



# Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education and the New Job Market

## Citation

Daniel Thies, Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education and the New Job Market, \_\_ Journal of Legal Education \_\_ (2010).

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# RETHINKING LEGAL EDUCATION IN HARD TIMES: THE RECESSION, PRACTICAL LEGAL EDUCATION, AND THE NEW JOB MARKET (FORTHCOMING IN THE JOURNAL OF LEGAL EDUCATION)

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## INTRODUCTION

Legal education has always been shaped by the underlying economic realities of the educational system and the legal profession. The earliest formal legal education in America developed as practitioners sought to supplement their incomes by taking on apprentices.<sup>2</sup> Langdell’s case method, for all its other virtues, ultimately became a dominant paradigm largely because it allowed large class sizes, and thus cheap education.<sup>3</sup> The rise of the clinical movement in legal education coincided with a period of unprecedented prosperity and growth in the legal

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1. The Author would like to thank Philip Burling, Dan Coquillette, Lawrence Fox, Jane Gionfriddo, John Manning, Michael Meltsner, John O’Brien, Amanda Pallais, Paul Tremblay, and David Wilkins for their comments and suggestions.

2. See MARIAN C. MCKENNA, TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL 60 (New York 1986).

3. See ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 63 (London 1983).

market.<sup>4</sup> While the economic forces at play in these examples were not the only factors influencing the shape of legal education, they set both its boundaries and the goalposts. In other words, they helped to define both the constraints within which legal education had to operate and the objectives it was trying to achieve.

The economic recession that began in the United States in December of 2007<sup>5</sup> will likely have a significant effect on both of these variables. The recession's effects—rising tuition, scarce student loans, and a poor job market—are pushing legal education to the breaking point. Students at many schools can no longer afford taking on debt of \$100,000 or more for a marginal improvement in their job prospects. Consequently, most law schools cannot expect to continue raising tuition indiscriminately while still filling their ranks with qualified students. The boundaries are shrinking.

At the same time, the recession is causing legal employers to put a premium on job candidates with practical skills—those on whom they will not have to spend time and money before they are ready to practice. Law schools that want to produce graduates competitive in such a market will thus have to adjust their priorities. No longer can schools continue to subsidize academic research at the expense of teaching practical skills to their graduates. Although law schools have long aimed to become a respected part of the university by producing academic scholarship, they now need to remember their initial place as professional schools whose chief goal is to produce graduates who can provide legal services. The goalposts are moving as well.

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4. For a discussion of the funding of clinical legal education, see Margaret Martin Barry et al., *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 18–30 (2000). For a discussion of the rise of large law firms and their influence on legal education, see ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 75–85 (Chicago 1992) [hereinafter MACCRATE REPORT].

5. Press Release, Nat. Bureau of Econ. Research, Determination of the December 2007 Peak in Economic Activity (Dec. 11, 2008), available at <http://www.nber.org/cycles/dec2008.html>.

This Paper traces the influence of the economic recession on legal education. Part I examines how the recession is influencing the market for legal services and provides some predictions about how the legal profession must change to adapt to this market. It concludes that graduates with practical training will be best situated to succeed in the emerging job market. Part II examines the difficulties that law schools have had in developing the kind of practical training the new job market will require. It then suggests that the recession may help to produce a change in priorities as students begin to seek law schools that best prepare them for the job market. Part III concludes with some suggestions about how the ABA Section of Legal Education and Admissions to the Bar can respond to the recession by helping to facilitate this transformation in law schools. It recommends first that the Section require law schools to provide more information to prospective students about the career prospects of their graduates. Second, it suggests that the Section adjust its accreditation standards so that schools have more freedom to incorporate adjunct faculty into their educational programs.

## **I. THE CHANGING MARKET FOR LEGAL SERVICES**

The economic recession of 2008-2009 has placed unprecedented stress on the legal profession. Although smaller downturns in 1990-1992 and 2000-2001 created similar problems, the current recession likely will outstrip them in duration and intensity.<sup>6</sup> The legal profession is thus entering uncharted waters. To fully understand how the market is likely to change the legal profession, however, one must first understand how the profession has operated in recent years. Because of its disproportionate influence on the profession, the best place to start such an inquiry is with the large Wall Street law firm.

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6. HILDEBRANT, CLIENT ADVISORY 2 (2009), *available at* [http://www.hildebrandt.com/PublicDocs/CLIENT\\_ADVISORY/2009\\_Client\\_Advisory.pdf](http://www.hildebrandt.com/PublicDocs/CLIENT_ADVISORY/2009_Client_Advisory.pdf) [hereinafter HILDEBRANT, CLIENT ADVISORY].

### A. *The Traditional Large Law Firm Model*

The large law firm model that has predominated in recent decades emerged during the 1970s and 80s.<sup>7</sup> Under this model, law firms maintain a leveraged ratio of associates to partners, sometimes employing as many as five non-equity lawyers for every equity partner.<sup>8</sup> With about one-third of the revenue from each non-equity lawyer's billable hours translating into profit,<sup>9</sup> this model maximizes a firm's profits per partner. For every new associate a law firm hires, profits increase, at least as long as there is enough work to keep everyone busy. This engine for prosperity comes with a large proviso, however. As younger lawyers move up the ranks, many of them must leave the firm to maintain the pyramid structure and the high profits.<sup>10</sup> Firms using this model thus need to constantly hire a large number of new associates to replace the attorneys that leave the bottom of the pyramid.<sup>11</sup>

At the same time, however, a firm cannot scare away young associates too early, or it will not earn back the investment it has made in hiring and training the young lawyer. To solve this problem, the pyramid model must hold out a credible promise of promotion to partner for a certain number of associates. Because the number of promotions required to make such a promise credible usually exceeds the number of partners who wish to retire or leave, law firms using this model tend to grow over time. Indeed, one study found that to keep a constant ratio of associates to partner while still promoting the requisite number of associates, law firms must

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7. MACCRATE REPORT, *supra* note 4, at 77.

8. See Michael H. Trotter, *A Pig in a Poke? The Uncertain Advantages of Very Large and Highly Leveraged Law Firms in America*, in RAISE THE BAR: REAL WORLD SOLUTIONS FOR A TROUBLED PROFESSION 33, 35–36 (Lawrence J. Fox ed., Chicago 2007) [hereinafter RAISE THE BAR] (listing some of the 200 largest law firms in America with their leverage ratios in 2004, which range from 1.52 to 5.82, with the majority between two and three); see also MACCRATE REPORT, *supra* note 4, at 78.

9. A.W. Thorner, *Legal Education in the Recruitment Marketplace: Decades of Change*, 1987 DUKE L.J. 276, 278.

10. *Id.*

11. *Id.* (calculating that because of this attrition, “[r]oughly three to four times the number of anticipated future partners ha[ve] to be hired at the associate level”).

engage in exponential growth.<sup>12</sup> Consequently, the pyramid model causes law firms to engage in intense competition for top graduates of law schools, including ever-expanding associate salaries and lavish summer programs.<sup>13</sup>

### B. *The Large Law Firm and Legal Education*

This model has had a profound influence on legal education, creating a situation in which law schools had little incentive to ensure that their graduates had sufficient practical training at graduation. Two factors contributed to this situation.

First, the need to maintain the integrity of the pyramid model created an “apparently insatiable demand[] . . . for the annual crop of warm bodies.”<sup>14</sup> Law firms simply could not hire enough qualified applicants, and the hiring market swung to favor students seeking jobs. With too few law students to go around, employers of all kinds were hard pressed to hire enough students. One law school career services officer described the resulting recruitment frenzy as follows:

Employers of all sizes and types vie for the best and brightest in the second- and third-year classes of law schools across the nation. No longer is on-campus law school

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12. See Marc Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 780–83 (1990); see also MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 77–120 (Chicago 1991). Professors Galanter and Palay’s “Promotion-to-Partner Tournament” model has become the dominant explanation of law firm growth. David B. Wilkins & Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1581 (1998) (“Tournament theory has become the dominant academic model for analyzing the institutional structure of large law firms.”). Nonetheless, the theory has received some criticism. See, e.g., George Rutherglen & Kevin A. Kordana, *A Farewell to Tournaments? The Need for an Alternative Explanation of Law Firm Structure and Growth*, 84 VA. L. REV. 1695 (1998) (arguing that the need to maintain leverage and the inter-competition for associates provide a sufficient explanation); Randall S. Thomas et al., *Megafirms*, 80 N.C. L. REV. 115 (arguing that the “demand-side” consideration of the increase in the demand for complex legal services is also a significant factor); Wilkins & Gulati, *supra* (arguing that firms use a variety of incentives, in addition to the tournament, to keep associates around and working hard). For a partial response to these criticisms, see Marc S. Galanter & Thomas M. Palay, *A Little Jousting About the Big Law Firm Tournament*, 84 VA. L. REV. 1683 (1998). In any case, all of these commentators agree on the basic elements of large law firms in recent decades: high leverage, high associate attrition, a continual need to hire new associates, and a need to bring in more and more work, all driven by the basic desire to increase profits.

