

Rankings, Economic Challenge, and the Future of Legal Education

Gene R. Nichol

I was asked, some months back, to speak to the assembled law school deans about the future of legal education—particularly in the crush of economic challenge.¹ At one level, I was surprised by the invitation, since this was one of the few times, in the last two decades, that I was neither a dean nor university president. So I was an unlikely choice to address those still bold or foolish enough to remain in the saddle.

But it occurred to me that the conference organizers might have had other motives. Perhaps this was a “leadership protection effort” on the part of the Association of American Law Schools. I had been a law dean for many years. Like a lot of my colleagues, I’d been recruited off and on for various university presidencies. But until four or five years ago, I had consistently said no—explaining I was reasonably certain that being a law school dean was, all told, a better job than being president. Then, inexplicably, I succumbed and moved to that other level. Given the modestly public challenges of my controversial tenure at the College of William & Mary, perhaps the AALS planners thought I was living testament to the accuracy of my initial assessment. How better to demonstrate, than by bruising example, the wisdom of staying put?

If so, there were risks, still, in the strategy. After a year as a regular faculty member—teaching thrillingly large classes, running engaging seminars, studying only what you choose, setting your own schedule, seeing your wife, enjoying your kids—I could also report to my former colleagues, first hand, that there is indeed a reason we all came into this line of work in the first place. It is, lo and behold, still available. And the luxury of being able to say exactly what you want, in exactly the way you want to say it—without worrying what some spewing, flat-earth legislator or boorish, bullying, billionaire might think—these are sweet pleasures too delicious to surrender. If you can resist the temptation to run the shop, happiness protrudes at every turn.

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1. I refer here to the AALS Deans-Only Workshop at the Midyear Meeting of the American Bar Association in Orlando, Florida, Feb. 3–9, 2010.

Still, I was confident that my assignment lay in other quarters. I became convinced, as did many three or four years ago, that we faced a perfect storm in legal education. For public universities, at least, we started to see wrenching cuts in state appropriations. Jaw-dropping losses in endowment portfolios, on which so much depends, soon followed. Unsurprisingly, given the effects of great recession, legislatures and boards of trustees expressed heightened skepticism about a steady cascade of tuition increases. Raising private funds, the essential lifeblood for all law schools, no matter the pedigree, became distinctly more difficult. Even though a potential donor still has a couple hundred million dollars, if he used to have five hundred million he feels like a pauper. So problems multiplied, or perhaps squared, one atop of the other, adding to the deficits, both emotional and economic.

But then the perfect storm got more perfect. It honed itself. The bottom fell out of perhaps our greatest sugar daddy—a bountiful and lucrative hiring market for our graduates. Jobs were deferred in large numbers; offers disappeared; campus interviews were cancelled; alumni were laid off; graduates became fretful; parents became nervous; chief financial officers began to panic.² Lots of graduates and would-be graduates began openly complaining about their huge debt burdens. No dean, regardless of her bluster, willingly signed up for all this. I can remember the days, long departed, when we received more from the legislature with each new budget, rather than less. It sounds almost quaint. It also, I'll concede, makes my constitutional law class seem all the more ennobling.

As a university president I was asked to offer advice concerning such daunting strictures. I could proffer little that was heartening. It is surprising how rapidly, in times of economic duress, law schools can come to seem—for presidents, chancellors and provosts—miles distant from the center of institutional gravity. Without the immediacy, the numbers, the parents, the alumni, and the legislators of the undergraduates, law schools readily appear secondary amid the raging fire. They carry neither the absurd claims and tensions of athletics, nor the faculty clout of the college of arts & sciences. They trigger neither the massive costs nor bestow the grant-generated income of the hard sciences, engineering, and medicine (only those with medical schools can fully attest that when a university hospital gets a cold, the university gets pneumonia, or at least deeply contagious dose of swine flu). So it can't be completely unexpected when a president's reaction to a law school during times of immense exigency is, in effect, "it would be nice if you'd simply be quiet and help me get out of this mess."

