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An Essay on Rebuilding and Renewal in American Legal Education

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An Essay on Rebuilding and Renewal in American Legal Education

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AN ESSAY ON REBUILDING AND RENEWAL IN AMERICAN LEGAL EDUCATION

*Jack Graves**

The American model of legal education is broken as a value¹ proposition.² Like a building with an undermined foundation, it must be rebuilt rather than refurbished. And, like any rebuilding project, it will be costly and disruptive to many of its occupants. However, it will also present unique opportunities for innovation and renewal. This essay suggests a few of the contours for such a rebuilding project and describes a few of the benefits that might result.

I. THE PROBLEM

To begin, let us clear away some of the nonsense that far too often mires any progress towards real change within the legal academy. This is not simply an acute problem arising from a recent economic downturn. Instead, it reflects a chronic and substantial increase in the real cost of a legal education over the past thirty years, coupled with a real decrease in the economic value of that education based on significant changes in the world in which lawyers earn their livings. The increase in cost was almost certainly fueled by the com-

* Professor of Law, Touro College Jacob D. Fuchsberg Law Center. The views contained in this essay are solely my own. I do, however, wish to acknowledge the extensive, and very much appreciated, collaborative contributions and support of my colleague, Meredith R. Miller, in developing the ideas put forth in this essay. Any shortcomings are, of course, solely my own.

¹ In this essay, I will use the term “value” to indicate “financial value.” I would of course acknowledge that there are many extraordinary intangible values associated with a legal education, and many worthy objectives in pursuing a legal education beyond merely “making money.” However, those intangibles and alternative objectives are rendered entirely moot if graduates cannot even feed and house themselves while making their loan payments. In short, the “value” proposition necessarily fails if the result is unreasonable financial hardship. *See infra* p. 377 (explaining more fully how neither the IBR nor PAYE provides a viable general solution to this problem).

² *See, e.g.*, BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).

bination of law school competition for ratings fame and the easy availability of student loans,³ while the downward economic pressure on lawyer earnings has likely reached its most recent and extreme crisis proportions as a result of technological innovations.⁴ Whereas these innovations generally provide a boon to clients, they are providing a disruptive near term bane for many lawyers—not to mention law schools and their faculty members.⁵

Moreover, the issue is not solely a matter of making legal education better.⁶ To be sure, many aspects of modern legal education can be improved (and, in many cases, are being improved)—especially those related to legal practice skills and rapidly evolving technological innovations. The current quality of American legal education is, however, almost certainly better than ever before and better than anywhere else in the world. Quality is not the most significant problem today. Nor is the issue limited to greedy would-be-lawyers seeking hefty salaries from prestigious law firms.⁷ In fact,

³ See George Critchlow, *Kim Kardashian and Honey Boo Boo: Models for Law School Success (or Not)*, 45 CONN. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2046339> (analogizing law schools' chase for U.S. News ranking "fame" to the more general chasing of "fame" by the title characters).

⁴ See, e.g., William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. (forthcoming 2013) (thoroughly addressing the technology driven structural changes in today's legal market), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202823. Even the most skeptical observer would presumably agree today that this current "crisis" is not a mere cyclical downturn and, instead, reflects a structure sea change in the market for legal services and the employment opportunities for law school graduates. See *id.*

⁵ See Benjamin H. Barton, *A Glass Half Full Look at the Changes in the American Legal Market*, available at <http://www.masonlec.org/wp-content/uploads/2012/11/Barton-IJLE-DRAFT.pdf> (explaining that life would likely get "significantly worse for the majority of law professors, corporate law firm partners and associates in the near term and for the foreseeable future"); see also Critchlow *supra* note 3.

⁶ See, e.g., Henderson, *supra* note 4 (providing a variety of ideas for improving the educational product, but little, if anything, by way of suggestions for reducing tuition).