13. MACCRATE REPORT, *supra* note 4, at 79.

14. R.B. McKay, *The Rise of the Justice Industry and the Decline of Legal Ethics*, 68 WASH. UNIV. L.Q. 829, 846 (1990); see also MACCRATE REPORT, *supra* note 4, at 82–85.

recruiting the domain solely of the large firm or government agency. Within the last decade, medium and smaller firms, public interest organizations, corporations, and businesses have arranged interview dates nine to twelve months in advance of law students' employment availability. More and more employers are requesting interviews with or direct contact from students at law schools of all sizes, geographic locations, and reputations. The recruitment process is no longer an intrusion into the academic calendar to be borne solely by a few select law schools.<sup>15</sup>

Employers were thus in a poor position to demand that their new hires possess training in practical skills. Instead, the imperatives of the job market meant that "an emphasis on convincing or enticing interested applicants to join the organization . . . replaced selection through evaluation of paper credentials."<sup>16</sup> Throughout much of the 1980s and 90s, therefore, most law schools could promise their applicants excellent job prospects even if they did not have programs in place to impart practical skills. A law school could continue to raise tuition as the price for access to this job market without any corresponding obligation to improve its training, and the students would still come.

Second, the work that generally occupied new associates at the bottom level of the pyramid did not require extensive practical training. To make the model work, each partner at the top of the pyramid had to generate enough work for the two to six attorneys working below him in the pyramid. This work typically included wading through large discovery requests in complex litigation, document review, and basic research and writing.<sup>17</sup> As the ABA's *MacCrate*

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15. Thorner, *supra* note 9, at 280. Note that the recruiting frenzy had a trickle-down effect. Because large law firms were hiring so many associates, smaller firms, government agencies, and public interest organizations all had to increase their recruiting efforts as well, thus limiting their ability to demand more practical skills of their job applicants.

16. *Id.*

17. See Trotter, *supra* note 8, at 45.

*Report* noted, “[l]aw schools shaped their curricula to respond to the needs of the corporate practice of large law firms,”<sup>18</sup> but these needs were not particularly demanding of practical skills. Firms had no expectation associates would arrive knowing how to do more complex tasks, and law schools had little incentive to provide such training.

The result of the pyramid organization of law firms was thus that young lawyers had little need to learn practical skills during law school. A survey of Chicago lawyers in the late 1980s and early 1990s indicated that for most lawyers, law school was the primary source of skills and knowledge in only a few areas: legal reasoning, substantive law, procedural law, legal research, and professional ethics.<sup>19</sup> In contrast, lawyers learned most of their practical skills during summer work experiences or from their first jobs, including oral communication, written communication, negotiation, counseling, legal problem solving, client relations, and drafting.<sup>20</sup> Because law firms did not expect students to bring these skills with them to their first job,<sup>21</sup> failure to acquire them in law school was not fatal to a student’s job prospects. The structure of the job market thus allowed schools to put skills training on the backburner. As the job market has broken down, however, this reality is beginning to change.

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18. MACCRATE REPORT, *supra* note 4, at 87.

19. Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL ED. 469, 482 (1993). A 1999 survey of Minnesota lawyers showed similar results. See John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCH. L. REV. 303, 378–81 & tbl.4 (2007).

20. Garth & Martin, *supra* note 19, at 482–87 & tbl. 6.

21. See *id.* at 490 tbl.11 (noting that fewer than ten percent of law firm partners in Chicago expect new hires to be able to draft legal documents, counsel clients, conduct litigation, or engage in negotiation, while fewer than half expect them to be able to gather facts or to diagnose and find solutions for legal problems).



### C. *Changes in the Law Firm Market*

The catalyst of the current troubles, as far as law firms are concerned, is a decline in demand for legal services.<sup>22</sup> The resulting downward pressure on law firm rates has nearly frozen the annual increase in fees upon which law firms have come to rely. Consequently, law firms are having difficulty bringing in enough work and revenue to support their highly leveraged structure and inflated associate salaries. In response, firms are shifting as much work as possible to lower paid staff attorneys or contract attorneys, while employing fewer high-paid associates.<sup>23</sup> Many firms have engaged in significant layoffs, while others are using pay cuts and delayed start dates to lower their labor costs.<sup>24</sup>

All of these cost-saving trends are unremarkable for a market shaped by a deep recession. It is possible that, like all good businesses, law firms are simply adapting to a weak spot in the market and preparing to return to business as usual as soon as the economy improves. Many commentators, however, argue that the downturn will lead to more than a routine disruption in the legal market, and may spell the end of the traditional law firm model.<sup>25</sup>

The reason for this dire prediction is that the natural tensions of the model were becoming unsustainable even before the economic troubles hit. As described above, the model places intense pressure on law firms to continue hiring top graduates from the best law schools to

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22. Martha Neil, *Law Firm Consultant: 'I've Never Seen It This Bad,'* ABAJOURNAL.COM, Feb. 24, 2009, [http://www.abajournal.com/weekly/legal\\_consultant\\_ive\\_never\\_seen\\_it\\_this\\_bad](http://www.abajournal.com/weekly/legal_consultant_ive_never_seen_it_this_bad) (“Demand has been slow. Essentially the spigot of work has turned off, and law firms are working down their current inventory.”).

23. V. Dion Haynes, *Law Firms Tighten Belts—By Request*, WASH. POST, Oct. 20, 2008, at D1; V. Dion Haynes, *Recession Sends Lawyers Home: Firms Trade Brick-and-Mortar Prestige for a Better Business Model*, WASH. POST, Mar. 9, 2009, at D1 [hereinafter Haynes, *Recession Sends Lawyers Home*].

24. See Aric Press, *The Coming Law Firm Hiring Crisis*, LAW.COM, Feb. 17, 2009, <http://www.law.com/jsp/article.jsp?id=1202428296289>; Debra Weiss, *21,000 Legal Jobs Lost in Last Year*, ABAJOURNAL.COM, Mar. 6, 2009, [http://www.abajournal.com/news/4200\\_legal\\_staffers\\_lost\\_jobs\\_in\\_february\\_labor\\_stats\\_show/](http://www.abajournal.com/news/4200_legal_staffers_lost_jobs_in_february_labor_stats_show/).

25. See, e.g., HILDEBRANT, CLIENT ADVISORY, *supra* note 6, at 11 (“[W]e . . . believe that this recession is significantly different from prior ones and that it could result in some fundamental changes in the way law firms are structured and how they approach their work.”); Deborah L. Cohen, *End of the road for the 'Cravath model'? Some law profs, firms see potential for a sea change*, ABA J., Nov. 2008, at 36; Paul Lippe, *Law Firms' 2011 Scenario and the End of Leverage*, LAW.COM, Feb. 11, 2009, <http://www.law.com/jsp/article.jsp?id=1202428174244>.

replace associates on the bottom tier of the pyramid who have left or ascended to partner. Law firms' attempts to remain competitive in this hiring market caused associate starting salaries to remain nearly uniform while rising to \$160,000 just before the recession hit.<sup>26</sup> Once the associates had been hired, however, law firms had to get their money's worth by requiring large numbers of billable hours.<sup>27</sup> The greater demands on associates then increased attrition which, in turn, required law firms to hire even more new lawyers.<sup>28</sup> The entire system was dependent on enough work coming in to fill everyone's time. Because this cycle had repeated for a number of years, law firms were highly vulnerable to a sudden decrease in demand for their services.