2. See Jessica Rettig, *Law School Grads Face Tougher Economic Times*, U.S. News & World Report, Apr. 15, 2010, available at <http://www.usnews.com/education/best-graduate-schools/top-law-schools/paying/articles/2010/04/15/law-school-grads-face-tougher-economic-times>.

And, of course, at least a modicum of good citizenship is called for here. We are part of a broader, and absolutely essential, whole. I understand that there are a couple of outliers, exceptions to every rule. But ask yourself how many great law schools are not part, even a central part, of a great university?

My own sense of it has been, from both chairs, that it is crucial for the law school, and even the law school dean, in these moments, to be regarded as a vital ally to the president. In different schemes, there will be different justifications for the needed kinship. In many private institutions, the link will be economic. It will be essential to avoid further theft, or taxation, from the most successful markets. For public law schools—which, again, with a few exceptions, are not the cash cows they typically believe themselves to be—the institutions and their deans can frequently be among the greatest political assets presidents possess. When the provost and the president gather at the final cutting table, one wants them to be thinking, for whichever reason, “tell us we don’t have to face a big cut to the law school.”

Economic Privilege and Exclusion

These tensions and dynamics are predicted and understood. Given that this would surely be my last keynote to decanal colleagues, I wanted to move closer to the core and say things they might be less happy to hear. So I was, perhaps, game for a little annoyance. After all these years, it’s my huckleberry.

I believe, given the economics, that we are in for more than a modest dose of change in legal education—public and private, national and regional, elite and virtuously middle-tier. I also think that we are not as well positioned as we should be to deal with the unfolding challenge. We have gone far, in the last twenty-five years or so, toward breaking the bank, pushing costs beyond both call and sustainability. I doubt that we have done so to good end, that we have made optimum investments. I am quite sure that we have failed to bolster a mission in the common good. Now that our options are constricting, these choices may come back to bite us. They may have bitten a lot of our fellows already.

Consider a set of straightforward facts. The costs of legal education—tied to either per student expenditure or to tuition—have risen dramatically in the last two and a half decades. We know the anecdotal reports. We’ve experienced them. At least one broad-ranging study indicates that legal education expenditures have risen from about \$5,000 per student to \$25,000 or more.³ Even law school websites concede that the costs of legal education have increased dramatically, in real terms, beyond anything attributable to inflation.⁴ The GAO study two years ago concluded that tuition has risen by

3. I extrapolate very modestly here from John Sebert’s 2002 study. See John A. Sebert, *The Cost and Financing of Legal Education*, 52 *J. Legal Educ.* 516, 519 (2002) (“Average per-student expenditures at ABA-approved law schools have quadrupled in the past twenty years, from about \$5,000 in 1979–80, to \$20,713 in 1999–2000.”).

4. James Vescovi, *Why Does Law School Cost So Much?*, Columbia Law School, Summer

over 8 percent a year, on average, for the last fifteen years, a good deal more sharply than other branches of professional education.⁵

Average public law school tuition now is well over \$15,000 a year for residents and over \$30,000 for non-residents. At least six public schools charge over \$30,000 for in-state students.⁶ Several privates now approach \$50,000.⁷ California state schools, perhaps predictably, have gone up by shots of 20 percent or more per annum; Indiana, by 25 percent; my good colleagues at Colorado, 20 percent; at Iowa 20 percent, and at Texas, my alma mater, 16 percent.⁸ One noted scholar has compared the law school “tuition bubble” with the imploded sub-prime mortgage market.⁹ A much-discussed average student debt load is over \$90,000; or over \$100,000, upon graduation—depending on the study, and the date.¹⁰ There has been a dramatic drop in the percentage of law schools whose tuition can be met on Stafford loans.¹¹ It is no surprise, therefore, that AALS Executive Director and former UCLA Law School Dean Susan Westerberg Prager would worry that “middle class access” to legal education has been hugely compromised.¹² Our good colleague at Cal-Davis, Kevin Johnson, has put it more brutally: “[A]ffordable public legal education is no longer in existence.”¹³

2006, available at http://www.law.columbia.edu/law_school/communications/reports/summer06/lawschoolcost (“...so much more today than twenty years ago, even when inflation is taken into account”).