⁷ See, e.g., *The Brian Lehrer Show: Justice Sotomayor*, WNYC (Jan. 22, 2013), <http://www.wnyc.org/shows/bl/2013/jan/22/justice-sotomayor/> ("Yes, it's hard to get jobs, but when you talk to most people, it's hard to get the jobs that are paying them the big bucks that they want. There are plenty of jobs out there to serve communities that have needs; they just don't pay a lot of money. But if that becomes the measure or the goal in your life, then you are no longer concentrating on what I think is the most important part of the legal profession, and that is the one of caring, the caring of community, the caring of people in it, and the caring about what you are doing."). While it is easy to dismiss the increased recent focus on ROI overly focused on money, it is much harder to focus on anything else when one is drowning in unserviceable loan debt. See John E. Thies, *American Bar Association Task Force on the Future of Legal Education* (Feb. 9, 2013), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/task

the rarified niche of legal education serving students most likely to land those hefty big-firm salaries (and, to a large degree, always having served those students) still seems to be chugging along, though increasingly isolated from the less affluent reality beyond its borders. The real problem in legal education today involves the “middle class” of law students and law graduates and, in particular, the “lower middle class,” who are increasingly finding themselves impoverished by the cost of their educational experience, with few opportunities for recovering from this law school imposed poverty.⁸ The problem with the vast majority of legal education is clear and simple. The price of tuition is too damn high⁹—and it is too damn high by a lot!

I am often asked by colleagues, “how did it come to this?” I think there are two parts to the answer (one of which is mentioned above). First, and simplest, we all got far too caught up in the very expensive annual beauty pageant organized to no good end by U.S. News and World Report.¹⁰ Second, and somewhat less obvious, we were fooled¹¹—or at least lulled into a sense of complacency—by a bifurcation in the employment market for our graduates. And, of course, the easy availability of student loans made such “foolishness”

forcecomments/febhearing2013_john_thies_comment.authcheckdam.pdf (pointing out the inability of graduates with enormous debt burdens to perform public interest work or provide low cost legal services).

⁸ Thankfully, Income Based Repayment (IBR) and, more recently, Pay As You Earn programs help mitigate this issue to some degree. See *If Your Student Loan Debt Is High Relative to Your Income, You May Qualify for the Pay as You Earn Repayment Plan*, FED. STUDENT AID, <http://studentaid.ed.gov/repay-loans/understand/plans/pay-as-you-earn> (last visited Feb. 20, 2013) (describing the programs available). However, these programs do not represent anything close to a viable “solution” to the problem. Students are left with educational debt for at least 20 years, not all loans qualify, and a huge “tax bomb” will expose the student to significant and immediate liability for any amount ultimately written off. Moreover, these programs reflect our all too familiar approach to financing programs we don’t know how to (or don’t want to) pay for—we simply push the expense “down the road.” In a country in which we shall, at some point, have to deal with the cost of promised future entitlements (loan forgiveness is, essentially, an “entitlement”), there is no guarantee that programs like this will continue, as structured. And, in the interim, the student’s debt just keeps continuing to grow.

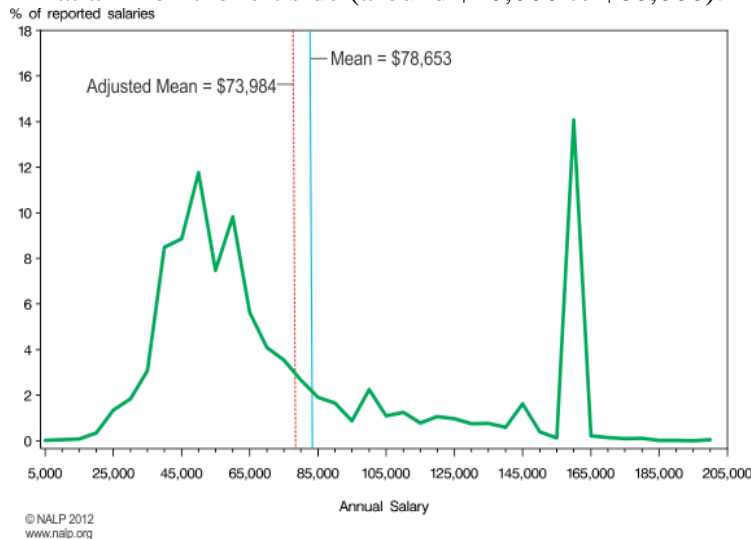
⁹ See Paul Caron, *The Law School Crisis*, PEPP. L. MAG., <http://lawmagazine.pepperdine.edu/index.php/2012/09/the-law-school-crisis/> (last visited Feb. 20, 2013) (analogizing the problem of tuition pricing to that addressed by 2010 New York mayoral candidate Jimmy McMillan, who campaigned on a slogan that “[t]he rent is too damn high” (internal quotation marks omitted)).

