sup>

Thus, the globalization of corporate legal services and advances in information technology have introduced a second important source of segmentation within the profession<sup>56</sup> and disrupted the traditional place of corporate law firms as training grounds—and gatekeepers—for so-called high-margin work. Instead, it may be that the most interesting, remunerative, and socially valuable legal work in the coming years will occur completely outside of large law firms, and in competition with them, in areas such as knowledge management and software system design.<sup>57</sup> Such skills transcend the traditional divide between the corporate and individual client sectors, and could lead to a radical reallocation of legal services.

#### II. DEREGULATION

Currently, U.S. law firms are protected from competition (and innovation) by monopoly regulation. Although Australia<sup>58</sup> and the U.K.<sup>59</sup>

<sup>54.</sup> See Paul Lippe, Welcome to the Future: Are Law Schools Beached?, THE AM. LAW. DAILY, Apr. 15, 2010, http://amlawdaily.typepad.com/amlawdaily/2010/04/welcome.html (reporting the remarks of Paul Beach, Associate General Counsel of United Technologies, who stated that his company refused to pay for first- and second-year associates' time because it was "worthless").

<sup>55.</sup> See Debra Cassens Weiss, HP Decides to Hire New Law Grads Rather than Law Firm Associates, A.B.A. J. News, Jun. 21, 2010, http://www.abajournal.com/news/article/hp\_opts\_for\_training\_its\_own\_in-

house lawyers, hires four law grads (reporting that Hewlett Packad has begun to train its own inhouse lawyers, rather than hiring laterally from large law firms); Interview with Mark Ross, supra note 52 (discussing Microsoft's use of Integreon, a legal process outsourcing firm); Ashby Jones, Newcomer Law Firms are Creating Niches with Blue-Chip Clients, WALL ST. J. ONLINE, July 18, 2008, http://online.wsj.com/article/SB121495897751221527.html (discussing corporate clients' use of lawyer staffing firms in place of large law firms).

<sup>56.</sup> See Bill Henderson, How the Cravath System Created the Bimodal Distribution, Empirical Legal Studies Blog, July 18, 2008, http://www.elsblog.org/the\_empirical\_legal\_studi/2008/07/how-the-cravath.html (discussing the increasing segmentation of large law firms according to their ratio of high-margin work); Press, supra note 5 (discussing the widening gap in profitability between the top 23 law firms and the rest).

<sup>57.</sup> See Gillian K. Hadfield, Legal Services Wanted; Lawyers Need Not Apply, Miller-McCune, June 28, 2011, http://www.miller-mccune.com/legal-affairs/legal-services-wanted-lawyers-need-not-apply-32128/ (stating "there is . . . a huge landscape of legal work that could be better done by differently trained lawyers" or non-lawyers); Larry E. Ribstein, The Death of Big Law, 2010 Wis. L. Rev. 749 (2010) (predicting "the sale of legal expertise may move beyond client advice by law firms to include completely different types of businesses"); Susskind, supra note 23, at 6 (stating "lawyers . . . face the threat of . . . being cut out of the supply chain [] by advanced systems").

<sup>58.</sup> See Law Council of Australia, Model Legal Profession Bill, Status of Implementation, available at http://www.lawcouncil.asn.au/programs/national\_profession/model-bill.cfm; Council of Australian Governments (COAG) National Legal Profession Reform, available at http://www.ag.gov.au/legalprofession (last visited Feb 20., 2012) (summarizing proposed amendments to the National Law and Rules).

<sup>59.</sup> See Legal Services Act, 2007, c. 29 (Eng.), available at http://www.legislation.gov.uk/ukpga/2007/29/contents.

have moved to deregulate private law practice by allowing non-lawyer ownership and investment in legal services, U.S. lawyers remain protected from non-lawyer competition by state licensing rules, unauthorized practice legislation, and ethics rules banning fee sharing and non-lawyer ownership. However, such protections are likely to erode considerably—or fall dramatically—in the decade to come.

Traditionally, the call for the deregulation of U.S. law practice has come primarily from the political left, in the name of low- and middle-income consumers priced out of access to basic legal services. [I]mproving access to justice" and "promoting the interests of consumers" also were among the central regulatory objectives of the U.K. Legal Services Act. 62

Increasingly, however, the call for deregulation is made in the name of corporate clients and linked to concerns about U.S. competitiveness in the global economy. For instance, Gillian Hadfield has mounted a campaign against "barrier[s] to innovation in legal markets," focusing on the costs of regulation "for what has been for decades the core market in which legal services are provided: services to corporate and other business entities." Larry Ribstein, likewise, has argued that large law firms "need outside capital to survive" and without it are vulnerable to both market and regulatory competition. Large law firms themselves have proposed that the ABA relax the regulation of "relationships between law firms and sophisticated commercial clients," stating that "the current regimes of lawyer regulation in the U.S. are no longer adequate to serve the legitimate needs and expectations of large business clients that are the drivers of our national (and global) economy." Most recently, two fellows at the

<sup>60.</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT, R. 5.4 (Independence of Lawyers). D.C. is the only jurisdiction to allow non-lawyer investment in law firms. See D. C. RULES OF PROF'L CONDUCT R. 5.4 (allowing up to 25% non-lawyer ownership).