This situation has become even more precarious in light of the decreasing loyalty of lawyers to their firms and vice-versa. Professors Marc Galanter and William Henderson have documented the shift from the basic tournament model of law firms to a more "elastic model," which "promotes, laterally hires, or de-equitizes partners in order to maximize profits for a proportionately smaller equity class."<sup>29</sup> Thus, the prize of equity partnership no longer held the promise of security, even as it became more rare.<sup>30</sup> This trend further undermined the incentive structure of the traditional law firm model.

The crunch on law firm finances has thus come at the precise moment when law firms are already seeking alternative models to alleviate the constant upward pressure on salaries, hours, rates, and required incoming business, while still maintaining high enough profits to prevent rainmakers from fleeing to other firms. One response has been to replace some associates on the bottom of the pyramid with contract attorneys. These attorneys, who are hired only for temporary

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26. See Press Release, Nat'l Ass'n for Law Placement (NALP), Salaries at Largest Firms Up Again (Aug. 21, 2008), available at <http://www.nalp.org/salariesatlargestfirmsupagain>.

27. Marc Galanter & William Henderson, *The Elastic Tournament, A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1922 (2008).

28. *Id.*

29. Galanter & Henderson, *supra* note 27, at 1906.

30. See Lawrence J. Fox, *The Death of Partnership: Can We End the Trend?*, in RAISE THE BAR, *supra* note 8, at 103, 105.

assignments, are significantly cheaper than associates, and need not be retained during slow periods.<sup>31</sup> Another common response is to increase the number of staff attorneys who either will not be considered for partnership or have already lost out on a promotion to partner.<sup>32</sup> Finally, some firms have begun tying associate pay to performance, rather than paying all associates in a lock-step compensation scheme.<sup>33</sup> All of these trends have intensified since the economic crisis began.<sup>34</sup>

What does this emerging law firm model mean for new law school graduates seeking jobs? These trends likely will create a job market that places a greater premium on graduates with practical legal skills. As non-partner-track attorneys of various kinds become more common, firms will be able to hire fewer partner-track associates. The market power will thus shift to the law firms in the hiring market. At the same time, non-partner-track attorneys will take over many of the most monotonous and mundane tasks, such as document review, that require

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31. See Anthony Lin, *Contract Attorneys Struggle With Their Identity*, N.Y.L.J., Oct. 18, 2004, available at <http://www.law.com/jsp/article.jsp?id=900005540810> (noting that one large firm typically hires contract attorneys for three months at a time at about two-thirds the cost of new associates). Many firms are also seeking contract attorneys overseas, where the savings are even greater. This trend has been facilitated by a recent ABA Ethics Committee opinion approving of the practice. See ABA News Release, ABA Ethics Committee Issues Opinion Detailing Lawyer Responsibilities When Outsourcing Legal Work Domestically or Internationally (Aug. 25, 2008), available at [http://www.abanet.org/abanet/media/release/news\\_release.cfm?releaseid=435](http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=435).

32. See Galanter & Henderson, *supra* note 27, at 1875–76, 1904–05; see also Kellie Schmidt, *McDermott Will to Add Lower-Paid Associates*, RECORDER, Nov. 2, 2007, <http://www.law.com/jsp/llf/PubArticleLLF.jsp?id=1193907832842> (“McDermott, Will & Emery plans to create a new tier of attorneys—think of them as permanent contract associates—to handle lower-end tasks at lower billing rates.”).

33. See Carlyn Kolker, *‘Medieval’ U.S. Law Firm Pay Structure Buckles*, BLOOMBERG, Mar. 16, 2009, <http://www.bloomberg.com/apps/news?pid=20601127&sid=aN3ilGkywFZg&refer=law>; Martha Neil, *BigLaw ‘Has Changed Forever,’ Says Womble Carlyle, Cutting Pay 10 Percent*, ABAJOURNAL.COM, Apr. 14, 2009, [http://www.abajournal.com/news/biglaw\\_has\\_changed\\_forever\\_says\\_womble\\_firm\\_cutting\\_pay\\_10\\_percent/](http://www.abajournal.com/news/biglaw_has_changed_forever_says_womble_firm_cutting_pay_10_percent/) (“Those with stellar skills and work ethics may not see any pay reduction at all.”).

34. See Haynes, *Recession Sends Lawyers Home*, *supra* note 23 (“Across the country, the recession is putting increasing pressure on law firms to slash spending and discount their services. Client demand for lower prices is prompting firms to outsource some of their document work to India, hire more temp or contract lawyers, shift from billable hours to fixed fees and eliminate staff.”); see also HILDEBRANT, CLIENT ADVISORY, *supra* note 6, at 15 (recommending that, in response to the economic crisis, “[f]irms that have not already done so should seriously consider modifying their associate compensation structures to allow a substantial portion of compensation to be tied to individual performance in support of the firm’s goals and strategy”).

the least training. Firms will thus expect their partner-track associates to perform more complex work from day one, creating an incentive to hire the graduates with the most practical skills.<sup>35</sup>

Under the traditional model, of course, young lawyers could have expected to receive such practical training on the job, and it was widely thought that large law firms provided the best training a young lawyer could receive.<sup>36</sup> As salaries and rates have skyrocketed, however, clients have become increasingly unwilling to pay for associate training.<sup>37</sup> At the same time, the increasing pressures on partners to both bill more hours themselves and to bring in more clients have decreased the amount of time partners are willing to spend mentoring young attorneys.<sup>38</sup> If new graduates without significant practical training can even get hired as partner-track associates, therefore, they will find it even more difficult to obtain such training at the firm.

Another part of the changing law firm model, the increasing prevalence of alternative billing arrangements, will similarly promote practical skills. Many legal consulting firms are recommending that their clients respond to the economic crisis by moving away from hourly rates to billing models more attractive to clients.<sup>39</sup> Unlike the billable hour, these alternative models reward efficiency and prevent a law firm from passing part of the cost of training new

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35. Professors Galanter and Henderson note that quality of work is a key factor in associate retention. *See* Galanter & Henderson, *supra* note 27, at 1893. Thus, firms can also decrease attrition and the demands of constant hiring by shifting drudgery away from their partner-track associates.

36. *See id.* at 1870 (noting that under the traditional law firm model, “the firm establishes its brand by hiring only the best students from the best law schools and providing them with the best training”).

37. *See* William D. Henderson, Are We Selling Results or Résumés? 7–8 (April 2008) (unpublished manuscript), available at <http://www.law.georgetown.edu/LegalProfession/documents/HendersonWebsiteArticle.pdf>; *see also* Martha Neil, *Some Law Firm Clients Ban 1st-Years, Says Morgan Lewis Chair*, ABAJOURNAL.COM, Apr. 13, 2009, [http://abajournal.com/news/some\\_clients\\_ban\\_1st-years\\_says\\_morgan\\_lewis\\_chair](http://abajournal.com/news/some_clients_ban_1st-years_says_morgan_lewis_chair).

38. *See* Galanter & Henderson, *supra* note 27, at 1918 (“[I]nformal training and mentoring in most large law firms are on the wane because partners are reluctant to invest the time beyond what is necessary to optimize their own practices.”); Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 739–46 (1998).

39. *See* PAM WOLDOW, TYING OUTSIDE LEGAL COSTS TO VALUE: WILL THE CURRENT ECONOMIC CRISIS SPARK A RUSH TO VALUE BASED FEES? (2009), available at [http://www.altmanweil.com/dir\\_docs/resource/9529de69-0ee2-4a08-8e9b-8c4ad91e260c\\_document.pdf](http://www.altmanweil.com/dir_docs/resource/9529de69-0ee2-4a08-8e9b-8c4ad91e260c_document.pdf).

lawyers along to its clients. Graduates with practical skills will therefore be in the best position to add the most value to these firms.

Significantly, there are also signs that firms are willing to take such graduates wherever they find them, regardless of whether they hold the traditional credentials from an elite law school. One law firm consultant, for example, reports that “some law firms have been pleasantly surprised by the performance of some experimental new hires from the top of their class at ‘lesser’ ranked law schools.”<sup>40</sup> Studies showing that school rank and grade point average are not the best predictors of law firm success have reinforced this openness to lower-tier schools.<sup>41</sup> Professors Galanter and Henderson have thus predicted that in the new job market “[d]emonstrated management and teamwork skills resulting in successful client engagements w[ill] carry more weight than Ivy League credentials.”<sup>42</sup>

For the first time in several decades, the legal employment market favors firms and not graduates. As one would expect, the firms will thus be able to dictate their terms. With tightening bottom lines and increasing demands for value from clients, law firms in this position will be able to put a premium on graduates with practical skills.