5. U.S. Gov’t Accountability Off., Higher Education: Issues Related to Law School Cost and Access, Report to Congressional Committees GAO-10-20, Oct. 2009, at 11, 16, available at <http://www.gao.gov/new.items/d1020.pdf> [hereinafter, GAO study].
6. See Official Guide to ABA-approved Law Schools 2008 Edition, Equal Justice Works, Dec. 2008, available at http://www.equaljusticeworks.org/sites/default/files/aba_tuition_fees.pdf.
7. Yale’s tuition in 2009 was \$46,200; Hastings’ non-resident tuition was reportedly \$40,608.
8. Karen Sloan, At Public Law Schools, Tuition Jumps Sharply, *Law.com*, Aug. 3, 2009, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202432727154>.
9. See Posting of Christine Hurt to The Conglomerate, Minding Our Own Business Forum: Bubbles, Student Loans and Sub-Prime Debt, Apr. 19, 2010, available at <http://www.theconglomerate.org/2010/04/death-of-big-law-forum-bubbles-student-loans-and-subprime-debt.html>.
10. See GAO study, *supra* note 5; Posting of Frank J. Macchiarola & Michael C. Macchiarola to Minding the Campus, Does U.S. News Make Law Schools More Expensive?, available at http://www.mindingthecampus.com/originals/2010/01/does_us_news_make_law_schools.html; Katherine Mangan, Law Schools Could Take a Hint from Medical Schools on Curricular Reform, *Chron. of Higher Educ.*, Apr. 24, 2010, available at <http://chronicle.com/article/Law-Schools-Could-Take-a-Hint/65264>; Debra Cassens Weiss, Law Students Push for Transparency, More Info re Law School Employment Stats, *A.B.A. J.*, Apr. 21, 2010, available at http://www.abajournal.com/news/article/law_students_plan_website_to_publish_better_law_school_employment_stats.
11. See GAO study, *supra* note 5.
12. See Sloan, *supra* note 8.
13. *Id.*

And then there is the task of unpacking why this is so. Surely diminished public support is part of the calculus.¹⁴ But the GAO study, confirmed and saluted by the ABA,¹⁵ concluded that “a [more] resource-intensive approach to legal education and competition among schools for higher rankings appear to be the main factors driving [law school costs.]”¹⁶ Officials at “most...ABA-accredited law schools [interviewed]...reported that [efforts] to increase their U.S. News & World Report ranking...had [a major] impact on [tuition levels] because...“rankings are determined in part by such cost-related factors as per student expenditures, student-faculty ratio, and library resources.”¹⁷

This confirmed findings from the more thoughtful and comprehensive study commissioned earlier by the Law School Admission Council.¹⁸ It had concluded that rankings “[have put] pressure on law school administrators to redistribute resources in ways that maximize their scores on [U.S. News criteria]...even if [law school officials] are skeptical that this is a productive use of their resources.”¹⁹ Both studies identified massive marketing expenses, merit scholarships to attract high LSAT students, huge dean and star-faculty salaries, and personnel and expenditures to “game”—we could also say “cheat”—the system as principal triggering causes.²⁰ This is, gingerly put, a broad competition to excel by spending more per student than one’s competitors. Or a race to become the most inefficient. Or an elevator heading in but one direction.²¹

