Book Review

Brian Z. Tamanaha, *Failing Law Schools*, Chicago: University of Chicago Press, 2012, pp. 216, $25.00.

Reviewed by David Burk

Failing Law Schools is not the right title for Professor Brian Tamanaha's book. A better one might be, The Sad Fate of Poor Performers at Low-Ranked Law Schools. It is not as catchy, but gives a better idea of what the book is about. Better still would be to excise the sections about how law school is a bad deal, and call the remaining portion Why Law School is So Expensive and What to Do About It, because the book does a fine job of answering those questions.

Tamanaha's casting of law schools as failing their students is problematic for at least two reasons. First, it seems unlikely that the problem he sees—law school is a bad investment for many of its students—will persist. Law students, after all, choose to go to law school. If law school were obviously such a bad investment, they would choose to do something else. Second, of the various victims of the legal education system, it is not clear that law graduates are the ones most in need of help. The legal education system has been implicated in, for example, the vast unmet legal needs of the lower class, as well as the staggering amounts of taxpayer dollars spent on litigation. From a social welfare perspective, these failings surely trump the indebtedness of law school graduates.

It is clear that law school is expensive. The book tells the story of how it came to be so expensive in an engaging, almost breathtaking way. This review will give a more detailed summary, but the essential reason is that the legal education system suffers from perverse regulations. Additionally, the book explains the widespread practice of ranking-chasing among law schools and how it affects tuition levels. Tamanaha is unduly harsh on rankings, but he does present fascinating evidence on the wasteful behavior they induce.

The argument that law school is a bad deal, however, is weak. Tamanaha presents some interesting summary statistics that do suggest that recent crops of law graduates struggle with high debt and high legal-joblessness rates. But this may be due to a bad period in the legal labor market, and does not imply that law schools are shortchanging their students in the long run—after all, a lawyer's career is long. Furthermore, Tamanaha does not explain why

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if law school is such a bad deal, it is a deal so many students take.. Certainly there are law graduates who, because of their heavy debt and poor financial management skills, regret their decision to attend. These remorseful souls are deserving of sympathy in the same way that underwater mortgage holders are. It is a shame they bought the house. But it is naive to blame the seller.

Despite the failure to adequately establish his pet problem, Tamanaha's ideas for reform are sensible and would address some of his concerns—the lack of low-cost legal education, for example—while also addressing problems with the broader legal system, like the unmet legal needs of the poor. In a word, he urges immediate deregulation.

This review intersperses summary with critique. It develops the criticisms highlighted above, and raises several additional points. It proceeds in the same topical order as the book. The first part describes how law professors have captured the law school regulatory body, the American Bar Association (ABA), and the effects of this capture on students. The second part discusses law schools' obeisance to the *U.S. News & World Report* rankings, and the inefficient maneuvering it induces. Third, it considers the dirty practice of awarding scholarships. Fourth, it describes legal education's "broken economic model." It concludes with a comment on Tamanaha's ideas for reform, which, despite the book's shortcomings, are sensible.

Law School Regulation

In the first section of the book, Tamanaha's basic argument is that law professors exert great influence over the accreditation process, and have used this influence to further their own interests at the expense of their students. This section of the book makes for a good case study of regulatory capture. That said, Tamanaha may be too quick to condemn some of the specific practices the standards codify. An understanding of what constitutes the ideal legal education environment—which the standards supposedly aim to secure—requires a clear understanding of how legal education works. The book also fails to mention the anticompetitive effects of the accreditation standards.

Law school accreditation standards, written by the ABA, are largely designed and enforced by law professors. Unsurprisingly, the standards include components that benefit law professors at the expense of the students. This is not merely Tamanaha's perspective. In 1995, the Department of Justice brought an antitrust complaint against the ABA, claiming that legal educators had subverted the accreditation process. At the time, ABA enforcement panels were "typically composed entirely of law faculty…. What accreditation amounted to was legal educators going around the country to school after school advancing the interests of fellow legal educators" (13). The standards seemed designed to improve professors' lives rather than to ensure a quality legal education: they lightened course loads, increased funding for research, and increased salaries. Since the Justice Department's lawsuit, Tamanaha asserts that "the blatant use of accreditation to benefit faculty is in the past"

(18). However, he argues that the faculty-exalting effects of the old standards linger.

