A Meditation on Sustaining the Current Model of Legal Education: Jobs, Income, Debt, and Availability of Credit

Rick Matasar

Professional degrees differ from other graduate programs. In many disciplines, graduate school is a training ground for an academic career. Students seek education as an end in itself– the field of study is the path to continued academic research in the field. Students begin their studies in undergraduate school, choosing majors in particulars subject areas, affiliate with professors from whom they will learn the "business" of their chosen field, and ultimately receive financial support in grants and other aid to conduct research with their professors or serve as teaching assistants in their courses. The disciplines are tailored to narrow the numbers of successful graduates. Unsuccessful students are sent on their way with terminal masters degrees after a few years of study. They then seek work outside of academia and often in an unrelated field.

Students in professional degree programs more often follow a different path–their education is usually solely a means to an end in which they become an accountant, lawyer, doctor, etc. Students come from varied undergraduate disciplines. They study under professors who have little expectation that their students will follow in their footsteps to an academic career. They may receive merit scholarships, but rarely work directly on their faculty mentors' scholarship and almost never share in teaching responsibilities with their faculty colleagues. The goal of the programs is to retain entering students and transition almost all of them to professional jobs outside the academy. The key to these programs remaining viable is a strong employment market that absorbs the graduates of the programs and offers salaries commensurate with the cost of acquiring the degree.[1]

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[1]. Even within professional schools there are substantial differences. Medical and dental students have substantial clinical opportunities while in school and are expected to take on low paid training jobs soon after graduation. Their income expectations are tempered by long apprenticeships, but with expectations of higher returns over the long run. Law schools, by contrast, have much less in-school clinical training, but substantial numbers of students have high salary expectations immediately after graduation.

The cost of professional education has risen rapidly over the last 15 years, with costs exceeding CPI and other inflation measures. This is unsurprising. Undergraduate programs cushion price increases by continually increasing the number of new students that they enroll. Each additional student brings in high marginal revenue at very little marginal cost. However, professional schools have limited capacity to expand the scale of their programs–either because of professional regulations or the lack of building and classroom capacities. To continue to increase salaries, deal with increased costs, expand curricular offerings, and deal with capital needs, most professional schools raise revenue by continually raising their price.[2]

Despite the rising price of education, several factors have kept demand for professional education strong. First, most professions require licenses that are exclusively available only to those who complete professional school. Second, the professions maintain a monopoly over their services because the government requires practitioners to have professional degrees. With limited access to the profession and protection from competition, professional schools are beneficiaries of a market well-tailored to absorb new graduates. Third, credit to finance professional education is easily available with relatively favorable rates and long-term payment periods. For several years the federal government has provided direct funds for many of these loans or reduced the credit risks taken by private lenders by guaranteeing payment in the event of defaults by graduates. Fourth, the loans themselves cannot be discharged in bankruptcy. Fifth, professional salaries for many graduates have continued to rise and have kept ahead of the increased cost of obtaining the degree. Sixth, especially in recent years, the cost of capital has been quite low and funds have been widely available. Seventh, the financial markets have had a taste for new financial instruments, like bundled student loan securitizations, that give lenders a way to diversify their risks in originating loans.

Legal education has prospered under this model. Vast numbers of students have entered law school. New schools have been approved. Interest rates for loans have been low. Defaults have been modest. Financial services companies have flooded the student loan markets with products and have competed vigorously for student loan volume and business. However, these conditions have not always existed. There have been several periods–usually associated with economic downturns–in which credit for students has been constricted. There have also been times when lenders were very particular about their borrowers, focusing on the overall default rates of students attending particular schools or the credit worthiness of particular borrowers.

I believe we are entering a new era in legal (and probably most higher) education in which lenders may be more discriminating in their business practices and in which significant

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[2]. Again, there are substantial differences among professional schools. Many medical fields have expectations that their faculty will generate salary income through professional practice and other support either through research or outside funding. Law schools rarely generate substantial grant support. I know of only one law school–Chicago-Kent College of Law–that generates salary income in its clinics.

numbers of students may find it difficult to finance their education. This mediation on that possibility explores the ramifications of such a scenario.

