THE PERENNIAL (AND STUBBORN) CHALLENGE OF COST, AFFORDABILITY, AND ACCESS IN LEGAL EDUCATION

by

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I. Introduction

"caught between a rock and a hard place"

"there is no answer, no magic bullet, no easy solution"

"we will continue to muddle through"[1]

These phrases aptly describe the current situation with regard to the challenge of financing legal education. The rock is the tuition students must pay and the debt they must incur to do so. The hard place is the bleak job market into which they graduate, along with the diminishing number of people willing to invest in such an expensive and uncertain opportunity. The problem admits to no clear remedy and perhaps all legal education can hope for is to somehow get by with incremental adjustments – as it has before.

Written a generation ago by John R. Kramer, then dean of Tulane Law School, they remind us that financing legal education is a perennial and stubborn challenge. Kramer was a trenchant and prescient commentator on legal education's financial challenges. The basic issue in his view was the business model underlying the way in which the enterprise operated and how that model became so deeply entrenched. It is the basic issue today as well. Simply, are students willing to borrow higher amounts to pay increasing levels of tuition in light of the jobs and salaries they can expect upon graduation? The model's logic, best described as a value proposition, depends on the answer being yes.

Kramer wasn't so sure of that answer and of the business model's sustainability. He worried about the economist's idea of elasticity – that the demand for law school seats is highly sensitive to the expected value.[2] Writing in a time when law school enrollments were leveling-off after a long and dramatic increase, he saw a problematic future. What happens when the value – the well-paying lawyer jobs -- is no longer there? He, and a few others, thought the jobs may not be there, leaving the value proposition resting only on overly optimistic student perceptions of job opportunities.[3] He said, "Research to date has yielded no firm answer to the question of how elastic the demand for legal education is."[4] He thought a reckoning was sure to come and come soon, with the business model itself imploding -- but it didn't.

One could argue that legal education has muddled through, with the business model working passably for many years. That is, enrollments plummeted after 2010 in the wake of the

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[1] John R. Kramer, "Deans and Presidents: Sharing in Bankruptcy or Maybe the Cash Cow Won't be Able to Moo," *The Law School and the University: The Present and the Future*, in American Bar Association Section of Legal Education and Admissions to the Bar, Occasional Papers 6 (1993), 55, 65.

[2] In the late 1980s economist Ronald Ehrenberg argued, "The market for law students 'behaves' in a manner that economists would consider quite rational from the perspective of the participants."[2] The investment students made was sensible given the job opportunities and salaries. Ronald Ehrenberg, "An Economic Analysis of the Market for Law Students," 39 *Journal of Leal Education* 627, 629 (1989).

[3] James White, "The Impact of Law Student Debt Upon the Legal Profession," 39 *Journal of Legal Education* 725, 729 (1989).

[4] John Kramer, "Will Legal Education Remain Affordable, By Whom, and How?" 1987 *Duke Law Journal* 240, 240 (1987).

Great Recession.[5] The question today is whether that reckoning has now finally arrived. One member of the recent American Bar Association Task Force on the Financing of Legal Education (ABA Task Force), himself a dean struggling with the same concerns as Kramer, thinks the answer is yes.[6]

Taking a lesson from Kramer, this essay focuses on that business model. It is divided into three substantive parts. The first two provide an historical context without which today's challenges cannot be fully understood. One looks at financing in post-World War II legal education to understand the business model itself -- its development, logic, and how it became so entrenched. The next adds a longitudinal exploration of seldom-analyzed data on key patterns and changes in post-World War II legal education. Specifically, it looks at the number of schools, enrollments, and tuition. These patterns and changes are a key part of the story and today they seem not so well understood or even known. The 1970s into the early 1980s are especially important as the number of schools and enrollments increased dramatically and then leveled-off – a dynamic behind Kramer's concerns about the business model's sustainability.

The final part treats the changes in enrollment and job prospects in the wake of the Great Recession as a kind of rough natural experiment for Kramer's concern about the business model and demand elasticity. He saw dire times for legal education, but students continued to come and continued to borrow increasingly to do so – at least until 2010. Post-2010 data on enrollment and employment paint a sobering picture for most of legal education. Only the top schools, where job prospects remained relatively robust, are an exception.

II. The Value Proposition Business Model: Affordability and Access

A. Some Context for the Business Model

Financing legal education has always had two sides that can be characterized as a "chicken and egg" relationship.[7] First and foremost is the need of law schools to fund their operations. The funds can come from a variety of sources. They may come directly from a governmental source or from private sources such as contributions to the school. The funds may come from the tuition and fees a school charges to attendees, especially for private schools.

Regardless, the entire enterprise depends on the student's ability to pay the tuition. As an important, early 1950s ABA special committee noted ominously, the lack of tuition-paying

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[5] For a more optimistic view s*ee* Michael Simkovic and Frank McIntyre, "The Economic Value of a Law Degree," 43 *Journal of Legal Studies* 249 (2014), arguing there is a long-term income benefit for a law degree compared to just an undergraduate degree, even if one graduates into a down job market.

[6] *American Bar Association Task Force on Financing Legal Education* (2015), Appendix D, "Separate Statement by Luke Bierman, Dean, Elon University School of Law," 56. https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_june_report_of_the_aba_task_force_on_the_financing_of_legal_education.authcheckdam.pdf.

[7] Peter Swords and Frank Walwer "Financing Legal Education," 64 *American Bar Association Journal* 1880, 1881 (1978); also see Swords and Walwer, The Costs and Resources of Legal Education: A Study of the Management of Educational Resources (1974), 265-71, 276-280.

students means a lack of revenue, which threatens the very survival of legal education.[8] This is the second side and the student must be able to pay tuition as well the other costs involved. Writing about the mid-1950s Peter Swords and Frank Walwer found that available funds for both scholarships and loans were limited. Aside from any financial aid, a student's resources consisted of "those provided by the student himself or herself, those provided by the spouse, and those provided by parents."[9]

While legal education as we currently know it is largely a post-World War II phenomenon,[10] two trends that started before the war are particularly important. Each made affordability and access decidedly more problematic. Each helped shape the context for the emergence of the value proposition business model as a way of dealing with the chicken and egg issue.

The first is insidious -- the long-term erosion of support for public higher education, including public law schools. Publicly supported higher education providing inexpensive access was far truer in the past than today. For some public laws, like University of California-Berkeley Boalt Hall and University of California-Hastings Law School in the 1930s tuition itself was free, although some fees may have been charged.[11] In 1933, those fees in nominal dollars were $102 for Berkeley and $100 for Hastings -- less than $2,000 in 2018 dollars.[12] The days of low cost or tuition-free law school, of course, are long gone.[13] For the 2018-19 academic year *in-state* tuition and fees for those two California was just north of $49,000.[14]

The second trend involves the long-term efforts of the American Bar Association (ABA) to shape the nature and structure of legal education, especially with regard to part-time legal education and schools not accredited by the ABA (the ABA began formally accrediting law schools in 1923).[15] Part-time legal education was far more available in the deeper past than now and offered a way for students to address the financing of their legal educations by working and taking late afternoon and/or evening classes. Depending on the point in time, some of these schools with part-time programs were ABA-accredited schools, but not many. Of 85 ABA-approved law schools in 1933, 11 had part-time programs and 89 non-approved schools had such programs.

Over time, the availability of this kind of opportunity declined. In writing about the ABA's efforts in the first half of the 20th century to control the structure and size of the legal

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[8] *See* American Bar Association Special Committee of the Conference on Personal Finance Law, "Loans for Law School Students," 5 *Journal of Legal Education* (1952-53).
[9] Swords and Walwer (1974), *supra* note 7 at 282-283.
[10] *See* Robert Stevens, *Law School*: *Legal Education in American from the 1850s to the 1980s* (1983), 205-231.
[11] Thomas Garden Barnes, *Hastings College of the Law: The First Century* (1978), 232.
[12] Unless otherwise footnoted, all data on the number of schools, enrollment, tuition, and employment used come from one of two sources: *Spinelli's Law Library Reference Shelf*, "Official Guide to ABA Approved Law Schools: 1926-2012" or ABA Section of Legal Education and Admissions to the Bar: Main Home (2011-18), http://www.abarequireddisclosures.org.
[13] Swords and Walwer, for example, reported a 129% increase (in constant dollars) in *in-state* public school tuition between 1955 and 1970; *supra* note 7 at 276-280. Long-term trends in tuition are discussed in Part III.
[14] The lowest stated figure for in-state tuition and fees in 1933 was the University of Oklahoma at $16 in nominal dollars or $314 in 2018 dollars; the figure for *in-state* tuition and fees for 2018-19 was $20,903.
[15] See Stevens, *supra* note 10; also see Richard Abel, *American Lawyers* (1989), 40-73.

education market and the legal profession, Richard Abel noted that part-time programs were prime targets. Typically found in stand-alone schools often serving immigrant and lower/working class aspirants, these programs helped fuel a rapid growth in the number of law schools and, concomitantly, in the number of lawyers.[16] The ABA expended substantial effort to drive as many of these schools as possible out of business by withholding accreditation using ABA-created standards few of these schools could meet.