For example, Tamanaha argues that because of the research emphasis embedded in the former standards, scholarship remains an important function of law professors. Tenure-track positions, and tenure itself, is determined largely by publication records. Accordingly, to attract good faculty, schools must offer them funding and time to conduct research. Funding this research has become increasingly expensive—a cost that gets passed on to students as higher tuitions. Adding insult to injury, much of this costly scholarship goes unread.

Tamanaha blames the increasing cost of research on the further self-interested maneuverings of the faculty. He does not consider that the increased emphasis on scholarship may instead be the consequence of some competitive process. If scholarship is unimportant, why is it that law schools have increased their funding of it, even without any prodding from a change in the accreditation standards?

To critique specific aspects of the legal education system, as Tamanaha critiques the institution of faculty scholarship, for example, it is useful to have a clear understanding of how legal education works. That is, how does law school produce lawyers? Two competing theories of education include the human capital theory and the signaling theory of education.[1] The human capital theory posits that education endows a student with new skills which enhance his productivity—a student benefits from law school because of the things he learns there. The signaling theory, on the other hand, sees education as revealing which students are more inherently productive—a Yale degree is valuable not because of the Yale training, but instead because it reveals the degree-holder to have superior innate abilities. A third theory might stress the importance of social networks developed at school. Which theory, or what combination of theories, best describes legal training is an empirical question.

Consider the signaling theory of education, which deemphasizes what students are taught and who teaches it, and instead sees a particular alma mater or GPA as constituting a quality signal to prospective employers. Under this theory, corporate law firms value Harvard JD's not because they value Harvard's training, but because the fact that a person made it into and through Harvard suggests that the person will be a good lawyer. This theory is supported by the notion that neither employers nor students value the third year of legal education. In fact many students secure job offers before beginning the third year. The degree is valuable as a necessary credential, and the name brand is valuable as a signal of the quality of the applicant.

If law school functions primarily as a signal, then faculty scholarship, even scholarship that goes virtually unread, may serve a purpose that Tamanaha

1. *See*, for example Gary S. Becker, Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education (Univ. of Chicago Press 1994), for the human capital theory, and Joseph E. Stiglitz, The Theory of "Screening," Education, and the Distribution of Income, 65 Am. Econ. Rev. 283, 283-300 (1975), for the signaling theory.

does not appreciate. Perhaps in order to attract the best students, and therefore establish the best signal, a school must hire the best faculty. Publication records serve as a metric by which to rate faculty. The fact that law schools with the most sought after students also have the strongest faculty is consistent with this hypothesis.

There is at least one negative effect of the standards that Tamanaha does not explicitly consider. It is that the accreditation standards stifle competition in the market for law schools. Some standards, such as the requirement for an extensive library or the imposition of pay standards for faculty, may serve as insurmountable barriers to entry for would-be new law schools. More cynically, law school accreditors may deny accreditation to new schools, even when they meet the standards. This stifling of competition has various adverse effects, one of which is keeping tuition high.[2] Deregulation is often good for the consumers, which in this case are law students.

Rankings

Tamanaha is vicious in his attack on the *U.S. News & World Report* rankings of law schools: "The annual pronouncement of the surviving rump of a defunct magazine thus mercilessly lords over legal academia" (79). This section of the book documents a wide range of wasteful and even dishonest behaviors that schools have engaged in to improve their ranking. Ultimately Tamanaha condemns the entire system: "*U.S. News* ranking competition has wrought profound detrimental changes," he writes, blaming the rankings for "the loss of moral credibility suffered by law schools" (85). However, he fails to consider the possibility that ranking serve a useful purpose.

The *U.S. News* rankings carry great importance in the legal education system. The book cites a statistical study that shows a rise in the rankings brings more and better applicants, and a fall in the rankings has the opposite effect. However, the strongest evidence that rankings matter, for elite and non-elite schools alike, is the fact that many schools engage in costly behavior to affect their ranking.