<sup>61.</sup> See DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988) (calling for the deregulation of routine legal services); Deborah L. Rhode, Access to Justice: An Agenda for Legal Education and Research, J. LEGAL EDUC. (forthcoming 2011) (stating that "[t]he recent economic recession has brought new urgency to longstanding problems in the delivery of legal services . . . [to] the poor and . . . middle-income individuals").

<sup>62.</sup> U.K. Legal Services Act, Section 1, (2007), available at http://www.opsi.gov.uk/acts/acts/2007/ukpga\_20070029\_en\_2#ptl-11gl (defining the objectives of the Act); see also Laurel Terry, Tahlia Gordon & Steve Mark, Adopting Regulatory Objectives for the Legal Profession, 80 FORDHAM L. REV. xx (forthcoming 2012).

<sup>63.</sup> Gillian K. Hadfield, Legal Barriers to Innovation: The Growing Economic Costs of Professional Control Over Corporate Legal Markets, 60 STAN. L. REV. 1689, 1695 (2008).

<sup>64.</sup> See Hadfield, supra note 64 (explaining "[w]hy a globalized U.S. economy requires new legal infrastructure").

<sup>65.</sup> Ribstein, supra note 57, at 813.

<sup>66.</sup> Proposals of Law Firm General Counsel for Future Regulation of Relationships between Law Firms and Sophisticated Clients, March 2011, http://www.abajournal.com/files/ABA\_Ethics\_Commission\_Proposals\_--\_3-8-11.pdf.

Brookings Institution called for the deregulation of law practice on the opinion page of the Wall Street Journal.<sup>67</sup>

It is unclear by what mechanism(s) formal (de jure) deregulation will occur. A state-by-state revolution seems unlikely and in any case would be too slow to keep up with market developments. Possibly, if one state were the first-mover, other states would follow—or entrepreneurial firms (and schools) would relocate to the first-mover state. This is one theory behind the proposal to relax the regulation of large firm practice, for instance. North Carolina is considering a proposal to allow up to 49% non-lawyer ownership of a law firm. Figure 19 passed, perhaps North Carolina will become the Delaware of multidisciplinary law practice.

Anthony Davis and others have suggested the possibility of federal legislation, either as a means for preempting state ethics rules that restrict large firm practice, <sup>70</sup> or as a means for more radical nationalization of the legal services market. <sup>71</sup> The federal government also could preempt state regulation under its treaty-making power. <sup>72</sup> Although most commentators agree that express preemption would be "both politically confrontational and problematic in practice," <sup>73</sup> the federalization of law practice already is proceeding in specialty areas such as securities, tax, patent and trademark, immigration, and labor. <sup>74</sup>

Litigation is another possible mechanism for deregulation. In May, 2011, law firm Jacoby & Meyers filed class action lawsuits in New York, Connecticut, and New Jersey, claiming the ban on non-lawyer investment in legal services violates the Commerce Clause. The complaint argues that the ban interferes with the firm's access to capital and thus its ability to

<sup>67.</sup> Winston & Crandall, supra note 27; see also Unlocking the Law Symposium, supra note 27.

<sup>68.</sup> See Proposals of Law Firm General Counsel, supra note 66.

<sup>69.</sup> See S.B. 254, Gen. Assemb., 2011 Sess. (N.C. 2011), available at http://www.ncleg.net/Sessions/2011/Bills/Senate/HTML/S254v0.html.

<sup>70.</sup> Anthony Davis, A New Approach to Law Firm Regulation, American Lawyer.com, July 22, 2010, http://www.law.com/jsp/tal/PubArticle TAL.jsp?id=1202463792675 (arguing that recent Supreme Court precedent affirms Congress's authority to regulate lawyers "implicitly" and therefore explicitly); see also Fred C. Zacharias, Federalizing Legal Ethics, 73 TEX. L. Rev. 335, 345 (1994) (calling for the nationalization of legal ethics rules).

<sup>71.</sup> See Eli Wald, Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in a Global Age, 48 SAN DIEGO L. REV. 489 (forthcoming 2011).

<sup>72.</sup> See Laurel S. Terry, From GATS to APEC: The Impact of Trade Agreements on Legal Services, 43 AKRON L. REV. 875 (2010).

<sup>73.</sup> Daniel R. Coquillette & Judith A. McMorrow, Zacharias's Prophecy: The Federalization of Legal Ethics Through Legislative, Court, and Agency Regulation, 48 SAN DIEGO L. REV. 123, 124 (2011); see also Wald, supra note 71, at 530-31 (arguing that the nationalization of law practice is "inevitable" but "premature," and advocating an intermediary approach based on open-border multijurisdictional practice).

<sup>74.</sup> Coquillette & McMorrow, *supra* note 73, at 124 (stating that the federalization of law practice is occurring "not through a tectonic shift but through a more stealth, incremental approach").

<sup>75.</sup> See Mark Hamblett, Suit Challenges N.Y. Prohibition of Non-lawyer Firm Ownership, N.Y. L.J. (Online), May 20, 2011.

expand legal services to "the lower, working [sic] and middle classes."<sup>76</sup> Blanket bans on non-lawyer ownership and the unauthorized practice of law also may be increasingly vulnerable to challenges under the First Amendment.<sup>77</sup>

But whatever the mechanism(s) and timetable for de jure deregulation, de facto deregulation is underway. Thousands of lawyers already work outside the boundaries of lawyer regulation in accounting and consulting firms. The Corporate counsel increasingly work outside the state(s) in which they are licensed and corporations increasingly rely on non-lawyer employees for law-related work. LawPivot, a legal website that offers crowd-sourced answers to legal questions, recently received \$600,000 from Google Ventures and other investors. Legal Zoom offers legal documents and "lifetime support" to consumers seeking routine legal services.