The last two years have led to three interrelated problems for the student loan industry: (1) a reduction of funds available to student lenders (and higher cost of capital even when funds are available); (2) the lowering of the percentage of the federal guarantee to lenders in the event of default (as well as a lower rate of return on loans that are made); and (3) the withdrawal from the market of numerous student lenders (as well as choices made by other lenders to participate only selectively in making loans). Together these trends have had an impact on the availability of funds. First, it has moved more schools into the direct lending program, which puts the federal government in direct competition with private lenders. Second, it has forced remaining private lenders to search for greater profitability by reducing benefits to borrowers and narrowing the circumstances in which they will loan funds. Because many of the newer lenders in the student loan industry have no independent source of funds for their loans–depending on short-term credit and securitization to fund their loan originations–some schools have struggled to find lenders willing to lend to their students. This has caused an acute problem in for-profit schools. In addition, it has been an increasing problem for borrowers seeking private loans–those not guaranteed by the federal government. These problems have been exacerbated by the sub-prime crisis, the failure of the auction rate municipal bond markets, and the general mistrust of securitization. The question is what this portends for the future.

These problems do not in themselves mean that law students, law schools, and the ability to finance a legal education are in immediate jeopardy. So long as lenders perceive that students who become lawyers will almost all find jobs after graduation, with salaries commensurate to pay the debt accumulated to obtain the degree, the basic premise of the legal education model remains fundamentally strong. More importantly, as the economy improves, creditor confidence rises, and funds become available, one might assume that students should find it even easier to receive funds. And even if private lenders hesitate, the direct lending program should fill the gap.

But, if the assumption of a robust job market, with salaries adequate to cover debt is erroneous, several unpleasant possibilities are likely.

First, private lenders will begin to distinguish between borrowers on the basis of the schools they attend–perhaps going so far as redlining some schools. The preliminary data from the After the J.D. Study suggest (somewhat strongly) that student incomes track the prestige of the schools they attend.

Second, lenders may begin to distinguish borrowers on the location of their schools (or the location of the employment market into which students will graduate) The After the J.D. Study also suggests that students graduating from large urban schools seem to receive higher salaries than those who graduate from rural schools or schools in smaller urban areas.

Third, and most importantly, lenders may begin to distinguish borrowers on the basis of their law school performance. Substantial data now show that virtually all schools outside of the most elite tier graduate two different cohorts of students. A small percentage (5-20%, generally at the top of their class in academic performance) earn salaries in excess of $140,000. These salaries are fully adequate to cover their debt. Unfortunately a much larger percentage (50-80%, generally outside of the top of the class) earn salaries from under $55,000. These salaries are probably inadequate to cover debt service. Moreover, the weakest students in the school may face the worst problems. Bar passage data suggest that a disproportionate number of students who fail the bar examination come from the bottom quartile of the class.[3] These students are less likely to find high paying legal jobs until after they pass the bar examination, with attendant delay and an increased likelihood of defaulting on loan payments.

Despite the bi-modal salary distribution in the law market, there is no similar bi-modal distribution of debt. Data provided by NALP, as well as the schools themselves, show that average student debt is nearly identical for schools in each of the tiers. Similarly, within the same schools, student debt is equally distributed among top, middle, and weaker students– although at some schools, students with the highest class rank may actually incur less debt because they receive merit scholarships. In other words: debt for most students and most schools is identical, but the ability to repay may vary widely by student performance, school attended, or

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[3]. It also continues to be true that disproportionate numbers of these students are from minority groups.

location of the job.[4]

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[4]. It is possible that the choice by a lender to discriminate by school or student performance –rational as it might be for a private lender–will just drive more students and schools into direct federal lending. Because the government has a public policy justification for making loans–support of its citizens' pursuit of education, a desire to improve the competencies of our workforce, hope to redistribute incomes, etc.–it may not be dissuaded from making less secure loans.

There are other trends that make these effects even more salient and increase the risk to the legal education enterprise. First, many more law schools are in the current accreditation pipeline and others are being contemplated. This portends even greater competition for the premier paying jobs and continued diminishment of opportunities for increasing numbers of graduates. Second, the legal profession itself may lose the taste for very highly paid associates; it certainly will do so if the cost of paying new associates cannot be recouped from clients, who are increasingly hesitant to pay for young lawyers whose work is not cost effective. Third, U.S.

