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Financial Retrenchment and Institutional Entrenchment: Will Legal Education Respond, Explode, or Just Wait It Out?

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Financial Retrenchment and Institutional
Entrenchment: Will Legal Education Respond,
Explode, or Just Wait it Out?
A Clinician's View

Ian Weinstein*

I. INTRODUCTION

Both markets and ideas have turned against the American legal profession. Legal hiring has contracted,¹ and law school enrollments are decreasing.² The business models of big law and legal education are under pressure, current levels of student indebtedness seem unsustainable, and a hero has yet to emerge from our fragmented regulatory structures.³ In the realm of ideas, the information revolution has sparked deep critiques of structured knowledge and expertise, opening the roles of the law and the university in society to reexamination. We are less enamored of the scholar-lawyer and gaze with longing at technocrats.

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1. Press Release, Nat'l Ass'n of Law Placement, Law School Grads Face Worst Job Market Yet—Less Than Half Find Jobs in Private Practice (June 7, 2012), available at <http://www.nalp.org/uploads/PressReleases/Classof2011ERSSSelectedFindingsPressRelease.pdf>; Press Release, Nat'l Ass'n of Law Placement, Median Private Practice Starting Salaries for the Class of 2011 Plunge as Private Practice Jobs Continue to Erode (July 12, 2012), available at http://www.nalp.org/uploads/PressReleases/Classof2011Salary_PressRel.pdf.

2. Debra Cassens Weiss, *Law Schools Could Be Admitting 80 Percent of Their Applicants This Fall, Statistics Suggest*, A.B.A. J. (Aug. 9, 2012, 6:45 AM), http://www.abajournal.com/news/article/law_schools_could_be_admitting_80_percent_of_their_applicants_this_fall_sta/; Paul L. Caron, *Carnage in 1L Enrollments*, TAX PROF BLOG (Sept. 22, 2012), http://taxprof.typepad.com/taxprof_blog/2012/09/carnage-.html.

3. See generally BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).

Thank you for this chance to speak about the role of clinical faculty in the new legal environment, which I take to be the world we will make, together, as we respond to market forces and new ideas. While my comments will necessarily advert to larger institutions and themes, my perspective is from one part (clinical faculty) of one sector (legal education) of what is, for most of us, our favorite complex social structure (law).

I hope that clinical law faculty can lead and ease the transition to programs of legal education responsive to the new legal environment. Clinicians have supervised in a lot of different settings, and we know what works and how to return real value to law students. A well-structured clinical program integrates simulation, field placement, and in-house clinics to offer effective programs with reasonable efficiency. Clinicians have been experimenting with legal education for years and can help legal education meet the challenges of the new legal environment.

I fear, however, that in a time of shrinking resources, some faculties and schools may become bogged down in contentious and ultimately counterproductive battles over how to allocate shrinking resources. In this version of the new legal environment, the status distinctions among law faculty could have real bite. Programs responsive to the expressed current needs of the bar and students could be sacrificed to programs controlled by better-entrenched faculty.

II. THE NEW LEGAL ENVIRONMENT

I see the new legal environment in comparison to its predecessor, the old legal environment, into which most of us were socialized as young professionals. The old order flourished between the end of World War II and the information revolution that began in the mid-1980s, if you were paying attention. It exploded into all our lives by the mid-1990s, during the Clinton Presidency.

From 1950 to a bit past the turn of the century, the law and the legal profession prospered (with some ups and downs) at a happy conjunction of politics, markets, and social organization. Postwar, pre-Microsoft America looked to the law to solve its hardest problems and manage its most significant resources. Many very

talented young people went to law school and framed their work-lives through law. The world economy was dominated by large American companies in which American law and American lawyers played key roles. Law firms grew into very large businesses, generating tremendous wealth and reaffirming the social status of lawyers in the years between World War II and the information revolution.

But then, as global markets opened and information became freer, the private sphere flattened and internationalized. Big business has become less distinctively American, and it manages people and goods with much greater efficiency. These changes take power from American law and lawyers. More economic activity is regulated by other legal systems, and improved business practices require fewer workers. Tasks that could only be accomplished by squads of American lawyers at the turn of the twentieth century can now be done by others or are no longer needed. Who knew that the days when big law firms would send a dozen associates to live in Wichita and spend twelve or eighteen weeks combing through physical documents in a warehouse were the halcyon days to which we would look back with nostalgia?

This story also includes the decline in demand for the commodity legal services and other changes that have reduced both the need and cost of legal services for large private consumers. That work was lucrative and helped support growth in our profession. We must also attend to the rise of powerful competing ideas and forms of social organization. If the period before the web favored mediating organizations to help us to manage information and structure group action, the web has favored flatter organizations and much less mediation between individuals and the larger collective. Who needs lawyers, law firms, or perhaps law to organize us when we can collect in an infinite number of shifting groups to accomplish whatever we aim for in the moment?

As these large themes play out in society, many lawyers and law students live the consequences of the financial pressures buffeting the profession. Employers drive ever harder bargains with new hires. Empowered by the current oversupply of labor, they seek more productivity for lower wages. Unemployment remains low among

lawyers relative to many other groups, but it is higher than it was.⁴ Starting wages are flagging, and most law graduates carry very significant debt. There is much more focus on job placement and law schools' responsibilities for graduates' job prospects than there was five years ago.

These trends ripple through legal education as applications decline,⁵ and those who do enroll seek more marketable (monetizable) skills. The tight labor market has also reinvigorated the long voiced criticism by the bar and others that law schools offer an overly theoretical education that does not make students *practice ready*.⁶ Observers from outside legal education have long advocated for clinical and experiential education,⁷ noting the contribution it makes to preparing young lawyers to practice,⁸ and perhaps hoping to find more capable, profitable young associates. At the same time, the high cost of legal education leads some to praise clinical legal education when they speak of academic needs and demonize the area when they talk about costs.

4. See *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS (Feb. 1, 2013), <http://www.bls.gov/web/empsit/cpseea30.htm>. The Bureau of Labor Statistics (BLS) reports the January 2013 unemployment rate for lawyers at 3.0 percent, well below the national average. *Id.* Of course unemployment statistics are quite complex in general and have their own wrinkles for lawyers, as this blog post illustrates, *Does Anyone Know if Law School Is Worth It?*, CONSTITUTIONAL DAILY (Apr. 24, 2012, 8:09 AM), http://www.constitutionaldaily.com/index.php?option=com_content&view=article&id=1633:do. It is also worth noting that the BLS predicts growth in the legal sector over the next ten years, although the predicted rate of growth is lower than it was over the prior ten-year period. See *Occupational Outlook Handbook, 2012–2013 Edition, Lawyers*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/ooh/legal/lawyers.htm> (last visited Feb. 22, 2013).