For law schools, then, the smart money is on the erosion of monopoly protections and the opening of diverse new markets for law and law-related training. This suggests both the need to rethink the boundaries of the U.S. J.D. degree, as well as the need to experiment with more flexible (and specialized) credentialing around it. <sup>83</sup> Part III argues this is best accomplished by rethinking the educational sequence, rather than promoting specialization within the existing three-year model. In other

<sup>76.</sup> Complaint, Jacoby & Meyers Law Offices v. Presiding Justices . . . of the Supreme Court of New York, available at http://www.nylj.com/nylawyer/adgifs/decisions/052011jacoby.pdf.

<sup>77.</sup> See Renee Newman Knake, Democratizing the Delivery of Legal Services: On the First Amendment Rights of Corporations and Individuals, OHIO ST. L.J. (forthcoming Spring 2012) (arguing that, under Citizens United, "blanket bans on corporate ownership of law firms cannot survive"); Catherine J. Lanctot, Does Legal Zoom Have First Amendment Rights? Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law, TEMP. POL. & CIV. RTS. L. REV. (forthcoming), available at http://law.bepress.com/cgi/viewcontent.cgi?article=1177&context=villanovalwps (predicting the success of a First Amendment challenge to UPL legislation).

<sup>78.</sup> See Tanina Rostain, The Emergence of "Law Consultants," 75 FORDHAM L. REV. 1397 (2006) (examining the growing market for law-related consulting services).

<sup>79.</sup> A.B.A., REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE, Aug. 2002, available at http://www.americanbar.org/content/dam/aba/migrated/final\_mjp\_rpt\_6\_5\_1.authcheckdam.pdf.

<sup>80.</sup> See Herbert M. Kritzer, The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education, 44 ARIZ. L. REV. 917 (2002).

<sup>81.</sup> Debra Cassens Weiss, Crowdsourced Legal Answers Website Gets \$600K from Investors, Including Google Ventures, A.B.A. JOURNAL: LAW NEWS NOW (Jan. 21, 2011, 11:16 AM), http://www.abajournal.com/news/article/crowdsourced\_legal\_answers\_website\_gets\_600k\_from\_investors\_including\_googl/.

<sup>82.</sup> Why Legal Zoom?, LEGALZOOM, http://www.legalzoom.com/about-us/why-legalzoom.

<sup>83.</sup> See Richard A. Matasar, The Viability of the Law Degree: Cost, Value, and Intrinsic Worth, 96 IOWA L. REV. 1579, 1581 (2011) (arguing that "the profession must be willing to experiment and permit new models of legal education to arise"); Larry E. Ribstein, Practicing Theory: Legal Education for the Twenty-First Century, 96 IOWA L. REV. 1649, 1675 (2011) (stating "one possible compromise is to retain the general-purpose law degree, but create alternative professional classifications" based on additional specialty training); Aric Press, Fixing Law School, THE AM LAW DAILY (Sept. 7, 2011, 6:19 PM), http://amlawdaily.typepad.com/amlawdaily/2011/09/fixing-law-school.html (calling upon the ABA to end the "six-semester tyranny" and provide more "freedom to experiment").

words: rather than further segmenting law schools according to the size and wealth of employers, reformers should focus on establishing a less costly, more unified J.D. degree, while at the same time developing specialized pre- and post-J.D. training. This approach not only makes sense for law schools, as competitors in an increasingly global and diversified educational market, it also makes sense for students and clients, who seek access—as both suppliers and demanders—to legal and law-related expertise.

### III. IMPLICATIONS FOR LAW SCHOOLS

Rethinking the boundaries of the J.D. degree (and, by implication, the "practice of law") has both a strategic (market) and normative (regulatory) component. Ideally, the two would be related, in that the regulation of educational requirements would be informed by market conditions and market demands, in turn, would be regulated with an eye toward professional values (such as the rule of law, professional independence, and access to justice).

Currently, however, the U.S. profession faces market and regulatory upheaval, thus it is hard to predict what the market—or professional values—will demand. Moreover, law schools operate in multiple markets that may be moving in different ways. Within this context, institutional innovation in law schools should be approached as a process, with a period of experimentation and collective empirical and normative assessment. Critical theory and research on the profession could play a significant role in this process.

## A. Implications of Segmentation

Schools at the very top of the market face little pressure for innovation—at least in terms of the price of tuition or the value of the credentials they offer. As is true of large law firms, where a dozen or so have established elite global brands, 84 the very top law schools increasingly operate within exclusive international networks made up of other elite institutions and serve as gatekeepers for those networks. 85 It is hard to

<sup>84.</sup> See Matt Byrne, Introducing the Sweet Sixteen, THE LAWYER (May 10, 2008), http://www.thelawyer.com/introducing-the-sweet-sixteen/132761.article (using the label "sweet sixteen" to refer to "the group of firms we believe are currently leading the transatlantic market for the provision of top-end transactional legal services"); Matt Byrne, The Transatlantic Elite 2009: The Sweet Sixteen, THE LAWYER (2009), (examining the effects of the downturn on this elite group of firms); Carole Silver, The Variable Value of U.S. Legal Education in the Global Legal Services Market, 24 GEO. J. LEGAL ETHICS 1, 2 (2011) (discussing large law firms' competition for "global" status).