It also may not choose to delve deeply into differences between borrowers and schools–especially if those distinctions might fall disproportionately on citizens of less means or minority populations. However, if the disparity in salaries for graduates continues, even the government will not be in a position to disregard risk because default may impact its freedom to budget for other, deeper problems. Moreover, whatever interests the government may have in promoting higher education or professional education, there is no a priori reason to believe it will continue to prefer graduate loans for lawyers, especially if those become riskier loans. Simply put: depending on a governmental bailout is at best an insecure assumption for the future health of the student loan market.

lawyers and firms now face significant competition from non-U.S. firms, many of which have lawyers admitted to U.S. practice (and who were educated here in LL.M. programs charging 1/3 the price of a J.D. degree). Fourth, to the extent that law firms and other legal employers can take legal work off shore, demand for U.S. law school graduates may decrease further. Fifth, undergraduate educational costs also are continuing to rise as is consumer debt for students and their families. This will lead to growing numbers of law school graduates already saddled with large debt before they enter professional school. If private loans remain difficult to obtain, undergraduates not only will begin with more debt, but the debt will be more expensive. Sixth, although LSAC data suggest that the number of college graduates over the next 25 years is likely to rise, many more of these graduates will be women, who generally have less flexibility in where they can attend school and more of them are likely to be from minority families whose incomes tend to be lower than white families. This is most pronounced among Hispanics who tend to have a higher birth rate than Caucasian, Asian, and Black families. Additionally, many more college graduates are likely to come from immigrant families which also may have fewer resources to deal with higher education costs.

Together, these factors further strain the ability of law graduates to obtain credit and manage debt. Coupled with the increasing disparity in lawyer salaries for the haves–those at high ranked schools and those at the top of their graduating classes–the market for legal education eventually must decline as the supply of new lawyers who cannot find jobs sufficient to pay their debt increases. This market, like any other, should shrink if consumers do not perceive sufficient value for their purchases. If the demand for education declines, it is unlikely to affect all schools equally. The very limited number of high prestige schools, in which as many as 50% of its graduates can find high paying jobs (or whose endowments are large enough to cushion the cost of the education) will continue to prosper. Inexpensive or state subsidized schools will probably maintain the ability to attract students. However, demand for education at the 100 or so expensive, is likely to decline.[5] Eventually, some schools will fail, many will constantly be searching for adequate resources, and most will have to cut expenses and services in order to survive.

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[5]. Some of these may respond by going to open enrollment–essentially maintaining their programs by accepting enough students of whatever qualification to continue to pay their costs. But this strategy cannot survive over the long haul, especially if the less qualified students further undermine placement possibilities for graduates of the school.

The fundamental question the legal education industry must confront is what can be done to improve the value proposition of going to law school? I suggest the following:

- We should explore whether students can reduce their time in school. At first this might mean expanding the number of 2 year J.D. programs. Most of these charge three years of tuition over the two years, but they do reduce the opportunity cost of study to 2 years and permit graduates to earn salaries a year sooner. Later, schools might begin to offer true two year degrees (and offset their lost revenue through LL.M. degrees or increased class sizes). Finally, because law school is at the end of a four year undergraduate education, schools might explore increasing the number of slots given to 3 + 3 programs and then eventually adopt 2 + 3 or 1+3 programs in which an Associates Degree might be sufficient background to attend law school.

- The ABA should permit much more extensive utilization of distance learning. As technology has improved and schools and students have become much more familiar with both synchronous and asynchronous distance learning platforms, it is clear that such technologies can offer good education. These technologies offer the possibility of significantly lowering educational cost. We must be prepared to approve even an entire on-line law degree program, to permit students to work and go to school at the same time and to reduce the cost of a facility and full-time faculty.

- Schools should explore and the ABA should permit law degrees offered by multi-school and multi-employer enterprises--affiliations between schools and employers in which costs are borne by employers and education is much more customized to accommodate the employer's and student's needs, rather than those of the school. Currently students may not receive pay and credit for the same work. This restriction should be eliminated.