¹⁰ See Critchlow, *supra* note 3.

¹¹ I am giving the legal academy the benefit of the doubt on this moral issue, rather than assuming we knew exactly what was happening, and only our graduates were fooled.

and “complacency” so much easier.

For the better part of the past forty years, the earnings of top lawyers and law firms have generally outpaced the rate of inflation, thereby providing ever improving financial opportunities for law school graduates.¹² Not surprisingly, for the better part of the past thirty years, law school tuition prices chased those opportunities, also rising far beyond the rate of inflation.¹³ For some time, the growing prosperity of law practice was enjoyed by most lawyers—not just those at the top. However, around 1990, an odd thing happened on the road to general prosperity when the fates of smaller firms and solos started heading in the opposite direction. By the turn of the millennium, we had the beginning of the full bimodal salary curve we see today.¹⁴ However, law school tuition kept chasing those big-firm salaries ever upward, and the “reasoned investment” of days-gone-by quickly turned into something more akin to a “lottery” for the majority of law students. In short, we have a legal education system priced based on the right hand side of the bimodal split (around \$160,000), while most of the graduates of most of the law schools find employment—if at all—on the left side (around \$40,000 to \$60,000).



¹² Barton, *supra* note 5.

¹³ Deborah J. Merritt, *Average Law School Tuition (Constant 2010 Dollars)*, available at <http://2.bp.blogspot.com/-akjGbowQM9o/UQ8S3nELCKI/AAAAAAAAAHs/HG3RdOKFOxs/s1600/Tuition.jpg> (last visited Feb. 20, 2013).

¹⁴ Barton, *supra* note 5.

Today, outside of the top few law schools, about half of all law graduates promptly find full-time employment using their newly minted JDs.¹⁵ For those who do, the median starting salaries likely amount to somewhere between one-third and one-half of their law school debt (and this is likely a generous characterization, except for those fortunate few who had no need to take out loans to finance their education). Under any reasonable financial analysis, this is a very poor investment.¹⁶ However, the story for today's "median" law school graduate is only a small part of the problem. The story for those below the "median" is much worse.¹⁷

The aspiring law student confidently sets out on the law school journey secure in the knowledge that he or she will certainly do better than most and perhaps even excel at the highest levels. Few likely aspire to the "median," and even fewer, if any, enter law school expecting just to survive and graduate in the bottom half. Yet half of our students will, in fact, be in the bottom half of their class.¹⁸ Like our students, we in the academy face a similar "ranking" of the insti-

¹⁵ Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES (July 14, 2012), http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html?_r=0.

¹⁶ See generally Jim Chen, *A Degree of Practical Wisdom: The Ratio of Educational Debt to Income as a Basic Measurement of Law School Graduates' Economic Viability*, 38 WM. MITCHELL L. REV. 1185, 1203 (2012) (explaining that "adequate" financial viability with respect to a law degree requires a salary equal to a graduate's total law school tuition paid, while even "marginal" or "minimally acceptable" financial viability requires a salary equal to two-thirds of that total law school tuition amount).

¹⁷ See Jim Chen, *Measuring the Downside Risk of Law School Attendance*, available at <http://ssrn.com/abstract=2214337> (presenting a set of "hypothetical," but very realistic data showing, for a total tuition of \$60,000, a "median" salary of \$45,000, a minimally viable salary of \$40,000, and almost 40% of the graduates below that minimally viable salary); see also Jerome M. Organ, *Hearing Comments* (ABA Task Force on the Future of Legal Education, Feb., 2013), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/febhearing2013_jerome_organ_comment_authcheckdam.pdf (pointing out that those with the poorest admissions credentials are not only paying the most for law school, but also having the greatest difficulty in landing good paying jobs upon graduation).