<sup>85.</sup> See Chambliss, supra note 20, (discussing emerging alliances between "global" law schools). See also YVES DEZALAY & BRYANT GARTH, ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF

imagine what strategic missteps would be required to unseat them. Unlike law firms, elite law schools are non-profit institutions that flourish mainly by attracting and providing symbolic capital<sup>86</sup>—it almost does not matter what they teach.<sup>87</sup>

But while the very top law schools, such as Harvard, Yale, Columbia, Stanford, and perhaps five or ten others, 88 can focus on expanding their brands based on the access they offer to international markets, few other law schools can rely on this strategy. Instead, most law schools need to position themselves to compete in a diverse set of markets: foreign and domestic, corporate and individual, bespoke and commodity, and private and public.

Most recent blueprints for innovation in legal education focus on adding value within (or on top of) the existing price structure, for instance by adding skills courses to make law graduates "practice-ready." Inspired by the 2007 Carnegie Report—which identified the lack of "direct training in professional practice" as a major limitation of U.S. legal education —many law schools have increased their investment in live-client clinics, 91 practice simulations, 92 and other forms of experiential

- 86. Pierre Bourdieu, The Market of Symbolic Goods, 14 POETICS 13, 19 (1985); Bryant G. Garth & Joyce Sterling, Exploring Inequality in the Corporate Law Firm Apprenticeship: Doing the Time, Finding the Love, 22 GEO. J. LEGAL ETHICS 1361, 1393 (2009) (stating "symbolic capital has value because people through a circular logic believe it has value. The system that produces this symbolic value... is relatively secure through many self-reinforcing practices").
- 87. See Silver, supra note 84, at 12 n.41 (quoting the managing partner of an Am Law 100 firm as stating that among people who fit the profile of "the top 5% at the top five law schools . . . we are indiscriminate of who we hire . . . [although] if they can't carry on a personal conversation . . . you do reject them").
- 88. As with law firms, there is some preoccupation with how many law schools may be called elite, or where in the rankings segmentation (versus stratification) occurs. See Law School Rankings in the United States, Wikipedia, org/wiki/Law\_school\_rankings\_in\_the\_United\_States#cite\_note-books-16 (last visited February 20, 2012) (discussing the category "T14," used to refer to the top 14 schools).
- 89. John Caher, N.Y. State Bar Asks ABA to Support "Practice Ready" Law School Education, N.Y. L.J. (ONLINE) (Aug. 4, 2011); NEW YORK STATE BAR ASSOCIATION, NEW YORK STATE BAR RESOLUTION CALLS FOR PRACTICE READY LAWYERS (Aug. 9, 2011), available at http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/HTMLDisplay.cfm&Conten tID=53622 (reporting that the resolution was adopted by the ABA at its annual meeting in August, 2011).
- 90. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 8 (2007) (Summary), available at http://www.carnegiefoundation.org/sites/default/files/publications/elibrary\_pdf\_632.pdf (summarizing the main findings of the report).
- 91. See Erwin Chemerinsky, Why Not Clinical Education?, 16 CLINICAL L. REV. 35, 35 (2009) (stating "never has the future of clinical education looked brighter in American law schools"); CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION, REPORT ON THE 2007-2008 SURVEY, 11-12 (2008) [hereinafter CSALE Survey], available at http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf

EMPIRE 171 (2010) (noting the increasing importance of "alliances of Wall Street law firms and investment banks, philanthropic foundations, and elite law schools" in the foreign policy establishment); Silver, *supra* note 84, at 10-11 (2011) (discussing the importance of elite law school credentials in the hiring practices of international law firms).

learning,<sup>93</sup> as well as capstone courses "designed to pull together the various strands of a student's education and prepare the student for the transition into practice." Law schools also offer an increasing number of specialized LL.M. degrees aimed at U.S. J.D. graduates as well as the graduates of foreign law schools. 95

The problem is that there is no unified set of practical or experiential skills that will equip law graduates for diverse and emerging markets, so schools' offerings tend to be idiosyncratic and difficult to assess. <sup>96</sup> A recent survey of clinical programs in ABA-accredited law schools identified over 800 clinics with thirty-four different substantive focuses. <sup>97</sup> Moreover, adding value by adding more specialized components to the three-year degree does not address the need for lower-cost entry into lower-priced markets or give law schools the flexibility to adapt to continuing change. On the contrary, some proponents of clinical education call for increasing the number of years of study required for the J.D. degree. <sup>98</sup>

A better strategy is to focus on lowering the cost of the unified J.D. degree, at least in part by making it shorter, while continuing to experiment with specialized forms of pre-and post-J.D. training. These specialized forms could include both integrated and stand-alone programs offered by

<sup>(</sup>survey of 131 law schools finding 809 distinct in-house, live client clinics and 895 field placement programs).

<sup>92.</sup> See, e.g., Karen Barton, John Garvey & Paul Maharg, Standardized Clients and SIMPLE (SIMulated Professional Learning Environment): Learning Professionalism through Simulated Practice, http://dotank.nyls.edu/furtureed/2011proposals/05scas.pdf (proposal for April, 2011 Future Ed conference at New York Law School).