5. For a front page example of these much cited statistics, see Jonathan D. Glater, *In Lean Times for Law Schools, an Opportunity*, N.Y. TIMES DEALBOOK (Dec. 5, 2012, 1:06 PM), <http://dealbook.nytimes.com/2012/12/05/in-lean-times-for-law-schools-an-opportunity/>.

6. N.Y. State Bar Ass'n, *Report of the Task Force on the Future of the Legal Profession* (Apr. 2, 2011), http://www.nysba.org/AM/Template.cfm?Section=Task_Force_on_the_Future_of_the_Legal_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentID=48108.

7. See generally A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM* (1992); WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 129 (2007).

8. Bar examiners are another important stakeholder in legal education and licensure. From a clinical perspective, I wonder if unlike the practicing bar, some bar examiners are not much interested in clinical and experiential education, because it is not easily subjected to valid and reliable testing, at least as compared to the often tested cognitive skills of comprehension and analysis.

In the story I am telling about the current state of law and legal education in America, neither the law nor lawyers are as central to our culture and society in the post-information revolution world as in the prior period. Today, our great figures are technologists who think in ones and zeros, not lawyer-statespeople whose mode is metaphor. More practically, new ways of sorting and organizing both information and knowledge have taken power from those whose command of old methods is no longer valuable; markets have shifted; and other nations have become more vigorous. We, American lawyers, feel pressure to work both harder and smarter, but we are uncertain about just how to do that.

But even anxieties based upon evidence may be interrogated with hope. The current mode of discourse on law schools tends toward the apocalyptic. Law schools are failing, bubbles are about to burst, and most law professors are lazy and corrupt, or at best, utterly clueless, we are told. We are hurtling to the precipice, heedless of the danger.

Events could make me very sorry to have typed these words, but I see a bit of millenarianism in current thought on legal education. While we face real pressures, legal education is also part of one of the most deeply entrenched structures of authority in society. Our profession controls many levers of both public and private authority. Lawyers are a very powerful group, and we, as law faculty, play a special role in the licensure process through control of the limited set of credential-granting schools. The value of our monopoly may be waning, but it remains an extraordinarily valuable franchise. Are we the fools unlucky enough to squander away all the accreted power and wealth that was bequeathed us?

Beyond our strong ties to formal structures of authority, we have powerful ideas and methods. Writing as I am for an audience of American legal academics and regulators, I won't belabor this point. One need not be a chauvinist to recognize the significance of the Anglo-American conception of law and legal process.⁹

9. While this may be more contested than I want to recognize, American legal education remains very highly regarded among the world's programs of professional education. As we sort out our current problems, however, we should also note recent tumult in legal education in China and Japan. As our student bodies have become more international, we are less insulated from changes in other parts of the world.

At the risk of being Pollyanna, or worse yet indulging my false consciousness to salve my pangs of conscience, I want to resist some of the language of self-dealing, corruption, and failure in both the material and moral realms. First, my own lived experience in legal education does not begin to comport with the tone of much of the current conversation, particularly in new media.

Second, too often, both law students and law faculty are reduced to purely money-driven actors. Money is quite important to most of us, I grant. But we may also care about ideas, status, and our place with our family and friends. It may be that faculty and administrators who have led us to this world of very expensive and very strong programs of legal education have gained some advantage while protecting and advancing important ideas, achieving worthwhile goals, and nurturing significant, worthwhile communities. Mixed motives and complex causal chains make for better novels than blog posts.

III. MATERIAL CHALLENGE AND THE PACE OF CHANGE

A. Law Schools and Our Students

The most pressing challenges many law schools face are to the current material arrangements supporting schools and their faculty. Fewer students are enrolling,¹⁰ and too many of them are likely to face future financial hardship on account of the loans they have taken out to pay our fees. In the longer term, the profession must respond to the larger challenges to our role in society.

What is the likely pace of change? If student enrollment levels off or strengthens even marginally, the pace of change in legal education and professional licensing of lawyers will likely remain slow. The slow or delayed change scenario seems most plausible if legal hiring were to improve or even if it were to stabilize at around current levels. In that scenario, legal education could continue its pace of glacial change, the natural tempo of reform among risk-adverse, well-

10. See Karen Sloan, *Law School Enrollment Continues its Decline*, NAT'L L.J. (Nov. 28, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202579603745&Law_school_enrollment_continues_its_decline.

entrenched academicians. This possibility is uninteresting and swims against the theme of our discussion, but one should never underestimate the power of entrenched institutions to resist change.

If student enrollment continues to weaken over the next three years, segmentation of legal education, which is already quite profound, will only increase. The small group of super elite schools will change little and continue to support the super elite bar. Most other schools will experience real financial pressure. While it is unlikely that more than a handful of accredited law schools are in danger of being unable to sustain their programs in the near term, knowledgeable observers note some schools have already slowed or stopped hiring new faculty,¹¹ and the environment does not favor the development of new programs at most schools. Budgets are tight and will get tighter, prompting faculty contests over resources and increasing pressure to change.

Looking out five years, were enrollments to continue to shrink or to stabilize at a level significantly below the high of 2009, some of the decrease would be absorbed by reduced student bodies across most law schools, and a few law schools could cease operating, but it is hard to know which schools are vulnerable. It would be Panglossian to suggest that the market will punish those schools offering the weakest programs or giving students the least value for their investment of time and money. The market will punish schools lacking significant financial reserves or university support. Winning schools will be those left standing once enrollments stabilize, and the sorting will be by financial strength, not quality of instruction or preparation for the profession. You don't have to outrun the bear; you only have to outrun your companion.

Another scenario worth noting analogizes law schools to tulips and looks to the bursting of a bubble in the educational credit market.¹² The rise of student debt generally and law student debt in

11. See Brian Leiter, *The Academic Job Market in Law: Looking Forward*, BRIAN LEITER'S LAW SCHOOL REPORTS (Nov. 29, 2012, 4:28 AM), <http://leiterlawschool.typepad.com/leiter/2012/11/the-academic-job-market-in-law-looking-forward.html>.