Several schools have been caught misrepresenting their students' LSAT scores and employment outcomes, both important components of the *U.S. News* ranking algorithm. Intentional misrepresentation is of course detestable, although it is impossible to say how widespread the practice is, especially after several schools have been caught and duly punished. The damage to these schools' reputations, along with the subsequent increase in oversight of reporting practices went a long way to stamping out future dishonest reporting.

Concern about rankings encourages behavior that Tamanaha sees as wasteful. For example, he is very bothered by the market in transfer students that has developed. An important determinant of a school's rank is the median LSAT score of the entering class. Transfer students' scores do not figure in this statistic, and thus a transfer student provides a school a way of receiving

2. Some other adverse effects are mentioned in the conclusion of this review.

the tuition of a relatively poor performer without receiving the pockmark of his low test scores. Higher-ranked schools lure away the best students from lower-ranking schools. This is a problem, according to Tamanaha, for several reasons. This transfer practice robs lower-ranked schools of their best students, and leaves the lowest-ranked schools with too many open seats. Students who do transfer do not really benefit from the superior education at the new law school, as they miss the crucial first year when the core of instruction occurs and valuable social networks form.

Tamanaha's concerns about this transfer phenomenon are overblown. First, the students who do transfer are presumably better off. Second, a school's concern for its reputation will prevent it from accepting substandard students just for the sake of getting their tuition. In fact, it is likely that transfer students improve the average quality of the classes they join. After all, transfer students have proven that they are excellent law students. Furthermore, students who do not transfer may actually benefit from losing their best classmates, insofar as class rank is important for obtaining a job.

Schools' tuition-reduction practices present another case of Tamanaha seeing a problem where there is none. Rather than preserving scholarships for students with financial needs, schools use scholarships to lure in students who would otherwise attend other schools. Tamanaha worries about these scholarships as forcing students to make difficult decisions—for example, attending Iowa at half-tuition or Vanderbilt at full-tuition. He is concerned that this financial temptation to forgo a spot at a higher ranked school differentially affects the poor, and pushes them to lower quality schools, since the offer of half-tuition is more appealing to a poor student than a rich student.

Again, Tamanaha's concern is misplaced. If the better school garners the student better job opportunities, a student, rich or poor, of course would be willing to pay more for it. If a student thinks he could get a higher-paying job from attending Vanderbilt than Iowa, rich or poor, it would make sense, at least on income-maximizing grounds, for him to take the Vanderbilt spot if the expected pay differential justified the tuition differential. This is perhaps tempered by the uncertainty involved in obtaining a job, but the broader point stands: the quality of an investment is independent of the resources of the investor.

Other rankings-induced wasteful behavior involves the "reputation score." This score, the single most important factor in the *U.S. News* rankings, is determined by fellow academics and practitioners. Thus to boost its score, a school must improve its public image. This prompts schools to offer huge salaries to hire away star professors from other schools, even when it is not in the best interest of its students. Reputational concern also leads schools to overspend on marketing and promotional materials.

Through his tirade against rankings, Tamanaha fails to realize that rankings do serve a useful purpose—he considers the costs but not the benefits. From both the student's and the employer's perspective, information about various

law schools is diffuse. A ranking system serves to consolidate this information, thereby lowering search costs, and facilitating better matches of both students to schools and graduates to employers. Just imagine how applying to law school and hiring new lawyers would work without any way of gauging a school's relative quality.

Any ranking system will be susceptible to some degree of gaming by law schools. This wasteful behavior on the part of law schools is lamentable, but also inevitable. It is the cost of having a ranking system. The book undertakes the task of documenting the costs of the current ranking system. The remaining task is to devise—and implement—a better one.

The Broken Economic Model

The discussion of tuition reductions segues into a discussion of the costs and benefits of law school. Tamanaha's key contention is that law school, with its high cost and uncertain outcome, is a bad investment for many students. He supports this claim with an appeal to some basic summary statistics. He does not, however, adequately explain why students keep signing up for law school. Alas, he fails to persuade.

Tuition has risen very quickly, and debt levels have climbed in lockstep. In 2010, the average debt of new law school graduates was $100,000, while the average starting salary for lawyers was $77,000. Tamanaha considers a hypothetical case of a person who has slightly higher-than-average debt and a slightly-lower-than-average salary, and shows that she would have a difficult time paying off her loans. This bleak situation does not even account for the many graduates who are unable to secure jobs as lawyers.