¹⁸ See David Segal, *Law Students Lose the Grant Game as Law Schools Win*, N.Y. TIMES (Apr. 30, 2011), <http://www.nytimes.com/2011/05/01/business/law-school-grants.html?pagewanted=all> (detailing the challenges for a "scholarship" student who expected to excel, but failed to understand the harsh dynamics of the law school curve); Deborah J. Merritt & Daniel C. Merritt, *Unleashing Market Forces in Legal Education and the Legal Profession* (Pub. Law & Legal Theory, Working Paper No. 180, 2012) [hereinafter Merritt & Merritt, *Unleashing Market Forces*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2190398 (explaining the nature of competition between students in law school as a "guild tournament[']").

tutions with which we are associated. Despite our persistent—and often very expensive—folly in seeking to “move up” by jumping through imaginary ranking hoops,¹⁹ half of us will always be in the “bottom half.”

This essay will focus, to some degree, on how to reduce risks and improve legal education outcomes for the bottom half of students in the bottom half of all law schools. This group represents 25% of current law graduates, and, as a group, they almost certainly bear a disproportionate share of the burden created by our broken educational model.²⁰ While the suggestions that follow will in some ways specifically target this “bottom quartile,” I believe they would materially improve legal education for a substantial majority of all prospective students.

The most obvious disadvantage for the bottom quartile is that, in our hierarchical system of law school admissions and student ranking within law schools, the lowest ranked students from the lowest ranked schools will, on average, have much more difficulty in securing reasonable opportunities to practice law. Yes, we can all come up with anecdotal exceptions, but this group, as a whole, has a much tougher time in the legal employment market. However, there are at least two additional disadvantages that make the plight of the bottom quartile law graduate even worse.

First, statistical evidence (consistent with common sense) strongly suggests that lower ranked students are much more likely to fail the bar exam.²¹ Inasmuch as bar passage is an absolute prerequisite to law practice, we can safely assume that 0% of those who cannot pass the bar exam will ultimately use their JD to practice law (at least not without violating the unauthorized practice of law rules). Admittedly, some will eventually pass after multiple attempts. However, such extended time spent on bar passage will necessarily delay

¹⁹ See Critchlow, *supra* note 3.

²⁰ See Merritt & Merritt, *Unleashing Market Forces*, *supra* note 18; see also Organ, *supra* note 17 (pointing out that those with the poorest admissions credentials are paying the most for law school).

²¹ See Douglas K. Rush and Hisako Matsuo, *Does Law School Curriculum Affect Bar Examination Passage? An Empirical Analysis of Factors Related to Bar Examination Passage During the Years 2001 through 2006 at a Midwestern Law School*, 57 J. LEGAL EDUC. 224, 232 (“Result 2: There was a strong association between law school class rank and passage of the bar examination on the first attempt.”).

employment and may also reduce its ultimate likelihood or financial value.

Second, the vast majority of “bottom half” law schools are almost entirely tuition driven. These schools have little, if any, endowments to support scholarships. However, these same schools feel compelled to create scholarships out of tuition subsidies in hopes of recruiting better students (and, among other things, improving or maintaining the school’s institutional “ranking”²²). The applicants with the strongest credentials and the students with the best grades get “scholarships” in the form of tuition discounts, while the rest pay full price (which is of course inflated in order to cover the “scholarship” subsidies). You don’t have to be a math genius to figure out that these tuition subsidies result in the weaker students subsidizing the stronger students. Thus, the bottom quartile generally ends up with the greatest debt upon graduation.²³

The above-described effects are particularly pernicious when one considers the purported existential rationale for many of these “bottom half” schools. Many of the lowest ranked schools were opened in pursuit of providing greater “access” to legal education and law practice for historically excluded populations.²⁴ One of the reasons these groups had formerly been excluded was that they tended to have lesser “credentials” based on traditional law school admission criteria.²⁵ Because these traditional admission criteria continue—both directly and indirectly—to drive law school rankings, these “access” schools generally tend to find themselves in the bottom half (and, more often than not, in the bottom quartile). Thus, graduates from these traditionally excluded groups are even more likely than

²² See Critchlow, *supra* note 3.

²³ This debt may also be heightened by the greater difficulty the lower ranked student will typically have in finding good paying employment while in law school.

²⁴ The cynic might suggest that many other law schools were simply created because legal education seemed to provide for an easily replicable “cash cow.” While there may be some truth to this assertion, in some cases, I will leave that for others to debate. For purposes of this essay, I am happy to attribute honorable “initial” motives to the legal academy. The problem addressed herein is not the original motive, but the ultimate evolution of our currently high-priced model and, especially, the incredibly “tone deaf” refusal of the majority of the legal academy to acknowledge the current problem.