In Abel's words, "The virtual demise of unapproved schools [in the first half of the 20th century] has also meant the decline of part-time law study … The ABA campaign against unapproved law schools disproportionately affected part-time study."[17] Among the major consequences was the affordability of and access to legal training. Abel said, "the decline of part-time schools has rendered legal education financially less accessible to students from poorer backgrounds. Evening instruction makes it far easier for students to support themselves by working."[18] In 2018, three-quarters of ABA-approved or provisionally approved schools showed at least some part-time enrollment, but this should not be taken as a return to greater part-time opportunities for students. Of those with part-time students, approximately one-half had less than 75.

Even if slowly, access to legal education became increasingly problematic for those of limited means -- and was always problematic for women and minorities. The profession in the first half of the 20th Century and the schools that trained lawyers were largely white, male, from northern European backgrounds, and more well off than not. Few seemed concerned, except to ensure this did not change.[19]

Perhaps the major pre-World War II exception, at least with regard to class and ethnicity, was Alfred Reed. Writing in 1921, he argued, "Humanitarian and political considerations unite in leading us to approve of efforts to widen the circle of those who are able to study law… It is particularly important that the opportunity to exercise an essentially governmental function (the practice of law) should be open to the mass of our citizens."[20] One more favorable commentator noted that he "championed the cause of evening law schools" because of their role in broadening access.[21] His ideas on access, however, were widely and strongly condemned by the organized bar.[22]

The concern over access gained some traction after World War II as the legal profession and legal academy explored the challenge of financing legal education in the future. It is seen in the early 1950s with the ABA special committee that looked beyond self-funding by students/families, and the meager scholarship monies then available. The committee warned:

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[16] Abel, *id.* supra at 57-58.
[17] *Id.* at 57.
[18] *Id.* at 58.
[19] See Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1976), 40, 108-129 on the early 20th century efforts to maintain the profession's social structure and characteristics.
[20] Alfred Z. Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States with Some Account of Conditions in England and Canada*, 398 (1921).
[21] Esther Lucile Brown, *Lawyers and the Promotion of Justice* (1938), 43, 43-45.
[22] *See* Auerbach, *supra* note 19 at 110-116.

"The people of this country would not countenance any standard that would result in all lawyers coming from the well-to-do or socially-elect classes. This result would be fatal in a modern democracy such as ours because those classes have no corner on ability and the lawyer is not only an officer of the court but also a public servant."[23]

Still, diversity and access, it seems, didn't go beyond "available to the barber's son on no more onerous terms than the broker's;"[24] or perhaps more radically, the "son of a Sicilian immigrant shoemaker ."[25] Women constituted a mere 3% of law students at ABA-accredited schools in 1950, and publicly available data on minority enrollment did not even appear for accredited schools until the early 1970s. Minority students were 8% of all students at accredited schools in 1975, women were 23%.

B. World War II and the GI Bill

World War II had a profound effect on law schools as it did on all of higher education. Enrollments "dropped dramatically during World War II,"[26] as the pool of potential law students went into military service. By 1943 total law school enrollment dropped below 4,300. The war reduced Northwestern Law School's "enrollment to a very small level,"[27] and even law professors switched to roles supporting the war effort in the military and elsewhere. At Iowa, "student enrollment dropped dramatically during WWII ... to a low of 23 in 1943. Law students and most faculty left to serve in the war."[28] Baylor's law school "ceased operations from 1943 to 1946 during World War II."[29] All told, eight schools, including Baylor, closed for some amount of time during the war and reopened afterward.

The government's plans for the immediate post-war period brought the original GI Bill, which provided broad access to education and training generally through its financial support of students in broad array of settings.[30] It saw higher education and training as public goods and it was the first major foray into higher education funding by the federal government. Its impact on legal education was immediate and dramatic. Baylor's law school "reopened in 1946 … (and) experienced a rapid increase in enrollment from about 100 in the fall of 1946 to 402 in the fall of 1949."[31] From its low of 23 students in 1943, after the war Iowa's "law enrollments swelled to record levels. Nearly 500 students were enrolled in 1947 and the school adopted special acceleration programs to move the bulge through as quickly as possible. By 1950, enrollments had stabilized at around 400." Enrollments swelled, "thanks largely to the GI Bill."[32]

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[23] ABA Special Committee, *supra* note 8 at 314.
[24] William Tucker Dean, "Who Pays the Bills? The Costs of Legal Education and How to Meet It," 16 *Journal of Legal Education* 416, 419 (1964).
[25] Barnes, *supra* note 11 at 229.
[26] Abel, supra note 15 at 74.
[27] James Rahl and Kurt Schwerin, *Northwestern University School of Law: A Short History*, 52-53 (1960).
[28] *Law School History and Milestones*, first prepared for presentation to the US District Court, Northern District of Iowa Historical Society, April 11, 2008, updated Fall 2012, by N. William Hines, https://law.uiowa.edu/law-school-history-and-milestones.
[29] *Baylor Law History*, http://www.baylor.edu/law/index.php?id=930137.
[30] The Servicemen's Readjustment Act of 1944.
[31] *Baylor Law History*, *supra* note 29.
[32] *Law School History and Milestones*, *supra* note 28.

There does not yet appear to be a study that explicitly and systematically explores the impact of the original or subsequent versions of the GI Bill on legal education. Writing in 2004, about the Boston College Law School, Brandon Bigelow (himself a 1990s-era Navy veteran and Boston College Law School graduate) presents a rare case study on the impact of the GI Bill. He noted that the war "presented challenging times for Boston College – and indeed, nearly destroyed the law school."[33] There were only six graduates in June of 1945 and the law school's finances were "dire."[34] The immediate post-war period was one of opportunity because of the GI Bill. "Returning veterans, flush with money provided by the federal government through the Servicemen's Readjustment Act of 1944 … financed an ambitious transformation of Boston College Law School from a well-respected regional school to one of national stature."[35]

Given the generous educational benefits and allowance for living and other expenses, the original 1944 GI Bill most certainly had a substantial impact on legal education. At least with regard to affordability it provided a breadth of access not seen before or since. Bigelow points out that the it paid tuition directly to the school with a relatively high limit – high enough, for instance, that Boston College Law School could raise tuition into the1950s and still stay comfortably within the limit ($500). The living allowance was paid directly to the veteran. Only 9 of 110 ABA-approved schools with a full-time program had a full-time tuition exceeding the limit in 1949. In short, said Bigelow, "economically, veterans returning to law school found themselves in pretty good shape ... With tuition and most living expenses paid, veterans left the (Boston College) law school unencumbered by debt."[36]

Of course, the GI Bill was also an enormous financial boon for law schools – and a badly needed one. Bigelow's Boston College provides an example.

> Perhaps the most dramatic and concrete effect of the massive influx of veterans was economic. In 1941-42, the law school held a reserve of approximately $32,000; by 1945 … that amount had shrunk to a mere $1,693. Increasing tuition from $300 to $350 for the day session in 1947, and to $400 in 1948, the law school was able to rebuild its capital position. By 1948, the law school held more than $162,000 in reserve.[37]

One might not be going too far in saying the 1944 GI Bill rescued legal education financially by making it quite affordable for large numbers of veterans to attend law school with the federal government covering the tuition. It remedied, at least temporarily, the lack of tuition-paying students and revenue, which was threatening the survival of legal education.

The Korean War GI Bill and subsequent benefit programs for veterans were less generous, but not meaningless. What they meant for legal education is unknown. Because of their lower level of support, the lower numbers of veterans leaving the service at the same time,

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[33] Brandon Bigelow, "The Impact of the GI Bill on Legal Education: A Case Study of Boston College Law School, 1949-1959," 3 (2004), *Law School Publications*, Paper 51, http://lawdigitalcommons.bc.edu/law_school_publications/51.
[34] *Id.* at 14.
[35] *Id.* at 3-4.
[36] *Id.* at 20-21.
[37] *Id.* at 18-19.

and the different environment for law schools, the impact is likely to have been less dramatic than the 1944 version. As the initial surge of veterans passed through law schools enrollments dropped in the middle 1950s.

Even with its relatively short-term impact the original GI Bill provided one effective model for financing legal education and higher education generally. Most importantly, it solved the chicken-and-egg issue by fully addressing both schools' revenue needs and students' ability to pay the level of tuition driven by those needs. Its short life highlighted the need for a business model moving forward.

C. Financing Legal Education Beyond the 1944 GI Bill

1. The Starting Point: Two Key Assumptions

Despite its success and generous public benefits, the original 1944 GI Bill was not destined to be the model going forward. There was little political support for a similar, broad-based program of direct governmental funding. Most, but not all, approached the challenge of financing legal education in terms of a model radically different than the GI Bill -- some variant of a value proposition not unlike the one still at the heart of the law school business model today. Two linked assumptions were key. One was empirical and the raison d'etre – responding to a shortage of lawyers reaching well into the future. There needed to be a robust legal education system to do so. The other was more ideological and framed the approach for underwriting that system – that legal education is a private good and government should stay out.

A. The Shortage of Lawyers

For the earliest post-war commentators discussing the financing of legal education, the pervasive assumption was a substantial lawyer shortage – not just an immediate shortage, but an expanding need into the indefinite future. This assumption was at the foundation of that ABA special committee's report addressing the financing of legal education in the post-GI Bill years. Among the reasons given for the need of a new, sustainable business model for legal education was "too few properly trained lawyers in the United States."[38] Even the initial influx of post-war students supported by the GI Bill would not be enough for the future as the population increased and the economy grew.