Of course, it is not clear for how many people this hypothetical is representative. If students are not completely ignorant as to the costs and expected benefits of the law school investment, one would expect that graduates with higher-than-average debt tend to have higher-than-average salaries. The overall averages obscure this. It would be better to have data on the relationship between graduates' debts and salaries, rather than just overall averages. The best Tamanaha can do is present overall averages from several individual schools. Moreover, the statistical portrait based on 2010 employment numbers exploits the sudden, and perhaps temporary, downturn in the legal labor market. Graduates of 2010 essentially decided to be lawyers in 2007, when the legal market was quite attractive. Many of those graduates were in for a rude surprise. This is not an indictment of a broken legal education system, but rather a reminder of the dynamic nature of labor markets. New law students in 2010 made their enrollment decision with the current legal labor market in mind, and their outcomes may be very different. Nonetheless, the assertion that there are many students who have high debt-to-income ratios is at least plausible.

The book discusses two government-funded avenues of debt relief. Under the loan extension plan, graduates may extend the payment plan on their

government loans from the typical 10-year plan to a 30-year plan, thereby lowering the monthly debt payments. The other program is the Income Based Repayment program (IBR). This program for low-income graduates reduces the monthly debt payments and completely forgives them after 25 years (or ten years for public service jobs). Qualifying as low-income depends on one's debt. Some graduates who make over $100,000 per year qualify.

The take-up rate of these programs among law graduates is high, and Tamanaha sees this as a problem. He fails to consider that many law students landed in debt relief programs not by accident but by design. If a law school applicant knows about these programs—and some law schools advertise them when trying to assuage concerns about the tuition—then she realizes the effective cost of law school is well below the sticker price.

Tamanaha reckons that approximately half of 2010 graduates qualified for IBR, and takes this as "indicative of a serious problem with the economics of legal education" (121). But exactly the opposite is true. The popularity of IBR may be taken as evidence that the economics of legal education seem to be working just as one would expect. If students are aware of IBR then they sensibly view law school as cheaper than its nominal costs. IBR is particularly attractive for applicants who desire to work in public service. It would be surprising if students did not take advantage of such a generous program.

When evaluating whether law school is a good investment, it is the out-of-pocket expense to the applicant that is relevant, not the nominal value of their loan. A $100,000 debt that will be forgiven after 10 years of small monthly payments is not a $100,000 debt at all. Therefore, for the student that takes IBR, law school will have been an excellent investment, regardless of the size of his debt upon graduation. The forward-looking student who plans to work in public service realizes before beginning law school that he doesn't need to pay off the $100,000—he just needs to make manageable monthly payments for ten years. Suppose a person would have a salary of $4,000 a month and zero debt if he did not attend law school and $5,000 a month if he does attend law school. If his monthly debt payment is less than $1,000, then law school is a good investment.

Perhaps Tamanaha does not think students are clever enough to figure out their options for financing their law school debts after graduation, noting, "unusual skill and skepticism on the part of a prospective student would be required to see through [the graduate outcome statistics the schools advertise]" (145). He believes law schools are intentionally misleading students. But Tamanaha should give the students more credit. Before making an investment of $150,000 and three prime working years, even gullible applicants do some research. This is particularly true after the spate of attention the issue of educational debt loads has received in the popular press. Additionally, there are blogs and websites devoted to law school financing and debt, not to mention the opinions and advice of every lawyer alive.

This is not to say that every graduate made a good decision in attending law school. Tragic stories abound. These tragedies, however, serve to fix the system. The more tragic cases of students with enormous debt loads and no job prospects in one year, the fewer applicants the next. If law school is a bad deal, students will figure it out.

Indeed, there are many signs that the legal education system is adapting, as Tamanaha himself documents. Applications have been on the decline since 2005. The most telling piece of evidence that applicants are aware of the changing soundness of an investment in law school is that applications did not spike in the 2008 recession, contrary to the historical regularity of an application boom during periods of high overall unemployment (161). Surely the dearth of applicants is bad news for existing law schools and their professors, particularly those that have failed to produce graduates who get jobs. But the failure of such schools is a sign of the economics of the legal education system functioning well, not poorly.