²⁵ While this group might, for example, include racial, ethnic, or economic groups that had been previously disadvantaged, my own categorization is not so limited. My focus here is on anyone attending an “access” school by virtue of having applied to law school based on lower than typical traditional “predictors” of law school performance.

most to find themselves severely disadvantaged, and perhaps even financially devastated, by the current law school financial model.²⁶ Many have argued that, first and foremost, we need to reduce the number of students we admit to law school each year.²⁷ Predictably, others have protested that such reductions will have the effect of limiting the sort of broad access that we have worked so hard to establish.²⁸ In fact, reducing law school seats is not the issue we should be focusing on—our laser vision focus must be on reducing the cost of tuition (even if it increases the number of prospective applicants, which it should, based on a normal demand curve). As many have accurately pointed out, our problem is not too many law graduates—in fact, we still have many underserved markets for legal services.²⁹ Our problem is that the price of tuition is far too high, and graduates with enormous debt loads cannot afford to service those underserved markets. Maintaining—and even improving—access to legal education is an admirable and achievable goal. However, doing so without impoverishing a generation of collateral casualties requires us to build a new model for legal education at a much lower cost of tuition—one in which everyone at a given institution pays the same price, except in the case of true, externally funded, scholarships.

II. REBUILDING BASED ON A NEW MODEL

The rough contours of this model were first described in a Comment that my colleague, Meredith Miller, and I submitted in December to the ABA Task Force on the Future of Legal Education.³⁰

²⁶ See Gene R. Nichol, *Rankings, Economic Challenge, and the Future of Legal Education*, 61 J. LEGAL EDUC. 345, 351 (2012) (discussing the exclusive effect high tuition costs may have on admission of “low and middle income students,” along with the “soaring debt levels” carried by those who do attend, and the ultimate effect on the “cost of the delivery of legal services”).

²⁷ Joe Palazzolo & Chelsea Phipps, *With Profession Under Stress, Law Schools Cut Admissions*, WALL ST. J. (June 11, 2012), <http://online.wsj.com/article/SB10001424052702303444204577458411514818378.html>.

²⁸ See *id.* (noting a concern for the effect reducing admissions would have on access to higher education).

²⁹ John J. Farmer, Jr., *To Practice Law, Apprentice First*, N.Y. TIMES (Feb. 17, 2013), http://www.nytimes.com/2013/02/18/opinion/to-practice-law-apprentice-first.html?_r=0.

³⁰ Jack Graves and Meredith Miller, *Comments on the Future of Legal Education* (ABA Task Force on the Future of Legal Education, Dec. 2012), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/task_forcecomments/201212_graves_and_miller_correctcomments.authcheckdam.pdf.

The current essay adds detail to that earlier description—particularly as it relates to the unique issues raised above with respect to students who find themselves below the class “median” at institutions below the national “median” rankings for law schools.

The proposed model would deliver the first half of the JD curriculum at a dramatically reduced price and would do so over twelve calendar months—not by reducing curricular content, but simply by using a full twelve-month school calendar.³¹ Cost reductions would be achieved by moving to very large doctrinal classes (significantly larger than current “large” classes),³² likely including significant on-line components.³³ While research, analysis, and writing instruction would continue to be delivered in relatively smaller classes, this too would likely benefit from greater efficiencies through the use of on-line components. All of the doctrinal content necessary to prepare for the bar exam, as well as the necessary analytical and writing skills, would be delivered in three successive trimesters (or four successive quarters) within these first twelve months.

This initial twelve-month program—Professor Miller and I call it Stage 1—could serve a number of different objectives, all of which would potentially generate law school revenue, thereby reducing the required tuition price per student. First and foremost, Stage 1 would lay the basic doctrinal and analytical foundation for a JD. Second, it would prepare a JD student to take the bar exam upon

³¹ For the sake of clarity and simplicity, this essay solely focuses on a full-time program model. While the application of the basic concepts to a part-time program would undoubtedly present additional logistical challenges, there is no fundamental reason they could not be so applied.