<sup>93.</sup> See, e.g., James Moliterno, Washington & Lee's Experiential Third Year: Description and Implementation, http://dotank.nyls.edu/futureed/2011proposals/06wlet.pdf (proposal for April, 2011 Future Ed conference at New York Law School).

<sup>94.</sup> See, e.g., INTERNATIONAL FORUM ON TEACHING LEGAL ETHICS AND PROFESSIONALISM, CAPSTONE COURSES, http://www.teachinglegalethics.org/category/teaching-methods/capstone-courses (noting that "capstone courses often include some experiential component and a focus on ethics and professionalism").

<sup>95.</sup> More than 100 U.S. law schools offer the LL.M. degree, typically as a one year, stand-alone, course-based program. See generally ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, OVERVIEW OF POST J.D. PROGRAMS, http://www.abanet.org/legaled/postjdprograms/postjd.html. Some programs attract both U.S. and foreign law graduates, whereas others are aimed exclusively at the graduates of foreign law schools. See Silver, supra note 84, at 17-18. The LL.M. degree is the most common U.S. law degree among foreign law graduates. Id. at 5.

<sup>96.</sup> See Silver, supra note 84, at 18 (discussing employers' difficulties in assessing the quality of LL.M. degrees). There is no entrance exam for the LL.M. and no standardized curriculum. The only standards to which "nearly all LL.M. programs for foreign law graduates adhere" are those defined by New York's rule on bar eligibility. Id. at 19.

<sup>97.</sup> CSALE Survey, supra note 91, at 11.

<sup>98.</sup> See Adam J. T.W. White, Note & Comment: Upholding the Oath of Competency While Filling the Indigent Void: Why the Law School Curriculum Should be Extended to a Fourth Year, 11 FLA. COASTAL L. REV. 425, 455 (2010) (calling for a mandatory year of practice for the J.D. degree, with the cost to be "borne by the students").

law schools—such as clinics, certificate programs, <sup>99</sup> executive education, and the LL.M.— as well as interdisciplinary, proprietary, <sup>100</sup> and for-profit programs at both the pre- and post-J.D. levels. Such a framework would increase flexibility for students, law schools, and employers, and promote collaboration and competition between law schools and other training providers. Moreover, embracing competition within these boundaries might help to stave off more radical proposals to eliminate the J.D. requirement altogether. <sup>101</sup>

## B. Implications for Regulation

Of course, any serious shortening would require changes in ABA accreditation or state licensing requirements. Perhaps in part for this reason, despite years of criticism about the wasted third year of law school, there are few concrete proposals for cutting it, or otherwise compressing the time-frame (and opportunity costs) of the J.D. degree. So far, the best ideas on the table are the "accelerated" J.D. degree, in which students can compress law study into two years and three summers (but at the same price as a three-year degree); 102 "three-plus-three" programs, in which students can apply to law school after three years of college for the combined completion of an undergraduate and J.D. degree; 103 and New York Law School's proposal to allow the admission of applicants after two years of college for the combined completion of a B.A. and J.D. degree ("two-plus-three"). 104

Notice that none of these proposals actually argues for shortening *law* school. The cuts all come from someone else's budget. Regulatory barriers

<sup>99.</sup> See Matasar, supra note 83, at 1621-22 (suggesting that law schools "add new degrees for students seeking only a part of a legal education," including "certificates that might be appended to other graduate degrees").

<sup>100.</sup> See Andrew Cook, James R. Faulconbridge & Daniel Muzio, The Firm as a New Actor in Legal Education: Implications for Lawyers' Identity Formation (unpublished manuscript on file with author) (discussing the trend toward proprietary training programs in global law firms); Weiss, supra note 55 (discussing Hewlett Packard's recent decision to train its own lawyers).

<sup>101.</sup> See Hans Bader on Abolish Law School Requirement, Keep the Bar Exam?, TRUTH ON THE MARKET (April 20, 2011) http://truthonthemarket.com/2011/09/20/hans-bader-on-abolish-law-school-requirement-keep-the-bar-exam/.

<sup>102.</sup> See A Law Degree in Two Years, INSIDE HIGHER EDUCATION (Jan 21, 2005), http://www.insidehighered.com/news/2005/01/21/Dayton (announcing that the University of Dayton School of Law was offering a two year J.D. program, the first in the nation); An Elite Law Degree in Two Years, INSIDE HIGHER EDUCATION (Jun. 20, 2008), http://www.insidehighered.com/news/2008/06/20/northwestern (announcing the Northwestern would offer a two-year program). Both programs require students to take the same number of credits as required for a three-year degree, "with accelerated students simply taking an extra course most semesters." Id.

<sup>103.</sup> Matasar, supra note 83, at 1625.

<sup>104.</sup> *Id*.

are one reason, obviously; but the real barrier is incumbents' reluctance to rethink the boundaries of monopoly protection. Because the question for a two-year law school is: what should come out? Is it all that high-falutin' scholarship, as Jonakait, Tamanaha, and even Matasar<sup>105</sup> have suggested? Such a move would save on staffing and has populist political appeal.<sup>106</sup> No one reads all those law review articles, anyway.<sup>107</sup> Another answer is to rely more heavily on distance learning<sup>108</sup> and other, more scalable (commoditized) delivery methods such as educational software<sup>109</sup> and games.<sup>110</sup>

But while there is obvious merit in rethinking the form and financing of law faculty scholarship—being a law professor recently was rated as the second-cushiest job in America<sup>111</sup>—and information technology clearly has the potential to radically lower educational costs, neither of these strategies puts forth a substantive vision of legal education (except to insist that it be more "practical"). Yet, from a strategic—and regulatory—standpoint, substance is the key question. What constitutes the "practice of law" in an increasingly global and information-driven economy? What part of U.S. legal education, if any, deserves continuing monopoly protection? What is the core value of the U.S. J.D. degree?

