

# Pepperdine Law Review

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Volume 40

Issue 2 *Symposium: The Lawyer of the Future:  
Exploring the Impact of Past and Present  
Lawyers and the Lessons They Provide for  
Future Generations*

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Article 7

2-26-2013

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William D. Henderson

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### Recommended Citation

William D. Henderson *A Blueprint for Change*, 40 Pepp. L. Rev. Iss. 2 (2013)

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# A Blueprint for Change

William D. Henderson\*

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## I. INTRODUCTION

United States legal education needs to change. Simply stated, there is a shrinking demand for the product we offer.<sup>1</sup> At the vast majority of American Bar Association (ABA)-accredited law schools, a large percentage of graduates are not obtaining full-time, permanent employment as practicing lawyers.<sup>2</sup> This situation is partially driven by lawyer overproduction—for the last several decades, the number of law schools and law students has steadily expanded.<sup>3</sup> At the same time, demand for

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1. Lincoln Caplan, Editorial, *An Existential Crisis for Law Schools*, N.Y. Times, July 15, 2012, at SR10, available at <http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html?smid=pl-share> (Lincoln Caplan, a member of the N.Y. Times Editorial Board who writes about legal affairs, stated that, “A huge number of new graduates, if lucky enough to find work, will not be employed in legal jobs that require passing the bar.”).

2. *Id.*

3. The number of ABA-accredited law schools has increased from 163 in 1975 to 201 in 2011. See *Enrollment and Degrees Awarded: 1963–2011 Academic Years*, A.B.A., [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf) (last visited Nov. 9, 2012). Based

traditional legal services has flattened and is now on the decline.<sup>4</sup> There are multiple reasons for shrinking demand, including legal process outsourcing, more efficient work processes and staffing methods, automation, and flat or declining real incomes of lower and middle class citizens.<sup>5</sup> Clients are also refusing to bear the training costs of junior-level lawyers—and with a plentitude of skilled senior lawyers who are unable or unwilling to retire, there is simply no need.<sup>6</sup> As discussed herein, these changes are structural rather than cyclical.<sup>7</sup> United States legal education exists in the present form only because of a system of federal student loans that is unsustainable, both financially and politically.<sup>8</sup>

This essay may look like a conventional law review article, but it is not. It is a strategy memo addressed to my fellow legal educators on how to respond to a profoundly serious business problem. The demand for our core product—traditionally educated law school graduates—is collapsing.<sup>9</sup> The legal market itself is undergoing a dramatic transformation.<sup>10</sup> On the most basic level, it is clear that law schools must become more attuned to legal employers—we need professional employment for our graduates to keep the doors open. Yet, legal employers are struggling to adapt to an environment in which clients are increasingly opting for technology and process-driven legal solutions that require less input from traditionally trained lawyers. Creating more “practice ready” graduates will help some law schools more effectively place their graduates in the finite—and likely shrinking—market for traditional entry level legal jobs. Yet, this strategy cannot work for all schools.

Stated bluntly, the legal profession is becoming a subset of a larger legal industry that is increasingly populated by nonlawyers, technologists, and entrepreneurs. Lawyers have a so-called monopoly on advocacy work

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on the fall 2010 1L enrollment of 52,488, the largest on record, the spring 2013 graduating class will likewise be a high water mark. *Id.*

4. *See infra* Part II.B.

5. *See infra* Part II.C.

6. *Id.* at 278; *see* William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373, 387 & n.55 (2011) [hereinafter Henderson, *Three Generations*] (“Clients are also refusing to pay for first-or second-year associates” (citation omitted)).

7. *See infra* Part II.B–C.

8. For background on the law school financing issue, including the economics and politics that caused the federal government to essentially take over the industry, *see* William D. Henderson & Rachel Zahorsky, *The Law School Bubble: How Long Will It Last if Law Grads Can't Pay Bills?*, A.B.A. J., Jan. 2012, at 30, 32, available at [http://www.abajournal.com/magazine/article/the\\_law\\_school\\_bubble\\_how\\_long\\_will\\_it\\_last\\_if\\_law\\_grads\\_cant\\_pay\\_bills/](http://www.abajournal.com/magazine/article/the_law_school_bubble_how_long_will_it_last_if_law_grads_cant_pay_bills/) [hereinafter Henderson & Zahorsky, *Law School Bubble*].

9. *Id.*

10. *Id.* at 35 (“The U.S. legal profession is in the midst of a broad structural transformation. Meeting the challenge to compete in a global economy requires a higher-education policy that honestly addresses issues of access, cost containment and national interest.”).

before a tribunal and client counseling on legal matters, but that is of little consolation. Virtually every other aspect of a legal problem can be broken down into its component parts, reengineered, streamlined, and turned into a legal input or legal product that is better, cheaper, and delivered much faster. For the next several decades, this will be the growth sector for legal jobs, although it is not preordained that these jobs will be filled by law graduates or even U.S. citizens. Further, this is the sector that holds the most promise of reducing the massive access to justice gap for the poor and middle class. We legal educators need to decide whether we want to be a significant part of this new and dynamic legal industry. If so, some of us need to retool.

This is a profoundly difficult period of transition for most U.S. law schools. Many law professors are bound to have a visceral, negative response toward curricular changes that will eat up our discretionary time and push us away from an established reward structure and toward new and unfamiliar subjects and teaching methods. We would prefer not to go on this journey. The enormous risk here is that we use our well-oiled intellects to resist unpleasant facts, such as the trend lines discussed in the body of this essay.<sup>11</sup> For many of us, the threat of our law school closing will feel remote, abstract, or beyond our own personal time horizons. Further, the greatest prerogative of tenure is autonomy. In our own minds, resistance to decisive leadership can be justified as something noble and principled. Yet, when making institutional decisions, as opposed to a closing courtroom argument, great lawyers and leaders do not try to bend or shape facts. Instead, they diligently collect all relevant facts and process them with ruthless objectivity.<sup>12</sup> Now is our time to do the same.

Fortunately, as I write this essay in the fall of 2012, a growing proportion of law professors want to have a focused dialogue on possible solutions. That is what I intend to offer here. I am offering one blueprint for change. There are others. But, beware. If other alternatives seem more attractive or less costly, they may be built upon flawed, unrealistic assumptions. Let me be crystal clear on one point: we are making business decisions designed to get our institutions to places of safety; we are *not* making pronouncements of our social, political, or aesthetic values. As a group, we have virtually no experience on the former, and entire academic careers have enabled us to focus on the latter. We have to be honest about our inexperience in making hard business decisions. Otherwise, we will not

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11. See *infra* Part II.B.

12. See JAMES C. FREUND, *LAWYERING: A REALISTIC APPROACH TO LEGAL PRACTICE* 127 (1979) (“[A] lawyer’s objectivity is his ‘most priceless asset’; when objectivity is sacrificed in an effort to please, the advice is useless.”).

obtain the desired results, such as a large volume of gainful professional employment for our graduates. For our institutions to survive, the math has to work.

We law professors make business decisions because we control hiring and curriculum, which are the core elements of any law school strategy. Many of the remaining business decisions are made by law deans, who cannot govern without law faculty support. For the last 100 years, we could make these business decisions without imperiling our financial viability.<sup>13</sup> The wind was at our backs due to the broader growth and prosperity of the U.S. legal profession and the rise of regulatory bodies that controlled the minimum requirements of market entry.<sup>14</sup> These fortuitous economic conditions enabled us to focus primarily on scholarship rather than innovation in curriculum or teaching.<sup>15</sup> Those days are rapidly coming to a close.<sup>16</sup> We now need to exercise true lawyerly judgment to make the right tradeoffs.

The body of this essay has two parts: a description of the problem (Part II), then a proposed solution (Part III). Part II presents evidence of a structural shift occurring in the U.S. legal profession—a structural shift that is actually gaining momentum rather than subsiding or leveling off.<sup>17</sup> It discusses the principles that a twenty-first century U.S. law school needs to follow in order to survive this shift. In brief, our students must obtain knowledge and skills that are more valuable than their cost of attendance. This is a market test passed or failed at the individual law school level. It requires *employers*—legal and, increasingly, nonlegal—to value the knowledge, skills, and abilities we develop over the course of three years.<sup>18</sup> Prospective students will then follow, aided by a new wave of rankings borne from the law school transparency movement.<sup>19</sup> There is also a political test: the federal government has to be satisfied with the rate of repayment of law student loans.<sup>20</sup>

Part III is about building a curriculum that can reliably and measurably transform motivated young people into the type of workers and problem-

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13. For a magisterial history of legal education through the full maturation of the traditional legal education, see ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983).

14. See generally William D. Henderson, *Three Generations*, *supra* note 6.

15. *Id.*

16. *Id.* at 387–89.

17. See *infra* Part II.B–C.

18. Note that I said “three years.” Changing the length of law school can certainly be put on the table. But that requires a regulatory change and a protracted political battle. Discussion of this “option” can quickly become an academic exercise; I have seen it happen dozens of times. If I am trying to help my own institution survive, I would be focusing my attention on internal matters that we control.

19. See *infra* Part II.B.

20. See *infra* text accompanying notes 82–92.

solvers that are in perennial short supply.<sup>21</sup> Legal education has become too expensive in time and money for anyone to accept the proposition that law school quality is primarily a function of the test scores of the students we admit.<sup>22</sup> To justify our current price tag, a law degree needs to be a transformative educational experience that confers personal and professional benefits to students and positive external benefits to society in the form of more capable leaders and problem solvers. To achieve this high bar, we need to identify and articulate the knowledge, the skills, and the competencies that we want to impart, and develop new systems to measure and benchmark our progress.

I refer to this approach as a competency-based curriculum. It contains five touchstone elements: (1) it identifies examples of professional excellence in both the new and old legal economies, (2) breaks them into discrete domains of knowledge, skills, and behaviors, identifying both overlaps and distinctive feature of specific practice areas, (3) uses an iterative process of theory and data to determine the best way to sequence and teach these competencies, (4) measures the performance of the program as a whole against a baseline (i.e., how well do graduates of this type of program do vis-à-vis graduates of a traditional unstructured J.D. program), and (5) continuously improves the educational process through feedback loops. Further, for reasons specified in Part III, I believe this agenda can only be carried out effectively by a consortium of law schools.

Although this new orientation is a change management problem,<sup>23</sup> not everything needs to change. I maintain that a portion of us needs to retool (12% to 20%), another portion needs to serve our institutions by doubling

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21. This is true in the new economy. See Matthew Bishop, *The Great Mismatch*, THE ECONOMIST, Sept. 10, 2011, available at <http://www.economist.com/node/21528433> (reporting evidence from the U.S. and abroad that, despite chronically high unemployment rates, skilled and talented workers remain in short supply), as well as the traditional legal market, see Tom Hentoff, *The Secrets of Superstar Associates*, 32 LITIG. J., no. 3, Spring 2006 at 24, 24 (noting that according to partners, high quality associates are in “agonizingly short supply”).

22. Stephen P. Klein, Ph.D. & Laura Hamilton, Ph.D., *The Validity of the U.S. News and World Report Ranking of ABA Law Schools*, ASSOC. OF AM. LAW SCHS. (Feb. 18, 1998), <http://www.aals.org/reports/validity.html> (“[T]he student selectivity factor explained about 90% of the differences in overall ranks among schools (i.e., percent of total variance). Since LSAT is the major driver of student selectivity (and is highly correlated with UGPA), ranking schools on LSAT alone will do a very good job of replicating the overall ranks US News publishes.”).

23. Any law school attempting to turn this corner needs to learn and implement the basic principles of change management. See John P. Kotter, *Leading Change: Why Transformation Efforts Fail*, HARV. BUS. REV., Jan. 2007, at 96 (articulating and explaining Kotter’s renowned eight principles of organizational change); see also Fred Nickols, *Change Management 101: A Primer*, DISTANCE CONSULTING LLC, <http://www.nickols.us/change.htm> (last updated Aug. 23, 2012) (an accessible overview by a leading consultant on change management).

down on what they do well (50% to 60%), and a third group needs to agree not to obstruct—or alternatively, to move on.

## II. STRUCTURAL CHANGE AND LAW SCHOOLS

Over the last few years, I have given dozens of talks at law schools, law firms, bar associations, and various industry groups on the topic of structural change affecting practicing lawyers and legal education. These presentations walk the audience through several decades of data. People tell me that the topic is scary and depressing. I believe them. I have seen the reactions on people's faces and felt the emotion and tension that builds in the room. Nonetheless, we need to deal with these trends to make good decisions that affect our organizations and institutions. Some readers may need no further convincing. They can skip to Part III, which offers at least one plan for change.<sup>24</sup> Alternatively, if you need facts and figures to convince yourself, or to bring along your colleagues, some of the requisite data are discussed below.

Section A articulates the principles of law school viability.<sup>25</sup> I begin with these core financial principles because they need to be in the forefront of our minds when we begin Section B, which presents data on the imbalance between the availability of traditional law service jobs (too few) and the number of law school graduates (too many).<sup>26</sup> Section C presents data on a rapidly growing sector of the legal industry that focuses not on legal *services*, but rather legal *inputs* and legal *products*.<sup>27</sup> Law schools and most practicing lawyers know little or nothing about this nascent sector—a sector that is contributing to the decline in jobs and earning power of our graduates; this is a knowledge gap that needs to be filled as quickly and completely as possible.

### A. *First Principles of Law School Viability*

The financial viability of law schools depends upon three interrelated factors:

- (1) A law school needs prospective students willing to enroll (“students”).
- (2) A reliable way to finance the students’ desire to enroll (“ability to pay”).

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24. *See infra* Part III.C.

25. *See infra* Part II.A.

26. *See infra* Part II.B.

27. *See infra* Part II.C.

- (3) Upon graduation, students enjoy enhanced employment prospects and earning power (“professional employment”).

Among these three factors, the third is the most important: high quality professional employment. Like water running downhill, the jobs attract prospective students; and the reliable earning power of those jobs attracts a method of finance. Without jobs for its graduates, any law school enterprise will eventually fail. The students and financiers will wise up and abandon the school and its faculty.

A focus on business factors is new for us. For the past two decades, the market for legal education has been seemingly defined by a rankings competition.<sup>28</sup> We focused on rankings, or lamented their inaccuracies and limitations, because virtually no law school was feeling pressure on the three factors that make a law school financially viable. Now that the entry level legal market has hit hard times,<sup>29</sup> applicants are in much shorter supply.<sup>30</sup>

Yet, rankings are not irrelevant to our analysis. Rather, they raise short-term strategy questions with no easy answers. Lower rankings affect applicant volume.<sup>31</sup> Thus, if a law school attempts to enroll the same size entering class as prior years, and its peers cut their enrollment, it may drop

28. See, e.g., Rachel F. Moran, *Of Rankings and Regulation: Are the U.S. News & World Report Rankings Really a Subversive Force in Legal Education?*, 81 IND. L.J. 383, 383 (2006) (discussing symposium on rankings in which rankings were referred to as “the 800-pound gorilla of legal education”).

29. See Karen Sloan, *A Dismal Job Market for Law Grads Got Even Worse for Class of 2011*, NAT’L L.J. (June 7, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202558291685&slret urn=20120820004951#> (reporting that “not quite 66 percent of the recent graduates were in jobs that require bar membership—down by 9 percent since 2008” and that “12 percent of the class of 2011 had part-time jobs nine months after graduating, when 5 percent was the norm during flusher times”).

