

The End(s) of Legal Education

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Legal education is in jeopardy.

There is no longer sufficient demand for the juris doctor degree from prospective students; the supply of seats exceeds the number of applicants possessing the credentials that have until recently been preferred by each respective institution.¹ As a consequence, schools have had to implement “tuition discounting” at unprecedented levels even to enroll fewer individuals who are less qualified by conventional predictors.² Meanwhile, the mainstream press, with encouragement from the organized bar, has excoriated the legal academy for its failures, whether real or perceived.³ These critics have wondered about the “return on investment.”⁴

I offer ruminations on the “business model” of legal education. These musings were presented in my speech to the participants in this symposium on “The Future of Legal Scholarship” at Northeastern University in spring 2016. I use the term “business model” deliberately and advisedly, out of the

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1. The Law School Admissions Council releases extensive applicant volume data. See *Three-Year Volume*, LAW SCH. ADMISSIONS COUNCIL, <http://lsac.org/lsacresources/data/three-year-volume> (last visited July 11, 2016).
2. See, e.g., *The Law Schools that Offer the Biggest Tuition Discounts*, BLOOMBERG <http://www.bloomberg.com/news/articles/2015-09-08/the-law-schools-that-offer-the-biggest-tuition-discounts> (Sept. 8, 2015); Karen Sloan, *It's a Buyer Market at Law School: Suddenly in Demand, Prospective Students Wonder, "How Much Money Can I Get?"*, NAT'L L.J. (June 25, 2012), <http://www.nationallawjournal.com/id=1202560485444/Its-a-buyers-market-at-law-school-?slreturn=20160624180321>. The “discount rate” has continued to increase throughout higher education. See Rick Seltzer, *Discounting Hits New Highs*, INSIDE HIGHER EDUC. (May 16, 2016), <https://www.insidehighered.com/news/2016/05/16/discount-rates-rise-yet-again-private-colleges-and-universities>. See also Maggie McGrath, *The Invisible Force Behind College Admissions*, FORBES (July 30, 2014), <http://www.forbes.com/sites/maggiemcgrath/2014/07/30/the-invisible-force-behind-college-admissions/#7f2fd136efbc>.
3. See, e.g., Noam Scheiber, *The Law School Bust*, N.Y. TIMES, June 19, 2016, BU1. See generally BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).
4. *Id.* For a rebuttal presenting an empirical analysis of the economic value of the J.D. degree, see Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 *J. LEGAL STUD.* 249 (2014).

belief it is impossible to ignore fiscal realities, but with an abiding appreciation of academic traditions.

In my talk, I made three basic points. These are descriptive claims that should prompt normative conversations.

First, institutions of higher education are selling something. Teachers might prefer that students not characterize themselves as consumers for the sake of their own development as critical thinkers. Higher education is neither a product nor a service. Education demands engagement.

Yet the assertion cannot well be disputed—higher education carries a price tag. With the unusual exceptions of full-scholarship schools (for example, undergraduate programs at Berea and Deep Springs), individuals who matriculate pay for that privilege.⁵ They typically resort to debt financing.⁶

Second, like any other economic entity, a law school has revenues and expenditures. At the end of the day, the budget must be balanced. A law school cannot run a deficit repeatedly. As with any venture, insolvency is not an ideal outcome. The American Bar Association, as an accrediting authority, considers the sustainability of a law school in its approval process.⁷

The revenue is generated primarily from students. For the bulk of schools that are “tuition-dependent” in the term of art, that sum is the enrollment multiplied by the published tuition that is to be charged, adjusted by the “discount rate.” Income may also come from an endowment, annual giving, a state subsidy, and perhaps auxiliary enterprises. Most law schools are “embedded” within a structure greater than themselves, and they also may receive a subvention from a central administration while benefiting from economies of scale.