³² New ideas often come from recycling old ones in a new context. In this case, very large doctrinal classes could be supplemented by much smaller “recitation” sessions conducted by teaching assistants as part of their later “Stage 2” education. These teaching assistants would operate entirely under the supervision and direction of the primary faculty member, thereby providing a more efficient delivery system, as well as an opportunity for more senior students to complete the learning cycle through teaching. See generally Christine N. Coughlin, *See One, Do One, Teach One: Dissecting the Use of Medical Education’s Signature Pedagogy in the Law School Curriculum*, 26 GA. ST. U. L. REV. 361 (2009).

³³ See Thies, *supra* note 7 (suggesting expansion of allowable credits earned through distance education). By “online” education, I mean “synchronous” delivery using sophisticated state-of-the art educational software, allowing for significant interaction between faculty and individual students, observed by all and in which any can participate. I am not referring to either pre-recorded webcasts or live broadcasts that do not allow for live interaction. While any given course might include components (e.g., quizzes) that might be accessed in individualized time frames, the primary instructional delivery method would be “synchronous,” just like it is today.

completion. Third, the completion of Stage 1, by itself, could be recognized in a “Certificate” or “Master of Legal Studies” program intended for those interested in a basic legal education without the actual practice component or the predicate to licensure.³⁴ Finally, Stage 1 would serve as an ideal introduction to United States law and legal methods for a foreign trained lawyer (i.e., as the primary basis for an LLM program in United States law for foreign trained lawyers).

In addition to generating additional revenues, Stage 1 would involve a significantly lower faculty cost per student. This cost would naturally be lowered by the increase in class sizes, and it could be lowered even further by increasing individual teaching loads.³⁵ The tuition for Stage 1 should be no more than \$15,000, maximum.³⁶

³⁴ Such a degree might be particularly useful individuals seeking a general introduction to law, such those intending careers in business management, other professional services, public service, or legal process outsourcing. The degree might also include a level of licensure short of a full license to practice law. See *Limited License Legal Technicians*, WSBA, <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Admissions/Limited-Licenses-and-Special-Programs/Non-Lawyers-and-Students/Legal-Technicians> (last visited Feb. 20, 2013) (describing Washington’s LLLT Rule).

³⁵ This of course raises at least two distinct, but related, issues—faculty scholarship and faculty head count, each of which would almost certainly be affected negatively in terms of quantity (whether this would negatively affect the quality of faculty scholarship is an entirely separate question, which I will leave for another day or another author). During the last thirty years of rising tuition cost, law school faculties have more than doubled in size, while teaching loads have at the same time fallen. Barton, *supra* note 5. Reversing this trend will of course be far more painful, but is at least as necessary as the original trend itself. The eventual result will very likely improve legal education, overall. See *id.*

³⁶ As Professor Miller and I originally explained in our earlier “Comment,” achieving these sorts of cost reductions will necessarily involve reductions in current law school faculty. However, any given law school could, at least in theory, avoid some of all of this effect to the extent it was able to gain market share from other schools through early innovation. Jim Chen has suggested the need to cut current faculty costs by one-third. See Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. TIMES (Feb. 10, 2013), <http://www.nytimes.com/2013/02/11/us/lawyers-call-for-drastic-change-in-educating-new-lawyers.html>. However, it is important to place this comment in the context of tuition at the University of Louisville, where Jim Chen is a faculty member. He appears to use a blended rate (taking into account both in and out of state tuition), which results in about \$60,000 total tuition for a JD. See Chen, *Measuring the Downside Risk*, *supra* note 17. Thus, his same analysis would suggest a two-thirds reduction for a school currently charging \$40,000 per year, or \$120,000 total for a JD (assuming of course a comparable median starting salary for graduates). Admittedly, this would seem to place private schools at a potential disadvantage vis-à-vis public schools with taxpayer support. However, this differential in public funding matters little to an informed student seeking a legal education at a reasonable price. A private school must simply do an even better job in efficiently employing limited resources to deliver a superior legal education.