An ongoing lawyer shortage – and a conspicuous optimism about an expanding need for lawyers -- animated an interesting 1956 article by Professor Charles Joiner. He looked into the future and saw a robust market for new lawyers. Examining indicators of population and economic growth he predicted a substantial need for more lawyers by the early 1970s saying, "it would not be unrealistic to predict that there will need for … forty percent more lawyers in 1970 than in 1955."[39]

Examining projections for increases in college enrollment Joiner also saw an increasing pool of potential law students through the early 1970s. To meet the growing need for lawyers

[38] ABA Special Committee, *supra* note 8 at 316.
[39] Charles Joiner, "The Coming Deluge: How Goes Our Ark?" 9 *Journal of Legal Education* 466, 469 (1956).

"graduating classes must increase by more than fifty percent in fifteen years."[40] His prediction, however, turned out to be a bit off. Enrollment in ABA-approved law schools increased by just over 130% between 1955 and 1970 -- a robust market indeed (see Part III below). Regardless of the veracity of Joiner's analyses, the article clearly suggested to his readers that the necessary jobs part of the value proposition was a certainty.

Joiner was by no means alone in his view of a lawyer shortage. Writing in 1968, Martin Katzman -- who then was the Assistant Director, Economic Analysis, Office of the Vice President-Planning and Analysis, University of California-Berkeley – reported on an economic analysis done for the University of California to determine whether or not the university needed to expand legal education. Based on the analysis, Katzman argued that there was indeed a shortage of lawyers based on available economic indicators. The exact extent of the shortage, however, could not be determined. He concluded by saying, "our analysis suggests the *direction* but not the *distance* we ought to go in choosing the number of lawyers to educate."[41] Even though he could not judge that distance, the value proposition's logic was built into Katzman's economic analysis. Apparently assuming that potential law students are reasonably rational economic actors, his argument was that they would apply to law school if there was a long-term return on the investment in legal education.

Contrary to the great optimism, law school enrollments declined in the middle 1980s, leading commentators like Kramer to begin raising concerns about the value proposition and its built-in assumption about the need for lawyers.[42] The decline, however, was short-lived (see Part III below) and others argued that the value proposition remained quite viable. Writing in 1989, as a part of symposium on student debt, economist Ronald Ehrenberg reported on his economic analysis that modeled the market for potential law students and concluded, "while tuition increases have outpaced starting salaries law school attendance, on average, still appears to be a worthwhile investment."[43] Still, Ehrenberg warned, the investment may be not be worthwhile for some because of the varying job prospects among different types of school (public and private, "higher" or "lower" quality).

2. The Value Proposition and Legal Education as a Private Good

At its heart, the value proposition sees legal education as a private rather than a public good. It is, after all, based on the individual student's gain from his/her long-term investment. Any broader or public good, it seems, would be a side-benefit – society having the diverse lawyers it needs. What that might mean in practice – sufficient in terms of what and whose legal needs -- was always somewhat hazy, as if things would just get sorted as lawyers capitalized on that investment.

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[40] *Id.* at 472.
[41] Martin Katzman, "There is a Shortage of Lawyers," 21 *Journal of Legal Education* 169, 176 (1968).
[42] *See* David Vernon and Bruce Zimmer, "The Demand for Legal Education: 1984 and the Future," 39 *Journal of Legal Education* 261 (1985).
[43] Ehrenberg, *supra* note 2 at 629. Also see Marilyn V. Yarbrough, "Minority Students and Debt: Limiting Limited Career Options." 35 *Journal of Legal Education* 697 (1989).

The value proposition's logic always has had a flaw in terms of that side-benefit. Even Ehrenberg saw it despite his otherwise positive assessment. He admitted, "High debt tuition and subsequent debt levels may discourage students from low-income families from entering law school. High debt levels may also discourage law students from entering low paying fields of practice (e.g., public interest law)."[44] Kramer was more acerbic, worrying that the model itself may attract a particular kind of student, saying law school "seats may be filled with many more students who, as they become lawyers, do so with the single-minded objective of milking the profession for all it is worth in order to be able to pay retrospectively for their legal education."[45]

The idea of legal education as a private good in conjunction with the assumption of a substantial lawyer shortage were the central ideas in that ABA special committee report noted above. The report deserves attention because it's purpose was to present "a recommended plan for use by [ABA] approved law schools for conducting a student loan program."[46] It was the first, and if not *the* first it was among the very first, places in which the value proposition was laid out explicitly, authoritatively, and in detail. It is especially important in light of the GI Bill's success and the ABA's perspective then on the federal government's role in financing legal education – which should be none.

A series of interconnected reasons drove the report and its argument for a non-governmental loan program. Three were broader in character and took the lead. The first was the lawyer shortage -- "there are too few properly trained lawyers in the United States."[47] The second was the challenge of making legal education available because "the cost of education of all kinds has risen greatly and is still rising," and to make it available to more people "without regard to financial status or social standing."[48] This did not, however, mean any kind of full commitment to diversity. It was to make it "available to poor boys of the requisite character, ambition, and ability."[49] It would be another generation before women and minorities were even noticeable in law schools.

The third recognized that most schools at the time did "not have sufficient funds to furnish the necessary financial assistance to qualified and deserving students."[50] Based on a survey of ABA-accredited law schools, the report noted some progress in building up scholarship funds. Regardless, while scholarships may help the top students, they will do little for the bulk of the students. The report tried to assess the then current state of loan programs by individual law schools. Few of the schools responding to the survey had any program; and for those that did the

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[44] Ehrenberg, *id*. at 629; also see Yarbrough *id*.
[45] Kramer, *supra* note 4 at 240-41. The concern with the impact of law school debt and affordability on access to justice has received renewed attention in the aftermath of the Great Recession. For example, a 2013 report of an Illinois State Bar Association commission said, "Contrary to popular belief, there are not too many lawyers in America; instead, there are too many lawyers with student debt preventing them from providing affordable legal services to the middle class." Illinois State Bar Association, *Final Report, Findings and Recommendations on the Impact of Law School Debt on the Delivery of Legal Services* (2013), 21.
[46] ABA Special Committee, supra note 8 at 312.
[47] *Id.*
[48] *Id.* at 312.
[49] *Id.* at 315.
[50] *Id.* at 312.

funds available were inadequate to fill the gap left by the meager scholarship funds.[51]

Three other reasons were decidedly different, and perhaps more important. The first was the overriding need for operating funds. A loan program would provide schools with the funds needed to meet "their present financial difficulties which are pressing upon them more and more by reason of inflation, increased costs, and expenses, and particularly the necessity of increases in teachers' salaries."[52] In other words, schools need and/or want to charge higher tuitions and a loan program would help students pay the increased fare. The second would enhance public support for legal education and the legal profession by making financial help available to those "poor boys." The third, and related, "a loan program would be a distinct asset in the public relations program of the American Bar Association."[53]

The report also devoted detailed attention to a loan program's design and operation – including amounts to be borrowed, interest rates that might be charged, and varying repayment possibilities. The bottom line was that loans should be repaid over a period of time with interest rates that would not place the new lawyer in any financial or moral peril. In words that would resonate for many today, the report stated, that "If the debt is too great, it can scar the soul …it will invite a tendency to avoid repayment and to moral decay. It may become so burdensome that it leads to hopelessness, despair, and even bankruptcy." [54]

A loan program can work, the report said, because "education is a long-range capital investment capable of returning high yields. The difference between the cost of a legal education and its value in terms of lifetime earnings is proportionately much greater than the return ordinarily experienced on invested capital. The average annual earnings of lawyers exceed that of skilled industrial workers by almost $5,000 per year. This greater annual return makes legal education a sound investment."[55] This value proposition works because the report assumed there were too few lawyers.

The GI Bill, of course, presented a fundamentally different approach to making law school affordable. It saw education as more of a public good. What makes the ABA report especially interesting, in light of the original GI Bill's success, is its strong rejection of *any* government involvement in a loan program or any other program for helping students pay for law school. While grudgingly accepting the government's help "for those who made such sacrifices in the armed forces, we feel that under normal conditions it is socialistic in concept, would suppress initiative in the individual student, destroy self-reliance, and undermine individual integrity."[56]

Indeed, the report presented loans (privately funded with no governmental involvement) and its version of the value proposition not just as a sustainable business model, but also as a bulwark against an existential threat. If a privately funded and privately run loan program is not

[51] *Id.* at 316.
[52] *Id.* at 313.
[53] *Id.*
[54] *Id.* at 318.
[55] *Id.* at 314.
[56] *Id.* at 315.

developed, the report said, "the alternative may well be for the government to intervene and grant such aid, which will inevitably lead to the socialization of the legal profession or at least legal education, and tend towards a totalitarian state."[57] Governmental intervention "will destroy our present educational system with its freedom of thought, expression, and spirit, as it exist today."[58]

While the value proposition and seeing legal education as a private good has won out over the long term, at least one radically different approach was proposed. Writing in 1964, Cornell law professor William Tucker Dean argued for a program – a business model -- that would see legal education as a public good. Pointing to Alfred Reed's arguments about the legal profession, one of Dean's starting points was the that "Everyone will agree that the lawyer is a member of a public profession with responsibilities in a democratic society."[59] As such a public good, "it is important that this 'special professional order' be drawn from the widest possible sources in our society."[60]

Dean agreed with the ABA report on the need for a sustainable source of revenue and for making legal education available to a broader range of students.[61] He rejected the idea of long-term student borrowing because the pool of possible law students was already tilted toward the affluent, saying, "college graduates are primarily the sons and daughters of upper-income citizens."[62] "If this method [long-term borrowing] were applicable to higher education generally, its effect on legal education might not be too serious" because that pool would be much broader. Instead of borrowing for law school, Dean said society generally should pay as it does for public grammar and high school – at least for a substantial proportion of law students (half or more).