#### *D. Other Areas of the Legal Job Market*

Large law firms have a profound effect on the entire legal job market. As the flagship employers of the legal profession, their decisions have a trickle-down effect on a wide range of other areas. It is useful, therefore, to say a word about how the economic recession is affecting other areas of the legal job market to complement the new focus on practical skills in large firms.

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40. Ward Bower, *The War for Talent and Starting Salaries*, ALTMAN WEIL, INC. REP. TO LEGAL MGMT., Apr. 2007, at 2, available at [http://www.altmanweil.com/dir\\_docs/resource/aa26ed0a-08e1-422b-8605-6e42e944bb92\\_document.pdf](http://www.altmanweil.com/dir_docs/resource/aa26ed0a-08e1-422b-8605-6e42e944bb92_document.pdf).

41. Debra Cassens Weiss, *School Rank and GPA Aren't the Best Predictors of BigLaw Success*, ABAJOURNAL.COM, Oct. 16, 2008, [http://www.abajournal.com/news/school\\_rank\\_and\\_gpa\\_arent\\_the\\_best\\_predictors\\_of\\_biglaw\\_success/](http://www.abajournal.com/news/school_rank_and_gpa_arent_the_best_predictors_of_biglaw_success/).

42. Galanter & Henderson, *supra* note 27, at 1927.

First, smaller firms, public interest groups, government agencies, and corporate legal departments will have more access to top attorneys in the job market, particularly in the short term as attorneys laid off from large firms bloat the applicant pool. Even in the long term, however, larger firms hiring fewer top attorneys into the partnership track will allow other employers to be more selective. This effect should cascade down the market to the least prestigious, lowest paying jobs, with every level enjoying greater flexibility in hiring. Employers of lower prestige have rarely been able to invest as much in training as large firms, so one would naturally expect them to use this flexibility to seek out lawyers with more practical skills. Indeed, many small and mid-size firms are already discontinuing their summer programs for law students and putting resources into recruiting more experienced attorneys.<sup>43</sup>

Second, the federal government's response to the financial crisis will also cause greater demand for young lawyers with practical skills. The government will likely employ an increasing number of lawyers in the coming years as the Obama Administration implements the stimulus package and enhances government programs.<sup>44</sup> Moreover, after the initial glut of layoffs from large firms, the new large law firm model with less attrition will mean fewer attorneys seeking to make lateral moves into government. The government will thus have to rely more on new graduates to fill its ranks. Traditionally, the government has emphasized practical experience in hiring, because

[u]nlike large firms, most government employers don't have the luxury of hiring entry-level lawyers simply to do legal research. Lean budgets mean lawyers are given lots of responsibility right away. . . . Government hiring attorneys, therefore, emphasize the

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43. Press Release, Robert Denney Associates, Inc., What's Hot and What's Not in the Legal Profession (July 2008), available at <http://www.robertdenney.com/pdf/comm-legal-hot-not-july2008.pdf>.

44. Dona DeZube, *Stimulus Package to Increase Government Hiring*, MYJOURNALCOURIER.COM, Apr. 20, 2009, <http://www.myjournalcourier.com/articles/government-1169-syndication-hiring-increase.html> (predicting that the federal government will add 200,000 jobs over the next three years, many of them attorney positions).

practical skills applicants bring to the table, not the prestige of attending a particular law school.<sup>45</sup>

Even though the government will have to hire more attorneys directly out of law school, they will still expect these attorneys to have practical training. The pressures from this job market will also put a premium on practical experience.

The job market's new emphasis on graduates capable of practicing law right away will thus come from multiple areas. The looming question is then whether law schools will be in a position to provide such graduates. This Essay therefore now turns its attention to law schools.

## **II. THE COMING CRISIS IN LEGAL EDUCATION**

### *A. The "Unfolding Education Hoax"*

The cost of legal education has been rising steadily throughout the extended expansion of the legal market during the last thirty years. Beginning in the 1980s, law school tuition has consistently risen at a rate more than two times the rate of inflation.<sup>46</sup> Between 1992 and 2002, inflation was twenty-eight percent, while the cost of legal education rose 134 percent at public schools and seventy-six percent at private schools.<sup>47</sup> Since 2002, tuition has continued to rise anywhere from five to fifteen percent a year.<sup>48</sup> In 2007, the average tuition at a private law school was \$32,367, and at public law schools, \$15,455.<sup>49</sup> When one includes books and living expenses, the overall annual cost of attendance is \$50,000 or more. As a result, many law

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45. David C. James, *Jobs: Public agencies seek lawyers committed to their missions*, STUDENT LAWYER, March 2005, at 5.

46. Maimon Schwarzschild, *The Ethics and Economics of American Legal Education Today*, 17 J. CONTEMP. LEGAL ISSUES 3, 5 (2008); *see also* THE ABA COMMISSION ON LOAN REPAYMENT AND FORGIVENESS, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE 16 (Chicago 2003) [hereinafter LIFTING THE BURDEN].

47. LIFTING THE BURDEN, *supra* note 46, at 10.

48. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LAW SCHOOL TUITION 1985–2007 (2007), *available at* <http://www.abanet.org/legaled/statistics/charts/stats%20-%205.pdf>.

49. *Id.*

students graduate today with over \$100,000 in debt, regardless of the rank of the school they attend.<sup>50</sup>

Moreover, tuition will likely continue to rise as the effects of the financial crisis become fully apparent. Nearly every school in the country is facing a significant decline in revenue because of decreased funding from state sources, declining endowments, and a drop in fundraising.<sup>51</sup> While part of these deficits can be made up in budget cuts, many schools have no choice but to raise tuition by double digit amounts.<sup>52</sup>

To make matters worse, these increases are coming at a time when the availability of student loans is increasingly precarious as a result of the credit crisis. Many private student lenders had already stepped away from the market after the College Cost Reduction and Access Act of 2007 decreased the percentage of private loans guaranteed by the government. Since then, the credit market has frozen, forcing more lenders out of the market and making it difficult for those that remain to raise capital.<sup>53</sup> The Federal government has agreed to pick up the slack by buying more loans itself, and President Obama has proposed that the government cease subsidizing private loans altogether in favor of a public-financing system.<sup>54</sup> Nonetheless, there are no guarantees that the public sector will continue to stomach costly subsidies to the legal profession, and public control of law student loans may carry some unpleasant strings that serve to restrict access.

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50. Schwarzschild, *supra* note 46, at 6; *see also* LIFTING THE BURDEN, *supra* note 46, at 17 n.7 (reporting the median student debt upon graduation in 2002 to be as high as \$84,400).

51. Karen Sloan, *Law schools dealing with budget cuts*, NAT'L L.J., Jan. 19, 2009, *available at* <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202427496279>; *see also* Amanda Bronstad, *Law school fundraising tightens*, NAT'L L.J., Oct 27, 2008, *available at* <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202425539593>.

52. *Id.* (reporting that Florida State University College of Law has proposed a fifteen percent increase in tuition for next year).

53. Doug Lederman, *Obama's Budget Blockbuster*, INSIDE HIGHER ED, Feb. 27, 2009, <http://www.insidehighered.com/news/2009/02/27/budget>.

54. *Id.*



Even if loans continue to be readily available, however, only a small percentage of law school graduates are in a solid position to pay back their loans. In 2007 the median salary of new graduates was \$62,000,<sup>55</sup> a level at which servicing debt loads over \$100,000 is, at best, difficult. Salaries are likely to decline in the current job market, even as debt loads rise, so this situation will not likely improve. Finally, some schools are considering paring back financial aid programs in response to the recession.<sup>56</sup> All of these trends suggest that, at least in the short term, legal education will become increasingly unaffordable for many students.