30. See Debra Cassens Weiss, *Law School Applications for Fall 2012 Drop More than 15 Percent*, A.B.A. J. (Jan. 20, 2012, 10:19 AM), [http://www.abajournal.com/news/article/law\\_school\\_applications\\_for\\_fall\\_2012\\_drop\\_more\\_than\\_15\\_percent/](http://www.abajournal.com/news/article/law_school_applications_for_fall_2012_drop_more_than_15_percent/). According to data published on the LSAC website, registrations for the Credentials Assembly Service (CAS), formerly known as LSDAS, has declined from 94,200 for the 2002–2003 admission season to 62,000 in 2011–2012. See *LSAC Volume Summary*, LSAC.ORG, <http://www.lsac.org/LSACResources/Data/PDFs/LSAC-volume-summary.pdf> (last visited Nov. 10, 2012) (published data in LSAC Resources Data). During this same period, first year enrollment with the ABA has been nearly identical (48,400 in the fall of 2002 and 48,700 in fall of 2011). See *LSAC Volume Summary*, *supra*.

31. See Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 LAW & SOC’Y REV. 105, 122–25 (2006) (using regression analysis to show that changes in rankings are closely associated with the volume of applications to law schools, especially among high-LSAT candidates, thus affecting school selectivity—another rankings input—and ultimately influencing the size and direction of any subsequent changes in the U.S. News rankings).



in the rankings.<sup>32</sup> This may set in motion a downward spiral that creates stiffer headwinds in the future. Yet, the alternatives are fraught with peril. A school could hang on to its LSAT-UGPA input numbers by cutting enrollment<sup>33</sup> or handing out lavish scholarships,<sup>34</sup> but this is expensive and unsustainable. If applicant volume stays low or further declines, there will have to be a day of financial reckoning in which layoffs and closure are put squarely on the table.

In the current environment, there is enormous risk that law schools will focus on the short term issues of enrollment, rankings management, and tightened budgets.<sup>35</sup> Yet, if we take that tact, we will not invest in a longer term strategy for cultivating more employment opportunities for graduates. As a result, the law school never gets to safer ground.

There are at least three reasons why a law school should muster the energy and fortitude to simultaneously formulate and execute a long term strategy focused on high quality professional employment:

- (1) *Market share.* In an era of dwindling or flat law school applicants, the schools with pipelines to jobs will take market share in terms of applicants.<sup>36</sup> And schools will need that market share to stay open. My school or your school doesn't have to outrun the bear, just the other law schools. I am not stating my preferences here. My preferences, and the readers', are irrelevant. I am stating the competitive dynamics that apply to a flat or contracting industry.
- (2) *No place to hide.* We are living in era of heightened transparency. As of 2012, granular law school-level outcome data will be posted annually on the ABA website.<sup>37</sup> These data, supplemented with

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32. See *id.* at 125–129.

33. See 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> (reporting that at least ten schools have publicly announced smaller entering classes).

34. See Karen Sloan, *It's a Buyers' Market at Law School*, NAT'L L.J. (June 25, 2012), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202560485444&Its\\_a\\_buyers\\_market\\_at\\_law\\_school\\_slreturn=20120901180223](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202560485444&Its_a_buyers_market_at_law_school_slreturn=20120901180223) (reporting that some law schools are “sweetening their scholarship packages” to lock in desirable prospective students).

35. See *Recent Law School News Focuses on Rankings*, U.S. NEWS & WORLD REPORT (July 5, 2012), <http://www.usnews.com/education/blogs/college-rankings-blog/2012/07/05/recent-law-school-news-focuses-on-rankings> (“According to Kaplan’s report based on a June 2012 survey of Kaplan Test Prep’s LSAT students: ‘When asked, ‘What is most important to you when picking a law school to apply to?’ [32% cited a law school’s ranking . . . .]”).

36. See *id.* (indicating that “U.S. News urges law school applicants not to heavily rely on the rankings as the basis for where to apply . . . [and] to strongly consider cost, location, course offerings, and job prospects.”).

37. See *Class of 2011 Legal Employment and Underemployment Numbers Are in, and Far Worse than Expected*, LAW SCHOOL TRANSPARENCY (June 15, 2012), <http://www.lawschooltransparency.com/2012/06/class-of-2011-legal-employment-and->

other information, will be used by entrepreneurs to create benchmarks that will essentially test whether a school under- or over-performs on its *U.S. News* ranking in terms of employment and other measures.<sup>38</sup> With information costs near zero, prospective students will bargain hard over scholarship aid; thereafter, they will vote with their feet. This is the mechanism by which schools will gain and lose market share.

- (3) *Federal loans contingent on employment outcomes.* Since the passage of federal legislation in 2010, the Department of Education has become the banker to law schools and all of higher education.<sup>39</sup> Law students are financed under the same generous terms given to doctors and dentists,<sup>40</sup> yet their economic fates are diverging from their doctor and dentist counterparts.<sup>41</sup> For the last few years, student indebtedness has gone up<sup>42</sup> and entry level lawyer salaries have gone down.<sup>43</sup> If law students have significantly lower

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underemployment-numbers-are-in-and-far-worse-than-expected/ (detailing the employment outcomes published by the ABA for the class of 2011).

38. I know these entrepreneurs. There is money to be made here while at the same time believing that you are helping prospective students. Law schools have long wanted to get rid of the *U.S. News & World Report* rankings. New entrants will not necessarily make life easier for law schools.

39. See Peter Baker & David M. Herszenhorn, *Obama Signs Overhaul of Student Loan Program*, N.Y. TIMES, Mar. 31, 2010, at A14, available at [http://www.nytimes.com/2010/03/31/us/politics/31obama.html?\\_r=0](http://www.nytimes.com/2010/03/31/us/politics/31obama.html?_r=0) (reporting on federal legislation that eliminates role for private banks in federally subsidized student loans); see also Henderson & Zahorsky, *Law School Bubble*, *supra* note 8 (discussing history leading up to change in federal law and discussing current and future implications).

40. At present, any student admitted into an ABA-accredited law school who has not defaulted on federal student loans is eligible for Direct Plus loans originated from the U.S. Department of Education up to “the cost of attendance (determined by the school) minus any other financial assistance received,” as set forth by the U.S. Department of Education for professional school education. See information on “How much can I borrow?” located on *Plus Loans*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/types/loans/plus#how-much-can-i> (last visited Nov. 10, 2012).

41. See Matt Leichter, *At Last, a Rational Explanation for Why Law School Tuition Keeps Rising*, AM. L. DAILY (Mar. 1, 2012, 7:01 PM), <http://amlawdaily.typepad.com/amlawdaily/2012/03/at-last-a-rational-explanation-for-why-law-school-tuition-keeps-rising.html> (comparing Department of Labor employment statistics and projections for lawyers, dentists, and doctors and noting that market is projected to be substantially weaker for lawyers).

42. See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS 109–10* (2012) (reporting that average law school debt has climbed from approximately \$16,000 in the mid-1980s to \$47,000 in 1999 and to \$98,500 for the class of 2010).

43. See Karen Sloan, *Starting Salaries Continue Slide as Big Firm Opportunities Dry Up*, NAT’L L.J. (July 12, 2012), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202562736465&Starting\\_salaries\\_contine\\_slide\\_as\\_big\\_frim\\_opportunties\\_dry\\_up\\_](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202562736465&Starting_salaries_contine_slide_as_big_frim_opportunties_dry_up_) (reporting on NALP data

repayment rates than their professional counterparts (due to a much higher reliance on income-based repayment programs),<sup>44</sup> the Department of Education, or even Congress, is bound to ask whether it should continue writing such large checks to law schools. The logical policy adjustment—already in place for for-profit colleges<sup>45</sup>—is to make eligibility for federal loans contingent upon a minimum threshold of graduate employment and repayment.

If a law school is performing well on professional employment for its graduates, the threats of insufficient quality students and inadequate financing mechanisms will largely fall away, or be less severe than for competitors. This is why a law school, acute as the short term problems might be, needs to build an infrastructure to deliver long-term employment outcomes. But before we can better prepare students for a changing legal marketplace, we need to understand for ourselves how legal work is changing.<sup>46</sup> If we are indulging false assumptions about the marketplace, we are likely to execute a plan that is headed in the exact wrong direction.

#### *B. The Decline of Traditional Legal Service Jobs*

As a general matter, the economic engine of law schools has been lawyers working in private practice. As shown in Figure 1 below, during the first half of the twentieth century, the overwhelming majority of law school graduates worked in this sector. Further, the vast majority worked as solo practitioners or as individual lawyers in office-sharing arrangements. According to a national census of lawyers drawn from the Martindale-Hubbell directory (estimated to be 90% complete), there were 171,110 lawyers working in the United States in 1948.<sup>47</sup> Among the roughly 152,600 working in private practice, 66.2% were identified as solo practitioners.<sup>48</sup> Within law firms, roughly 40,500 were classified as partners, with the remaining 7,500 positions composed of associates—a mere 4.7% of the private practice bar.<sup>49</sup> According to statistics compiled in 1947 by the U.S.

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showing that the “median starting salary has dropped by 17 percent since 2009 . . . and the average salary has decreased by 16 percent,” largely due to the collapse of large law firm hiring).

44. See generally *Income-Based Plan*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/repay-loans/understand/plans/income-based> (last visited Oct. 1, 2012).

45. See Kimberly Railey, *Why Some For-Profit Colleges Could Lose Eligibility for Federal Aid*, CHRISTIAN SCI. MONITOR (Jun. 27, 2012), <http://www.csmonitor.com/USA/Education/2012/0627/Why-some-for-profit-colleges-could-lose-eligibility-for-federal-aid> (discussing implementation of new “gainful employment” rules for vocational centers run by for-profit colleges).

46. See *infra* Part II.C.

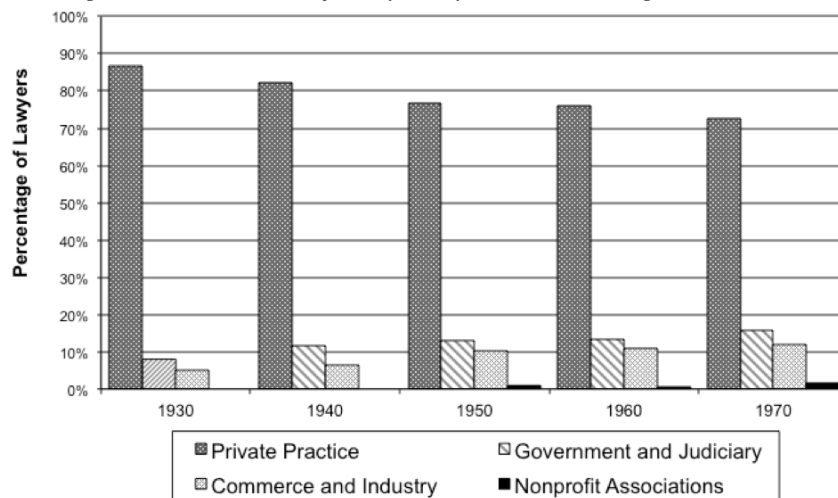
47. See Albert P. Blaustein, *The 1949 Lawyer Count: A Preliminary Statement*, 36 A.B.A. J. 370, 371–72 (1950).

48. *Id.* at 372.

49. *Id.*

Department of Commerce, the average law firm had an average of 1.64 members.<sup>50</sup>

Figure 1. Breakdown of Lawyers by Practice Setting, 1930 to 1970



**Data Source:** See RICHARD ABEL, *AMERICAN LAWYERS* 299 tbl.37b (1989)

With such a large proportion of the bar working as solo practitioners,<sup>51</sup> there was little expectation that law schools were responsible for finding paid employment for their graduates.<sup>52</sup> A 1950 survey of lawyers in private practice inquired about the most important sources of help in finding employment or making a start in practice.<sup>53</sup> Nearly 80% reported personal contacts followed by 47% from personal efforts.<sup>54</sup> Only 10% of lawyers reported law school placement offices as an important source of opportunities, albeit only twelve of 102 surveyed law schools had established a separate office for this function<sup>55</sup>—an enormously different world than legal education in the year 2012.

In the intervening sixty years, the expectations of law school graduates have changed substantially. As the economy has become more complex,

50. See William Weinfeld, *Income of Lawyers, 1929–48*, 29 SUR. OF CURRENT BUS., Aug. 1949, at 18, 21.

51. See Blaustein, *supra* note 47, at 372.

52. See Weinfeld, *supra* note 50, at 19, 23–24.

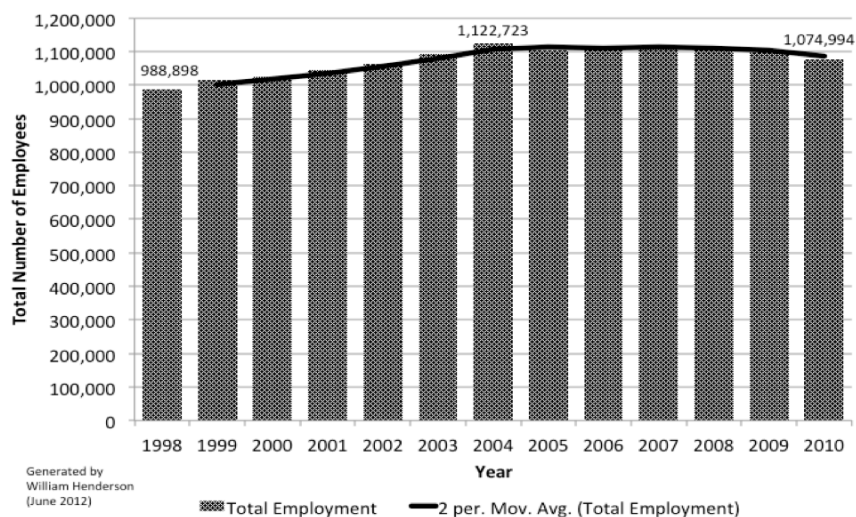
53. See Louis A. Toepfer, *Placement in the Legal Profession: A Responsibility of the Organized Bar*, 37 A.B.A. J. 497, 498 (1951).

54. See *id.* (“Organized placement activity seems to be a fairly recent development.”).

55. See *id.* at 499.

interconnected, and regulated, there has been a massive surge in paid employment for lawyers.<sup>56</sup> Over the last three decades, lawyers working for organizational clients, either as in-house attorneys or outside counsel, have prospered the most.<sup>57</sup> The primary driver of this prosperity has been a relative shortage of sophisticated and highly specialized lawyers—a shortage that has been cured by the rise of the large law firm.<sup>58</sup>

Figure 2. Total Law Office Employment, 1998 to 2010



**Data Source:** *County Business Patterns (1988–2010)*, U.S. CENSUS BUREAU<sup>59</sup>

At the same time the number of technically sophisticated lawyers has proliferated, industry data suggest that the total number of jobs in private

56. See, e.g., *Salary Trends—A 13-Year Overview*, NALP.ORG (Sept. 2003), <http://www.nalp.org/2003sepsalarytrends> (showing an 80% rise in median starting salaries for lawyers between 1990 and 2002).