Dean asks, where will the money come? His answer is direct and clear: "That it can only come from the Federal Government is apparent at the purely practical level."[63] One finds no talk of creeping socialism or threat of totalitarianism in Dean's discussion, but instead the idea that the federal government has been involved in financially supporting students. Among the more recent programs noted was the post-World War II GI Bill and National Science Foundation fellowships, which "re-emphasized the inevitable role of the Federal Government in higher education."[64] Other areas of higher education were receiving substantial federal support, while legal education was not, an observation to which others pointed as well.[65] Legal education, as a special, public profession should also receive federal aid: "A well-trained profession, open financially to able citizens of every income group, is a vital element in the preservation of the Republic."[66]

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[57] *Id.*
[58] *Id.* at 316.
[59] Dean, *supra* note 24 at 417.
[60] *Id.* at 418.
[61] *Id.* at 419.
[62] *Id.* at 418.
[63] *Id.* at 426.
[64] *Id.* at 427.
[65] *See* Bayless Manning, "Financial Anemia in Legal Education: Everybody's Business," 55 *American Bar Association Journal* 1123 (1969).
[66] Dean, *supra* note 24 at 427.

Dean's plan, however, was not dependent on the assumption of a large and increasing number of well-paying jobs.[67] His plan would create National Legal Scholarships and a National Legal Scholarship Commission. While not everyone would need such a scholarship or choose to apply, he assumed that most applicants would apply. Those applying would be required to take the LSAT (at the time, not all schools required it). Unlike the GI Bill, Dean's plan was purely meritocratic. Scholarships would be awarded based on performance on the LSAT, with the commission determining the cut-off point for receiving aid based on "periodic evaluations of the future demand for legally-trained professionals."[68]

A scholarship recipient would choose a school and the commission would disburse money directly to school for the full amount of tuition along with funds to cover books and room and board. Apparently, there would be no partial scholarships. Those not applying for a scholarship or those not receiving one would need to find other ways to finance their legal educations -- school scholarships, loans from the school or other sources, or work to help finance their educations.

Dean readily admits that the impact of his meritocratic plan on legal education would be "complex," with "different schools … affected in different ways."[69] It would be a boon for top schools, but it could pose real problems for some schools of what he called marginal quality – schools that would find it difficult to attract full-tuition paying students. He did not envision a parallel, large-scale loan program for those not receiving federal scholarships. We can't know what he might say about his meritocratic plan today (Dean retired in 1988 and passed away in 1999) in light of more recent evidence surrounding bias and the LSAT or bias and other standardized tests, suggesting the impact may be complex in ways he could not foresee or expect.[70]

3. The Value Proposition, the Federal Government, and Education as a Private Good

Of course, Dean's plan did not prevail. An approach built on the value proposition idea did. Still, one key argument of Dean's did prevail – the necessary involvement of the federal government. In fact, law schools eventually had the decision on the institutionalization of the value proposition made for them by the federal government with the passage of the Higher Education Act (HEA) of 1965 and subsequent amendments and reauthorizations.[71] While not the first federal foray into higher education, one commentator described the HEA as the first

[67] *Id.*at 429. It is not clear that Dean accepted the oft-stated idea of a substantial shortage of lawyers.
[68] *Id.*
[69] *Id.* at 430.
[70] *E.g.*, William Kidder, "Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?" A Study of Equally Achieving 'Elite" College Students," 89 *California Law Review* 1055 (2001); William Kidder and Jay Rosner, "How the SAT Creates 'Built-In Headwinds": An Educational and Legal Analysis of Disparate Impact," 43 *Santa Clara Law Review* 131 (2002).
[71] See Alexandra Hegji, *The Higher Education Act (HEA): A Primer*, Congressional Research Service (2014). https://www.hsdl.org/?view&did=749333.

"significant, coordinated approach to higher education at the federal level that would actively foster broad access."[72]

Among other things, the HEA and later amendments created Pell Grants, a number of targeted scholarships and grants, Parent Loans for Undergraduate Students (PLUS loans), Guaranteed Student Loans, Direct Loans (subsidized and unsubsidized), Stafford Loans (subsidized and unsubsidized), and Work-Study Programs.[73] Finally, with regard to access one part of the 1972 amendments to HEA not dealing directly with financial aid to students or institutions must be noted – Title IX, which "is a comprehensive federal law that prohibits discrimination on the basis of sex in any federally funded educational program or activity."[74]

One other key program especially important for legal education was not a part of HEA – the Middle-Income Student Assistance Act. "Passed in 1978 MISAA made guaranteed subsidized loans available to students apart from income or need."[75] In a 1987 article on the affordability of law school, Kramer highlighted this measure's importance for law student borrowing, saying: "Law students did not begin to use Guaranteed Student Loans to a significant extent until after 1978, when the Middle Income Student Support Act removed some income eligibility limitations applicable to Guaranteed Student Loans. By 1980-81, law students had $210 million in Guaranteed Student Loans … [that covered] 66% of private school and 78% of public school tuition in that year."[76]

By the end of the 1980s the value proposition was firmly institutionalized. Writing in 1989, the Consultant on Legal Education to the American Bar Association, James White, noted "a significant number of law schools are financed almost totally by student tuition and fees."[77] And what provides the funds for tuition? Said White, "The single most important factor in financing legal education has been … student loans. Students have been able to pay for the increasing costs of law school study only through development of a national loan system."[78] Somewhat ominously, he added, "Students have been willing to borrow in large part because their perception of job opportunities after graduation has been optimistic."[79]

Without these federally-backed loans, said Kramer, "legal education as we know it today

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[72] David Brown, "'We Have Opened the Road:" A Brief History of the Higher Education Act," 12 *Higher Education Review* 1 (2016). Brown's title is taken from President Lyndon Johnson's remarks as Johnson signed the Higher Education Act of 1965. *Id.* at 203.

[73] *See id. passim* for a detailed description.

[74] "Overview of Title IX of the Education Amendments of 1972," United States Department Of Justice, https://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq.

[75] Brown, *supra* note 72 at 4.

[76] Kramer, *supra* note 4 at 252. Kramer's article provides a detailed explanation of the programs in existence in the middle 1980s (federal as well other loans programs) and the impact of changes made during those years that made borrowing more advantageous to students as tuitions were increasing. He also reviews some potential programs suggested by those within the legal academy for addressing the increasing levels of debt, such as income-based repayment plans and public service loan forgiveness programs. Also see David Vernon, "Educational Debt Burden: Law School Assistance Programs – A Review of Existing Programs and a Proposed New Approach," 39 *Journal of Legal Education* 743 (1989).

[77] White, *supra* note 3 at 731.

[78] *Id.* at 729.

[79] *Id.*

would not exist."[80] The loan system was propping-up a highly problematic business model. He opened his 1987 article on affordability noting, "law schools for the last twenty years have been testing the elasticity of demand for their product."[81] The evidence at the time, he said, seemed to suggest a surprisingly inelastic demand they he could not fully understand. At some point the demand would inevitably diminish as the value proposition stopped working. The prospects beyond the turn of 21st century of an increasingly "debt-driven regime" worried him greatly.[82] Kramer did not live to see the reckoning he feared. He passed away in 2006, as law school enrollments were increasing again.

III. The Great Expansion and Rising Tuition

1. Schools

What motivated observers like Kramer was something that might have been seen as a good thing by earlier commentators– the great expansion of legal education combined with tuition levels that kept most schools in decent financial shape. That expansion included not just more law students to fill the seats in existing schools but more schools. The demand seemed – at times – almost inexhaustible.[83]

As World War II started there were 109 fully or provisionally accredited schools – 49 public and 60 private. For the 2018-19 academic year 201 schools were accredited (83 public and 118 private). Three periods of increase stand out: the immediate post-World War II years (1948-1950) with 12 new schools, half private; the substantial increase in the 1970s with 24 schools, 20 private; and the less substantial, but still important increase in the early 2000s with 18 schools, 15 private).[84]

A single explanation for the patterns of increase, especially for new private schools, is hard to discover. One might hazard an explanation for the periods of greatest increase as a clear response to an identifiable need based on a systematic assessment akin to Dean's plan. No such assessments, however, were made. Instead, individual entities – schools, state governing boards, etc, -- made their own decisions for their own reasons. If they sought ABA accreditation, the process required a localized feasibility study to explore "the demand for legal education and the need for lawyers in the area."[85] In light of the ABA's standards for accreditation, that feasibility

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[80] Kramer, *supra* note 4 at 252. He noted a 1986 amendment to the HEA, which no longer required that students applying for loans in the federal program from being treated as dependents. This meant there was no longer an expectation that parents would be contributing to the student's support, meaning students could qualify for larger loans.

[81] *Id.* at 240

[82] *Id.* at 241.

[83] *See* Millard H. Ruud, "That Burgeoning Law School Enrollment" 58 *American Bar Association Journal* 146 (1972).