A recent *Forbes* article describes the debt burden of law school graduates as “an unfolding education hoax on the middle class that’s just as insidious, and nearly as sweeping, as the housing debacle.”<sup>57</sup> Students may finally be waking up to the reality of this hoax, however. Applications to law schools have declined sharply from a peak of 100,600 in 2005 to 83,400 in 2008.<sup>58</sup> Some potential students are thus realizing that a law degree may not be a cost-effective investment. Even more telling is that the economic crisis has not reversed this decline. Typically applications to graduate school increase significantly during a recession; the number of applicants to law school jumped 17.6 percent following the recession of 2001-2002, for example.<sup>59</sup> This time, however, the number of applicants to law school for the fall of 2008 *decreased* 0.8 percent from the fall of 2007.<sup>60</sup> Early evidence suggests that that the number of

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55. Press Release, Nat’l Ass’n for Law Placement, Market for New Law Graduates Up—Topping 90% for First Time Since 2000 (July 25, 2007), *available at* <http://www.nalp.org/marketfornewlawgraduatesup>.

56. *See* Sloan, *supra* note 51.

57. Kathy Kristof, *The Great College Hoax*, *FORBES*, Feb. 2, 2009, at 60, 61.

58. Law Student Assistance Comm’n, LSAC Volume Summary [hereinafter LSAC Volume Summary], <http://members.lsac.org/Public/MainPage.aspx?ReturnUrl=%2fPrivate%2fMainPage2.aspx>. Nor is this decline the result of a decrease in the population. *See* U.S. Census Bureau, Annual Estimates of the Population by Sex and Five-Year Age Groups for the United States: April 1, 2000 to July 1, 2007, <http://www.census.gov/popest/national/asrh/NC-EST2007-sa.html> (showing an overall increase in the population of 20–39 year olds of about 700,000 between 2005 and 2007).

59. *See* LSAC Volume Summary, *supra* note 58.

60. *Id.*

applicants has increased slightly for the fall of 2009,<sup>61</sup> but not nearly as much as historical jumps during a recession would lead one to expect. Moreover, anecdotal evidence of increases in applications at top schools<sup>62</sup> suggests that there may still be a decline among applicants to lower-tier law schools, who have the least chance of making a salary capable of servicing their debt upon graduation.

If the number of law school applicants remains low, law schools may see a market shift analogous to that in the employment market: power will shift away from the law schools and to potential students. As the number of overall applicants decreases, it will become increasingly difficult for schools to fill their classes with qualified applicants. Schools will need to compete ferociously for the diminished number of qualified applicants, however, both to maintain their *U.S. News and World Report* ranking<sup>63</sup> and because a school with better students generally has a better educational environment.<sup>64</sup> Schools will thus face significant pressure to adjust their programs to be as attractive to students as possible.

To confront this challenge, law schools will need to realize what is keeping students away: the prospect of taking on debt too high to support in the current job market. The schools that figure out how to make their graduates more competitive in the coming job market, while at the same time limiting the cost of a legal education, will be most attractive in this situation.

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61. Debra Cassens Weiss, *Number of Students Applying to Law School Jumps 3.8%*, ABAJOURNAL.COM, Apr. 29, 2009, [http://abajournal.com/news/number\\_of\\_students\\_applying\\_to\\_law\\_school\\_jumps\\_3.8\\_percent/](http://abajournal.com/news/number_of_students_applying_to_law_school_jumps_3.8_percent/).

62. See Martha Neil, *Law Applications Surge at Some Schools, But National Increase Is Less Than 1%*, ABAJOURNAL.COM, Feb. 24, 2009, [http://www.abajournal.com/weekly/law\\_applications\\_surge\\_at\\_some\\_schools\\_but\\_national\\_increase\\_is\\_less\\_than\\_1](http://www.abajournal.com/weekly/law_applications_surge_at_some_schools_but_national_increase_is_less_than_1).

63. Robert Morse & Sam Flanigan, *Law School Ranking Methodology*, U.S. NEWS & WORLD REP., Apr. 22, 2009, at 74, 75, available at <http://www.usnews.com/articles/education/best-law-schools/2009/04/22/law-school-rankings-methodology.html> (showing that a school's selectivity accounts for twenty-five percent of its ranking score).

64. Jay Conison, *Financial Management of the Law School: Costs, Resources, and Competition*, 34 U. TOL. L. REV. 37, 40 (2002).

Because the job market will favor job-seekers with proven practical training,<sup>65</sup> the market will ultimately reward law schools that can deliver a skills education at a reasonable price.

The pressure on law schools to emphasize skills should not be overstated, of course. Graduates from elite schools will likely still be able to secure high-paying jobs, and these schools will thus continue to attract the most-qualified students. Indeed, many elite schools have seen a sharp increase in applications during this recession.<sup>66</sup> For more marginal law schools, however, the new job market will present a significant challenge. Such schools will only attract students if they can ensure them a good return on their investment. Many law schools will thus face more pressure than ever before to emphasize practical training.

### *B. Overcoming the Barriers to Reform*

If the economic crisis has a silver lining, it may be this potential to catalyze a greater emphasis on practical training in American law schools. A number of reports over the last century have recommended that legal education move in precisely this direction, including most recently the ABA Section of Legal Education and Admissions to the Bar's 1992 *MacCrate Report*<sup>67</sup> and the 2007 Carnegie Foundation Report *Educating Lawyers*.<sup>68</sup> These calls for reform have had some effect, leading to a growth in the skills training curriculum that the *MacCrate Report* calls "[u]questionably, the most significant development in legal education in the post-World War II era."<sup>69</sup> More clinical courses, simulations, and other practical skills courses are available than ever before.<sup>70</sup>

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65. See *supra* Part I.

66. See *supra* note 62.

67. MACCRATE REPORT, *supra* note 4.

68. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (San Francisco 2007) [hereinafter CARNegie REPORT]. For a discussion of the attempts to move legal education in a practical direction over the last century see Sonsteng et al., *supra* note 19, at 363–86.

69. MACCRATE REPORT, *supra* note 4, at 6.

70. See Barry et al., *supra* note 4, at 32.

Nonetheless, the traditional law school curriculum has proved remarkably resilient, resisting integration with the new skills training curriculum and keeping it on the “periphery” of legal education.<sup>71</sup> Professor John Sonsteng, surveying the landscape just a couple of years ago, concluded that:

Law schools successfully train students in eight of seventeen key legal practice skill areas, but students must seek other sources of training in the remaining nine legal practice skill areas and in all the legal management skill areas. As with the apprentice systems of early legal education, the most substantial practical training a modern lawyer receives is outside the formal legal education system. A century of studies confirms that the formal legal education process does not live up to its promise to train students to practice law.<sup>72</sup>

Professor Sonsteng identified a number of factors that have discouraged reform, including the resistance of traditional tenure-track faculty who prefer to focus on research, the lack of meaningful assessment of graduates’ capabilities, the emphasis of law school rankings on prestige and research output rather than practical skills and teaching, and the high cost of implementing a skills curriculum.<sup>73</sup> Together, these factors ensure that, to the extent that reform has come, law schools have simply added a skills curriculum to their current programming rather than changing current practices by reforming curricula or reallocating resources. As three observers of clinical education put it,

[b]ecause any shift of resources from other parts of the law school budget to the clinics is likely to provoke considerable resistance from the constituencies that are adversely affected, some law schools will only consider such a measure as a last resort. It is more likely that a law school would explore ways to leverage faculty teaching clinical courses

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71. *Id.* at 32–41.

72. Sonsteng et al., *supra* note 19, at 388–89.

73. *Id.* at 333–63.

to do more or would explore ways to expand the budget to allow for the growth of in-house clinical programs.<sup>74</sup>

To the extent that law schools do recognize the importance of skills training, therefore, they still insist on “having their cake and eating it too.” This addition of a skills curriculum without cuts elsewhere has been one of the major drivers of tuition increases at law schools over the last several decades.<sup>75</sup> For example, between 1977 and 1988, law schools’ expenditures on in-house clinical education rose by 92.5 percent, while the overall increase in law school expenditures was nearly twice as much, at 173.9 percent.<sup>76</sup> Far from raising funds for skills education by decreasing other expenditures, therefore, law schools continued to increase funding in other areas by an even *greater* amount. A significant chunk of this increase in funding has gone to subsidize academic research,<sup>77</sup> an enhancement that does little to improve the practical abilities of students. In this way, law schools can pay lip service to skills training while maintaining a true emphasis on faculty research and writing and protecting their “prestige” score in the *U.S. News* rankings. The *Carnegie Report* calls this approach merely “additive,” and suggests that it is inferior to a more comprehensive “integrative” approach in which practical skills are worked into the traditional curriculum.<sup>78</sup>

### C. *Rethinking Priorities: The Questionable Value of Legal Scholarship Today*

Even as law schools have continued to pour resources into academic scholarship, this scholarship has become increasingly disconnected from the concerns of practicing lawyers.