57. The financial fortunes of the lawyers serving organizational clients are magnificently chronicled in the Chicago Lawyers I and II studies. See generally JOHN P. HEINZ & EDWARD LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (rev. ed. 1994) (Chicago Lawyers I); JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 99 (2005) (Chicago Lawyers II) (reporting that between 1975 and 1995 large law firms were the “clear winner[s] in the market for legal services”).

58. See Henderson, *Three Generations*, *supra* note 6, at 380 (“As the size of the corporate bar has expanded over the last several decades, the total volume of technically sophisticated lawyers (specialists) is at an all-time high.” (citing William D. Henderson & Leonard Bierman, *An Empirical Analysis of Lateral Lawyer Trends from 2000 to 2007: The Emerging Equilibrium for Corporate Law Firms*, 22 GEO. J. LEGAL ETHICS 1395, 1396 (2009) (describing an increase in the number of partners and associates in large law firms over the past three decades))).

59. Generated by William Henderson, based upon data from U.S. CENSUS BUREAU.

law practice has plateaued and may now be on the decline.<sup>60</sup> As shown in Figure 2, which is drawn from the U.S. Census Bureau County Business Patterns dataset, the high-water mark for law office employment was 2004—nearly nine years ago.<sup>61</sup> As of 2010, total employee head count in U.S. law offices has contracted by over 47,000 employees.<sup>62</sup>

Recent data published by the National Association for Law Placement (NALP) reveal long-term trend lines that are profoundly troubling for entry-level lawyers and thus, by extension, for law schools.<sup>63</sup> As shown in Figure 3, the proportion of new graduate jobs in private practices has been on a downward slide since the late 1980s. This pattern, however, is not necessarily attributable to a corresponding shrinkage in the entry-level market. Rather, it is likely due, at least in part, to a surge in supply.<sup>64</sup> As shown in Figure 4, during the same twenty-five-plus year time frame, the number of ABA-approved law schools has increased from 175 to 201 (14.8%) and the number of graduates has risen from 41,000 to 49,000 (19.5%).<sup>65</sup> With the supply of entry level law school graduates outstripping demand, entry-level salaries have declined precipitously. For the class of 2010, the adjusted mean salary for a law school graduate was \$77,333, a 9% decline from the 2009 high-water mark of \$84,952.<sup>66</sup> For the class of 2011, the market tumbled another 4% to an adjusted mean salary of \$73,984.<sup>67</sup>

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60. See generally *County Business Patterns (1998–2010)*, U.S. CENSUS BUREAU, available at <http://censtats.census.gov/cgi-bin/cbpnaic/cbpsect.pl>.

61. See *supra* Figure 2.

62. The County Business Pattern dataset includes payroll and head count data for both lawyer and nonlawyer employees, but the trend lines are likely the worst for lawyers. Other data from the Bureau of Labor Statistics suggest that lawyer jobs are trailing both paralegals and legal assistants. See U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK (2012), available at <http://www.bls.gov/ooh/legal/home.htm>.

63. See *Class of 2011 Has Lowest Employment Rate Since Class of 1994*, NALP.ORG (July 2012), <http://www.nalp.org/0712research>.

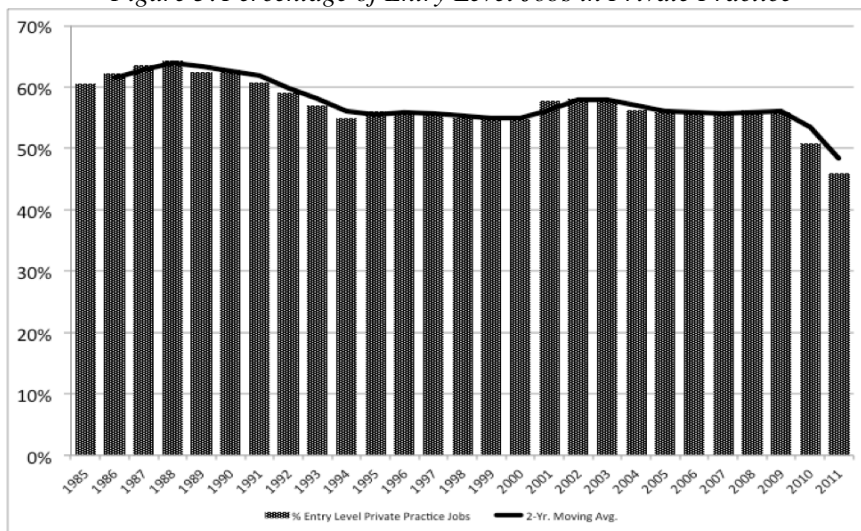
64. *Enrollment and Degrees Awarded*, AMERICANBAR.ORG, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf) (last visited Oct. 1, 2012).

65. See *id.*

66. See *Starting Salaries Re-Examined: A Critical Look at Averages*, NALP.ORG (Oct. 2010), <http://www.nalp.org/oct2010adjustedsalmean> (explaining the importance of using adjusted mean salary data, which statistically corrects for the low response rate among graduates in lower paying jobs; reporting adjusted means for every other year from 1999 to 2009); see also *Salary Distribution Curve*, NALP.ORG, [www.nalp.org/salarydistrib](http://www.nalp.org/salarydistrib) (last visited Nov. 11, 2012) (showing in chart format the adjusted means for the classes of 2010 and 2011).

67. See *Salary Distribution Curve*, *supra* note 66.

Figure 3. Percentage of Entry Level Jobs in Private Practice



Data Source: Class of 2011 Has Lowest Employment Rate Since Class of 1994, NALP.ORG (July 2012)<sup>68</sup>

Figure 4. Incoming 1L Classes ABA-Accredited Law Schools

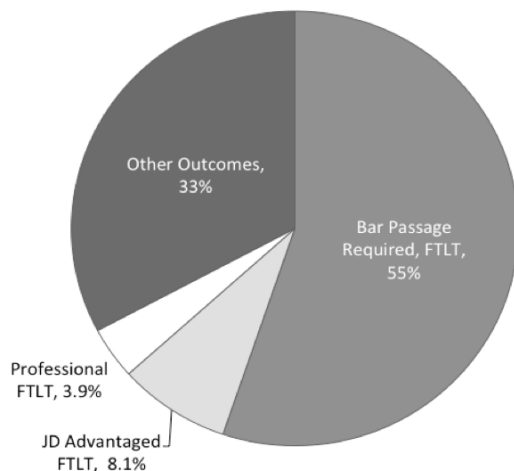


Data Source: ABA Section on Legal Education and Admission to the Bar<sup>69</sup>

68. See Class of 2011 Has Lowest Employment Rate Since Class of 1994, *supra* note 63.

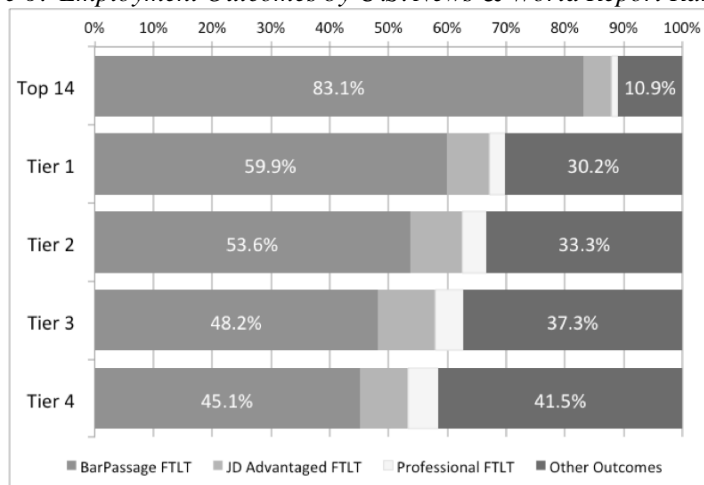
69. See Enrollment and Degrees Awarded, *supra* note 64.

*Figure 5. Employment Outcomes for the Class of 2011*



**Data Source:** ABA Section on Legal Education and Admission to the Bar<sup>70</sup>

*Figure 6. Employment Outcomes by U.S. News & World Report Rankings*



**Data Source:** ABA Section on Legal Education and Admission to the Bar  
Calculated by William D. Henderson (June 2012).

70. See *Employment Summary Report*, AM. BAR ASSOC. SEC. OF LEGAL EDUC., <http://employmentsummary.abaquestionnaire.org/> (select class "2011" under "Compilation All-Schools Data" section; then click on "Download Complete Employment Data") (last visited Nov. 11, 2012).



As a result of the numerous lawsuits against law schools, the ABA Section of Legal Education and Admission to the Bar has finally adopted disclosure standards for law schools that make it virtually impossible to conceal bad employment outcomes.<sup>71</sup> Each employment outcome is broken down by sector (private practice, government, business, public interest, unknown), whether bar passage is required, and whether the employment is full-time versus part-time, or short-term versus long-term.<sup>72</sup> These data are now published in spreadsheet format and available for download on the ABA's website.<sup>73</sup>

The outcomes for the class of 2011 are bleak. As shown in Figure 5, only 55% of law graduates obtained full-time, long-term (FTLT) bar passage-required employment nine months following graduation. Another 12% found professional full-time, long-term professional employment in jobs that do not require bar passage or even a J.D.<sup>74</sup> Not surprisingly, these jobs generally pay lower salaries than bar passage-required jobs.<sup>75</sup> The vast majority of the remaining one-third of graduates are either unemployed or underemployed.<sup>76</sup> Remarkably, these numbers are probably optimistic. Four hundred seventy-six members of the class of 2011 (over 1%) were hired into FTLT jobs that were funded by their graduating law schools.<sup>77</sup> Fifty-six percent of these jobs were provided by law schools in the top fourteen according to *U.S. News & World Report* rankings—i.e., wealthy, elite national law schools. Eight law schools account for 72% (342) of all the FTLT school-funded jobs, and all are top twenty-five law schools.<sup>78</sup> All of this information, on a school by school basis, is now fully disclosed.<sup>79</sup>

Although the elite national law schools are clearly faring better than their non-elite counterparts, the breakdown in Figure 6 makes clear that the employment issues are largely systemic to all of legal education.<sup>80</sup> Outside of the elite national law schools, between 30% and 42% of law graduates are

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71. See 2012–2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standards Nos. 508–510 (2012), available at [http://www.americanbar.org/groups/legal\\_education/resources/standards.html](http://www.americanbar.org/groups/legal_education/resources/standards.html).

72. See *Employment Summary Report*, supra note 70.

73. See *id.*

74. See supra Figure 5.

75. See *Class of 2011 National Summary Report*, NALP.ORG (July 2012), [www.nalp.org/uploads/NatlSummChart\\_Classof2011.pdf](http://www.nalp.org/uploads/NatlSummChart_Classof2011.pdf) (reporting average salary of \$81,050 for Bar Passage Required versus \$63,995 for J.D. Advantage and \$66,547 for Other Professional).

76. See *id.*

77. See supra Figure 5.

78. See supra Figure 5.

79. Readers can look at the names of the law schools themselves. I am not calling them out. There is no moral high ground here.

80. See supra Figure 6.

failing to obtain permanent employment following graduation.<sup>81</sup> In short, this is an industry-wide crisis.

I use the word “crisis” with some trepidation. Unfortunately, the word fits. As chronicled by Brian Tamanaha in his important book, *Failing Law Schools*, the collapse in both jobs and earning power of law school graduates coincides with a relentless increase in student debt.<sup>82</sup> Average law school debt has more than doubled between 1999 and 2010, rising from \$47,000 to \$98,500.<sup>83</sup> When the average undergraduate debt is factored in (over \$25,000 per student borrower), the total educational burden for the *average* borrower rises to nearly \$125,000.<sup>84</sup> Further, many law schools have average debt loads much higher than the overall average.<sup>85</sup> And within most law schools, there are students with \$150,000 to \$300,000 of total educational debt.<sup>86</sup>

As Professor Tamanaha ably demonstrates, in the current job market, many if not most law graduates have very little prospect of even keeping up with, much less paying off, their educational debt.<sup>87</sup> Eventually, a substantial portion of these educational funds will be written off through either uncollectable student defaults or loan forgiveness through the Federal Government Income-Based Repayment (IBR) or Public Service Programs.<sup>88</sup> These two programs effectively cap repayment obligations according to a formula based on a borrower’s income; they also waive any payment at all if a borrower falls below a minimum income threshold.<sup>89</sup> Yet, when borrowers are unable to keep up with their interest payments, total indebtedness grows through a process called “negative amortization.”<sup>90</sup> Thus, the law school

81. See *supra* Figure 6.

82. See TAMANAHA, *supra* note 42, at 101–25.

83. See *id.* at 109–10.

84. See *id.* at 109–11.

85. See *id.* at 110–11 (reporting twenty-two law schools with the highest law school debt loads, ranging from \$123,025 to \$145,621).

86. See 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, 1200 (2012) (noting that, “Law student debt varies widely. . . . [P]rivate law school[] . . . graduates routinely incur \$100,000 or more in law school debt alone.”).

87. See TAMANAHA, *supra* note 42, at 107–25.

88. See *id.* at 124.

89. The formula is “15 percent of the difference between your AGI [adjusted gross income] and 150 percent of the Department of Health and Human Services Poverty Guideline for your family size and state.” See *Income-Based Repayment Plan for the Direct Loan and FFEL Programs*, FEDERAL STUDENT AID, available at <http://studentaid.ed.gov/sites/default/files/income-based-repayment.pdf> (last visited Nov. 11, 2012).

90. See Letter from Professor Deborah Jones Merritt, Moritz College of Law, The Ohio State University, to Dean John F. O’Brien, Chair, Council and Accreditation Committee, ABA Section of

graduates who have failed to receive a boost in income have the potential—and for many, the likelihood—of being dogged by their law school debt for decades. This creates a highly volatile political and economic issue that will likely grow over time.

When the federal government is experiencing lower levels of repayment for law school graduates,<sup>91</sup> and the graduates themselves are complaining about the terms of the loans, what is the likelihood that the federal government will continue to issue a blank check to U.S. law schools? The federal government's lending for legal education is premised on the belief that a law degree enhances a recipient's human capital, and surely that is true. But at what cost? At today's tuition rates and levels of student indebtedness, it is possible that for many students the value of a law degree is not worth the cost.<sup>92</sup> Let me summarize so that I am not misinterpreted: Our current legal education is likely to enhance the human capital of our students, but in the emerging economic environment, the benefits of that education are insufficient to pay back its cost. We may believe that our own institutions offer a very good legal education. But, that is not the issue here. The issue is whether the education we offer is able to adapt to the rapidly changing legal industry.

The value of the law degree is cast into doubt by two factors. First, the traditional engine of law school economics—lawyers working in private practice—has plateaued.<sup>93</sup> Second, the number of law schools has proliferated and continues to churn out near record numbers of law graduates. Even with the benefit of generous federal financing—an assumption that may not hold—law schools will continue to experience uncomfortable levels of competition trying to fill their seats, and, in turn, will have difficulty finding their graduates meaningful professional employment. This pressure will produce higher levels of both failure and innovation.

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Legal Education and Admission to the Bar 2 (Nov. 14, 2011), *available at* [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/20111116\\_comment\\_general\\_s510\\_deborah\\_merritt.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/20111116_comment_general_s510_deborah_merritt.authcheckdam.pdf) (discussing the “negative amortization” as one of the consequences of the current system of higher tuition and student debt combined with stagnant incomes).