[84] The figures in this paragraph exclude the three law schools in Puerto Rico. The 2018-19 figure is net of law school closures, mergers, splits, and consolidations that occurred since 1948. The most recent count of non-accredited schools is 32, see Law School Admission Council, "Non-ABA-Approved Law Schools (US)," https://www.lsac.org/choosing-law-school/find-law-school/non-aba-approved-law-schools.

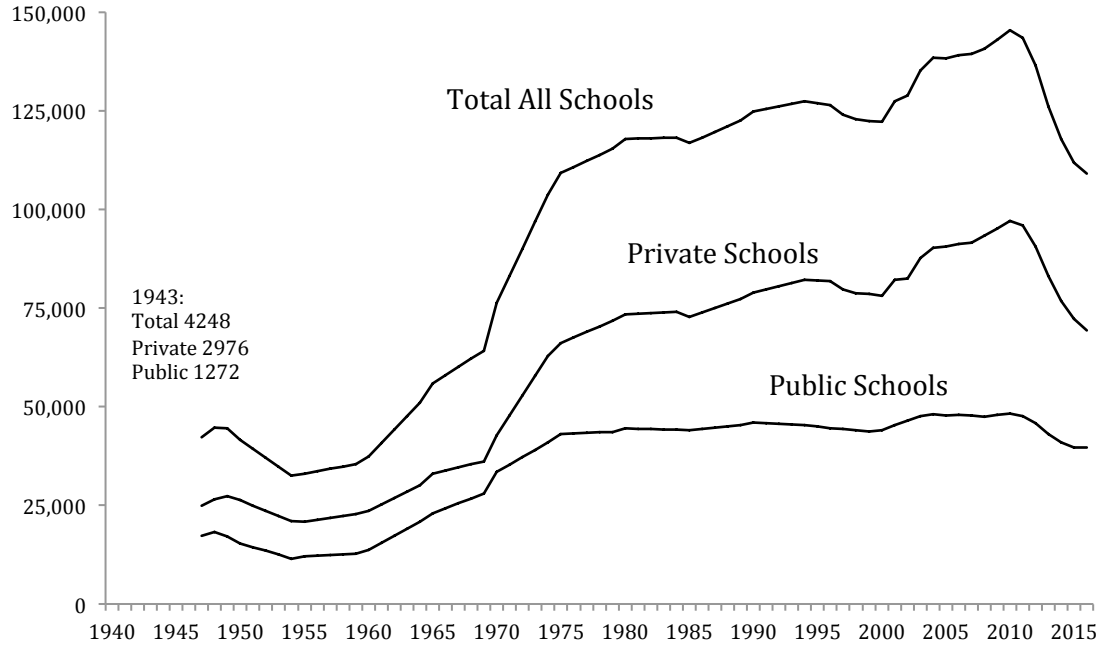
[85] *Approval of Law Schools: ABA Standards and Rules of Procedure* (as amended, 1979), 39.

study seemed to be largely geared toward showing a potential market for students whose tuition dollars would cover a school's operating costs.

2. Enrollments

While the precise connection between the number of schools and demand for law school seats might be hazy, there clearly has been a substantial increase in enrollment since World War II. Figure 1 shows the increase in total JD enrollment in accredited public and private schools since 1943, as well as enrollment overall. The extremely low level of enrollment in 1943 shows dramatically the impact of the war on law schools – the figures are so low they don't even show as points on the graph. By 1947 with the war's end and the GI Bill, total enrollment increased from 4,248 in 1943 to 42,411 in 1947, an increase of 898% over the 1943 figure.

Figure 1
Total JD Enrollment: 1943-2016



Even though the number schools increased in the immediate post-war years, enrollment dipped in the early to mid-1950s as the World War II and Korean War veterans moved through legal education. It regained ground in the 1960s – enrollment in 1970 represented an increase of 104% over the 1960 figure. The reasons for this decade's increase are unclear. Some may be related to the federal government's involvement via the HEA of 1965, but as noted above it had limits on financial aid. Some may simply have been a result of the early "baby boomers" moving through the education system.

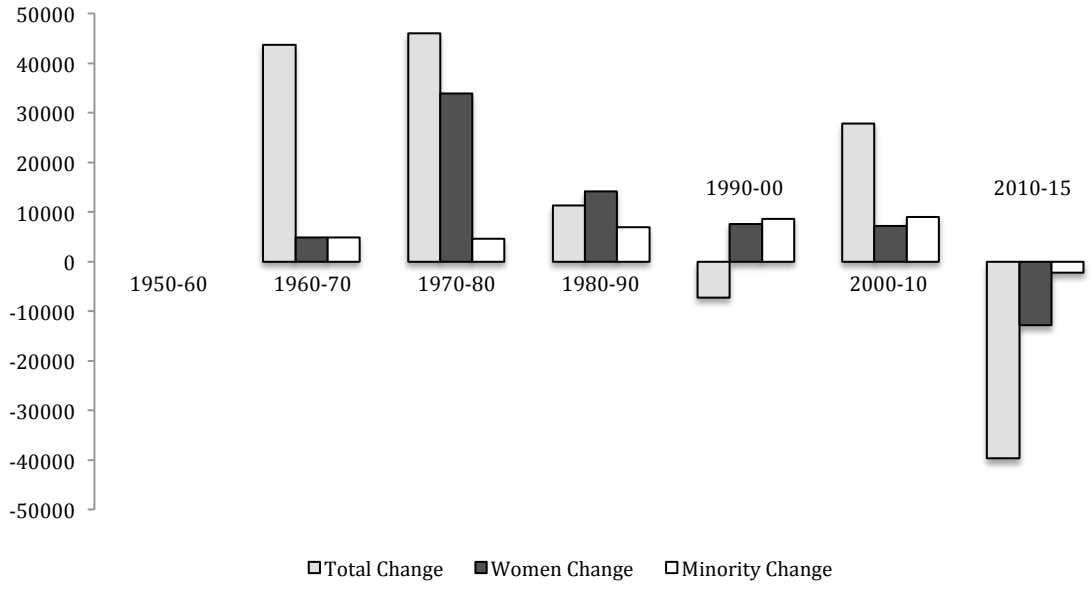
The 1970s brought 24 new schools (mostly private) and more increase in enrollment. The greater capacity provided by the new schools was important. Those 24 new schools accounted for 34% the increase in enrollment between 1970 and 1980. There was clearly a demand for law school seats, more than could be handled by the older schools alone, especially the older public

schools. It was this substantial increase in the 1970s that so worried Kramer, who was not sure of a concomitant increase in employment opportunities.

The possible reasons for the increase in the 1970s are perhaps a little clearer than those in the 1960s. Loans were more broadly available, something important given that 62% of students were enrolled in higher-tuition private schools (new and already existing schools). Loans were doubly important given, as Figure 1 shows, the overall enrollment trend from the mid-1970s onwards was driven by private school enrollment.

Perhaps more important, as Figure 2 shows, was the rapid and unexpected increase in female students in the 1970s. Figure 2 sets the changes in the number of enrollees -- total, female, and minority -- from to 1950 to 1960 to zero and then subtracts the respective figures from the changes in enrollment numbers in each subsequent decade to show the increase or decrease compared to 1950-60. There is one exception to the pattern – for 2010-15 the figures for change between 1950 and 1955 are used. Because figures for minority enrollment are not available for years earlier than 1973, rough estimates are used for 1950, 1960, and 1970, based on the percentage of female enrollment for each year (women were 3% of enrollment for 1950 and 1960, and 8% in 1970; minorities were 8% of enrollment in 1973). For each decade the left-hand column represents the change in the total number of enrollees from the beginning to the end of the decade. The middle column represents the change in the number of female enrollees and the right-hand column represents the change in the number of minority enrollees.

Figure 2
Change in Enrollment by Decade Compared to 1950 to 1960
(change from 1950 to 1960 set to zero, and that figure substracted from change in later decades to show increase or decrease compared to 1950-60)



Between 1960 and 1970, women accounted for only 12% of the increase in enrollment. Between 1970 and 1980, women accounted for 80% of the increase. While female enrollment continued to increase after 1980, the increases were much smaller. The reasons for this influx of women are unclear. One might simply point to the passage on Title IX in 1972 as the explanation and it undoubtedly played a role by opening the doors for women with its prohibition of gender discrimination. But opening the doors isn't enough and neither is just referring to the women's movement.

The picture is more complex. For instance, a national survey of 1971 college seniors (done by Educational Testing Service) about their plans upon graduation showed that few respondents were interested in any further education, only 38% -- and most of them were men, 69% of the 38%. Very few of those interested in more education were interested in law school, only 12% of that 38%. And of those interested in law school only 11% were women. (Of women with post-graduation plans, only 4% were interested in law school.[86]) A similar survey done in 1961 did not even include women at all, "since more than 90% of all students selecting law are men."[87]

That 1971 survey showed that perceptions of discrimination may have played a role. Both male and female respondents thought it "more difficult for women to gain admission to professional schools of business, medicine, and law, and this impression of discrimination is particularly prevalent among women in relation to medicine and law … it is not unreasonable that it discouraged or deterred more women than men for applying for further study in these fields."[88] The lack of money also played an important role for both men and women with regard to further educational plans generally, but more so for women.[89] Interestingly, respondents across all racial/ethnic groups thought "admission procedures [overall and not just law schools] more likely to be tainted by sexism than racism."[90]

Title IX may have opened the doors for women, but evidence like this begs the question of why *so* many women decided to go to law school. Obviously, there is much we still do not know about the influx of women, their changing views of legal education, or the views of their job prospects. The influx of women, nonetheless, exacerbates Kramer's concerns given the lack of any apparent evidence of substantial job opportunities for women at the time.