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74. Barry et al., *supra* note 4, at 26–27; accord Sonsteng et al., *supra* note 19, at 340 (“Barriers to change are also apparent in the faculty attitudes which define and tend to separate substantive and skills-based courses.”).

75. Daniel J. Morrissey, *Saving Legal Education*, 56 J. LEGAL EDUC. 254, 259 (2006) (“As the work of clinical and legal writing professors was accepted as a career calling, it has become necessary for law school budgets to include a greater salary allocation to them. Such additional permanent positions, of course, . . . increase the overall expenses of a school’s operation . . .”).

76. Barry et al., *supra* note 4, at 22.

77. See Schwarzschild, *supra* note 46, at 4–7 (describing the increasing “subsidy” that law schools have given to academic research by raising faculty salaries, decreasing teaching loads, and hiring more traditional faculty).

78. See CARNEGIE REPORT, *supra* note 68, at 191–92.

Professor Anthony Kronman argues that the two most influential academic legal movements of the last half century—law and economics and critical legal studies—both downplay the importance of practical legal skills and “depreciate[] the value of practical wisdom.”<sup>79</sup> Both of these movements seek to explain developments in law through reference to other disciplines, rather than cultivating the skills unique to a lawyer that are most relevant in a practice setting. Law and economics seeks to give law scientific precision through the application of the social sciences in an academic fashion, rather than emphasizing doctrinal analysis and traditional modes of legal reasoning.<sup>80</sup> Critical legal studies looks to define law through the underlying social outlook of those who create and administer it, again at the expense of more traditional doctrinal analysis.<sup>81</sup>

The twin dominance of these schools of thought in the legal academy means that few works of scholarship today provide anything of use to practicing attorneys or judges. As Judge Harry Edwards put it,

[o]ur law reviews are now full of mediocre interdisciplinary articles. Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it.

. . . .

I sense from academic writings and from ceaseless comments that I hear from colleagues in the profession that, at least at a number of the so-called “elite” law schools, there is no longer a healthy balance between “impractical” and “practical”

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79. ANTHONY KRONMAN, *THE LOST LAWYER* 168 (London 1993).

80. *See id.* at 225–40.

81. *See id.* at 240–64.

scholars. . . . [T]oo few law professors are producing articles or treatises that have direct utility for judges, administrators, legislators, and practitioners . . . .<sup>82</sup>

Moreover, this emphasis on scholarship has a significant negative effect on the experience of most law students:

The law student who merely takes a variety of pure theory courses, and learns that “practitioners [a]re sell outs,” will be woefully unprepared for legal practice. That student will lack the basic doctrinal skills: the capacity to analyze, interpret and apply cases, statutes, and other legal texts. More generally, the student will not understand how to practice *as a professional*. He or she will have gained the impression that law practice is necessarily grubby, materialistic, and self-interested and will not understand, in a concrete way, what professional practice means.<sup>83</sup>

In short, the more that a professor is engrossed in the production of legal scholarship of marginal relevance to practice, the fewer practical skills a student will be able to learn from him.

Law schools facing the realities of the new job market will thus need to reconsider their prioritizing of legal scholarship over practical training. Although law schools have made some strides toward developing a skills curriculum, they have not yet confronted the difficult tradeoffs required to do so in a cost-effective manner. Despite the barriers to reform that have slowed the development of skills training in the past, the economic crisis means that law schools will have an unprecedented incentive to evaluate each part of their curriculum and the contribution it makes to the training of their graduates. Over the coming decade, law schools may be more willing to integrate skills training into the traditional curriculum or to cut the subsidy for

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82. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992).

83. *Id.* at 38 (citation omitted).

academic research. This Essay thus now turns to the question of how the ABA Section of Legal Education and Admissions to the Bar can assist this necessary transformation.

### **III. HOW THE ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR CAN HELP**

The ABA Section of Legal Education and Admissions to the Bar is the accrediting agency for law schools in America. Although it has been criticized frequently for using this power to maintain a monopoly over legal education,<sup>84</sup> it remains the nerve center for a wide variety of interest groups touching every aspect of legal education. As such, it possesses a unique ability to coordinate any broad response to the economic crisis. This Essay now turns to several steps the Section can take to assist the transformation of American legal education as it responds to the demands of the economic crisis. These steps fall into two categories. First, the Section can improve the dissemination of information to prospective law students, thus facilitating the market-driven transformation of law school programming in a pragmatic direction. Second, it can reformulate its requirements on faculty composition, recruitment, and tenure, to ensure that law schools have the flexibility they need to be competitive in the new market.

#### *A. Providing More Consumer Information*

The argument of this Essay so far assumes the proper functioning of markets. Because legal employers will seek graduates with more practical experience, graduates with such experience will be better positioned to find a job and pay off their loans. Prospective students should, in turn, demand schools that will provide this practical training at a reasonable cost. If a school cannot prepare them to be competitive in the new job market, students should not choose to attend that school.

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84. See, e.g., KURT OLSON & LAWRENCE VELVEL, *THE GATHERING PEASANTS' REVOLT IN AMERICAN LEGAL EDUCATION* (Andover, Mass. 2008).



The functioning of this second market depends on students having adequate information to decide whether to attend law school, and to pick the right law school. One of the most critical criteria for this decision is whether a school can provide enough training to secure a job at which the student will be able to pay for the cost of his education. Only if students actually award schools that focus on practical training with their attendance will schools feel the pressure to change.

And yet, although an unparalleled amount of information is available,<sup>85</sup> potential students may be more ill-informed on this point than ever before. The *Forbes* article quoted above identifies the lack of accurate information in this area as one of the key components of the higher education “hoax” that schools are perpetuating, describing higher education as “a self-serving establishment trading in half-truths that exaggerate the value of its product.”<sup>86</sup> A *Wall Street Journal* article recently identified the same problem, noting that “[s]tudents entering law school have little way of knowing how tight a job market they might face. The only employment data that many prospective students see comes from school-promoted surveys that provide a far-from-complete portrait of graduate experiences.”<sup>87</sup> The article reports that one law school advertised a median salary upon graduation of \$135,000, but based the number on a survey of only twenty-four percent of students at the top of the class.<sup>88</sup> Another school reported a median salary of over \$100,000 for students at firms, but included fewer than half of the schools graduates in the survey.<sup>89</sup> Even schools who try to report accurate data may be over-reporting salaries, the article notes, because those who are unemployed or make less money may be too embarrassed to

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85. Hannah R. Arterian, *Legal Education and the Tyrannical “Paradox of Choice: Why More is Less,”* 38 U. TOL. L. REV. 495, 499 (2007).

86. Kristof, *supra* note 57, at 61.

87. Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, at A1.

88. *Id.* (reporting on Tulane Law School).

89. *Id.* (reporting on Brooklyn Law School, and also noting that the school includes temporary contract attorneys in its calculation of the number of students working the private sector upon graduation).

respond. The biggest problem, however, is that most schools do not report this data, and most prospective students do not consider it. As the *MacCrate Report* noted almost two decades ago:

Law school administrators know the strengths and weaknesses of their own institutions and should be candid in discussing them with applicants. Catalogs and application materials should provide the kinds of information that will enable candidates to make informed decisions. Unfortunately, this is not always the case. . . . Schools could be the source of considerable information about such concerns, about the pressures of law school and practice, about the kinds of work their graduates do, and about the financial and personal implications of different legal careers. . . . [but] schools are not doing a good job of distinguishing themselves from one another.<sup>90</sup>

The problem is exacerbated by the dominance of the *U.S. News and World Report* rankings. According to the *Wall Street Journal*, “[p]rospective students are voracious readers of the annual U.S. News rankings” and frequently rely on them to inform their decisions about law schools.<sup>91</sup> The rankings, however, are not well correlated with the return a student can expect on his investment, particularly after one gets past the elite schools at the top.<sup>92</sup> Indeed, the need to

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90. MACCRATE REPORT, *supra* note 4, at 228.