12. The reality and rhetoric of economic bubbles is a bit complex for the non-specialist to sort. See CHARLES MACKAY, *EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS* (1841); see also PETER M. GARBER, *FAMOUS FIRST BUBBLES: THE FUNDAMENTALS OF EARLY MANIAS* (2001) (providing a more careful contemporary treatment).

particular has been much commented on.¹³ As a general economic matter, there are conditions under which rising debt is quite sustainable; mild inflation can ease the impact of high levels of debt on debtors as they repay loans with inflated salaries, although inflation can obviously be quite corrosive over time.¹⁴ But it is also possible that the current financing model of legal education could collapse with a sudden significant constriction in loan funds. The tech, municipal bond, and housing crises have sensitized many of us to the consequences of our taste for low-regulation, high-risk markets.

If law student loan debt plays out as a bubble, the degree of dislocation that occurs is really a political question. Under the current administration, some kind of bailout seems quite probable. A recalibration of the financing model seems more likely than the sudden shuttering of many law schools across America, but accurate predictions about a purported bubble seem more luck than insight.

So I imagine that in the next two to five years, most law schools will continue to contend with declining tuition revenues and increased demand for price discounting in the form of financial aid. A few will enjoy increased university support or access to other resources. Most will cut programs and personnel, and we will all look for new and better ways to accomplish our missions.

As law school resources decline, more is demanded of our graduates. Employers of all types insist that they cannot continue to offer training to their new lawyers and need young associates who are ready to practice law. I have been told by many law firm partners that clients will not pay for first- or second-year associates' time because they add no value from the client's perspective.¹⁵ Unfortunately, the

13. *See generally* TAMANAHA, *supra* note 3.

14. I note this not only because it is generally true that debtors favor inflation but also because many senior law faculty have seen a dramatic rise in their wages over their careers, making debt that seemed quite large in the early 1980s quite manageable.

15. I have less often suggested to those partners that I hear them talking about whether clients are willing to pay a bill that breaks out first-year associate time. I wonder about the distribution of whatever fees a client will pay among the lawyers employed by a given firm. Partners could devote more firm resources to supporting young lawyers. They could view it as a cost of doing business. But the pressure to shift cost to associates and law schools is one of the hydraulic forces in this equation. It has long been the motivating force behind the otherwise inexplicable practice of basing hiring decisions on first-year grades rather than the more

very particular demands of the many different settings in which our graduates may work do not mesh well with law school's traditional strength, offering a strong general legal education. Although most students do not know what specific type of practice they will enter until shortly before they graduate, the profession demands that we offer niche training while evaluating our students only on their performance in the first third of our programs.

Furthermore, we are not only preparing students for particular specialized practice areas and roles. Some also need an education that will prepare them to use their law degrees in business and to prosper as professional roles continue to grow more integrated, dynamic, and demanding. Law graduates should be able to crunch (or at least understand) numbers, work well in inter-professional collaborations, function in diverse settings with cultural competence, and also be masters of legal doctrine and procedure. They must be competitive in a marketplace that is less interested in investing in a person with legal credentials for the long term and more interested in whether or not a candidate can add value to a team working on a current problem.

Many law schools offer a more diverse and sophisticated program of legal education today than they did twenty years ago. That is great. The new legal environment challenges us to take yet another leap forward and offer our students an education responsive to new conditions under greater financial constraints. If lawyers previously succeeded by being risk averse and steady, the new environment seems to demand greater efficiency, flexibility, much more creativity, and the ability to work in teams with and perhaps under the direction of non-lawyers.

B. Other Actors in Legal Education and Licensure

Of course law schools are not the only actors affecting this marketplace. If financial pressures on law firms continue, we can also imagine realignment of the complex set of institutions that regulate the legal profession. This could pave the way to more significant structural reform in legal education. Plausible arguments are made for

complete picture one could get by making hiring decisions based on four or even five semesters of law school performance.

reducing law schools to two-year programs, switching to an undergraduate model coupled with articling, or some other professional training, and other radical changes to the system.¹⁶ But significant reform requires coordinated, or at least complementary, change by the Council on Legal Education, states in their capacity as gatekeepers to the bar, and courts, agencies, and other bodies in their own regulation of the advocates who may appear before them.¹⁷

California, New York, or another major jurisdiction could force change by permitting graduates of two-year programs to take the state's bar exam or otherwise significantly altering the credentials required to apply for membership in the bar.¹⁸ But neither those two

16. Elie Mystal, *Will American Law Schools Adapt to the Changing Legal Market? Ever? Do They Even Care?*, ABOVE THE LAW (July 16, 2012, 2:14 PM), <http://abovethelaw.com/2012/07/will-american-law-schools-adapt-to-the-changing-legal-market-ever-do-they-even-care/> (describing a panel at the International Legal Ethics Panel where proposals including making law school an undergraduate degree or a two-year professional degree were discussed); *see also* Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. TIMES, Feb. 11, 2013, at A11, *available at* http://www.nytimes.com/2013/02/11/us/lawyers-call-for-drastic-change-in-educating-new-lawyers.html?_r=0 (calling for "drastic changes" in legal education).

17. The regulatory structure governing legal education and admission to the bar is complex and fragmented, as is typical of deeply embedded American social structures. The Council on Legal Education of the Section on Legal Education and Admission to the Bar of the American Bar Association is recognized by the Department of Education, pursuant to 34 C.F.R. § 602, as the only lawful national accrediting agency for schools awarding the Juris Doctor degree. The law requires that the Council exercise its authority as a separate and independent body from the ABA. Most states only permit graduates of ABA-accredited law schools to sit for the bar exam. *See* N.Y. STATE BD. OF LAW EXAM'RS, COURT RULES FOR ADMISSION OF ATT'YS AND COUNSELORS AT LAW, Rule 520.3 (2012), *available at* <http://www.nybarexam.org/Rules/Rules.htm> [hereinafter N.Y. STATE BD. OF LAW EXAM'RS]. Few states, notably California, permit graduates of state-accredited law schools to also seek admission to the bar.

Of course that is just the accreditation piece of the puzzle. Each state controls its own bar exam and bar admission process, although there is coordination through the Multistate Bar Exam (MBE), the Professional Responsibility Exam, and the limited use of the Uniform Bar Exam (UBE).

And while admission to a state bar is the key to access most of our monopolistic privileges, lawyers must again seek admission, largely pro forma, before appearing in most federal courts and before a host of specialized administrative and other tribunals. Patent law is the best example.

If one threads the needle of school accreditation, state bar admission, and admission by particular tribunals, one can contemplate the uncertain contours of unauthorized practice of law, fee-splitting and other markers of our professional boundaries. Years of running a law firm in a university have sensitized me to the very complex regulatory landscape with which legal education must contend.