In the next decade, 1980-90, the long upward trend in enrollment seen in Figure 1 flattened out. Figure 2 shows that women, now along with minorities, were the driver of what was a modest increase in total enrollment. By 2000, women accounted for approximately one-half of enrollment and minorities accounted for 21% (57% of all minority enrollees were women; and minority women accounted for 24% of all women). Regardless, it appeared that the force behind the earlier big increases in total enrollment was exhausted. There would not be

[86] Leonard Baird, *The Graduates: A Report on the Characteristics and Plans of College Seniors* (1973), 18.
[87] Seymour Warkov and Joseph Zelan, *Lawyers in the Making* (1965), 1.
[88] Baird, *supra* note 86 at 102.
[89] *Id.* at 126-127.
[90] *Id.* at 85.

substantial increases in the number of women wanting to go to law school; and while minority enrollment continued to increase, it would never bring the kind of increases seen earlier.[91]

In the new century the pattern changed once more and it would seem any Kramer-esque pessimism was misplaced. Eighteen new schools opened and overall enrollment rebounded between 2000 and 2010, though not to the magnitude of earlier increases. Women, however, were not pushing this new increase. It was men, especially non-minority men, who accounted for 48% of the increase.

After 2010, the enrollment bottom fell out endangering the viability of numerous schools. Female enrollment declined – and sharply -- for the first time, and especially for non-minority women (female minority enrollment declined only marginally). Male enrollment, especially for non-minority males, declined too. Non-minority female enrollment accounted for 36% of the 2010 to 2015 decline and non-minority male enrollment accounted for 57%.[92]

In the wake of those declines Kramer-esque pessimism reigned and the idea of a value proposition itself was strenuously attacked in ways not seen before. The days, to use a term from another arena, of "irrational exuberance" regarding job prospects were over. Where students during the great influx of the 1970s may have faced little information dampening any overly optimistic perceptions of their job prospects, not so in the post-recession years – especially for women. The challenges faced by women in tightening job markets were regularly highlighted.[93]

The image of debt-ridden, unemployed graduates was pervasive in the media as was criticism (if not outright condemnation) of legal education and its cost. Legal education's "failings" were widely and intensely discussed (and continue to be) at a level of unlike anything in the past, especially via social media and numerous specialized websites. There was nothing in the past to compare what some call the "scamblog movement" and to a series of consumer fraud complaints filed against individual law schools for allegedly defrauding students with regard to employment opportunities.[94] From Kramer's perspective the post-2010 enrollment declines – and

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[91] In 2000, 57% of all minority enrollees were women; and minority women accounted for 24% of all women.

[92] The remaining 7% of the decline came from minority students. One commentator, using empirical materials, has argued that some schools targeted lower LSAT minority students as a way to prop-up their dangerously declining enrollments and tuition dollars. See Aaron Taylor, "Diversity as a Law School Survival Strategy," 59 *St. Louis University Law Journal* 321 (2015).

[93] *See* Jacqueline Bell, "Women See Another Year of Slow Gains at Law Firms," *Law360* (2017), https://www.law360.com/articles/946586/women-see-another-year-of-slow-gains-at-law-firms; American Bar Association Commission on Women in the Profession, https://www.americanbar.org/groups/diversity/women/.

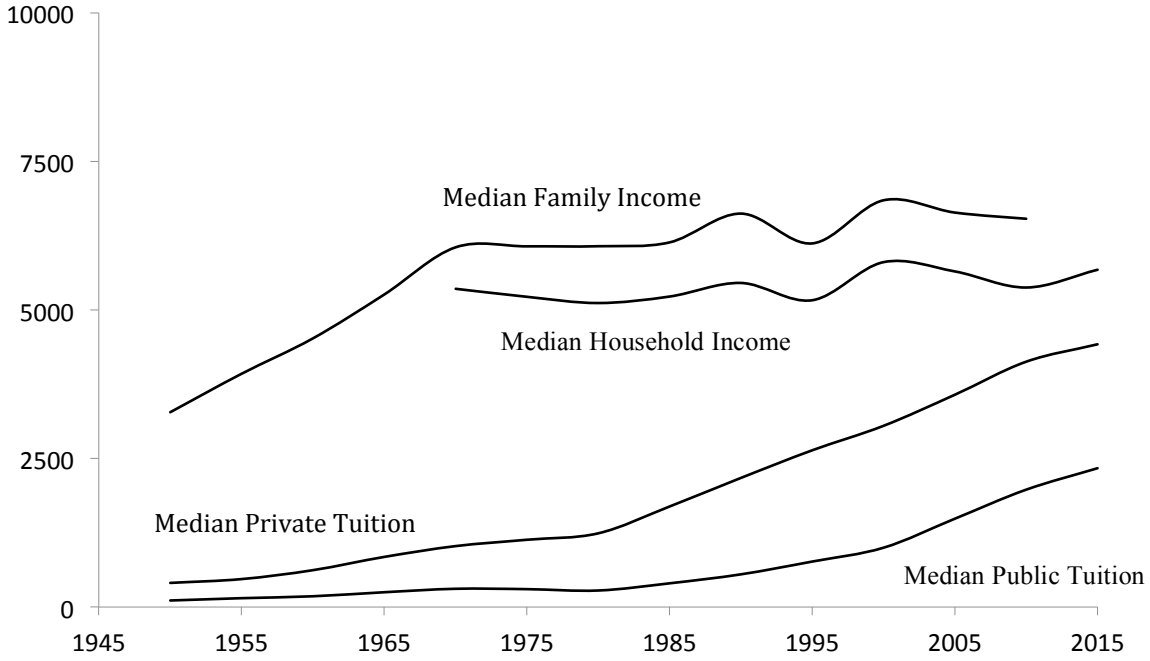
[94] *See* "A Brief History of So-Called Scamblogging: Where We Are and Where It's Going," Outside the Law School Scam, May 5, 2013, http://outsidethelawschoolscam.blogspot.com/2013/05/a-brief-history-of-so-called.html; "What's Next for the Scamblog Movement?" Outside the Law School Scam, February 20, 2017, http://outsidethelawschoolscam.blogspot.com/2017/02/whats-next-for-scamblog-movement.html. "We haven't won yet. Not until the cost of law school tuition approaches rationality and we don't have large numbers of law grads roaming the streets unable to work in the field they trained in. For me, this wasn't about sticking it to the law schools (OK, maybe a little bit). My personal goal was more focused on curbing the avarice of the law schools at the expense of their students." *Also see* David Segal, "Is Law School a Losing Game," New York Times, January 8, 2011, on whether the value proposition really works, https://www.nytimes.com/2011/01/09/business/09law.html; Matthew Shaer, "The Case(s) Against Law School," *New York*, March 4, 2012 on consumer fraud complaints against law schools, http://nymag.com/news/features/law-schools-2012-3/; Daniels Barnhizer, "Cultural Narratives of the Legal Profession: Law School, Scamblogs, Hopelessness, and the Rule of Law," 2102 *Michigan State Law*

maybe even the fraud complaints -- should not be surprising if potential law students began questioning the value of a substantial investment in legal training. His day of reckoning appeared, finally, to be at hand.

3. Tuition and Debt

For the value proposition to work, students must go into debt to cover the cost of their investment. Tuition, of course, is *the* major cost component and as Figure 3 shows – in constant dollars -- it has increased substantially over time, especially since the 1980s. Tuition has increased for both private and public schools, with private schools (where most students matriculate) naturally being more. As a reference point for affordability, Figure 3 also includes median family and household income (again in constant dollars). Importantly, after 1970, the former levels off and the latter stays within in a narrow range after its introduction in the graph in 1975.[95] Tuition simply kept increasing. In 2015, 10 schools had tuition that exceeded the median household income.

Figure 3
Family Income, Household Income, and Law School Tuition (1949$)



Review 663 (2012). *See* Wendy Espeland and Michael Sauder, *Engines of Anxiety: Academic Rankings, Reputation, and Accountability* (2016) for the role ranking systems may have played in the reporting of employment data by schools.

[95] See John Kramer, "Who Will Pay the Piper or Leave the Check on the Table for the Other Guy?" 39 *Journal of Legal Education* 655, 656-667 (1989) for a more contemporaneous discussion of rising tuition along with law school budgets and expenditures.

Increasing tuition was a part of Kramer's concern about the value proposition's sustainability because it meant increasing borrowing by students, thereby making the availability of good paying jobs all that more important. Writing in 1989, he lamented, "Tuition is still running ahead of the cost of living … How does one pay the piper? … We deplore dependence on them [loans], but, at the same time, we heap them even higher upon the bent backs of our students, human subjects of our experiment on manageability."[96]

To aggravate the problem, he also pointed out that "the true range of debt burdens our graduates confront remains uncertain. We have no good evidence because few have the time or the money, or indeed the incentive to collect the data."[97] Today there is some useful evidence, and highlighting Kramer's concern it gives one pause about debt and the elasticity of demand for law school seats.