91. Amir Efrati, *Law School Rankings Reviewed to Deter “Gaming,”* WALL ST. J., Aug. 26, 2008, at A1.

92. See William D. Henderson & Andrew P. Morriss, *Student Quality As Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L.J. 163, 197 (2006) (“In some cases, it makes more economic sense to forgo admission to a Tier 1 school in favor of a Tier 2 school that feeds into a vibrant legal market. Similarly, other students admitted to the same Tier 2 law school may forgo that option in favor a Tier 3 public law school that offers in-state tuition and a scholarship. In the eyes of that student, the prestige payoff of a Tier 2 school is just too speculative to justify additional student loans.”). The rankings have also been criticized for a variety of other deficiencies. See Nancy B. Rapoport, *Ratings, Not Rankings: Why U.S. News & World Report Shouldn't Want to be Compared to Time and Newsweek--or The New Yorker*, 60 OHIO ST. L.J. 1097, 1099 (1999) (arguing that the *U.S. News* rankings are not “good indicator[s] of quality” because they “don't reflect how well the law school teaches, how cutting-edge its research is, or whether the law school community is cutthroat or supportive”); David A. Thomas, *The Law School Rankings Are Harmful Deceptions: A Response to Those Who Praise the Rankings and Suggestions for a Better Approach to Evaluating Law Schools*, 40 HOUS. L. REV. 419, 422 (2003) (“[T]he magazine does not publish all the relevant data, does not describe all the measures it takes to ensure the accuracy of the data, and does not describe its methodology in enough detail to enable anyone to actually check the results or to isolate and identify the influence of individual factors on the rankings.”); see also Law School Admissions Council, *Deans Speak Out*, <http://www.lsac.org/Choosing/deans-speak-out-rankings.asp> (letter endorsed by over one hundred deans criticizing the *U.S. News* rankings as “inherently flawed”).

move up in the rankings often encourages schools to make changes that diminish their ability to provide practical training at a reasonable cost, precisely the most important factor for students entering the new job market. Forty percent of the rankings score now comes from prestige, a factor often based on the amount and quality of research a school produces. Thus, it encourages schools to focus on a scholar's academic output, rather than on his teaching ability, and to increase tuition to pay for more research while transferring resources from other areas.<sup>93</sup> Finally, schools frequently manipulate the rankings by reporting false data.<sup>94</sup>

The ABA Section of Legal Education could mitigate these problems by ensuring that students have the information they need to accurately assess different law schools, especially in the area of employment after graduation. Professors William Henderson and Andrew Morriss have already suggested such a course of action:

Law schools, acting through their accrediting agency, the ABA, could authorize NALP to compile and publish school-level salary and employment information. Providing information on the distribution of salaries of recent graduates would, for example, allow students a realistic method of comparing their expected debt levels to their ability to pay off student loans after graduation. Salaries have the potential to exert a large anchoring effect on law student expectations; furthermore, average salaries can be substantially affected by a small fraction of students obtaining lucrative large firm employment.

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93. See, e.g., Memorandum from John Garvey, Dean of Boston College Law School, to the Boston College Law School Community (Apr. 23, 2009) (on file with Author) (describing the school's "strategic plan" to boost its *U.S. News* ranking by "reduc[ing] faculty course load to encourage a greater focus on scholarship").

94. See Henderson & Morriss, *supra* note 92, at 201–02 (describing a "perception that undetection [of false reporting] is rampant" and noting that many schools decrease their JD class size while increasing the number of transfer students to increase LSAT and GPA scores). Other typical manipulations include hiring unemployed students at graduation to work as research assistants, encouraging applications from students who have no chance of admission, and counting each new periodical as a new volume in the library.

Therefore, a more useful and accurate summary of information would provide a detailed breakdown of employment type by law schools.<sup>95</sup>

Alternatively, the Section could amend Standard 509 to require law schools to provide this information directly to potential applicants. Under either system, of course, schools would still feel the temptation to manipulate this data to their advantage. Thus, the Accreditation Committee and site teams should confirm that a school is reporting accurate data and that all of its promotional materials are honestly representing the school's information.

In addition to providing more useful information to graduates, making such data public may encourage *U.S. News* to change its rankings methodology. Other than the controversial prestige score, the *U.S. News* rankings criteria closely track the information the Section requires schools to report. *U.S. News* currently considers incoming students' LSAT scores, undergraduate GPA, and acceptance rate, graduates' employment rate and bar passage rate, and the school's expenditures per student, student/faculty ratio, and library resources. The Section requires law schools to report each of these data under Standard 509.<sup>96</sup> Using information that is already publicly available is much cheaper than gathering new information, so this strategy makes sense for *U.S. News*. Whatever the reason, however, the *U.S. News* criteria closely track the Section's reporting requirements.

Moreover, *U.S. News* has explicitly signaled that its criteria will follow the information the Section requires in the accreditation process. Several recent changes in the Section's law school questionnaire provide a case in point. According to the 2009 edition of the *U.S. News*

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95. William D. Henderson & Andrew P. Morriss, *Measuring Outcomes: Post-Graduation Measures of Success in the U.S. News & World Report Law School Rankings*, 83 IND. L.J. 791, 831 (2008).

96. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2008-2009, at 42 (Chicago 2008) [hereinafter ABA STANDARDS] (requiring schools to provide, among other things, information about admission data, the composition and number of faculty, library resources, and placement rates and bar passage data).

rankings, “[w]hen the American Bar Association's 2008 Annual Questionnaire changed how law schools reported their first-time test takers bar passage results to the same calendar year, *U.S. News* changed our calculations.”<sup>97</sup> Similarly, the magazine noted that “[w]hen the American Bar Association's 2008 Annual Questionnaire changed how law schools categorized their unemployed students into either unemployed and seeking and unemployed and not seeking, *U.S. News* changed our calculations.”<sup>98</sup> Thus, the Section should not underestimate its influence on the *U.S. News* rankings. Simply by changing the information law schools must produce, the Section may change the rankings system.

This gives the Section significant power to lessen the perverse incentives the rankings provide for a law school to increase its “prestige” at the expense of its current students’ educational experience. By forcing law schools to divulge more and more accurate information about the outcome of its students’ education, the Section can encourage *U.S. News* to emphasize the same factors in its rankings. Even if the *U.S. News* criteria stopped tracking the reporting requirements, however, the Section could still continue to ensure that schools provide accurate information themselves, thus providing more information for students to make their decisions. With accurate information available, the market should then take over as students who wish to succeed in the job market gravitate to those schools most able to facilitate their success.

*B. Help from the Bar and the Bench: Reconsidering the Use of Adjunct Faculty*

As schools react to these market pressures, they will likely try a wide variety of tactics and innovations to improve their education at a low cost. Many of these innovations can be accomplished while remaining well within the current accreditation standards.<sup>99</sup> For example,

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97. Morse & Flanigan; *supra* note 63.

98. *Id.* Note that the magazine also uses “the American Bar Association definition” to determine the student/faculty ratio. *Id.*

99. See Sonsteng, *supra* note 19, at 439–41.

Professor John Sonsteng has noted that the accreditation standards treat tenure-track and full-time contract faculty identically for purposes of calculating the student/faculty ratio.<sup>100</sup>

Consequently, a school could replace half of its tenure-track faculty with twice as many full-time contract faculty, thus providing three times the number of teaching hours at a comparable cost.<sup>101</sup>

Transferring resources away from scholarship and toward teaching in this way would provide schools with significant opportunities to improve their practical training.

Other potential innovations are currently discouraged by the accreditation standards, however. Many of these restrictions are necessary to ensure that students do not receive a subpar education. Students should not be treated as guinea pigs, nor should a school be allowed to jeopardize educational quality in the name of reducing costs. Nonetheless, the Section must ensure that its standards do not unnecessarily restrict innovation. One area of potential concern is the standards' treatment of adjunct faculty. Practicing lawyers and judges are uniquely situated to help schools address the challenge of providing a practical education at a reasonable cost, and the standards should not restrict schools from experimenting in this area.

### **1. Potential Benefits Of Adjuncts**

Adjuncts are particularly well suited to help law schools face the current crisis, both as a way of saving money and improving the transference of practical skills to students. Adjuncts are typically paid a flat fee for each course that they teach. While these fees vary, estimates usually run between \$1500 and \$5000, depending on the experience of the teacher, the quality of the school, the length of the course, and the number of students.<sup>102</sup> Even assuming the higher

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100. *Id.* at 439.