91. *Id.* at 124.

92. Several recent articles explore this question. *See, e.g.,* Chen, *supra* note 86, at 1201–04 (calculating out the income needed by a law student to capably handle various levels of educational debt and concluding that comfortable levels of debt and current tuition rates require incomes of \$96,000 to \$288,000 per year); *see also* Herwig Schlunk, *Mamas 2011: Is a Law Degree a Good Investment Today?* 19–20 (Vand. L. & Econ., Working Paper No. 11-42, 2011), *available at* <http://ssrn.com/abstract=1957139> (calculating, after factoring in opportunity costs based on undergraduate prospects, that law school in the current economic climate is a bad economic investment for over two-thirds of law graduates).

93. *See* Nathan Koppel, *Bar Raised for Law-Grad Jobs*, WALL ST. J. (May 5, 2010), <http://online.wsj.com/article/SB10001424052748704866204575224350917718446.html>.

C. *Susskind's World: The Rise of Legal Inputs and Legal Products*

Things are getting tougher for law schools because we train our graduates for the legal *services* market. Yet, the legal services market is gradually being upended by new entrants who are offering legal *inputs* and legal *products* to law firms, legal departments, and average citizens.<sup>94</sup> The principal attraction behind a legal input or a legal product is very simple: technology or a better-designed process is reducing the need for expensive, artisan-trained lawyers.<sup>95</sup> In many cases, by removing the lawyer from the value chain, cost goes down, quality goes up, and service delivery time becomes faster.<sup>96</sup>

This is a paradigm shift. The best commentator on this shift is Richard Susskind, the British lawyer, technology expert, and futurist.<sup>97</sup> In his 2008 book, *The End of Lawyers?*,<sup>98</sup> Susskind introduced a framework, shown in Figure 7, that describes the evolution of the legal industry.<sup>99</sup> Along a continuum that moves left to right, Susskind asserts that legal work is gradually migrating from bespoke (e.g., court room practice), to standardized (e.g., form documents for a merger), to systematized (e.g., a document-assembly system for estate planning), to packaged (e.g., a turn-key regulatory compliance program), to commoditized (e.g., any IT-based legal product that is undifferentiated in a market with many competitors).<sup>100</sup> These changes are made possible by identifying recursive patterns in legal

94. See RICHARD SUSSKIND, *THE END OF LAWYERS?* 9–10 (2010) [hereinafter SUSSKIND, *THE END OF LAWYERS?*].

95. *Id.* at 11.

96. *Id.*

97. Susskind has a strong track record predicting the future of the legal profession. In 1996, Susskind predicted that lawyers and their clients would soon communicate by e-mail. Senior officials at the Law Society urged that Susskind not be allowed to speak in public because “the feeling was that I had failed to understand confidentiality and was bringing the profession into disrepute.” See Richard Susskind, *Does the Law Society Know that There’s an Internet Generation*, *TIMESONLINE* (London) (May 13, 2010), <http://www.thetimes.co.uk/tto/law/article2509518.ece>.

98. See SUSSKIND, *THE END OF LAWYERS?*, *supra* note 94.

99. *Id.* at 29. At the time of publication, I learned that Richard Susskind's new book, *TOMORROW'S LAWYERS* (Oxford 2013) would be released within the month. Richard was kind enough to share a pre-publication manuscript. It is lucid account of a revolution that is well underway. The first two paragraphs read:

This is book is a short introduction to the future for young and aspiring lawyers.

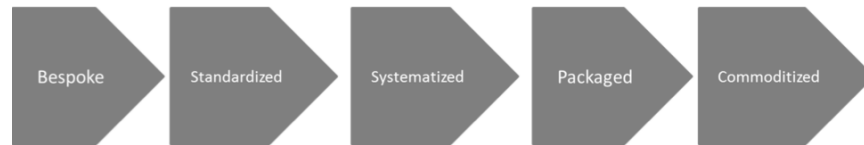
Tomorrow's legal world, as predicted and described here, bears little resemblance to that of the past. Legal institutions and lawyers are at a crossroads, I claim, and are poised to change more radically over the next two decades than they have over the last two centuries. If you are a young lawyer, this revolution will happen on your watch.

RICHARD SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (forthcoming 2013).

100. See *id.* at 28–33.

forms and judicial opinions, which enables the use of process and technology to routinize and scale very cheap and very high quality solutions to the myriad of legal needs.<sup>101</sup>

Figure 7. Richard Susskind's Evolution of Legal Industry<sup>102</sup>



Lawyers, of course, are quite frightened by the paradigm shift. So, according to Susskind, their natural reaction is double-down on the “bespoke” work and claim that this artisan craft is a specialty.<sup>103</sup> One problem with this reaction is that it is shared universally by nearly all lawyers.<sup>104</sup> Clients do not want to pay a lot of money for their legal solution; thus, they are leading the relentless “pull to the right.”<sup>105</sup> More significantly, there is more money outside of the shrinking quantity of bespoke legal work.<sup>106</sup> As Susskind points out, the greatest profit-making opportunities are lodged between the systemized and packaged parts of the continuum.<sup>107</sup> If an organization can continuously innovate and create systematized or packaged solutions to legal issues and problems that can be sold over and over again to a large base of clients, the organization can enjoy the prospect of “making money while you sleep.”<sup>108</sup>

When I first heard Richard Susskind speak in 2009 (shortly after the publication of his book) and then subsequently read his book, I found his model intellectually coherent and, at a theoretical level, highly cogent. But on a practical level, the ideas seemed abstract. Who were these new legal entrepreneurs? And what were the products and services they are offering? I am an academic, so I was content that I found an interesting intellectual puzzle. And that was it.

Susskind’s model became less abstract during the summer of 2010 when I examined data from the U.S. Census Bureau County Business Patterns

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101. *Id.* at 6.

102. *Id.* at 29.

103. *Id.* at 34.

104. *Id.*

105. *Id.* at 35 (“If the clients’ pull away from bespoke service were not sufficient to incline law firms rightwards, then the prospect of competitors driving in that direction should surely give pause for thought.”).

106. *Id.* at 37–38.

107. *Id.*

108. *Id.* at 37.

dataset.<sup>109</sup> One of the Census Bureau's duties is to create and maintain a taxonomy of the nation's economic activity and use it to track employer type, payroll data, and geographic location.<sup>110</sup> The nature and composition of economic activity continuously evolves, so every few decades the entire classification system needs to be replaced. This last happened in 1997, when the North American Industrial Classification System (NAICS) supplanted the Standard Industrial Classification (SIC) system.<sup>111</sup> The economic trends I observed in the summer of 2010 (limited to data through 2008, as the data has a two year lag) got my attention. Since then, the troubling pattern has only become more pronounced.

Consider the following. The NAICS code for legal services is 5411.<sup>112</sup> In 2010, this sector employed 1,172,748 employees (as of March 15, 2010).<sup>113</sup> Of these workers, 91.7% are employed in law offices (NAICS 54111), which is down from 94.2% in 1998.<sup>114</sup> The second biggest category in the 5411 category is Title Abstract and Settlement Offices (NAICS 541191), which is driven by the requirement in some states that lawyers participate in real estate closing. This subsector employed 69,399 in 2010—down from the 85,759 high-water market in 2006, which is a clear fallout from the real estate bubble that nearly took down the entire U.S. economy. The only other 5411 subsector is the catch-all “All Other Legal Services” (NAICS 541199).<sup>115</sup> This subsector has steadily grown from 9,800 workers in 1998 to 23,504 workers in 2010.

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109. See generally *County Business Patterns*, U.S. CENSUS BUREAU, available at <http://www.census.gov/econ/cbp/> (last visited Nov. 11, 2012).

110. *Id.*

111. See *North American Industry Classification System (NAICS)*, U.S. CENSUS BUREAU, available at <http://www.census.gov/eos/www/naics/> (last visited Nov. 11, 2012).

112. A reference table to NAICS codes is available at <http://www.census.gov/eos/www/naics/> (follow “2012 NAICS Structure” hyperlink) (last visited Nov. 11, 2012).

113. See *County Business Patterns*, *supra* note 109 (follow the hyperlink to specific year).

114. *Id.*

115. See NAICS codes, *supra* note 112.

Figure 8. Change in Number of Employees in Legal Service Industry Since 1998, Law Offices vs. All Other Legal Services

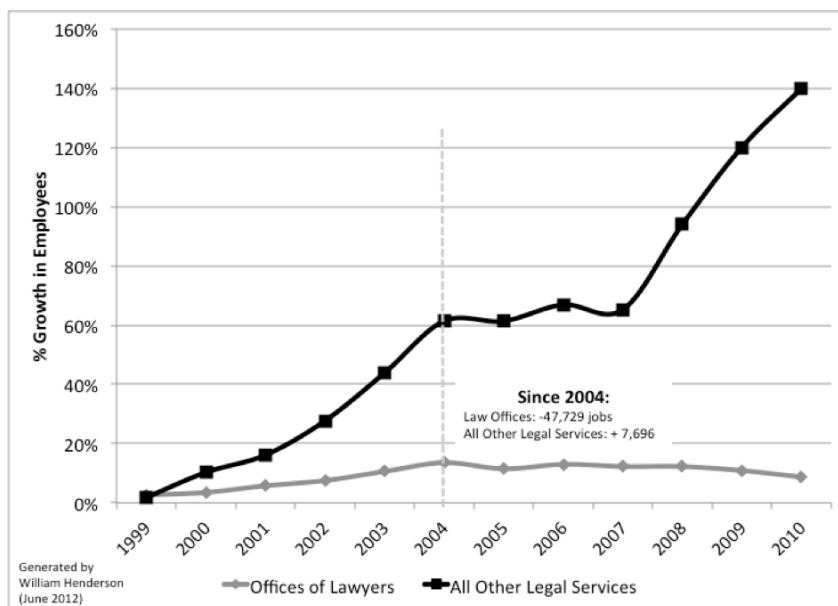


Figure 8 above plots the percentage growth in “Offices of Lawyers” versus “All Other Legal Services.”<sup>116</sup> The Offices of Lawyers trendline is the same one shown in Figure 2.<sup>117</sup> This reveals 2004 as the high-water mark for law office employment.<sup>118</sup> Again, the total employment decline has been roughly 48,000 workers.<sup>119</sup> Yet, since 2004, the All Other Legal Services group has grown by nearly 8,000.<sup>120</sup> The average job in a law office pays \$80,000 versus \$46,000 in All Other Legal Services.<sup>121</sup> But the most striking feature is the rate of growth, which averages 8.5% a year. In 1998, All Other Legal Services comprised 0.9% of 5411. As of 2010, the percentage had increased to 2.2%—and at the time of this writing, these data are 2.5 years old.

What companies comprise the 541199 subsector? Because County Business Patterns data include payroll and headcount information, which is information that a company would like to withhold from rivals, it is

116. See *supra* Figure 8.

117. See *supra* Figure 2.

118. See *supra* Figure 8.

119. See *supra* Figure 8.

120. See *supra* Figure 8.

121. Calculations made by author from U.S. County Business Patterns data. I divided total payroll by the number of employees in each subsector.

anonymous and aggregated at the county level.<sup>122</sup> As a result, we don't know the identities of these companies. But we do know that the following states have at least one All Other Legal Services employer, employing between 500 and 999 workers: Delaware, Florida, Georgia, Missouri, New York, Ohio, and Pennsylvania.<sup>123</sup> Likewise, in the 100 to 499 employee range, California has eight employers; Florida, Illinois, and Texas have two; and Connecticut, Indiana, Massachusetts, Minnesota, New Jersey, Ohio, and Pennsylvania each have one.<sup>124</sup> The states with the biggest All Other Legal Service payrolls are California (\$201 million, 4,222 employees, 553 establishments), followed by Florida (\$125 Million, 2,925 employers, 697 establishments) and New York (\$113 million, 2,501 employees, 297 establishments).<sup>125</sup>

As someone who purportedly studies the legal industry, I know embarrassingly little about this burgeoning subsector. That said, these companies could be the very vendors that Susskind described in *The End of Lawyers?* The following questions jump immediately to mind:

- Who are these employers?
- What services and products are they providing?
- Why are they growing so quickly?
- What is the connection between the flat office employment figures and growth in this sector?

Based on my readings and monitoring of the legal industry, my best assessment is that some substantial portion of these companies are contract registry services that assemble contract attorneys for large electronic discovery and due diligence projects. One of the biggest is Robert Half, which has twenty-six locations throughout the United States and Canada.<sup>126</sup>

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122. This information is withheld at the county level when it would functionally reveal competitive information on specific employers.

123. See *County Business Patterns*, *supra* note 109 (follow link for each specific state) (last visited Sept. 30, 2012).

124. *Id.*

125. *Id.*

126. Robert Half's description of their services: "We place lawyers, paralegals, law clerks and legal support professionals on a temporary, project and full-time basis in high-demand practice areas. We also provide project teams, along with dedicated space and high-tech resources, for a wide range of initiatives including litigation support, M&A review and discovery matters." *About Us*, ROBERT HALF LEGAL, <http://www.roberthalflegal.com/AboutUs> (last visited Nov. 11, 2012).



Robert Half is owned by Robert Half International, which is a public company traded on the New York Stock Exchange (NYSE symbol: RHI).<sup>127</sup> The SEC filings do not break out information on their legal services business. Similarly, a competitor of Robert Half is Special Counsel, which “places attorneys, paralegals . . . and legal support personnel on a temporary, temporary-to-direct hire, and direct hire basis into law firms and corporate legal departments.”<sup>128</sup> Special Counsel is owned by Adecco Group North America,<sup>129</sup> which is a subsidiary of Adecco Group. Adecco Group is listed on the SIX Swiss Exchange (symbol: ADEN).<sup>130</sup> Again, because of the size of the corporate parent, financials for Special Counsel are not disclosed. That said, Special Counsel now has thirty-six offices in the United States.<sup>131</sup>

As substantial as these contract attorney registry companies appear, they are increasingly competing against legal process outsourcers (LPO), who provide the same staffing and process services for large legal transactions and litigation matters, yet accomplish it with foreign lawyers.<sup>132</sup> In terms of tracking industry trends, this creates difficulties for us because only the domestic component of a global supply chain will appear in a dataset like County Business Patterns.<sup>133</sup> So, an increase of 14,000 domestic workers in the All Other Legal Services subsector may actually correspond to a much larger multiple when the global workforce is considered.

One of the most well-known LPOs is Pangea3, which was started in 2003 by a U.S. lawyer and his Indian-American M.B.A. counterpart with \$1.5 million in venture capital funding.<sup>134</sup> The company was subsequently purchased by Thomson Reuters (NYSE symbol: TRI) in 2010 for a deal rumored to be worth between \$35–40 million.<sup>135</sup> At the time, the company

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127. *Investor Center*, ROBERT HALF INT’L, <http://www.rhi.com/InvestorCenter> (last visited Sept. 30, 2012).

128. *About Special Counsel*, SPECIAL COUNSEL, <http://www.specialcounsel.com/about-special-counsel/> (last visited Sept. 30, 2012).