- Schools should band together to seek loans or scholarship support from lenders, philanthropies, governments, and employers to provide for the neediest graduates or for who make multi-year commitments to low paying public service sector jobs. We should coordinate these efforts among the sister-affiliated legal education organizations: LSAC, AALS, the ABA, NALP, Access Group, and NCBE.

- The ABA should encourage schools to create legal education consortia in which resources of multiple schools are combined and duplication is eliminated in facilities, faculty, libraries, and equipment.[6]

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[6]. It is also important that the allied legal education organizations work closely to begin marketing our industry to potential students. For many years, these

Many of these or other possible experiments will necessitate a firm commitment by the ABA Council to take immediate steps to recognize the potential risks to the legal education industry and become more flexible in its regulations.

First, we must become much more transparent. Students should understand the legal education/legal employment market. This might mean requiring schools to collect and disseminate information on outcomes by class rank or academic performance by students at various schools and in various percentiles within those schools. Students ought to know the risks they take by choosing a particular school and the likelihood of reaching their goals dependent on their performance in school. The ABA should also work with NALP to require legal employers to be much more forthright about their hiring practices. If it turned out that employers do not make significant distinctions among vast numbers of law schools, but that students erroneously believe that employers follow the minute distinctions in the rankings, students should have this information in order to make an informed decision about which school to attend. Given the great disparity in incomes graduates will receive in their first jobs, depending on law school performance, students might decide on which school to attend either by choosing a school offering them a scholarship, which would reduce their cost, or one in whose pool they are most likely to achieve high grades.

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organizations have worked on "pipeline" experiments meant to attract minority students to the legal profession. However much these are valuable efforts, we must generalize the efforts to increase demand for education. These efforts might offset declines that would otherwise occur and might be coupled with the strategies suggested above to attract talent to the profession from applicants who understand fully the economics of legal education.

Second, all rules that primarily are about faculty or administrator privilege should be eliminated. No school should be required to have life-long contracts, maximum teaching loads, particular types of facilities, or a particular mix of full-time and part-time faculty. The only measure should be outcomes: do the students receive an education that prepares them to become lawyers (or serve other useful societal functions if that is a school's mission)? By shifting focus to outcomes, we eliminate preconceived ideas about the conditions necessary to a legal education. Many of these preconceptions–the need for a particular library configuration, the need for a full-time faculty, the need for a first-rate facility, may be desirable ends. All add costs and are not inherently necessary to prepare a student to become a lawyer. Minimally, the need to reduce costs suggests that we must be open to experiments that would test the assumptions.

Third, restrictions on distance learning should be rolled back or even eliminated. There is evidence that one can learn through distance learning. Other disciplines have experimented and succeeded in offering degree programs through distance learning. If we move to an outcomes focus, it would suggest that the measure of success is not **how** something is done, but **whether** it is done. By stifling fulsome experimentation with new technology, we inhibit the development of techniques that hold the promise of substantially reducing the cost of a law degree. We often worry about stratification–the creation of two or more kinds of legal education. It is time to worry more about the stratification that already exists: between those who can afford to pay the cost of the their education and those who cannot.

Fourth, schools must be encouraged to develop many different models of education measured by the interaction between school mission and student outcomes. This might mean tolerance of much more vocational programs, or schools geared to producing graduates for government service or schools focused on business jobs for their graduates. The key is that the desired student outcome should be the way to evaluate the school. For example, a school might decide to eschew any focus on research. Such a school might seek many more practicing lawyers for its faculty, might have very high teaching loads, may decide to create co-operative education in which students are paid for academic work, and in which faculty members were expected to teach, not to do research. The measure for such a school would be its success in training students, not faculty productivity.

Finally (and most fuzzy), the various factions in legal education should be encouraged (required) to get along and focus on outcomes. For too long the academy has focused on itself–on job security, on low teaching loads, on research grants, on demographics of the professorate, on our facilities, on our libraries, on just about anything other than the students' futures.

Now is the time to alter our priorities (or at least to permit schools to alter theirs).