In contrast, fewer than one in ten schools are “stand-alone” institutions. Such schools show more clearly the workings of legal education, because by definition they are dedicated exclusively to the field and lack the support of a surrounding campus. Credit reporting agencies, which are about as objective as could be found an appraiser of the ongoing viability of a business, rate

5. See *Ten Best Colleges with Free Tuition in 2016*, THE BEST COLLEGES, <http://www.thebestcolleges.org/10-best-colleges-with-free-tuition/> (last visited July 11, 2016). Other tuition-free/full-scholarship schools, facing fiscal challenges, have changed their policies, such as The Cooper Union. See *Tuition & Student Fees*, THE COOPER UNION, <http://cooper.edu/about/finance-and-administration/financial-faq/tuition-student-fees> (last visited July 24, 2016).
6. The Law School Transparency Project has sought to present these data. *Debt-Financed Cost of Attendance*, LAW SCH. TRANSPARENCY, <http://www.lawschooltransparency.com/reform/projects/Non-Discounted-Cost/> (last visited July 11, 2016).
7. See *Standard 201*, AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 99 (2015-2016), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_aba_standards_for_approval_of_law_schools_final.authcheckdam.pdf.

the independent law schools that issue debt. Moody's has systematically downgraded these schools as businesses.⁸

Third, law school spending is primarily on payroll. Among the people employed at the school, faculty members receive greater compensation than staff members, on average.⁹

At virtually every law school, especially those that are AALS members, the production of original scholarship is expected of professors—indeed, AALS makes such activity a criterion for membership in its learned society.¹⁰ Unlike the standard practice in STEM (science, technology, engineering, and math) disciplines, however, few law professors receive external funding, meaning from sources outside the school itself, such as the National Science Foundation, the National Institutes of Health, or charitable foundations, for their pursuits. (In many fields, stature and even job security depend on such money.)

The logical conclusion from these premises is that students at most schools remit tuition in part to support faculty performing research. The only exceptions are extraordinary law schools that control their own sizable endowments and can use the annual income from the corpus to support faculty research and scholarship.

Since all but the most elite schools devote tuition revenues substantially to faculty salaries, the teaching and the research functions essentially are bundled

8. The Moody's report is proprietary and available only by subscription. An example of analysis of its conclusions is Dan Filler, *Analyzing Moody's New Report on Law Schools* (May 8, 2014), <http://www.thefacultylounge.org/2014/05/analyzing-moodys-new-report-on-law-schools.html>.

9. The Society of Law Teachers collects such data, since the ABA was precluded from doing so by an antitrust settlement (observed beyond its time limit). See *2014-2015 SALT Salary Survey*, 2015 SALT EQUALIZER 1, <https://www.saltlaw.org/wp-content/uploads/2015/10/SALT-salary-survey-2015-REVISED-final.pdf>. Cf. *Professionals in Higher Education Salary Survey*, COLL. & UNIV. PROF'L ASS'N FOR HUMAN RES., <http://www.cupahr.org/surveys/phe.aspx> (last visited July 24, 2016) (comparable survey of higher education professionals who are not faculty members).

A significant issue, beyond the scope of this article, is that of administrative costs—including those of executives. At most institutions, cuts over the past few years have affected staff more than faculty. At UC Hastings, for example, even as I eliminated thirty-two of 200 staff positions in the first-ever comprehensive layoff, we protected all faculty from the process and even continued to hire tenure-track professors. Many of the new requirements imposed on institutions have necessitated additional personnel. Sexual assault prevention and remediation, a laudable cause, has been mandated, and that means specialists with expertise must be hired. See Anemona Hartocollis, *Colleges Spending Millions to Deal With Sexual Misconduct Complaints*, N.Y. TIMES (March 29, 2016), http://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html?_r=0. As for compensation of the most senior leaders, I agree it has become excessive, but I also know better than to brag about one's own virtues. I will note only that I returned well into the six figures from my own salary to a scholarship fund for students oriented toward public interest, refused raises, and otherwise held down perquisites.

10. ASS'N OF AM. LAW SCHS., *Bylaws of the Association of American Law Schools*, in 2016 HANDBOOK § 6-1(b)(2) ("The Association values and expects its member schools to value . . . scholarship, academic freedom, and diversity of viewpoints.").

together as a package; it is impossible at the better law schools to purchase the former without contributing to the latter. Students who wish to be trained to join a profession are required to underwrite professors' own intellectual interests. There is no option to disaggregate teaching and research, at either the institutional level or the individual level.¹¹

It could be argued that students receive an incidental benefit, because professors who are especially productive improve the scholarly reputation of the school, and that reputation, in turn, boosts rankings.¹² In an instrumental albeit indirect manner, students spend for reputation and rank, enhancing their own employment prospects.¹³

Therefore, we should perform a cost-benefit analysis for the sake of our students. Discussions about legal scholarship tend to be caricatured or hyperbolic. They proceed from either the proposition that said scholarship is invaluable and cannot be reduced to crass measurements applied in other contexts, or from the proposition that virtually all of law faculties' published output is manifestly useless and mere self-aggrandizement.