129. *Id.*

130. *Who We Are and What We Do*, ADECCO GROUP, <http://www.adecco.com/en-US/About/Pages/default.aspx> (last visited Sept. 30, 2012).

131. *Office Locations*, SPECIAL COUNSEL, <http://www.specialcounsel.com/locations/> (last visited Sept. 30, 2012).

132. See Rachel M. Zahorsky, *Vendor or Competitor? Pangea3 Purchase Pleases Some, Worries Others*, A.B.A. J. (Feb. 1, 2011, 1:50 AM), [http://www.abajournal.com/magazine/article/vendor\\_or\\_competitor](http://www.abajournal.com/magazine/article/vendor_or_competitor).

133. See *County Business Patterns*, CENTER FOR TRANSP. RES. & EDUC., [http://www.ctre.iastate.edu/research/bts\\_wb/cd-rom/employment/cbp.htm](http://www.ctre.iastate.edu/research/bts_wb/cd-rom/employment/cbp.htm) (last visited Sept. 30, 2012).

134. Anuj Agrawal, *In Conversation: Sanjay Kamlani and David Perla, co-CEO’s of Pangea3*, BAR & BENCH (Jun. 27, 2012), <http://barandbench.com/brief/4/2540/1/in-conversation-sanjay-kamlani-and-david-perla-co-ceos-of-pangea3> (reporting on growth of LPO from a start-up in 2004 to 850 lawyers currently and projected growth of 40% to 60% per year).

135. See *Thomson Reuters Acquires Indian Legal Outsourcing Co. Pangea3*, A.B.A. J. (Nov. 18, 2010, 4:25 PM), [http://www.abajournal.com/news/article/report\\_thomson\\_reuters\\_to\\_acquire\\_indian\\_legal\\_outsourcing\\_co\\_pangea3/](http://www.abajournal.com/news/article/report_thomson_reuters_to_acquire_indian_legal_outsourcing_co_pangea3/).

had \$25 million in annual revenue and electronic discovery was reported to be its “biggest piece of business.”<sup>136</sup> Thomson Reuters maintained the company’s management team after the acquisition.<sup>137</sup> With core operations in Mumbai, additional facilities in Dehli, India, and Dallas, Texas, and corporate headquarters in New York City,<sup>138</sup> Pangea3 has consistently grown between 40% and 60% per year.<sup>139</sup> It now employs over 850 lawyers worldwide, and the company expects its historical growth rate to continue for the next several years.<sup>140</sup>

The Pangea3 growth rate is slightly ahead of the 30% pace reported by Mindcrest, a U.S.-based LPO with 600 attorneys in the United States and India.<sup>141</sup> Mindcrest was founded by a former partner at McGuireWoods, an *Am Law* 200 firm. Other companies operating in this space include UnitedLex, which does e-discovery work along with contract and intellectual property portfolio management.<sup>142</sup> Recently, UnitedLex was listed on the *Inc.* magazine’s list of the 500 Fastest Growing Private Companies, with sales growth of 1,287% over three years.<sup>143</sup> UnitedLex has 750 employees, including 650 in India.<sup>144</sup> CPA Global is another LPO that does work in document review, legal research, patent portfolios, and trademark renewals. It employs 1,500 people in 17 locations throughout the world.<sup>145</sup> In early 2012, CPA Global was acquired by Cinven, a European private equity firm.<sup>146</sup> A fourth large company in this space is Huron Consulting Group, a publicly traded company (NASDAQ symbol: HURN)<sup>147</sup>

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136. Agrawal, *supra* note 134.

137. *Id.*

138. *See About Us*, PANGEA3, <http://www.pangea3.com/about/company-overview.html> (last visited Sept. 30, 2012).

139. Agrawal, *supra* note 134.

140. *Id.*

141. Aesha Datta, *Fresh Law Grads Find Yet Another Avenue in Legal Process Outsourcers*, THE HINDU BUS. LINE (May 11, 2012), [http://www.thehindubusinessline.com/industry-and-economy/article3408624.ece?ref=wl\\_opinion](http://www.thehindubusinessline.com/industry-and-economy/article3408624.ece?ref=wl_opinion).

142. *See generally* UNITEDLEX, <http://www.unitedlex.com/> (last visited Sept. 30, 2011).

143. *See* Press Release, UnitedLex, UnitedLex Makes Inc. Magazine's 2012 Inc. 500 List of the Nation's Fastest-Growing Private Companies (Aug. 21, 2012), *available at* [http://www.unitedlex.com/pr\\_inc500\\_082112.shtml](http://www.unitedlex.com/pr_inc500_082112.shtml).

144. *See UnitedLex Expects 80% Revenue Growth this Fiscal*, THE ECON. TIMES (Jan. 22, 2012, 4:45 PM), [http://articles.economictimes.indiatimes.com/2012-01-22/news/30652828\\_1\\_unitedlex-analytics-clients](http://articles.economictimes.indiatimes.com/2012-01-22/news/30652828_1_unitedlex-analytics-clients).

145. Press Release, CPA Global, Cinven to Acquire CPA Global (Jan. 18, 2012), [http://www.cpaglobal.com/media\\_centre/press\\_releases/5046/cinven\\_to\\_acquire\\_cpa\\_global](http://www.cpaglobal.com/media_centre/press_releases/5046/cinven_to_acquire_cpa_global) (reporting on locations of CPA Global).

146. *Id.*

147. *See generally* HURON CONSULTING GROUP, <http://www.huronconsultinggroupusa.com/> (last visited Nov. 11, 2012).

which recently issued a press release announcing a new document review and data operations facility in Gurgaon, India (a booming suburb of Delhi).<sup>148</sup> The press release reads, “The Company offers around-the-clock global discovery support with 1,500 seats at nine locations across the U.S., U.K., and India to address clients’ complex business needs.”<sup>149</sup> Huron Consulting Group’s revenues have increased from \$314.6 million in 2007 to \$606.3 million in 2011.<sup>150</sup>

Although the legal market is terrible for law graduates in the United States,<sup>151</sup> the market is booming for Indian law graduates.<sup>152</sup> Why? Because LPOs are growing very rapidly and competing with the traditional Indian legal employers.<sup>153</sup> Although we might be tempted to assume these jobs are highly repetitive and mundane, that may not be the case.<sup>154</sup> As the LPOs have become larger, more sophisticated, more stable, and more global in reach, the competitive advantage has begun to switch from labor arbitrage to process engineering.<sup>155</sup> In a May 2012 story in the *Hindu Business Line*, an Indian law professor was quoted, “There is a rising trend of students opting for LPOs. The nature of work is changing and these places offer good packages and work culture. Moreover, I believe, promotions also come faster in LPOs.”<sup>156</sup>

The attractiveness of LPOs is corroborated by the experience of Pangea3, which had a retention rate of 94% after its first year of operation.<sup>157</sup> David Perla, a Penn Law grad and co-CEO of Pangea3, recently remarked to an Indian publication:

[E]very year you see surveys about how law students perceive LPOs and every year you see more and more law students saying “I view an LPO as a good career opportunity.” Today I think it is up to 50 or 60 percent of law students looking at LPOs as a possible

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148. See Press Release, Huron Consulting Group, Huron Consulting Group Expands Global E-Discovery Offerings with India Document Review and Data Operations Facility (July 17, 2012), <http://ir.huronconsultinggroup.com/phoenix.zhtml?c=180006&p=RssLanding&cat=news&id=1715246>.

149. *Id.*

150. See *Huron Consulting Group Fact Sheet*, HURON CONSULTING GROUP 1 (2012), [http://www.huronconsultinggroup.com/library/Huron\\_factsheet.pdf](http://www.huronconsultinggroup.com/library/Huron_factsheet.pdf).

151. See Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J. (June 25, 2012, 10:18 AM), <http://online.wsj.com/article/SB100001424052702304458604577486623469958142.html>.

152. See Mihaela Papa & David B. Wilkins, *Globalization, Lawyers, and India: Toward a Theoretical Synthesis of Globalization Studies and the Sociology of the Legal Profession*, 18 INT’L. J. LEGAL PROF., no. 3, 2011 at 175, 175.

153. *Id.* at 187.

154. See Alex Hamilton & Kevin Colangelo, *Making LPO Work*, OUTSOURCE MAG. (July 3, 2012), <http://outsourcemagazine.co.uk/articles/item/4579-making-lpo-work>.

155. See Papa & Wilkins, *supra* note 152, at 180.

156. Datta, *supra* note 141.

157. Agrawal, *supra* note 134.

career opportunity. This is quite substantial in 5 years where they might have perceived it as “another call centre”.<sup>158</sup>

These developments should get our attention. The work Perla is describing is formerly labor-intensive work that has traditionally been performed by entry-level United States law school graduates.<sup>159</sup> It is now being done by Indian law graduates, who are learning how to design and operate processes that extract useful information from large masses of digital text. Not only are the Indian law graduates getting the employment, they are learning valuable skills that are entirely—*entirely*—absent from U.S. law schools. A recent article in *Managing Partner* magazine acknowledged that LPOs are taking market share away from U.S. law firms, as more general counsel instruct LPOs directly.<sup>160</sup> Savings are perceived to be in the 50% range.<sup>161</sup> According to the story, legal process outsourcing is currently a \$1 billion industry and “is forecast to double in size in the next two to three years.”<sup>162</sup>

Another industry that reflects Susskind’s view of the future is the emerging industry loosely called “predictive coding.”<sup>163</sup> In essence, it is machine algorithms partially replacing humans altogether in the search for relevant information.<sup>164</sup> Because of the massive explosion of digital data, where so much of our daily lives is encoded into emails, text messages, internal knowledge management platforms designed to replace email, and digitized voice mail, the scope of discovery in civil or white collar litigation has become prohibitively expensive using traditional methods of review.<sup>165</sup>

In a recent federal court decision, United States Magistrate Judge Andrew J. Peck ruled that a predictive coding algorithm was, on the facts before him, an acceptable substitute for manual review.<sup>166</sup> Judge Peck favorably cited one study that compared two computer algorithms against human review, finding that the two computer searches were at least as

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158. *Id.*

159. See Papa & Wilkins, *supra* note 152, at 184.

160. See *Law Firms Are Losing Work to LPO Providers*, MANAGING PARTNER (Sept. 3, 2012), <http://www.managingpartner.com/news/business-strategy/law-firms-are-losing-work-lpo-providers>.

161. *Id.*

162. *Id.*

163. See Melissa Whittingham, Edward H. Rippey & Skye L. Perryman, *Predictive Coding: E-Discovery Game Changer?*, EDDE J., Sep. 23, 2011, at 11.

164. *Id.*

165. See *id.* at 14 (discussing the potential price structure of predictive coding services).

166. See *Da Silva Moore v. Publicis Groupe*, No. 11 Civ. 1279 (ALC), 2012 WL 607412, at \*1 (S.D.N.Y. Feb. 24, 2012) (recognizing that “computer-assisted review is an acceptable way to search for relevant ESI in appropriate cases”).

accurate as lawyers.<sup>167</sup> Judge Peck also favorably cited another study, which found that “[t]he technology-assisted reviews require, on average, human review of only 1.9% of the documents, a fifty-fold savings over exhaustive manual review.”<sup>168</sup> The combination of accuracy and cost made predictive coding judicially reasonable under Federal Rule of Civil Procedure 1, which mandates the courts “secure the just, speedy, and inexpensive determination” of lawsuits.<sup>169</sup> Judge Peck’s decision has been designated as a landmark ruling by some members of the legal press.<sup>170</sup>

Companies operating in the predictive coding space include Recommind, which specializes in e-discovery, compliance, and information management.<sup>171</sup> It explicitly offers “products” for searching and analyzing large volumes of information.<sup>172</sup> Recommind has approximately \$15 million in annual revenues and approximately 100 employees spread over facilities in Massachusetts, California, London, Germany, and Australia.<sup>173</sup> Kroll Ontrack is another e-discovery company that offers predictive coding. Kroll Ontrack, which started as a hard disk recovery service, evolved into the e-discovery and information management services.<sup>174</sup> It now employs 1,500 workers in eleven U.S. and nineteen foreign locations around the world. In 2010, Kroll Ontrack had revenues of \$250 million. Kroll Ontrack is a subsidiary of Kroll Inc., which is a global risk consulting firm.<sup>175</sup> Kroll Inc. was recently acquired by Altegrity, which is a conglomerate that owns a series of companies specializing in information management.<sup>176</sup> Altegrity is owned by the Providence Equity Partners, a private equity fund with over

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167. See *Da Silva Moore*, 2012 WL 607412, at \*9 & n.11 (citing Herbert L. Roitblatt, Anne Kershaw, & Patrick Oot, *Document Categorization in Legal Electronic Discovery: Computer Classification v. Manual Review*, 61 J. AM. SOC’Y FOR INFO. SCI. & TECH. 70, 79 (2010)).

168. *Id.* at 9 (quoting Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11, 43 (2011)).

169. FED. R. CIV. P. 1.

170. See Allison Frankel, *In E-Discovery Breakthrough, Judge Endorse ‘Predictive Coding,’ On the Case*, THOMSON REUTERS NEWS & INSIGHT, Feb. 27, 2012, available at <http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=40579&terms=@ReutersTopicCodes+CONTAINS+‘ANV’> (referring to Judge Peck’s ruling as a “landmark e-discovery decision”).

171. See generally RECOMMIND, <http://www.recommind.com/> (last visited Sep. 30, 2012).

172. *Id.*

173. See *InsideView*, RECOMMIND, INC., <http://www.insideview.com/directory/recommind-inc> (last visited Nov. 13, 2012).

174. See *History*, KROLLONTRACK.COM, <http://www.krollontrack.com/company/history/> (last visited Sept. 30, 2012).

175. See *Overview*, KROLL ONTRACK, <http://www.krollontrack.com/company/overview> (last visited Oct. 3, 2012).

176. See Aaref Hilaly, *What’s Next for Kroll Ontrack?*, E-DISCOVERY 2.0 (June 8, 2010, 12:31 PM), <http://www.clearwellsystems.com/e-discovery-blog/2010/06/08/what%E2%80%99s-next-for-kroll-ontrack/> (reporting sale price of \$1.13 billion for Kroll, Inc.).

\$27 billion under management.<sup>177</sup>

Finally, outside the realm of sophisticated corporate clients, it is worth mentioning LegalZoom, which supplies legal forms and simple instructions for a variety of legal needs, including business formation, employment agreements, tax forms, trademark registration, copyright registration, provisional applications for patents, real estate leases, and more.<sup>178</sup> LegalZoom recently filed its S-1 registration statement with the U.S. Securities and Exchange Commission (SEC) in anticipation of going public.<sup>179</sup> According to the S-1, the company has served more than two million customers since its founding in 2002.<sup>180</sup> The filing reports that in 2011, nine of ten of its surveyed customers said they would recommend LegalZoom to their friends and family (and remember, this is in a disclosure document subject to federal securities law).<sup>181</sup> Last year, 20% of all California limited liability companies were formed using Legal Zoom.<sup>182</sup>

Indeed, in conjunction with the *Pepperdine Law Review* symposium that solicited this Essay, I found myself in a rental car in southern California during the spring of 2012. The radio was tuned to the *Jim Rome Show*, which is syndicated on over 200 stations nationwide. During several hours of driving, I probably heard a dozen commercials for LegalZoom (I never changed the channel because I had never heard legal advertising at anywhere near this scale). According to the SEC filing, the company had \$156 million in revenue in 2011 and \$12 million in profit.<sup>183</sup> It is seeking \$120 million in funding for general corporate purposes.<sup>184</sup>

At least for me, Richard Susskind's ideas are no longer an abstraction. All of the companies discussed above are profiting from the migration away from bespoke legal work. As I reflect upon the array of nonlawyer talent and capital that has assembled itself into formidable, rapidly growing companies, I have a difficult time identifying a realistic stopping point that will preserve a domain exclusively for artisan lawyers—i.e., the type of training that U.S. law schools ostensibly provide. It appears that everything

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177. *About Us*, PROVIDENCE EQUITY, <http://www.provequity.com/about-us> (last visited Oct. 3, 2012).