Or, to put the question more pointedly: what should stay in?

# C. Implications for Scholarship on the Profession

Here, then, is an opening for critical engagement and research. Rather than stripping away the scholarly and research mission of law schools, law schools should be investing in research and scholarship on the profession

<sup>105.</sup> See Matasar, supra note 83 at 1622 (stating that "the research mission of a law school is costly" and further stratification of schools according to their support for scholarship is "inexorable"); Karen Sloan, Legal Scholarship Carries a High Price Tag, NAT'L L. J. (ONLINE) (Aug. 9, 2011) (citing Professor Richard Neumann's estimate that law review articles by tenured law professors cost roughly \$100,000 per article in salary and benefits).

<sup>106.</sup> See Ribstein, supra note 83, at 1661 (suggesting that lowering the costs of lawyer licensing "could resonate with the emerging populist Tea Party political movement").

<sup>107.</sup> See Thomas A. Smith, The Web Of Law, 44 SAN DIEGO L. REV. 309, 336 (2007) (analysis of Lexis' Shepard's data base finding that 43% of law review articles never get cited at all).

<sup>108.</sup> See Matasar, supra note 83, at 1619-20; William K.S. Wang, The Restructuring of Legal Education Along Functional Lines, 17 J. CONTEMP. LEGAL ISSUES 331, 360-72 (2008) (discussing the potential costs savings from distance learning within the current regulatory framework).

<sup>109.</sup> See Barton et al., supra note 92 (discussing the benefits of online simulations); DAVID I.C. THOMSON, LAW SCHOOL 2.0: LEGAL EDUCATION IN A DIGITAL AGE (2009) (discussing various forms and potential uses of educational technology in law schools).

<sup>110.</sup> See David R. Johnson & Tanina Rostain, Seriously Gamifying Legal Learning, http://dotank.nyls.edu/futureed/2011proposals/03sgll.pdf (proposal for April, 2011 Future Ed conference at New York Law School).

<sup>111.</sup> The Highest Paying Jobs with the Most Time Off, 247 WALL STREET (Sep. 1, 2011) http://247wallst.com/2011/09/01/the-highest-paying-jobs-with-the-most-time-off/ (airline pilots, copilots and flight engineers came in first).

and the evolving role of lawyers in the global political economy. There are at least two sets of questions on the table.

First, what are the implications of foreign demand for domestic law school reform? Much of the current critique of U.S. law schools is parochial, taking little account of educational or political developments elsewhere. Yet while the domestic market for the J.D. appears, finally, to be contracting, 112 the foreign demand for "American-style" (graduate) legal education is increasing, 114 particularly in Australia, 115 India, 116 and East Asia. 117

What do they see in us? Does this demand primarily represent a desire for access to international markets? Such a desire clearly motivates foreign enrollment in U.S. LL.M.s<sup>118</sup> and may help to explain the rapid development of J.D. programs in foreign markets.<sup>119</sup> Are these countries beefing up their "legal infrastructure"<sup>120</sup> to support economic development? Research suggests that this, too, is part of the story, as East Asian countries

<sup>112.</sup> See Nathan Koppel, Bloom's Off Law School Rose, WALL ST. J., Sep 28, 2011 (reporting that the number of law school applicants for the fall, 2011 class was down 10 % from 2010, and the number of LSAT test-takers was down 18.7%). See also Law School Admission Council, http://www.lsac.org/LSACResources/Data/Isats-administered.asp (showing the number of LSAT tests administered on each administration date since June, 1987).

<sup>113.</sup> Mayumi Saegusa, Why the Japanese Law Schools System Was Established: Co-optation as a Defensive Tactic in the Face of Global Pressures, 34 LAW & Soc. INQUIRY 365, 366 (2009) (examining the creation of graduate law schools in Japan).

<sup>114.</sup> See JOHN FLOOD, LEGAL EDUCATION IN THE GLOBAL CONTEXT, REPORT FOR THE LEGAL SERVICES BOARD 1 (2011) (finding "an inexorable move in the world towards the Americanization of legal education, in the form of the widespread adoption of the J.D. degree over the LL.B.").

<sup>115.</sup> See Melbourne Law School, The Melbourne J.D., available at http://www.law.unimelb.edu.au/jd; James Hathaway, New Markets for the U.S. Model (Australia), Future Ed Conference Panel 4, available at http://nyls.mediasite.com/mediasite/Catalog/pages/catalog.aspx?catalogId=ac401784-b023-4af8-9d50-e059b4e95c30 (April 9, 2010) (describing the move to a selective, graduate program at Melbourne).

<sup>116.</sup> See FLOOD, supra note 114, at 10 (describing the Jindal Global Law School's alliances with American law schools), and 22, Table 1 (comparing the flow of Indian students to U.S. versus U.K. training institutions).