18. Dan Filler has also noted the potential for state regulators to have significant impact. *See* Dan Filler, *Don't Like ABA Law School Standards? New New York Regs Hint at the Future*,

states nor any other major jurisdiction is currently publicly considering major reforms.¹⁹ My point is not that change is impossible but that even if economic turmoil continues to spur interest in reform, significant change in the regulatory environment will take time to develop. Recent efforts to modify ABA standards have continued for five years and are projected to require two years or more to complete.²⁰ The multiple actors who regulate the legal profession and access to justice in America each have their own agendas, and it will take time to alter the course of this complex of institutions.

If the stars aligned, one might imagine that changing licensing requirements could herald the emergence of a more varied legal profession with different kinds of schools and programs coexisting. In the end, changes in licensure do not seem to me to address the real problems, but the idea merits some consideration. In this version of the future, lawyers graduating from a smaller number of three-year post-graduate law programs would provide the most complex legal

THE FACULTY LOUNGE (Oct. 10, 2010, 6:28 AM), <http://www.thefacultyounge.org/2012/10/the-perils-of-marginalizing-the-aba-new-york-bar-snubs-online-legal-education.html>.

19. Two of the largest jurisdictions have been attending to legal education, but the scope of their efforts to date do not suggest urgency. New York recently adopted some rule changes supportive of clinical legal education as well as a requirement that applicants to the bar engage in fifty hours of pro bono service before admission. N.Y. STATE BD. OF LAW EXAM'RS, *supra* note 17 (raising the cap on clinical credits and broadening the definition of experiential work counted toward the minimum in class hours); N.Y. STATE BD. OF LAW EXAM'RS, COURT RULES FOR ADMISSION OF ATT'YS AND COUNSELORS AT LAW, Rule 510.16 (2012), *available at* http://www.nycourts.gov/attorneys/probono/Rule520_16.pdf (requiring all applicants to the New York Bar as of January 1, 2015 to certify that they have completed fifty hours of pro bono service); *see* ADVISORY COMM. ON N.Y. STATE PRO BONO BAR ADMISSION REQUIREMENTS, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK AND THE PRESIDING JUSTICES OF THE FOUR APPELLATE DIVISION DEPARTMENTS (2012), *available at* <http://www.nycourts.gov/attorneys/probono/ProBonoBarAdmissionReport.pdf>. The California State Bar Task Force on Admissions Regulation Reform is currently considering a practical skills training requirement and is scheduled to issue a report in January 2013. Karen Sloan, *State Bar Wants to Call the Tune*, NAT'L L.J. (Apr. 30, 2012), http://www.lexis.com/research/retrieve?_m=f76094ceffe02a8904a13f25caf3ccda&csvc=bl&cform=searchForm&fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzB-zSkAb&_md5=dd3ff73ca7bd2d31d45d3420defe8dfd.

Significant as these developments are, neither state has or would alter the basic structure of licensure, and there is no significant public discussion among state court chief judges of relaxing our monopoly.

20. The current comprehensive review began in 2008. *See Standards Review Committee*, ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, http://www.americanbar.org/groups/legal_education/committees/standards_review.html (last visited Feb. 22, 2013).

services. Graduates of other less intensive programs would be licensed to provide limited legal services to individuals or work with others to service more complex clients or matters.

In the best case, this could help us respond to the huge unmet demand for legal services among middle and underclass people. There is a huge gap in access to justice in America between the rich and everyone else. Our courts are full of unrepresented people in high-stakes litigation, particularly in family law, as well as in the myriad administrative proceedings through which the state regulates its social services. Our current model does not provide enough legal professionals to serve all those clients, and it strongly motivates the lawyers we have to seek other kinds of careers.²¹

We can imagine how permitting people with less rigorous, and presumably less expensive, training to serve certain parts of the market could expand access to justice for middle class and underclass Americans. It could be useful to give legal service providers more efficient tools. But that idea also threatens a future in which people with lesser means are served by lesser-qualified, less well-trained legal service providers who would likely wield less authority on their behalf. The current bar would be surrendering and admitting that we, lawyers with JD degrees and bar membership, have no special relationship to justice and have become business people.

More practically, this path of reform, like some other suggestions in the debate on legal education, gives far too much weight to the role of regulation as the constraint on our ability to solve our problems creatively. If we had the will to close the access to justice gap, we would fund legal services and legal aid organizations as well as better supporting our public law schools. Our problem is not that we are somehow prevented from providing great low cost legal services by self-interested law professors. Rather, many have political objections to providing legal services to the poor, whether in opposition to redistribution of resources or efforts to redistribute power. That is the normative debate that animates the distribution of public legal

21. See generally *Task Force to Expand Access to Civil Legal Services in New York*, N.Y. STATE UNIFIED COURT SYSTEM (Oct. 17, 2012), <http://www.nycourts.gov/ip/access-civil-legal-services/>.

services. Focus on the regulatory structure as a primary driver seems misplaced.

Still, the idea of expanding the role of other kinds of legal professionals, beyond lawyers, is not without attractions. While it may not go to the root causes, it could help address the need for assistance in real estate closings, simple family law matters, consumer disputes, and the host of smaller legal problems with which many people have to deal from time to time. But the barriers are much more in our political disagreements over the place of poor people in our society and, in the case of legal service for the middle class, the continued lack of a working business model for providing adequate services at the right price. Licensure requirements are a small part of the puzzle. Change in the licensure system risks significant unintended consequences and will be slow to come unless some major jurisdiction believes it gains advantage by being the dislocating first mover, a role rarely taken by state supreme courts and bar examiners.

IV. THE ROLE OF CLINICAL FACULTY IN THAT NEW LEGAL ENVIRONMENT

I have tried to sketch out some of the longer-term influences and some of the more immediate trends that are flowing together to create the new legal environment. However we understand the causes, our current experience is one of challenge. What is the role of clinical faculty as law schools respond to falling enrollments, increasing criticism from the bar and others about the value our education adds to our students as employees, and the potential for sudden dislocating change should the current financing model turn out to be a bubble?

Sometimes I believe that non-clinical colleagues think my role should be to retreat back to the basement where clinicians belong. Once I get downstairs, I should abandon all low-ratio teaching because it is just too expensive and make my experiential program an adjunct of the career services office. It is efficient and effective, in this view, to let students work with practicing lawyers who will give them jobs. Academics, they might suggest, can remain in the traditional classroom.