178. *Our Products & Services*, LEGALZOOM, <http://www.legalzoom.com/products-and-services.html> (last visited Oct. 3, 2012).

179. See LegalZoom.com, Inc., Registration Statement (Form S-1) (May 10, 2012), available at <http://www.sec.gov/Archives/edgar/data/1286139/000104746912005763/a2209299zs-1.htm>.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

up until the courthouse door, or the moment when legal advice is communicated from the counselor to the client, is an entry point for a legal service vendor to become part of the global legal industry supply chain. The debate over Model Rule of Professional Conduct 5.4, which prohibits fee-splitting with nonlawyers,<sup>185</sup> is largely a farce.<sup>186</sup> Rule 5.4 is not keeping nonlawyers out of the legal industry. Rather, it is a mental fence that keeps lawyers and law professors from venturing out and understanding how the world is changing around us.

### III. A BLUEPRINT FOR CHANGE

As discussed in Part II, we, the legal professoriate, are facing enormously serious structural problems that are likely to accelerate in the years to come. These can be summarized as follows: (1) our costs are high and relatively fixed;<sup>187</sup> (2) the market for traditional legal jobs appears to have plateaued;<sup>188</sup> (3) we have excess industry capacity, with a need to fill 45,000 1L seats each year;<sup>189</sup> (4) we are almost entirely dependent on federal loans originated by the U.S. Department of Education, which exposes us to political winds associated with student indebtedness and repayment rates;<sup>190</sup> (5) as predicted by Richard Susskind, law is in the early stages of a profound and massively disruptive information revolution.<sup>191</sup>

As formidable as these challenges might be, I would maintain that our biggest challenge is managing ourselves. We, the tenured law faculty, control two of the most important components of any law school's strategy: hiring and curriculum. We have inexperience in making difficult institutional choices and tremendous muscle memory that pulls us back toward the illusory comfort of the status quo. Setting new priorities in this environment is mentally and emotionally exhausting. Further, it is made all the more difficult by the uncertainty regarding incentive and status

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185. See MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983).

186. See, e.g., Joe Palazzolo, *IBM General Counsel: Nonlawyer Ownership Is a Nonstarter*, WALL ST. J. LAW BLOG (Feb. 14, 2012, 2:22 PM), <http://blogs.wsj.com/law/2012/02/14/ibm-general-counsel-nonlawyer-ownership-is-a-nonstarter/> (discussing practicing bars opposition to any attempt to enable nonlawyers to own equity in law firms, including proposed changes by the ABA Ethics 20/20 Commission); see also Chris Bonjean, *ISBA Submits Resolution Regarding ABA's Ethics 20/20*, ILL. STATE BAR ASSOC. (Jun. 20, 2012), <http://iln.isba.org/blog/2012/06/20/isba-submits-resolution-regarding-abas-ethics-2020> (reporting on resolution by the Illinois State Bar Association, modeled on a 2000 ABA resolution, that "law firms shall not be owned by non-lawyers and legal fees shall not be shared with non-lawyers").

187. See *supra* Part II.B and text accompanying note 92.

188. See *supra* Part II.B and Figure 2.

189. See *supra* Part II.B and Figure 4. As noted earlier, based on 1L admissions in the fall of 2010, the spring of 2012 will graduate the largest class in the history of U.S. legal education. See *supra* note 64 and accompanying text.

190. See notes 63–92 and accompanying text; see also notes 89–92 and accompanying text.

191. See *supra* Part II.C.

structures. Who is going to bear the costs of retooling? Is scholarly productivity still going to be major part of the reward structure? If scholarly promise is not going to be the primary hiring criteria, what criteria will replace it? These are difficult questions. But, if an institution is going to get itself to safer ground, the answers, and compromises, have to be based on a realistic assessment of the future.

Each law faculty will need to formulate, then adopt and execute, its own blueprint for change. After many months of reflection, I have formulated a blueprint for change that is comprised of three concrete steps that I believe would help any law school navigate this difficult journey. These three steps are as follows:

- (1) Build consortia of law schools that can reliably pull together information, resources, and expertise for the purpose of large-scale collaborations focused on labor market outcomes. These consortia should be built in conjunction with alumni and employers, who are themselves looking for resources and venues that help them successfully adapt to a rapidly changing legal marketplace.<sup>192</sup>
- (2) Use the economies of scale and scope of a consortium to begin the process of constructing a competency-based curriculum that enables students to enter traditional law practice, the Susskind process-driven world,<sup>193</sup> or a third alternative identified and targeted by the law school.
- (3) Implement a realistic allocation of the retooling burden—what I call the “12% solution.”

These steps will be discussed in order in the following three sections of Part III.

*A. Consortium of Law Schools Focused on Labor Market Outcomes*

In Part II, I stated that the financial viability of law schools depends upon three interrelated factors: (a) students wishing to enroll, (b) an ability to pay, and (c) professional employment at graduation. Of these factors,

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192. Note to Deans: A task-based or mission-based consortium is an effective way to reach out to alumni and employers. It has been my experience that lawyers will support these initiatives with both time and money.

193. See *supra* Part II.C.



professional employment is the most important because, if present, the first two factors will take care of themselves. Building a pipeline to desirable professional employment is a complicated undertaking. Further, for some of my colleagues, this proposal is going to smack of vocational training, which is a serious criticism that warrants a serious response. Therefore, in this section, I address both the complexity issue and the vocationalism critique.

With that explanation in mind, I want to be very explicit about the engine that underlies my Blueprint for Change. It is labor market outcomes. A simple, stylized example illustrates their importance. Imagine students from Law School A, who have the benefit of a competency-based curriculum, and students from rival Law School B, who receive a traditional legal education that is unstructured after the 1L year. Now consider legal employers in the current economic environment, who are under enormous and unprecedented economic pressure.<sup>194</sup> If graduates of Law School A, as a group, consistently outperform graduates of Law School B, graduates of Law School A will over time receive a disproportionate share of the available employment opportunities. Because law students want to be heavily pursued by employers, Law School A also receives a disproportionate share of law school applications. In short, Law School A would enjoy market power in both the admissions and employments sides of its operations.<sup>195</sup>

Changing employer behavior is complicated, particularly in the legal market, where reliance on an ingrained prestige hierarchy produced a century of steadily growing profits.<sup>196</sup> But as discussed in Part II, those underlying economic conditions are undergoing dramatic change. That is our opening. Yet, it is much too big a job for a single law school. Changing employer behavior requires (1) a lot of current knowledge on the legal marketplace, (2) deep relationships with legal employers who are willing to experiment, (3) an agreed upon specification of high performance, (4) a critical mass of law professors willing to build and teach a curriculum designed to produce high performers, and (5) a reliable system of measurement that can quantify the value-add. I doubt any one law school has the resources and personnel to accomplish this at a world class level. A

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194. See Henderson, *Three Generations*, supra note 6, at 381 (discussing how forces of supply and demand have dramatically shifted in favor of large corporate clients and that this imbalance is reshaping the legal marketplace).

195. Such market power is currently enjoyed by the elite national law schools. But is it warranted? At least some legal employers fighting over market share will be willing to look at the data. Cf. William D. Henderson, *Law Firm Strategies for Human Capital: Past, Present, Future*, in 52 *STUDIES IN LAW, POLITICS, AND SOCIETY* 73, 100 (Austin Sarat ed., 2010) (discussing coming battle over market share among large U.S. law firms and necessity of firms to reexamine their human capital strategies in order to compete).

196. See *id.* at 74 (attributing lack of innovation in human capital strategies to a perennial rise in private practice incomes and historical reliance on national law schools and noting, "If the model is not broken, the adage runs, why fix it?").

consortium of law schools, in contrast, would have a much better shot.

Over the last several decades, as law schools have become increasingly embedded inside universities, law professors have bristled at the thought of education and training that was designed to meet the needs of the marketplace.<sup>197</sup> I have three responses to this perspective.

First, the types of education that will attain the highest valuation are complex problem-solving skills that enable law school graduates to communicate and collaborate in a highly complex, globalized environment. This is not vocational training; it is the creation of a new model of professional education that better prepares our graduates for the daunting political and economic challenges ahead. And it should be obvious that as a group, we legal academics lack these skills ourselves. Although we could fix that. The consortium would provide the resources to retool.

Second, we academics are on thin ground when we claim that we must operate apart from market influences in order to develop critical thinking among our students. Many colleagues are likely to argue that law is the primary mechanism for controlling the negative externalities of market forces and market failures; therefore, it is worrisome when legal education is designed with an eye toward the marketplace.

This critique has undeniable merit, but it should not be controlling. Whether we like it or not, we already operate within a market. Indeed, for the last several decades, there has been a vibrant lateral market for law professors that has ratcheted up law professor salaries.<sup>198</sup> Virtually every law dean in the nation has had the experience of being asked to “meet the market” to retain his or her most well-known and productive faculty members. Indeed, it is now conventional wisdom that the best way to receive a large pay increase is to obtain a lateral offer from a rival law school. Further, within the university, our higher base salaries are justified based on the opportunity cost of private practice income. At the same time, there is a glut in the market for entry level law graduates. Further, virtually all lack the skills needed to differentiate themselves or to be economically valuable to an employer or client without additional training. We cannot credibly accept the benefits of market forces without also accepting the burdens.

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197. According to historian Robert Stevens, this has been a persistent tension in university-based legal education. See STEVENS, *supra* note 13, at 209-211, 264-65 (discussing the resistance to so-called “Hessian training” by the professoriate trying to establish the primacy of scholarship with the nation’s leading law schools).

198. See, e.g., Clayton P Gillette, *Law School Faculty as Free Agents*, 17 J. CONTEMP. L. ISSUES 213, 214-19 (2008) (observing at least widespread perceptions that lateral movement is more common and has likely increased salaries for both mobile and less mobile faculty members).

This brings us to the third reason we need to focus on labor market outcomes: As discussed in Part II.A, lack of professional employment for graduates is the economic force that could put many law schools out of business. Simply stated, the market for traditional legal education is drying up. Yet, legal problems and issues remain. An education that is attuned to this changing marketplace is a valuable education. Further, in addition to a private sector market benefit, such an education is likely to also include the knowledge and skills needed to govern and regulate within a complex, globalized world.

It may be useful to step back for a moment and ask ourselves the true nature of legal education's current problems. Some might argue that it is excessively high tuition and debt. I agree these are serious issues, but not the most serious. I believe the most serious problem is inadequate quality.<sup>199</sup> We can do a lot more with three years of time and \$120,000 plus in tuition per student. Moreover, as a matter of public welfare, our society needs these problem-solvers.

This is the type of large gap that only a consortium of law schools would be able to fill. The purpose of such a body is to pool together (a) alumni networks, which encompass a wide range of high quality employers, and (b) the enthusiastic and innovative faculty members from several schools. Outside of the purview of ordinary faculty governance, this group of willing legal educators would have the resources and latitude to create the type of curriculum and teaching methods that could attract the interest and allegiance of employers who are themselves locked into their own fierce battle for market share.

This cooperative effort might begin as a consortium-based summer program for underemployed law students during their first or second summer of law school. If the program is met with enthusiasm by students and employers, it could be migrated to consortium-based 2L and 3L programs. As other law faculty see concrete evidence of the success of the program and have an opportunity to observe its teaching methods, the consortium innovations can be repatriated and scaled back to the home law schools.

The consortium approach has several advantages regarding scale and scope. But its biggest contribution may be sidestepping intractable issues of faculty governance. Unlike curricular reform at the school level, which is often characterized as being long on discussion and short on actual

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199. Cf. William D. Henderson & Rachel Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession?* A.B.A. J., (July 1 2012, 4:20 AM), [http://www.abajournal.com/magazine/article/the\\_pedigree\\_problem\\_are\\_law\\_school\\_ties\\_choking\\_the\\_profession/](http://www.abajournal.com/magazine/article/the_pedigree_problem_are_law_school_ties_choking_the_profession/) (presenting evidence that the labor market's obsession with prestige—not just large law firms, but also federal judges, federal agencies, and public interest organizations—inhibits innovation in legal education).

change,<sup>200</sup> a dean has the latitude to commit one or two enthusiastic faculty members to a consortium effort that will build and experiment with new approaches to legal education. More significantly, the resulting consortium faculty would be a veritable dream team for rapid trial-and-error innovation. Within one or two years, the consortium moves from ideas to actual results. And, if it works, results are successes that resonate with students, employers, and alumni. Within each law school faculty, these successes are likely to produce converts to the new approach and accelerate the overall rate of adoption, especially if the current economic climate for law school graduates continues.

Finally, there is nothing in the consortium approach described above that would urge a law school not to experiment with its own non-consortium initiatives. Rather, the consortium approach brings to bear the greatest amount of talent and resources with the fewest number of institutional roadblocks. Indeed, if a law school dean has a handful of faculty members who are willing to commit to it, it becomes a relatively low-cost hedging strategy that is worth pursuing.

#### *B. A Competency-Based Curriculum*

The key to moving an entry level labor market is clarity between educators and employers on the requisite knowledge, skills, values, and behaviors that amount to high performance. Very few legal employers, including law firms, government agencies, and corporate legal departments, have analyzed their human capital in a sophisticated way.<sup>201</sup> Therefore, in most cases, a dialogue on this topic will be strategic and mutually advantageous for all parties involved. After defining the criteria for high

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200. See, e.g., Robert F. Blomquist, *Some Thoughts on Law School Curriculum Reform: Scaling the Mountainside*, 29 VAL. U. L. REV. 641 (1995) (analogizing the law school curriculum to a mountainside that changes at a very slow pace).

201. A handful of law firm partners and law firm professional development practitioners comprise the field. See, e.g., SCOTT WESTFAHL, *YOU GET WHAT YOU MEASURE: LAWYER DEVELOPMENT FRAMEWORKS & EFFECTIVE PERFORMANCE EVALUATIONS* (NALP 2008) (authored by Director of Professional Development at Goodwin Proctor); JOAN C. WILLIAMS, *FAIR MEASURE: TOWARD EFFECTIVE ATTORNEY EVALUATIONS* (ABA Commission on Women in the Profession, 2d ed. 2008); HEATHER BOCK & ROBERT RUYAK, *CONSTRUCTING CORE COMPETENCIES: USING COMPETENCY MODELS TO MANAGE FIRM TALENT* (ABA 2006) (authored by Managing Partner and Head of Professional Development at the now defunct Howrey LLP law firm); PETER B. SLOAN, *FROM CLASSES TO COMPETENCIES, LOCKSTEPS TO LEVELS: HOW ONE LAW FIRM DISCARDED LOCKSTEP ASSOCIATE ADVANCEMENT & REPLACED IT WITH AN ASSOCIATE LEVEL SYSTEM* (2007) (authored by partner at Blackwell Sanders). That said, in my experience working with legal service organizations, a well-designed system only becomes effective when it is properly executed. This requires leadership and attention to culture and incentive structures.

performance, the shared goal should be the creation of *measurably better* law school graduates. With adequate measurement, both employers and educators can ascertain the value of the specialized curriculum. This has the potential to change the current focus from cost (“legal education is too expensive”) to value (“we want to hire more of your graduates because they perform better on the job”).