Conclusion

Whether or not law schools are failing, the legal education system certainly can be improved. Tamanaha finishes his book advocating various deregulatory measures. He argues that deregulation would bring about changes in the legal education landscape to make law school more accessible and more affordable for prospective attorneys. Indeed, deregulation would bring a host of other, perhaps more significant benefits, too.

Tamanaha gives specific suggestions for how a less regulated educational system should work: drop the third year of law school; permit schools to rely on non-tenured, non-scholar instructors; don't require law schools to maintain expensive brick-and-mortar libraries. Deregulatory measures such as these would allow schools to lower their tuitions to a fraction of their current levels. The Harvards and Yales might change very little, as their reputations rely on high-profile scholars who demand tenure and research budgets. But low-cost options for students with less ambitious goals would arise to meet the demand.

Alternatively, Tamanaha suggests the simpler yet more extreme change of dropping the requirement, present in most states, that lawyers hold a degree from an ABA-accredited school. This deregulation would facilitate even more competition, and provide more options for students. Any concern that unaccredited schools would produce unqualified lawyers could be addressed by the still-standing requirement that they pass the bar exam. In support of this suggestion, Tamanaha quotes a state supreme court justice: "No empirical data has been offered to suggest that the ABA standards correlate in any way to a quality legal education" (176).

Given his belief that the legal education system will persist in short-changing its students—which betrays a lack of trust in the market mechanism—it is surprising to encounter Tamanaha's market-based ideas for reform. Certainly the accreditation standards prevent the market in law schools from

operating optimally, but the presence of regulation does not put on hold all of the workings of the market. If law school prices remain high and jobs remain scarce, would-be lawyers will see that law school is a bad deal, and will choose other careers. If the number of students declines sufficiently, some law schools—the poorest performers—will cut costs or shutter their doors. The legal labor market will hit a new equilibrium. This, of course, is standard Econ 101 fare. But Tamanaha does not present any evidence to suggest it does not apply.

Keeping law school prices high is effectively a labor supply restriction. It is sometimes said, misleadingly, that there is an oversupply of lawyers. But there are also many unmet legal needs in this country. So the problem is not that there too many lawyers. It is that there are too many lawyers who insist at working at relatively high wages. If a law school graduate's most lucrative job option is a non-legal job, it is not surprising that he should take it, particularly if he has a heavy debt burden.

The theory of labor supply restrictions has a long history in economics, originating perhaps with Milton Friedman's doctoral thesis, published in 1945. In it he argues that the American Medical Association, by restricting the supply of doctors, drove up the price of medicine. This of course was good for doctors, but bad for almost everyone else, who has to pay higher fees for medical services. A recent book by Clifford Winston and others[3] applies a similar argument to the legal profession. Using econometric techniques, they estimate that inflated lawyers' salaries incur an annual welfare cost of approximately $10 billion. That is, the regulation of the legal labor market, which begins with the ABA accreditation standards, costs society $10 billion in higher fees. That $10 billion is spread across the entire legal profession.

So Tamanaha is right to pick on the legal education system. He is exclusively concerned with burdening new law graduates with too much debt. This concern seems misplaced, given that if law school is in fact a bad deal for certain types of people, then those types of people will cease to apply in the future. Furthermore, concern for heavily indebted law students—who chose to attend law school—seems almost trivial while there are broader social issues, such as the unmet legal needs of the lower class.

Serendipitously, Tamanaha's suggestions for reform would address various negative effects of the legal education system, not just the one he is most worried about. A less regulated legal education system would foster low-cost legal education options. This would lead to more lawyers willing to work for lower wages. Competition in the market for legal services would lead to more low-cost legal options. Legal services would become affordable to lower-class people who are currently disenfranchised. Government funds devoted to legal services, such as support for public defenders, would go farther. Regular citizens would pay lower prices for their legal needs. Even the group Tamanaha

3. Clifford Winston, Robert W. Crandall & Vikram Maheshri, First Thing We Do, Let's Deregulate All the Lawyers (Brookings Institution Press 2011).

is most concerned about—law school graduates overwhelmed by debt—would benefit. Society as a whole would be better off.