I grant that we could offer cheaper legal education by turning the clock back twenty or thirty years. Many more experienced lawyers have firsthand experience with the very efficient world of legal education offered almost exclusively in large classes. Another possibility is to deliver virtual instruction to large groups who need not invest time and money in travel and other incidents of in-person interaction. We know how to offer less costly education that is woefully inadequate. Can we do better, and what role should clinicians play in meeting that challenge?

A. Goals

One of the most cherished tropes of clinical legal education is to begin analysis of a question with an inquiry about goals. Certainly, my view of the role of clinical faculty is informed by my understanding of the goals of professional education. While law schools must either attract students or disappear, merely enrolling students and figuring out how to make an economic go of some form of legal training is a pretty thin mission. Legal education should be understood to have several overlapping core missions. Our primary obligations flow to our students, to whom we owe a deep professional education that will be of real value in their lives. Law schools should also attend to the legal profession, the academy, and the pursuit of justice.

Not everyone agrees with those goals. Some think law students should not pay the bill for the role law schools play in strengthening the profession and the law while preserving and extending structured knowledge in the university. They might argue that our students should have the choice to pay for only the learning they believe will advance their personal interests and not have that cost bundled with the cost of achieving larger public aims. Others will say that while the goals are laudable, it is impossible to continue to fund so ambitious a project. But students should not be the final arbiters of the content of our programs. We owe them the benefit of our learning. And the practical claim of impossibility cries out for creative thinking and problem solving, skills clinicians claim to help develop.

B. What Clinicians Know

I turn from what strawmen might say in critique of the larger ideas that frame my conception of legal education to a positive statement about my corner of legal education. Focusing now upon clinicians, I suggest that as the difficult conversations occurring at many law schools proceed, clinical faculty should help their colleagues keep our pedagogic mission in view. We must articulate the unique value of reflective practice in the development of professional expertise. Clinical faculty are among the pedagogic theorists on many faculties, often having greater interest in teaching and learning than others and quite accustomed to finding ideas of real interest in areas others regard as second rate or insubstantial. The spread of clinical legal education over the past thirty years is some evidence of the strength of the ideas that underlie and frame the field, including the idea of lawyering as a central case of professional expertise.²²

From the standpoint of reforming or designing a program of legal education, one important idea is the value of conscious sequencing of learning experiences to layer theory and practice. This central insight animates important themes in a line of educators and psychologists from the pragmatists,²³ to Jean Piaget,²⁴ and Jerome Bruner,²⁵ and a group of clinical theorists who have elaborated Anthony Amsterdam's ideas.²⁶ Legal educators, and particularly clinicians,

22. See generally ALLEN NEWELL & HERBERT A. SIMON, *HUMAN PROBLEM SOLVING* (1972); DONALD A. SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1984) (the seminal contemporary works). See also MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2007) (perhaps the best known contemporary popular treatment of the issues).

23. See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 801 (1989) (identifying themes in pragmatism presaging the contextualized study of professional practices).

24. Piaget's constructivist epistemology was an important way station to the cognitive bias and behavioral economics literature, offering insight into how each of us comes to our idiosyncratic take on the world. See generally JEAN PIAGET, *THE CHILD'S CONCEPTION OF THE WORLD* (1928).

25. See generally ANTHONY AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (1992) (applying insights from cognitive science to analyze narrative strategies in Supreme Court opinions).

26. The first and most powerful thinker to bring the cognitive science professional expertise model to lawyering was Anthony G. Amsterdam. See generally Anthony Amsterdam, *Clinical Legal Education: A 21st Century Perspective*, 34 *J. LEGAL EDUC.* 612 (1984)

have long designed programs with an eye toward optimizing the interplay of theory and practice to promote the development of expertise and appropriate professional identity.²⁷

Legal theory and legal practice are complex and permeable categories. At one end is high theory—the moral basis of the criminal law or the political theory justifying private property. At another extreme is the practical knowledge of how to format and file a particular motion in a given court or examine a witness in a deposition. For this discussion, I identify theoretical knowledge with general, abstract ideas gained through reading, reflection, and discussion. Practical knowledge typically involves contextualized ideas that are responsive to particular problems in the world and is often gained by doing things in addition to reading and reflection or discussion of abstract ideas. Practical knowledge can be gained in a large classroom, and theory may be learned while one is engaged in solving problems in the world, but those are not the typical cases.

Cycles of theoretical and practical learning can occur within classes and across classes. Not every class must be based on or reflect this distinction, but it is an important dynamic in the construction of an overall program. At my law school, as at almost all, we start with a large and unalloyed dose of theory in the first year. While I agree with those who would mix things up a bit more, I am sufficiently co-opted by elitism to give a privileged place to theory at the start of the process of professional training. But after that foundation is laid, law students need experience with real, unresolved problems playing out in their particular contexts. Working with real lawyering problems adds a distinctive and very valuable element as we promote students' professional development.

(invoking the language and models of Newell and Simon). Other works on expertise and judgment in clinical legal theory include Gary Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 318 (1995); Mark Neal Aaronson, *We Ask You to Consider: Learning about Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247, 258–61 (1998); Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem Solving*, 23 VT. L. REV. 1 (1998); Alex Schert, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161 (2002); STEPHEN ELLMANN, ROBERT D. DINERSTEIN, ISABELLE R. GUNNING, KATHERINE R. KRUSE & ANN C. SHALLECK, *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* 346–86 (2009).

27. See generally DAVID A. KOLB, *EXPERIENTIAL LEARNING* (1984).

I have seen hundreds of law students engage with active legal matters and significantly deepen both their understanding of and their ability to work with doctrine. Some of the impact stems from contextualization. Many of us see patterns in context more easily²⁸ than in abstraction. Many students are challenged when they are first asked to use theory to guide their practical solution to a problem in the world.²⁹ Beyond offering another way to deepen their grasp of doctrine, engagement of the sort I am describing also brings the essential element of affective commitment. The emotions that flow with responsibility for real legal matters open the best approach to offering our students help developing their skills on the emotional, affective, or “irrational”³⁰ side of practice. The life of the law has not been only theory.

The balance of theoretical and practical knowledge in legal education is a subject of some dispute. Almost without exception, schools with an elite identity privilege theory over practical knowledge. Many of these schools have strong clinical and experiential programs, but they remain hesitant to adopt the language of *practice ready graduates* to characterize their aspirations or to make clinicians full members of the faculty.³¹ While almost no school

28. Separating the useful patterns from the less useful is hard, given that so many of each type elicit a happy response. Michael Shermer, *Patternicity: Finding Meaningful Patterns in Meaningless Noise*, SCI. AM., Nov. 25, 2008, available at <http://www.scientificamerican.com/article.cfm?id=patternicity-finding-meaningful-patterns>.