More accuracy and nuance are imperative. Assuming that legal scholarship has some intrinsic value,¹⁴ the issues are whether that benefit is commensurate with the cost, and, as important, by whom it should be borne.

11. There is no law school analogue to the selective liberal arts college. Liberal arts colleges belong to a separate Carnegie classification from research universities, and they are ranked in a separate list by *U.S. News & World Report* (which adopts the Carnegie system). The elite liberal arts colleges have faculty who perform research—and they would claim, and I would not dispute—of the same quality, albeit lesser quantity, than their counterparts at a research-intensive institution. Williams can be number one, despite Harvard.

Because law schools are ranked on a unitary scale, there is no such thing as a law school that is the equivalent of the selective liberal arts college. It likely could not develop without a separate Carnegie classification and separate list in *U.S. News*.

For more background on the Carnegie system, see *Definitions*, CARNEGIE CLASSIFICATION OF INST. OF HIGHER EDUC., <http://carnegieclassifications.iu.edu/definitions.php> (last visited July 24, 2016).

12. See Theodore Eisenberg, *Assessing the SSRN-Based Law School Rankings*, 81 IND. L. REV. 285 (2006); Theodore Eisenberg & Martin Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. LEGAL STUD. 373 (1998).
13. See AMERICAN BAR ASSOCIATION, *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 42-44 (2004) (showing importance of law school selectivity on initial salaries following graduation).
14. Lest a reader come to an erroneous conclusion about my opinion, I note that I have written extensively in blogs about the value of rule of law and, specifically, the role of legal scholarship, using examples such as product safety in China as compared with the United States, the public policy issues presented by autonomous vehicles, and the contributions scholars can make on a decision such as secession of a state. See Frank H. Wu, *How the Rule of Law Helps Us Buy Flax Seed Oil*, LINKEDIN (Feb. 14, 2014), <https://www.linkedin.com/pulse/20140214170447-13561052-how-the-rule-of-law-helps-us-buy-flax-seed-oil?trk=mp-reader-card>; Frank H. Wu, *The Future of Scotland and the Role of Scholars*, LINKEDIN (Sept. 12, 2014), <https://www.linkedin.com/pulse/20140912205642-13561052-the-future-of-scotland-and-the-role-of-scholars?trk=mp-reader-card>; Frank H. Wu, *How Autonomous Vehicles Will Come to the Road: Rule of Law*, HUFFINGTON POST (Dec. 17, 2015), <http://www.huffingtonpost.com/>

I happen to be skeptical about the sustainability of the current “business model.” I doubt the capacity of institutions, other than those with the greatest resources, to compete indefinitely with one another to simultaneously enroll sufficient numbers of students to make their budgets, as well as to defeat rivals in the rankings. Specifically, I am concerned about whether they can perform both of those tasks under the constraints of the supply of seats exceeding the demand and under the current regime of rankings methodology, distinct from the discussion of whether they ought to do so. My contention is that they cannot do both simultaneously, whether or not that is some sort of ideal.

One or the other is feasible. But choices must be made between, on the one hand, enrollment and hence revenue, and, on the other hand, selective metrics. Those choices give rise to (or should set in motion) discussions about competing objectives.

Here is the most concrete example of how the decision plays out.¹⁵ In the summer, law schools turn to their wait lists for “enrollment management” purposes. They increasingly game the wait lists, as applicants do; they keep a significant reserve of potential first-year students on the wait lists, because outright acceptance will affect their admissions rate (and rankings), while outright rejection risks ending up with far too few incoming students. As they lose students who have paid deposits, because of better offers (including the decision not to attend any law school at all), they can admit replacements. The wait list consists primarily of students with one or another credential (LSAT or UGPA) lower than what the law school would prefer (probably its median for that indicator).¹⁶ The trade-off is presented. Admitting that next student means more tuition revenue and a slight slide toward the “tipping point” of the LSAT or UGPA falling a point or tenth of a point, respectively; rejecting the student means less tuition revenue and preserving the qualification.