Having successfully completed Stage 1, a student would then, ideally, be allowed to sit for the bar exam—not as a final step to licensure,³⁷ but as an intermediate gateway to Stage 2 of the JD program. After the successful completion of Stage 2, the graduate would then (and *only* then) be eligible for licensure, without further examination. Everything a student needs to pass the bar exam can reasonably be delivered in Stage 1 of the standard JD curriculum, and this approach would eliminate the current plague of third-year bar review courses thinly disguised as JD curricular content. Once a student had successfully passed the bar exam, he or she could focus more fully on learning how to practice law during the final twelve months of the JD program delivered in Stage 2.³⁸

The typical student would likely spend three to six months outside of the JD program between Stages 1 and 2, depending on how quickly a state could provide bar exam results.³⁹ Students might spend the time between the administration of the exam and the announcement of the results in a variety of ways, including positions as interns or law clerks. However, a student would not be eligible to begin Stage 2 until he or she had successfully passed the bar exam.

For those students who were not successful in their first attempt at bar passage, the school could offer the opportunity to repeat doctrinal courses at little or no additional charge (there being little incremental costs to the school), so that the student would incur little or

³⁷ Compare Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599, 599 (2012) (proposing to allow students to sit for the bar exam after completing two-thirds of the current JD program requirements and then immediately seek licensure upon passage, without ever completing the JD requirements), with Thies, *supra* note 7 (suggesting early bar administration, but still requiring graduation for licensure).

³⁸ This approach would allow an experience similar in many ways to that provided by the highly acclaimed Daniel Webster Scholar Honors Program at the University of New Hampshire school of Law. See *Daniel Webster Scholar Honors Program*, U. OF NEW HAMPSHIRE: SCH. OF L., <http://law.unh.edu/academics/jd-degree/daniel-webster-scholars/> (last visited Feb. 20, 2013) (describing the two-year program available). While not avoiding the bar exam, as in the case of the UNH program, the experience could be quite similar with the bar exam behind the student, except of course that the experience would be available to all students entering Stage 2 of the program.

³⁹ Ideally, a state administering the bar exam in July would complete the grading by the end of August, and the student would be able to complete this whole process in three months, assuming the school was on a quarter system. Alternatively, the student could begin Stage 2 after only a four month break for the bar exam if results were available in September, and the school was on a trimester system. Six months is intended only as a worst-case example.

no additional tuition costs without bar passage.⁴⁰ For students that ultimately failed to pass the bar exam, the cost of the experience would be far lower than under the current model. Thus, the financial cost of failure would be significantly reduced. This approach could more fully realize the goals of increased “access” to a legal education (perhaps even taking a more flexible approach to admissions, having reduced the potential financial risks), while minimizing the risks associated with such increased access and significantly reducing the collateral financial casualties associated with the current model.

This “staged” approach to law school would not just reduce the risk of “failure,” but would also reduce the risk of simply changing one’s mind. Many potential law students are uncertain as to whether a legal career is “right” for them. Unfortunately, the cost of learning more, in the form of first-year tuition, is sufficiently high to scare off many prospects that might have actually enjoyed a legal education. Too many others invest in that first year, despite their uncertainty, and then feel compelled to throw more “good money after bad,” eventually becoming unhappy graduates and, in many cases, unhappy lawyers. Under the proposed model, a student interested in studying law, but uncertain about his or her interest in practicing law, could invest in Stage 1 at a relatively modest tuition price, and then make objective and better informed later decisions with respect to the bar exam and Stage 2.

The cost of delivering Stage 2 would be significantly greater than Stage 1. The second stage would focus on practical skills, employing simulations, clinics, externships, and other practical experiences, all in combination with additional doctrinal development (including seminars) in a student’s chosen area or areas of focus.⁴¹ The cost of Stage 2 could be subsidized by revenue generating clinics, as part of a law school, as law firm⁴² (similar to the medical or dental

⁴⁰ A school might, however, provide optional tutoring for such students at a reasonable additional charge.

⁴¹ This “experiential” approach to the latter stage of a JD program is not particularly new, and many law schools have developed and are developing outstanding experiential learning programs. However, this proposal for delivery the experiential segment after completion of the bar exam is new, and it provides significant opportunities for enhancement of such programs.