What I am advocating is the creation of a competency-based curriculum. In a competency-based curriculum, we identify the knowledge, skills, behaviors, and attributes of highly successful professionals—lawyers and nonlawyers—and then work backwards.<sup>202</sup> This can be summarized in five sequential steps:

- (1) In conjunction with a group of alumni and employers pulled together through a consortium of law schools, identify examples of professional excellence in both the new and old legal economies.
- (2) Break these examples into discrete domains of knowledge, skills, and behaviors, identifying both the overlaps and distinctive features of specific practice areas. Industrial and organizational psychology provides the methodology, which has been applied in virtually all industries.<sup>203</sup>
- (3) Use the iterative process of theory and data to determine the most effective ways to sequence and teach the requisite knowledge, skills, behaviors, and competencies.<sup>204</sup>
- (4) Measure the post-graduate performance of students who have had the benefit of this education (a summer program that eventually evolves into a curricular program at individual law schools) against the post-graduate performance of law students who received a traditional J.D. education.
- (5) Build feedback loops on the student, faculty, and employer experience, evaluate program and repeat. Yes, that’s right, repeat. Version 1.0 won’t be nearly good enough.

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202. In the adult learning literature, this process is akin to the creation of an “impact map,” which works backward from outcome to measurement, action, and required skill or knowledge. *See, e.g.*, ROBERT O. BRINKERHOFF & ANNE M. APKING, *HIGH IMPACT LEARNING: STRATEGIES FOR LEVERAGING BUSINESS RESULTS FROM TRAINING* ch. 4 (2001).

203. *See, e.g.*, LYLE M. SPENCER, JR. & SIGNE M. SPENCER, *COMPETENCE AT WORK: MODELS FOR SUPERIOR PERFORMANCE* (1993).

204. *See id.* at 153–155.

The above five-step process contains a critical assumption: that students' professional potential is not substantially fixed by incoming academic credentials. Stated another way, it is possible for a student who receives three years of an outstanding competency-based education to obtain a permanent, sustainable advantage over a more academically qualified student who received a traditional—and therefore largely unstructured—legal education.<sup>205</sup> If an educational program can produce a measurable value-add that another school cannot reliably produce, employers will seek out the graduates of such a program; students will seek out admission; and alumni will want to contribute time and money toward its construction and improvement.

A real world example of transformative education is the late Randy Pausch's Entertainment Technology Center at Carnegie Mellon University.<sup>206</sup> The Center supervised a two-year masters degree that taught students how to combine art with technology in pursuit of entertainment.<sup>207</sup> The massive creativity that this program generated led to companies making three year commitments to hire its graduates.<sup>208</sup> As Pausch wrote, this meant that employers “were promising to hire people we hadn't even admitted yet.”<sup>209</sup>

No doubt, some would argue that law is different.<sup>210</sup> In my experience, many law professors believe in the determinative power of general intelligence—that is, the quality of one's legal education cannot significantly reorder the sorting of quality of innate ability (LSAT and undergraduate credentials) that occurs in the admissions process.<sup>211</sup> As one law professor once told me, “I can't teach ‘smart.’” For educators in this group, a

205. *See id.* at Part V.

206. *See* RANDY PAUSCH, THE LAST LECTURE 124 (2008).

207. *Program Overview*, ENTERTAINMENT TECHNOLOGY CENTER CARNEGIE MELLON, <http://www.etc.cmu.edu/site/program/> (last visited Sept. 28, 2012).

208. *See* PAUSCH, *supra* note 206, at 125.

209. *Id.*

210. *See* Jason A. Smith, *Training Individuals in Public Health Law*, 36 J.L. MED. & ETHICS (SPECIAL ISSUE) 50, 52–53 (2008). (“Competency-based training is foreign to legal education and practice. . . . Formal legal education is fundamental to learning.”).

211. At least one scholar has made the observation that *U.S. News & World Report* rankings do not measure educational quality; rather, the primary function of ranking is to sort the quality of raw material. *See* Russell Korobkin, *Harnessing the Positive Power of Rankings: A Response to Posner and Sunstein*, 81 IND. L.J. 35, 40–43 (2006) [hereinafter Korobkin, *Harnessing*] (observing that rankings don't assess educational quality by providing a market-clearing device that enables top law students and legal employers to identify each other, thus augmenting “employment opportunities and . . . long-term earning potential” for prospective law school applicants); *see also* Russell Korobkin, *Essay, In Praise Of Law School Rankings: Solutions To Coordination And Collective Action Problems*, 77 TEX. L. REV. 403, 407–14 (1998).

competency-based curriculum is unlikely to hold much appeal.<sup>212</sup> The quality of the input compromises and largely predetermines the quality of the output.

That said, it is not a productive use of our time to debate whether this worldview is correct.<sup>213</sup> How much value a competency-based curriculum can add, if any, is an empirical question that needs to be answered with data.<sup>214</sup> We answer this question by building such a curriculum and observing the results; the control group will be comprised of the large number of law schools who lack the leadership and imagination to break from the status quo.<sup>215</sup> It is just that simple.

There is a paucity of high quality empirical research on the factors that contribute to lawyer effectiveness.<sup>216</sup> But what little evidence there is suggests that academic indicators are less important than what some of us law professors might believe.<sup>217</sup>

The leading study on this topic was conducted by Professors Marjorie Shultz and Sheldon Zedeck of the University of California at Berkeley.<sup>218</sup> The study was partially inspired by the passage of Proposition 209 in the mid-1990s, which made it illegal for California state colleges and universities to use racial preferences in their admissions.<sup>219</sup> Based on twenty years of teaching experience at U.C. Berkeley Law, Professor Shultz was skeptical that the admissions criteria used for admission to law school—the LSAT and undergraduate GPA (UGPA), which have significant racial performance disparities—were valid and reliable predictors of future success

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212. See generally Korobkin, *Harnessing*, *supra* note 211 (discussing the value of law school rankings as a logical coordination system and arguing that faculty scholarship, the traditional approach to legal education, is one of the most important factors for the ranking system).

213. For my view on the potential of legal education to transform, see Henderson & Zahorsky, *The Pedigree Problem*, *supra* note 199 (reviewing evidence that law school pedigree fails to predict success as a lawyer).

214. In his recent best-selling book, the Nobel Laureate Daniel Kahneman marshals a wealth of research to document humankind's propensity toward overconfidence. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* chs. 19–24 (2011). We don't bother collecting data and testing our assumptions, because we are so certain we are correct. *Id.* This propensity produces a relentless stream of bad decisions. *Id.*

215. See *supra* Part III.B.

216. See generally Marjorie Shultz & Sheldon Zedeck, *Identification, Development, and Validation of Predictors for Successful Lawyering*, Final Report (Sept. 2008) (unpublished manuscript) (on file with U.C. Berkeley School of Law, University of California, Berkeley) [hereinafter Shultz & Zedeck, *Identification, Development, and Validation*] (demonstrating the lack of empirical research and analyzing factors that contribute to lawyer effectiveness in an official report commissioned by LSAC).

217. *Id.* at 15–18.

218. See Marjorie Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 *LAW & SOC. INQUIRY* 620 (2011) [hereinafter Shultz & Zedeck, *Predicting Lawyer Effectiveness*].

219. See Shultz & Zedeck, *Identification, Development, and Validation*, *supra* note 216, at 66, n.8; see also CAL. CONST. art. I, §31 (codifying Proposition 209).

as a practicing lawyer.<sup>220</sup> To test this theory, Professor Shultz enlisted the help of Professor Zedeck, who is one of the nation's leading industrial and organizational (IO) psychologists.<sup>221</sup>

Drawing upon well-established IO psychology empirical methods, Shultz and Zedeck identified twenty-six lawyer effectiveness factors.<sup>222</sup> These factors, which are grouped into eight umbrella categories,<sup>223</sup> are summarized in Figure 9 below.

Figure 9. Shultz and Zedeck Lawyer Effectiveness Factors

<p><b>Intellectual &amp; Cognitive</b></p> <ul style="list-style-type: none"> <li>• Analysis and Reasoning</li> <li>• Creativity and Innovation</li> <li>• Problem Solving</li> <li>• Practical Judgment</li> </ul> <p><b>Research &amp; Information Gathering</b></p> <ul style="list-style-type: none"> <li>• Researching the Law</li> <li>• Fact Finding</li> <li>• Questioning and Interviewing</li> </ul> <p><b>Communications</b></p> <ul style="list-style-type: none"> <li>• Influencing and Advocating</li> <li>• Writing</li> <li>• Speaking</li> <li>• Listening</li> </ul> <p><b>Planning &amp; Organization</b></p> <ul style="list-style-type: none"> <li>• Strategic Planning</li> <li>• Organizing/Managing One's Own Work</li> <li>• Organizing/Managing Others (Staff/Colleagues)</li> </ul>	<p><b>Conflict Resolution</b></p> <ul style="list-style-type: none"> <li>• Negotiation Skills</li> <li>• Able to See the World Through the Eyes of Others</li> </ul> <p><b>Client/Business Relations:</b></p> <p><b>Entrepreneurship</b></p> <ul style="list-style-type: none"> <li>• Networking and Business Development</li> <li>• Providing Advice and Counsel and Building Relationships with Clients</li> </ul> <p><b>Working with Others</b></p> <ul style="list-style-type: none"> <li>• Developing Relationships Within the Legal Profession</li> <li>• Evaluation, Development, and Mentoring</li> </ul> <p><b>Character</b></p> <ul style="list-style-type: none"> <li>• Passion and Engagement</li> <li>• Diligence</li> <li>• Integrity/Honesty</li> <li>• Stress Management</li> <li>• Community Involvement and Service</li> <li>• Self-Development</li> </ul>
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Part of the Shultz-Zedeck project included the development of behaviorally anchored scales for measuring performance on a one-to-five scale on each of the twenty-six effectiveness factors.<sup>224</sup> These scales were empirically derived from extensive lawyer interviews and focus groups and

220. Shultz & Zedeck, *Predicting Lawyer Effectiveness*, *supra* note 218, at 623.

221. As evidence of this claim, note that Professor Zedeck is the Editor-in-Chief of the American Psychological Association's HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY (2010).

222. See Shultz & Zedeck, *Predicting Lawyer Effectiveness*, *supra* note 218, at 630.

223. *Id.* at 640–41.

224. *Id.* at 629.



then tested to ensure their reliability and validity among lawyer evaluators.<sup>225</sup> These scales were then used to obtain peer and supervisor evaluations for 1,150 U.C. Berkeley and U.C. Hastings graduates and 200 U.C. Berkeley alumni who graduated law school between 1973 and 2006.<sup>226</sup> These effectiveness factors were only weakly correlated with student and alumni LSAT, UGPA, and first-year grades—and some of these correlations were negative.<sup>227</sup> In contrast, other assessment tools were positively and more strongly correlated with a significantly larger number of effectiveness factors.<sup>228</sup> These nonacademic assessment tools included biographical information data (positively correlated with twenty-four factors), a situational judgment test (twenty-three factors), and a well-known off-the-shelf Big Five personality test (twenty-two factors).<sup>229</sup>

Indirectly, the Shultz-Zedeck study also revealed the unduly narrow scope of the traditional law school curriculum.<sup>230</sup> Despite the fact that nonacademic assessments were useful predictors of actual lawyer effectiveness, these assessments added no incremental value to predictions of first-year grades beyond what LSAT and UGPA were already able to predict.<sup>231</sup> Yet, as Shultz and Zedeck pointed out, this negligible predictive power is likely due to the fact that law school, particularly in the first year, assesses “a narrow band of cognitive test taking skills,”<sup>232</sup> which is a small fraction of the twenty-six effectiveness factors.

The original purpose of the Shultz-Zedeck study was to develop more accurate and valid methods for making law school admissions.<sup>233</sup> Yet the study ultimately delivered much more. One of these takeaways is that traditional academic predictors capture a mere subset of what enables a lawyer to be effective.<sup>234</sup> A second key takeaway is that most of the

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225. *Id.*

226. *See id.* at 639.

227. *Id.* at 641 (reporting that only eight out of twenty-six effectiveness factors were positively correlated at statistically significant levels with the LSAT, ranging from .07 (Problem Solving) to .15 (Writing); reporting statistically significant negative correlations between LSAT and Networking and Business Development (-.12) and Community Service (-.10); reporting statistically significant correlation between UGPA and three effectiveness factors); *see also* Shultz & Zedeck, Identification, Development, and Validation, *supra* note 216 (in student sample, reporting no statistically significant positive correlations between UGPA and effectiveness factors, but observing a negative association between Practical Judgment (-.169), Seeing the World Through the Eyes of Others (-.170), Developing Relationships (-.195), Integrity (-.189) and Community Service (-.152)) (data taken from correlation tables in appendices).

228. *See* Shultz & Zedeck, *Predicting Lawyer Effectiveness*, *supra* note 218, at 634.

229. *See id.* at 643. The personality assessment was the Hogan Personality Inventory (HPI). The Hogan Developmental Survey, which focuses on job “derailers,” was meaningfully correlated with eighteen factors, albeit most negatively.

230. *See* Shultz & Zedeck, Identification, Development, and Validation, *supra* note 216, at 88.

231. *Id.* at 65.

232. *See* Shultz & Zedeck, *Predicting Lawyer Effectiveness*, *supra* note 218, at 643.

233. *See id.* at 628.

234. *Id.* at 641.

traditional law school curriculum has little or no overlap with most of the Shultz-Zedeck effectiveness favors.<sup>235</sup> Lacking awareness that these factors are even important, we legal educators spend a lot of time disseminating substantive legal knowledge and developing a relatively small number of effectiveness skills.<sup>236</sup> As a consequence, we spend virtually no time or concentrated effort on other skills. Indeed, it is fair to ask whether we law professors, as a group, have developed many of the requisite effectiveness factors. Are we good at networking or developing relationship within the legal profession? Or seeing the world through the eyes of others? Or strategic planning? As embarrassing as this might seem, these deficits may be our greatest opportunity.

Building a competency-based curriculum is complicated.<sup>237</sup> A single faculty member cannot design it within the confines of a single essay; it is a task that, in its first permutation, requires the efforts of a large number of faculty, social scientists, and practicing lawyers over an extended period of time. The complexity of a competency-based curriculum is further compounded by an information revolution that is changing the mix of current and future jobs. Because of the emphasis on process and technology now taking hold within the legal industry,<sup>238</sup> the practical technical skills and domain knowledge that might have held us in good stead in 1980 or 1990 may be inadequate for a large proportion of law students graduating in the year 2015.<sup>239</sup>

Drawing upon my ongoing research, my experience building competency-based curricula at Indiana Law, and my related work with law firms and legal departments, I would offer three guiding principles for building a competency-based curriculum:

(1) *“Practice-Ready” is Not Enough.* Despite the rebukes often received from the practicing bar, for most law schools an emphasis on “practice-ready” skills will be insufficient to cope with the structural changes occurring within the legal industry.<sup>240</sup> Granted, it is true that better

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235. *Id.*

236. *See id.* at 623.