29. Like other law professors, I find theory more congenial than most people. I believe I learned to interview clients from a book as much as from the simulations and closely supervised clinical experiences I had in law school. Years of teaching others to interview have persuaded me that people vary widely in their ability and desire to learn theory in support of practical skills.

30. As both Max Weber and Carl Jung used the term, the irrational is the non-rational, not the nonsensical or inexplicable. See generally MAX WEBER, *THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (1947); see also CARL G. JUNG, *PERSONALITY TYPES* 569 (Harcourt Brace 1933) (defining the term). The very significant role Jung ascribes to the irrational is among the most distinctive currents in his work.

31. No discussion of the relative place of theoretical and practical learning among law schools should ignore the important differences in role conception and status of clinicians in different segments of the legal education. Dual status systems seem well entrenched among the most elite law schools while others may have unitary tenure systems or simply deny significant academic status to most or all the clinicians at a school. In the new legal environment, it seems likely that clinicians will continue to play different roles at different schools and the project of trying to force all schools to a single model has never seemed promising, given how deeply entrenched the practice is as a pretty fundamental organizing principle of many of the most

with a strong elite identity chooses to identify itself wholly with practical knowledge and practice, some non-elite schools embrace that identity. Other schools that do not self consciously adopt that identity still embrace a strong commitment to teach black letter law and prepare students to pass the bar.

While there is a whole different paper to write about the sociology of knowledge and status among law schools, it is worth noting that there is debate among clinicians and other faculty about the merits of privileging theory and theoretical scholarship. I believe that deep theory supports deep professional expertise and informs the complex judgments that are at the heart of solving complex legal problems (that is to say that I adopt an attitude consistent with the status or status aspirations of my law school). Others observe that what little practical value may be gained from deep theory in the end is outweighed by the outrageous costs it imposes on legal education.³² This argument seems to me both overstated and narrow in its normative conception, but I think it is quite an important tension in the current discussions. I do not take it for granted that my conception of lawyering as professional expertise is a central pedagogic idea for all. It is, however, a respectable idea clinicians should bring to the discussion as we theorize and plan to respond to the current pressures.

C. Program Design

Beyond our contribution to the theoretical conversation about how to educate legal professionals, clinicians also have a contribution to make as we redesign programs of legal education. Too often, in the general discussion of legal education, experiential education is taken as a synonym for “very expensive in-house clinic.” This is an

highly sought jobs in our field. Here too, status concerns and private action will likely overwhelm most aspects of any regulatory regime we are likely to see adopted.

32. A popular treatment of this issue is Karen Sloan, *Legal Scholarship Carries a High Price Tag*, NAT. L. J., Apr. 20, 2011, available at http://www.lexis.com/research/retrieve?_m=82ea5c5f00d3aedbfe0671e65810a93c&svc=bl&cfom=searchForm&_fimtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzk-zSkAW&_md5=5e9635cff2d2f439717c1ee1648cba03 (describing a provocative presentation by Professor Richard Neumann arguing that law schools spend about \$100,000 for each law review article produced by a member of its faculty).

unfortunate and all too widely made slip. While many law schools support significant in-house legal practices for teaching purposes, contemporary experiential legal education is the most diverse and dynamic sector of legal education. Those looking for innovation, openness to change, and experimentation with new models would do well to study the landscape of law school simulation, field placement, and clinical programs.

At my law school, clinical, experiential, and skills offerings are understood as distinct pieces of an integrated program, designed to offer a set of complementary learning opportunities to our students at reasonable cost. We run about fifteen in-house clinics each semester.³³ They offer rich teaching and learning to a significant portion of our student body, and are the low student-faculty ratio courses that are often spotlighted as drivers of high cost. But they are only one part of a large and varied program. We also run a high-volume simulation-based class that offers individualized and small group work on interviewing, counseling, negotiation, and case theory development to more than 350 students each academic year³⁴ at a cost lower than or quite competitive with the large first-year class model.³⁵ Our field placement program provides unique value to many students at our law school at modest cost.³⁶

33. Our Spring 2013 clinics are described at *Choosing a Clinic*, FORDHAM UNIV., <http://law.fordham.edu/clinical-legal-education/2268.htm> (last visited Nov. 1, 2012).

34. The class is described at *Welcome to Fundamental Lawyering Skills*, FORDHAM UNIV., <http://law.fordham.edu/clinical-legal-education/22830.htm> (last visited Nov. 1, 2012). Two distinctive features of that class are our use of a web-based video capture and file sharing system and our extensive use of actors. The one is a practical innovation that has greatly simplified the logistics of providing individualized critique to hundreds of students and the other is a pedagogical contribution that addresses the affective or irrational side of professional practice.

35. Hiring three full time teachers to teach classes of 80 or 120 is simpler to administer than effectively managing and maintaining academic standards across a shifting group of a dozen or more adjuncts, but students gain when we offer them an intelligently assembled set of courses that combine to give them the theoretical and practical knowledge they need to become effective professionals.

36. The Fordham Law School externship program is described at *Welcome to the Externship Program*, FORDHAM UNIV., <http://law.fordham.edu/clinical-legal-education/2158.htm> (last visited Nov. 1, 2012). One key to maintaining rigor in academic programs that rely upon adjuncts or field supervisors for significant teaching is the degree of support and guidance the law school provides those teachers. It is crucial that these be understood as academic programs and that the primary axis of assessment is the rigor and usefulness of the course from the student perspective. In my experience, it makes a difference if authority and supervision

Our integrated program is only one model. Other schools have made effective use of hybrid models, which blur the lines between field placement and in-house clinic by giving lawyers in organizations outside the law school significant supervisory responsibility for students. Many other schools strongly emphasize field placements, whether because of local market constraints, a traditionalist take on legal pedagogy, or simple resource constraints. Each of these kinds of programs can make an important and distinctive contribution to our students' legal educations if they are well designed and properly managed.

My point is not that clinical legal education can be done cheaply but that a thoughtfully constructed program of experiential education can be more effective and efficient if we think about the value of different kinds of classes and how they fit together to address a given school's particular mission and context. Simulation is a great way to deepen understanding of a given area of law and develop technical skills such as drafting, interviewing, or witness examination. But simulation cannot reproduce the affective experience³⁷ that is such a powerful part of the live client experience and can be an important feature of a field placement.