⁴² See, e.g., *Seeking Legal Help: The Law Offices of Chicago-Kent*, IIT CHIC.-KENT C. OF L., <http://www.kentlaw.iit.edu/seeking-legal-help> (last visited Feb. 20, 2013) (a “teaching law firm with a dual mission—to provide high quality clinical education . . . and to deliver

school model), and it would, to a large degree, be delivered by faculty who were simultaneously engaged in the practice of law. Even so, it would necessarily be much more expensive than Stage 1. The tuition for Stage 2 might be in the range of \$25,000 to \$30,000. However, no student would incur this amount without having first passed the bar exam. Moreover, the total JD tuition would likely be under \$45,000, and the student would be eligible for licensure a full year earlier than under the current model (immediately upon completion of Stage 2), thus saving the student a full year of lost income opportunity costs. And the same tuition “sticker” prices would be charged to all students—without regard to credentials—thus ending the current “reverse Robin Hood” subsidies.⁴³

A law school’s educational efforts on behalf of its students should not, however, necessarily end at Stage 2. A school should also facilitate a third educational stage—the solo/small practice incubator. An increasing number of graduates today are finding themselves on their own in establishing a law practice. This may actually be a good thing if we have properly trained them to be entrepreneurs and innovators⁴⁴ in providing cost effective legal services, including services to traditionally underserved communities. However, the skill set necessary to run a law firm typically goes well beyond that which even a practice-focused JD program can realistically provide. The Stage 3 incubator bridges this gap, providing a safe, collaborative, mentored, and perhaps marginally subsidized environment in which to develop the skills and experience needed to operate a successful solo or small firm practice.⁴⁵

outstanding and competitively priced legal services to our clients”). While the discussions of law schools, as law firms, have becoming increasingly commonplace with respect to “incubators” for graduates, the idea admittedly remains quite controversial with respect to revenue generating “clinics” and the anticipated reaction of the practicing bar. However, a well-crafted program could target existing underserved legal markets and do so in collaboration with the practicing bar in a manner that could go a long way towards minimizing reasonable resistance.

⁴³ See Organ, *supra* note 17 (citing Tamanaha, *supra* note 2) (describing this “ ‘reverse Robin Hood’ scenario”). “Real” externally endowed scholarships would, of course, be unaffected.

⁴⁴ See generally Renee N. Knake, *Cultivating Learners Who Will Invent the Future of Law Practice: Some Thoughts on Educating Entrepreneurial and Innovative Lawyers*, 38 OHIO N.U.L. REV. 847 (2012).

⁴⁵ This Stage 3 incubator might be operated as a part of the same “law school, as law firm” referenced in Stage 2, or it might be fully independent. In either event, however, there are significant opportunities for collaboration between the incubator and clinical function.

For the most part, this entire model can be realized under current ABA and state licensure rules. However, two crucial changes are needed in order to maximize its potential:

- (1) The state bar examiners would need to allow early administration of the bar exam. Again, this would not eliminate the requirement of a JD, but would simply move the bar exam, as an essential element for licensure, to an earlier point in time. States would incur no additional costs, the gatekeeping function of the bar exam would in no way be diminished, and the risk of failure would be dramatically reduced. Moreover, those who successfully pass the bar exam could be afforded far greater opportunities afterwards to focus on practice skills and subject matter specialization—each of which would likely benefit the student, as well as his or her eventual clients.
- (2) The ABA would need to allow greater use of online instruction throughout the JD program (or at least during the first half). Under Standard 306, the use of online instruction is currently precluded during the first twenty-eight credit hours of a JD program, and the total use is limited to twelve credit hours within a JD program. In fact, the technology available today allows for online instruction sufficiently comparable to “in-person” instruction, such that, in many instances, the significant additional cost of “in-person” instruction does not justify the minimal incremental benefit. This decision should be left to individual law schools in the same manner that other equally important pedagogical decisions are left to those schools and to individual faculty.

At bottom, this essay is a plea to three crucial constituencies—the legal academy,⁴⁶ the state bar regulators, and the ABA. With a concerted effort, we can all do much to make legal education affordable again, and, in the process, we can also make it a good deal better.

⁴⁶ To date, a great deal of skepticism has been expressed as to whether law school faculty are, themselves, ready, willing, or able to bring about the necessary reform in legal education—especially that involving tuition reduction. *See, e.g.*, Bronner, *supra* note 36. However, the author remains hopeful that some will prove the skeptics wrong.