14. See GAO study, *supra* note 5, at 25. See also Sebert, *supra* note 3 at 517 (dramatic drop in percentage of state funding from 1986-96).
15. GAO study, *supra* note 5, Appendix II, Letter from Hulett H. Askew, Consultant on Legal Education, to George A. Scott, Director, Education, Workforce, and Income Security Issues, Gov’t Accountability Off., Oct. 2, 2009 (“Your conclusion, based upon the sampling of law school deans and others, replicates the conclusions reached by the Section [on Legal Education] in its own study of [the costs of legal education] in 2002/3.”).
16. GAO study, *supra* note 5, at 21.
17. *Id.* at 21. See also Eric Kelderman, Law-School Cost Is Pushed Up by Quest for Prestige, Not Accreditation, GAO Survey Finds, *Chron. of Higher Educ.*, Oct. 26, 2009, available at <http://chronicle.com/article/Competition-Not/48940>.
18. See Michael Sauder & Wendy Espeland, Fear of Falling: The Effect of U.S. News & World Report Rankings on U.S. Law Schools, L. Sch. Admissions Council, Grants Report 07-02, Oct. 2007, available at <http://www.lsac.org/LSACResources/Research/GR/GR-07-02.pdf>.
19. *Id.*
20. *Id.* John Sebert’s study in 2002 reached the same result: “[A] more significant portion of the cost increases is due to competition by law schools for students and for reputational rankings...[a] positional arms race...ever increasing competition for students, faculty and ranking...resulting [in] rapidly increasing tuition costs and debt that non-scholarship students bear.” Sebert *supra* note 3, at 524.
21. Deborah L. Rhode, Legal Education: Professional Interests and Public Values, 34 *Ind. L. Rev.* 23, 26 (2000) (“[Rankings] often distort law schools’ priorities...the temptation is to underinvest in features that U.S. News & World Report editors find unimportant”).

I know what you're thinking. There are likely weaknesses in these studies—particularly the GAO report. They are but partial pictures, they overstate, they miss the larger focus. I'm guessing all that might be true—though we have to concede, they have used our own words (interviews with law school deans) to make their case.

My worry, having been around legal education for three decades, is that though they may not be completely true, there is much truth in them. Too much truth, by a large margin, for us to remain unembarrassed.

Here's another way of making the broad point. I went to the website recently of one of my favorite law schools—a great one, one of the best in the nation, by any standard. The site included a special section—given the times—explaining why law school costs so much more than it did twenty-five years ago. Why, in this case, do students now have to pay more than \$150,000 to get a degree?²²

Law plays a larger role in society than a quarter century ago, the site explained, and students must be better prepared to take on the roles it envisions. The discipline is now global and significantly more interdisciplinary, drawing on efforts from across the academy. It employs more professor-student intensive courses, requires huge technological expenditures linking faculty to their students and the world as well as student-friendly capital facilities, new research centers, and new student services.²³

The website didn't mention huge increases in dean and faculty salaries,²⁴ significantly reduced teaching loads, dramatically expanded leave policies, expensive marketing campaigns,²⁵ money redistributed to high-end merit scholarship recipients,²⁶ and other drivers that have marked the reality of most modern decanal careers.²⁷

But even before these omissions, I have to say that I wasn't convinced. It's not that we haven't done a lot of the things outlined. I just don't believe they

22. See *supra* note 4.

23. *Id.*

24. See National Jurist study, *infra* note 27.

25. See Sauder, *supra* note 18. See also N. William Hines, Ten Major Changes in Legal Education Over the Past Twenty-Five Years, Association of American Law Schools, Aug. 2005, available at http://www.aals.org/services_newsletter_presAug05.php (discussing “torrent of promotional materials”).

26. See Sebert, *supra* note 3, at 525.

27. See, e.g., the National Jurist study finding that law faculty salaries have increased by 40 percent in the last decade; resulting in 48 percent of the costs which have driven up tuition 102 percent at public law schools and 74 percent at private schools. Debra Cassens Weiss, Study Partly Blames Higher Law School Tuition on Forty Percent Leap in Faculty Size, A.B.A. J., Mar. 10, 2010, available at http://www.abajournal.com/news/article/study_blames_higher_law_school_tuition_on_40_leap_in_faculty_size/; Richard A. Matasar, The Rise and Fall of American Legal Education, 49 N.Y.L. Sch. L. Rev. 465, 483 (2004) (Faculty hiring competitions and increased benefit packages, and research focus, “[usually] have only a tangential relationship to the core education of law students...[but] are essential in the arms battle for reputation.”).