While well-supervised³⁸ field placements can be powerful learning settings, in-house clinics, taught by people whose major professional commitment is teaching, will always offer a much more consistent experience with much greater opportunities for critical reflection, deep learning,³⁹ and transfer (or generalizable learning)⁴⁰

flow from and through members of the full-time law school faculty. Law faculty tend toward intellectual pursuits and do not always readily take on the administrative challenges of managing both faculty colleagues and supervising the practical details of running ten or fifteen course sections. It can be quite challenging to develop this skill set among current colleagues and perhaps even more challenging to recruit new faculty in this area at elite schools.

37. Much as I value the work of my actor colleagues as they play clients and witnesses in our many simulations, these teaching methods cannot match the potent learning experience of entering into a relationship with a client who has something real at stake and must rely upon the student.

38. The bounds of appropriate supervision are contested. I think a robust faculty role essential to protect academic rigor but acknowledge solid externship programs run largely by law school administrators.

39. John Bigg's theory of constructive alignment and deep learning is engagingly presented in this twenty-minute video. See Ian Banerjee, FROM CLASSROOMS TO LEARNING ECOLOGIES—MAPPING NEW SPACES OF LEARNING, *John Biggs: "Constructive Alignment"*

than field placements supervised by lawyers in practice who have many other pressing obligations that must take precedence over law students. If clinics offer the most consistent and deepest learning, field placements excel at permitting students to focus on particular areas of law or kinds of practices and offer real legal problems unfolding in context. No law school can offer in-house clinics in every area, and even a rich array of in-house clinics can usefully be supplemented by field placements.

It also bears noting that simulation, field placement, and in-house clinics do not exhaust the types of experiential or practical learning offered at most of our law schools. While I favor those modes, I observe students who flourish in journals, moot court, trial advocacy, and arbitration competitions, and even students who gain much of their practical knowledge from paid employment. I urge students to include different kinds of learning in their legal education. The key is varying the modes, and individual difference and preference turns out to be a significant factor. While I have ideas about combinations and sequences that typically work well, it is apparent that there is room for diverse approaches.

So, if one is looking to reform an existing program or start a new program of legal education that aims to respond to the current call to help lawyers be smarter and better, a role for clinical faculty is to contribute our practical learning about how to design and run classes that effectively and efficiently promote the development of professional expertise.

D. Institutional Design

Lastly, I turn to institutional design of law schools and the vexing problem of how power is allocated and exercised in our law schools and throughout our system of legal education and licensure. Clinicians are sometimes tarred with excessive self-dealing, even among law professors, for our twin obsessions—status and low

(Theory + Video) (Dec. 27, 2010), <http://educationalurbanism.wordpress.com/2010/12/27/john-briggs-constructive-alignment-video/>.

40. See Paul Bergman, Albert J. Moore & David Binder, *A Depositions Course: Tackling the Challenge of Teaching for Professional Skills*, 13 CLINICAL L. REV. 871 (2007).

teaching ratios. On this view, we are the most privileged of a privileged elite, teaching a handful of students while advancing our own narrow interests. I have taught at a school in the Jesuit tradition long enough to think sin a respectable subject of intellectual discourse, and I don't mind being reminded of the dangers of bad faith, self-dealing, and the many ways we favor ourselves and create unfairness. But I am wary of reducing my colleagues to a single dimension and worry about missing the normative forest for the regulatory trees.

If the new legal environment in legal education is as challenging as many predict, the pressure will mount on even the fundamental structures at our institutions. Tenure is being reexamined at all levels of American education,⁴¹ and its role, and the role of the broader idea of security of position have been the subject of extensive, warm, and ongoing discussions in the comprehensive review of the ABA Accreditation Standards for law schools.⁴² It is no secret that clinicians have followed the process closely and have been a vocal interest group, as one can see from the volume of comments from clinicians to the Standards Review Committee.⁴³

I see the advocacy of clinicians on what some dismiss as “terms and conditions and employment,” as motivated by our long and

41. Note the New York Public Schools' shift on the practice of granting teachers tenure, Al Baker, *Many New York City Teachers Denied Tenure in Policy Shift*, N.Y. TIMES, Aug. 17, 2012, available at http://www.nytimes.com/2012/08/18/nyregion/nearly-half-of-new-york-city-teachers-are-denied-tenure-in-2012.html?pagewanted=all&_r=0 (noting a dramatic reduction in grants of tenure in the past year), and the controversy at a major American university whose top administration challenged the tenure system, Nick DeSantis, *Saint Louis U. Drops Controversial Post-Tenure Review Proposal*, CHRON. OF HIGHER EDUC. (Sep. 17, 2012), <http://chronicle.com/blogs/ticker/saint-louis-u-drops-controversial-post-tenure-review-proposal/49002>.

42. Some proposals being considered by and comments to the Standards Review Committee of the Council on Legal Education of the ABA Section on Legal Education and Admission to the Bar can be found at *Standards Review Committee*, A.B.A., http://www.americanbar.org/groups/legal_education/committees/standards_review.html (last visited Nov. 1, 2012). The conversation regarding security of position can be found at *Special Committees Reports*, ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, http://www.americanbar.org/groups/legal_education/committees/standards_review/special_committee_reports.html (last visited Feb. 22, 2013).

43. *Special Committees Reports*, ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, http://www.americanbar.org/groups/legal_education/committees/standards_review/special_committee_reports.html (last visited Feb. 22, 2013).

complex experience with alternatives to tenure and full participation in law school decision making. Clinicians have more experience with a diverse array of status arrangements, funding streams, and governance rights.⁴⁴ Sometimes we have sought alternative arrangements, but more often, a job offering a fixed term contract that is ambiguous about renewability, perhaps in a program that is grant funded, with oddly limited or no governance rights, has been all that was offered.

There are examples of well-resourced, highly motivated institutions offering exemplary experiential programs under exactly the marginalizing and subordinating institutional arrangements I just described above.⁴⁵ But we do not set standards with the strongest, wealthiest, and most motivated institutions in mind. As in other areas of legal education, super elite law school clinical programs are mostly *sui generis*. Their strengths can cover a multitude of omissions and make practices that would be disastrous elsewhere seem attractive. The much more typical and worrisome problem is the very real marginalization of clinical faculty at the large group of schools that will find the new legal environment more challenging than will our colleagues at the most elite schools.