The ABA Task Force found that the vast majority of contemporary law students borrowed to pay for their legal education– almost 90%. "The amount borrowed by students has increased substantially in recent years even after adjusting for inflation."[98] The reason – "full tuition prices have increased at a greater rate than discounts."[99] The spring 2016 (AY 2015-2016) LSSSE survey showed for respondents graduating that year with law school debt the typical amount (in 2016 dollars) to be between $80,000 and $100,000 for public school graduates and between $120,000 and $140,000 for private school graduates (for 25% of private school graduates the debt exceeded $160,000, and the comparable percentage for public school graduates was 7%).[100]

IV. A Kramer-esque Experiment on the Value Proposition

Has Kramer's day of reckoning finally come? Has the test of the value proposition and the elasticity of demand for what law schools offer finally played out in the real world? The post-recession environment can be seen as rough, natural experiment for Kramer's concern about the sustainability of the value proposition business model. Like Ehrenberg, Kramer believed the "market for law students 'behaves' in a manner that economists would consider quite rational from the perspective of the participants."[101] True to the value proposition's logic, students stopped coming after 2010 amid the questions about employment and legal education's investment value.[102]

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[96] *Id.* at 656.
[97] *Id.* at 672.
[98] ABA Task Force, *supra* note 8 at 8.
[99] The ABA Task Force also found that "tuition discounting through grants and scholarships occurs, is widespread, and is generally increasing." *Id.* at 7.
[100] LSSSE is the acronym for the Law School Survey of Student Engagement, an annual survey of students at participating law schools conducted by the Indiana University Center for Postsecondary Research, http://lssse.indiana.edu/who-we-are/. The statistics shown are from the author's analysis of the spring 2016 raw data (n=16,616 respondents) provided by LSSSE.
[101] Ehrenberg, *supra* note 2 at 627.
[102] Even Ehrenberg – writing in 2013 – thought the business model was "breaking down because of the collapse of the job market for new lawyers." Ronald Ehrenberg, "American Law Schools in a Time of Transition," 63 *Journal of Legal Education* 98, 98 (2013).

Kramer typically talked in big picture terms, implying that the value proposition is problematic for all schools and for all students. Perhaps more telling is what lies beneath the big picture and the differences among schools. Not all schools will necessarily suffer the same fate in terms of enrollment, meaning the business model may not be so problematic. Assuming there are any schools with substantially better employment outcomes, they may still offer a good investment. Other schools may offer decidedly bad investments and the value proposition may not be a sustainable business model at current tuitions.

The crucial question is what is happening in the broad middle where most law schools operate and where most lawyers are trained. Any business model or system of financing legal education has to work for this broad middle. Too often, attention is given to schools seen as the "bad" ones – the ones with supposedly the worst outcomes who fuel the idea of legal education as a scam.[103] They are the easy target as if they are the problem and once they are dealt with all will be well. In other words, a symbolic effort with no real attention to the fundamental challenge of financing legal education.

Figures 4 (private schools) and 5 (public schools) offer some simple visual evidence of what is happening beneath the big picture. The figures are organized around five pairs of bars, each pair represents a group of schools based on the average of a school's yearly median LSAT over time -- median LSAT score for full-time students for each academic year between AY2006-2007 and AY2016-17.[104] The groups are designated simply as G1 through G5, with G1 schools having the lowest LSAT scores and G5 schools the highest. This scheme is used as an alternative to the *US News* rankings schools.[105]

The bars themselves present two sets of substantive data. The first set (the gray bars in each figure) is comprised of school-level employment data taken from the ABA's Law School Employment Database and aggregated for each group of schools (all the schools in a group together). Specifically, for each group, it is a percentage calculated by dividing the total number of reported graduates from 2011 to 2016 who obtained full-time, long-term, bar pass-required positions (FTLBP) by the total number seeking employment.[106] Aggregating in this way over a number of years puts the focus on the underlying dynamic rather than year-to-year variations.

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[103] See Karen Sloan, "ABA Seeks to Stay InfiLaw Accreditation Suits," *Law.Com*, August 9, 2018, https://www.law.com/2018/08/09/aba-seeks-to-stay-infilaw-accreditation-suits/?slreturn=20190009165610 so; Jack Crittenden, "Arizona Summit Second of Three InfiLaw Schools to Lose Accreditation, June 19, 2018, *The National Jurist*, http://www.nationaljurist.com/national-jurist-magazine/arizona-summit-second-three-infilaw-schools-lose-accreditation; Andrew Kreighbaum, "Calls for Tougher Oversight of For-Profit Law Schools, November 15, 2017, *Inside Higher* Ed, https://www.insidehighered.com/news/2017/11/15/accreditors-scrutiny-florida-law-school-renews-concerns-over-oversight; also see sources in *supra* note 94 (Segal, etc. Part III)

[104] Averaging over a period of time provides a measure not affected by year-to-year variations before and after the post-2010 enrollment declines.

[105] It is the approach used by the *ABA Task Force*, *supra* note 8, and a very similar approach was used in Taylor, supra note 92.

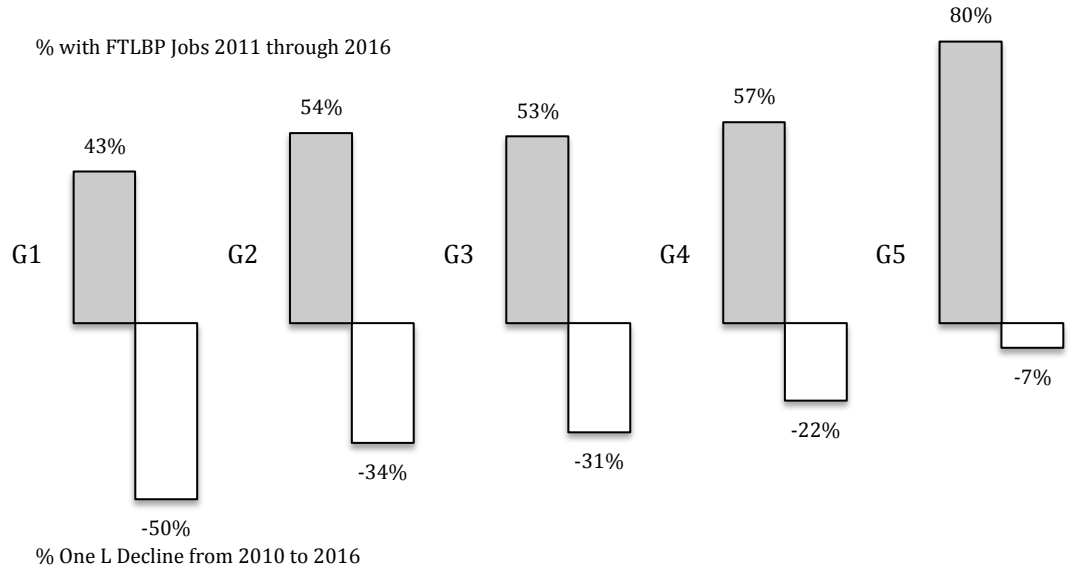
[106] The figures do not include all schools for the time period covered, only those who had a graduating class in 2011 and not those whose first graduating class came later. Because two schools switched from private to public during the time covered – what are now New Hampshire and Texas A & M – the private/public in the two figures are based on the status of these schools at the start of the time covered, meaning they are counted as private schools.

The FTLBP category generally constitutes the largest percentage of employment outcomes for each school in the database and these are the hoped-for jobs for most students. The category also has the virtue of being an unambiguous one unlike, for example, JD-preferred – which each school can define in a variety of unique ways. 2011 is used as the starting year because it is the first year for which such detailed data were collected. It is also a good starting point because it comes just as the post-2010 enrollment decline was about to start.

The second set (the white bars in each figure) is comprised of data from the annual ABA 509 disclosures and aggregated for each group of schools. Specifically, for each group, it is the percentage difference in One L enrollment for each group of schools between fall 2010 (the peak enrollment year) and fall 2015 -- how much new, first-time enrollment went up or down in 2015 compared to 2010. One L enrollment is used rather than total enrollment because it is a more immediate indicator of the schools' attractiveness.

The pattern in Figure 4 for private schools (these schools account for two-thirds of all job seekers) is clear. As the percentage of graduates obtaining FTLPB positions increases, the decline in One L enrollment gets smaller. The G5 private schools would appear to still offer a good investment for students and so the schools are attractive even if students borrow a substantial amount. One suspects this has always been the case. These schools, however, train only a minority of law students – just 26% of private school job seekers between 2011 and 2016, and only 17% of all job seekers.

Figure 4
Private Schools by LSAT Group:
% Graduates with FTLBP Jobs and % One L Enrollment Decline



Private G1 schools account for almost one-quarter (23%) of the private school job seekers and 15% of all job seekers. They are the ones garnering most of the attention recently and they offer a decidedly bad investment in light of the employment outcomes. Their graduates face a daunting challenge in getting an FTLPB position (one suspects this has always been the case), and the schools have endured the most dramatic declines in One L enrollment. For some of them the value proposition's reckoning may be close at hand, if it hasn't already arrived. As of this writing, three of the private G1 schools are closing.[107]

That broad middle of private schools (G2-G4) accounts for one-half of the private school job seekers (one-third of all job seekers). Their graduates fare better than the private G1 graduates, but nowhere near as well as the G5 graduates. Collectively, just over one-half (55%) of their students obtain a FTLPB position. For them, and their students, the value proposition's value is not all that great, especially in light of the higher private school tuition. Together their enrollment declined by 29%.