The complication is that the dilemma is faced by more than a single school. It is faced by almost all of them.

frank-h-wu/how-autonomous-vehicles-w_b_8831644.html.

The Scotland piece alludes to BRAD R. ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT: PREMISES OF A PLURALIST INTERNATIONAL LEGAL ORDER (2011); JOEL SAMUELS ET AL., TRANSNATIONAL LAW: AN INTEGRATED APPROACH TO THE WORLD LEGAL ORDER (2013); Brad R. Roth, *Secessions, Coups, and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELBOURNE J. INT’L L. 393 (2010); Brad R. Roth, *The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention*, 16 GERMAN L.J. 384 (2015) (Special Issue on the Crisis in Ukraine); Joel Samuels, *Condominium Arrangements in International Practice: Reviving an Abandoned Concept of International Boundary Dispute Resolution*, 29 MICH. J. INT’L L. 727 (2008).

15. For a description of the decision by one school, see Elizabeth Olson, *Minnesota Law School, Facing Waning Interest, Cuts Admissions*, N.Y. TIMES (May 13, 2016), <http://www.nytimes.com/2016/05/13/business/dealbook/minnesota-law-school-facing-waning-interest-cuts-admissions.html>.
16. See Natalie Kitroeff, *The Smartest People Are Opting Out of Law School*, BLOOMBERG (April 15, 2015), <http://www.bloomberg.com/news/articles/2015-04-15/the-smartest-people-are-opting-out-of-law-school>; and Jordan Weissmann, *Desperate Law Schools Are Admitting Way Too Many Poorly Qualified Students*, SLATE (Oct. 29, 2015), http://www.slate.com/blogs/moneybox/2015/10/29/law_schools_are_admitting_too_many_poorly_qualified_students.html.

The dean of each might be tempted, as in other prisoners' dilemma situations, to seek advantage for her school. A single actor could behave in a manner that is rational in isolation, but irrational in the aggregate.

The thinking is that if one could hold on just long enough, perhaps with predatory pricing, others will be driven out of the market or significantly weakened. Deans can try to use selective tuition discounting to buy highly credentialed students away from schools ranked higher, or even some tuition discounting to buy lesser-credentialed students away from schools ranked lower (so long as the latter group doesn't adversely affect rankings). Or they can gamble that the trends are temporary, not a permanent "new normal," such that they can ask for a loan from the central administration or tap into reserves, to wait it out.

The alternative is to make decisions, very unpopular decisions. An overly simplified but useful means to consider the choices tracks the revenue and expenditure sides of the ledger. A school could maintain its revenue by admitting students who likely will cause its rankings to fall. For many schools a bit of room remains—such students would not be, strictly speaking, "unqualified," only less qualified than the school has been accustomed to. Or a school could allow its revenue to decrease, bringing expenditures in line. Since expenditures are human resources, that entails eliminating jobs, increasing efficiencies, or both (and the overall cost of instruction is increased by the amount that goes to noninstructional activities). Faculty, for instance, could take on greater teaching loads, presumably to the detriment of scholarly productivity.

Finally, were the law school applicant pool to burgeon once again to record levels, the problem would be less obvious and urgent. It would cease to be a problem for the law schools (and administrators and professors). But it would remain a problem for the law students who are charged the tuition and have reasonable expectations that the degree will be worth it.

Nothing in this situation is novel. It is the application of economic principles accepted in everything from the manufacturing of consumer goods to the rendering of professional services.¹⁷

Before the legal academy can address any of these problems, people—specifically professors—must be persuaded that there is a problem, or set of problems. If the belief persists that all that is needed is for a single individual to emerge, with a different strategy or the charisma to attract philanthropic largesse, then as a corollary the nature of the difficulty, collective and structural, will be denied.

That will lead to disaster.

17. With respect to the legal profession, see RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2010).