101. *Id.* at 469–71.

102. See David A. Lander, *Are Adjuncts a Benefit or a Detriment?* 33 U. DAYTON L. REV. 285, 289 (2008).

number, a law school could hire twenty-five adjuncts for every full professor earning salary and benefits of \$125,000 a year.<sup>103</sup>

In addition to providing huge cost savings, adjuncts are also well-suited to help schools integrate the practical and theoretical aspects of legal education. Because of their ongoing practice experience, “adjuncts will have an enhanced sense of how to meld the theoretical and the practical, and they are generally more focused upon how to use the law strategically to accomplish client goals.”<sup>104</sup> This unique experience allows adjuncts to supplement the traditional teaching students receive from full-time faculty, and gives them a unique credibility to teach the nuts and bolts of law practice to their students.

Adjuncts can also help a school provide a wider variety of course offerings, thus giving students the opportunity to develop a unique specialty that will make them more competitive in the job market. Few schools have the resources to provide a full-time faculty member with detailed knowledge of every area of the law. Adjuncts can help to fill in the gaps, often teaching courses like sports law, intellectual property, entertainment law, bankruptcy, and upper-level commercial law offerings.<sup>105</sup> Finally, adjuncts are well-connected in the job market and can provide assistance to students looking for employment.

## **2. Potential Downsides of Adjuncts, and How They Can Be Mitigated**

There are potential downsides to the use of adjuncts. Adjuncts are typically less available to students than full-time faculty, complete less scholarship in the areas in which they teach, are

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103. See Barry et al., *supra* note 4, at 25 n.106 (reporting that the average full professor salary and benefits in 1998–1999 was approximately \$125,000). This estimate is likely low, given that about a decade has passed since it was calculated. David Lander estimated in 2008 that a law school could hire forty adjuncts for every full-time professor. Lander, *supra* note 102, at 289. Even if one includes the expenses necessary to ensure adequate training and supervision for adjuncts, the cost-savings are enormous.

104. Lander, *supra* note 102, at 290.

105. See *id.* at 288–89.

less integrated into the law school culture, and may be inexperienced teachers.<sup>106</sup> These criticisms of adjuncts are all accurate, and any school that wants to increase its use of adjuncts should be fully aware of the potential risks. There have been a number of articles and guides published recently to help schools avoid these pitfalls, and schools should take advantage of them.<sup>107</sup> The Section has already provided guidance in this area with the publication of its *Adjunct Faculty Handbook*,<sup>108</sup> and it should continue explore the benefits and dangers of using adjunct faculty while providing guidance to schools in this area.

For example, schools can mitigate the harm from the lower availability of adjuncts by taking advantage of the smaller class sizes adjuncts allow. Four adjuncts teaching four courses of twenty students each may provide more face time per student than a single full-time faculty member teaching a typical course of eighty students. Second, schools must be careful to invest sufficient time in the hiring and training of adjuncts.<sup>109</sup> Interviews should include a presentation by the candidate to gauge teaching ability, and schools should ensure that the full-time faculty regularly review and critique adjunct teaching. Adjuncts who perform poorly should not be rehired. Schools should also recognize the unique strengths of adjuncts and use them where they will be most effective, including as teaching assistants to full-time faculty in legal writing or clinical courses, and to teach specialized upper-level courses.<sup>110</sup>

Schools should also take advantage of opportunities to integrate adjuncts into the classroom with full-time faculty. For example, Harvard Law School's new Problems and Methods course for first-year students will include small groups of students working with an

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106. *See id.* at 291–92.

107. *See, e.g.,* Marcia Gelpe, *Professional Training, Diversity in Legal Education, and Cost Control: Selection, Training and Peer Review for Adjunct Professors*, 25 WM. MITCHELL L. REV. 193 (1999); Judith Ann Lanzinger, *Judges Teaching in Law School: Who, What, Where, and Why Not?*, 43 J. LEGAL EDUC. 96 (1993); Karen L. Tokarz, *A Manual for Law Schools on Adjunct Faculty*, 76 WASH. U. L.Q. 293 (1998).

108. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *ADJUNCT FACULTY HANDBOOK* (Chicago 2005).

109. *See* Gelpe, *supra* note 107, at 213–19.

110. *See id.* at 209–11.



adjunct on a particular practice problem introduced in class by a full-time professor. Not only will the students benefit from this experience, but the adjuncts will have the advantage of observing the full-time professor at work, thus providing the school with an experienced pool of adjuncts to draw on later to teach other courses.

A school that can use adjuncts effectively and manage them well should be able to improve its educational program while restraining the rise in tuition. Given the challenges that legal education faces today, one can expect that many schools will want to explore this way of giving their students a competitive advantage in the new job market.

### **3. The Accreditation Standards' Effect on Law Schools' Use of Adjuncts**

Currently, the standards include a number of provisions that limit a school's use of adjuncts. Standard 402, for example, significantly discounts the value of adjuncts in calculating a school's student/faculty ratio.<sup>111</sup> Adjuncts count as only one-fifth of a full-time faculty member for this purpose, even though they typically teach about one-third of the courses a full professor teaches. Even more significantly, all part-time teachers can constitute no more than twenty percent of the full-time faculty for purposes of calculating the ratio.<sup>112</sup> In other words, a school gets no credit for every teacher it hires in this category beyond twenty percent of the full-time faculty. For a school seeking to gain accreditation, or simply to move up in the *U.S. News* rankings,<sup>113</sup> these restrictions provide a significant disincentive to hire adjunct faculty.

Second, Standard 403 requires that "[t]he full-time faculty . . . teach the major portion of the law school's curriculum, including substantially all of the first one-third of each student's

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111. ABA STANDARDS, *supra* note 96, at 32–33.

112. This category includes administrators and librarians who teach, clinicians and legal writing instructors not on the tenure track, emeriti faculty, and teachers from other parts of the university, as well as adjuncts. *See id.* at 33.

113. The *U.S. News* rankings use the ABA method for calculating the student/faculty ratio in its rankings. *See Morse & Flanigan, supra* note 63.

course work.”<sup>114</sup> This requirement restricts a school’s ability to experiment with the first-year curriculum by including practical courses that make greater use of adjuncts. Even in the upper-level courses, this standard prevents schools from using adjuncts significantly more than they are already.<sup>115</sup> Any innovation seeking to increase the use of adjuncts will thus be severely restricted.

These standards were all developed with the potential downsides of adjuncts in mind, and they reflect the reality that a school can abuse the use of adjuncts by putting them in courses they are ill-suited to teach and providing insufficient oversight and training. Rather than discouraging the use of adjuncts altogether, however, the Section should invest its resources in ensuring that law schools are using adjuncts appropriately. Thus, the Section should consider relaxing the standards that discourage schools from using adjuncts. Not every law school will want to hire more adjunct faculty, but the option should be available. As schools seek to provide an affordable education in practical skills, the benefits of adjuncts are simply too great to be overlooked.

## CONCLUSION

The economic recession presents a unique opportunity for legal education to shift its priorities. Rather than using student money to subsidize academic research from full-time professors, successful schools will need to seek new ways to train students in practical skills. Only then will schools continue to be able to attract qualified students. There are many different ways that a school can achieve this end, and no two schools’ solution will look the same. As long

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114. ABA STANDARDS, *supra* note 96, at 34.

115. *See* Lander, *supra* note 102, at 288 (reporting survey results showing that the vast majority of law schools use adjuncts to teach between twenty and thirty percent of all courses). While it is unclear what percentage a “major portion” requires, it is not likely much less than seventy to eighty percent. These numbers are not directly comparable, of course, as the standard measures the proportion of student credit hours, rather than the number of courses, taught by adjuncts.

as prospective students have sufficient information and schools have the flexibility to try different solutions, however, the law schools with the best programs will begin to rise to the top.

Legal educators have spent much of the last century thinking about how to integrate practical training into the law school curriculum. To echo the *MacCrate Report*, “[i]n sum . . . the time has come to put the pieces together.”<sup>116</sup>

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116. MACCRATE REPORT, *supra* note 4, at 323.