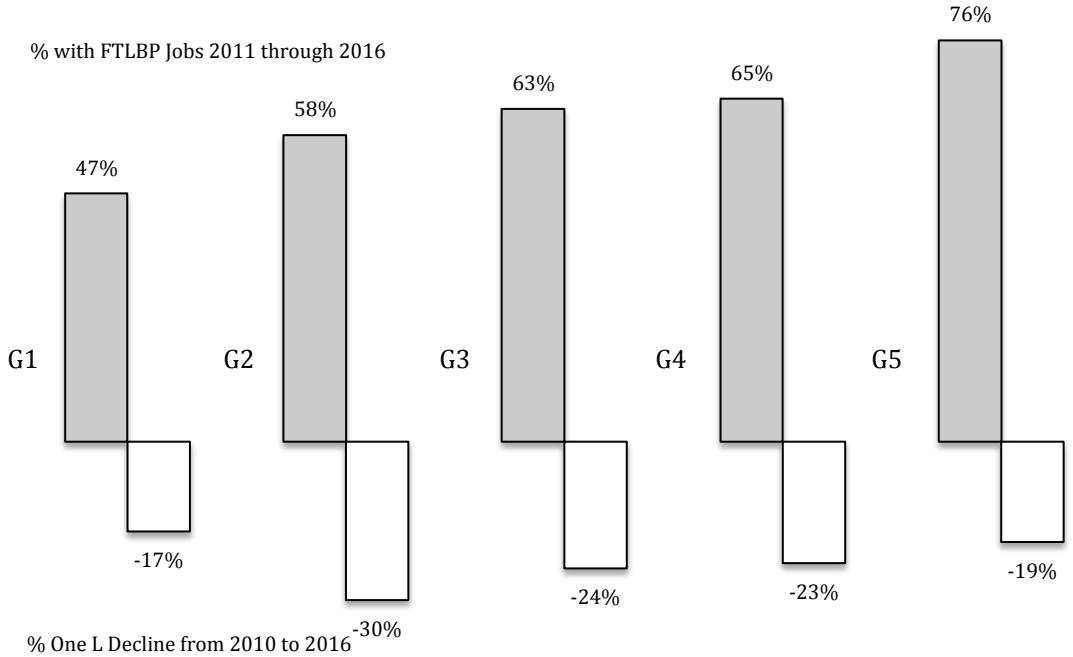
It is questionable whether this is a sustainable business model for the G2-G4 private schools unless they schools see substantial enrollment increases, or unless they drastically reduce the cost to students, or unless employment prospects at sufficient pay somehow appear. The first

[107] Charlotte and Whittier, *see* Elizabeth Olson, "For-Profit Charlotte School of Law Closes," *New York Times*, August 15, 2017, B3; Elizabeth Olson, "Whittier Law School Says It Will Shut Down," *New York Times*, April 20, 2017, B4. Valparaiso, *see* Emma Whitford, "Another Law School Will Close," *Inside Higher Ed*, October 31, 2018, https://www.insidehighered.com/news/2018/10/31/valparaiso-law-school-will-close-following-unsuccessful-attempt-transfer-middle.

is unlikely, the second is unrealistic for most, and the last is beyond their control. Perhaps all these schools can do is muddle through with incremental adjustments that better prepare their students for the available jobs while finding ways to somewhat reduce costs to students (or minimize increases). This doesn't address the underlying problem of the business model itself, but it is at least a recognition of the challenge. For all but those G5 schools, it would seem that it is live by the value proposition, die by the value proposition for private schools.[108]

Figure 5 presents the same material for public schools (which account for one-third of all job seekers) and the pattern is different in one key respect. Public G1 schools had the lowest percentage employed in FTLPB positions *and* the smallest One L decline. They will be examined below. Without them the pattern is similar to that in Figure 4 for private schools. While not as negative, the pattern is not especially positive.[109]

Figure 5
Public Schools by LSAT Group:
% Graduates with FTLBP Jobs Jobs and One L Enrollment Decline



The value proposition seems to make sense for only a minority of public schools and their graduates. Like their private school counterparts, public G5 schools have the best record for FTLPB positions, although at a slightly lower level. They accounted for just over one-quarter (26%) of the job seekers and only 9% of all job seekers. The largest percentage of public school

[108] The correlation between a private school's percent One L decline from 2010 to 2016 and its percent of the total number of graduates between 2011 and 2016 with FTLPB position is a robust .60 (sig=.000).

[109] The correlation between a public school's percent One L decline from 2010 to 2016 and its percent of the total number of graduates between 2011 and 2016 with FTLPB position is .28 (sig=.006). If G1 schools are excluded the correlation rises to .42 (sig.=.000). While not as robust as the correlation for private schools, it is still an important indicator of the value proposition at work.

job seekers were from the G2-G4 schools – the broad middle. Two-thirds of public school job seekers were from G2-G4 schools (23% of all job seekers) and they fared better than their higher-tuition, private school counterparts. Sixty-three percent found FTLPB jobs compared to 55% -- suggesting that the value proposition may work somewhat better for these public schools (with their lower tuitions) and their students.

Public G1 schools are eccentrics. They don't fit fully fit the value proposition pattern. They account for a very low percentage of the graduates in the market – 8% of public school graduates and 3% of all graduates. They are like their private counterparts in having the lowest percentage of graduates landing a FTLPB position; but rather than having the greatest decline in One L enrollment, they have the lowest for public schools. Only G5 private schools had better enrollment figures.

Other factors are apparently at work with the G1 schools. Four are a part of an historically black college or university, and a fifth is a newer school with a substantial minority enrollment. Two of the reaming four public G1 schools are very low enrollment schools and the only law schools in their sparsely populated states (the Dakotas). And the final two are local, lower cost law schools in Illinois (Northern and Southern). Although beyond the scope of this essay, they require further investigation.

These findings are by no means definitive with regard to the future viability of the value proposition-based business model. Nonetheless, in light of Kramer's concerns they are sobering as evidence of a problematic business model for legal education. The value proposition makes sense only for a minority of schools and a minority of students. Perhaps, as Kramer said, legal education may be able to muddle through for a while, but sustainability is problematic.

V. Conclusion

John Kramer worried deeply about the perennial and stubborn challenge of financing legal education. He also worried about the ability of law schools to prepare for his day of reckoning or to even see it coming. Given legal education today he would be very worried indeed. As he wrote a generation ago there is still "no magic bullet, no easy solution. As always we will continue to muddle through together."[110] Some current critics of legal education might not even grant the muddling through.[111]

Without a fundamental change -- like the original GI Bill or something akin to Professor Dean's fully federally-funded National Legal Scholarship program or some as better alternative for training people to provide needed legal services -- muddling through may be as good as it gets. This may be so if – in line with some literature on organizational change -- we see muddling through as incremental change within a set of institutional constraints an organization cannot alter. Barring fundamental structural change in institutional constraints (controlled primarily by the ABA), most change will be gradual with some contingency and randomness.

[110] Kramer, *supra* note 1 at 65.
[111] *See* Brian Tamanaha, *Failing Law Schools* (2012).

Not all adaptions will be successful and not all organizations will even try to adapt, but some may try and succeed.[112]

One of the important observations of the ABA Task Force was that at least some schools are trying different ways of delivering the services they provide, with innovations being planned and/or instituted to meet their challenges.[113] Some schools, to reduce costs and enhance access, are trying hybrid programs allowing students to take more classes online. One school has an honors program based around a two-year practicum that is designed to give students intensive, hands-on training and better entry onto the local job market. Others are revising their third-year curricula to better prepare their students to compete in a changing employment market. Another now requires its JD students to complete full-time, course connected residencies-in-practice as part of a highly experiential curriculum that is two and one-half years long. And there are others.

In effect, as the ABA Task Force observed, the adaptations schools are trying are natural experiments. It is muddling through as experimentation.[114] They are the incubators of new directions *and* an exacting market proving ground. Moving forward these experiments may well be the source of practical solutions and models, allowing others to see what can be done, how, and with what success. They can also show what may not work, and this is equally important. Of course, nothing guarantees that individual schools – or even most schools – will follow any particular set of adaptations or that any will make much difference with regard to the value proposition's viability.

There is another possibility, another experiment that looks beyond law schools and sees their challenges as an opportunity – the development of an alternative professional role, a non-lawyer professional akin to mid-level professionals in the health care arena. This would a licensed professional trained outside of a traditional law school at a lower cost, a professional to serve particular legal needs at an affordable price. In 2012, Washington State created such a mid-level professional called a limited licensed legal technician or LLLT. This is a formally trained (at minimum a two-year program plus substantial clinical requirements), licensed and regulated professional, authorized to provide a narrowly prescribed set of legal services without the supervision of a licensed attorney in a well-defined practice area. Again, live by the value proposition, die by the value proposition.

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[112] *See* Michael Hannan and John Freeman, "The Population Ecology of Organizations," 82 *American Journal of Sociology* 929 (1977), Michael Hannan and John Freeman, "Structural Inertia and Organizational Change," 49 *American Sociological Review,* 149 (1984).

[113] ABA Task Force, *supra* note 6 at 11- 14; *also see* Stephen Daniels, Martin Katz, and William Sullivan, "Analyzing Carnegie's Reach: The Contingent Nature of Innovation," 63 *Journal of Legal Education* 585 (2014).

[114] A recent book on the history of American higher education sees experimentation as the key to the success of American higher education; see David Labaree, *A Perfect Mess: The Unlikely Ascendancy of American Higher Education* (2017).