<sup>117.</sup> See Setsuo Miyazawa, Kay-Wah Chan & Ilhyung Lee, The Reform of Legal Education in East Asia, 4 ANN. REV. LAW & SOC. SCI. 333 (2008) (examining the adoption of U.S.-style legal education in China, Japan, South Korea, and Taiwan); see also Saegusa, supra note 113, at 365 (examining Japan's adoption of the J.D.).

<sup>118.</sup> See Flood, supra note 114, at 7-8 (noting that U.S. LL.M. graduates can sit for the New York bar examination); see also Silver, supra note 84, at 19 (examining the role of U.S. LL.M.s as an element of professional capital).

<sup>119.</sup> See, e.g., Melbourne Law School, About The Melbourne J.D., at http://www.law.unimelb.edu.au/jd/course-and-subjects/about-the-melbourne-jd. ("The Melbourne J.D. will provide you with a degree that is highly regarded and readily recognised, both nationally and internationally. The J.D. leads to admission to the legal profession in all Australian jurisdictions. It can also be used as a basis for seeking admission in many common law jurisdictions overseas, including the United States, Canada, England and Wales, and New Zealand.")

<sup>120.</sup> Hadfield, supra note 57, at 41 (referring "to the set of legal materials available to economic actors").

move toward market economies.<sup>121</sup> What, then, is (and should be) the relationship between the "economic" and the "political/democratic" sectors of the legal profession?<sup>122</sup> Should they be taught and regulated separately, as Hadfield has suggested?<sup>123</sup> What would be the "political/democratic" consequences of such disaggregation?<sup>124</sup>

The Carnegie Report found that U.S. law schools do an impressively good job of socializing students into "a distinctive habit of thinking that forms the basis for their students' development as legal professionals," <sup>125</sup> but "fail to complement the focus on skill in legal analyses with effective support for developing ethical and social skills."

Students need opportunities to learn about, reflect on and practice the responsibilities of legal professionals. Despite progress in making legal ethics a part of the curriculum, law schools rarely pay consistent attention to the social and cultural contexts of legal institutions and the varied forms of legal practice. 127

This critique has been taken by domestic reformers to mean that law schools need more applied ethics training through case studies of practice and hands-on experience with clients. 128

One might argue, however, that within the context of global economy, "applied" legal ethics involves a broader set of political/democratic questions about the foundations of the rule of law and lawyers' professional independence from markets and the state. For instance, what is the relative

<sup>121.</sup> See Saegusa, supra note 113, at 366 (discussing rule of law projects in Japan, South Korea, Taiwan, and China).

<sup>122.</sup> Hadfield, *supra* note 63, at 1695 (arguing that the two sectors face "fundamentally different issues" and require different regulatory analysis).

<sup>123.</sup> *Id.* at 1732 (arguing that professional regulation should be "unburdened by the need to infuse the structure of corporate legal markets with the ponderous weight of upholding the American constitutional order").

<sup>124.</sup> See Rebecca Roiphe, A History of Professionalism: Julius Henry Cohen and the Professions as a Route to Citizenship, XL Fordham Urb. L.J. (forthcoming 2012) (arguing that, notwithstanding increasing segmentation in the market for legal services, the ideal of a unified profession and the rhetoric that surrounds it play an important role in American cultural integration and are worth salvaging),

<sup>125.</sup> SULLIVAN ET. AL., *supra* note 90, at 5 ("Within months of their arrival in law school, students demonstrate new capacities for understanding legal processes, for seeing both sides of legal arguments, for sifting through facts and precedents in search of the more plausible account, for using precise language, and for understanding the applications and conflicts of legal rules").

<sup>126.</sup> Id. at 6.

<sup>127.</sup> Id.

<sup>128.</sup> See, e.g., William Henderson, Jerome Organ, Patrick Longan, John Berry & Clark Cunningham, Are We Making a Difference? Developing Outcome Measures to Evaluate the Effectiveness of Law School Efforts to Teach Ethics and Develop Professionalism, http://www.nyls.edu/user\_files/1/3/4/30/58/1053/Henderson&Organ&Longan&Berry&Cunningham.pd f (proposal for October, 2010 Future Ed conference at Harvard Law School).

importance of elite lawyers and law schools in the globalization of law?<sup>129</sup> What are the consequences of different law school models for the "nature and distribution of legal knowledge in society"?<sup>130</sup> How should U.S. law schools, collectively, respond to increased segmentation between global and domestic legal markets?

A related set of questions involves lawyers' professional responsibilities outside of the lawyer-client relationship, for instance in acting as system designers, informational technologists, and entrepreneurs. Johnson, Ribstein, and others predict that law practice increasingly will move beyond individualized advice to clients toward the design of legal products and expert systems. Embracing this role of "system designer" or "legal-information engineer" could dramatically improve access to justice (or at least information) by ordinary consumers, as well as providing the legal infrastructure required for complex economic transactions. Is

So far, however, law schools have done little to prepare students for this transformation, either by teaching the specialized skills that lawyers will need for such roles, <sup>136</sup> or more importantly (within the framework of an argument for a shorter J.D.), addressing the professional responsibilities associated with its development. What are the professional responsibilities

<sup>129.</sup> See Frank Munger, Globalization Through the Lens of Palace Wars: What Elite Lawyers' Careers Can and Cannot Tell us About Globalization of Law, xx LAW & SOC INQUIRY (forthcoming 2012) (review of Yves Dezalay and Bryant Garth's trilogy of studies about the globalization of law, arguing that elite lawyers provide a limited point of entry for understanding globalization); see also Silver, supra note 84(analyzing the variable role of U.S. legal education in China and Germany).