have had the impact described, or, more candidly, that they have been driving the train. I am fearful that we have pushed to the edge economically, past sustainable standards, towards breaking the budget, without dramatically improving, or perhaps even paying close attention to, the actual learning experience of our students. I hope we haven't weakened that experience but I don't think we've marched over the hill to lift it up either.²⁸ We are not beyond improvement. For other purposes, I have been reviewing, of late, a number of graduate history programs, at least one of which approaches greatness. I have been modestly embarrassed at the depth and the quality of faculty supervision, editing, intellectual challenge and exchange. These programs reflect remarkable exercises in rigor, analysis, writing, argument, and impressively relentless revision, qualities that I am not sure are so apparent in American law schools. Maybe I am wrong, but I don't think so.

So I am worried that we have exploded an economic model, or cracked it, without dramatically improving legal education in the process. We have undoubtedly made life better for ourselves. We've managed, broadly speaking, to assure the highest faculty salary levels, or at least among the very highest, in the academy. Our research support, leave policies, and teaching loads have become extraordinarily, and unnecessarily generous.²⁹ We have, in short, made certain that legal education works powerfully for us.

At the same time, we have added, inadvertently, to a crisis in equal justice—wrought from the effective exclusion of so many millions from access to our system of civil adjudication.³⁰ This exclusion has occurred through the heightened cost of legal education; through barriers which restrict low and middle income students from attending law school in the first place; through soaring debt levels; through constrained opportunities to work in the public service; through the indirect elevation of the ultimate cost of the delivery of legal services. We have not played our role in the equal administration of justice admirably.

And now, it seems, the bloom fades from the vaunted rose. Students protest exorbitant tuition increases across the land.³¹ They also move to demand “more transparency” in law school employment and placement data. With

28. Rhode, *supra* note 21, at 23 (“America offers the world’s most expensive system of legal education, yet fails to address routine legal problems at a price most low and many middle income Americans can afford.”).

29. *Id.* See also Matasar, *supra* note 27, at 483.

30. See Gene R. Nichol, Judicial Abdication and Equal Access to the Civil Justice System, 60 Case W. Res. L. Rev. 325 (2010).

31. See Bill Lindelof, California Students Arrested Amid Protest Over Fee Increases, Nov. 20, 2009, Sacramento Bee, *available at* <http://www.mcclatchydc.com/2009/11/20/79247/california-students-arrested-amid.html>; Clarissa A. Leon, An Educated, Escalated Movement, The Nation, May 1, 2010, *available at* <http://www.thenation.com/article/educated-escalated-movement> (tens of thousands protest in thirty states).

reason, they complain that the ratio of costs to actually-derived economic opportunities doesn't add up.³² In the meantime, a distinguished professional study urges that legal education be dramatically, and expensively, transformed to assure more valued and transformational learning experiences.³³ And lawyers, judges and employers seek a wholesale overhaul of the law school curriculum to better meet the needs of a constrained marketplace.³⁴ Deans predictably fret that now they don't have the money.³⁵

My hope is, as we necessarily adjust to the changes coming over the next decade, that we will focus far more meaningfully, pointedly, and successfully, on the actual experiences of our students. We must remind ourselves that our institutions are essential components in an essential system of justice. Access to the legal profession has, historically, been a powerful democratizing influence on the corridors of power and persuasion in the United States. The last thing any of us ever went into this line of work to accomplish was to merely replicate and fortify privilege—whether that privilege belongs to our most economically-blessed students, or to us.

32. See Weiss, *supra* note 10.

33. See William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass 2007).

34. See Mangan, *supra* note 10 (describing conference at Arizona State University's Sandra Day O'Connor College of Law entitled "National Forum on the Future of Legal Education").

35. *Id.*