It is in the cohort of less well-resourced schools that I most worry about the dismantling of academic programs of clinical instruction. Those programs may be replaced by outsourcing from the faculty to administrative-run field placements with little or no academic

44. Nonclinical faculty fall into two main categories—tenure stream and adjunct faculty—with a dollop of visitors. Legal writing teachers are members of a distinct field, but as a matter of status, they are either assimilated into the clinical faculty or hold tenure stream or adjunct appointments. Clinical programs are staffed by tenure stream and long-term contract faculty, staff attorneys, and field supervisors along with adjunct faculty. Clinical faculty have experience with a more complex web of status distinctions and tend to manage status both up and down the hierarchical chain. Their tenure stream colleagues mostly only manage down once they gain tenure. Funding arrangements also distinguish many clinical and experiential programs from other parts of the academic program of many schools. While doctrinal classes are funded through operating budgets, experiential and clinical education is often funded by grants and other less secure funding streams. Partnerships and shared authority with groups outside the law school are also common in clinics and field placements, another feature uncommon in other parts of the program of legal education.

45. It bears noting that subordination and marginalization operate within clinical programs as well as upon them. As many schools have developed systems in which clinicians with full-time faculty status supervise staff attorneys, visitors, practitioners in residence, or fellows, hierarchy has been replicated within our programs.

component, or nothing may take their place. That would damage the programs we offer.

My argument about institutional arrangements is not a theoretical claim about the best way to organize a professional school. It is a contingent claim about the best way to organize the law schools we have, rooted in the history of the clinical legal education movement in our law schools. Given the current alignment of people, resources, and rules, continued or accelerated marginalization of clinical teachers in the discussions about the future of legal education would advantage non-clinical faculty at the expense of the programs most responsive to many of the calls for reform from the bar and the public.

Law schools need to do a better job educating students for the demands of the profession, and clinicians are more likely than other faculty to pursue that goal. But experience tells us that too many non-clinical faculty will be warm to cutting back clinical programs, muttering of “expense” and “Cadillacs when Fords will do,” if clinicians are not in the room to make the counterarguments and refocus the conversation on the needs of our students and the profession.

This is a debate about the future direction of legal education in my mind, not a debate about the right kind of regulation. Some argue that less regulation would free law schools to innovate in their clinical programs as well as in other areas.⁴⁶ Free deans will create value, we are told. But among the most innovative areas in legal education is the very one criticized for relying on excessive, protective self regulation. The facts belie the assumption of expensive, moribund clinical programs governed by pure self interest. In my view, the real contest is whether faculty or deans and corporate officers will control law schools in the future, not a battle to free us from the ancient shackles of the guild mentality.

46. A 2009 letter from the American Law Dean's Association (ALDA) to the Standards Review Committee typifies this view: *ALDA, January 2009, Comments on the Comprehensive Review*, ABA SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, http://www.americanbar.org/groups/legal_education/committees/standards_review/comments.html (last visited Feb. 22, 2013).

While institutional arrangements matter, I do not argue there is a canonical form they must take. Rather, they must safeguard academic freedom and voice. While some have argued for post hoc process guarantees of academic freedom,⁴⁷ I remain committed to security of position as the guarantor of this fundamental commitment. Once an intellectual community is involved in post hoc processes, the battle is lost. That community has already suffered a blow to any robust commitment to inquiry it might have held.

Promises of good faith from powerful school administrators are not enough. Security of academic position and voice, understood as a significant role in faculty governance, are the two key safeguards to ensure that academic values drive academic programs. Senior administrators bring a distinctive and important set of tools, but their norms and values tend toward administrative efficiency and often underplay, in my judgment, the significance of soft factors such as intellectual community and commitment to rigorous inquiry. While I celebrate academic culture, I appreciate that some would flee from it. Still, I identify that culture with a powerful and very valuable tradition.

Both tenure and long-term contracts offer substantial protection for academic freedom and also protect the exercise of independent legal judgment for those of us practicing law within law schools and universities. Maintaining something like this dual system is a reasonable second best to some unattainable complete reform that could make all faculty equal with long-term contracts and immensely preferable to reforms that would make faculty at-will employees and empower deans or other bosses to run schools autocratically.

Voice in academic decisions is vital if clinicians are to play the role I suggested above, as experts in how we, as teachers, help students develop expertise. If my claim that clinicians know something about and have something significant to contribute to the

47. A proposal relying only on post hoc review of personnel decisions, rather than strong ex ante guarantees was before the Standards Review Committee at an earlier stage of the current comprehensive review. See *Security of Position, Academic Freedom and Attract and Retain Faculty* (2010), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/november_2010_meeting_materials/academic_freedom.authcheckdam.pdf.

conversation about how to educate our students for the new legal environment is true, their voices should be heard.

Of course when clinicians participate in the discussion, clinicians too must think about the whole picture, not just their programs. More clinicians should be open to change and experimentation. In my discussion of clinic design, I tried to be catholic in my treatment of diverse models of clinical and experiential education. My school favors one model, but I see a variety of structures that work and other examples of programs structured similarly to a successful program but seeming to lack a spark. Clinicians too can be petty, doctrinaire, or self-interested. Many of our programs are quite good, and some are expensive but make little contribution. I have no reason to believe we are worse than other faculty in these ways, but some will think that damning with faint praise.

There are challenging conversations for clinicians ahead, as there are for all law professors. Most of our schools and many of us must change to accommodate the new legal environment, or we will be left behind. As we discuss how law schools are organized and who gets to make what decisions, clinicians can offer other faculty the benefit of our experience with many variations on possible arrangements. Some of those lessons are hard won and push me to prefer pragmatic solutions that adjust theory to account for the irrational and historically contingent over attractively consistent high-level theory that cannot account for our lived experience.

V. CONCLUSION

I hope I have gotten across three ideas.

First, American legal education faces challenges, but talk of the apocalypse is overdone. Our challenges are quite real and significant, but legal education and associated social structures governing entry into the legal profession are deeply entrenched, have access to significant sources of material support (university endowments are playing a significant role in sustaining some schools at this point in the downturn), and control important levers of authority. While sudden dislocating change is possible, some kind of bailout or other public mitigation seems likely. The current conditions make significant change more likely but hardly inevitable.

Second, clinicians know something important about the education of professionals, and our ideas and programs offer real value. The idea of reflective practice and the model of professional skill as expertise are powerful organizing principles for legal education. They help us understand and improve the programs we offer and can usefully guide the development of new programs.

Third, there is duality in the tone of the current discussion about the role of clinicians in the new legal environment. While it is gratifying to be noticed, we are at once celebrated for the promise of our approach to educating students and criticized for being selfish and wasteful. We understand the polarities pretty well. They are useful to highlight if one wants to heighten struggle in an effort to reallocate power. If one wants to improve our programs and respond to the challenges we face, it seems more useful to advance on common ground than emphasize division.