<sup>130.</sup> Annelise Riles & Takashi Uchida, Reforming Knowledge? A Socio-Legal Critique of the Legal Education Reforms in Japan, 1 DREXEL L. REV. 3, 5 (2009) (arguing that there are economic and political benefits to Japan's retention of polycentric, undergraduate legal training alongside its new U.S.-style, graduate model).

<sup>131.</sup> Ribstein, supra note 83, at 1667-69 (discussing lawyers' emerging role as "information engineers"). See also Bruce H. Kobayashi & Larry E. Ribstein, Law's Information Revolution, 53 Ariz. L. Rev. 1169 (2011); Paul Lippe, A Professional Renewal: Why Great Lawyers of the New Age May Be 'System Designers,' A.B.A. J., Jun. 8, 2011, available at http://www.abajournal.com/legalrebels/article/professional\_renewal\_in\_the\_new\_normal/ (quoting David Johnson).

<sup>132.</sup> Lippe, *supra* note 131 ("The great lawyers of the prior age were relationship lawyers . . . . Maybe the great lawyers of the new age will be system designers.") (quoting Johnson).

<sup>133.</sup> Ribstein, supra note 83, at 1663.

<sup>134.</sup> See Kobayashi & Ribstein, supra note 131, at 1171-72 (predicting that the development of the legal information market will enable ordinary middle class consumers to cheaply obtain legal information).

<sup>135.</sup> See Hadfield, supra note 57.

<sup>136.</sup> See Ron Staudt & Marc Lauritsen, Apps for Justice: Learning Law by Creating Software, http://dotank.nyls.edu/futureed/2011proposals/11llcs.pdf (proposal for April 2011 Future Ed conference at New York Law School) (arguing that "new lawyers are unprepared for economic and technological reality" and calling for the expansion of programs "in which students create software as part of their education."). See also Press Release, Apps for Justice Wins Future Ed Contest (Apr. 20, 2011), available at http://www.kentlaw.edu/news/releases/apps-for-justice-wins-future-ed-contest.html.

of lawyers in the market for legal information? To what extent should contract and intellectual property protections supplant professional regulation?<sup>137</sup> How can the core values of the profession be effected in an increasingly diverse and deregulated market?

#### CONCLUSION

U.S. law students face a future in which they will be competing not just with other U.S. lawyers but also with foreign lawyers and non-lawyers, who will not be regulated—or socialized—the way U.S. lawyers traditionally have been. Law schools owe it to their students to put forth a positive, substantive vision of the profession that includes a commitment to analytical rigor and shared professional norms. 139

Research and scholarship on the profession are essential for constructing this vision. The traditional boundaries of the U.S. legal profession are being challenged and likely will be redrawn, either around a strong, unified core of accessible, high quality training—or not. Strategic choices by individual law schools will play an important role in this story, as will the collective investment of deans, law faculty, regulators, and

<sup>137.</sup> See Kobayashi & Ribstein, supra note 131, at 1173 (arguing that the protection of property rights in legal information can simultaneously "reduce the need for and increase the [benefits] of [de]regulating legal advice") (alteration from original).

<sup>138.</sup> See Kritzer, supra note 80, at 918 (arguing that increased segmentation and the growth of information technology makes it possible for "services that were previously provided only by . . . the professions to be delivered by specialized nonprofessionals"); see also Ribstein, supra note 83, at 1661-62 (arguing that legal-information engineers would not need to be licensed because they would not be advising clients or representing them in court).

<sup>139.</sup> See, e.g., The Lawyer as Hacker, email from James Grimmelmann to author (Sept. 13, 2011) (on file with author).

The pitch is that programmers have developed a professional model that could serve as a good template for a positive vision of lawyering. Programmers, like lawyers, do things with words that have highly precise formal meanings. Like lawyers, they have clients and employers, and are expected to produce code that gets the job done. The "hacker" mindset provides a kind of culture hero/pattern/model for how they can take pride in their work, be faithful to their clients, and serve the greater good. (This is "hacker" in the sense of someone who is a skillful programmer with integrity, not someone who breaks into computer systems.) Some elements: (1) Technical skill is valued as a craft; one earns status by doing good work. (2) Work product is judged both on its objective efficiency and its (ineffable but commonly recognized) elegance. (3) Doing the technically "right" thing and being ruthlessly pragmatic are both legitimate, and good hackers know when to move between these modes. (4) Entrepreneurialism is good, but the goal should be to make something good in the world, not the financial reward for its own sake. (5) "Information wants to be free": serve the common good by helping make the benefits of computers widely available, without artificial restrictions. (6) One can have a day job doing something mundane for a bank, and contribute to open-source projects in one's spare time. (7) Play with everything: understand how it works for yourself, then put it back together better. (8) Never stop learning. (9) Solve problems through open debate; argue your position forcefully. If you can't win on the merits, it's not worth winning. (10) Be tolerant of the awkward, the different, the shunned: we all remember being in that position in high school.

reformers. This essay calls for greater institutional investment by law schools in defining and enhancing the value of the U.S. J.D. degree, in part by ceding some of the benefits of monopoly protection. It calls, in other words, for law schools to embrace competition and collaboration with other training providers, in order to improve the value of legal training to students, clients, and consumers.

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