237. *See* SPENCER & SPENCER, *supra* note 203 (summarizing hundreds of research studies from a twenty-year time span on competency assessment and application).

238. *See supra* Part II.C.

239. The IO psychology literature provides some clues on competencies that cut across all workplaces. *See, e.g.*, SPENCER & SPENCER, *supra* note 203, at 336 (listing eight factors that “predict success in work and in life”: achievement orientation, initiative, information seeking, conceptual thinking, interpersonal understanding, self-confidence, impact and influence, and collaborativeness).

240. Several practicing lawyers with adjunct professorships in law schools have advocated for a curriculum that would enable law students to be more practice ready at graduation. *See, e.g.*, Brent

skills training will enable law school graduates to better compete for the finite number of traditional legal service jobs that will be available in the years to come.<sup>241</sup> But, to be blunt, in a world that is getting pulled in Susskind's continuum from bespoke to commoditized, practice-ready skills training will not change the total number of traditional legal jobs available to law school graduates. Moreover, one of greatest dangers of the "practice-ready" solution is that we law professors will too readily conclude that we don't need to leave the building—that is, engage with the profession and the industry<sup>242</sup>— to find a solution. Our schools would just need to hire more clinicians. Yet, this is a very expensive solution that fails to address the longer-term systemic employment problems.<sup>243</sup>

(2) *Design and Build It Yourself*. What we teach, and how we teach it, are the key factors that will enable a law school to distinguish itself in the years to come. Although it might be tempting for a law school committee to craft something that is based on the landmark Shultz-Zedeck effectiveness factors,<sup>244</sup> or purchased from a consultant, the ultimate work product has to produce graduates that employers are anxious to hire. This is a design problem that requires data to effectively construct. We need to know what to teach and when and how to teach it. Indeed, the fifth and final step in building a competency-based curriculum is simply "repeat." This is why engagement with the legal industry is so critical: *We need a reliable feedback loop*. Equally important in the short term is the fact that the process of designing and building a competency-based curriculum is a profoundly powerful change management tool.<sup>245</sup> With the right leadership,

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Evan Newton, *The Ninety-Five Theses: Systemic Reforms of the American Legal Education and Licensure*, 64 S.C. L. REV. (forthcoming 2012); see also Steven C. Bennett, *When Will Law School Change?*, 89 NEB. L. REV. 87 (2010); see also Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 CAL. W. L. REV. 219 (2007). I applaud the passion and dedication of these lawyers and am sympathetic to many of their critiques. But, following their prescriptions will not solve our longer term problems.

241. The soft employment market, however, also provides employers with a temptation to double-down on law school pedigree. See Henderson & Zahorsky, *The Pedigree Problem*, *supra* note 199.

242. See Part III.A.

243. Cf. TAMANAHA, *FAILING supra*, note 42, at 172–73 (pointing out that the rise of clinical education reflects the error in abandoning the apprenticeship model but arguing that the clinics are uneconomical and not a viable solution to legal education's long-term woes).

244. The Shultz-Zedeck effectiveness factors were not designed to be a working tool for a law school curriculum. My own experience in both a law school and legal employer context is that twenty-six factors is too many. An effective competency-based curriculum will simplify these factors and place them in a sequence and hierarchy to facilitate effective teaching.

245. As noted earlier, change management is a well-established discipline with a deep literature. See *supra* note 23 and accompanying text. For a general discussion on change management, see John P. Kotter, *Leading Change: Why Transformation Efforts Fail*, HARV. BUS. REV., Jan. 2007, at 96 (articulating and explaining Kotter's renowned eight principles on organizational change); see also Fred Nickols, *Change Management 101: A Primer*, DISTANCE CONSULTING LLC, <http://www.nickols.us/change.htm> (last updated Aug. 23, 2012) (accessible overview by a leading consultant on change management).

it can also be the basis for a successful law school capital campaign. Again, engagement with alumni and the legal industry will lead us out of this maze.<sup>246</sup>

(3) *Alliances with Employers*. Law schools have one factor working in our favor. Legal employers are facing a battle over market share,<sup>247</sup> and high quality professional talent is the solution to their problem. Legal employers lack the know-how and expertise to solve this problem on their own. Further, they too are under enormous cost pressures.<sup>248</sup> Effective engagement with the legal industry can and should result in mutually beneficial collaboration. The value of the third year of law school is now almost universally questioned.<sup>249</sup> Thus, it is ripe for a law school-legal employer collaboration that drives down costs while accelerating lawyer development.

### C. The 12% Solution

My Blueprint for Change takes a realistic view of how quickly and dramatically law schools can change. Some faculty members may deny there is need to change. Others will disagree with the direction I have staked out here. A third group may like the proposal but conclude that it is too late in their careers to make a substantial contribution. So let's begin with a coalition of the willing. To my mind, 12% of the faculty is enough, particularly if they are pooled together in a consortium-based working group as discussed in Part III.A.

Further, as a political matter, let's stipulate that the blueprint does not call for the tearing down of legal education as we know it. Instead, we start with 12% of the curriculum—the equivalent of one course per year—driven by a small subset the faculty, who are willing and able to take up the

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246. See *supra* Part III.A.

247. See Henderson, *Law Firm Strategies*, *supra* note 195 (discussing coming battle over market share among large U.S. law firms); see also William D. Henderson, *From Big Law to Lean Law*, George Mason Law & Economics Symposium (forthcoming) (on file with author) (describing current battle over market share).

248. See, e.g., Dan DiPietro & Gretta Rusanow, *Cost Reduction Is Good, Cost is Certainly Better*, AM. L. DAILY (Dec. 10, 2010, 6:00 AM), <http://amlawdaily.typepad.com/amlawdaily/2010/12/citi3-quarterparttwo.html> (“[T]he corporate law department faces pressure internally to reduce its outside legal costs. General counsel have been open to other options given the availability of offshore legal service providers, and Am Law Second Hundred firms prepared to offer services at a lower cost than the traditional law firms.”).

249. See, e.g., Mitu Gulati, Richard Sander & Robert Sockloskie, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 244 (2001) (among a sample of 1,100 3Ls, the authors “estimate that third-year students at many law schools attend only around 60 percent of their large classes.”).

challenge. Because the competencies and learning encompassed by the 12% will move students substantially further into the noncognitive effectiveness factors identified by Shultz and Zedeck, this 12% change could immediately distinguish a school's graduates from graduates of peer schools. Thereafter, the 12% would provide a basis for additional investment and learning. Again, 12% is where we start.

If 12% seems like too high a price, I would direct your attention to two insurmountable problems with doing less. The first is economic: because of structural changes occurring in the profession, our business model is unsustainable.<sup>250</sup> The second is moral: we are underserving our students by permitting them to incur so much educational debt when the education we offer does not adequately map onto the workplace they are entering.<sup>251</sup> The model of three years of generalist training to become an artisan lawyer is no longer a realistic or sufficient career preparation for most law graduates.<sup>252</sup> The problem here is not the cost of legal education per se; rather, it is the value of legal education as it is currently constructed.

For the vast majority of law schools, the best solution is to retool.<sup>253</sup> Why? To ensure the long term viability of our law schools, our students need a reliable pathway to high quality professional employment. Focusing only on traditional legal employment is too risky.<sup>254</sup> As discussed in Parts II.B–C, the number and earning power of these jobs is likely to shrink in the years to come. Some might argue that law schools should become more affordable by slashing budgets and increasing teaching loads.<sup>255</sup> Although this might reduce student debt in the short to medium term, it does nothing—zero—to prepare our students for the changes occurring in the legal profession and the broader legal industry.<sup>256</sup> From my perspective, the inadequacy of legal education today is a problem at least on par with its high cost. We need to solve both.

My own belief is that educational quality is the next great frontier. If we can put a man on the moon in the 1960s, surely with three years and \$100K we can turn a reasonably able and motivated twenty-four-year-old into a critical thinker who can reliably communicate, collaborate, gather facts,

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250. See Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 651, 651–53 (2012) (raising the issue of “whether the huge enhancements in legal education in recent years can be sustained”).

251. See *id.* at 671–85 (discussing the burden of student debt).

252. See *id.* at 696.

253. This idea was originally discussed in an essay I wrote in a special online series for the *National Law Journal*. See William D. Henderson, *The Hard Business Problems Facing U.S. Law Faculty*, NAT'L L.J.'S L. SCH. REV. (Oct. 31, 2011, 12:39 PM), <http://legaltimes.typepad.com/lawschoolreview/2011/10/the-hard-business-problems-facing-us-law-faculty.html>.

254. See *id.*

255. See Bourne, *supra* note 250, at 692–93.

256. See *id.* at 695–96.

assess data, lead, follow, and approach problems with both empathy and objectivity. Improving quality changes the debate from “how much does my law degree cost?” to “how much is my law school degree worth?” If the worth is sufficiently high, I believe both public and private employers would be willing to subsidize it in exchange for preferred access to graduates.

The only barrier is institutional focus. To make this happen, a law school—or, more likely, a law school consortium—has to take an “Apollo Project” approach that focuses purely on education. After figuring out the “how high” and “how fast” possibilities, an institution could then focus on controlling costs through process improvements and building modules. First quality (worth), then cost. This is not trade school education; this is about fully exploring human potential.<sup>257</sup>

My 12% solution is an “Apollo Project” approach, albeit with a realist’s assessment about (a) the complexity of the task before us and (b) how quickly an organization can change and remain stable and cohesive. Law schools are filled with highly talented and dedicated professionals who want to deliver value to their students. But not everyone has the energy and mindset to begin the iterative process of building a competency-based curriculum. Many of these competencies that a law school might include—for example, teamwork, communication skills, emotional self-control, problem-solving, and decision-making—have to be taught experientially. And for most of us law professors, creating and executing these types of teaching plans would be a new skill. Managing student expectations is also a problem. Students, more than anyone, would prefer the legal profession as depicted in the popular media. They expect to learn about torts, contracts and constitutional law. They are unprepared to learn that law is becoming less about jury trials and courtroom advocacy and more about process engineering, predictive coding, and the collaborative and technical skills those processes entail.<sup>258</sup>

As a practical matter, I would suggest that we begin with a summer institute between the 2L and 3L years of law school that is created and staffed by the select group of faculty, alumni, and employers drawn from a law school consortium.<sup>259</sup> What can be accomplished during a ten-week

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257. See William D. Henderson, *What is the Answer to High Student Debt?*, THE LEGAL WHITEBOARD (May 23, 2012), <http://lawprofessors.typepad.com/legalwhiteboard/2012/05/what-is-the-answer-to-high-student-debt.html>.

258. Richard Susskind recently remarked that, “I talk to many audiences, nearly all of them skeptical and conservative. And consistently, the most conservative audiences are law students.” See William D. Henderson, *Why Are We Afraid of the Future of Law?*, NAT’L JURIST, Sept. 2012, at 8, 8 (quoting Susskind during a speech given in London in June 2012).

259. There is an immensely practical reason for starting with a summer program that does not

summer program for 3L law students is approximately equivalent to 12% of learning in law school. Although the consortium faculty would be charged with creating the curriculum, in all likelihood it would be entail simulations, team-based projects, and other forms of experiential learning. The summer institute would enable a larger number of law professors to observe these new forms of teaching. If successful, the course materials and assessment tools developed by the summer institute would begin migrating back to the law school environment to fill 12% of the actual law school curriculum.

Building and delivering this 12% curriculum will probably require the efforts of at least 20% of the law school faculty. Let us go with the 20% who are most willing to accept this challenge—probably many junior members of the faculty who realize that riding out the clock is just not an option. The remaining 88% of the curriculum, taught by the remaining 80% or so of the faculty carrying a slightly heavier teaching load, can be kept largely intact. This process of building and improving a competency-based curriculum will have to unfold over a period of years. With some early successes, the 12% can be expanded to fit the strategic needs of the schools. But I would advise a simple maxim: crawl, walk, run.

The 12% solution is a plan for law faculty to create school-specific capital.<sup>260</sup> A competency-based curriculum is best executed by the faculty who created it and who continue to grow and improve it.<sup>261</sup> We will be interdependent upon one another to create the new competency-based curriculum, and it is this interdependence that will enable us to deliver a superior education as compared to other law schools staffed by autonomous teachers and scholars. The price we will pay for this school-specific capital is likely to mean substantially less time for traditional legal scholarship—the kind that has historically enabled law professors to obtain a more lucrative lateral offer at a higher-ranked law school.<sup>262</sup>

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offer law school credit: the entire program would be outside the purview of ABA Accreditation Standards and law school educational policy committees, yet it could nonetheless transform some law students into the type of law school graduates that are in short supply. Again, to be successful, this entire blueprint requires validation by the labor markets.

260. The concept of school-specific capital is based on Gilson's and Mnookin's discussion of firm-specific capital, which is the creation of a resource by partners that can only be profitably exploited within the firm and thus is not subject to grabbing and leaving. See Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 353–71 (1985) (discussing advantages and sources of firm-specific capital); see also William D. Henderson, *Law Professor Free Agency and "School-Specific" Capital*, LEGAL PROF. BLOG (Aug. 13, 2008), [http://lawprofessors.typepad.com/legal\\_profession/2008/08/law-professor-f.html](http://lawprofessors.typepad.com/legal_profession/2008/08/law-professor-f.html) (discussing the effects of increasing professor mobility on school-specific capital).

261. See Gregory S. Munro, *Integrating Theory and Practice in a Competency-Based Curriculum: Academic Planning at the University of Montana School of Law*, 52 MONT. L. REV. 345, 358–63 (1991).

262. See Gillette, *supra* note 198, at 215.

Ironically, in terms of scholarship, any law school that succeeds in creating true school-specific capital would be in a position to make an enormous contribution to the literature on experiential legal education, educational assessments, adult learning, teamwork, institutional design and change management. That said, I realize that this is not the type of work that many law professors signed up for. If this describes you and your colleagues, then you likely have some decisions to make. If your law school embraces a plan that is uncomfortably far away from your vision of legal education, think long and hard about whether your preferred vision is economically viable. It may be time to either let go of old ideas or, alternatively, to move on to other opportunities.

#### IV. CONCLUSION

The day before I completed this manuscript, I had breakfast with Mark Chandler, the general counsel of Cisco Systems, Inc, a major publicly traded technology company. I told Mark about the subject of this essay—that I am delivering the hard news that the vast majority of law schools either have to adapt to the new legal marketplace or go out of business. I was focused on the fear and sadness it might engender for many readers. He, in contrast, focused on the benefits and innovations that these pressures will soon produce. “What you are describing is my industry, my job, every day. Changes in the way knowledge is collected and accessed are affecting all of us. For everyone but law school deans and professors who refuse to change, this sounds like wonderful news. So don’t worry about it. Now, what do you want for breakfast?”

This was a welcomed reality check for me. There is an opportunity here; an opportunity to do something great. I hope you agree.



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